

**IN THE DISTRICT COURT
AT AUCKLAND**

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

**CRI-2018-004-004304
[2018] NZDC 20733**

COMMERCE COMMISSION
Prosecutor

v

PB TECHNOLOGIES LIMITED
Defendant

Hearing: 28 September 2018

Appearances: J Barry for the Prosecutor
A Lenard for the Defendant

Judgment: 28 September 2018

NOTES OF JUDGE E M THOMAS ON SENTENCING

Fined a total of \$77,000.

REASONS

The offending and its aftermath

[1] PB Tech is a computer and IT retailer. It is a significant player in the New Zealand domestic market. It faces charges relating to extended warranty contracts that it sold ancillary to its sales of computer and IT products.

[2] Between May and November 2017, it sold 17,400 such contracts to both businesses and consumers. Of those, 4,400-odd were to consumers. Those contracts form the basis of the charges.

[3] PB Tech failed to meet the necessary disclosure requirements under the Fair Trading Act 1986. The disclosure violations included failing to provide a copy of the extended warranty agreements to customers, failing to provide a summary of a customer's rights under both the warranty that they had purchased and the Consumer Guarantees Act 1993, and failing to provide oral notice that a customer was entitled to cancel without penalty, within five working days.

[4] The result of that to the customers concerned is that they did not have, fairly, information before them to allow them to make the proper decision as to whether they should purchase the extended warranty contract concerned.

[5] The revenue was reasonably significant from these contracts. It came to a little over \$500,000.

[6] The contracts fell broadly into two categories: PB Tech's own extended warranty contract and an Apple extended warranty contract. The great majority of contracts fell within the first category.

[7] There have, however, been claims made by customers from both groups. Those claims have not been insignificant. The company has paid around \$250,000 as a result of bona fide claims made under the extended warranty contracts purchased by the various consumers.

[8] Because of PB Tech's failure to meet its disclosure requirements or obligations under s 36U Fair Trading Act, it faces 14 charges. Each of those carries a maximum penalty of a fine of \$30,000. The company has pleaded guilty by notice. These are infringement defences, so no conviction is entered.

Starting point

[9] The various factors that a Court need to consider in assessing the level of penalty has been discussed and refined over the years. The current practice is to apply the factors initially identified in *Commerce Commission v L D Nathan & Co Ltd*.¹ Here, the conduct that PB engaged in undermined important consumer protection objectives of the Act. It involved multiple violations repeated extensively over a period of several months. It was a result of a wide systemic failure. There was at least a moderate degree of carelessness with a significant number of victims.

[10] The Commission may arguably be justified in arguing that there was a high level of carelessness. What saves the company from my finding in that regard is, to some extent, the practical reality of selling additional products or ancillary products across the counter in a high volume business. There were certainly clear systemic failures but there were also instances where it would be a counsel of perfection perhaps to expect that every member of the counter staff selling every single one of these contracts is going to be so aware of their obligations that they are going to be able to unfailingly meet them. These are important obligations and the company has fallen short and carelessly so in what its staff needed to do. It is finely balanced but I am prepared to stay away of a finding of a high level of carelessness. Ultimately, I do not think that has any bearing on the level of fine, given the other factors that apply.

[11] The Commission points to the harm suffered by the consumers. It is very difficult to quantify. There is certainly significant harm suffered in a generic sense in people buying products that they are ill-informed to buy. The fiscal harm, or what that represents here in terms of dollars, is a little bit different. We do not know how many would have declined to purchase. We know that a few have. We know that there are many who have, who have made claims under those warranties and those claims have

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

been honoured. So clearly there have been tangible benefits attaching to those warranties. Those consumers, I am sure, would quite happily say that they are glad they purchased the extended warranty contracts.

[12] I agree, however, with the Commission that there is a high need for a deterrent response. Perhaps not so much so in the case of PB Technologies, but there is a significant public interest in ensuring that customers who part with their money are properly informed about the benefits that they are receiving in doing so. There is a significant public interest in ensuring that warranties and policies of that nature, renowned for exclusions and limitations, are fairly provided. That disclosure relating to those is fairly made to customers. So that they can make an informed decision about whether or not to invest a reasonably significant sum of money in that sort of product.

[13] Both PB Technologies and the Commission have referred to cases that deal with this sort of offending. The starting point of \$110,000 in total fines suggested by PB Technologies is within the range. It is supported by the authorities advanced and relied upon by both sides. Recognising the need to impose the least restrictive outcome, that is the starting point that I adopt.

Discount

[14] I tangibly recognise the company's co-operation with authorities. Its immediate acceptance of its failings. The steps that it has taken to remedy its failings and to ensure that they do not occur. The halting of sales to achieve that significantly. That it has no previous convictions.

[15] The Commission fairly argues that any discount for co-operation and remedial steps should be cautiously applied, given that PB Technologies is simply complying with its legal duty, something that it should have done before it was charged, before it sold any of these warranties. However, the fact that it has done so promptly and that it has no previous convictions does warrant a discount.

[16] So too does its early guilty plea. The maximum discount available is 25 percent and it is fair that the company gets the maximum discount.

Result

[17] That brings the result to a fine of \$77,000. That is made up of a fine of \$5,500 on each of the 14 charges.

Judge EM Thomas
District Court Judge

Date of authentication: 15/10/2018

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.