IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI 2018-404-368
[2019] NZHC 2098

IN THE MATTER	of concurrent appeals against a decision of the District Court at Auckland
BETWEEN	COMMERCE COMMISSION Appellant
AND	STEEL & TUBE HOLDINGS LIMITED Respondent

Hearing: 25 March 2019

Counsel: JCL Dixon QC, AMM McClintock & B J Thompson for Appellant
M Heron & AMW Stewart for Respondent

Judgment: 23 August 2019

JUDGMENT OF DUFFY J

This judgment was delivered by me on 23 August 2019 at 4.30 pm pursuant to Rule 11.5 of the High Court Rules.

E Hamon
Deputy Registrar
Auckland High Court

~~Registrar~~/ Deputy Registrar

Solicitors/Counsel:
Matthews Law, Auckland
Michael Heron QC, Auckland
Meredith Connell, Auckland

[1] In the District Court Steel & Tube Holdings Ltd (Steel & Tube) pleaded guilty to and was convicted of 24 representative charges under the Fair Trading Act 1986 (FTA) in relation to false representations Steel & Tube had made about one of its steel products, which is known as SE62. The company was fined the sum of $1,885,000.[1]

[2] The Commerce Commission, which brought the prosecution, now appeals against the level of the fine imposed on the ground it was manifestly inadequate. Steel & Tube cross appeals on the ground the fine was manifestly excessive.

Facts

Background

[3] The sentencing proceeded on an agreed summary of facts. There were essentially two groups of representative charges. The first, which were brought under ss 40(1) and 10 of the FTA, involved various false representations about SE62's compliance with AS/NZS 4671:2001, which is the Australian/New Zealand industry standard for reinforcing steel (the Standard). The second, which were brought under ss 40(1) and 13(e) of the FTA, involved various false representations that SE62 had been independently tested and certified as being compliant with that Standard. The charges related to approximately 482 batches of SE62 steel mesh, which was sold by Steel & Tube between 1 March 2012 and 5 April 2016 (the charging period). Each batch comprised no more than 1000 sheets of SE62 steel mesh and the total number of steel mesh sheets was approximately 480,000.

[4] Steel & Tube is a New Zealand company. It operates a national network of 56 branches and distribution centres, and it employs approximately 1,000 employees. It was incorporated in 1953 and has been listed on the Stock Exchange since 1967. Its revenue for the financial year ending 30 June 2016 was approximately $516 million, and its underlying earnings for the same period (excluding one-offs) were $19.4 million.

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1 *Commerce Commission v Steel & Tube Holdings Ltd* [2018] NZDC 21579.

[5] Steel & Tube supplies a broad range of steel products, including products it processes from steel supplied by third parties. One such product is SE62 steel mesh, which is made from New Zealand made steel. SE62 was manufactured at Steel & Tube facilities located at Auckland and Christchurch.

[6] Lessons learned from the Canterbury Earthquake led to an amendment to the New Zealand Building Code in November 2011 from which time Acceptable Solution B1/AS1 required 500E grade steel mesh to be used to provide reinforcement for concrete slab-on-ground floors on "good ground" that were designed and constructed in accordance with Acceptable Solution B1/AS1. The "E" in 500E grade steel stands for "earthquake" and means the product complies with the "E" ductility class in the Standard. Ductility in laymen's terms is the ability of steel to stretch under stress. In response to those changes Steel & Tube developed a range of "E" ductility grade steel mesh products, which included SE62.

[7] The use of the abbreviation SE62 implies, and is commonly understood within the building industry to mean, that a product complies with the Standard's requirements for 500E grade steel mesh. Throughout the charging period SE62 was sold as being 500E grade steel mesh when it was not.

[8] Three versions of SE62 steel mesh sheets were produced. The differences between each version were their respective dimensions, which affected the overall weight and price of each version. Whilst Steel & Tube made other products in the SE range, because SE62 comprised about 50 per cent of the SE range and was Steel & Tube's best-selling product the Commission focussed its investigation on this product and only brought charges in relation to it.

[9] Steel & Tube made approximately 13,900 deliveries of SE62 during the charging period. About 8300 of those were to national building merchants. The remainder were to other customers, such as builders. Compliance of SE62 with the relevant Standard was a significant marketing factor, however, those representations were not true. SE62 steel mesh sold at a higher price than non-seismic grade mesh.

The offending conduct

[10] The Standard specifies certain chemical, physical and mechanical requirements and a standard methodology for determining the chemical composition and mechanical geometrical properties of reinforcing steel used for the reinforcement of concrete. Steel & Tube failed to meet those requirements.

[11] First, Steel & Tube did not age-test the pieces. The Standard requires that test pieces are aged in accordance with the Standard before being tested. The process involves heating and cooling the test specimen to simulate the changes to steel that naturally occur as it ages following the manufacturing process. This is important because it gives a realistic estimate of the strength and ductility that the steel mesh will exhibit when in use.

[12] Second, Steel & Tube did not measure uniform elongation in accordance with the Standard at either its Auckland or Christchurch facilities, each of which had adopted a different non-compliant approach to such measurement. Uniform elongation is a measure of the ductility of steel mesh. Determining the uniform elongation involves stretching a section of the mesh to measure how far it can be strained before it no longer stretches in a uniform way. Grade 500E steel mesh must have uniform elongation greater or equal to 10 per cent, which is higher than is required for other grades of steel mesh.

[13] Third, Steel & Tube's retesting procedure was not in compliance with the parallel procedure under the Standard. The Standard requires four samples be taken from each batch of up to 1,000 sheets. The mean figure obtained, which must be more than 10 per cent, is then used to determine whether a batch conforms with the Standard. Instead, Steel & Tube used individual test values, which is something the Standard does not permit.

[14] Fourth, Steel & Tube did not carry out long-term quality evaluation. The Standard requires long-term quality evaluation of steel mesh. Manufacturers are required to collect test results to determine the long-term quality of steel. Steel & Tube

did not carry out long term quality evaluation. An alternative procedure is also permissible under the Standard but Steel & Tube did not adopt it either.

[15] It follows that none of the SE62 steel mesh manufactured over the charge period was properly tested in accordance with the Standard. Thus, none of the relevant SE62 steel mesh can be described as being of 500E grade steel. The test results of batches, as tested by Steel & Tube, may therefore be overstated. Also, Steel & Tube kept no records which would have enabled long term quality testing. This means, Steel & Tube cannot determine whether the variation or dispersion of its testing results was within the boundaries set in the Standard. Accordingly, Steel & Tube's test results do not reliably represent the qualities of the relevant SE62 steel mesh.

[16] However, the Ministry of Business, Innovation and Employment (MBIE) have advised that when used in concrete slabs on the ground non-compliant steel mesh does not pose a "life-safety" risk. When used in suspended floors there is greater difficulty in predicting how non-compliant steel mesh will contribute to the overall structural performance of such systems, but MBIE considers it is very unlikely they would pose a life-safety risk.

The investigation

[17] The non-compliant aspect of SE62 came to light following the Commission commencing an investigation into the quality of steel mesh imported from overseas. There was some publicity regarding the Commission's investigations. Shortly after it began investigating Steel & Tube's steel mesh products, Radio New Zealand ran a story stating that Steel & Tube's use of a logo on batch test certificates to certify independent testing by Holmes Solutions (Holmes), which is an independent and accredited third party testing agency, was incorrect. This caused Steel & Tube to contact the Commission and to advise that it was carrying out its own investigations into the use of the Holmes logo.

[18] When the Commission tested samples of SE62 it found that none of the samples achieved all of the mechanical requirements of the Standard. Further investigation and testing was carried out. Again, all the samples failed to achieve the 10 per cent uniform elongation requirement under the Standard and some samples

failed other requirements as well. A temporary halt was put on the sale of SE62 and undertakings were given by Steel & Tube in favour of the Commission. It did not recommence selling the SE range until it had in place an external testing regime to show that any SE62 steel mesh on the market had been independently tested for compliance with the Standard.

The charges

[19] Charges 1 to 12 relate to misrepresentations that were liable to mislead the public because they gave the false impression SE62 steel mesh was 500E grade compliant steel mesh when it was not. The misrepresentations were made on batch tags, batch test certificates, and in various other ways, including Steel & Tube's website, all of which conveyed the false impression that SE62 complied with the Standard's requirements for 500E grade steel mesh.

[20] Batch tags were attached to each sheet of SE62 steel mesh. The majority of those tags included the words "seismic 500E grade mesh". One of the false representations stated that each tag was unique and linked the sheets to its test certificate, date of manufacture, quality control data and stated that the tag could be used to track the product's performance years after it had been installed.

[21] Batch certificates prepared by certain Steel & Tube employees were attached to approximately 19 per cent of the deliveries of SE62 mesh. Each certificate falsely represented that the reinforcing steel class was 500E and noted the testing Standard.

[22] Steel & Tube also falsely represented that SE62 was "500E grade" on documents including invoices, packing slips and physical product brochures.

[23] On its website Steel & Tube made false representations of compliance with the standard. The website referenced the Christchurch Earthquake as being the trigger for seismic mesh products like SE62 and conveyed the impression that Steel & Tube's SE grade steel mesh was:

> ... designed to fully comply with the new legislation and is an exact match to the specifications listed in the steel reinforcing standard.

...

> "If you're after a New Zealand-made reinforcing mesh that's robust, reliable and guaranteed to meet New Zealand structural safety requirements, have a look at Seismic SE," says Graham Taylor, Steel & Tube Technical Product Specialist.

[24] On a number of occasions during the charge period the web site referred to SE62 steel mesh as being designed to comply with the Standard and stated each individual sheet of SE62 was tested before it left the factory.

[25] Charges 13 to 24 related to misrepresentations that SE62 steel mesh had been tested by Holmes. In fact, Holmes did not undertake any testing of SE62 over the charging period. All such testing was carried out by Steel & Tube.

[26] Representations a product has been independently tested are a selling point in the industry. Here each of the batch certificates for the charge period contained Steel & Tube's logo and that of Holmes. Above the Holmes logo were the words "tested by" followed by a signature and the words laboratory manager, which falsely represented the products had been tested by Holmes in a laboratory. A total of 482 such certificates (282 from the Auckland factory and 200 from the Christchurch factory) were produced for the SE62 line of products when Holmes had not completed testing for any of these certificates. There were approximately 2700 copies of the 482 batch certificates included in deliveries of SE62 to building merchants and builders over the charging period.

[27] In addition, other false representations were made regarding testing of Steel & Tube's seismic mesh products, including SE62. The first two such representations falsely stated these products complied with AS/NZS 4671:2001; were made of 500E grade steel; were of class E grade ductility and were independently tested and certified. The third such representation conveyed the same impression as the first and second representations. However, at all material times all batch testing of Steel & Tube's seismic steel mesh, including SE62, was internally done by the company.

Steel & Tube's response

[28] One person was directly responsible for SE62 being non-compliant with the Standard. He is now a former employee, but at the relevant times he was employed as a technical manager and branch manager at Steel & Tube's Christchurch factory (the technical manager). Twelve staff reported to him and he reported to the General Manager for Reinforcing.

[29] The technical manager had spent more than 20 years working in manufacturing, with particular experience working in manufacturing nails and wire fencing. He held a New Zealand Certificate in Engineering. He became involved in the manufacture of steel mesh in 1987 and subsequently joined Steel & Tube. He was a member of the joint New Zealand/Australian committee tasked with drafting the Standard, specifically representing the steel manufacturing industry. Steel & Tube regarded him as an expert in steel mesh, and say it relied on him to ensure compliance with the Standard. Given his expertise, the company did not check what he was doing to ensure compliance. In any case, there was no-one senior to the technical manager who either knew as much, or more, than he did.

[30] The technical manager was responsible for modifying Steel & Tube's existing procedures for non-seismic steel mesh to comply with the Standard in respect of both its manufacturing and testing procedures. The testing carried out at the Christchurch site was his responsibility until March 2014, when he retired. The testing at the Auckland factory was the responsibility of a different employee, however, the Technical manager was still responsible for the designs of the steel mesh being processed at the Auckland site. He influenced the manufacturing process at the Auckland site as well.

[31] Before the technical manager retired he trained another employee (replacement employee) who had worked for Steel & Tube for approximately 13 years. Steel & Tube retained the technical manager as a consultant. The company estimates that enquiries were made of him six to eight times in the 18 months after his retirement.

The technical manager's conduct

[32] When the Building Code regime was amended to require 500E steel mesh in certain situations, the technical manager was the person within Steel & Tube responsible for determining how to produce and market the SE range of steel meshes. As a part of that role he worked with a metallurgist at Pacific Steel – a steel manufacturer – to ensure the steel coil used to make the SE range of meshes had the right composition and characteristics to enable it to be processed into seismic mesh satisfying the Standard.

[33] In 2011 Steel & Tube engaged Holmes to test the newly developed SE range of steel mesh and the results of those tests were used to demonstrate to the Department of Building and Housing (DPH) that the SE range complied with the Standard. That was the limit of Holmes' involvement in testing this product.

[34] The technical manager had a working relationship with the metallurgist at Pacific Steel and the chief executive of Holmes. The technical manager also knew the managing director of Holmes. From time to time he informally discussed issues relating to steel mesh with these persons. However, he never discussed any of the deviations from the Standard that he was taking with them. Steel & Tube relied on the technical manger to ensure compliance with the Standard and never checked the work he did.

[35] The technical manager made the decision not to age-test the product. He considered the impact of aging was negligible. Further, he considered that as the ageing process added significant time to the production process, it was not worth doing. He did not seek review or approval of that decision from anyone else at Steel & Tube.

[36] Steel & Tube did not measure uniform elongation in accordance with the Standard at either of its factories. The method used at the Christchurch factory was different from that used at the Auckland factory. The technical manager considered the process adopted in Christchurch was equivalent to the process being used by Holmes. He considered his method was "better" because in his view it gave a more

accurate result. Steel & Tube said its testing staff indicated it was rare for an individual test to not achieve the 10 per cent uniform elongation specification. However, it did not record the individual values of less than 10 per cent. The technical manager's explanation for values less than 10 per cent not being recorded was that he saw a risk of the office administrator mixing up results or recording incorrect information.[2]

[37] When the technical manager was retesting, he tested for "minimums and maximums" rather than "characteristics" of the product. For each batch to receive a "pass", each individual uniform elongation test result needed to be above the minimum 10 per cent, rather than the mean of the tests being above 10 per cent. If an individual test result failed to achieve uniform elongation above 10 per cent, he would retest the new sheet of steel mesh with the aim to get a replacement test result above 10 per cent.

[38] The technical manager did not implement any form of long-term quality evaluation. He did not think it was necessary. He thought Steel & Tube had done enough by accumulating the numbers and having them available. He considered that by taking a "strict approach to testing results" Steel & Tube would meet the characteristic strengths of the Standard.

[39] Regarding the false representations relating to SE62 being independently tested, the technical manager maintained that all advertising or specification documents for seismic mesh for Steel & Tube would come past him for approval. Further, that the representation about the product being "independently tested and certified" was fulfilled by the initial testing and development having been done with Holmes, rather than by ongoing testing.[3]

[40] No changes were made to the testing procedures after the technical manager's retirement. He had an arrangement with Steel & Tube that he continued to provide consulting advice and answer any queries from his replacement, who took comfort from the views of the technical manager and his having worked with Holmes in the development of SE62.

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2 The District Court Judge did not find this a credible explanation, above n 1, at [58].
3 The District Court Judge doubted this explanation, above n 1, at [59].

Detection

[41] In 2015 the Commission received complaints about the quality of steel mesh imported from overseas by a number of companies. By 2016 the Commission was investigating whether 500E steel mesh complied with the standard. Around this time it decided to test Steel & Tube's mesh. The Commission obtained samples of Steel & Tube's steel mesh. None of the samples achieved all the mechanical requirements of the standard. A second set of samples were tested and none of these met all the requirements either.

[42] The summary of facts records that the failure of the samples to meet the standard does not establish that all the SE62 mesh produced during the charge period failed to meet the standard. But this is because it is simply not possible to make this determination now.

The aftermath

[43] Steel & Tube co-operated with the Commission during the investigation. It issued media releases to allay concerns about its seismic mesh products, disclosed and apologised for the non-compliance issues to the public.

[44] MBIE then acted to clarify the Building Code regime regarding steel mesh. This resulted in an amendment which stated:

> The amendment clarifies how testing of grade 500E ductile steel mesh must meet .. AS/NZS 4671: 200.

The amendment also clarified the testing methodology.

[45] Steel & Tube has no previous convictions under the FTA.

District Court sentencing

[46] The Judge found the technical manager had made a conscious decision to deviate from the Standard requirements for ageing grade 500E steel. Regarding the re-testing procedure, the method for measuring uniform elongation and long-term

quality evaluation the technical manager had either not considered or misunderstood the Standard's requirements.[4]

[47] The Judge found that Steel & Tube had relied on the technical manager to ensure that its testing procedure complied with the Standard even though he was not knowledgeable in statistical analysis and metallurgy, and in circumstances where the technical manager was not part of Steel & Tube's senior management team.[5] Whilst his manager was part of this team he did not come from a mesh-manufacturing background. As a general manager, he was not expected to have technical knowledge of the Standard. Thus, he was not in a realistic position to review or question the technical manager's work.[6]

[48] The Judge found that at the time the replacement employee for the technical manager assumed control there was no review of the testing procedures put in place by the technical manager, nor were there any internal or external audit of the procedures to ensure compliance with the Standard. And no product testing was carried out externally on SE62. Also, the technical manager's decision not to age the product in accordance with the Standard was not notified to, or signed off, by senior management.[7]

[49] The Judge found there was no audit process for Steel & Tube's testing or results. Any questions around the testing regime went to the technical manager as the subject matter expert rather than to the quality systems manager employed by Steel & Tube. Thus, the quality systems manager did not review or audit Steel & Tube's steel mesh testing procedures.[8]

[50] The Judge also found there was no-one at Steel & Tube that met the description of a "laboratory manager", which was the designation that appeared next to the signature on the batch testing certificates. Instead, certain staff members who had been trained by the technical manager and who were in supervisory positions, signed

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4 *Commerce Commission v Steel & Tube Holdings Ltd,* above n 1, at [64]
5 At [65].
6 At [66].
7 At [67].
8 At [69].

the test certificates as "laboratory manager". But, none of the four such employees who were involved in testing SE62 on a day-to-day basis had read the Standard before or during the charge period. None of them had more than a passing familiarity with the requirements of the Standard. Their role was merely to test the samples in the manner implemented by the technical manager and documented by Steel & Tube.[9]

[51] To set the level of the fine the Judge split the charges into compliance representations and independent testing representations. For the compliance representations he adopted a starting point of $2.4 million and for the independent-testing-representations he adopted a starting point of $600,000. He then applied the totality principle and made what he described to be "a modest adjustment in the combined starting-points" which brought the total starting point of the fine to $2.9 million.[10]

[52] The parties were closely aligned on the level of discount for mitigating factors. The Commission considered a discount of thirty per cent was appropriate whereas Steel & Tube sought a discount of thirty-five per cent. The Judge chose to apply a thirty-five per cent discount. On appeal no issue was taken with this discount.

[53] A key factor that was instrumental in the fine the Judge imposed was his view on the level of Steel & Tube's culpability. This is an issue that featured majorly in the appeal.

[54] The Commission considered that s 45 of the FTA should be applied so that the technical manager's intentional, knowing and deliberate departures from the Standard's requirements and his intentional and deliberate decisions to act in accordance with what he thought were sufficient processes when it came to the manufacture and distribution of SE62 steel mesh, should be attributed to Steel & Tube. The Judge rejected this submission. He concluded that s 45 served the purpose of sheeting home liability under the FTA to a body corporate.[11] He found that s 45 could not be used to attribute the technical manager's state of mind to that of Steel & Tube

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9 At [70].
10 At [75].
11 At [90]

to prove an aggravating factor relevant to sentencing under the Sentencing Act 2002 (SA).[12] Instead he had regard to the actual state of mind of Steel & Tube's senior management/ board of directors, which led him to conclude that their failure to ensure there was sufficient supervision of the technical manager and their blind reliance on him to ensure SE62 met the Standard amounted to gross negligence.[13] It was on this basis that he approached his assessment of the appropriate starting point.

Grounds of appeal

[55] The Commission appeals on the ground the sentence was manifestly inadequate. It contends that: (a) the Judge improperly applied s 45 of the FTA; and (b) the Judge failed to take into account all relevant factors and in particular the company's size, resources and gain.

[56] The Commission submits that the appropriate starting point for a fine was $3.5-3.8 million, rather than the $2.9 million starting point adopted by the Judge.

[57] The Commission's appeal is governed by the principles applicable to prosecution sentencing appeals. The Commission must satisfy this Court that the sentence imposed by the Judge was manifestly inadequate.[14] The Court must assess whether there was an error intrinsically in the decision or as a result of additional material submitted on appeal.[15]

[58] In the cross-appeal Steel & Tube submits that the sentence imposed was manifestly excessive. It contends the sentence imposed displays three errors: (a) it was unprecedented and irreconcilable with previous penalties; (b) the Judge was wrong to find that Steel & Tube was "grossly negligent"; and (c) the Judge made multiple factual errors.

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12 At [91].
13 At [93]-[99].
14 *Tutakangahau v R* [2014] 3 NZLR 482 (CA) at [26].
15 *R v Shipton* [2007] 2 NZLR 218 (CA) at [138].

Discussion

The Commission's appeal

[59] The Commission contends the Judge's refusal to apply s 45 of the FTA to the sentencing process was mistaken for two reasons. First, he was wrong to find s 45 applies for liability purposes and not for sentencing purposes, which led to the erroneous conclusion that the conduct of the technical manager could not be attributed to Steel & Tube. Secondly, he was wrong to find that the Commission must prove independently of s 45 that Steel & Tube's senior management or its Board had acted deliberately before it could establish Steel & Tube had acted deliberately. The Commission contends that these errors led the Judge to assess Steel & Tube's culpability incorrectly. The second alleged error is a corollary of the first such error. Accordingly, these errors can be dealt with together.

[60] Steel & Tube, on the other hand, argue the Judge was wrong to find it was "grossly negligent".

[61] Section 45 relevantly provides:

> **45 Conduct by servants of agents**
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> (1) Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.
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> (2) Any conduct engaged in on behalf of a body corporate-
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> (a) by a director, servant, or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or
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> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual of apparent authority of the director, servant or agent –
>
> shall be deemed, for the purpose of this Act, to have been engaged in also by the body corporate.

(3) ...

(4) ...

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose

[62] Sections 10 and 13 of the FTA create strict liability offences; in *Fastlane Autos Ltd v Commerce Commission*, Randerson J remarked:[16]

> [16] It is well established that ss 10 and 13 of the Fair Trading Act create offences of strict liability: *Sound Plus Ltd v Commerce Commission* [1991] 3 NZLR 329 and *Adair v Commerce Commission* (1995) 5 NZBLC 103,615. One of the most helpful authorities on s 13 is the decision of Tipping J in *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 at pp 506–508. That case is authority for the proposition that in cases under s 13:
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> > (a) The offence is committed if a person makes a representation which is false or misleading, irrespective of whether the representor knows that a misrepresentation is involved or intends to make a representation;
> >
> > (b) The question whether a representation is false or misleading is to be judged objectively. It is not a question of whether someone has actually been misled, although proof of that may well be helpful for an informant; and
> >
> > (c) The representation may be by words or conduct; the essence is that the representor must be communicating a statement of fact to the representee whether directly or by clear and necessary implication.
>
> [17] As Anderson J observed in *Sound Plus Ltd* at p 332, the Fair Trading Act is directed to the regulation of conduct in the interests of public welfare. The statutory policy in relation to offences both under ss 10 and 13 is one of strict liability subject to the specific offences provided by s 44. It follows that correction of a misleading representation at or before the point of sale does not alter the fact that a misleading representation has been made but may be a matter of mitigation: *Commerce Commission v Noel Leeming Ltd* (High Court, Christchurch, 21 August 1996, Tipping J).

[63] So, it was not necessary for the Commission to establish the state of mind of Steel & Tube to prove the company had committed offences under ss 10 and 13. Thus s 45(1) was not then engaged. Nonetheless, the Commission seeks to engage s 45(1) when it comes to sentencing for those offences.

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16 *Fastlane Autos Ltd v Commerce Commission* [2004] 3 NZLR 513 (HC).

[64] I consider a trial or entry of conviction following a guilty plea and the subsequent sentencing process, which follows, to be one entire proceeding. This is because the sentencing is dependent on a conviction, without which the sentencing cannot occur. Accordingly, when a body corporate's state of mind is not a necessary element in relation to the first stage of a proceeding (proof of the offence) I find it hard to see why, in the absence of any specific reference in the FTA, this circumstance should change when it comes to the second stage of the proceeding (the sentencing).

[65] There is nothing in the FTA which suggests that on sentencing a body corporate for strict liability offences, which include ss 10 and 13, the FTA makes it "necessary to establish" the offender's state of mind. Nor do I consider that any such provision can be read into the FTA. Had Parliament wanted s 45(1) to be available for application solely at the sentencing stage of a proceeding it could have expressly provided for that to occur. I am satisfied, therefore, that the sentencing of Steel & Tube did not engage s 45(1).

[66] Section 45(2) of the FTA has no relevance because it is focussed on attributing the "conduct" of certain specified persons to a body corporate. Section 45(1) distinguishes between "conduct" and "state of mind" which suggests to me that when Parliament refers to "conduct" in s 45(2) it is referring to actions or omissions simpliciter and not the mental states that might accompany those. Accordingly, I do not consider that s 45(2) is so nuanced that it can be relied upon to attribute "deliberate intentional" conduct as opposed to other types of conduct such as "careless" or "innocent and unintentional" conduct. Instead, I consider that had Parliament wanted to achieve with s 45(2) the result where the associated state of mind accompanying the subject conduct could also be attributed to a body corporate it would have made express reference to the state of mind attribution as well as to conduct attribution. Certainly, this is what was done for s 45(1). The language used in s 45(2) shows that unless Parliament intended the scope of s 45(2) would be limited to actual physical conduct and not the accompanying state of mind.[17] Accordingly, I find that s 45(2)

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[17] See *Trade Practices Commission v Tubemakers of Australia* (1983) 47 ALR 719 (FCA) at 740 where the Federal Court of Australia found the Australian equivalent of s 45(2) of the Fair Trading Act 1986 was not concerned with a state of mind such as intention.

cannot be relied upon to attribute the technical manager's state of mind to Steel & Tube.

[67] I am satisfied that for sentencing purposes the relevance of Steel & Tube's state of mind arises from s 9 of the SA, which requires the sentencing Judge to have regard to aggravating and mitigating factors. With the commission of a strict liability offence, the state of mind of the offender will have relevance as an aggravating factor where there is evidence to prove the commission of the offence was either wilful or careless; on the other hand, if the offender acted inadvertently this will be relevant as a mitigating factor. As was recognised by Tipping J in *Commerce Commission v Noel Leeming Ltd*:[18]

> Put broadly and in ascending order of seriousness, a misleading representation can be made either inadvertently, carelessly or wilfully.

[68] However, a state of mind that is a necessary and relevant consideration under s 9 of the SA will not meet the necessity requirement of s 45(1) of the FTA. Accordingly, I find the Judge did not err when he refused to apply s 45(1) to attribute the technical manager's state of mind, which showed deliberate misconduct on his part regarding ss 10 and 13 of the FTA, to Steel & Tube. However, my reasons for reaching this conclusion differ from the Judge's.

[69] The Judge considered that, in principle, s 45(1) could be relied upon to prove liability but not at sentencing. I do not make that distinction. In my view if s 45(1) is engaged and relied upon to prove a necessary state of mind at the trial stage, then once this is established I consider the body corporate offender must be sentenced on the basis it had the attributed state of mind. To do otherwise would be to allow the body corporate on sentencing to submit essentially that it had lacked an essential element of its offence, which would undermine the factual basis for the conviction. On the other hand, in a proceeding under the FTA where it is not necessary to establish a particular "state of mind" to secure a conviction s 45(1) is not engaged at the trial stage, in which case there is no basis for engaging the section later at the sentencing stage of what is essentially part of the same proceeding.

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[18] *Commerce Commission v Noel Leeming Ltd* HC Christchurch AP139/96, 21 August 1996 at 5.

[70] In the present case the outcome I have reached, and that reached by the Judge, are the same. However, if the case had involved proof of a mens rea offence against a body corporate the Judge would seemingly have viewed s 45(1) as available to secure a conviction against the body corporate but not available at the sentencing stage. Whereas in those circumstances I would have seen s 45(1) as being available to attribute the necessary state of mind at both stages of the proceeding.

[71] The Judge relied upon *Progressive Enterprises Ltd v Commerce Commission* as authority for the proposition that s 45(1) of the FTA was only for attributing mens rea for the offending.[19] The Commission submits, and I accept, that this amounts to a misinterpretation of that decision. The questions at issue in *Progressive Enterprises* were: (a) whether s 17 of the FTA imposed a *mens rea* requirement, which Asher J found to be so; and (b) whether the state of mind of more than one employee could be aggregated for the purposes of attribution under s 45(1), which Asher J found could not be done. Asher J did not need to take the further step of deciding whether the attributed mens rea to secure a conviction could then be relied upon at sentencing.

[72] The Commission relied on *Premium Alpaca Ltd v Commerce Commission* as authority for the proposition that s 45 is applicable to sentencing of a strict liability offence under the FTA.[20] However, I consider that decision is distinguishable. In *Premium Alpaca*, corporate bodies who were importers and retailers of alpaca rugs were charged under the FTA for false representations regarding the country of origin of alpaca rugs, and false representations about the composition of alpaca, merino and Southdown duvets. Their respective directors were charged with being parties to those offences pursuant to s 66 of the Crimes Act 1961, which required proof of mens rea despite the principal offences being strict liability.[21] On appeal the body corporates and their directors argued the sentencing Judge had erred in describing the appellants as having acted fraudulently because ss 10 and 13 are strict liability offences. Those arguments were rejected, and the appeals were dismissed. There were two bases for this rejection. First, because guilt as a party required mens rea, the directors had acknowledged they had the necessary mens rea by their guilty pleas and s 45(1) of the

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19 *Progressive Enterprises Ltd v Commerce Commission* (2008) 12 TCLR 284 (HC) at [90].

20 *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.

21 See *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 TCLR 231 (HC) at 245. See also *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.

FTA allowed this guilty knowledge to be attributed to the body corporates.[22] Secondly, because the directors' fraudulent knowledge and conduct were an aggravating feature of their companies' offending.

[73] Separate and apart from s 45(1) of the FTA there was a proper legal basis for attributing the fraudulent knowledge and conduct of the directors, which was clearly established by their guilty pleas, to the relevant body corporates. In *R v Murray Wright Ltd* McCarthy J in the Court of Appeal stated:[23]

> A corporation can, of course, only act through its officers; the acts of commission and omission for which it is responsible are really the acts and omissions of its officer, but the criminal responsibility of a corporation is not based upon the principle of *respondeat superior*. The law views the company as personally responsible, not as vicariously responsible. As Staple J said ...in *R v ICR Haulage Co Ltd* ... "The acts of the managing director were the acts of the company and the fraud of that person was the fraud of the company".

[74] Similarly, in *Meulen's Hair Stylists v Inland Revenue Commissioner* Barrowclough CJ found that the company secretary's knowledge of the repeated failure by two related companies to make PAYE returns to the Commissioner of Inland Revenue could be attributed to those companies to prove that they had knowingly failed to pay to the Commissioner the relevant tax deductions for which they were being prosecuted.[24]

[75] Accordingly, there was another legal route by which the fraudulent knowledge of the directors in *Premium Alpaca* could be attributed to their respective companies for consideration as an aggravating circumstance under the SA. Had the ability to attribute this knowledge been entirely dependent on s 45(1) of the FTA I would have considered the decision to have been wrongly decided.

[76] The common law principle for attribution of director/manager's states of mind to a body corporate would not assist the Commission here because the technical manager was not part of the senior management of that company and for this reason

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22 No reasons were given to support the conclusory statement that s 45(1) of the Fair Trading Act 1986 could be applied to attribute the director's fraudulent knowledge and conduct to their companies.

23 *R v Murray Wright Ltd* [1970] NZLR 476 (CA) at 485.

24 *Meulen's Hair Stylists Ltd v Inland Revenue Commissioner* [1963] NZLR 797 (SC) at 800.

that principle could not be invoked. Section 45(1) of the FTA, once engaged, goes further than the common law principle because it specifically permits attribution of the state of mind of servants or agents acting within their actual or apparent authority to a body corporate. Accordingly, had I found s 45(1) was applicable the section would have provided the means to attribute the technical manager's state of mind to Steel & Tube.

[77] The Commissions' second ground of appeal is that the Judge failed to take into account all relevant factors including Steel & Tube's size, resources and gain. This argument must be viewed in the light of the actual conduct and knowledge of the board of directors and senior management of Steel & Tube (the management).

[78] The Judge made the following factual findings:[25]

> [93] I characterise the culpability of Steel & Tube as grossly negligent. That finding is irresistible. At the very least, senior management ought to have known of the large-scale non-compliance over the four-year charging period.
>
> [94] The technical manager was not properly supervised. Steel & Tube cannot be permitted to wash their hands of taking responsibility for that negligent oversight. Even when the technical manager left Steel & Tube in March 2014 – half way during the charge period – the company did not audit or review his procedures in any way. Rather, Steel & Tube continued to rely on his processes and replace the person that oversaw them. It was a failure to audit its own systems at a point where detection for non-compliance should have occurred. The inappropriate non-compliance was allowed to continue on the basis of the technical manager's shortcuts. After all, it was Steel & Tube's responsibility to have proper systems in replace to ensure compliance with the Standard. This is particularly so given the significant revenues Steel & Tube derived from its sales of SE62 and the heavy extent of its reliance on the Standard and its marketing of that product.
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> [95] However, senior management staff did not know of the specifics of the testing occurring at any given time, a compelling inference drawn from the primary facts. Nevertheless, the lack of robust procedures would have been self-evident even if basic enquiries had been made. And as the manufacturer and original distributor of the product, its conduct is more culpable. This is because Steel & Tube had complete control over what testing it was conducting. It was not relying on a third party to do that testing and explain the results to it. Steel & Tube's conduct is properly characterised as grossly negligent.
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> [96] The same gross-negligence finding applies equally to the independent-testing misrepresentations. The presence of the Holmes' logo on the relevant

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25 *Commerce Commission v Steel & Tube Holdings Ltd,* above n 1. Steel & Tube dispute these and other factual findings. I shall deal with these arguments when dealing with the cross-appeal.

> batch certificates cannot be characterised as mere inadvertent practice. I do not accept the technical manager's explanation that he mistakenly left the template that Steel & Tube had earlier asked Holmes to produce when it was conducting some testing of the SE62 in its development phase. Such an explanation does not explain the use of the words "laboratory manager" when no-one at Steel & Tube held that title. It ought to have been obvious the testing was not conducted in a laboratory. And claims of independent testing went beyond the batch certificates and were made on Steel & Tube's Website throughout the charging period. Holmes was not conducting ongoing testing with SE62 past the development phase. Also, Steel & Tube had requested a proposal from Holmes to become more involved in its certification processes in 2014. Although that proposal was provided it was not taken up by Steel & Tube. The company nonetheless continued to provide batch certificates containing the Holmes' logo throughout the period until 16 March 2016.
>
> [97] This conduct may have initially arisen inadvertently but later became clearly grossly negligent. Steel & Tube ought to have known of this non-compliance and the fact it was not discovered within a reasonable time period galvanises the gross-negligence-finding. The fact that Steel & Tube's lack of oversight of the technical manager could allow the latter to approve the continued use of the Holmes' logo throughout the charging period was inexcusable.
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> [98] Whilst the inference can be drawn that the technical manager's conduct in this regard equated to a conscious choice to allow this false representation to be disseminated, there is still a gap in the evidence to suggest that senior management or the board knew of this problem. Again, s 45 cannot assist the Commission and its large team of prosecutors.
>
> [99] As is plain, I consider the overall culpability of Steel & Tube was grossly negligent. This level of culpability did not materially alter across the charging period. Both sets of representations were completely untrue. The cumulative effect of the breaches constituted substantial failures. There was a high degree of dissemination of these false representations. This was by a company with a large market share of the product in question. And the representations on the Website, for instance, must have been viewed nationwide and possibly internationally. The prejudice to consumers was significant. They were paying for the reassurance the product met the grade 500E standard.

[79] Here the maximum sentences for an offence under ss 10 and 13 of the FTA was $200,000 for the conduct prior to 17 June 2014 and for conduct from that date onwards $600,000.

[80] Thirteen of the charges attracted a maximum fine of $200,000 per charge (in total $2.6m) and the remaining 11 charges attracted a maximum fine of $600,000 per charge (in total $6.6m). The sum of the available maximum fines here was $9.2m.

[81] The Commission contended for a global starting point of between $3.8m and $4.6m, which was between 42 and 51 per cent of the maximum fine. This was without

any allowance for totality. Steel & Tube contended for a starting point, when adjusted for totality, of between $500,000 and $800,000, which was between 5.5 and 9 per cent of the maximum fine.

[82] The Judge noted Steel & Tube's submission that the suggested end range of the Commission's proposed sentences, once all adjustments were made was between $2.7m and $3.3m, which would be three times the highest fine ever imposed on a single entity under the FTA.

[83] The Judge adopted a starting point of $2.4m for the compliance offences and $600,000 for the false independent testing representations. He reduced the total sum to $2.9m in line with the totality principle, which suggests a totality discount of approximately three per cent. He then deducted a non-contentious discount of 35 per cent for relevant mitigating factors, which brought the end fines to the total sum of $1,885,000.

[84] The Judge then ordered the global fine to be allocated to each of the 24 charges in a way that reflected an accurate breakdown of the respective categories of offending and the applicable maximum penalty.[26] That breakdown was not available to me on appeal.

[85] The summary of facts informs me that charges 13 to 21 related to the misleading representations concerning testing by Holmes and charges 22 to 24 related to additional misleading misrepresentations about independent testing of the SE62 mesh. However, it is not clear to me from either the summary of facts or other information in the case on appeal as to how many of charges 13 to 24 related to offences for which the maximum penalty was $200,000 and how many related to offences for which the maximum penalty was $600,000. Accordingly, I cannot gauge where the $600,000 starting point for those offences sits in relation to the maximum fines available.

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26 At [148].

[86] Further, the Judge has not explained why he considered charges 1 to 12 attracted a starting point of $2.4m and charges 13 to 24 attracted a starting point of $600,000.

[87] The total sum of the fines is at the highest level yet to be imposed. Accordingly, when the fines are presented as a single global sum it is difficult to assess their character or find comparator cases against which they, or the starting point adopted to reach the end fines, can be measured.

[88] It is possible arithmetically to work backwards from the global starting point to identify where individual starting points would sit in relation to the maximum fine. However, from the information available to me this can only be done by equalising the fine for each charge according to whether it is within the subset of offences having a $200,000 maximum or those subset for which $600,000 is the maximum. I see no difficulty with this approach. The Commission and Steel & Tube have each approached the offences on a single global basis, as if they each carry the same degree of culpability. To some extent the Judge implicitly has done so as well, because after initially identifying two separate starting points ($2.4m and $600,000) he then proceeded to deal with the fines as a single global sum in terms of the discounts given to them and in terms of the final end sum he reached.

[89] Accordingly, I have divided the offences into two groups: (a) the 13 offences for which the maximum fine was $200,00; and (b) the 11 offences for which the maximum was $600,000. For the first group ($200,000 maximum fine) I have concluded the sum of $63,043.00 represents an equalised figure for each offence; and for the second group ($600,000 maximum fine) the sum of $189,130.00 represents the fine for each offence. These figures work out to approximately 32 per cent of the maximum fine for each group of offences.

[90] Given the parties do not quarrel with the 35 per cent discount for mitigating factors the focus of attention is on the chosen starting point. In particular, has the adoption of a starting point that amounts to approximately 32 per cent of the maximum fine resulted in a sentence that is manifestly inadequate.

[91] A starting point should reflect the gravity of the offending.[27] Factors relevant to this assessment when it involves offences under the FTA include those identified in *Commerce Commission v LD Nathan & Co Ltd.*[28] Relevantly, they are: (a) the objectives of the FTA; (b) the importance of any untrue statement; (c) the degree of wilfulness or carelessness involved in making a statement; (d) the extent to which the statements in question depart from the truth; (e) the degree of their dissemination; (f) the resulting prejudice to consumers; and (g) the need to impose deterrent penalties. I have put to the side consideration of efforts made to correct the untrue statements because they are factors relevant to mitigation, which is not a subject of dispute in this appeal.[29]

[92] The offences here are strict liability offences. However, the states of mind that generally accompany such offending will influence its gravity as either aggravating or mitigating factors. The three ascending categories of mental states which Tipping J identified in *Commerce Commission v Noel Leaming Ltd* provide helpful guidance. In general, the acts of commission or omission that constitute a strict liability offence will be done inadvertently, carelessly or deliberately. Inadvertence will be a mitigating factor, whereas, deliberate conduct will be an aggravating factor. Careless conduct will sit in between; being viewed as either neutral or aggravating depending on the degree of carelessness involved. Thus, in broad general terms a starting point for inadvertent misrepresentations might be up to 33.3 per cent of the maximum fine, careless misrepresentations might be between 33.3 per cent and 66.7 per cent of the maximum fine and deliberate misrepresentations from 66.7 per cent upwards. There may also be room for some overlap between these bands. For example, gross carelessness may fit somewhere between the second and third band. Recklessness may also fit in this area. Further adjustment of the chosen starting point will then be required to accommodate other aggravating and mitigating features of the offending.

[93] I would characterise the state of mind of Steel & Tube's board of directors and top-level management as one of gross carelessness by omission. Such a state of mind is one that can, under common law principles, readily be attributed to the body

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27 *R v Taueki* [2005] 3 NZLR 372, (2005) 21 CRNZ 769 (CA).
28 *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160 (HC) at 165.
29 See above at [52].

corporate given their level of control within the company. Essentially, Steel & Tube completely failed to take any steps or put in place any procedures that may have revealed the technical manager's deliberate disregard for the Standard's requirements or his deliberate permitting of SE62 mesh to be sold with false representations about it being independently tested. Further those omissions continued even after the technical manager had retired, which was in 2014. His replacement was trained by the technical manager to follow his approach and Steel & Tube's senior management continued with the same misplaced trust and reliance as they had done before, despite the fact the replacement did not have the same length of experience or high standing in the industry as did the technical manager.

[94] Steel & Tube is a large manufacturing company it is not a small casually operated company which might be given some latitude when it comes to having lax management and defective systems. Steel & Tube should have had careful quality control systems in place to ensure its products were what they were represented to be. It is unusual for a company of Steel & Tube's size to fail so completely to have systems and procedures in place that would alert it to deviance, but that is what has happened here.

[95] The Commission submits that if Steel & Tube had taken a more active role in understanding the core aspects of the Standard and how they must meet them, this offending would not have occurred for the extended period that it did. I agree with this submission. In relation to the culpability of an ignorant board, the Commission relies on a passage of an Australian Court in *Director of Consumer Affair Victoria v Alpha Flight Services*:[30]

> Some of the other matters to which attention was drawn on behalf of Qantas might also be thought to point to the need for a substantial penalty rather than a lower penalty. It was said for Qantas, for example, that the contravening conduct had occurred without the knowledge or involvement of any of Qantas' senior management, but that circumstance suggests that Qantas did not have systems to ensure that such contraventions would receive attention by senior management rather than that Qantas should not have a substantial penalty imposed on it.

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30 *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2014] FCA 1434 at [33].

That case dealt with a situation where compliance had been outsourced. The Commission submits, and I agree, that the comments apply with greater force when applied to a situation where compliance is delegated to someone within the same company.

[96] Accordingly, I consider the carelessness to be serious, or as the Judge said, "gross". It had not crossed into recklessness, but it was at the high end of carelessness. I have chosen to use "carelessness" rather than "negligence", as was used by the Judge, because carelessness is the term adopted by Tipping J in *Commerce Commission v Noel Leaming Ltd.* This would weigh in favour of a starting point between 55 and 60 per cent of the maximum fine.

[97] There are other factors that also support a starting point of between 55 and 60 per cent of the maximum fine. The false representations about SE62 mesh were important. Consumers had to rely on the SE62 mesh being what it purported to be. Here there was false additional assurance given to them by the false statements this mesh was independently tested.

[98] The departure from the truth was serious insofar as the SE62 mesh was not what it was represented to be. Nor can it now be tested.

[99] There was wide dissemination of the false representations. Also relevant is the length of time of the offending. It was between 1 March 2012 and 5 April 2016; it was just over four years, which in my view significant. Particularly when it is realised that but for the Commission's inquiry into imported steel mesh no-one may have tested Steel & Tube's SE62 mesh. Thus, the non-compliance may have been on-going and potentially permanent.

[100] Then there is the cost of the carelessness to purchasers. During the charge period approximately 480,000 sheets of purportedly SE62 steel were sold. The average sale price of Steel & Tube's SE62 grade small steel mesh sheets, which were sold to building merchants during the charge period, was $51.74 per sheet whereas the average price of the equivalent mesh in Steel & Tube's non-seismic range was $43.13 per sheet. The Judge estimated that Steel & Tube would have earned in the region of

$24 million from the sale of the non-compliant SE62 mesh.[31] Accordingly, Steel & Tube derived financial benefit from those sales insofar as it did not spend the outlay it would have spent had the representations it made been true. Because the subject steel mesh was non-compliant purchasers paid more than they should have, and Steel & Tube received more earnings from the misleadingly represented mesh steel than it should have received if the misleading products were sold as mesh that did not comply with the Standard.

[101] Once the non-compliant mesh was used in a construction this circumstance could not be readily rectified. The incorporation of this mesh into most constructions, once completed, would make replacement with the correct product very difficult, if not impossible.

[102] The breach of trust was significant. Without doing their own tests, which would be unrealistic, purchasers had no means of detecting that they had purchased steel mesh which was not fully compliant with the Standard. Such persons were entirely reliant on Steel & Tube's SE62 grade mesh being what it was represented to be.

[103] The objects of the FTA recognise the importance of consumer protection and the vulnerability of consumers to the extent they must often rely on the representations of the provider of a product. When consumers have no readily obtainable means of self-assessing the character of a product and must instead trust the manufacturer's representations as to its character, breaches of this trust call for denunciation and deterrence, not only in terms of the offender, but, also in general to deter others from like offending. This calls for fines that bite, although I also acknowledge what was said by Tipping J in *Megavitamin Laboratories (NZ) Ltd v Commerce Commission*:[32]

> ...it is important the Act be seen to have some teeth. I only observe that in general terms the teeth should be sharper when the falsity is deliberate. This is not to excuse a situation where the falsity arises out of carelessness. Strict liability is designed to encourage the taking of appropriate care.

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31 *Commerce Commission v Steel & Tube Holdings Ltd,* above n 1, at [117]

32 *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 (HC) at 252.

[104] There are also countervailing factors that weigh in favour of lowering the starting point. First, the independent assessment of MBIE is that the non-compliant SE62 mesh will not be life threatening in concrete slabs on the ground and very unlikely to pose a life-safety risk if used in a suspended concrete floor system. The summary of facts did not directly address the degree of prejudice to consumers. Nothing was said as to whether individual constructions have failed to obtain Building Code compliance because of the false representations. Thus, the harm done by the misrepresentations may not be as serious as it could have been.

[105] Second, Steel & Tube has also been a victim of the technical manager's deliberate misconduct. The impression I have gained from the summary of facts and submissions is that the management of Steel & Tube had no reason to doubt the technical manager was doing all that was required of him. Its misplaced and somewhat naïve reliance on him has placed the company in its present position.

[106] The technical manager was the employee who had the greatest technical knowledge. In this regard it is important to note that he had more than 20 years' experience in manufacturing nails and wire fencing, before becoming involved in the manufacture of steel mesh in 1987 and subsequently employed by Steel & Tube. He had held a position on the joint Australian/New Zealand committee that developed the Standard, as a representative of the steel manufacturing industry. Senior management of Steel & Tube were aware of the technical manager's role on the Standards Committee when they appointed him as technical manager. He had been responsible for the design and technical aspects of the production of steel mesh for Steel & Tube. He had worked with the metallurgist at Pacific Steel (which was the manufacturer of all steel coil used to manufacture SE62 mesh produced by Steel & Tube) to ensure the steel coil used to make the steel mesh had the right composition and characteristics to enable it to be processed into seismic mesh that satisfied the Standard. He had arranged extensive independent testing with Holmes of SE62 mesh during the development of 500E grade steel meshes in 2011.

[107] It is hard to understand why someone in those circumstances would then embark on what was seemingly a frolic of his own where he either felt confident that his alternative approaches would suffice to meet the Standard's requirements, or that

there was no proper need to meet such requirements. Either way the conduct was reprehensible and a complete breach of his obligations as a trusted employee of Steel & Tube. It is the management's misplaced trust in the technical manager that led to the offending. There is no evidence to suggest that Steel & Tube would otherwise have acted in a way that led to its products not conforming with the Standards.

[108] After taking all the above factors into account, I find that had I been sentencing Steel & Tube at first instance I would have adopted a starting point that rested somewhere between 46 and 56 per cent of the maximum fine. Had the conduct been deliberate or reckless; had the life-safety risk been higher; or had the non-compliance demanded expensive rectification, this would necessarily have placed the gravity of the offending nearer to the maximum.

[109] The range of starting points that I have arrived at well exceed the 32 per cent starting point adopted by the Judge. I acknowledge his starting point included an allowance for totality. My range of starting points is also higher than the Commission's suggested range, which was between 42 and 51 per cent of the maximum fine.

[110] There is no dispute concerning the 35 per cent discount for mitigating factors. Steel & Tube is a first offender. Once the non-compliance was known it co-operated and took all necessary steps to rectify its misconduct. It pleaded guilty to the offending. Accordingly, I agree with the 35 per cent discount.

[111] Steel & Tube is a large profitable company. There is no issue regarding its ability to pay a fine, so this would not provide a basis for any further reduction.[33] Nor is there any issue regarding the application of s 40(2) of the FTA, which is applicable where offences are the same, or are substantially similar in nature and they have occurred at or about the same time, in which case the aggregate amount of any fines imposed shall not exceed the maximum fine that may be imposed for a conviction for a single offence. The Judge found s 40(2) of the FTA did not apply here and Steel & Tube did not dispute this finding on appeal.[34]

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33 See s 40 of the Sentencing Act 2002.

34 See *Commerce Commission v Steel & Tube Holdings Ltd,* above n 1, at [136].

[112] However, a sentence should not be increased unless the court is clearly of the opinion on review of the facts and circumstances that the sentence imposed was manifestly inadequate, or the prosecution is able to point to an error in principle made by the sentencing judge. On when a sentence might be manifestly inadequate, the Court of Appeal have made the following remarks in *R v Wilson*:[35]

> Whether a sentence can be said to be manifestly inadequate turns firstly on the maximum sentence for the particular offence; then on a consideration of comparable sentences, to the extent that those are considered to be appropriate; and above all, the focus is required to be on the totality of the offending and the culpability of the offender in the particular case.

[113] The considerations justifying an increase must be more compelling than those which would justify a reduction. In *Police v Velenski* the High Court remarked:[36]

> Crown appeals are not for the purpose of correcting a sentence in an individual case but are primarily for the purpose of establishing the proper tariff or prevailing level of sentence or to correct a judge who is constantly or continuously imposing sentences which are less than the prevailing level.

[114] When the appellate court finds that a sentence should be increased on the grounds of manifest inadequacy or error of principle, the increase will only be to the level required to remedy the manifest inadequacy, rather than to the level which would be imposed if the appellate court were the original sentencing court:[37]

> Upon a successful appeal by the Solicitor-General a sentence is adjusted by no more than the minimum extent necessary to remove the element of manifest inadequacy.

[115] Accordingly, I propose to adopt a starting point of 42 per cent, which is the lowest starting point proposed by the Commission. It is also the lowest starting point that I think is available in the circumstances. This leads to individual fines of $84,000 for the offences with a $200,000 maximum, and $252,000 for the offences with a

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35 *R v Wilson* [2004] 3 NZLR 606 at [41]. This approach has been applied in prosecutorial appeals against the level of fines imposed in regulatory prosecutions; see: *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526, (2013) 11 NZELR 11; *Department of Labour v Street Smart Ltd* (2008) 5 NZELR 603 (HC); *Department of Labour v Safe Air Ltd* [2012] NZHC 2677, (2012) 10 NZELR 198.

36 *Police v Velenski*, HC Timaru APPS4/94, 19 May 1994 at 4.

37 *Sipa v R* [2006] NZSC 52, [2006] 3 NZLR 349 at [9]. This principle is applicable in the case of a prosecutorial appeal against the level of a fine; it was applied by Kos J in *Department of Labour v Safe Air Ltd*, above n 36, at [25].

$600,000 maximum. When a discount of 35 per cent is subtracted for those fines it reduces then to $54,600 and $163,800. This comes to a total sum of $2,511,600.

[116] There is then the question of whether to give a discount for totality. The Judge's reasons for giving a totality discount was the connection that he saw between the two sets of representations. I acknowledge the Judge viewed them as distinct because even if Steel & Tube had complied with the Standard, the misrepresentation regarding independent laboratory testing by Holmes and others still remained. However, he also considered the Holmes misrepresentations were inextricably linked to the compliance representations. I accept this was the correct way to view the offending. Both sets of representations stemmed from the same deliberate misconduct by the technical manager, and such conduct resulted from the same omissions on the part of Steel & Tube's directors and senior management. Accordingly, both sets of offending have some overlap.

[117] The purpose of the totality principle is to recognise that with multiple offences the sentence must reflect the totality of the offending, and because the total sentence must represent the overall criminality of the offending and the offender.[38] Where multiple offences occur, and particularly where they may overlap to some degree, allowance is made for this. Otherwise individual sentences for each offence can result in a crushing sentence that is out of kilter with the overall criminality of the offending and the offender.

[118] I note that in *R v Xie* the Court of Appeal confirmed that in respect of multiple sentences the Court will not insist that the total sentence be arrived at in any particular way.[39] I find it preferable to consider totality last because in that way I can best assess if the sentence arrived at requires further adjustment to reflect the overall criminality of the offending and the offender.

[119] Here I consider a 20 per cent discount for totality is appropriate. This brings the end fines on each offence for which the maximum is $200,000 to $43,680 and for

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38 *R v Xie* [2007] 2 NZLR 240 (CA) at [17].
39 At [17].

the offences where the maximum fine is $600,000 to $131,040. The total sum of the end fines is $2,009,280.

Steel & Tube's cross-appeal

[120] The findings I have reached on the Commission's appeal largely dispose of the cross appeal as well.

[121] Steel & Tube submit the sentence was manifestly excessive, the Judge was wrong to find Steel & Tube was "grossly negligent" and the Judge made factual findings in error.

[122] The determinations I have made on the appeal dispose of Steel & Tube's first two submissions. However, I consider more needs to be said on the question of whether the sentence imposed in the District Court was manifestly excessive. Steel & Tube refer to sentencings in other cases, which they consider comparable. I have found it difficult to find comparator cases because of the tendency in sentencings to refer to global sums and to not identify where starting points sit in relation to maximum fines available. This coupled with the increase in maximum fines over time makes it difficult to assess any comparison. I have also found it hard to discern how the starting points in many of the cases on which Steel & Tube relies were arrived at. For this reason I have focussed on characterising the conduct here to arrive at an appropriate starting point.

[123] It remains necessary to deal with Steel & Tube's arguments regarding the Judge's factual findings being incorrect. I propose to limit the analysis to those arguments alleging such errors in relation to [93] through to [99] of the District Court sentencing notes because I have adopted those factual findings in arriving at my assessment of the gravity of the offending, which has otherwise been based upon conclusions that I have drawn from the summary of facts.[40]

[124] Steel & Tube has identified three factual errors, which I shall deal with in turn. The first is that the Judge was wrong to find the technical manager made a conscious

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[40] See [91]-[96] herein.

choice to allow and approve the false independent testing representations to be distributed. I consider the summary of facts supports an inference the technical manager did act in this way. He knew the only testing by Holmes and other independent testing was done on sample batches when SE62 was being developed. He knew that once this product was developed and in the market place there was no further independent testing. He also would have known what the labelling of the product said. Those words plainly suggest that each batch of SE62 steel mesh bearing the independent testing representations had been so tested. There is nothing about the language to suggest that only the prototype has been independently tested and that was as far as the independent testing had gone. Given he knew all those factors and did nothing to stop SE62 mesh being sold with false representations I consider it reasonable and logical to infer he knowingly allowed this circumstance to occur, which to me also suggests intentional and deliberate conduct on his part.

[125] The second error is that senior management ought to have known of the breach of the Standard. The arguments Steel & Tube make here are essentially counter to the findings I have already made on the degree of carelessness exhibited by Steel & Tube. To some degree I have made allowance for the breach of trust Steel & Tube have also suffered through the technical manager's misconduct and the company's misplaced naïve reliance on him when I assessed the gravity of the offending.

[126] Nevertheless, I reject Steel & Tube's submission the Judge reached incorrect conclusions in [93], [94] and [97] of the sentencing notes. The findings made therein are well supported by the summary of facts. The senior management of a company cannot absolve itself of responsibility for not knowing a mid-level manager is acting in a way that has placed the company in breach of ss 10 and 13 of the FTA.[41]

[127] Steel & Tube also refers to [100] of the sentencing notes where the Judge referred to the impact of the offending on certainty, consumer confidence, local councils and property values. I have not adopted this reasoning and I have not been influenced by it. It follows that if the Judge has gone too far here and entered the field of speculation this has had no influence on the outcome of the appeal.

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41 See discussion at [93]-[96] herein.

[128] Moreover, I observe that whilst MBIE has said there is little if any life-safety risk from the non-compliant mesh, depending on whether it is used in concrete on the ground slabs or suspended ceilings nothing has been said in relation to potential property damage about how non-compliant SE62 mesh might react in an earthquake. It may react in the same way that steel mesh which meets the Standard is expected to react, but on the other hand non-compliant SE62 mesh may not perform as well. The purpose of the Standard is to ensure better performance in an earthquake or in other situations where there is significant ground movement. Consumers who now find themselves with constructions that involve the non-compliant SE62 mesh lack the assurance which having compliant steel mesh can give. This much is certain.

[129] The Standard was amended after the Commissions' investigation. Whilst this may suggest some obscurity or ambiguity in the original Standard there is nothing that suggests to me the technical manager acted as he did through him genuinely misunderstanding the Standard. His involvement in the development of the Standard and the place he held in the industry suggest to me he would have known what the original Standard required and for reasons known to himself he deliberately chose to depart from it.

[130] It follows that the cross appeal is dismissed.

Result

[131] The Commission's appeal against sentence is allowed. The sentences imposed in the District Court are set aside on the ground they are manifestly inadequate.

[132] The total sum of the fine I would impose on Steel & Tube is $2,009,280.

[133] As was done in the District Court, the Commission is directed to file a memorandum which will enable the total sum of the fines to be allocated to each of the 24 offences in a way that reflects the applicable maximum penalty. The memorandum should also set out the relevant date range of each offence.

Duffy J