IN THE DISTRICT COURT
AT AUCKLAND

CRI-2008-004-11407
CRI-2007-004-14313

COMMERCE COMMISSION
Informant

v

THE WAREHOUSE LIMITED
Defendant

Hearing: 5 February 2009

Appearances: Williams for the Informant
Ross for the Defendant

Date of Decision: 27 February 2009

SENTENCING DECISION OF HIS HONOUR DAVID J HARVEY, DISTRICT COURT JUDGE

Introduction – the Charges and the Factual Background

[1] This is a sentencing matter following pleas of guilty by the defendant to a number of charges that it faces under The Fair Trading Act. For the purposes of the submissions and for the sentencing the charges have been divided into two proceedings.

[2] Proceeding 1 covers three sets of charges.

a) Two charges under s 10 and s 40(1) of The Fair Trading Act 1986 of engaging in conduct that was liable to mislead the public as to the characteristics of goods (the "exclusive to Warehouse" charges - CRN7004502867 and 869).

b) 11 charges alleging breaches of s 13 G and s 41 of The Fair Trading Act of making false or misleading representations with respect to the price of goods (the "prices" charges – informations numbered 287004502877, 2878, 2880, 2883, 2884, 2886, 2889, 2873 and 2891). Informations ending 2890 and 2892 have been withdrawn by leave.

c) 4 charges under s 19(2) and s 40(1) of The Fair Trading Act of having advertised goods for sale at this specific price, but fail to offer such goods for supply at that price for the period that was and in quantities that were reasonable (four "bait advertising" charges) informations numbered 7004502870 to 873.

[3] Proceeding 2 relates to pleas of guilty to 6 charges under s 13(a) and s 40(1) of the Fair Trading Act of making false and misleading representations with goods of a particular kind, standard, quality, grade or composition. These are the "duvet" charges informations numbered 08004502885, 2888, 2882, 2879, 2876 and 2873.

Proceeding 1 - Facts

[4] . The offending under Proceeding 1 relates to conduct that took place between November 2005 and December 2006. In brief outline in this period The Warehouse made representations that:

a) were false and misleading about the price of a "Madagascar" DVD both instore and in its 2005 Christmas catalogue. The advertised price was $10. In fact this was only a deposit that was required to pre-order the DVD.

b) Representations that are false or misleading about the price of a "Pink Floyd Pulse" DVD in its July 2006 catalogue in that the advertised

price was $12.99 whereas in fact the price had not been set at the time of advertising.

c) Made representations that are false or misleading that all advertised toys in its June 2006 catalogue were on sale for a limited time only when in fact only some of those toys were available at the same price as prior to the sale period.

d) Made representations that were false or misleading that all advertised toys in its June 2006 catalogue were on sale for a limited time only when, in fact, only some of those toys were available for the same price as prior to the sale period.

e) Made representations that were false or misleading on certain pink stickers that were attached to toys instore stating "Advertised Special" that the toys were on sale at a reduced price when, in fact, they were available at the same price prior to the sale period.

[5] Between 28 June 2006 and 11 November 2006 it is also claimed that The Warehouse:

a) Engaged in conduct that was liable to mislead the public by stating in its June 2006 catalogue that the Duplo "Thomas Load and Carry Set" was "exclusive to The Warehouse" when, in fact, it was available from other toy stores in New Zealand.

b) Engaged in conduct that was liable to mislead the public by stating in the Weekend Herald on 11 November 2006 that certain Lenovo computer products were exclusive to The Warehouse when, in fact, they were available from other computer retailers in New Zealand.

[6] The final set of offending within Proceeding 1 took place 1 November 2006 and 18 December 2006. During that period The Warehouse:

a) Advertised for sale in its catalogue dated 1 November 2006 "Explorer Folder Scooters", but failed to supply the goods in quantities that were reasonable.

b) Advertised for sale in its catalogue effective from 31 October to 24 December 2006 "My Little Pony Twin Gift Packs", but failed to supply the goods in quantities that were reasonable.

c) Advertised for sale in its catalogue dated 13 December 2006 26" Men's and Women's "MTB Bikes", but failed to supply the goods in quantities that were reasonable.

d) Advertised for sale in its catalogue dated 15 November 2006 "Labyrinth", "Dark Crystal" and "Hostel" DVDs, but failed to supply the goods in quantities that was reasonable.

Proceeding 2 - Facts

[7] Proceeding 2 involves duvet inners. The allegations are that there were false and misleading representations about the compositions of duvet inners. In winter of 2007 the defendant began promoting and selling feather and down duvet inners under the "Nature's Pride" brand. Some 17,744 of these had been imported from China .

[8] Three types of duvets were sold with packaging and labelling representing that they contained 80% goose down clusters, 80% duck down clusters and 50% duck clusters respectively.

[9] In fact, the duvets from China did not meet the labelling as far as content was concerned. The defendant was advised of this in July 2007 and who commissioned its own testing which was completed on 1 August 2007. This testing showed that the content of all three duvet products marked by the defendant, deviated significantly from the labelling claims as to the down cluster contents. The false representations as to content were made on outer packaging for the duvets and on printed labels attached to the inners.

[10] Notwithstanding on 26 July 2007 the defendant continued selling the duvet inners with misleading packaging and labelling and put the product into clearance and sold it at a reduced price for the purposes of, it is alleged, selling them through quickly.

[11] Staff of the informant made 9 test purchases of the duvet inners on 6 and 7 August 2007 in Auckland, Wellington and Christchurch after receiving a complaint. Subsequent tests confirmed that the content of the duvets varied by a significant amount to the claimed down cluster content on the packaging and labels.

[12] The Commerce Commission contends that a deliberate decision was made to reduce the price of the goods and to maintain the false labelling in order to sell them through quickly resulting in more sales. Five thousand duvet inners were sold before the price reduction and ten thousand after they were put on sale.

[13] Mr Ross objects to the use of the word "deliberate", but in this context I find that it is well used. The defendant was well aware of the fact that the duvet inners did not comply with the advertised specification, but rather than properly advertise them or alternatively withdraw them from sale completely, chose to try and get rid of them as quickly as possible.

[14] In addition, it is claimed by the Commerce Commission that the defendant did not attempt to contact consumers who purchased the mislabelled duvet inners and it did not carry out corrective advertising and did not offer refunds, but did remove the remaining stock from the stores.

[15] Mr Ross submitted that The Warehouse is willing to offer refunds to consumers who wish to return the duvets and have, indeed, embarked upon a high profile advertising campaign offering a product recall. However, according to Mr Williams, this has not been as effective as it could be and still means that mis-described product was purchased and is still in the hands of consumers.

[16] The extent of a product recall, if that is the proper term, was considered in the case of *Commerce Commission v Ezibuy Limited* (CRI 2008-004-011440, District

Court Auckland 3 September 2008 Judge Gittos). Once the defendant in that case learned that its product did not comply with labelling, it contacted all the customers who purchased the items in both New Zealand and Australia and individually offered them a refund on the purchase monies on terms that did not require the customer to return the item purchased. Refunds were made as a result to 4,800 customers. Ezibuy's position was facilitated by virtue of the fact that it was a mail order company and had contact details for each customer. Although Mr Williams did not use the term, the attempted product recall by The Warehouse could be characterised as too little, too late.

Fair Trading Act Sentencing Criteria

[17] In the case of *Commerce Commission v L D Nathan & Co. Limited* [1990] 2 NZLR 160, 165 a number of factors have been taken into account when arriving at a proper penalty under the Fair Trading Act. These include:

a) the objectives of the Act;

b) the importance of any untrue statement made;

c) the extent to which the statement departs from the truth;

d) the degree of dissemination;

e) prejudice to consumers;

f) the degree of wilfulness or carelessness involved in making such a statement;

g) whether any and, if so, what efforts had been made to correct the representations; and

h) the need to impose deterrent penalties.

[18] In addition to these factors, Judge Abbot in *Commerce Commission v Ticketek* (unreported, Christchurch District Court CRN 2009031178, 81-83, 6 June 2003 suggested that the following additional factors should be taken into account:

a) . the financial circumstances of the offender;

b) any guilty plea; and

c) the previous record of the offender.

[19] Mr Williams submits, and it is not really in contention, that the Act is regulatory in nature and underlying the legislation is that the traders who conduct their business should do so fairly and disclose accurate information. Traders who disclose inaccurate information disadvantage consumers and can obtain an unfair advantage over competitors. Primarily however, it does appear that the Act is in the nature of consumer protection legislation.

[20] In July 2003 the maximum penalties under the legislation were doubled. As a result there has been a substantial increase in sentencing levels, but Mr Williams submits that this is not just with regard to the higher penalties, but also an increasing awareness for the need for deterrent sentences. As a result of the earlier decisions on sentencing under the Fair Trading Act are not as helpful as they once might have been. That is being acknowledged in *Commerce Commission v Westpac Banking Corporation* (District Court Auckland, CRN 5004500677-782, 29 September 2006, Judge Joyce QC) at 107 and in *Commerce Commission v GlaxoSmithKline (NZ) Limited* (District Court Auckland, CRN-60004503913, 27 March 2007, Judge Gittos).

[21] As I have stated there is no real contention with these principles. In addition to the specific principles applicable under the Fair Trading Act are the general principles and purposes of sentencing under the Sentencing Act 2002. Mr Williams submits that the following purposes are relevant to sentencing under the Fair Trading Act:

a) s 71(a) – this sentence should hold the offender accountable for harm done to the community by the offending;

b) 2 71(b) – to promote in the offender a sense of responsibility for and acknowledgement of the harm;

c) s 71(e) – denunciation of the conduct in which the offender was involved; and

d) s 71(f) – to deter offender or other persons from committing the same or similar offence.

[22] The need for deterrent penalties is also a matter taken into account by Greg J in *Commerce Commission v L D Nathan & Co.* (above).

[23] Mr Williams also submits that some of the principles of sentencing contained in s 8 are particularly relevant:

a) the gravity of the offending in the particular case including the degree of culpability of the offender;

b) the seriousness of the type of offence in comparison with other types of offences is indicated by the maximum penalties prescribed for the offences;

c) the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and

d) the aggravating and mitigating factors of the offending.

[24] In this decision I shall consider firstly, the specific matters that should be taken into account in sentencing under the Fair Trading Act as set out in *Commerce Commission v L D Nathan & Co.* and *Commerce Commission v Ticketek,* consider the sentencing authorities to which reference has been made, consider the

aggravating the mitigation circumstances of the offending and finally, address the penalty that should be imposed.

Application of Fair Trading Act Sentencing Criteria to This Case

Importance of untrue statements made

[25] Charges under s 19 are specifically referred to as bait advertising. The informant characterises all of the price charges in Proceeding 1 as having a similar affect. Bait advertising attracts customers at cheap prices, but the goods advertised are in such small quantities that disappointment could be experienced although, in some cases, of deliberate conduct an offending will operate a "bait and switch" technique to move the customer into buying something more expensive.

[26] Mr Ross correctly argues that there is no evidence that The Warehouse operated a bait and switch technique or that it was intended to have that affect.

[27] Nevertheless, in *Commerce Commission v ANZ Banking Group (New Zealand) Limited,* District Court Wellington, 23 February 1996 which involved misleading representations regarding the availability and cost of mortgage finance. Judge Ongley "the pleas of guilty in this case recognised that misleading advertising is nonetheless an offence when the mischief of offence is rectified at point of sale". The effective advertising would probably have been to attract potential customers to the ANZ Bank through the superficial attraction of the advertised borrowing benefits. The practical effect of the newspaper advertisement may have been that a person attracted by it could be enticed to apply to the bank for loan finance and might then simply acquiesce to conditions offered by the bank or feel unable to withdraw and seek finance elsewhere.

[28] Thus it is contended that through the misleading advertising The Warehouse was able to lure customers into the shops. In the offence involving the "My Little Pony" twin gift pack, the complainant made a special trip to The Warehouse to purchase the item for her daughter for Christmas. Once in the store, she was disappointed.

[29] The informant argues that this form of advertising has the capacity to harm rival traders. It is suggested that if customers had known the true price they could have compared prices offered by rival traders and may have purchased elsewhere. Essentially with claims to exclusivity customers are being told that there is no need to look elsewhere because the goods are not available elsewhere.

[30] Mr Ross argues that, in fact, the advertising was unclear relating to the DVDs. The error on the Madagascar DVD was fixed immediately. The error on the Pink Floyd DVD resulted in three complaints from a total mail out of 1 million.

[31] It was also argued that for innocent reasons some of the stores did not have advertised stock on hand although new stock arrived within several days. In one case it seems there was stock in the store although a store employee made a mistake of advising that there was none. It is acknowledged that the statements relating to exclusivity were wrong, but had no malicious intent behind them.

[32] The statements relating to the second proceeding regarding the duvet inners, involved what the Commerce Commission characterises as credence goods where the customer is wholly reliant upon the labelling as they do not have access to a testing laboratory to discover the true composition of the product. The different types of filling attract different prices. Goose down cluster involves a payment of a premium, but customers rely on the labelling. For credence goods the customer relies upon representations made by the retailer.

[33] Mr Ross acknowledges that the charges involving the duvet inners are more serious.

[34] The statements that were made in the first proceeding were in the nature of carelessness rather than with the intention of wilfully misleading with the intention of increasing a profit. The carelessness is indicative of a lack of responsible business conduct on the part of the defendant. The statements in the second proceeding were of a different category. A consumer relies upon a content label where the true nature of the product is not easily verifiable. Thus the labelling was of a significantly

enhanced importance in the scheme of trading. This factor along with others is significant when it comes to sentence.

Extent to which the statements depart from the truth

[35] The departure from the truth or the reality of the situation depends upon the nature of the charges. The Commerce Commission characterises the representations in both proceedings as a moderately serious departure from the truth especially regarding the exclusivity charges where the Lenovo goods were available through at least 45 different suppliers and the Duplo goods were available at KMart and Toy World.

[36] Mr Ross argues:

a) that the DVD products were not advertised at a lower price, but were rather unclear;

b) the majority of the stores did, in fact, have all the stock and it was only in a few cases where there was an absence of one item or another;

c) the statements made regarding exclusivity were genuine, but incorrect and The Warehouse accepts that these claims were false; and

d) the incorrect statements as to the quantities of goose and/or duck down in duvet inners were as a result of supplier error.

[37] In both the proceedings there extent of departure from the truth or the reality of the circumstances was high. This was especially so in the second proceeding. The extent varied in the first proceeding. The nature of the departure from the truth in the DVD charges was high. In the product availability charges it was not as high because there was some stock available which later ran out.

Degree of dissemination

[38] Some of the representations are nation-wide because they arose out of national mailers. Others related to specific stores only. Representations made about the "Madagascar" DVD, the "Pink Floyd" DVD and "Biggest Toy Sale on Earth" were made in 3 million mailers to customers and representations were also made in store of which there were some 85 throughout New Zealand. The Commission points out that some 3,370 customers who pre-ordered the Madagascar DVD were potentially mislead by the price representation and the Madagascar charges concerned complaints from New Zealand and were wide-spread emanating from Taupō, Christchurch, Tauranga, Wellington, Auckland, Whangārei and Cambridge.

[39] The representations in the second proceedings were not as wide-spread, but were nevertheless nation-wide and related to representations made on duvet inners in stores in shops in Auckland, Wellington and Christchurch. Mr Ross contends that the degree of dissemination in the first proceeding is over-stated, but the "reach" of a national mailer indicates very widespread dissemination indeed.

Prejudiced consumers

[40] The major contention is that bait advertising and advertising contending exclusivity or special offers rob the consumer of choice. This is particularly the case with exclusivity. However, it could be contended that one of the major motivators for consumers is that of price and consumers will look around for the most favourable deal on price before taking into account other considerations. Thus alongside of exclusivity representations, price representations are significant.

[41] The second proceeding relating to the duvet inners occupies a slightly different category. The informant contends that no effort has been made to contact customers to rectify the misrepresentation. Nor has there been corrective advertising or an offer of refund. Customers who purchases at a premium price have not purchased the product that they wanted.

[42] Mr Ross concedes prejudice, but also has presented evidence of a product recall programme undertaken by The Warehouse indicating a significant amount of advertising at not inconsiderable cost.

[43] The exclusivity charges certainly create a disadvantage or prejudice for consumers. They will not look elsewhere in the fact of a claim of exclusive distribution. The labelling on products where the true nature of the content cannot be ascertained – the duvet charges – is also of significant prejudice to consumers

Degree of wilfulness or carelessness

[44] There was considerable discussion regarding the use of the word "deliberate". Mr Ross is quick to argue that this word should not be used in its pejorative sense – that the mis-representations were a ploy to make ill-gained profit. On the other hand the offending was deliberate in the sense that the defendant had mounted an advertising campaign both nationally and locally, but it seems that any deliberateness arose out of omission rather than co-mission. It is pointed out that steps could have been taken to ensure that the exclusivity claims, for example, were not made.

[45] The charges relating to the duvet inners occupy a different category in the sense that:

a) the representations were, in fact, deliberately made in the absence of testing; and

b) once the problem was detected, rather than with-draw the products entirely, the defendant continued to offer them for sale at a lower price, but maintained the incorrect misrepresentations – this must be seen as an aggravating factor.

Efforts made to correct the misrepresentations

[46] As far as the Madagascar DVDs are concerned, once the defendant had received the complaints from members of the public it had put up clarification notices in its stores and verbally explained the price at point of sale. The Warehouse also provided gift vouchers to complainants who called and, in other cases, sold the DVD for $10.

[47] In the case of the second proceeding, the Commerce Commission refers to the *Ezibuy Case* (see above) where customers were offered a refund of the purchase money once it was found out that the product did not comply with labelling. *Ezibuy* can be distinguished. It was a mail order retailer. The Warehouse sells over the counter. There are difficulties relating to identifying customers in the first place. It is for that reason that an advertising campaign was mounted for the product recall.

Deterrent penalties

[48] Both counsel acknowledged that the law recognises a need to impose deterrent penalties for offences under the Fair Trading Act. In *Megavitamin Laboratories Limited v W J Stewart and The Commerce Commission* [1995] 2 CLR 231, Tipping J stated at 252 that the Act should been seen to have teeth and in general terms the teeth should be sharper when the falsity is deliberate. Nevertheless, that does not excuse the situation where the falsity arises out of carelessness. Tipping J noted particularly that strict liability is designed to encourage the taking of appropriate care.

[49] Commercial gain is the benefit accrued to an offender where there have been offences under the Fair Trading Act. In *Commerce Commission v Weedons Poultry Farm* (District Court Christchurch, CRN 1009004163, 15 March 2001, Judge Kean, it was noted "a company or an individual in these sorts of circumstances cannot expect to be able to profit out of these sorts of actions. It would obviously be illogical and send totally the wrong message to people who may be prepared to give it a go, something of this sort, knowing that if they were caught, they could still keep part of their ill-gained profits.

[50] There is no doubt that there has been profits as a result of this offending. For example, the pre-ordered Madagascar DVDs were advertised for $10 and were actually sold for $24.86. The profit from the sale of the duvet inners was significant – on a very rough calculation based on revenue from total sales of the duvets of $1,251,143 less a landed cost of $817,379.90, profits amounts to $433,763.10. Certainly as was held in *Lane's Appliance Centres Limited v Commerce Commission* [1989] 3 TCLR 374, the consequences for offending must be deterred in nature

otherwise retailers would be encouraged to break the law, take a significant profit and pay a trivial penalty.

[51] Mr Ross argues that this is not a case of The Warehouse "giving it a go" as was the situation in *Weedon's Poultry Farm* and there has been no evidence that there was a pre-conceived plan to gouge profits as a result of misleading advertising.

[52] Nevertheless, the strict liability nature of the offending, is as much directed against omission and carelessness as it is against wilfulness and premeditation. Although it is in the nature of advertising to engage in hyperbole and excessive language, the restraints imposed by the Fair Trading Act require advertisers and businesses to ensure that the advertising is correct and is not misleading. As has been noted, reasonable enquiry by the defendant would have revealed that some of its contentions in it advertising could not be sustained.

[53] The advertising relating to the prepaid price of the DVDs was more egregious in nature and cannot really be characterised as a mere oversight.

[54] The advertising relating to the duvet inners, in my view, occupies a separate category and it is acknowledged by the defendant that it is in some difficulties as far as the second proceeding are concerned.

The financial circumstances of the offender

[55] Under s 40(2) of the Sentencing Act, in determining the amount of a fine, the Court must take into account the financial capacity of the offender. That may have the effect of increasing or reducing the amount of the fine. It is pointed out that the defendant is a major retailer with 85 stores in New Zealand, employing more than 6,000 people and in the 2000 financial year had an annual turnover of approximately $1.5 billion.

Sentencing Authorities

[56] The Sentencing authorities advanced by the informant are of assistance in ascertaining the approximate rain of penalties that may be imposed in certain circumstances. In the case of *Commerce Commission v Brownlie Brothers Limited* (District Court Napier, CRI 2003-041-3200, 29 March 2004), the defendant failed to disclose that two of its premium juice products contained 13 % to 17 % imported juice from Brazil. The packaging claimed that the juice was sourced either from New Zealand or Australia. The offending continued for a period of between two and 11 months. Scale of the defendant's business was large. It supplied juice to 330 supermarkets, comprising 60 % of its business and it produced 100,000 litres per week of each of the juices in question. It was argued that the conduct was wilful and motivated by an aim to preserve market share. It was felt that there was significant potential impact upon competitors. However, the defendant took corrective steps, co-operated with the Commission and showed remorse. Fines totalling $35,000 were imposed after entering pleas to two charges of engaging in conduct in breach of s 10 of the Act

[57] In *Farmers Trading Company Limited v Commerce Commission*, (High Court Auckland, AP 167/88, 7 October 1988, Hillyer J), a fine of $26,000 was imposed after a guilty plea to four charges under s 13 of the Fair Trading Act representing false representations regarding place of origin of the goods. Children's clothing was imported from China, but was labelled made in New Zealand. A complain was made to the Commerce Commission and investigators visited the store advising Farmers of the complaint. The company continued in its behaviour as was observed on three occasions subsequently. Farmers was fined $8,000 per charge.

[58] In *Commerce Commission v Air New Zealand* (District Court Auckland, CRN 400450058, 16 June 2006, Judge Thorburn), Air New Zealand published a series of misleading advertisements over a period of two years. It failed to properly disclose the various fees and charges that were additional to advertised fairs.

[59] In that case, ranges of sentence were discussed. The Court noted with approval the suggestion of counsel that fines for lower breaches of s 10 would be between $5,000 and $20,000 per charge, mid level offending would be within the

range of $40,000 per charge and serious offending would be in-between $60,000 to $140,000 per charge.

[60] Air New Zealand was assessed as being at the lower level and a fine of some $9,000 per charge was disclosed, including a discount for guilty pleas.

[61] The offending in the Air New Zealand case was wide spread occurring over a long period and in a variety of different media. The total overall fine charges amounted to $600,000.

[62] Mr Williams pointed out that the Air New Zealand case involved , not a failure to disclose, but a failure to disclose fairly. The Air New Zealand case was as he characterised as a "small print" case, the information could be located, but with considerable difficulty. Furthermore, the Air New Zealand case was a test case which is not the situation presently before the Court.

[63] *Commerce Commission v Kathmandu Limited* (District Court Auckland, CRI-06004500110, 19 June 2006, Kiernan DCJ, involved seven charges. The issue was that of sales, including goods which had already been discounted prior to the sale. Some of the sale prices advertised were genuine specials, but a limited number of products had previously been on sale because they were discontinued.

[64] It was found that the defendant's offending was not at the higher end, but on the other hand was not inadvertent, and therefore deliberate, careless rather than wilful. There was significant dissemination of advertising brochures and there had been television advertising, advertising in the print media and on a website. There had been previous warnings from the Commerce Commission. In the Kathmandu case, a starting point of $40,000 was imposed as a total penalty. A fine of $4,000 per charge was ultimately imposed, totalling $28,000.

[65] Mr Williams argues that the case of The Warehouse is more serious than that of *Kathmandu*. The statements were not only misleading, but wholly false and the charges in the case of The Warehouse involve five discrete areas of offending, namely:

a) misrepresentations about price;

b) misrepresentations about whether an item was on sale;

c) misrepresentations about availability;

d) misrepresentations about whether The Warehouse had exclusive rights to sell a product; and

e) mislabelling as to content.

[66] The case of the duvet inners was more than careless. It was not inadvertent and was deliberate and had the conduct continued, notwithstanding price reduction, after The Warehouse became aware of its difficulties.

[67] In the case of *Commerce Commission v GlaxoSmithKline (NZ) Limited,* (District Court Auckland, CRN 60004503913, 27 March 2007, Judge Gittos), involved the mislabelling of Ribena. It had been found that there was no vitamin C in certain Ribena products. Notwithstanding, misleading advertising to that effect. Although a statement in advertising was literally true (the black currents in Ribena contained four times the vitamin C of oranges), it was liable to mislead consumers into thinking Ribena had four times the vitamin C of orange juice. It was accepted however, that there was no intent to deceive and no evidence that a substantial number of customers had been affected. Taking into account changes in the penalties that may be imposed under the legislation, a total fine of $70,000 was imposed, being $7,000 for each of the less serious "four times the amount of vitamin C".

[68] Finally in the case of *Commerce Commission v CarreraBenz Diamond Industries Limited* (District Court Auckland, CRI 2005004015088, 11 September 2007, Judge Gittos), the company faced 21 representative charges under s 13 of the Fair Trading Act. There had been television and newspaper advertising to promote the sale of jewellery at prices up to 80% cheaper than registered independent valuers prices. The valuations were done for insurance purposes only and for the Australian

market, so the valuations were significantly above true valuation. There was a level of deception that was found to be moderately serious, also the Court took into account the extent of dissemination, the type and cost of goods, the number of people affected and the effect of other traders. The company had no previous convictions and had pleaded guilty and different fines were imposed for different media. A total fine of $27,500 was fixed for the 11 television advertising charges and $20,000 for the 8 newspaper advertising charges and a $2,000 total fine for two charges relating to misrepresentations made to members of the public.

[69] Mr Ross takes no real issue with the authorities and submits that the *Kathmandu* case is helpful in setting a starting point. However, he argues that the offending is less serious than in Kathmandu.

Aggravating and mitigating circumstances

[70] There can be no doubt that there is an element of deliberateness in all of the offending before the Court. As I have already suggested, the first proceeding offences involves deliberateness arising out of omission where proper enquiry or more care would have resulted in more accurate advertising.

[71] The second proceeding involving the duvet inners is more egregious as I have earlier stated. The offending continued and what might have started as significantly careless by failing to carry out proper testing, became behaviour that must be characterised as wilful and therefore contains this added aggravating significance.

[72] In all of the cases there was wide spread dissemination of the advertisements. In some cases there was a national mail out arising from a national advertising campaign and market push by The Warehouse. Some of the other advertising was localised, but was in large population centres where the advertising "reach" would be significantly higher, than say, in the rural area.

[73] In the second proceeding the customer was totally reliant upon the advertising and representations that had been made by the defendant – what the Commerce Commission has described as credence goods. This is an additional

feature which must be taken into account in setting the penalty for the second proceeding.

[74] The offending took place over a lengthy period of time. The first proceeding covered a period of some 11 months between November 2005 and December 2006 and for the second proceeding 6 and 7 August 2007.

[75] Finally, the defendant is a large organisation with resources to implement compliance programmes, but has offended in five discrete areas which I have already noted (See paragraph 65).

[76] Mr Ross in attempting to dilute the informant's submissions, argued that much of the difficulties faced by the defendant arise from the nature of strict liability. What on one hand could be characterised as offending, in truth amounts to basic errors that can easily occur on the contents of advertising fast moving consumer goods. In the case, for example, of the Madagascar DVD the advertising could have been clearer and immediate steps were taken to clarify the advertisement by the publication of clarification notices. This however, is more of a matter of mitigation. As far as the Pink Floyd DVD was concerned the layout of the advertisement created a problem. He argued that the unavailability of products arose from logistical error, the incorrect stickers placed on products arose from human error and the exclusivity claims were representations made in good faith on the basis what The Warehouse understood to be the position.

[77] On the other hand the behaviours are still demonstrative of carelessness and lack of cohesion within a large retail organisation, well known throughout New Zealand which advertises heavily in all media. One would have expected that such an organisation with such a considerable reliance on advertising and, no doubt, with a significant advertising budget, would ensure compliance with the Fair Trading Act especially in regard to such simple matters as ensuring that products claiming to be exclusive would be as such. Behaviour within the organisation such as "stickering" products is a matter of staff training as are the subsequent dealings that staff had with disgruntled consumers.

[78] The defendant has however, taken mitigatory steps. Clarification notices were advertised for the Madagascar DVD and gift vouchers were provided to some complainants and others were allowed to purchase DVDs at the advertised price.

[79] The mitigatory behaviour of the product recall in respect of the duvet inners must, however, be balanced against continuing behaviour of the defendant in selling the product after its problems had been drawn to its attention.

Totality

[80] Both counsel are agreed that in addition to imposing a penalty on "per charge" basis, the totality of the penalty must also be taken into account. This is clearly been the position in the *Air New Zealand Case*, the *Kathmandu Case* and in the cases of *Commerce Commission v Noel Leeming* [1996] DCR 311, of *Commerce Commission v Ecoworld* (District Court Hamilton, 26 July 2005, Judge Burnett) and *Commerce Commission v Zenith Corporation Limited* [2006] DCR757,778.

[81] Section 40(2) of the Fair Trading Act also encapsulates the totality principle which may apply to situations such as newspaper advertising or Internet advertising where the same or similar representations are made at about the same time and which are widely disseminated and for which a number of charges could be made. In *R V Strickland* [1989] 3 NZLR 47, the Court of Appeal recognised that the totality principle is recognised as a sentencing principle to assist a court when sentencing an offender for a number of offences.

[82] Although Mr Williams submitted that there were five discrete areas of offending (misrepresentation about price, misrepresentations about whether an item was on sale, misrepresentations about availability, misrepresentations about exclusivity and mis-labelling as to content and which I have noted at paragraph 65); for the purposes of sentencing he reduced those categories to four, only one misleading representations as to price, two misleading representations as to exclusivity, three unavailability of goods as advertised and four false labelling as to content. That being the case Mr Williams argues that for the first proceeding a starting point of $160,000 total fine should be imposed and for the second

proceeding involving the duvet inners, the starting point in the range of $120,000 to $150,000 is justified. In arguing that and in addition to the aggravating features of the offending, Mr Williams submits that there are aggravating circumstances that apply to the offender.

[83] The offender has previous convictions. There was some argument as to the way in which previous convictions should be approached. Mr Ross pointed out that most of the cases involve defendants who are first offenders. But, as a result of a change of policy on the part of the Commerce Commission whereby instead of civil proceeding, prosecution under the Fair Trading Act is contemplated, The Warehouse has been caught in the net of a changed policy. That, with respect, does not get around the fact that the Fair Trading Act addresses the behaviour of businesses in trade and provides remedies where behaviour falls below the standard imposed by law. It seems, with respect, that notwithstanding the previous conviction, The Warehouse has not modified its business behaviour so that it complies.

[84] In addition there have been other occasions where there have been concerns expressed by the Commerce Commission about compliance with the Fair Trading Act which have resulted in warnings to The Warehouse especially in terms of lack of product availability and false exclusivity. It is argued that these most recent offences indicate a lack of corrective measures, notwithstanding warnings from the Commerce Commission.

[85] Mr Ross argues that the informant has pitched the matter too high and for the first proceeding a total fine of $50,000 should be imposed and for the second proceeding, acknowledging that the matter of the duvet inners is more serious, a total fine of $75,000 should be imposed.

Conclusion – Proceeding 1

[86] I take into account the wide dissemination of the advertising, the nature of the misrepresentations and particularly the fact the defendant has a previous conviction. I note particularly that although these offences may be characterised than more careless than wilful, they are nevertheless deliberate within the context of a wide

spread advertising campaign in print and all have a certain "bait" characteristic about them – as indeed most advertising does – without necessarily falling into the *Weedon Farms* category of, "giving it a go".

[87] I consider that a total starting point of $130,000 should apply to all of the offences under Proceeding 1, but I also give credit for the guilty plea and for the remedial steps that were undertaken by The Warehouse. Therefore a total fine for the offences under Proceeding 1 of $110,000 will be imposed apportioned as follows:

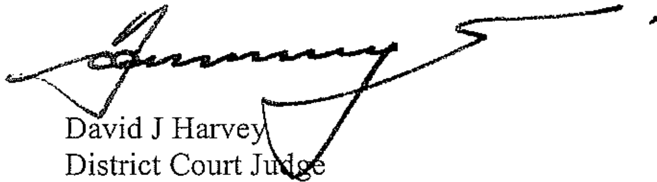
a) as to the exclusivity charges under s 10 - $15,000, being $7,500 per information;

b) for the offences under s 19 involving failure to supply $20,000 which there are four charges of $5,000 per charge;

c) the misleading representations under s 13 of which there are 10 charges attract a total fine of $75,000 being $7,500 per information.

[88] The second proceeding occupies a different category. There the carelessness became wilfulness and the conduct more deliberate. Although the advertising did not take place over a lengthy period of time as was the case in Air New Zealand, the conduct continued and the product recall remedial steps was somewhat belated although credit will be given for that along with the guilty plea. Again a matter of concern must be the previous convictions of the defendant. In addition, I emphasise the quality of deterrence. The defendant is a large, nation wide retailing organisation which maintains a high profile, not only be the distinctive colour of its business premises, but also by the utilisation of saturation advertising and large scale print campaign. Rarely a week goes by without New Zealanders receiving some form of promotional material from the defendant and therefore it is incumbent that the defendant ensures that its advertising complies with the Fair Trading Act. Its behaviour in terms of the duvet inners once the true nature of the product had been drawn to its attention, was wrong. The product should have been immediately withdrawn from sale or alternatively advertising should have been put in place to

correctly represent the nature of the product. Nevertheless, the product continued to be sold with the misleading representations albeit at a lower price. The behaviour of the subject of the prosecution is the representation and by lowering the price consumers might well have thought they were getting a quality product for a bargain basement price and thus the incentive to purchase would be even higher. For those reasons a significantly higher starting point must be imposed than for the offences under Proceeding 1. I set the starting point at $120,000. I give credit for the guilty plea and for the product recall. The final total penalty would be in the range of $100,000, but noting that there are six charges and the mathematics of imposing a penalty in respect of each charge therefore result in a recurring figure and I fix the fine at $99,600 or $16,600 per information.



David J Harvey
District Court Judge