IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2022-404-000157
[2023] NZHC 2149

BETWEEN	COMMERCE COMMISSION Appellant
AND	VODAFONE NEW ZEALAND LIMITED Respondent

CRI-2022-404-000162

BETWEEN	VODAFONE NEW ZEALAND LIMITED Appellant
AND	COMMERCE COMMISSION Respondent

Hearing:	13 to 15 March 2023
Appearances:	Nick Flanagan, Ben Hamlin and Chloe Fleming for the Appellant/Respondent Fletcher Pilditch KC, Allison Ferguson and Karl van der Plas for the Respondent/Appellant
Judgment:	11 August 2023

JUDGMENT OF MOORE J
[Appeal against conviction and sentence]

This judgment was delivered by me on 11 August 2023 at 3:00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

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INTRODUCTION

[1] On 16 November 2018, Vodafone New Zealand Ltd ("Vodafone") pleaded guilty to nine representative charges of misleading conduct in relation to services pursuant to s 11 of the Fair Trading Act 1986 ("FTA"). These charges related to representations on its website as to the availability of fibre-to-the-home broadband services ("the availability charges").

[2] On 23 April 2021, following a Judge-alone trial, Vodafone was convicted of nine further representative charges of misleading conduct under s 11 of the FTA.[1] These related to the branding and advertising of its Hybrid Fibre Coaxial network ("the branding charges").

[3] On 14 April 2022, Judge A A Sinclair in the District Court at Auckland imposed a fine of $2,250,000 on all charges.[2]

[4] Vodafone appeals its convictions on the branding charges and the sentence imposed on all charges.

[5] The Commerce Commission ("the Commission") opposes Vodafone's conviction appeal and cross-appeals the sentence on the basis of manifest inadequacy.

FACTUAL BACKGROUND

Overview of broadband network

[6] This case is about the provision of broadband services. As such it is important to first set out, as briefly as reasonably possible, the network architecture and technology.

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1 *Commerce Commission v Vodafone NZ Limited* [2021] NZDC 7381 [Conviction decision].
2 *Commerce Commission v Vodafone NZ Limited* [2022] NZDC 6695 [Sentencing decision].

[7] The network by which broadband reaches the end-point consumer consists of two main parts:

(a) The "core network", which provides connectivity between major cities and between countries.

(b) "Access networks", which connect to the core network and link customers with broadband service providers.

[8] Whereas the core network in New Zealand is made entirely of fibre optic cable, access networks can take a number of different forms. These can be physical (i.e., wired) or wireless.

[9] This case is concerned only with "wired access broadband networks". Broadly speaking, there are three different types of wired access broadband networks in New Zealand:

(a) Digital Subscriber Line ("DSL"), a general term which encompasses Asymmetric Digital Subscriber Line ("ADSL") and Very-High-Bit-Rate Digital Subscriber Line ("VDSL").

(b) Hybrid Fibre Coaxial ("HFC").

(c) Fibre-to-the-home ("FTTH").

[10] DSL uses twisted pair copper cable, sometimes simply referred to as "copper", from the home to the nearest exchange of the network provider. This is New Zealand's original broadband network that utilises conventional telephone lines.

[11] HFC consists of fibre optic cabling to the "node" (typically a roadside cabinet), and coaxial copper cabling from the node to the home.

[12] FTTH, as the name suggests, uses fibre optic cables all the way into the home.

[13] The main difference between these networks is the physical material used for the so-called "last mile". In other words, the "journey" of any given piece of data across the wired access broadband network is on fibre optic cable until the final stage of its journey into a consumer's house, at which point it diverges depending on the wired access broadband network the consumer's address is connected to.

[14] The different material properties of FTTH and HFC, in particular, are central to the case before the Court.

Government's FTTH network

[15] In or about 2009, the Government embarked upon a $1.7 billion ultra-fast broadband ("UFB") initiative aimed at upgrading the whole of New Zealand's broadband infrastructure. The first phase of the project involved building a new, purpose-built FTTH network across 33 of the nation's most populous areas, covering 75 per cent of the national population.

[16] To implement the roll out, the Government engaged four local fibre companies ("LFCs"), including, relevant to this case, Chorus New Zealand Ltd ("Chorus") and Enable Networks Ltd ("Enable"). Chorus is contracted for the Wellington and Kāpiti regions, while Enable covers Christchurch.

[17] In addition to laying the fibre optic cables, the LFCs act as wholesalers in order to sell access to the FTTH network to internet service providers ("ISPs"), such as Vodafone. The LFCs invested several million dollars in marketing to encourage the uptake of FTTH.

[18] The first phase of the Government's UFB initiative was completed in December 2019. A second phase, extending the coverage of FTTH to 87 per cent of the national population, was completed in December 2022.

Vodafone's HFC network

[19] Vodafone is a telecommunications company providing a number of services, including broadband.

[20] In 2012, Vodafone purchased Telstra-Clear and acquired its HFC network. This network covers Wellington, Kāpiti and Christchurch, utilising the existing infrastructure of coaxial cables associated with cable television networks built in the late 1990s.

[21] In November 2015, Vodafone upgraded its HFC network to the latest standard, DOCSIS3.1 ("DOCSIS"), which had been released in October 2013.

[22] Following this, on 5 October 2016, Vodafone announced that it would be marketing its UFB service on the upgraded HFC network under the brand name "FibreX".

[23] A further announcement on 20 October 2016 set out some basic information about FibreX, including that the underlying technology was DOCSIS, that the network was Vodafone-owned, and that a three-day installation promise would apply to customers with an existing HFC connection.

[24] The media picked up and reported on these announcements. FibreX became available to customers from 26 October 2016.

Branding and marketing of FibreX

[25] Vodafone's advertising of FibreX was geographically limited to the areas where HFC was available, namely Wellington, Kāpiti and Christchurch. The campaign involved a wide range of media and media strategies, including:

(a) advertisements in the local press;

(b) geo-targeted digital media using banners on high traffic media websites including the NZ Herald, Dominion Post, and The Press (as online banners);[3]

(c) sponsored posts on regionally targeted social media;

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[3] Geotargeting can be used to limit online advertisements to only appear in certain locations, as was the case here.

(d) radio advertising on MediaWorks and NZME networks, including ZM, The Hits, Flava, Mai FM, More FM, The Rock, The Edge, the Breeze, The Sound, Radio Tarana, and Radio Live stations;

(e) outdoor billboards in Wellington and Christchurch;

(f) direct mail sent to selected households;

(g) 90 Adshel advertisements (large posters in bus shelters); and

(h) in-store advertisements in Vodafone's retail stores and on Vodafone's website.

[26] To promote its upgraded network, Vodafone selected the headlines "FibreX is here" and "FibreX has arrived", together with what it describes as an image of a "night sky filled with shooting stars".

[27] Vodafone's broader campaign focused on the key metrics of speed, price and availability/installation time.

Availability checker tool

[28] Vodafone also used a broadband availability checker tool on its website in order to promote FibreX. When customers within the FibreX coverage areas inputted their address into the checker, they would be advised that no other broadband services apart from FibreX were available to them.

[29] In addition, when consumers using the availability checker navigated to the FTTH page on Vodafone's website, they were advised that FTTH was not available at their address.[4]

[4] The Commission accepted that this was not intentional but rather the result of a technical error.

Wider reporting on FibreX

[30] In March and April 2017, TrueNet released reports which suggested FibreX's performance suffered from congestion.[5]

[31] On 2 May 2017, Consumer New Zealand ("Consumer NZ") published an article on its website which relied on and repeated the claims made in the TrueNet reports regarding FibreX. It also stated that "many users on the FibreX service have complained that speeds drop to sub-ADSL levels".

[32] On 1 June 2017, Consumer NZ published a further article entitled, "Vodafone's FibreX risks misleading consumers". The last sentence of the article read:

> "The Commerce Commission is investigating Vodafone's FibreX service and wants to hear from people with complaints. If you've experienced problems, you can email the commission at contact@comcom.govt.nz."

[33] At this time the Commission's investigation had not yet been made public. The Consumer NZ article was picked up by other media outlets such as the National Business Review.

[34] On 2 June 2017, Vodafone wrote to TrueNet in relation to its reporting. It claimed that the results were inaccurate due to flaws in TrueNet's testing methodology and asked for the content to be taken down.

[35] TrueNet responded on 9 June 2017 with an acknowledgment that its headline may have had the potential to mislead readers as to the cause or scale of Vodafone's performance against other networks.

The Commission's investigation

[36] The publishing of TrueNet's reports coincided with the Commission's investigation into Vodafone's branding and marketing of FibreX, which commenced in March 2017.

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5 TrueNet is an independent organisation dedicated to the measurement and reporting of broadband performance in New Zealand.

[37] The Commission had received complaints about the marketing of FibreX in the months following its October 2016 launch. Consideration of those complaints prompted the Commission to launch its investigation.

[38] As is standard procedure, the Commission approached Vodafone and asked for information regarding its position on the Commission's concerns.

[39] In late 2017, Vodafone made changes to its FibreX advertising campaign in response to some of these concerns. In particular, it endeavoured to communicate more clearly to consumers that FibreX utilised the Vodafone-owned HFC network.

[40] It also made changes to the availability checker tool on its website, so that when consumers within the FibreX coverage areas inputted their address, they received a message that Vodafone broadband was available at their address but that ADSL and VDSL "might not" be. FTTH was still not presented as an option even where it was available.

[41] In February 2018, Vodafone ceased all advertising of FibreX in third-party media but continued to advertise the services on its website, in-store, and via door-to-door sales/direct marketing.

[42] By 28 March 2018, Vodafone had amended its website to remove the availability checker and direct consumers to call to check whether FibreX was available at their address. However, the advertising checker inadvertently remained on Vodafone's help page under the heading, "Can I get Vodafone fibre?". When consumers within the coverage area inputted their address, it again showed FibreX as the only available option.

The charges

[43] On 30 April 2018, as a result of its investigation, the Commission laid a total of 28 representative charges being the nine availability charges to which Vodafone later pleaded guilty, and 18 branding charges. The branding charges comprised two tranches of nine charges; nine alleging misleading conduct under s 11 and, in the

alternative, nine alleging false and misleading representations under s 13(b) of the FTA.

[44] Each tranche of nine charges covered conduct said to have been captured in three six monthly periods covering the 17 month period between:

(a) 26 October 2016 to 26 April 2017;

(b) 27 April 2017 to 27 October 2017; and

(c) 28 October 2017 to 28 March 2018.

[45] At the hearing in the District Court, it was explained by Mr Flanagan, for the Commission, that the selected periods were arbitrary in the sense that although the alleged unlawful conduct occurred across the entire period, it was divided into three equal date ranges for reasons of management and practicality. No objection was taken to this process by Mr Pilditch KC, for Vodafone. Each of these periods was then further divided into the three geographical zones referred to earlier, being Wellington, Kāpiti, and Christchurch, that is the three regions where FibreX was offered.

[46] The chart below assists:

Branding charges	**Wellington**	**Kāpiti**	**Christchurch**
26 Oct 2016 – 26 Apr 2017	Charge 1	Charge 2	Charge 3
27 Apr 2017 – 27 Oct 2017	Charge 4	Charge 5	Charge 6
28 Oct 2017 – 28 Mar 2018	Charge 7	Charge 8	Charge 9

Availability charges	**Wellington**	**Kāpiti**	**Christchurch**
1 Nov 2016 – 19 May 2017	Charge 10	Charge 11	Charge 12
20 May 2017 – 31 Oct 2017	Charge 13	Charge 14	Charge 15
1 Nov 2017 – 28 Mar 2018	Charge 16	Charge 17	Charge 18

[47] I shall first consider the branding charges found proved by the Judge, namely those laid under s 11. That section relevantly provides:

> "**11 Misleading conduct in relation to services**
>
> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services."

[48] As for these charges, the particulars alleged were that:

> "By the naming of the service and Vodafone's promotion of it in billboard, radio, in-store, direct marketing and internet advertisements in the [named] region stating "FibreX is here" or "FibreX has arrived" and using travelling beams of light as a background to the (non-radio) advertisements, Vodafone was liable to mislead the public into thinking that its broadband service delivered over its HFC network named "FibreX" is a FTTH broadband service, when it is not."

[49] The alternative charges were laid under s 13(b), which relevantly provides:

> "**13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,
>
> …
>
> (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics;"

[50] As for these charges, the particulars alleged were that:

> "Vodafone's website was liable to mislead the public in the [named] region as to the options of broadband services (including FTTH broadband) available at their address, or at their address supplied by Vodafone."

PROCEDURAL BACKGROUND

[51] On 16 November 2018, Vodafone pleaded guilty to the availability charges leaving the 18 branding charges for determination.

[52] The Judge-alone trial on these charges took place between 2 and 17 November 2020.

[53] On 23 April 2021, Judge Sinclair gave her reasons and entered convictions on the nine s 11 branding charges.[6] The charges under s 13(b) were dismissed. Sentence was passed on 14 April 2022, being the fine of $2,250,000.[7]

[54] The Commission filed an appeal against sentence. Vodafone subsequently applied for leave to appeal against both conviction and sentence. The reason leave to appeal was required was because the notice was filed one day out of time. Unsurprisingly the Commission consented to leave being granted. There is no prejudice to the Commission. The delay, such as it is, is minimal. Leave to appeal out of time is granted.

[55] I heard the appeals concurrently between 13 and 15 March 2023 and reserved my decision. This judgment sets out my reasons on all appeals. I propose to first deal with Vodafone's conviction appeal.

CONVICTION APPEAL

District Court decision

[56] The Judge began by noting that for the Court to convict Vodafone under s 11 of the FTA, the Commission needed to prove beyond reasonable doubt that:[8]

(a) Vodafone was a person within the meaning in s 2 of the FTA;

(b) Vodafone was in trade within the meaning in s 2 of the FTA;

(c) Vodafone's conduct was liable to mislead the public; and

(d) that conduct was in relation to the characteristics of its services.

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6 Conviction decision, above n 1, at [148].
7 Sentencing decision, above n 2.
8 Conviction decision, above n 1, at [10].

[57] She recorded that elements (a) and (b) were not in dispute.

[58] As for (c), in order to determine whether Vodafone's conduct was liable to mislead the public, the Judge said she had to first define the relevant consumer group.[9]

[59] She cited the following passage from *Godfrey Hirst NZ Limited v Cavalier Bremworth Limited* [*Godfrey Hirst*], in which the Court of Appeal held that where headliners and qualifiers in advertising target a large group of consumers, the "consumer" comprises all consumers in the class except the "outliers".[10]

[60] The Judge determined on the evidence that the relevant consumer group comprised the 250,000 "households passed" on Vodafone's HFC network during the charge periods, meaning those in Wellington, Kāpiti and Christchurch within distance of running a coaxial cable to connect the home.[11]

[61] The Judge then went on to consider the meaning that consumers would have taken from the word "fibre". She considered it plain on the evidence before her[12] that broadband networks are known by the technology used for the last mile, and that the LFCs had invested heavily in promotional material that sought to establish "fibre" in the minds of consumers as FTTH.[13]

[62] The Judge was also satisfied that by October 2016, a significant number of consumers in the relevant consumer group would have seen the LFCs' promotional material and understood "fibre" to mean FTTH.[14] The rollout of FTTH was "well advanced" in Christchurch and over halfway through in Wellington and Kāpiti at this time.[15]

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9 At the appeal hearing, Mr Pilditch explained that the sub-elements to (c) as set out in the judgment and discussed here were drawn from a list of factual issues identified by Vodafone akin to a fact-based question trail. The Judge adopted them in determining what was required to be proved relative to (c).

10 *Godfrey Hirst NZ Limited* v *Cavalier Bremworth Limited* [2014] NZCA 418, [2014] 3 NZLR 611 at [20] [*Godfrey Hirst*].

11 At [60].

12 This consisted primarily of evidence from professionals in the telecommunications industry, as well as expert evidence from a professor in marketing.

13 At [70].

14 At [71].

15 At [68].

[63] The Judge then turned her mind to whether the addition of the "X" was sufficient to differentiate Vodafone's HFC service from a FTTH service. She accepted Professor Gendall's expert opinion on this point, to the effect that consumers would take the X to mean "exceptional or the X factor", likely related to speed or capacity, such that consumers would think FibreX was an enhanced version of fibre.[16]

[64] The Judge further considered that the headlines ("FibreX is here" or "FibreX has arrived"), together with the background image of shooting beams of light, operated to reinforce this interpretation.[17]

[65] In conclusion on element (c), the Judge was satisfied (on the basis of expert evidence and "as a matter of common sense") that a substantial number of consumers in the relevant consumer group, upon viewing Vodafone's advertisements, would have been liable to be misled into believing that FibreX was a FTTH product.[18]

[66] The Judge went on to state that this conclusion was unaffected by the fact that a consumer, upon making further enquiry, may have subsequently found out that FibreX was Vodafone's HFC network.[19] This is because, by that stage, the consumer had already been lured into the "marketing web" by the erroneous belief created by the advertisement.[20]

[67] Having been satisfied that the Commission had proved element (c), her Honour went on to consider the final element (d), namely whether Vodafone's conduct was in relation to the characteristics of its services.

[68] The Judge rejected Vodafone's submissions that its service was limited to the provision of rights of access to the internet, and that the characteristics of its service were limited to how the consumer experiences the right of access (factors such as download speeds).[21] Rather, the Judge was satisfied that the medium of delivery – in

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16 At [74]. Professor Gendall, Professor of Marketing, was called by the Commission to give evidence of what, in his opinion, consumers would have understood the term "fibre" to mean in the context of UFB.

17 At [75]-[76].

18 At [80] and [86].

19 At [81].

20 *Godfrey Hirst*, above n 10, at [84].

21 At [97]-[98].

particular the architecture in the last mile of the HFC network – is a characteristic of Vodafone's broadband service.[22]

[69] The Judge added:[23]

> "… this technology is important to consumers. The evidence of Ms Nisha and Ms Horton was to the effect that consumers cared about the medium of delivery of their broadband service and in particular, whether it was by cable or by fibre. This was because cable was seen by consumers as being slow, outdated and aging technology."

[70] Furthermore, Vodafone's advertising referred specifically to the network.[24] It followed that the Judge was satisfied beyond reasonable doubt that Vodafone's conduct in the branding and promotion of its service as FibreX was in relation to this characteristic.

[71] The elements under s 11 of the FTA were therefore satisfied. The Judge accordingly found Vodafone guilty on each of the nine branding charges, and dismissed the alternative charges under s 13(b).[25]

[72] Although not elements of the offence under s 11, the Judge went on to consider what the Commission referred to as "inherent limitations" in the HFC network that differentiate it from a FTTH network. These related to variability, likelihood of congestion, speed, reliability, latency, upgrade pathways, and ability to change provider. The Judge found each to be made out on the evidence and to be matters which some consumers would want to know about.[26]

Legal principles on conviction appeals

[73] This Court must allow the appeal if satisfied that the Judge erred in her assessment of the evidence to such an extent that a miscarriage of justice has occurred,[27] or a miscarriage of justice has occurred for any reason.[28]

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22 At [102].
23 At [101].
24 At [99].
25 At [148].
26 At [145].
27 Criminal Procedure Act 2011, s 232(2)(b).
28 Section 232(2)(c).

[74] A miscarriage of justice is defined as any error, irregularity, or occurrence in or in relation to or affecting the trial that:[29]

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[75] The appellant is entitled to this Court's assessment of the evidence.[30] If it reaches a different view on the evidence, the trial Judge will necessarily have erred and the appeal must be allowed.[31] However, the appellant bears the onus of showing that an error has been made. In assessing whether there has been an error, this Court must take into account any advantages the trial judge may have had.[32]

Grounds of appeal

[76] Vodafone advances seven grounds in support of its appeal against conviction. It contends that the Judge erred by:

(a) finding that the physical makeup of the network, that is hybrid fibre coaxial cable, was the service or a characteristic of the service;

(b) finding that consumers had been conditioned to ascribe FTTH as a particular and secondary meaning to the word "fibre" when it appeared in broadcasting content;

(c) related to (b), failing to address the admissibility of the consumer complaints table;

(d) reversing the standard and burden of proof;

(e) failing to address the composition and characteristics of the relevant consumer group;

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29 Section 232(4).
30 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
31 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38].
32 *Snowden v Police* [2021] NZHC 3491 at [36], citing *Sena v Police,* above n 31, at [38].

(f) disregarding other aspects of Vodafone's advertising conduct; and

(g) failing to properly consider and weigh all admissible evidence.

[77] The seven points listed above were not addressed in that order in oral argument before me. Instead, counsel sensibly and logically addressed the issues as they were treated by the Judge at first instance. I propose to discuss these points in that same order.

Ground 1.1(e): Failure to address the relevant consumer group

[78] This ground is more fully particularised in Vodafone's points on appeal as:

> "When determining whether the relevant consumer group was liable to be misled, the learned Judge erred by failing to consider and address (with the exception of size and location) the composition and characteristics of the relevant consumer group in the context of the information available to the market, in particular:
>
> (i) what that consumer group was likely to have known and understood about broadband services and networks, in particular HFC;
>
> (ii) how and when consumers obtained information about broadband services and how they typically engaged with that information:
>
> (iii) their level of interest in the technological details by which a broadband service might be delivered; and
>
> (iv) that they could be expected to exercise reasonable care and diligence."

[78] The essence of Mr Pilditch's criticism of the Judge's approach under this head is that it was simplistic in that she treated the relevant consumer group as the general public at large, with the exception of size and location, rather than undertaking a more discriminating and fine grained analysis in order to construct and identify the notional consumer group.[33]

[79] The Judge's discussion of the relevant consumer group is succinct. Whether it is "simplistic" to the point that it can be described as wrong is a different issue as is discussed later.

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[33] *Australian Competition and Consumer Commission v TPG Internet Pty Limited* [2013] HCA 54, (2013) 250 CLR 64 at 646 [*TPG*].

[80] As earlier noted, after quoting relevant extracts from *Godfrey Hirst*, the Judge set out what she considered was the relevant consumer group.[34] Her treatment of this question is reproduced below in full:[35]

> "[58] As Vodafone's HFC network operates only in Wellington, Kāpiti and Christchurch, the target consumer group was limited to those regions. Vodafone's advertisements stated that FibreX was not available everywhere and were plainly directed to those able to turn on or be connected to the FibreX network. By way of example, the three day install offer was at 'eligible addresses only' being those in a FibreX area with a pre-cabled house.
>
> [59] It was Ms Nisha's evidence that in the charge periods there were 250,000 'households passed' on Vodafone's HFC network meaning that those households were within distance of running a coaxial cable to connect the home. Ms Nisha was not sure of the split of these households between regions.
>
> [60] I am satisfied on the evidence to the requisite standard that the relevant consumer group in this case consisted of the 250,000 'households passed'."

[81] In developing his submission that the Judge treated the relevant consumer group as the general public at large, Mr Pilditch noted that the Commission had led no evidence of the relevant consumer group and in particular their characteristics and the degree of reasonable care expected of them. In the absence of such evidence, it was not open to the Court to simply treat them as the general public at large. As a consequence, he submitted the Court erred in its assessment of the evidence.

[82] Having failed to address the characteristics of the consumer group, it is also claimed by the appellant that the Court erred when it concluded that the relevant consumers would be lured into the marketing web. This is because there was no evidence that consumers approached their purchasing decision on the basis of the brand name only and that they disregarded other aspects of the service offered. Vodafone adduced evidence that the relevant consumer group had a heightened degree of knowledge and would exercise a correspondingly heightened degree of care, or so it could be expected. The Judge was thus required to address whether the Court could dismiss the reasonable possibility that consumers would not approach their purchasing decision in such a simplistic way.

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34 *Godfrey Hirst*, above n 10.

35 The figure of 250,000 households was also the figure cited by Vodafone in its 22 March 2022 letter to the Commission in which Ms Horton advised that 250,000 addresses had access to the FibreX network. Of these, 128,907 were "eligible addresses", that is addresses already connected to Vodafone's HFC network and thus eligible for a $100 credit and 3-day install.

[83] Put simply, the essence of Mr Pilditch's submission is that there was "a distinct lack of analysis at the macro-level". The question which should have been asked, but was not, is how would the notional consumer group have approached the advertising? Furthermore, and relatedly, what standard of care would reasonably be expected of the notional consumer in purchasing a contract for UFB services as compared to carpet, bread, baked beans or any other sort of consumer goods?

[84] Mr Pilditch submitted that the consumer cohort in question was likely to be more sophisticated and discerning than simply the occupants of the 250,000 homes passed. They could be expected to be less vulnerable to branding. The consumer group was comprised of users or potential users of UFB services either because they were signing up for such services or were considering changing services. Additionally, Mr Pilditch submitted that many in the consumer group would not be expected to have high levels of technical knowledge about the network architecture or how internet services are supplied, nor would they have much interest in those details. Their interest in what was being offered would focus on information about how they would experience the service and at what cost, rather than the means or mechanism by which they receive the data. He thus submitted that excluding the outliers, that is the "extremely stupid… fanciful or perhaps gullible",[36] the relevant consumer cohort would consist of a sliding scale of interest in the underlying technology. This, in turn, would inform the extent of reasonable enquiry expected of them.

[85] Against that backdrop, Mr Pilditch described the Judge's finding that consumers would enter the marketing web solely as a consequence of the brand name as "speculative" and without evidential foundation.

[86] When assessing conduct which is allegedly liable to mislead or deceive, the Court must identify those who have been or are likely to be misled or deceived.[37] As Mr Pilditch put it, the questions are:

(a) Who or what is the relevant audience against which the objective assessment of whether they are liable to be misled is made?

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36 *Godfrey* Hirst, above n 10, at [53].
37 *Unilever New Zealand Ltd v Cerebos Greggs Ltd* (1994) 6 TCLR 187 (CA).

(b) What are the characteristics of that consumer group?

[87] It is to those questions I now turn.

[88] As her Honour noted, the leading New Zealand case is the Court of Appeal's decision in *Godfrey Hirst*.[38] This involved headline representations in relation to carpet warranties. The Court addressed these questions in the face of a submission that the appropriate approach is to ask whether a sufficient number of people are likely to be misled by the statement. The Court expressly rejected that approach when it observed:[39]

> "… for reasons we will explain, we do not agree with the concept of a "sufficient" or "significant" group of consumers being misled. Where, as in this case, headlines and qualifiers in advertising target a large group of consumers, "the consumer" comprises all the consumers in the class targeted except the outliers. The "outliers'" encompass consumers who are unusually stupid or ill-equipped, or those whose reactions are extreme or fanciful."

[89] And then:

> "[47] That the protection of ss 9 and 13 of the Act is restricted to reasonable consumers is confirmed by the several cases which exclude from the protection consumers who are 'quite unusually stupid' and 'perhaps the gullible'. Other cases exclude the extremes or consumers 'whose reactions are extreme or fanciful'. Those are the consumers we have termed outliers and excluded in our formulation in [20].
>
> [48] If you take all the 'average' or 'ordinary' or 'reasonable' (or, as we prefer, all the typical) members of the public generally, or of any targeted class of the public, you will end up with all the consumers in the class targeted except the outliers, which is our formulation in [20] above, reiterated in [50] below. …
>
> [49] We summarise. We have endorsed, but at the same time attempted to clarify, the test this Court laid down in *Adair* because we consider it is consistent with the corresponding tests adopted in the cases we have reviewed. And consistency with the Australian cases is important because the legislation in the two countries is substantially the same and because of the trans-Tasman trade ties. We endorse the *Adair* test also because we consider it is the easiest to apply. We agree with the *Adair* Court that it is not appropriate – and we do not think it necessary – to apply ss 9 and 13(i) of the Act to an 'hypothetical individual. It is best and easiest to apply the two sections to the actual consumers in the target class excepting the outliers.

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38 Above n 10.
39 At [20].

> [50] We reiterate our response to the question 'who is the consumer?'. 'The consumer' encompasses all the consumers in the class targeted by the allegedly misleading representations, except the outliers as we have explained them in [20] above. Or, if the representations are made to the public at large, it is all the public except the outliers."
>
> [Footnotes omitted]

[90] More recently, Gault J in this Court in *Du Val Capital Partners Ltd v Financial Markets Authority* considered whether the promotion of a mortgage fund was likely to mislead or deceive potential investors.[40] He observed that the correct application of *Godfrey Hirst* required the Court to ask two questions:

(a) Who is the consumer or consumer group? and

(b) What is the standard of care expected of the consumer/s?

[91] As for the first question, the Court is required to identify the target of the representations; namely whether it is the public at large or a particular class or cohort of consumers, because in assessing whether the representations made are likely to mislead or deceive, the characteristics of the members of the class must be identified.[41]

[92] I do not agree that the Judge erred in the ways advanced. My reasons follow.

[93] First, it is plain not only from the extracts of *Godfrey Hirst* which her Honour quoted, but also her treatment of the principles, that the Judge understood and correctly applied the relevant law. That she may have done so in an economical fashion does not detract from the correctness of her approach or mean her application of the law was wrong.

[94] Secondly, the context and nature of Vodafone's marketing campaign places what follows in context. Mr Flanagan described the marketing of FibreX as a "multimedia blitz". That is no hyperbole. The list of advertising media and strategies set out at [25] above amply justifies that label. Logically, the nature and extent of the advertising informs the identification of the advertiser's target group. The broader the

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40 *Du Val Capital Partners Ltd v Financial Markets Authority* [2022] NZHC 1529 [*Du Val*].
41 *Du Val*, above n 40, at [33] and [37].

advertising campaign, the wider the consumer group being targeted. Vodafone's campaign targeted the general public in the relevant areas; that is users or potential users of UFB in Kāpiti, Wellington and Christchurch. Given the ubiquity of the internet and the inescapable truism that there are few facets of modern life where UFB might be regarded as anything other than an essential tool for functioning members of society, attempts to constrain the consumer cohort by contrasting the product with more prosaic household commodities such as baked beans, are inapt. In fact, on one view the consumer cohort for carpet, as was the case in *Godfrey Hirst*, might rightly be considered narrower and more discriminating than that for UFB services in the modern paradigm.

[95] Thirdly, despite Vodafone's evidence on the point, I cannot accept that those in the targeted areas necessarily had an enhanced understanding of UFB because of their familiarity with the services Vodafone had been operating for some years. Self-evidently some would have. Others would not have. It is simply not possible to quantify the proportional split or refine the consumer cohort with any greater precision other than to make the general and common sense observation the Judge essentially did; that those being targeted by Vodafone included those in the market for UFB. Indeed, the Judge dealt with this in the following way:

> "[83] Vodafone submits that consumers in Wellington, Kapiti and Christchurch would have been more knowledgeable than normal about the network because the HFC network had been available there since 1999. On the evidence, the most that Vodafone is able to say is that there may have been some in the relevant consumer group who had that knowledge although it is unclear on the evidence why those consumers would conclude that it was the HFC network (as opposed to fibre) that was being used in 2016. Furthermore, it does not lessen the impact of the advertising on other consumers in the relevant consumer group.
>
> [84] In this regard, I have already found that by October 2016 a significant number of consumers in the relevant consumer group in each of the three regions would have understood 'fibre' to mean a FTTH product. I am further satisfied to the requisite standard that a substantial number of those particular consumers on viewing the Vodafone advertisements, would have been liable to be misled into believing that 'FibreX' was such a product."

[96] In any event, the Judge did examine what the consumer group knew and understood about UFB. She did so in her extensive analysis of what the consumer took the word "fibre" to mean.[42]

[97] Relatedly, neither do I accept that the Judge was required to undertake some form of enquiry into what consumers knew or that this exercise, had it been undertaken, would have shown that consumers would have investigated what lay behind the headline and assessed what Vodafone was actually offering in terms of speed, cost, installation and so on. There is some logical force in Mr Flanagan's submission that if, as Vodafone says, such consumers may have had a background knowledge of UFB, that would only serve to make it more likely they cared about what they were getting. As will be discussed later, I am satisfied the headline banner conveyed the message consumers would be getting fibre, not cable.

[98] To put it more directly, it was unnecessary for the Judge to identify or define the relevant consumer group with any more precision than she did. Indeed, the consumer group might simply have been identified as those who are able to buy HFC. That is what the Judge effectively did when she concluded that the relevant consumer group was the 250,000 households passed.

[99] For these reasons I am satisfied there was no error on the part of the Judge and this aspect of the appeal must fail.

Ground 1.1(f): The Judge erred by disregarding other aspects of Vodafone's advertising conduct and in applying the relevant law

[100] Mr Pilditch submitted that in light of the "service" and relevant market group it was offered to, the Judge was required to consider the totality of Vodafone's conduct and representations. This is because the brand name "FibreX" was just one component in a suite of marketing materials to which the consumer group was exposed. Had the Judge undertaken that task, Mr Pilditch submitted that she could not have been sure that the FibreX brand was liable to mislead.

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42 At [62]–[71].

[101] In this context, Mr Pilditch pointed out that nowhere in the advertising materials did Vodafone ever claim that what it was offering was a FTTH product. Instead, it was offering improved UFB services at highly competitive prices and with a three day install, the latter being a particularly attractive feature given the delays ISP competitors were struggling to overcome at the time.

[102] Unsurprisingly, it was common ground that it was impracticable for any ISP to headline the detail of the technology being used to deliver UFB services in its advertising materials. In fact, efforts to convey a comprehensible message in this field went back to early communications by the LFCs. For example, Mr Fuller, Enable's Chief Executive Officer, said that customers struggled to understand the actual differences in technology which is why that company focused on simple marketing messages in its promotions, emphasising "fibre to the door". It was for the same reason that Ms Horton, Vodafone's senior in-house counsel, explained that Vodafone headlined the key messages of speed, price and availability because that was what was believed to be important to consumers. She described the process of communicating with the potential customer base as requiring a "layered approach". This layered approach, Mr Pilditch submitted, may be seen in the evolution of Vodafone's marketing programme starting with press releases picked up by media outlets announcing that Vodafone was upgrading its existing HFC network which would be known as FibreX. That was followed by billboard advertising headlining speed, price and availability. Web-based information explained the services as well the technology. Consumers had options to select UFB on "fibre" or on "cable".

[103] Additionally, Vodafone instructed its frontline sales agents in their October 2016 training on the eve of the FibreX launch that FibreX should not be confused with the Government's fibre UFB rollout; that FibreX uses DOCSIS technology. The instructions also recorded that agents should not use the word "cable" when describing FibreX because Vodafone's own market research had suggested that customers associated the word "cable" with slow, outdated and aging technology. Instead, the following technical description should be used:

> "Hybrid-Fibre coaxial HFC, fibre to the node, and then coaxial cable to the home. Fibre uses fibre all the way to the home."

[104] According to Ms Horton this message was repeated in "refresher training" in June 2016 after the Commission had commenced its investigation.

[105] Furthermore, all consumers considering UFB services were provided with Offer Summaries consistent with the Telecommunications Forum Code. These disclosed the HFC technology. The offer summary is the industry accepted method for product disclosure, regarded as acceptable to the Commission.

[106] As a result of complaints received by the Commission from members of the public about Vodafone's branding of its HFC network as FibreX, the Commission initiated its investigation in March 2017. This led to a voluntary interview on 11 August 2017. Vodafone's answers to the questions posed by the Commission were contained in Ms Horton's letter of 22 March 2022.

[107] It would appear that consequential changes were made to Vodafone's description of FibreX from mid-August 2017 in which FibreX was described as:

> "… a fantastic new way to connect ultrafast broadband to your home over Vodafone's hybrid fibre coaxial copper network which is being upgraded using world-leading DOCSIS3.1 technology."

[108] Mr Pilditch's submission was that through these communications, Vodafone was explicit with consumers about the FibreX brand of UFB services being delivered on an HFC network, that the relevant consumer group would have had a heightened knowledge of HFC and that they can be expected to have exercised a greater degree of care. He submitted that if consumers wanted more detail on matters such as reliability, congestion, latency, these were available. He said that such consumers shopping for UFB services would not be lured into the marketing web by a brand name alone and that the Judge erred in so finding.

[109] Relatedly, Mr Pilditch submitted that the Judge erred by disregarding aspects of Vodafone's advertising other than the brand name, including from October 2017 when a description of the network architecture was given in conjunction with the use of the headline, FibreX. It was necessary to consider the "consumer's journey" which involved informing potential consumers of the nature of the access network and how it was made up. Mr Pilditch criticised the Judge's approach; that is adopting the

Commission's submission that this was a case where an initial deceit lured the consumer into the marketing web to negotiate. Instead, the Judge was required to critically assess the totality of the conduct both in terms of the characteristics of the consumer group as well as whether Vodafone's representations, viewed in context, amounted to a misrepresentation.

[110] This principle was recognised by the Court in *Godfrey Hirst* when it observed the importance of considering the advertisement's "overall impression" and "dominant message".[43] What Vodafone submitted distinguishes *Godfrey Hirst* and the other cases cited by the Commission from the present facts, is that "FibreX" made no claims about the essential nature and quality of the service offered that is speed, cost and installation times. Those were attributes which sat independently of the brand name.

[111] This final point links closely to the next ground of appeal advanced by Vodafone, which is concerned with what consumers took from "FibreX". For present purposes, however, I do not accept that the Judge disregarded Vodafone's conduct in the ways set out above. She expressly referred to and dealt with Ms Horton's evidence.[44] She referred to Ms Horton's description concerning the strategic marketing decision to avoid the use of the word "cable" in its advertising because research had revealed that customers associated it with outdated technology. In launching the new technology, a brand name was chosen which Ms Horton said differentiated the services from others in the market and, in Vodafone's view, reflected the quality of the services consumers could expect to receive.

[112] I agree with Mr Flanagan that the adoption of the so-called "layered" approach and the availability of summaries which could be downloaded from Vodafone's website do not distinguish Vodafone's conduct from that discussed in *Godfrey Hirst* and *Australian Competition and Consumer Commission v TPG Internet Pty Limited* [*TPG*].[45] Any corrective material, such that it was, was less prominent and less proximate to the headline.

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43 Above n 10, at [70] and [84].
44 At [39]–[48].
45 *Godfrey Hirst*, above n 10; and *TPG,* above n 33.

[113] I also agree with Mr Flanagan that the Court addressed this issue directly. Examples follow.

[114] The Judge referred to Vodafone's evidence on the press releases at the launch of the network:

> "[77] … Ms Horton stated that these were available on Vodafone's website. I do not accept it can reasonably be contended that consumers would have seen these. It was Ms Horton's evidence that articles were subsequently published in nine media outlets. Three of these articles were produced. There is no evidence as to how widely these articles were circulated. Professor Gendall was shown two of the articles and noted that one had been published in the business section. (The third article was published in NBR and would no doubt have also been met with the same comment from Professor Gendall). In Professor Gendall's opinion, these articles would not have had a great effect in terms of the general public. I accept his evidence. In the circumstances, the Court cannot be satisfied that consumers in Wellington, Kāpiti and Christchurch will have seen these articles when they were published and/or that they would have made any difference to consumers' understanding of the FibreX service when they subsequently viewed Vodafone's advertising."

[115] Her Honour made similar observations after she determined that consumers viewing Vodafone's advertisements would be liable to have been misled by the branding and promotion of FibreX into believing that FibreX was, indeed, an FTTH product. She said:

> "[81] Having already formed this view on the basis of Vodafone's advertisements, it is unlikely that any consumer would have considered it necessary to make further enquiry about the network access type by going to Vodafone's website. Furthermore, the fact that a consumer may subsequently find out on a careful reading of the offer summary on Vodafone's website that the access network was Vodafone's HFC network does not overcome these misleading advertisements. As the Court of Appeal stated in [*Godfrey Hirst*] where a consumer is enticed into the 'marketing web' by an advertisement on an erroneous belief, this will be misleading even if the consumer may learn of the true nature of the service before the transaction is concluded. This is because the initial misleading advertising is seen as contributing to any subsequent sale."

[116] While it is correct that when assessing conduct claimed to be misleading or deceptive, the conduct must be viewed as a whole,[46] it is no answer to misleading advertising to claim that if any such wrong impression was conveyed, it would be

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[46] *Geddes v New Zealand Dairy Board* CA180/03, 20 June 2005 at [80]; and *Parkdale Custom Built Furniture Ltd v Puxu Pty Ltd* [1982] HCA 44, (1982) 149 CLR 191 at 199.

corrected before the consumer committed themself by entering into a contract with Vodafone. On that point the comments of the High Court of Australia in *TPG* are particularly instructive.[47]

[117] As with the present case, *TPG* involved the promotion of broadband internet services. The company engaged in a multimedia advertising campaign. The headline advertised broadband services at an attractive flat monthly rate but also displayed, much less prominently, information to the effect that the offer was available only when bundled with a landline telephone service for a similar amount per month, a minimum commitment of six months, a setup fee and a deposit for telephone charges. *TPG* argued that the advertisements were published in a market where reasonable consumers were alive to the possibility that a telephone line was required for the internet broadband service. The qualifier contradicted the dominant message, leading readers to go back to the dominant message to enquire what it really meant. The first instance Judge attributed to the target audience a fair measure of knowledge and experience of the internet. In rejecting that submission, the High Court said:[48]

> "… the Full Court did not recognise that the tendency of the advertisements to mislead was to be determined, not by asking whether they were apt to induce consumers to enter into contracts with TPG, but by asking whether they were apt to bring them into negotiation with TPG rather than one of its competitors on the basis of an erroneous belief engendered by the general thrust of TPG's message.
>
> It might be said, as TPG did, that consumers, acting reasonably in their own interest, could be expected to obtain a clear understanding of their rights and obligations before signing up with TPG; but to say that is to confuse the question whether the consumer has suffered loss with the anterior question as to whether the advertised viewed as a whole, has a tendency to lead a consumer into error. …
>
> It has long been recognised that a contravention of s 52 of the TPA may occur, not only when a contract has been concluded under the influence of a misleading advertisement, but also at a point where members of the target audience have been enticed into "the marketing web" by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded. That those consumers who signed up for TPG's package of services could be expected to understand fully the nature of their obligations to TPG by the time they actually became its customers is no answer to the question whether the advertisements were misleading."

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47 Above n 33.
48 At 654–655.

[118] Contravention of the statute occurs not only when a contract is concluded but also, often much earlier, at the point when members of the target audience are lured into the marketing web by an erroneous belief promulgated by the advertiser, even if they appreciate the true position by the time they contract for the services. The rationale behind that principle is that such an outcome is intrinsically anti-competitive because industry competitors are denied that commercial advantage. That is the case here. The brand name was front and centre of the advertising graphics and collateral.[49] It was inextricably connected to other messages Vodafone sought to attract customers with, such as speed, cost and availability. If the brand name conveyed a misleading dominant message or conveyed an erroneous and deceptive overall impression, namely that the underlying technology to the home was fibre rather than coaxial cable (even if DOCSIS enhanced), the fact that consumers might later understand that they were signing up for cable and not fibre, does not affect liability under s 11.

[119] It follows I do not accept the Judge erred in relation to this ground.

Ground 1.1(b): Erroneous finding that consumers had been conditioned to ascribe FTTH as a secondary meaning to the word "fibre"

[120] It was common ground on the appeal that this is the "core issue" to be resolved.

[121] Vodafone claimed that it was not proved the word "fibre" was commonly understood by consumers to mean the Government's FTTH network and, as a consequence, questioned whether consumers were liable to be misled when Vodafone used that word in its FibreX branding.

[122] Mr Pilditch submitted that in the absence of admissible direct evidence establishing that consumers had this particular understanding or any admissible evidence from which a proper and lawful inference could be drawn, it was not possible for the Commission to prove this element beyond a reasonable doubt and that the Judge erred in so finding. Relatedly, Mr Pilditch submitted that the Court erred in dismissing Vodafone's evidence about what FibreX meant and the reasonable doubt which this raised.

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[49] Collateral is a term used in the marketing industry to mean advertising and promotional materials.

[123] In support of this submission, Mr Pilditch drew on the law relating to misrepresentation,[50] confusion,[51] and passing off.

[124] From those cases, the following principles emerge. First, the prohibition on misleading and deceptive conduct self-evidently requires some misrepresentation by the defendant. Conduct cannot be described as misleading or deceptive (or likely to be so) unless it involves a misrepresentation.[52] Secondly, conduct which produces or contributes to confusion or uncertainty may or may not be misleading or deceptive. Ordinarily, a tendency to cause confusion or uncertainty will not suffice to establish that conduct is of the type proscribed by s 11.[53] It is not enough that the conduct may cause a state of wonderment or doubt.[54] Mr Pilditch submitted that this principle is particularly important here given the Commission's allegation that the language used by Vodafone was liable to suggest to consumers that the service being offered was in fact some other service with which consumers were familiar.

[125] Against this background, Mr Pilditch referred to a line of authority dealing with generic or descriptive trading names.[55] The principle running through these cases may be summarised by the observations of Venning J in *Ballance Agri-Nutrients Limited v Quin Environmentals (NZ) Ltd*:[56]

> "The starting point is that the Courts will generally be reluctant to grant a monopoly over a descriptive or general term. …
>
> The law does, however, acknowledge that words with a generic or primary descriptive meaning may acquire a secondary meaning which indicates they originate from a particular vendor or have a particular characteristic.
>
> Lockhart on *The Law of Misleading Conduct* suggests that reputational secondary meaning is nothing more than customer familiarity with a marketing symbol or a name as a means of identifying a particular product."

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50 *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 (HC); *Neumegen v Neumegen* [1998] 3 NZLR 310 (CA); *Premium Real Estate Ltd v Stevens* [2009] 1 NZLR 148 (CA) at [51]; and *Property Brokers Ltd v Hastings McLeod Real Estate Ltd* [2020] NZHC 271 at [37].

51 *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177; and *Taylor Brothers Ltd v Taylor Brothers Group* [1988] 2 NZLR 1 (HC) at [28].

52 *Bonz Group (Pty) Ltd v Cooke*, above n 50, at [229].

53 *Taco Company of Australia Inc v Taco Bell Pty Ltd,* above n 51.

54 *Taylor Brothers Ltd v Taylor Brothers Group*, above n 51, at [39].

55 *Co-Operative Bank Ltd v Anderson* [2014] NZHC 2686 at [37]; *National Mini Storage Ltd v National Storage Limited* [2018] NZCA 45; *Healthy Food Media Ltd v Healthy Options Ltd* HC Auckland CIV-2005-404-6484, 16 November 2005 at [18]; and *Ballance Agri-Nutrients Limited v Quin Environmentals (NZ) Ltd* [2020] NZHC 1885.

56 At [73]–[75].

[126] Applying these principles to the facts of the present case, Mr Pilditch submits that at the heart of the Commission's case was the proposition that the word "fibre" could only be used in connection with a "pure fibre" or "fibre to the home" broadband service, as that is what the term "fibre" meant to the relevant consumer group. The Commission equated the brand name, which includes "fibre", to a particular meaning which it alleged the word "fibre" carried over the charge period. More particularly, Mr Pilditch submitted that there was no consumer evidence to support the Commission's contention. Rather it sought to establish this by tendering marketing material from the LFCs, Chorus and Enable, who were marketing FTTH and tendering "expert" evidence on what consumers would have made of this material and Vodafone's brand name FibreX. As a consequence, the Court had to draw an inference that consumers understood this secondary meaning and there had to be sufficient evidence on which to establish this inference beyond reasonable doubt.

[127] Mr Pilditch submitted the Court was required to address the issue in two stages:

(a) first, what the Commission had proved in relation to the word "fibre" and what consumers took that word to mean at the relevant time; and

(b) secondly, what the Commission had proved about what customers would have taken the word "Fibre" in "FibreX" to mean at the relevant time.

[128] Mr Pilditch correctly emphasised that the enquiry was fixed by the charge period and not what consumers, or the Judge understood at the time of the trial. The former approach was critical to a proper assessment because the charges span a period of development in internet technology from slower internet access to UFB. Correspondingly, consumer understanding would have evolved over the period as UFB became more readily available and as the retail service providers' and LFCs' marketing initiatives developed.

[129] Mr Pilditch was critical that the evidence relied on by the Court was insufficient comprising:

(a) evidence that broadband networks are identified by the technology used for the last mile to the home or premises (the FTTH UFB network was therefore known as fibre);

(b) evidence that the LFCs invested millions of dollars in the promotion of fibre broadband and in establishing in consumers' minds that "fibre" meant FTTH;

(c) Professor Gendall's opinion that he believed consumers viewing LFCs' promotional materials would have understood "fibre" to mean FTTH; and

(d) evidence of the extent of the FTTH roll out across the three regions.

[130] While accepting that it is generally not necessary to prove that consumers were in fact misled, Mr Pilditch submitted that because of the way the Commission framed its case it was, in fact, necessary to demonstrate the subjective knowledge or belief in the mind of the consumer between October 2016 and March 2018, being the charge period. That was because consumers at that time had to share that common understanding in order to be liable to be misled by the use of the word fibre.

[131] It is in this context that Mr Pilditch returned to the passing off cases and the topic of descriptive language. He observed that in these cases, invariably, there is some evidence about consumers and how they respond. He gave examples drawn from the case law. In the present case, he was critical there was no such evidence adduced to support the Commission's case that consumers were liable to be misled when they saw the word "fibre" being used. In those circumstances, and in any event, Mr Pilditch submitted that the Judge should have adopted a tripartite approach in assessing the sufficiency of proof. Mr Pilditch submitted that had the Judge directed herself in this way it would have been plain that the Commission's case fell woefully short of the required standard.

[132] In order to examine this submission properly, it is necessary to review the four limbs of the evidential foundation relied on by the Judge under two heads; what "fibre" meant in the mind of the consumer and, subject to that, whether the use of "FibreX" and its associated promotional imagery, was liable to mislead. I now turn to consider those issues.

(a) What "fibre" meant to the consumer?

[133] The Judge dealt with the evidence in a reasonably detailed analysis.[57] She referred to the expert evidence that fixed line broadband networks are identified in the telecommunications market by the technology used for the last mile to the home or premises. In the case of the Government's UFB network, the last mile is the fibre optic cable and is thus known as "fibre". Her Honour traversed the evidence of the two LFCs that they had invested millions of dollars in the promotion of fibre broadband and in establishing in consumers' minds that "fibre" meant fibre to the home. She traversed the evolution of the consumer messaging into the charging period concluding that by the start of the charge period in October 2016, the focus of the LFCs' promotion moved from marketing ultra-fast broadband to marketing fibre. Her Honour also referred to Professor Gendall's evidence and the opinion he expressed that consumers viewing the LFCs' promotions would have understood "fibre" to mean fibre to the home or to their business.

[134] Analysing the extent of the roll out in the respective areas by October 2016, her Honour concluded that a significant number of consumers in each region would have seen some of the promotional material and thereby understood "fibre" to mean a FTTH product. Those numbers, naturally, would have increased as the roll out continued and Vodafone pursued its marketing campaign.

[135] The question for me is whether there was sufficient evidence to support her Honour's findings. Mr Pilditch submitted that in the absence of direct evidence on the point such as supporting consumer market evidence, or similar, there was insufficient proof of this element.

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[57] Conviction decision, above n 1, at [62]–[71].

[136] With respect, I cannot agree for the reasons which follow.

[137] First, the *Neumegen v Neumegen* case Mr Pilditch cited by analogy is of limited assistance in this context.[58] There the plaintiffs called evidence from both law firms to prove that clients were confused and/or mistaken as to which firm they were dealing with. Given that the test under s 11 does not require proof that a consumer was actually misled, it is questionable whether this evidence would have been admissible and whether the Judge would have permitted the Commission to call evidence from consumers as to their understanding. Certainly, evidence tending to prove consumer confusion to that level is unnecessary for the reasons already explained.

[138] Secondly, given the size of the consumer cohort, measured in literally hundreds of thousands of households, the utility and efficacy of polling a necessarily minute sample of that population would be questionable and plainly open to attack on both the inadequacy of the sample size and the methods of selection.

[139] On this point, drawing on Professor Gendall's evidence, Mr Pilditch also submitted that a market survey might have assisted. However, it is important to carefully review Professor Gendall's evidence on the point and place it in context. When first approached by the Commission to give an expert opinion, Professor Gendall suggested that the Commission should consider undertaking a market survey to marshal evidence addressing the alleged secondary meaning. He suggested that the questions could be answered by a survey of consumers in the Wellington, Kāpiti and Christchurch areas, adding that the case for the Commission could be strengthened by a well-designed internet survey. However, Professor Gendall later retracted that view, commenting in evidence that the evidence in favour of the conclusion he came to was "really strong [he] felt", and adding that he had spent most of his life thinking about the ways consumers in the general public interpret words and analysing their understanding. He said that he was confident that the way in which FibreX would have been interpreted by the general public was reflected in the conclusions he had come to and that he did not need a survey to draw that conclusion.

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58 *Neumegen v Neumegen*, above n 50, at 325.

[140] Thirdly, Mr Flanagan referred me to a number of New Zealand and Australian cases which have discussed the limitations of survey evidence in this context.[59] For completeness these are footnoted. The rationale behind the various judicial pronouncements in those cases lies in the legal requirements of what must be proved, how that task is to be undertaken and the practicalities of calling members of the public in an attempt to prove it. As for the first, what must be proved is a tendency to mislead and not proof that consumers were, in fact, misled. As for the second, the correct judicial approach involves an evaluative exercise having regard to all the circumstances, a task which is well familiar to Judges. The third has already been discussed.

[141] Fourthly, I cannot fault the Judge's treatment of the evidence as set out earlier in this section. She referred to the LFC witnesses. They discussed the very substantial investment they had made in promoting FTTH and the clear and consistent marketing message that UFB and "fibre" equated to a FTTH service. The retailers adopted the same, consistent messaging to potential customers.

[142] Ms Harker, Chorus' head of marketing, put it this way:

> "It is important to have consistency in the marketing terms used to describe different broadband products, because there is some confusion in the market when it comes to buying plans. In general, consumers know what they want to buy and understand that fibre is the best available type of broadband. We see that in preference for fibre in research. Our market insights tell us that 'fibre' has a high level of familiarity in New Zealand. However, consumers do not have a high level of understanding about the different technologies and how they work. Accordingly, Chorus has spent significant sums on marketing initiatives and campaigns designed to familiarise consumers with fibre and its benefits."

And later in her evidence:

> "… We have always talked about – you know you saw it in that early material fibre to the premises, fibre to the homes and businesses and schools and health facilities. It is in the early collateral, you know, right to your house and it's also important not only from the benefits in terms of what you're getting, but

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[59] *J W Spears & Sons Ltd v Zynga Inc (No. 2)* [2015] EWCA Civ 290 at [162]; *Intercity v NakedBus* [2014] NZHC 124 at [194]; *Australasian Conference Association Ltd v A Little Bit of Britain Ltd* [2018] NZHC 2501 at [91]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634, (2014) ALR 73 at [45]; and *Australian Competition and Consumer Commission v Snowdale Holdings Pty Ltd* [2016] FCA 541, (2016) ALR 455 at [54].

> also the fact that we have to get it to your house, we have to install it, so that has been I think a key part of the marketing communication messaging to the end customers right from the early days."

[143] Ms Harker also described the evolution of the marketing programme adopted by the LFCs. It was put to her by Mr Pilditch that there were significant differences in the advertising and marketing material between 2014 and 2017. Ms Harker responded:

> "There is a shift in the headlines, but I think there is a consistency throughout the documentation around there [sic] to pass to this, and I think that the reason for the shift is, if you think about it, I think I stated it before, if you think about for your average New Zealander there was a big programme being rolled out, it was widely known as a big infrastructure upgrade for New Zealand, the largest in our history at the time, and bringing you know ultrafast fibre broadband to homes and businesses, schools and hospitals, and so in the early years, UFB was people probably had in their head associated with Fibre and then as it became more brand fibre probably took hold, we started talking about Fibre because it would have much more mass awareness by then, so people would connect with it more easily."

[144] The evidence of Mr Fuller, on behalf of Enable, was to similar effect, namely that Enable marketed its FTTH network on the basis that customers got fibre all the way to their door when they brought "fibre".

[145] There was other evidence consistent with this approach. Mr Brown, a US-based electrical engineering consultant with extensive experience in the cable and fibre optics field, was called by Vodafone. In cross-examination on the commonly accepted differences between fibre and cable he said:

> "Q. Now in the United States HFCs called 'cable' isn't it?
>
> A. It's a common term that is frequently used, yes.
>
> Q. It's never called 'fibre'?
>
> A. When you use the technical term, 'hybrid fibre coax', yes. When you use the common term, 'cable', no.
>
> Q. In fact, when somebody uses 'fibre' as a common term, they are referring to fibre to the home aren't they?
>
> A. That's typically true."

[146] Dr Nelson, a New Zealand-based electrical engineer called by Vodafone, also supported this statement when he was cross-examined:

> "Q. Now in all your experience in the Internet, in New Zealand, have you ever come across an HFC network described simply as 'fibre'?
>
> A. No.
>
> Q. That denotes a fibre to the home network of course in New Zealand?
>
> A. Well it denotes all sorts of networks, but generally speaking, it's fibre to the end point, yes.
>
> Q. And HFC in New Zealand has been known to that or as 'Cable'?
>
> A. Its … Yes, yeah."

[147] Furthermore, in Vodafone's interview with the Commission, Mr Walker of the Commission asked Vodafone's Ms Ferguson, whether she thought that consumers understood fibre to refer to the fibre optic network rolled out across New Zealand. She answered, "Some will".

[148] Even Vodafone recognised this distinction in its own advertising of its FTTH service which it described as the "other fibre". In its instructions to its sales representatives, it specified that FibreX was not fibre, adding "a fibre uses fibre all the way to the home".

[149] And, of course, there is Ms Horton's own evidence at interview, when she observed that customers saw the word "cable" as referring to "outdated technology".

[150] It follows from this analysis that there was ample evidence available to the Judge from which to draw the conclusion she did. It was not necessary for the Commission to lead additional evidence in the form of market surveys for the reasons and inherent limitations already discussed.

[151] Furthermore, in determining whether there was sufficient evidence to satisfy this element the Judge is required to adopt an evaluative approach. That is what Judge Sinclair did. I am not satisfied that having done so, the conclusion she came to was unreasonable or unavailable on the evidence.

(b) Whether "FibreX" was liable to mislead the consumer

[152] This aspect of the appeal is closely connected to the preceding discussion. The Judge, having been satisfied that the relevant consumer group would have understood "fibre" to mean FTTH, went on to consider Vodafone's claim that the addition of the letter "X" effectively differentiated its HFC service from a FTTH service.[60] She referred to Ms Horton's evidence that the rebranding of the HFC network as "FibreX" suggested to customers that the network included fibre and something else – "… the X being coaXIAL". She observed that there was no expert evidence adduced by Vodafone supporting this contention and, more particularly, the claim that the addition of the X was sufficient to alert customers to the fact that they were not getting a service of the type commonly identified by the word "fibre". She referred to the evidence of Professor Gendall who was of the opinion that the suffix X meant exceptional or the X-factor, such that consumers would think that FibreX was probably fibre with a level of enhancement. Professor Gendall referred to the use of suffixes used by broadband providers, opining that all were associated with speed. From that, he concluded that the addition of the X in FibreX would have been understood by consumers to relate to improved speed or capacity rather than differences in the delivery mechanism.

[153] On the appeal, Mr Pilditch submitted that his earlier submissions as to how this particular consumer cohort would have approached the brand name and other information in the market at the time about the product also applied here. He returned to his central proposition that there was a stark difference between the notion of reasonable care which Vodafone instilled in its market, compared to the assessment made by the Court which necessarily found that consumers of broadband services or internet access exercised such a low level of care about their purchasing decision that they could be lured simply by a brand name and a picture. In the present context, it was Mr Pilditch's submission that the relevant consumer group must be credited with a greater degree of care; that they will not form views about whether or not to purchase internet services without some engagement with the information which is available and must necessarily be accessed in the course of the consumer journey. His submission was that if the consumers concluded that FibreX was a particularly fast broadband they were not misled. Alternatively, because brand names do not generally

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60 At [72]–[87].

provide much information, particularly given the narrower consumer cohort Mr Pilditch pressed for, they would not have been misled simply by virtue of a brand name.

[154] I agree with the approach adopted by the Judge. Although Professor Gendall's opinion aligns with common sense, it is buttressed by his marketing expertise and knowledge of other promotional campaigns. As he commented, the suffix X does tend to suggest an addition or refinement to the word it qualifies, here "fibre". Adopting the evaluative approach required, in my view the adoption of the suffix "X" is a good deal more consistent with an intention to enhance the word "fibre" than Vodafone's explanation that it is a reference to the X in "coaxial". How consumers might be expected to recognise or understand the connection between the "X" in FibreX and the "X" in the middle of a four syllable technical term is unexplained.

[155] Furthermore, that imagery is compounded by the advertising graphics used by Vodafone. Mr Pilditch suggested that the diverging beams of light depicted in the associated literature are more reminiscent of a night sky than fibre optic cables. Again, while I accept it is a matter of impression, the combination of the word FibreX beside an image of radiating beams which, in some of the graphics plainly resemble fibre optic strands, emphasises the overarching and dominant message that the technology in question is, in fact, fibre optic.

[156] In those circumstances, I agree with the Judge that the images were liable to mislead.

Ground 1.1(c): Failure to address admissibility of consumer complaints table

[157] The next ground advanced by Vodafone relates to a consumer complaints table produced as an exhibit by the Commission. This was a schedule of complaints received by the Commission in relation to Vodafone's marketing of FibreX. Vodafone formally objected to its admissibility at the outset of the trial and again at the close. However, it seems the Judge never ruled on the objection and, in Vodafone's submission, appeared to rely on the evidence. It is thus submitted the Judge erred and as a result justice has miscarried.

[158] Vodafone's objection was based on a submission that the table contained inadmissible hearsay and lay opinion evidence.[61] The Commission's position, as communicated to the Judge in its opening and closing remarks, was that it did not rely on the table for the truth of its contents, that is the complaints themselves. Rather, it adduced the schedule as proof of the fact that complaints were made. It follows that the Commission's case is that the schedule is not inadmissible hearsay evidence.

[159] Given this approach, I asked Mr Flanagan why the contents and details of the complaints had been adduced at all. Mr Flanagan's response was that the Commission would have otherwise been exposed to the criticism, "What were the complaints about?".

[160] While such an approach would not have been acceptable in the context of a jury trial, this was a Judge-alone trial, and the Commission was clear throughout as to the limited evidential purpose of adducing the evidence. Given that background and the express submissions by the Commission on the point, I am satisfied the consumer complaints table did not constitute inadmissible hearsay evidence.

[161] The fact remains, however, that the Judge did not address its admissibility. Mr Pilditch submitted that this suggests that the Judge was operating under a misapprehension as to the effect of the evidence and of the significance of the issue in dispute. He further submitted that there is a real risk that the Court was influenced by this evidence. In support of this submission, Mr Pilditch relied on footnote 16 of the conviction decision, in which the Judge noted:

> "For the avoidance of doubt, the evidence recorded in this decision is selective and a summary only. In reaching my decision, I have taken into account *all the evidence (including documentary evidence) given during the course of the trial*."
>
> (Emphasis added)

[162] I do not accept the admission of this evidence was a material error amounting to a miscarriage of justice. My reasons follow.

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[61] I note that the submission relating to lay opinion evidence was not further advanced on the appeal by either party. I need say no more about it.

[163] First, while the contents of the consumer complaints table clearly touch on relevant key issues in dispute, such as the meaning consumers took from the headline FibreX, I do not interpret footnote 16 to mean the Judge took the table and its contents into account in determining that and related issues. To do so requires a leap of logic from what is a very broad and sweeping judicial statement designed to convey that the Judge took into account evidential material beyond that which she might have specifically mentioned in her judgment. It is a common formula adopted by Judges to convey to the reader that material beyond that explicitly referred to in the decision has been considered.

[164] Secondly, and more significantly, there is nothing in the body of the decision itself to suggest the Judge took this specific evidence into account, either explicitly or implicitly. Notably, the decision makes no reference to the table at all – not even to cover the fact that the Commission had received complaints regarding Vodafone's marketing of FibreX.

[165] Thirdly and relatedly, as Mr Flanagan points out, this is not a case where the evidential foundations for the conclusions reached are unclear requiring an appellate Court undertake a close examination of the decision in an attempt to divine the underlying reasoning. Here the Judge clearly set out the evidence she relied on in relation to each finding.

[166] Fourthly, having reviewed the notes of evidence, I am, in any event, satisfied that the table did not form a significant part of the Commission's case.

[167] Finally, while it is a regrettable omission that a formal ruling on admissibility was overlooked, that is another factor which actually supports the view that the Judge did not rely on the consumer complaints table. Plainly the Judge did not consider the evidence memorable.

[168] It follows that I do not consider the admission of the table gave rise to a miscarriage of justice.

Ground 1.1(a): Erroneous finding as to characteristic of service

[169] This ground of appeal relates to the Judge's finding that the physical components through which Vodafone's HFC broadband service was delivered to consumers characterised the "service".[62] This finding was a prerequisite to liability under s 11, because the Court had to be satisfied that Vodafone's conduct was liable to mislead the public in relation to the characteristics of its services.

[170] Mr Pilditch submitted that the Judge erred in law and fact because the physical makeup of the network is not the "service" nor a characteristic of it. Rather, Vodafone's service is limited to the provision of rights of access to the internet for the transfer of electronic data. The characteristics of this service, in Mr Pilditch's submission, were defined by the consumer experience – namely speeds/data limits at specified prices.

[171] This ground of appeal may be dealt with relatively briefly. That is because the definition of "services" in s 2 of the FTA is broad. It encompasses any rights, benefits, privileges or facilities that are to be provided, granted, or conferred under a contract for the supply of telecommunications.

[172] As to what constitutes a "characteristic" of a service (as opposed to a good), the Courts in New Zealand and Australia have yet to consider this in any depth and it is not necessary to do so in this judgment. However, the case law does make it clear that the enquiry is a context-specific one.[63] As such I find the evidence at trial to be of the greatest assistance in resolving this issue. Most of the findings set out below have been discussed earlier in this judgment.

[173] In my view, the evidence established the following:

(a) Broadband networks in New Zealand are known by the technology used in the last mile.

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62 Conviction decision, above n 1, at [101].

63 *Sound Plus Ltd v Commerce Commission* [1991] 3 NZLR 329 (HC); *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832*; ACCC v Turi Foods Pty Ltd (No 4)* [2013] FCA 665; and *Australian Competition and Consumer Commission v Snowdale Holdings Pty Ltd,* above n 59.

(b) Consumers in New Zealand would understand "fibre" to mean a FTTH service, and "cable" to mean the HFC network.

(c) Broadband providers typically advertise the last-mile technology through the name of the service. In 2016, Vodafone's broadband plans were called "Fast (ADSL)", "Faster (VDSL)", "Ultra Fast Fibre" and "Ultra Fast FibreX".

(d) In addition to the brand name, Vodafone's advertising of FibreX also highlighted the medium of delivery through references to the "superfast gigabit network" and "fantastic upgraded broadband network".

(e) Consumers care about the technology used in the last mile. Vodafone chose the name FibreX because it had undertaken market research which suggested consumers associated cable with being slow and outdated.

(f) FTTH has certain inherent advantages over HFC.

[174] I consider it plain on these propositions drawn from the evidence that the medium of delivery – and in particular the architecture of the last mile – is a characteristic of any wired access broadband service. To use the language in *Commerce Commission v New Zealand Nutritionals (2004) Ltd*, the last mile technology "serves to identify or indicate the essential quality or nature" of the broadband service.[64]

[175] The medium of delivery in this context is not simply a "technical detail" of how the "thing" got there in the first place. It is inextricably linked to the broadband service that the customer receives. This is true both in a literal sense (in that the technology used in the last mile affects the overall performance of the network) and a semantic sense (in that consumers have come to ascribe secondary meanings to the words "fibre" and "cable"). This is also reflected in the manner in which broadband providers advertise their services.

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64 *Commerce Commission v New Zealand Nutritionals (2004) Ltd*, above n 63, at [53].

[176] In these circumstances, I do not consider the Judge erred in finding that the physical makeup of the HFC network was a characteristic of Vodafone's broadband service.

Ground 1.1(d): Reversal of burden and standard of proof

[177] Under this ground of appeal, Vodafone alleges that the Judge erred by reversing the onus and standard of proof, namely by casting a burden on Vodafone to prove its innocence on key issues.

[178] Whilst acknowledging that the Court in a Judge-alone trial is not required to remind itself of the standard tripartite direction, Mr Pilditch submitted that the process contemplated by the direction must still be followed.[65]

[179] Mr Pilditch pointed to three issues on which he says the Court either implicitly or explicitly dismissed evidence presented by Vodafone and concluded that Vodafone had not altered the evidential position. These relate to the use of the "X", the impact of press releases, and changes to advertising in the third charge period. The most striking example, in his submission, is the last.

[180] Ms Horton's evidence was that changes to Vodafone's promotional materials (to include reference to the HFC network) began to occur in August 2017 and were in place by October 2017. However, the example she provided of a digital advertisement was from February/March 2018. On this the Judge concluded:[66]

> "… the final charging period finished on 28 March 2018 and there is no evidence that this form of advertising was being used in the market prior to this time (or indeed, how widely it was being used even in February/March 2018). In the absence of evidence to this effect, I cannot be satisfied when advertisements containing references to the HFC network started to be used by Vodafone and whether the changes made were sufficient to enable consumers to identify the network."

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65 For completeness, this process is to first acknowledge that the defendant electing to call evidence does not alter the burden of proof. Following this, if the Court either accepts the defence evidence or considers there is a "real possibility" that this evidence might be true, it is required to acquit due to reasonable doubt. If the Court rejects the defence evidence, it must not automatically conclude guilt, but rather examine all evidence to determine whether guilt has been proved beyond reasonable doubt: *R v McI* [1998] 1 NZLR 696 (CA) at 708, affirmed in *R v MacDonald* [2009] NZCA 428 at [2] and *Pohutuhutu v R* [2017] NZCA 501.

66 At [85].

[181] Mr Pilditch contends that this treatment of the evidence demonstrates the Court laboured under the fundamental misconception that Vodafone carried an onus to answer prosecution evidence or establish facts in order to secure an acquittal.

[182] With respect, I do not accept these submissions. In the example reproduced above, the Court was simply commenting on the available evidence rather than casting or imposing an onus. The Judge then concluded, on the basis of that evidence, that it provided an insufficient foundation for the proposition that the changes to Vodafone's advertising materials were in place during the last charge period. Put another way, the Court found itself unable to make the factual finding contended for in the absence of sufficient evidence to support such a finding. That is an elementary proposition. Her Honour described the evidence as follows:

> "[48] Ms Horton stated that in August 2017, Vodafone began to make changes to its promotional materials to include reference to the network. It was Ms Horton's evidence that she was certain that these changes had been implemented by October 2017. However, Vodafone did not have good records of the advertising actually in use in this period. The only two examples were a flyer from March 2018 where the small print was extremely difficult to read and a digital advertisement from February/March 2018. This advertisement included the statement: "FibreX is Vodafone's HFC cable network". However, Ms Horton was not able to tell the Court whether this wording had been used in any other advertisements prior to this time."

[183] Even if the Judge erred in this respect, I am not satisfied there was a miscarriage of justice. That is because there was ample evidence that over the whole charge period, Vodafone's advertising conduct was liable to mislead. Mr Flanagan referred me to Ms Horton's evidence which supports such a finding.

[184] As to the use of the "X", the Court merely recorded that Vodafone did not produce any expert evidence to support its contention that the "X" was sufficient to alert consumers to the fact that it was not a FTTH product.[67] That cannot reasonably be taken as implying that Vodafone should have called evidence to this effect. It is simply a statement of fact. The same can be said of the Court's comments in relation to the impact of press releases.[68]

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[67] At [73].
[68] At [83].

[185] In summary, the Court approached the evidence in an entirely orthodox manner and did not reverse the burden or standard of proof. This ground of appeal fails as a result.

Ground 1.1(g): Failure to properly consider and weigh all admissible evidence

[186] Mr Pilditch introduced this ground in his oral submissions as stand alone, but recognised it effectively invited the Court to reflect on whether the cumulative effect of the Judge's errors caused justice to miscarry even if the preceding grounds, considered separately, may not have.

[187] In particular, Mr Pilditch drew my attention to the third set of charges which he submitted covered a period when there were significant remedial changes made in Vodafone's advertising strategy and content which the Judge effectively ignored.

[188] I do not propose to cover every point raised by Vodafone under this heading. Most if not all have been discussed in the preceding analysis.

[189] What appears, at least from Vodafone's written submissions, to be the gravamen of its complaint under this head is that when the evidence is viewed in its entirety and against the backdrop of the issues raised by Vodafone, as discussed above, there is a clear evidential gap in proof and thus a principled basis for reasonable doubt.

[190] Mr Pilditch submitted that the Judge's rationale in convicting Vodafone on all charges was that it should not have used "fibre" in its branding because by using that word, consumers may have been misled to think it was a service offered on the FTTH network. This was an error which arose from the essential premise of the Commission's case, namely that consumers needed to know the architectural differences between FTTH and HFC because it was those differences which made FTTH "superior". However, when addressing the architectural differences, the Judge held that these were irrelevant to liability under s 11.

[191] Mr Pilditch developed this submission by claiming that Vodafone was thus found guilty for using the word "fibre" in its brand name because that misled customers on the architectural differences, when there was no evidence that consumers

knew anything about these matters in the first place. He submitted it is reasonably possible, if not certain, that the word "fibre" did not represent detailed technological information about last mile technology in the minds of consumers. The word was never going to inform consumers of the technological differences that the Judge found consumers "would want to know about". He then referred to the evidence which indicated that in fact these differences were not reflected in FTTH performance. He criticised the Judge for failing to address the evidence, commissioned by the Commission and produced by Vodafone that showed FTTH was not meeting performance expectations nor the representations being made about its performance by ISPs.

[192] With respect, I consider this submission rather misses the point.

[193] The core question the Judge was required to determine was whether Vodafone's representations across the three charge periods were liable to mislead the relevant consumer cohort. The Judge found that Vodafone's use of the expression FibreX, including associated imagery, was liable to lead consumers to believe that they were getting a fibre product rather than cable. There was a sound evidential foundation for that finding, including Vodafone's own evidence derived from market surveys which informed its marketing strategy. The attributes of the underlying technology or the respective qualities of FTTH over Vodafone's DOCSIS enhanced coaxial cable rightly did not form part of the Judge's analysis on this front. The enquiry was not whether the consumer was getting a superior product. It was whether the consumer was denied the opportunity to make an informed choice as to which product they preferred.

[194] Furthermore, standing back, for the reasons I have already canvassed in respect of each of the individual grounds, I do not accept that collectively the position changes.

[195] Finally, in terms of the last charge period in respect of the branding charges, being 28 October 2017 to 28 March 2018, I accept that Vodafone's advertising strategy was modified in an apparent attempt to correct any misapprehensions about the nature of the FibreX product. Those steps have already been discussed. However, even if steps were taken by Vodafone in an attempt to mitigate the potential for consumer misunderstanding, the core feature liable to mislead the public was the brand name

FibreX and its associated graphics. These remained and, as a consequence, so too did the liability of the advertising to mislead.

[196] That being the case and for the reasons discussed earlier in this decision, I find that the relevant charges were properly proved.

Conclusion on conviction appeal

[197] It follows that I have not identified any grounds of appeal on which Vodafone succeeds. The conviction appeal fails as a result.

SENTENCE APPEAL

[198] There are two sentence appeals; a defendant's appeal on the grounds the sentence was manifestly excessive and a Solicitor General's cross-appeal on the basis that the sentence imposed was manifestly inadequate.

District Court decision

[199] The Judge began by noting[69] that she would be following the approach to sentencing in FTA cases as set out by the Court of Appeal in *Commerce Commission v Steel & Tube Holdings Ltd*.[70]

[200] The Judge then turned to the culpability factors:

(a) *Nature and use of the service:* UFB plays a crucial role in everyday lives of New Zealanders. The significant investment by the Government in FTTH and Vodafone in the upgrade of its HFC network reflects this.[71]

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69 *Sentencing decision*, above n 2, at [15].
70 *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549 at [90]–[93] [*Steel & Tube*].
71 At [21]–[22].

(b) *Extent to which the false statements were misleading*: the brand name, headlines and imaging were plainly misleading. The representations on the availability checker involved a material departure from the truth.[72]

(c) *Extent and duration of offending*: this was an extensive advertising campaign in three regions over a 17-month period.[73]

(d) *Vodafone's state of mind*:

(i) in respect of the branding charges, the Judge was not satisfied that Vodafone intended to mislead or deceive consumers that FibreX was FTTH,[74] but considered that it was grossly careless in its choice of name and in the marketing of the service;[75] and

(ii) as to the availability charges, the Judge was not satisfied that Vodafone intended to mislead consumers as to the available broadband at their address, but found it was grossly careless in its presentation of information on the availability checker. However, she described the level of carelessness as "moderate", being less than that for the branding charges.[76] Certain of the representations were unintentional or inadvertent.[77]

(e) *Senior management and compliance culture and systems*: the active involvement of senior management (in deciding upon the FibreX brand name and marketing campaign) was not in dispute.[78] The Judge considered it apparent from the offending that Vodafone did not have a sufficiently robust compliance structure, adopting a "cavalier approach" to its responsibilities under the FTA even after being put on notice by the Commission.[79]

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72 At [23]–[24].
73 At [25]–[27].
74 At [32].
75 At [39].
76 At [45].
77 At [46].
78 At [47].
79 At [40]–[50].

(f) *Extent of commercial gain or benefit*: the Judge declined to make any assessment of Vodafone's revenue/commercial gain, noting that to do so would be speculative. She was not satisfied that the inferences the Commission invited her to rely on were robust enough to arrive at a finding that Vodafone's revenue from its offending was "substantial".[80]

(g) *Harm to consumers*: the Judge did not place any particular weight on the consumer complaints table, or any weight at all on the victim impact statements in assessing harm to consumers.[81] However, she noted (and Vodafone accepted on the basis of the Court's findings) that it caused harm to consumers within the FibreX coverage areas by depriving them of the ability to make an informed choice.[82]

(h) *Harm to the market*: Vodafone accepted that its offending had an impact on competitors in the market, namely other retailers providing FTTH.[83] The Judge also noted that such behaviour causes both consumers and competitors to lose confidence in the market.[84]

(i) *Harm to the LFCs*: the Judge accepted that the LFCs would have suffered harm, in particular the loss of access fees they would otherwise have earned but for Vodafone's offending. However, she did not consider these losses to be in the millions of dollars as contended by the Commission.[85]

[201] As to mitigating factors of the offending, the Judge rejected an argument that Vodafone's "layered approach" to the provision of information, whereby a consumer could find out more information about the network by reading the offer summaries, materially mitigated its culpability.[86] No other mitigating factors were identified.

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80 At [64]–[65].
81 At [70] and [76].
82 At [80]–[81].
83 At [83].
84 At [85].
85 At [87].
86 At [88]–[89].

[202] The Judge then turned to the maximum penalty. It was held that neither the branding nor the availability charges met the requirements of s 40(2) of the FTA to qualify as a single offence for the purposes of sentencing.[87] In particular, the offending within each group of charges was not the same or of a substantially similar nature. As such, the Judge determined that the maximum penalty for all charges was $10.8 million.[88]

[203] The Judge went on to note that a global starting point would be adopted to mitigate the risk identified in *Steel & Tube,* namely that the aggregate maximum fine would have a framing effect on the starting point.[89]

[204] Following this, the Judge summarised three comparable cases[90] which she viewed as useful to the approach taken in assessing culpability factors, though of limited value for comparing the fines imposed.[91]

[205] After noting the parties' positions, weighing up all culpability factors and having regard to the applicable sentencing purposes and principles, the Judge adopted a global starting point of $2,100,000.[92]

[206] The Judge then uplifted the starting point by 20 per cent to reflect Vodafone's previous convictions, which she considered illustrative of "a clear pattern of failure by Vodafone to take all necessary steps to ensure compliance with the FTA".[93] These convictions were grouped under the following headings, each relating to a different advertising campaign or course of conduct by Vodafone:

(a) Billing Beyond Termination;

(b) Red Essentials Plan;

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87 At [98]–[99].
88 At [100].
89 At [101], citing *Steel &* Tube, above n 70, at [84].
90 *Steel & Tube*, above n 70; *Commerce Commission v Reckitt Benckiser (NZ) Ltd* [2017] NZDC 1956, [2017] DCR 431 [*Reckitt Benckiser*]; and *Commerce Commission* v *Carter Holt Harvey* DC Auckland CRI-2005-004- 18578, 12 October 2006 [*Carter Holt Harvey*].
91 At [115].
92 At [128].
93 At [146].

(c) Broadband Lite;

(d) Broadband Everywhere, Super Prepaid Connection Pack and Largest 3G Network Campaigns;

(e) $1 a Day Mobile Data promotion; and

(f) Vodafone Live!.

[207] This brought the sentence to $2,520,000 before taking into account any mitigating factors personal to Vodafone.

[208] The Judge considered a five per cent discount to appropriately reflect Vodafone's co-operation with the Commission's investigation, reducing the fine to $2,394,000.[94]

[209] The parties agreed that Vodafone was entitled to a 25 per cent discount following early guilty pleas on the availability charges.[95] It was then necessary for the Court to determine the proportion of the global sentence that should be allocated to the availability charges. The Judge considered the appropriate split between the branding and availability charges to be 65 and 35 per cent respectively.[96] Vodafone was therefore entitled to a 25 per cent discount on $837,900, bringing the sentence to $2,184,525.

[210] Lastly, the Judge considered Vodafone's substantial financial resources and concluded:

> "[163] I am of the view that in order to have any sting and serve as a personal deterrent to Vodafone, an uplift is required. Applying the Court of Appeal's approach [in *Steel & Tube*], and mindful that the fine should retain proportionality to the offending, I consider that an upward adjustment to $2,250,000 is appropriate."

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94 At [153]–[154].
95 At [155].
96 At [157].

[211] The result was that Vodafone was convicted and sentenced to pay a total fine of $2,250,000, comprised of:[97]

(a) $1,462,500 on the branding charges, being $162,500 on each of the nine charges; and

(b) $787,500 on availability charges, being $101,250 on each of the six charges in the first two charge periods, and $60,000 on each of the three charges in the third charge period.

Legal principles on sentence appeals

[212] This Court must allow the appeal if satisfied that for any reason there was an error in the sentence imposed on conviction and a different sentence should be imposed.[98] The focus is on the sentence imposed, rather than the process by which it is reached.[99] The Court will not interfere where the sentence is within the range that can properly be justified by accepted sentencing principles.[100] To this end, the concept of a "manifestly excessive" (or inadequate) sentence is well engrained and there is no reason not to apply it.[101]

[213] In respect of the Commission's appeal against sentence, a Solicitor-General's appeal, the sentence should not be increased unless the circumstances of the offending clearly demonstrate that it is manifestly inadequate or that some error of sentencing principle has occurred.[102] Moreover, any increase must only be "to the level which accords with the lower range of appropriate sentences".[103]

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97 At [164].
98 Criminal Procedure Act, s 250(2).
99 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
100 At [36].
101 At [35].
102 *R v Cargill* [1990] 2 NZLR 138 (CA) at 140.
103 *R v Muavae* [2000] 3 NZLR 483 (CA) at [10].

Application of s 40(2) of the FTA

[214] Before considering the parties' respective positions, I propose to first deal with a preliminary issue which is relevant to both sentence appeals, namely the aggregate maximum penalty.

[215] Vodafone was convicted of 18 charges under s 11, each carrying a maximum penalty of $600,000. The Commission submitted, and the sentencing Judge accepted that the aggregate maximum penalty was therefore $10.8 million.[104]

[216] Vodafone had submitted that the Court had to take account of s 40(2) of the FTA, which relevantly provides:

> "**40 Contraventions of provisions of Parts 1 to 4A an offence**
>
> …
>
> (2) Where a person is convicted, whether in the same or separate proceedings, of 2 or more offences in respect of contraventions of the same provisions of this Act and those contraventions are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person in respect of those convictions shall not exceed the amount of the maximum fine that may be imposed in respect of a conviction for a single offence."

[217] Vodafone's position in the District Court and on appeal is that there is no distinction between the different locations alleged in the charges insofar as the advertising, branding and relevant consumer groups were concerned. On appeal, Mr Pilditch also submitted that no such distinction was made by the Court in the conviction decision or indeed by the Commission at trial. In these circumstances, s 40(2) of the FTA applied and the available fine was, at its highest, $3.6 million, calculated on the basis of the two charge types and the three geographical zones. Accordingly, Mr Pilditch submitted that the Judge erred in finding that this provision did not apply.

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104 At [98].

[218] In oral submissions, however, Mr Pilditch conceded that the offending could be separated into the three charge periods alleged by the Commission.[105] This appears to be at odds with the express requirement in s 40(2) that the offending occurred "at or about the same time".

[219] As the Court of Appeal explained in *Steel & Tube,* the policy behind s 40(2) requires that it is tightly circumscribed.[106] In particular, it must be limited to "essentially similar" offending committed over a "reasonably short period".[107] Further guidance can be found in the Swanson report to which s 40(2) can be traced. In that report, the Australian Trade Practices Act Review Committee expressed concern as to:[108]

> "… the possible magnitude of the penal liability that advertisers may incur in respect of essentially similar advertisements, placed respectively in newspapers or on radio or television, in the framework of a single advertising campaign lasting no longer than two months."

[220] Vodafone's advertising campaign, spanning 17 months as it did, evidently does not fall within the type of offending intended to be captured by s 40(2). In addition, while broadly similar, there were aspects in which the campaign varied between (and indeed within) each geographical region.[109] For instance, the advertising differed between households who were simply in the HFC coverage area and those who were already connected to the HFC network.

[221] More importantly, I do not consider this to be a case in which the aggregation of penalties would result in unfairness. In fact, I am of the view that treating Vodafone's offending as a single offence would significantly understate its culpability. As the Judge rightly noted, any framing effect created by the maximum penalty can be mitigated by the adoption of a global starting point or adjustment for totality.[110]

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105 These span from 26 October 2016 to 28 March 2018.
106 Above n 70, at [82].
107 At [82].
108 Trade Practices Act Review Committee Report to the Minister for Business and Consumer Affairs (Australian Government Publishing Service, Canberra, 1976).
109 These are set out at [96]–[97] of the sentencing decision.
110 At [101], citing *Steel & Tube*, above n 70, at [84].

[222] As such, I do not consider the Judge erred in finding that s 40(2) did not apply. The maximum aggregate penalty is to be calculated on the basis of all charges, namely $10.8 million.

[223] I turn now to consider the Commission's sentence appeal.

Commission's sentence appeal

[224] Mr Flanagan submitted that the District Court's approach to the sentence contained significant errors of principle which in turn led to a sentence which is manifestly inadequate. The errors alleged by the Commission fall under three broad grounds:

(a) first, the Court adopted a manifestly inadequate starting point as a result of the following four errors:

(i) finding that Vodafone's breaches were grossly careless, rather than wilful;

(ii) erring in its assessment of the significance of the commercial gain Vodafone made from its offending;

(iii) erring in its assessment of the harm to consumers caused by the offending; and

(iv) failing to apply the process laid down in *Steel & Tube* or to identify the factors leading to the starting point chosen;[111]

(b) secondly, the Court imposed an uplift that was manifestly inadequate having regard to Vodafone's financial resources and the need to achieve specific deterrence; and

[111] Above n 70.

(c) finally, the Court departed from the two-step sentencing methodology laid down by the Court of Appeal in *Moses v R*, resulting in greater discounts than would otherwise have applied.[112]

[225] I shall deal with each of these grounds in turn.

Ground (a)(i): Error as to Vodafone's state of mind

[226] The Commission first alleged that the Judge erred in finding that Vodafone's breaches were grossly careless, rather than wilful. In doing so it was said she applied the wrong legal test.

[227] The test applied at sentencing was whether Vodafone intended to mislead consumers that FibreX was FTTH, and/or that non-FibreX services were unavailable at their address. Mr Flanagan submitted that the correct test is whether Vodafone intentionally launched the FibreX campaign/the availability checker, knowing it was liable to mislead consumers into believing FibreX was FTTH and/or non-FibreX services were unavailable.

[228] I do not accept that Judge Sinclair was wrong is this respect. The test proposed by the Commission appears to me to reduce the threshold for wilful conduct to a standard which equates with gross carelessness. The Court of Appeal's comment on what constitutes wilfulness in *Steel & Tube* must be given its plain meaning, namely that wilfulness in this context requires a "specific intent to mislead or deceive in the relevant respect".[113] This was the test Judge Sinclair applied.

[229] Mr Flanagan also submitted that irrespective of the test applied, it was not open to the Court, on the facts, to find that Vodafone's offending was grossly careless because:

(a) that conclusion is unsupported by the evidence;

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112 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 [*Moses*].
113 Above n 70, at [89].

(b) it sits uncomfortably with other factual findings in the liability and sentencing decisions; and

(c) Vodafone made admissions to the effect that it knew its branding was liable to mislead.

[230] The key evidence in question, as found by the Judge and upheld by this Court, is that wired access broadband networks are known by the last mile technology and that Vodafone had made a conscious marketing decision to depart from the word "cable" towards the word "fibre".

[231] However, the Judge also found that Vodafone genuinely believed that the "X" was sufficient to differentiate FibreX from FTTH, and that this was a belief that persisted until trial. Having reviewed the contemporaneous evidence, the interview transcripts and Vodafone's letters to the Commission during the course of its investigation, I agree with these findings.

[232] In making that determination it is important not to conflate the meaning that consumers would likely take from the "X", on which the Judge preferred Professor Gendall's evidence, and the meaning that Vodafone subjectively believed consumers would take from it. Conceptually they are quite different but reconcilable propositions. The Judge was entitled to reach two different conclusions in these respects.

[233] Developing this point further, an unreasonable belief, or one that is unsupported by evidence, may nonetheless be genuinely and honestly held. Earlier in this judgment,[114] I stated that the adoption of the suffix "X" is a good deal more consistent with an intention to enhance the word "fibre" than Vodafone's explanation that it is a reference to the X in "coaxial". That finding, however, does not necessarily lead to the conclusion that Vodafone intended consumers to believe the product was actually FTTH when it was in fact HFC. The evidence bears this out. For example, Vodafone instructed its frontline sales agents in their October 2016 training on the eve of the FibreX launch that FibreX should not be confused with the Government's fibre

[114] At [153].

UFB rollout and that FibreX uses DOCSIS technology. Similarly, there were changes to the marketing strategy that led to new terms being incorporated such as "Hybrid-Fibre coaxial HFC, fibre to the node, and then coaxial cable to the home, Fibre uses fibre all the way to the home."

[234] However, that Vodafone did not carry out any market testing as to what consumers would take from the "X" in my view supports a finding of gross carelessness as opposed to the considerably higher level of intent, actual wilfulness.

[235] Moreover, the fact that the Judge made other findings to the effect that Vodafone ought to have known that its choice of brand name, headlines and imagery were liable to mislead does not change my assessment of what Vodafone actually believed or intended at the time of the offending, which is what this ground of appeal is concerned with.

[236] As for Mr Flanagan's third point, I am not satisfied that Vodafone made the admissions alleged. The Commission relies on the following section of an interview between Vodafone's Ms Horton and Ms Fergusson and one of the Commission's investigators:

> "**MR WALKER:** So, during the rebranding process did anyone ever raise a concern about the term "FibreX" that people might misinterpret it?
>
> **MS HORTON:** People preferred others, those sorts of concerns were raised. There were plenty of formulations.
>
> **MS FERGUSON:** But there were some other names that issues were taken with, yeah.
>
> **MR WALKER:** Okay, so I wasn't clear on the answer there in terms of FibreX. Were any concerns raised internally about that name or convention?
>
> **MS HORTON:** I'd have to go back and -
>
> **MS FERGUSON:** There were a bunch of different iterations and there were concerns about others that were not used.
>
> **MR WALKER:** Okay, I'm not asking -
>
> **MS FERGUSON:** I'm just - I'm not sure about -
>
> **MS HORTON:** Yeah, that's fair to say, yes, yeah.
>
> **MS FERGUSON:** Presumably-

> **MS HORTON:** There was discussion and some were definitively ruled out, yeah."

[237] I do not take Ms Horton's first answer as confirming that concerns were raised specifically about the possibility consumers may misinterpret FibreX. It is more likely to have been a reference to the words immediately preceding and following, namely that there were many formulations and people had different preferences. This is reiterated by Ms Ferguson later in the exchange.

[238] Moreover, when asked more directly about the potential that consumers might confuse FibreX for FTTH, Vodafone's representatives stated:

> "**MS HORTON:** And I think if we thought there was to be such confusion-
>
> **MS FERGUSON:** We wouldn't have done it.
>
> **MR WILSON:** - we would have steered away because our - from our perspective this is better. This is a three day install rather than going through the pain of a fibre connection which I'm currently experiencing.
>
> **MS FERGUSON:** Me too.
>
> **MS HORTON:** Yeah, it is significantly cheaper, it is the best value gigabit plan that you can get on the market by quite a considerable margin.
>
> …
>
> **MS HORTON:** - there's certainly not an intention to try and ride on the coattails of the Government's roll-out. We wanted to differentiate it and make people know that it was different and better in many respects from the customer experience."

[239] This is further supported by the contemporaneous training materials given to Vodafone's frontline agents in October 2016 on the launch of FibreX. Some of these were discussed in the preceding paragraphs. These open with "FibreX is not Fibre aka the Government backed UFB rollout, and we should not confuse customers that it is". Importantly, these materials predate the Commission's investigation. Hence, there is considerable evidential support for the proposition that Vodafone, at the time it launched FibreX, did not intend to mislead customers into believing the product was FFTH.

[240] To use the language of the Court of Appeal in *Steel & Tube*, this is not a case in which "a trader knowingly passed its product off as something else or deliberately duped consumers about their rights".[115]

[241] It follows I am not satisfied the Judge erred in finding that Vodafone was grossly careless, as opposed to wilful, in relation to the branding charges.

[242] Nor am I satisfied that Vodafone wilfully intended to mislead consumers in respect of the availability charges. As the Commission accepted, Vodafone was entitled to make a commercial decision whereby it would only offer FibreX, as opposed to its other broadband services, in the areas where it was available. I accept it was careless in the language used in the first two charge periods, when the availability checker incorrectly represented that it was presenting all available broadband at the consumer's address, rather than just the available broadband offered by Vodafone at that address. It was accepted the representations in the third charge period were inadvertent.

[243] This ground of appeal fails as a result.

Ground (a)(ii): Error as to significance of commercial gain

[244] Secondly, the Commission alleges that the Judge erred in assessing the significance of the commercial gain Vodafone made from its offending, including by:

(a) wrongly excluding commercial gain earned after the charge period;

(b) failing to make any assessment of the commercial gain; and

(c) misapplying the Court of Appeal's decision in *Steel & Tube*.

[245] I shall deal with each claim in turn.

[246] I accept that the assessment of commercial gain is not limited to that earned within the charge period. To do so would be to draw an artificial line in the sand where

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[115] Above n 70, at [115].

in most cases, gains from conduct liable to mislead will be ongoing. Nor is it a line that has been drawn in the legislation or case law. However, given my findings on the next alleged errors, this is of little moment.

[247] I do not consider the Judge erred in declining to make any assessment of Vodafone's commercial gain. The approach the Commission suggested she should have taken was a broad-brush one, largely justified by the sheer scale of the FibreX campaign itself.

[248] Mr Flanagan properly conceded that it "is very difficult to assess Vodafone's actual gain with any precision". However, he submitted that taking into account various factors, Vodafone's financial gain from the offending "must have been measured in the millions of dollars".

[249] The correctness of that concession is borne out by the Commission's own submissions on the point. For example, the Commission accepted that it is not possible to know the number of customers who signed up to or remained on Vodafone's cable network due to being misled by the FibreX campaign or the availability representations. However, the Commission submitted that those numbers "must have been substantial". By way of illustration, the Commission referred to the falling cable broadband subscriber numbers since July 2012. In the year June 2013, the number of cable subscribers was approximately 66,000. This figure steadily declined over the next three years, which broadly coincided with the lead up to the FibreX campaign in October 2016. From that point, the decline reversed somewhat before reverting to a steep decline to 2020 when the number of cable subscribers dropped to 50,545.

[250] Vodafone submitted the brief upward movement is unlikely to be a coincidence. The increase in the additional subscribers can reasonably be attributed to the misleading elements of the FibreX campaign the Commission submitted. The difficulty with that submission is that the numbers referred to are not broken down geographically so that the figures for Wellington, Kāpiti and Christchurch can be isolated and analysed. The numbers appear to be national. Additionally, if the figures did, in fact, relate to the three relevant geographical areas, the relatively modest uptake in cable subscribers might in fact be due to factors other than the subscriber being

misled by Vodafone's FibreX campaign. Other attractive features of Vodafone's offerings such as highly competitive contract terms and rates, and installation times might well account for the increases rather than new subscribers mistakenly believing they were contracting for FTTH. This tension illustrates the inherently speculative nature of attempting this kind of analysis of commercial gain.

[251] A similar comment may be made of the Commission's attempts to calculate the revenue from customers Vodafone retained on HFC as a result of the campaign which would otherwise have been lost to competitors. The Commission has calculated that for the period from 1 July 2016 to 30 June 2019, Vodafone's annual revenue from additional or new subscribers was $22,813,628. As the Commission properly accepted, that is not Vodafone's commercial gain. However, that revenue is not broken down into geographical areas and, of course, there are many other variables which may have influenced these metrics as discussed above. Any attempt at a more refined assessment of what proportion of Vodafone's total revenue from additional subscribers may have been attributable to the FibreX campaign or the availability assertions is simply impossible. While I agree that the case law speaks of applying judgement rather than calculating to that level of precision, the challenges in going further in this case were captured in the Commission's own written submissions when it said:

> "So, Vodafone's profit from improperly obtained FibreX customers is a figure lying on a range between what it would otherwise have had to pay LFCs at the bottom end, and all of the revenue from those customers (less some minor marginal costs) at the top end. It is of course impossible to say anymore. But it is plain that Vodafone's commercial gain is in many millions of dollars."

[252] I am bound to agree with every aspect of this submission other than the last sentence which, in my view, necessarily calls for speculation rather than judgement.

[253] As for the submission that the Judge misapplied the Court of Appeal's decision in *Steel & Tube*, I cannot agree. The relevant passage of the judgment referred to by the Judge and relied on by the Commission is reproduced below:[116]

> "[101] In practice courts do not usually engage in close analysis of gain, which does not set an upper or lower limit for fines. Other information, such as advertising data, sales volume or revenue may sufficiently inform the court about the scale and seriousness of the offending. Deterrence is only one

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116 Above n 70.

> consideration at sentencing, and the requirements in any given case are a matter of judgment rather than calculation. **To the extent that a court thinks it necessary or appropriate to estimate gain**, a court may find that **proved revenue attributable to the offending** conduct is an adequate measure. To such a case, defendants may be able to discharge an evidential burden of showing that an allowance ought to be made for expenses associated with the offending goods or services."
>
> (Emphasis added)

[254] While acknowledging that high level data may sufficiently enable a Court to undertake an assessment of commercial gain, the Court of Appeal also plainly contemplated that such an assessment is not necessary or appropriate in every case. It is just one culpability factor among several. Furthermore, the Court's qualified reference to "proved revenue attributable to the offending" recognises that not only is such a measure not available in every case but even where it is, it may not be necessary or appropriate to use it.

[255] It follows I have not identified any errors relating to commercial gain that resulted in a manifestly inadequate starting point.

Ground (a)(iii): Error as to assessment of harm to consumers

[256] Thirdly, the Commission contended that the Judge erred in assessing the harm to consumers caused by the offending, including by placing inadequate weight (if any) on the schedule of complaints received by the Commission and the victim impact statements presented by the Commission.

[257] I consider the schedule of complaints to be of limited probative value in assessing consumer harm, albeit for slightly different reasons from the sentencing Judge.

[258] First, although the schedule was admitted for the purpose of demonstrating the number of complaints, it is relevant that the complaints themselves were broad and varied in nature. This gives rise to the risk that consumer harm not linked to the index offending would be taken into account in assessing Vodafone's culpability.

[259] Secondly, even if the Commission's case is taken at its highest, a total of 50 complaints over a two-year period is not of great significance, particularly when viewed in the context of the FibreX campaign targeting 250,000 homes.

[260] It follows that I do not consider the Judge erred in not placing "any particular weight" on the number of complaints in assessing harm to consumers.[117]

[261] I do, however, take a different view from her Honour in relation to the victim impact statements ("VISs").

[262] Prior to the sentencing, there was a brief disputed facts hearing. In his written submissions on this appeal Mr Flanagan advised that before that hearing, the Commission indicated it would make the five consumer victims who had given statements available for cross-examination. The parties, apparently, later agreed that this course was unnecessary because Vodafone's objection was founded on the legal constraints around the scope of the information contained in the VISs rather than the reliability or credibility of the makers of the statements. Any objections could be canvassed at the sentencing itself by way of submission.

[263] However, in her sentencing remarks the Judge noted that the VISs contained expressions of opinion as to Vodafone's misleading conduct, described their dealings with Vodafone's staff and the outcomes they suffered. She recorded that Vodafone objected to the statements because they contained untested factual assertions which went beyond the legal scope of VISs. She concluded that Vodafone's inability to test the reliability of the makers of the VISs was highly prejudicial to Vodafone, given the Commission's purpose in presenting the statements, that was to show actual rather than potential harm to consumers. The Judge thus concluded that no weight should be placed on any part of the statements.

[264] It is extremely unusual, if not unprecedented, for victims of crime to be cross-examined or otherwise challenged on the contents of their VISs. That is probably, at least in part, because VISs are intended to inform the Court of the effects of the

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[117] Sentencing decision, above n 2, at [70].

offending on the victim and there is generally very limited utility in challenging a victim's views especially where assertions of remorse by a defendant are advanced.

[265] Further guidance can be obtained by looking to the legislation, which defines and refers to VISs as "information".[118] They form part of the material available to the Court at sentencing but do not constitute evidence, per se, just as cultural reports tendered under s 27 of the Sentencing Act 2002 ("the Sentencing Act" do not amount to evidence. As the Supreme Court recently stated when discussing s 27 reports, any shortcomings or issues relating to the report's conclusions can be adequately addressed in the weight to be attributed to the various conclusions, rather than as a question of admissibility.[119] I consider that the same logic applies by analogy here.

[266] While it was open to the Judge to determine the weight to be placed on the VISs,[120] in my view it was wrong to exclude them on the basis that the defendant had not had the opportunity to test the reliability of the makers by cross-examination, especially when it seems the Commission had offered to make the victims available for that purpose (although I accept the Judge may not have been aware of that offer).

[267] In its submissions on this appeal Vodafone claimed that the most the VISs could have shown was the harm already accepted by Vodafone – namely that its offending deprived consumers of the ability to make an informed choice.

[268] However, there was material in at least some of the VISs which Vodafone did not object to which disclosed tangible adverse effects of the offending on victims. In his written submissions, Mr Flanagan referred to one example which relevantly read:

> "10. Because I purchased FibreX from Vodafone, I experienced the inconvenience of having our driveway dug up for a second time, as it had already been dug up when our original fibre service was connected.
>
> 11. I am concerned that the FibreX service is not future-proofed in the same way fibre services are."

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118 Victims' Rights Act 2002, s 17AA(2)(a).
119 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [175].
120 Section 22B.

[269] There can be no question this victim's description went to the effects of the offending on them and was plainly relevant in terms of the sentencing Court's function reflecting the mandatory requirement under s 8(f) of the Sentencing Act to take into account information concerning the effect of the offending on victims. In these circumstances the Judge should have engaged in a closer analysis to exclude those aspects of the VISs which fell outside the permissible scope without disregarding the statements entirely.[121]

[270] It follows I am satisfied the Judge erred in failing to place any weight on the victim impact statements. However, the question for me is whether this error has any material effect on assessing the appropriate starting point. I am not satisfied it does because the essence of the harm is not so much the risk potential subscribers were exposed to by Vodafone's conduct but rather, as Vodafone accepted, the fact that consumers were deprived of the ability to make an informed choice. The Judge expressly addressed this in her sentencing remarks.[122] The victim group comprised the 250,000 households passed. I agree with the Judge that the medium by which UFB is delivered to consumers' households is important to them and that FibreX had the limitations she listed. Relatedly, I also agree with the Judge in respect of the availability charges; that reliance on the availability checker deprived consumers of choice. That is the harm.

[271] This is not a case where, as a consequence of misleading representations, those consumers who did contract for FibreX received a materially inferior product, although I accept it had inherent limitations that differentiated it from FTTH. As Mr Flanagan put it in introducing his oral submissions on the appeal, Vodafone had a competing product that the "Commission...happily accepted [was] an excellent one [which] deserved to do well in the marketplace".

Ground (a)(iv): Failure to follow approach in Steel v Tube

[272] Fourthly, the Commission alleges that in setting the starting point, the Judge failed to compare Vodafone's offending and its particular culpability factors against

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121 *Curtis v Police* (1993) 10 CRNZ 28 (HC).
122 At [77]–[78].

the approach and offending in *Steel & Tube*.[123] It says that at a minimum, the Court was required to identify the factors justifying the starting point adopted.

[273] In setting the starting point the Judge identified the relevant culpability factors with reference to the approach in *Steel & Tube*. She expressly addressed the mitigating factors.[124] Then she determined the maximum penalty.[125] She examined comparable case law.[126] She summarised (and noted the limitations of) comparable cases and set out the parties' respective positions.[127] From that she proceeded to fix the global starting point.[128]

[274] The fact that the Judge referred to but did not expand on "the applicable sentencing purposes and principles" at this point in the decision is of limited moment.[129] The Judge had, from the outset[130] cited the relevant passage from *Steel & Tube* where the Court identified denunciation, accountability, totality and consistency as relevant sentencing considerations, as well as the objects of the FTA more specifically.[131] In any event, it is plain from a reading of the sentencing notes as a whole that the Judge recognised and applied the relevant sentencing principles. That the Commission may consider that certain principles such as denunciation may not have been applied in practice is a different issue to which I shall later return.

[275] The essence of this ground of appeal is actually the submission that Vodafone's offending was substantially more serious than that in *Steel & Tube*, and warranted a much higher starting point. Mr Flanagan submitted that each "serious aggravating feature" identified by the Court of Appeal in that case was present here, namely:

(a) Vodafone offended in a calculated manner with intent to profit by misleading consumers;

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123 Above n 70.
124 At [88]–[89].
125 At [90]–[101].
126 At [102]–[115].
127 At [116]–[120].
128 At [121]–[128].
129 At [128].
130 At [14].
131 *Steel & Tube*, above n 70, at [90]–[92].

(b) the product sold was materially different to what it was represented to be;

(c) Vodafone persisted after being put on notice; and

(d) the offending resulted in significant commercial gain and harm to consumers and competitors.

[276] The first and last of these factors have already been discussed. For the reasons earlier given I am not satisfied that Vodafone's level of intention can be elevated to wilful or intentional nor have I accepted the Commission's submissions on the level of commercial gain and harm.

[277] However, I am satisfied that FibreX was a materially different product to FTTH, which, through Vodafone's gross carelessness in marketing, is what it was represented to be. As previously noted, the harm to the consumer was the denial of their ability to make an informed choice rather than the receipt of a materially inferior product, even if as an HFC service, FibreX had inherent limitations that differentiated it from a FTTH service.

[278] I also accept that Vodafone continued its marketing campaign despite being put on notice by the Commission from an early stage. This conduct may be contrasted to *Steel & Tube* where the company responded by withdrawing its steel mesh from the market immediately.

[279] As against that, Vodafone's offending spanned 18 months in contrast to the four years in *Steel & Tube*, and plainly involved a much more sophisticated and extensive marketing campaign. In addition, in comparing the two levels of fine, there are different considerations in play such as the different maximum penalties available and the effect of inflation.

[280] Taking all these factors into account and recognising that setting the appropriate starting point in a case like this requires judgement rather than a detailed

analysis, I consider that a significantly higher starting point is warranted albeit not of the scale suggested by the Commission.

[281] I consider an uplift of one third from the $2,100,000 figure set by the Judge is appropriate, bringing the global starting point to $2,800,000.

Ground (b): Manifestly inadequate uplift

[282] The next ground of appeal advanced by the Commission relates to the uplift applied for Vodafone's financial means. It submits that the Judge imposed an uplift that was manifestly inadequate because the Judge:

(a) correctly concluded that the proposed penalty was inadequate to achieve specific deterrence of the defendant, having regard to the defendant's financial resources; but

(b) imposed an uplift of only $65,475, which did not achieve its stated purpose of ensuring that the penalty served as a personal deterrent.

[283] I am satisfied that an uplift of that order is wholly insufficient to meet the purpose for which it was intended. My reasons follow.

[284] In increasing the maximum penalty for misleading conduct under s 11 of the FTA, Parliament expressly intended to give courts the flexibility to impose higher penalties that undermine the profitability of the offending.[132] Otherwise, the penalty may simply be regarded as a modest licence fee to offend or treated as an acceptable cost of doing business.

[285] I also do not accept Vodafone's submission that the different aspects of its business can be compartmentalised, and that it is more appropriate to assess the appropriate level of fine against the corresponding part of the business (i.e., that for fixed broadband). This is not a distinction drawn in the case law nor it is consistent with the purpose for which a means adjustment is made. The inherent absurdity of

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[132] Fair Trading Amendment (No 3) Bill 2001 (192-1) (explanatory note) at 1.

that approach is highlighted by calculating the proportion of the uplift to the revenue Vodafone received from its fixed broadband services. The amount of $65,475 represents approximately 0.009 per cent of Vodafone's revenue from that source in 2021 alone. Plainly a more significant uplift is called for.

[286] This is where the concept of a fine which "stings" is engaged. In my view a greater uplift is required in order to ensure the penalty "stings" from Vodafone's perspective and serves as a personal deterrent, particularly given Vodafone's history of non-compliance with the FTA. On the other hand, the fine must retain proportionality to the offending.[133]

[287] That brings me to the appropriate uplift in this case. Vodafone's means are, on any measure, very substantial. The company was purchased in 2019 for $3.4 billion and produced an EBITDAF of $447.9 million for the year ending 31 March 2021. If the Commission's suggested starting point of $4.8 million is adopted, it contends that an uplift of around 15 per cent would have been appropriate, bringing the fine to $5.865 million. If that starting point is not adopted, the Commission submits that a significantly greater uplift would be required.

[288] The exercise is made more difficult by the fact that this approach is relatively novel in New Zealand and there is little by way of comparison. The Commission referred me to several Australia cases, where what is suggested is a more established practice, although predominantly in the civil context.[134]

[289] There does not appear to be any real consistency in the case law in terms of the quantum of the penalty where the offender has substantial means. For instance, in one of the cases referred to me the defendant's gross sales revenue was between approximately $250 and $340 billion during the period of offending. There, a fine of $75 million was described as "not a particularly significant amount".[135] In another,

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133 *Steel &* Tube, above n 70, at [105].

134 *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 [*Volkswagen*]; *Australian Competition and Consumer Commission v Leahy (No 3)* [2005] FCA 265, 215 ALR 301; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330, (2015) 327 ALR 540; and *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)* [2018] FCA 953 [*Apple*].

135 *Volkswagen*, above n 134.

where the defendant's gross revenue exceeded $230 billion, the Court considered a fine of $9 million to be sufficient.[136] While this is a broad brush analysis that does not take into account any other differences between the cases, it is nonetheless instructive if only to demonstrate that each case turns on its own circumstances.

[290] Again, the assessment of what the level of uplift should be in any case is an evaluative exercise requiring judgement having regard to all the circumstances. Here an uplift of $700,000 on account of means, or 25 per cent of the $2.8M starting point, seems to me to strike the appropriate balance between the competing considerations.

Ground (c): Departure from accepted sentencing methodology

[291] The Commission finally alleges that the Judge erred in the discount applied for mitigating factors specific to Vodafone, in particular because she did not apply the two-step sentencing methodology laid down by the Court of Appeal in *Moses v R.*[137] It says that this resulted in greater discounts than would otherwise have applied.

[292] I am satisfied that the Judge's failure to follow the two-step sentencing approach is an error of principle. However, under s 250 of the Criminal Procedure Act 2011, I must also be satisfied that a different sentence should be imposed. To this end the well-established rule against "tinkering" with a sentence that is nonetheless within the available range applies.

[293] In this instance, the Judge's failure to follow *Moses* would only result in a notional additional discount of $46,725 on the Commission's analysis. In the context of a multimillion dollar fine, this is plainly minor and did not bring the fine outside of the available range. Nor do I consider the Judge's approach "opens the door to differing methodologies in future FTA cases" as the Commission contends.

[294] This ground of appeal fails as a result.

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136 *Apple*, above n 134.
137 *Moses*, above n 112.

Conclusion on Commission's sentence appeal

[295] The Commission's appeal against sentence is allowed. The global starting point is increased from $2,100,000 to $2,800,000. The means uplift is increased from $200,000 to $700,000, or 25 per cent of the new global starting point of $2,800,000.

[296] The remaining adjustments to the starting point were not challenged by the Commission. They comprise:

(a) a 20 per cent uplift for previous offending;

(b) a five per cent discount for co-operation; and

(c) a 25 per cent discount for guilty plea on the availability charges, applying a 65/35 per cent split between the branding and availability charges.

[297] Under the orthodox *Moses* two step methodology, each of the above uplifts and discounts (including the means adjustment) would be applied at step two of the sentencing process as aggravating and mitigating features of the offender.[138] However, the matter is complicated by the fact that the discount for guilty plea applies only to the availability charges, which the Judge apportioned at 35 per cent of the adjusted starting point, after the uplift for previous conviction and discount for co-operation had been applied.

[298] In my view, the approach that most closely accords with *Moses* is as follows:

(a) First, to apply the 65/35 per cent split to the starting point of $2,800,000, leading to:

(i) a starting point of $1,820,000 on the branding charges; and

(ii) a starting point of $980,000 on the availability charges.

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138 Above n 112.

(b) Second, to apply the 25 per cent means uplift, 20 per cent uplift for previous offending, and five per cent discount for co-operation to the $1,820,000 starting point on the branding charges, leading to:

(i) an adjusted starting point on the branding charges of $2,548,000.

(c) Third, to apply the 25 per cent means uplift, 20 per cent uplift for previous offending, 5 per cent discount for co-operation, and 25 per cent discount for guilty plea to the $980,000 starting point on the availability charges, leading to:

(i) an adjusted starting point on the availability charges of $1,127,000.

(d) Fourth, to calculate the fine for each of the nine branding charges from the adjusted starting point of $2,548,000 on those charges, being:

(i) $238,111 on each of the nine charges.

(e) Fifth, to calculate the fine for each of nine availability charges from the adjusted starting point of $1,127,000 on those charges, being:

(i) $146,510 on each of the six charges for the charge periods from 1 November 2016 to 19 May 2017 and 20 May 2017 to 31 October 2017; and

(ii) $82,646 on each of the three charges for the charge period from 1 November 2017 to 28 March 2018.[139]

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[139] This reflects the fact that the representations in the third charge period, the Commission accepted, were inadvertent. The Judge appeared to apportion the fine on the availability charges between the first two charge periods, and the third charge period, at approximately 78%/22%, although she did not explain her calculations. I have followed that split here.

(f) Finally, to add together the adjusted starting points, leading to a total fine of $3,675,000.

[299] Vodafone is therefore sentenced to pay a total fine of $3,675,000, which is an increase of $1,425,000 from the fine of $2,250,000 imposed by the Judge at first instance.

Vodafone's sentence appeal

[300] Because I have determined that the Commission's sentence appeal must succeed, it necessarily follows that I do not accept the sentence imposed in the District Court was manifestly excessive. That would ordinarily dispose of Vodafone's sentence appeal. However, for the sake of completeness, I shall deal with Vodafone's sentence appeal albeit in a more abbreviated fashion than might ordinarily be the case.

[301] Mr Pilditch did not take issue with the Court's factual findings at sentencing but submitted that the end sentence was nonetheless manifestly excessive because the Court:

(a) departed from accepted sentencing methodology;

(b) made several errors relating to the adjustments for personal culpability factors, namely:

(i) improperly penalised Vodafone for offending that occurred at the same time as the present offending;

(ii) applied an uplift for Vodafone's previous convictions that was outside of the available range;

(iii) applied an insufficient discount for co-operation; and

(iv) failed to provide a discount for reducing trial time;

(c) applied a means adjustment; and

(d) adopted a manifestly excessive starting point.

[302] I shall deal with each of these grounds in turn.

Departure from accepted sentencing methodology

[303] Mr Pilditch acknowledged that the Judge failed to apply the two-stage sentencing methodology in *Moses* but contended, despite the Commission's submission to the contrary, that this resulted in a sentence that was manifestly excessive.[140]

[304] On Vodafone's analysis, this failure resulted in the fine on the availability charges being $140,000 higher than it otherwise would have been.

[305] As noted earlier, I am satisfied that the Judge's failure to follow the two-step sentencing approach is an error of principle. However, the focus must be on the end sentence imposed, which I found was manifestly inadequate. Furthermore, in substituting the sentence on appeal I have endeavoured to adhere to the *Moses* methodology as best as possible in the circumstances.

Errors relating to adjustments for personal culpability factors

[306] Under this ground of appeal, Vodafone alleges a number of errors relating to the adjustments adopted for personal culpability factors. It acknowledges that individually, these errors may not have resulted in a manifestly excessive sentence but submits that in combination they become material.

(a) Improperly penalising Vodafone for offending that occurred at the same time as the present offending

[307] Mr Pilditch submitted that the Court erred in taking into account Vodafone's Billing Beyond Termination offending, which overlaps to a certain extent with the present offending in that it took place between 1 January 2012 and 17 December 2018.

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140 Above n 112.

Mr Pilditch submits that this offending ought to have been considered as if it was being heard alongside the present charges, totality being the primary consideration.

[308] This submission overlooks to a certain extent the fact that the Billing Beyond Termination offending predated the current offending by over four years. In this regard, even if it cannot be regarded as aggravating the present offending, it plainly does show an ongoing pattern of non-compliance. That is precisely the position reached by the Judge, as illustrated by the following paragraph of the judgment:[141]

> "… It is not in dispute that the Billing Beyond Termination offending occurred during the same period as the present charges and on that basis, those convictions cannot be regarded as aggravating offending. However, in my view, this conduct is still relevant as another example of Vodafone's culture of non-compliance."

[309] It follows that I do not consider there to be any error in the approach adopted by the Judge. In any event, however, the complete exclusion of the Billing Beyond Termination offending is unlikely to have made a material difference to the 20 per cent uplift applied for all of Vodafone's previous convictions. It was not the most serious of the five 'groups' of charges for which Vodafone was penalised, nor did it have as direct a relevance to the present charges.[142]

(b) Uplift for previous convictions

[310] Following on from the previous ground, Mr Pilditch submitted that Vodafone's previous convictions in general are not as aggravating as the Court suggested and did not warrant as high an uplift. He submitted that the convictions capture what is fundamentally different criminality and are temporally distinct.

[311] With respect, I take a different view. All of Vodafone's previous convictions relate to offending under the FTA and, when taken together, reveal a concerning indifference to its consumer obligations under the Act. The uplift applied by the Judge

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141 Sentencing decision, above n 2, at [145].

142 It was accepted by the Commission that the Billing Beyond Termination offending was not intentional and had occurred due to errors in Vodafone's legacy billing systems. In contrast, the Broadband Everywhere and Largest 3G network campaigns involved misleading representations with regard to the product offered, and did not stem from systems or human error.

appropriately reflects the nature and extent of these convictions, and the persistence of Vodafone's conduct despite serial penalties being imposed.

[312] I also do not see it as significant that Vodafone was constituted by different senior management teams across this period. If anything, this feature tends to suggest either that there is an entrenched culture of non-compliance within senior levels of the company or that Vodafone has attempted to address its compliance issues by passing them around management teams, rather than undertaking a comprehensive corporate strategy designed to address regulatory compliance in a co-ordinated fashion.

(c) Discount for co-operation

[313] Mr Pilditch next submitted that Vodafone's co-operation with the Commission's investigation warranted a greater discount than five per cent. He pointed out that Vodafone was not compelled to do anything, and that several exhibits relied on by the prosecution would not have been admissible but for Vodafone's co-operation. Mr Pilditch also noted that it was Vodafone who alerted the Commission to the error which gave rise to the availability charges in the third charge period.

[314] I am not satisfied the Judge erred in this respect. While Vodafone volunteered some information, the Commission's position was that some of this information was wrong or misleading in important respects, and resulted in additional delays at trial. Moreover, its co-operation did not accompany guilty pleas on all charges nor payment of compensation. The five per cent discount struck the appropriate balance between these considerations.

(d) Discount for reducing trial time

[315] Finally in relation to personal culpability factors, Mr Pilditch submits that the Court failed to consider a relevant mitigating factor, namely the steps taken by Vodafone to reduce the trial time.

[316] Mr Pilditch explained that at sentencing, Vodafone submitted that it should be given credit under s 9(2)(fa) of the Sentencing Act for its offer to provide all briefs of evidence to the Court in advance of the trial, and for those briefs to be taken as read,

or read at the trial. He says that it was the Commission which insisted all evidence be led viva voce.

[317] According to Mr Pilditch, Vodafone's submission was disregarded by the Judge at the hearing, and not addressed in her sentencing decision.

[318] I am not certain it is appropriate to give credit under s 9(a) for a mere offer to take steps which could operate to shorten the proceeding or reduce costs, even if the offer was frustrated by the other party's intransigence. Whether a discount is given at all for this factor is a matter for evaluation by the Judge in the particular circumstances of the case.[143] In this instance, there may be a variety of tactical reasons in play as to why Vodafone was prepared to have the briefs of evidence taken as read, or read at the trial, just as the Commission may have been motivated to insist all evidence be led viva voce. In any event, experience indicates that taking evidence as read does not, in the long run, generally materially reduce hearing time. The Judge is still required to read the evidence either outside Court sitting times or in Court. Inevitably there will be supplementary evidence required, particularly in a document heavy case such as this.

[319] While it would have been preferable for this factor to have been squarely addressed in the judgment, I do not consider the failure to do so amounts to a material error.

Means adjustment

[320] The next ground of appeal relates to the upward adjustment the Court applied for Vodafone's means. In short, Mr Pilditch submitted that such an adjustment, while available to the Court more generally, was not warranted in this case.

[321] Mr Pilditch disputes that Vodafone ever accepted a means adjustment was appropriate or invited the Court to make one. He also submits that while the Court articulated a global upward adjustment of $65,000, it effectively imposed a $140,000 increase, which is the equivalent of approximately 20 per cent.

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143 *Mehrok v R* [2021] NZCA 370 at [50].

[322] Mr Pilditch further reinforces that the fine must retain proportionality to the offending and submits that the fine adopted by the Court before the means adjustment was plainly sufficient to serve its purpose, being the highest on record for offending under the FTA.

[323] I have already addressed the means adjustment in the context of the Commission's sentence appeal. I found that the means adjustment was not only necessary but that a greater uplift was required in the circumstances to ensure the fine served its deterrent purpose and had a "sting".

Manifestly excessive starting point

[324] Last, Mr Pilditch submitted that the sentencing Judge erred in her assessment of the gravity of the offending when measured against the relevant case law and, in turn, its assessment of the appropriate starting point.

[325] First, Mr Pilditch submits there is a material difference in the duration of offending; here, 18 months, in contrast to the four years in *Steel & Tube* and the nine years in *Reckitt Benckiser*.[144] While technically correct, this submission overlooks the nature of the offending in those cases, which appears to have been more passive in contrast to the involved and extensive multimedia advertising "blitz" in the present case.

[326] Secondly, unlike the above cases and *Carter Holt Harvey*, the present offending did not involve a risk to life and safety.[145] In Mr Pilditch's words: "no one was going to die if FibreX did not deliver a comparable service to a FTTH connection". Again, this cannot be disputed, although I consider Vodafone risks understating the potential effects of its offending by describing it as "an architectural possibility that some consumers could experience some issues with screening Netflix and playing shooter games". Broadband is a key resource to thousands of New Zealanders and, as the Judge found, the choice of broadband is an important one for

144 *Steel & Tube*, above n 70; and *Reckitt Benckiser*, above n 90.
145 *Carter Holt Harvey*, above n 90.

consumers. Vodafone's offending, it accepted, caused harm to consumers within the FibreX coverage areas by depriving them of the ability to make an informed choice.

[327] Thirdly, Mr Pilditch submitted that in the cases referred to above, there was no way for a consumer to learn the true position. In contrast, he says that Vodafone never kept the access technology from consumers, rather this information was readily available online. Mr Pilditch adds that unlike *Carter Holt Harvey*, Vodafone made changes to its upfront advertising in response to the Commission's investigation.[146] As I have touched on earlier when discussing Vodafone's "layered" approach, I do not accept the information was 'readily available' to consumers. In addition, the upfront changes Vodafone made to its advertising were largely ineffective.

[328] Mr Pilditch said that these factors, when considered together, demonstrate that the present offending is significantly less serious than these cases, and yet the Court selected a starting point within a comparable range. For reasons that I have already discussed, I do not accept this argument. The starting point of $2,100,000 was low in all of the circumstances.

Conclusion on Vodafone's sentence appeal

[329] It follows that Vodafone's appeal against sentence must fail. Consistent with the accepted approach on Solicitor General appeals the substituted sentence is the lowest of the available range.

RESULT

[330] The conviction appeal is dismissed.

[331] Vodafone's sentence appeal is dismissed.

[332] The Commission's sentence appeal is allowed.

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146 Above n 90.

[333] The total fine of $2,250,000 is quashed and a fine of $3,675,000 is imposed in its place. This is to comprise:

(a) $2,548,000 on the branding charges, being $238,111 on each of the nine charges; and

(b) $1,127,000 on the availability charges, being:

(i) $146,510 on each of the six charges for the charge periods spanning 1 November 2016 to 19 May 2017 and 20 May 2017 to 31 October 2017; and

(ii) $82,646 on each of the three charges for the charge period spanning 1 November 2017 to 28 March 2018.

Moore J

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