IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA484/2019
[2020] NZCA 549

BETWEEN	COMMERCE COMMISSION Appellant
AND	STEEL & TUBE HOLDINGS LIMITED Respondent

CA485/2019

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AND	COMMERCE COMMISSION Respondent

Hearing:	12 August 2020
Court:	Miller, Brown and Courtney JJ
Counsel:	JCL Dixon QC, A M McClintock and J B Hamlin for Commerce Commission M R Heron QC and E McGill for Steel & Tube Holdings Limited
Judgment:	9 November 2020 at 4.00pm

JUDGMENT OF THE COURT

A Steel & Tube's appeal is allowed.

B Commerce Commission's appeal is dismissed.

C The fines substituted in the High Court are set aside.

D We impose the fines set out at [155] of this judgment, totalling $1,560,000.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] This is a sentence appeal and cross-appeal for offending against the Fair Trading Act 1986.

[2] Steel & Tube Holdings Ltd pleaded guilty to 24 representative charges of misleading conduct and false representations in connection with its "seismic grade" steel mesh, known as SE62 mesh. It represented that the mesh, which is used to reinforce concrete structures, was 500E grade, meaning that it had been tested and complied with the relevant building standard, AS/NZS 4671:2001 ("the Standard"), and further that it had been tested independently.

[3] The key characteristic of 500E steel is that it meets a high standard for ductility, or (put simply) the ability to stretch in a uniform way under stress. Following the Canterbury earthquakes the Standard was amended to require that steel mesh used in concrete slab floors on "good" ground be 500E grade.[1] Steel & Tube developed SE62 mesh to meet this standard. During the four-year period covered by the charges,

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[1] Amendment on 11 August 2011 to Standards New Zealand *New Zealand Standard 3604:2011, Timber-framed buildings* (14 February 2011), cl 7.5.8.1. This amendment required reinforcing steel in slab-on-ground floors to be Ductility E Class in compliance with Standards New Zealand and Standards Australia *Australian/New Zealand Standard 4671:2001, Steel Reinforcing Materials* (2 April 2001).

1 March 2012 until 5 April 2016, the company sold approximately 480,000 sheets at an average premium over non-seismic mesh of $8.61 per sheet.

[4] The steel may indeed meet the ductility requirements of the Standard, but that cannot now be verified. What can be said is that it was not tested in the prescribed manner, and so strictly could not be said to comply with the Standard. By representing that it did, and that it had been independently tested, Steel & Tube misled consumers.

[5] In the District Court the company pleaded guilty and was fined a total of $1,885,000.[2] Both parties appealed to the High Court, where the fines were increased to a total of $2,009,280.[3]

[6] Both parties have been given leave to bring second appeals to this Court.[4] Steel & Tube maintains that the starting point of around $3.8 million set in the High Court was without precedent or statutory support,[5] and was adopted without hearing argument, and that the resulting sentence, far exceeding any previously imposed on a single entity under the Fair Trading Act, was manifestly excessive. The Commerce Commission argues that the decisions below were affected by error. In particular, the High Court Judge wrongly held that the state of mind of the employee responsible for flawed testing processes could not be attributed to the company for sentencing purposes, wrongly allowed too great a discount for totality, and failed to take into account Steel & Tube's size, resources and financial gain: all of this meaning that the sentence was manifestly inadequate.

The facts

[7] The following account is taken from the agreed summary of facts, a lengthy and dense document that conveys an impression of having been closely negotiated.

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2 *Commerce Commission v Steel & Tube Holdings Ltd* [2018] NZDC 21579 [District Court decision].

3 *Commerce Commission v Steel & Tube Holdings Ltd* [2019] NZHC 2098 [High Court decision]. Also see the supplementary judgment in which individual sentences are set out: *Commerce Commission v Steel & Tube Holdings Ltd* [2019] NZHC 2209.

4 *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 39 [Leave decision].

5 See High Court decision, above n 3, at [115].

Steel & Tube

[8] Steel & Tube is a major and longstanding producer of steel products in New Zealand. The summary of facts describes it as a substantial firm, employing 1000 employees and operating 56 branches and distribution centres in New Zealand, and it records that in the year ended June 2016 its revenues were approximately $516 million and its underlying earnings for the same period $19.4 million. Mr Heron QC, who appeared for Steel & Tube, advised us that the company's market capitalisation — it is listed on the New Zealand Exchange — was then $192 million but is now only $96.3 million.

E-class mesh and the Standard

[9] Steel mesh used in certain building applications must comply with the Standard, which provides for three ductility classes, L (low), N (normal) and E (earthquake).[6] After steel-reinforced concrete slab foundations in houses performed poorly in the Canterbury earthquakes, the Department of Building and Housing introduced an amendment in 2011 requiring that steel mesh used in concrete slab-on-ground floors on "good" ground be of the E ductility class.

[10] The Standard requires that reinforcing steel and steel mesh must meet certain chemical, mechanical and dimensional requirements, and it further requires, importantly, that testing against the Standard must follow prescribed sampling and testing procedures. To be designated 500E, steel mesh must exhibit uniform elongation of not less than 10 per cent and yield stress of between 500 MPa and 600 MPa, when tested in accordance with the Standard.

[11] There are several relevant features of the Standard's testing requirements. First, tested steel must be aged, which means that it must be heated to a prescribed temperature for a period, then cooled. This is designed to emulate changes that occur in steel as it ages naturally. Second, the Standard prescribes how steel must be stretched to demonstrate uniform elongation. Third, the Standard provides for batch

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6 This is provided for in Acceptable Solution or Verification Method documents issued by the Ministry of Business, Innovation and Employment the effect of which is to establish compliance with the Building Code. See ss 17, 19 and 22 of the Building Act 2004. See also *Australian/New Zealand Standard 4671:2001*, above n 1, cl 5.2(c).

testing and sets out how batch compliance is to be assessed. Four samples must be taken and tested per batch of up to 1,000 sheets. Yield stress, uniform elongation and yield ratio are to be calculated as the mean of the individual values from the number of sampled items. Individual test values may not be used, and test results that do not meet the Standard must be included when calculating the mean. Where a batch mean does not meet the specified values for each parameter, a larger sample must be tested to establish compliance. Finally, the Standard establishes a procedure for collecting test results and using them for long-term quality evaluation. This process is considered important because it provides a broader picture of the underlying characteristics of the product. After 2003, a manufacturer who does not use long-term quality evaluation must test a much larger number of samples per batch and more variables must be assessed.

Steel & Tube introduced SE62 mesh and sold it in large quantities

[12] Steel producers responded to the Department's initiative by introducing "E" grade steel mesh products. Steel & Tube called its products "Seismic SE Grade 500E Ductile Reinforcing Mesh". One of those products, which became its best seller, was SE62, and it is the subject of the charges. Its designation comes from the terminology used by the Standard: "S" means the bars are square, "E" means the steel is earthquake grade, and "6" and "2" refer respectively to steel diameter (6 mm) and mesh spacing (200 mm). It was manufactured in sheets of varying sizes.

[13] Steel & Tube began selling SE62 mesh in March 2012, and the 24 charges span the period from then until April 2016. Over the four-year period Steel & Tube sold approximately 482 batches of the mesh, each comprising not more than 1,000 sheets. The summary records that the average price at which Steel & Tube sold SE62 small mesh sheets to merchants during that period was $51.74 per sheet, while the average price for equivalent-sized mesh in its non-seismic range was $43.13 per sheet.

Steel & Tube's failures to meet the Standard

[14] Steel & Tube failed to meet the Standard in four respects. First, it did not age test pieces. The impact of this failure cannot be measured with precision, but the Commission accepts it is likely to have been negligible.

[15] Second, Steel & Tube did not measure uniform elongation in accordance with the Standard at either of its two facilities in Auckland and Christchurch. The methods used at those facilities differed. The method followed in Auckland may have overstated ductility of the mesh, but the extent of any overstatement cannot be estimated with precision.

[16] Third, Steel & Tube followed a re-testing procedure which did not comply with the Standard. Individual test results that failed the uniform elongation requirement were excluded when calculating batch compliance. This may mean that some batches did not meet the Standard, but the extent of any overstatement cannot be estimated with precision.

[17] Finally, Steel & Tube did not carry out long-term quality evaluation. This means that its test results may not accurately represent the characteristics of the product.

[18] In consequence, the mesh that Steel & Tube produced during the four-year charge period and sold as 500E grade was not tested as the Standard required. None of it could be described as 500E grade.

What can be said about the non-compliant SE62 mesh?

[19] The Commission tested three sheets of SE62 mesh purchased from a retailer and found that none met the uniform elongation requirement of the Standard and some failed yield stress and yield ratio requirements. It then tested a further three sheets, all of which also failed the uniform elongation requirement. It does not follow that the overall population of mesh fails to meet those requirements; far more extensive sampling would be needed to justify that inference.

[20] Relying on advice from the Ministry of Business, Innovation and Employment, which is now responsible for the functions of the former Department of Building and Housing, the Commission and Steel & Tube agree that non-compliant steel mesh poses no risk to life when used in concrete slabs on the ground and is very unlikely to do so when used in suspended floors. It may carry a greater risk of loss of amenity than

would compliant mesh. Steel & Tube maintains that the adverse impacts of installing mesh with uniform elongation as low as five per cent are negligible.

Steel & Tube's misrepresentations about compliance

[21] As noted above, the charges fall into two categories. The first 12 concern representations on batch tags, batch test certificates and on the Steel & Tube website and in "various other collateral". They took the following form:

(a) Batch tags were attached to each sheet of SE62, and most of them included the words "Seismic 500E grade mesh".

(b) Employees who tested batches of mesh prepared test certificates copies of which were attached to approximately 19 per cent of mesh deliveries. Each certificate represented that the "reinforcing steel class" was "500E" and noted that the testing standard was AS/NZS 4671:2001.

(c) The mesh was described as 500E grade on other documents, including brochures, invoices and packing slips.

(d) Steel & Tube's website narrated that its products were manufactured to comply with the Standard and stated that "Seismic Construction Meshes are fabricated from 500E grade steel to specifications listed" in the Standard. Other documents on the website included a customer newsletter, a corporate profile and a product catalogue. In various ways they all represented that Steel & Tube used 500E steel in its seismic mesh, that the mesh met the Standard, and that the mesh had been tested in accordance with the Standard, the requirements of which were summarised in some detail in product catalogues. Customers were assured that the mesh met the Building Code. By way of illustration, the customer newsletter stated:

> …
>
> In response to growing demand for a product to meet these [earthquake] requirements, Steel & Tube released a new generation product — Seismic SE Grade 500E Ductile

> Reinforcing Mesh. The product range has been designed to fully comply with the new legislation and is an exact match to the specifications listed in the steel reinforcing standard. This allows designers, specifiers and contractors to accurately and reliably select the correct reinforcing directly from the standard without worrying about variations, equivalents or alternatives.
>
> By employing micro-alloyed Class E steel in the fabrication process, Seismic SE possess significantly greater ductility than hand-drawn wire meshes, which means the reinforcing can continue to stretch under load after yield has been reached. […]
>
> Not only that, Seismic SE is tested and tagged before it leaves the factory floor. Each tag is unique and links the sheet to its test certification, date of manufacture and quality control data, and can be used to track the product's performance years after it's installed. […]

[22] It will be seen that Steel & Tube went to some lengths to assure customers, in specific terms, that its mesh not only met the Standard's specifications but also had been tested to verify that it complied.

Steel & Tube's misrepresentations about independent third-party testing

[23] Charges 13 to 21 concern representations that the mesh had been tested by Holmes Solutions, which is an independent and accredited testing agency, or were in general independently tested and certified. These charges also span the entire period.

[24] The representation was made in batch test certificates. Four hundred and eighty-two offending certificates were issued for SE62 products and approximately 2,700 copies were distributed with the mesh. The Holmes logo was located on each certificate below the words "tested by". It was accompanied by a signature and the words "laboratory manager". Steel & Tube thereby represented that Holmes had tested the product in a laboratory.

[25] Holmes had tested the mesh in 2011 when Steel & Tube initially developed the product to demonstrate to the Department of Building and Housing that it met the Standard. But Holmes had not tested the steel covered by the batch tests certificates. Batch testing was done in-house. Nor did anyone at Steel & Tube have the title "laboratory manager".

[26] During the same period, a document available for download on the Steel & Tube website and titled "Residential Product Solutions — Stronger Homes" also stated that the company's seismic steel mesh was "independently tested & certified". These representations were false as all batch testing of the mesh had been internally conducted by Steel & Tube itself, and they form the basis for charges 22 to 24.

Why did Steel & Tube not comply with the Standard?

[27] Steel & Tube assigned responsibility for developing seismic steel products to its technical manager, a senior and now former employee who had spent more than 20 years in manufacturing (the "Former Employee"). He was a member of a joint Australian and New Zealand committee which developed the Standard and held a New Zealand Certificate in Engineering. He was considered an expert. However, he was not knowledgeable in metallurgy or statistical analysis. He had a working relationship with Pacific Steel (a steel manufacturer) to ensure the steel coil used in the mesh had the right composition and characteristics, and with Holmes on the 2011 development.

[28] Steel & Tube relied on the Former Employee to ensure its products met the Standard. No one signed off his decisions to not follow the Standard, nor did anyone check his work. There was no internal or external audit system to monitor compliance. He trained the staff who tested the mesh but they followed the processes he prescribed; they were not familiar with the Standard. The General Manager of Processing to whom he reported was not a technical expert and not able to review or question his technical work.

[29] The Former Employee retired in March 2014, leaving a sizeable knowledge gap in the company. His practices were continued by his successor.

[30] We pause to remark on the way in which the parties have handled the responsibility of the Former Employee. He was not charged. We do not suggest he ought to have been, but his non-involvement places us at a disadvantage when it comes to assessing culpability. Mr Heron was at pains to say that Steel & Tube accepts it is responsible for his actions, but it also considers itself a victim of his conduct.

The summary of facts records explanations he gave, but the parties disagree about the inferences to be drawn from it about his state of mind.

What testing and compliance practices did Steel & Tube adopt?

[31] The summary records that the Former Employee tested aged and unaged pieces and compared the results to external tests on aged steel that had been carried out by Holmes. He concluded that ageing had a negligible effect on test pieces. Ageing also added significant time to the production process. So he decided to dispense with ageing.

[32] The Former Employee also chose not to measure uniform elongation as the Standard required, considering his method better. His method was used in Christchurch but a different one was used in Auckland. The summary records that neither complied with the Standard, but it does not give any details of what was done.

[33] The Former Employee decided not to comply with the Standard's requirements for batch testing and re-testing. Uniform elongation values of less than 10 per cent were not recorded; rather, staff discarded the failed piece of mesh and tested another. He explained that failed values were not recorded because he worried the office administrator would mix up results or record incorrect information.

[34] Staff who conducted the tests told investigators that failures were very rare. However, the procedure used must logically mean there may have been batches for which mean values were below the Standard but which were not re-tested as the Standard required.

[35] The Former Employee explained that when re-testing was done he adopted a more stringent rule than the Standard prescribed; he tested for "minimums and maximums" and a batch passed only if every individual test met the minimum value of 10 per cent.

[36] No long-term quality evaluation was undertaken. The Former Employee thought that the company had done enough by accumulating the data and having it available. We note here that Steel & Tube sought to rely on a 2003 amendment to the

Standard which stated that long term testing might be waived for steel mesh to be used in New Zealand provided all batch test results were above specified values, but the Former Employee did not know of the waiver and did not rely on it when deciding not to carry out long term quality evaluation. It is not suggested that the waiver actually applied, presumably because that would require that batch testing be done correctly and produce no failed test results.

Why did Steel & Tube represent that SE62 production was independently tested?

[37] As noted above, Holmes tested the mesh in 2011. At that time Steel & Tube asked it to provide a template test certificate that included the Holmes logo. Steel & Tube then added its own to the batch test certificates. It is not clear why this was done. The Former Employee maintained that the certificates conveyed that Holmes had tested SE62 products when they were developed; put another way, they were not misleading. That is plainly wrong. The summary of facts says that inclusion of the Holmes logo was an oversight and the Former Employee offered no credible explanation why it had not been removed. It records that there was "no intention to give the impression" that Holmes had tested production mesh.

Steel & Tube's response to the Commission's investigation

[38] This proceeding began with a Commission investigation into the quality of steel mesh imported by other companies, some of which have also been prosecuted. We address their circumstances below. The Commission then extended its investigation to the question whether 500E mesh met the Standard. This brought to light Steel & Tube's use of the Holmes logo. When that became public Steel & Tube volunteered that it had been done in error.

[39] At first the company claimed that its mesh met the Standard, but after being presented with the Commission's test results (see [19] above) it voluntarily ceased selling 500E mesh and did not resume sales until it had an external testing regime in place.

[40] The summary of facts records that Steel & Tube cooperated with the Commission's investigation.

[41] It also records that the Standard has since been amended to clarify and elaborate upon testing requirements. However, it is not suggested that the Former Employee misunderstood the Standard's requirements.

The charges

[42] The 24 charges laid against Steel & Tube were representative. As noted above, the first 12 charges were for representations, made in batch tags, batch test certificates, collateral and the company's website that its SE62 steel mesh was 500E grade. The Commission charged that they were liable to mislead the public about the product's suitability for purpose.[7] Charges 13 to 24 were for false or misleading representations that SE62 steel mesh had an approval or endorsement, namely that it had been tested by an independent building product testing laboratory, Holmes Solutions, or had been independently tested.[8] Each charge was for a different time period, although they overlapped.[9]

[43] On 17 June 2014, during the period in which these charges were laid, the maximum fine for a body corporate increased from $200,000 to $600,000.[10]

The District Court sentencing

[44] Steel & Tube was sentenced on 23 October 2018 at Auckland. Judge Cathcart recognised that the offending affected public confidence in the construction industry such that a significant penalty was required.[11] The Commission contended for a starting point between $3.8 million and $4.6 million, with no allowance for totality, while Steel & Tube argued for a totality-adjusted starting point of $500,000 to $800,000. The Judge opted for a totality-adjusted figure of $2.9 million from which he deducted 35 per cent for mitigating factors including Steel & Tube's early guilty pleas.[12]

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7 Fair Trading Act 1986, s 10.
8 Section 13(e).
9 See table at the end of this judgment.
10 Fair Trading Act, s 40(1)(b).
11 District Court decision, above n 2, at [5].
12 At [8], [75] and [142].

[45] The Judge cited a list of relevant factors drawn from *Commerce Commission v Ticketek New Zealand Ltd*.[13] He found that the company's conduct clearly infringed on the consumer protection objectives of the Fair Trading Act and the Standard.[14] Although the parties agreed there is no risk to life, consumers have been left in a state of uncertainty.[15]

[46] The Commission argued that the company's conduct was deliberate, and further that the infringement went undetected because senior management were grossly negligent in failing to put in place adequate procedures and oversight. The argument that the company was guilty of a deliberate breach presumed the Former Employee's knowledge and intention could be attributed to the company. The Judge rejected that premise.[16] In his view s 45 of the Fair Trading Act, which we discuss below, is a special attribution rule which exists to sheet home *liability* to a body corporate.[17] It applies when it is necessary to prove mens rea. In this case, Steel & Tube faced strict liability offences. For that reason, s 45 did not apply in this case. Even if it did, it could not be relied upon for sentencing purposes, for which deliberation is an aggravating factor that must be proved by a prosecutor.[18] On the summary of facts, there was nothing from which the Judge could properly infer that knowledge of the Former Employee's actions reached senior management or the company's board.[19]

[47] The Judge found Steel & Tube was grossly negligent.[20] The company ought to have known of the large-scale non-compliance over the four-year charging period. It failed to supervise the Former Employee properly, and it did not audit or review his procedures even after he retired. The lack of robust procedures would have been self-evident if basic enquiries had been made by senior management staff. The failure was all the more culpable because Steel & Tube had complete control over what testing it was conducting. The same finding of gross negligence applied equally to the

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13 At [72] citing *Commerce Commission v Ticketek New Zealand Ltd* [2007] DCR 910 at [47].
14 At [77].
15 At [79].
16 At [87]–[88].
17 At [90].
18 At [91].
19 At [92].
20 At [93]–[95].

independent testing misrepresentations, which could not be characterised as inadvertence. The Judge did not accept that there was an innocent explanation.[21] He noted that Steel & Tube had invited Holmes to become more involved in its certification processes in 2014 and the proposal was provided, but not taken up; rather, Steel & Tube continued to issue batch certificates bearing the Holmes logo.

[48] The Judge accepted that there was a need for a fine that reflected general deterrence, but there was no significant need for specific deterrence.[22] Steel & Tube had taken remedial action and radically changed its systems.[23] He did not appear to take the company's gain into account.

[49] Citing s 40 of the Sentencing Act 2002, the Judge considered Steel & Tube's financial capacity.[24] He accepted that an offender's means may be taken into account to increase what would otherwise have been an appropriate fine, but he did not make any adjustment. He reasoned that there must remain some proportionality between the seriousness of the offending and the fine imposed. Further, publicity had already affected Steel & Tube, both in its reputation and in its share price.

[50] Turning to the starting point, the Judge examined comparable cases.[25] He distinguished the leading case on which the Commission relied, *Commerce Commission v Carter Holt Harvey*, on the ground that knowledge of the unlawful conduct reached a level of senior management and head office in that case.[26] The Judge also referred to recent decisions involving other companies selling steel mesh.[27] In those cases starting points of $600,000 and $650,000 were adopted, but the offending was on a much smaller scale than that of Steel & Tube. He concluded that the compliance representations justified a global starting point of $2.4 million, with a

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21 At [96].
22 At [105].
23 At [106].
24 At [107]–[109].
25 At [110]–[126]. See in particular *Commerce Commission v Carter Holt Harvey* DC Auckland CRI-2005-004-18578, 12 October 2006; and *Commerce Commission v Glaxosmithkline (NZ) Ltd* DC Auckland CRI-2006-004-503913, 27 March 2007.
26 At [118].
27 At [123] citing *Commerce Commission v Timber King Ltd* [2018] NZDC 510; and *Commerce Commission v Brilliance International Ltd* [2018] NZDC 7359.

further $600,000 for the independent testing representations.[28] He made a modest totality adjustment of $100,000.[29]

[51] The Judge accepted that Steel & Tube had taken significant remedial action.[30] Apart from withdrawing the product from the market for a time, it entered enforceable undertakings with the Commission, engaged independent laboratories to test the mesh, invested in new systems and training, and hired an additional quality manager. The company had no previous convictions under the Fair Trading Act, and its pleas were entered at the first reasonable opportunity.[31] His decision to allow a 35 per cent deduction for mitigating factors is not in dispute.[32]

The High Court decision

[52] Both parties appealed.[33] After surveying the background, Duffy J turned to the question of attribution. Because ss 10 and 13 of the Fair Trading Act create strict liability offences, the Commission need not prove the company's state of mind in order to establish guilt. Rather, it sought to attribute knowledge for sentencing purposes, relying on s 45. Differing in this respect from Judge Cathcart, the Judge appeared to accept that s 45 would apply to sentencing if it were necessary to prove the company's state of mind for liability purposes.[34] In this case that was not necessary, and it followed that s 45 could not be relied upon at sentencing.[35] Rather, the wilfulness or carelessness of the conduct were to be treated as an aggravating factor under s 9 of the Sentencing Act.[36] She added that the common law could not be relied upon to attribute the Former Employee's knowledge to the company, for he was not part of the senior management team.[37]

[53] Citing the judgment of Tipping J in *Commerce Commission v Noel Leeming Ltd*, the Judge accepted that acts constituting a strict liability offence may be classified

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28 At [126] and [135].
29 At [141].
30 At [144].
31 At [8] and [147].
32 At [148].
33 High Court decision, above n 3.
34 At [69].
35 At [64]–[66].
36 At [67].
37 At [76].

as inadvertent, careless or wilful.[38] Inadvertence is a mitigating factor, while wilful conduct is aggravating and careless conduct sits between, being viewed as either neutral or aggravating depending on the degree of carelessness involved. The Judge suggested that in broad general terms starting points might be up to one third of the maximum fine for inadvertent misrepresentations, between one third and two thirds of the maximum fine for careless misrepresentations, and upwards of two thirds of the maximum fine for deliberate representations.[39]

[54] The Judge characterised the state of mind of Steel & Tube's board of directors and senior management as "gross carelessness by omission".[40] The company completely failed to take any steps or put in place any procedures that might have revealed the Former Employee's deliberate disregard for the Standard, or his deliberate decision to allow mesh to be sold with false representations about independent testing. Steel & Tube is a large manufacturing company, not a small firm that might be given some latitude when it comes to systems. It ought to have had careful quality control systems in place. The level of carelessness weighed in favour of a starting point between 55 and 60 per cent of the maximum fine.[41] The Judge found support in the importance and wide dissemination of the representations, and the cost to purchasers.[42] Based on comparison of prices for seismic and non-seismic mesh, Steel & Tube would have earned in the region of $24 million from the sale of the non-compliant mesh. Consumers had no way of verifying the accuracy of Steel & Tube's representations, and in most cases it will be difficult if not impossible to replace the mesh.[43]

[55] Against that, the Judge noted that the non-compliant mesh will not be life-threatening in concrete slabs on the ground and very unlikely to be if used in a suspended floor system.[44] The company had also been a victim of what she found to be the Former Employee's deliberate misconduct.[45] She was prepared to accept that

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38 At [92] citing *Commerce Commission v Noel Leeming Ltd* HC Christchurch AP139/96, 21 August 1996.
39 At [92].
40 At [93].
41 At [96].
42 At [97]–[100].
43 At [101]–[102].
44 At [104].
45 At [105].

the management of Steel & Tube had no reason to doubt that he was doing all that was required of him. He was known to be an expert and he had arranged extensive independent testing with Holmes as the mesh was being developed in 2011.

[56] Duffy J concluded that had she been sentencing the company at first instance she would have adopted a starting point somewhere between 46 and 56 per cent of the maximum fine.[46] Had the conduct been deliberate or reckless, or the risk to life higher, or had their non-compliance demanded expensive rectification, the gravity of the offending would have been closer to the maximum. The Judge adopted a starting point of 42 per cent, which she considered the lowest figure that was available in the circumstances.[47] That would lead on our calculation to a total starting point of just over $3.8 million.

[57] The Judge calculated that after allowing for mitigating factors her calculation would lead to individual fines of $84,000 (for the offences with a $200,000 maximum), and $252,000 (for the offences with a $600,000 maximum), resulting in a total fine of $2,511,600.[48] The Judge then allowed a 20 per cent discount for totality, bringing the total fine imposed on all charges to $2,009,280.[49] This she distributed among the charges as a percentage — 22 per cent — of the maximum fine available on each charge.

The issues on further appeal

[58] When granting leave to appeal, this Court stated that the attribution issue is a matter of general or public importance.[50] And given disparate views taken by the courts below and polarised positions adopted by the parties, it appeared that guidance on starting points could also be useful.

[59] We will begin with attribution, establishing whether the Former Employee's state of mind ought to be attributed to the company. We will then consider relevant sentencing purposes, principles and factors and review the authorities. We will address

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46 At [108].
47 At [115].
48 At [115].
49 At [119].
50 Leave decision, above n 4, at [14]–[15].

the significance of Steel & Tube's size and resources and its financial gain from the offending. Finally, we will decide whether the sentence substituted in the High Court was manifestly excessive or inadequate; and if it was either of those things we will adjust it accordingly.

Attribution

[60] A company may commit an offence, and because it acts only through human agency the actions and states of mind required for the offence are those of human actors which the law attributes to the company.[51] Those actors need not be confined to those who hold office under the company's constitution, or to those who are the company's "directing mind and will".[52] They may include servants or agents. The appropriate rule of attribution depends on the substantive law creating the offence; the question is how was that law intended to apply to a corporate defendant.[53] So, for example, in *Linework Ltd v Department of Labour*, in which a company was prosecuted for failing to take reasonably practicable steps to avoid risking its employees' safety, it was held that the acts of the supervisor in charge of a worksite should be attributed to the company.[54] This Court cited *R v British Steel Plc*, a workplace safety case in which Steyn LJ, as he then was, held that it would defeat the statutory objective if the company could avoid criminal liability where the offending act was committed by someone who was not its directing mind.[55]

[61] The Fair Trading Act is a consumer protection statute which regulates conduct in trade. It promotes fair conduct and prohibits certain unfair conduct and practices. Relevantly, s 10 prohibits conduct that is likely to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods; and s 13(e) prohibits false or misleading representations that goods have (among other things) any approval, endorsement or performance characteristics. It is an offence to do these things.[56] It is common ground that both the offences of contravening s 10

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51 *Cullen v R* [2015] NZSC 73, [2015] 1 NZLR 715 at [35]–[36]. The Sentencing Act 2002 does not mention corporations but the s 2 definition of "person, owner" in the Crimes Act 1961 includes "any board, society or company, and any other body of persons".

52 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 14–16.

53 At 12.

54 *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA) at [38] and [46]–[47].

55 *R v British Steel Plc* [1995] 1 WLR 1356 (CA) at 1362–1363.

56 Fair Trading Act, s 40.

and s 13(e) are strict liability offences and that some other offences under the Act require mens rea.

[62] The Act creates special rules of attribution. In s 45(2) it attributes to a body corporate the conduct of any servant or agent acting within the scope of their actual or apparent authority:[57]

> (2) Any conduct engaged in on behalf of a body corporate—
>
> (a) by a director, servant, or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

[63] Attribution of conduct is also addressed in s 44(1)(c), which creates an affirmative defence that a contravention of s 40 was due to the act or default of another person and the defendant took reasonable precautions and exercised due diligence to avoid it. For purposes of that defence, another person does not include a director or servant or agent of a corporate defendant.[58]

[64] Attribution of a state of mind is addressed in s 45(1), which provides that where, in proceedings under Part 5 (which includes the offence provision, s 40) in respect of any conduct engaged in by a body corporate, "it is necessary to establish" the state of mind of the body corporate, it is sufficient to show that a director, servant or agent, acting within the scope of that person's actual or apparent authority, had that state of mind:

> **45 Conduct by servants or agents**
>
> (1) Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a

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57 Section 45 appears under the subpart headed "Civil proceedings" in the Fair Trading Act but it applies equally to criminal proceedings.

58 Section 44(2).

director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.

…

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

[65] The statutory language is obviously concerned with attribution to a corporation of the state of mind and conduct of a director, servant or agent.[59] The corporate defendant is liable by reason of its agency relationship with the individual director, employee or agent concerned, so long as that person was acting within the scope of their actual or apparent authority.[60]

[66] The extent of the statutory attribution reflects the purpose of consumer protection. It is not confined to senior management; rather, it extends to the conduct or state of mind of any employee or agent whose conduct on behalf of the defendant firm may mislead consumers. Nor is it confined to actions within that person's actual authority; it extends to their apparent authority. Apparent authority arises in trade where a firm holds out that its employee has authority to make representations as to its goods or services, there is a reasonable basis on which the consumer can assume this authority exists, and the consumer relies on that authority.[61]

[67] Steel & Tube does not dispute attribution of the Former Employee's conduct for purposes of the offences. It does not contend that the conduct was beyond his actual or apparent authority. For purposes of the Act his conduct is deemed under s 45(2) "to have been engaged in also" by Steel & Tube.

[68] The parties join issue on the question whether it is "necessary" in this proceeding to establish the state of mind of Steel & Tube so as to permit attribution of

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59 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [8]–[9] and [48]–[50]. The Court was speaking of s 90 of the Commerce Act 1986, which is in identical terms to s 45.

60 We record that we are not here concerned with the question whether the individual is also liable as a principal offender: see *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [51]–[56]; and *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 6 TCLR 231 (HC).

61 See *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (CA); and *Pascoe Properties Ltd v Attorney-General* [2014] NZCA 616, [2015] NZAR 457.

the Former Employee's state of mind under s 45(1). They agree that these are strict liability offences, for which s 44 permits limited defences of absence of fault; the defendant may prove reasonable mistake or reasonable reliance on another person who is not an employee or agent acting within the scope of actual or apparent authority.

[69] We are satisfied that it is necessary to establish the company's state of mind for sentencing purposes, for four reasons. First, s 45(1) does not specify that attribution is limited to proof of liability. Rather, the subsection applies whenever it is necessary to establish a body corporate's state of mind in a proceeding under (relevantly) s 40(1), which states that any person who contravenes certain provisions of the Act commits an offence and is liable on conviction to a fine not exceeding, in the case of a body corporate, $600,000. To state the obvious, in a proceeding under s 40 a court must both convict the defendant and fix the appropriate penalty.

[70] Second, at sentencing a court must consider the applicable sentencing purposes, principles and factors in ss 7–9 of the Sentencing Act. The state of mind of the defendant is an orthodox sentencing consideration for strict liability offences.[62] After all, strict liability is designed to encourage those in trade to meet the standards of care that legislation requires of them.[63] A court is always interested in the reasons why those standards were not met. State of mind may inform the court's assessment of the gravity and culpability of the offending.

[71] Third, when sentencing under this legislation courts commonly categorise conduct as inadvertent, careless or wilful, following the judgment of Tipping J in *Noel Leeming*.[64] This categorisation rests on the defendant's state of mind, which is in issue here. Mr Heron argued that the Commission had not proved as an aggravating factor that the Former Employee's conduct was knowing or wilful; on the contrary, the company should be sentenced on the basis that it was merely careless. Steel & Tube cannot both argue that a court need not consider its state of mind at sentencing and that its sentence should be calculated on the premise that it was at worst careless.

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62 *Kiwi Drilling Co Ltd v R* (1997) 4 ELRNZ 23 (CA) at 27 citing *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC) at 503; and *Lane's Appliance Centres Ltd v Commerce Commission* (1989) 3 TCLR 374 (HC) at 380.

63 *Megavitamin Laboratories (NZ) Ltd v Commerce Commission*, above n 60, at 252.

64 *Commerce Commission v Noel Leeming*, above n 38, at 5. We have more to say about this categorisation at [89] below.

If state of mind materially affects sentence, then it is a matter of necessity that the Court should establish it.[65]

[72] Fourth, necessity is not only a question of law. It may be a question of fact in the particular proceeding. In this case, it will be apparent that the company's state of mind is a matter of real significance and real controversy.

[73] We add that if s 45(1) did not apply to sentencing for strict liability offences a court would have to adopt some alternative attribution rule. Ms McGill argued that none is necessary, but that cannot be correct so long as the company's state of mind is a relevant consideration at sentencing; its state of mind must be that of some human agent which is attributed to the company in the circumstances.[66] Based on the authorities, especially *Linework Ltd*,[67] there is no room for an attribution rule that would excuse Steel & Tube responsibility for the Former Employee's state of mind. The legislation requires that a corporate defendant should be liable for the conduct of any employee in the course of whose employment consumers were misled. Even if s 45 had not covered the field, we would hold that the Former Employee's state of mind should be attributed to the company on ordinary common law rules of attribution. He was a senior figure whose actual authority extended to production, testing and certification of the mesh. The company could escape attribution in his case only if a "directing mind and will" rule was adopted. That would be quite contrary to the purpose of the legislation.

[74] For these reasons we accept Mr Dixon QC's submission that it was an error to sentence on the basis that the company did not share the Former Employee's state of mind but rather was a victim of his conduct.

[75] All of that said, liability is binary — a defendant is guilty or not — but culpability is a sliding scale. The Former Employee was a senior employee, but it was

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65 It is arguable that a corporation is incapable of moral agency and deterrence is the only relevant sentencing purpose; see for example Sylvia Rich "Corporate Criminals and Punishment Theory" (2016) 29(1) Canadian Journal of Law and Jurisprudence 97. But corporations may commit offences under the Fair Trading Act and the Sentencing Act does not exempt them from its generally deserts-based approach to sentencing.

66 *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 52, at 12.

67 *Linework Ltd v Department of Labour*, above n 54.

the company that was being sentenced and its board and senior management figures did not know of his conduct. Their behaviour was of a different kind; they carelessly failed to supervise and monitor what he was doing. How far is attribution to extend for sentencing purposes?

[76] The answer lies in s 45(1), which provides that it is "sufficient" to show a relevant director, employee or agent had a given state of mind. The state of mind of an agent whose misleading conduct is the subject of the charge suffices for sentencing purposes, but that person need not be the only agent whose conduct and state of mind may influence sentencing. The court may inquire further. State of mind may matter at two points in time; when the offence was committed and at sentencing. So far as the offence date is concerned, senior management's complicity in, or ignorance of, an employee's actions may aggravate or mitigate culpability, depending on the circumstances. At sentencing, where senior management invariably speaks for a corporate defendant, the court is interested in co-operation with the authorities, assumption of responsibility, and commitment to future compliance.

[77] We accept that the strict liability character of the offences affects sentencing processes. A court must take as proved any facts essential to proof of liability, but mens rea (let alone any specific intent) is not an essential element of these offences. The court may rely on any facts proved at trial or upon which the parties agree. It may draw appropriate inferences from facts proved or agreed.[68] Otherwise facts that have a material bearing on sentence are characterised as aggravating or mitigating, with the burden and standard of proof being distributed between the parties accordingly under s 24. To this extent we respectfully agree with Duffy J.

[78] We part company with the Judge in that we consider carelessness should not be treated as a default state of mind, with inadvertence and knowing breach characterised as mitigating or aggravating facts. The circumstances of the particular case determine whether facts are material and have the effect of aggravating or mitigating the sentence.

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[68] *R v Kinghorn* [2014] NZCA 168 at [20]–[21], citing *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) at 169–170 per Wright LJ; and *Pokai v R* [2014] NZCA 356 at [30]–[31].

Sentencing practice in Fair Trading Act penalty cases

The maximum fine

[79] We begin by noting that the maximum penalty for a single offence by a body corporate is a fine of $600,000.[69] That is the result of legislative amendments enacted in 2014 as part of an updating of consumer laws.[70] The maximum fine was trebled, seemingly not because existing fines had proved inadequate but to better align the legislation with Australian consumer laws.[71]

Limited statutory provision for totality

[80] Section 40(2) of the Fair Trading Act provides that where a person is convicted in respect of two or more contraventions of the same provisions and the contraventions are of the same or substantially similar nature and occurred at or about the same time, the aggregate fine may not exceed the maximum for a single offence. Judge Cathcart found that this provision did not apply because "Steel and Tube's offending occurred over a period of four years and involved differing conduct",[72] and no issue was taken with that on appeal in the High Court or before us. It could not be said that all of the offending occurred at or about the same time. It is nonetheless worth pausing over the subsection, partly because the bands adopted by Duffy J were based on percentages of the maximum fine per charge laid, partly because the parties join issue on the Judge's allowance for totality, and partly because the subsection has something to say about legislative policy.

[81] Section 40(2) can be traced to the Swanson Report, which led to a corresponding provision in the Australian Trade Practices Act 1974.[73] The concern was that "a single advertising theme would, if used in a nation-wide, multi-media campaign, result in the commission of a large number of offences within very few days".[74] The Trade Practices Act Review Committee explained that:

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69 Fair Trading Act, s 40(1)(b).
70 Fair Trading Amendment Act 2013, s 27.
71 (11 December 2012) 686 NZPD 7410.
72 District Court decision, above n 2, at [136].
73 Trade Practices Act Review Committee *Report to the Minister for Business and Consumer Affairs* (Australian Government Publishing Service, Canberra, 1976).
74 At 9.136.

> 9.137 The Committee is concerned about 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. By 'essentially similar advertisements' we mean advertisements where the substance of the conduct differs only as to the names, addresses or telephone numbers of persons from whom the goods or services are available, or by whom the goods or services are made, the date of publication, the publisher, the colour or size of the advertisement, the advertised prices or the period during which the advertised goods or services are available.

[82] It will be seen that the prohibition on fines for multiple offences exceeding the maximum for a single offence was to be tightly circumscribed; to qualify, the offences must be essentially similar and must be committed over a reasonably short period. The Committee was concerned that the imposition of criminal penalties would cause serious difficulties for advertisers. The same point was made by New Zealand officials commenting on submissions that recommended deleting s 40(2) from the Fair Trading Bill 1985.[75] The more general point to emerge from s 40(2) is that the legislature recognised that breaches of the Act may take the form of repeated and essentially identical offences which should be sentenced, in qualifying cases, as if they were a single offence. We return to this point when discussing totality under the Sentencing Act at [150] below.

Number of charges and the aggregate maximum penalty in this case

[83] In this case there are three distinct representations and each covers a continuous period of four years (during which the maximum penalty was increased). Six representative charges might have covered the conduct and the period.[76] In the absence of any information to the contrary we will assume that the Commission followed its own guidelines, which state that the nature and number of charges should adequately reflect the criminality of the defendant's conduct as disclosed by the facts alleged.[77] Put another way, the aggregate maximum fine for the 24 charges in this case

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75 Fair Trading Bill 1985 (149–2), cl 34(2). Department of Trade and Industry Report (Report to the Commerce and Marketing Select Committee, CM/86/112 D4). See submissions from the New Zealand Association of Citizens Advice Bureaux Inc at [2.5.2], Dunedin Community Law Centre, New Zealand Federation of Labour at [16] and [17], New Zealand Retailers' Federation Inc at [21], and Poverty Action Link at [6.3].

76 The three distinct representations are: the compliance representations, the independent testing representations, and the Holmes representations. Two charges could be laid for each to reflect the increase in maximum penalty during the period of offending.

77 Commerce Commission *Criminal Prosecution Guidelines* (October 2013) at [29].

— $9.2 million — is a function of a prosecutorial assessment of Steel & Tube's culpability.

[84] We do not criticise the decision to lay so many charges, and we have noted that the Commission claims that Steel & Tube's gain far exceeds the maximum for any one charge. We do observe that in cases where a course of conduct has led to multiple identical charges a court should be conscious of a risk that the aggregate maximum fine will have a framing effect on the starting point. If in such a case the court sets the starting point for each charge separately it is very likely that a substantial totality adjustment will be required, as Duffy J did here.[78]

A brief survey of sentencing practice

[85] Fair Trading Act sentencing practice has developed in the District Court, which has much exposure to such cases, and to a lesser extent in the High Court on appeal. It appears that no sentencing appeals have previously reached this Court.

[86] For present purposes we may begin with *Commerce Commission v L D Nathan & Co Ltd*,[79] in which Greig J adopted the following list of relevant considerations from Australian case law:[80] the objectives of the Act; the importance of the untrue statement which was made or published; the degree of culpability, in the context of wilfulness or carelessness, which will generally involve a consideration of the circumstances in which the statement was made or published; the extent to which the statement departed from the truth; the extent of its dissemination; the extent of prejudice or harm (if any) to consumers or other traders which resulted from the statement; whether any efforts have been made to correct the statement; and the importance of deterrence.

[87] In *Commerce Commission v Ticketek New Zealand Ltd*, a sentencing decision for misleading representations in breach of s 13(i) of the Act, Judge Abbott surveyed the authorities and added the following relevant considerations to the above list:[81]

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78 High Court decision, above n 3, at [119].

79 *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160 (HC) at 165.

80 Drawn from the judgment of French J in *Gardam v Splendid Enterprises Pty Ltd* (1987) 9 ATPR 48,495 (FCA) at 48,502.

81 *Commerce Commission v Ticketek New Zealand Ltd*, above n 13, at [47].

the attitude of the offender in respect of remorse, co-operation with the authorities, and remedial action, in particular in respect of correction; the financial circumstances of the offender; any guilty plea(s); the previous record of the offender; the effect of any publicity regarding the prosecution and/or the defendant's activities; where there are two or more defendants, the relationship between them and the respective culpability of each of them (which is of course not a factor in the present case); and where there are two or more charges, the totality principle.

[88] These cases offer a helpful checklist of considerations that may arise in any given case, but the list is not exhaustive, and in any given case some of the listed considerations may not arise or may require closer analysis. Notably, the judgment of Moore J in *Budget Loans Ltd v Commerce Commission* contains a useful list of considerations that are likely to matter in cases involving calculated manipulation of vulnerable consumers.[82]

[89] The authorities do not address sentencing levels, which have received little attention in appellate courts. In *Noel Leeming*, Tipping J offered the ascending order of seriousness that we have already mentioned: inadvertent, careless or wilful.[83] This categorisation has been adopted in a number of sentencing decisions.[84] We agree that courts should distinguish between inadvertent and careless conduct, and "wilful" or "deliberate" is not over-inclusive so long as it is taken to mean that the offender had the specific intent to mislead or deceive in the relevant respect. (As will be seen, this last point leads us to characterise the Former Employee's conduct in this case differently from the courts below.) However, this categorisation rests on the offender's state of mind to the potential exclusion of other factors. For that reason, we think it was an error to base sentencing bands or guidelines on it.

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82 *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442 at [71].

83 *Commerce Commission v Noel Leeming Ltd*, above n 38, at 5.

84 The term "wilful" is often used interchangeably with "deliberate". See *Commerce Commission v Clark's Organic Butchery Ltd* DC Waitakere, 25 May 2006 at [63]–[70]; *Commerce Commission v Weedons Poultry Farm Ltd* DC Christchurch CRN 1009004163, 15 March 2001 at 4; and *Commerce Commission v Sports Resources Ltd* DC Auckland CRN 600045004417-20, 23 April 2007 at [36]. See also *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836 at [75] citing the earlier decision of Tipping J in *Megavitamin Laboratories (NZ) Ltd v Commerce Commission*, above n 60, at 252.

Synthesis

[90] The cases recognise that sentencing should begin with the objects of the Fair Trading Act, which pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers and businesses participate confidently.[85] To those ends it promotes fair conduct in trade and the safety of goods and services and prohibits certain unfair conduct and practices.

[91] Customary sentencing methodology applies. Factors affecting seriousness and culpability of the offending may include: the nature of the good or service and the use to which it is put; the importance, falsity and dissemination of the untrue statement; the extent and duration of any trading relying on it; whether the offending was isolated or systematic; the state of mind of any servants or agents whose conduct is attributed to the defendant; the seniority of those people; any compliance systems and culture and the reasons why they failed; any harm done to consumers and other traders; and any commercial gain or benefit to the defendant.

[92] Factors affecting the circumstances of the offender include: any past history of infringement; guilty pleas; co-operation with the authorities; any compensation or reparation paid; commitment to future compliance and any steps taken to ensure it. The court may also make some allowance for other tangible consequences of the offending that the defendant may face. By tangible we mean to exclude public opprobrium that is an ordinary consequence of conviction;[86] publicity ordinarily serves sentencing purposes of denunciation and accountability. The defendant's financial resources may justify reducing or increasing the fine.[87] Of course any other sentencing considerations applicable, such as totality and the treatment of like offenders, will also be taken into account.

[93] This catalogue of considerations is derived from the legislation and the cases. It is not exhaustive, nor is it mandatory. We offer it for several reasons. It seeks to make clear that the offender's state of mind is just one of a number of culpability factors, albeit important. It treats state of mind as a question of fact and degree.

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85 Fair Trading Act, s 1A.
86 See for example *Commerce Commission v Noel Leeming Ltd*, above n 38, at 7.
87 See [148] below.

It recognises that the starting point should reflect not only the conduct and state of mind of those employees or agents responsible for the contravention but also their seniority and the existence and effectiveness of any compliance systems and culture, which are usually attributable to senior management. It includes the extent of any commercial gain or benefit and the defendant's size or financial capacity, as one would expect for offending in a commercial setting. Finally, it is organised according to circumstances of the offence and the offender, consistent with modern sentencing methodology.

[94] It is necessary to say something more about gain and financial capacity in this context.

Commercial gain

[95] The Fair Trading Act does not provide that fines should eliminate commercial gain from the offending. By contrast, the Act does provide in s 40A for an additional penalty for offences against s 24, which prohibits pyramid selling. A court may order a convicted defendant to pay a fine plus the value of any commercial gain resulting from a contravention that occurred when producing a commercial gain. The civil standard of proof applies.

[96] Nonetheless, courts have long accepted that gain is a relevant consideration at sentencing for offending under the Fair Trading Act generally. Gain may affect the court's assessment of the offending's gravity and culpability,[88] and it is also likely to correspond to the extent of any economic loss, damage or harm to victims of the offending.[89] To achieve deterrence, which is one of the purposes of sentencing, a sentence should address incentives to offend; to that end, courts have held that it may be necessary to set fines at a level that eliminates commercial gain.[90]

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88 Sentencing Act, s 8(a).

89 Section 9(1)(d).

90 See *Lane's Appliance Centres Ltd v Commerce Commission*, above n 62, at 381; *Commerce Commission v Weedons Poultry Farm Ltd*, above n 84; *Commerce Commission v Clark's Organic Butchery Ltd*, above n 84; and *Commerce Commission v Sports Resources Ltd*, above n 84, at [63].

[97] That brings us to the measurement of gain. The cases do not have much to say about it.[91] We approach the topic by emphasising that the object of the measurement exercise must be kept clearly in mind. The court is interested in identifying gain that is attributable to the wrongful conduct.

[98] Gain may vary according to the nature and circumstances of the offence. In cases where the quality of goods or services has been misrepresented, the appropriate measure of gain may be the offender's revenue attributable to the offending conduct. By way of illustration, in a case in which battery-farmed eggs were passed off as free-range the offender's marginal revenue was $1.75 per dozen, being the difference between the price of the two products.[92] The only additional costs incurred by the offender were those of falsely labelling or marketing the eggs, for which no allowance was made (or could be made as a matter of sentencing policy). Judge Kean described the gain as "super profit", meaning as we understand it that the marginal revenue was gained at no cost.

[99] In other circumstances a court may find that an estimate of gain should incorporate relevant expenses of the business. In *Lane's Appliance Centres Ltd v Commerce Commission* Tipping J assumed that the firm's net profit was an appropriate measure of gain:[93]

> I have borne in mind the means and specifically the turnover and net profit of the appellant in coming to the view that the total penalty cannot be described as clearly excessive.

[100] The Judge presumably had it in mind that in a commercial setting a penalty will sufficiently deter if it eliminates the offender's profit. We accept that as a general proposition (while respectfully doubting whether profit was the correct measure of gain in that case — the company falsely represented that goods cost the consumer less than they actually did, so its gain was the difference in price). But again the object of the exercise must be kept in mind. "Net profit" may permit an accounting approach

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91 We have considered pecuniary penalty cases under the Commerce Act, but they are of little assistance, perhaps because the assessment gain in that setting usually depends on a counterfactual that is hypothetical in nature: *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344 at [43].

92 *Commerce Commission v Weedons Poultry Farm Ltd*, above n 84.

93 *Lane's Appliance Centres Ltd v Commerce Commission*, above n 62, at 381.

that incorporates revenues and expenses of a business having no direct connection to the offence. That may needlessly enlarge the court's inquiry and result in an underestimate of gain.

[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 volumes or revenue may sufficiently inform the court about the scale and seriousness of the offending. Deterrence is only one consideration at sentencing, and its requirements in any given case are a matter of judgement 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. In 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. For reasons developed at [123] below, we consider that an allowance for marginal costs of producing SE62 mesh would be appropriate in this case.

The offender's financial capacity

[102] The Sentencing Act provides in s 40 that when determining the amount of a fine the court must take into account the financial capacity of the offender, whether the effect is to reduce or increase the amount of the fine. Few authorities address the section. Most of those cited in the leading texts predate the Act.[94]

[103] A wealthy defendant's means cannot be characterised as an aggravating factor in themselves. Rather, they may justify increasing a fine to ensure it serves its purpose. In *Schnellinger v R* this Court said of a wealthy defendant ordered to pay a heavy fine that it was appropriate to have regard to her means to ensure the fine did have the effect of punishing her.[95] It has been held that a fine should "sting" from the offender's

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94 See GG Hall (ed) *Hall's Sentencing* (online ed, LexisNexis) at [SA40]. Pecuniary penalty cases under the Commerce Act address size, notably *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 344, but we do not rely on them. The Sentencing Act does not govern pecuniary penalties and size matters partly because of a correlation with market power.

95 *Schnellinger v R* CA223/82, 18 May 1983.

perspective,[96] and also serve as a personal deterrent.[97] In Sentencing Act terms, an increase under s 40 may serve purposes of accountability, denunciation and deterrence.

[104] It has been suggested that a fine might be increased under s 40 having regard to unaccounted-for proceeds of the offending.[98] We prefer the view that commercial gain is an aggravating feature of the offending, so should be taken into account when setting the starting point.

[105] The fine should retain proportionality to the offending. For that reason, it is good practice to determine the amount that would be payable but for the offender's means, then adjust down or up as appropriate.[99] This is appropriately done at the second stage of the sentencing analysis. As always, having calculated the end sentence the judge must step back and inquire whether it is correct in all the circumstances.

The appropriate sentence in this case

[106] This is not a guideline judgment. We will not attempt to establish sentencing bands (and those proposed by Duffy J should not be used). But because this appears to be the first sentencing appeal under the Fair Trading Act to reach this Court, the judgment will inevitably be looked to by sentencing judges.[100] For that reason we will assess the appropriate sentence ourselves, then consider whether the sentence substituted in the High Court was manifestly excessive or inadequate.

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96 *Djou v Commonwealth Department of Fisheries* [2004] WASCA 282, (2004) 150 A Crim R 255 at [23] citing *Sgroiv v R* (1989) 40 A Crim R 197 (WASCA) at 200–201.

97 *Affco New Zealand Ltd v Muir (Department of Labour)* (2008) 6 NZELR 281 (HC) at [34].

98 *Wynotts v Commerce Commission* HC Auckland AP80/92, 13 July 1992.

99 See *R v Jerome* [2001] 1 Cr App R (S) 316 (EWCA Crim) at 318.

100 The Court has dealt with civil pecuniary penalties imposed under the Commerce Act but those authorities, while instructive, are not squarely applicable to criminal offending under the Fair Trading Act. See *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (CA); *Giltrap City Ltd v Commerce Commission*, above n 60; and *Kuehne + Nagel International AG v Commerce Commission* [2012] NZCA 221, [2012] 3 NZLR 187. See also *Commerce Commission v Ophthalmological Society of New Zealand Inc* [2004] 3 NZLR 689 (HC); and *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2011] NZCCLR 19 (HC).

Circumstances of the offending

Nature and use of the product

[107] SE62 mesh is a widely used and long-life product the safety of which matters greatly to consumers. The structural integrity of their buildings may depend on it in the foreseeable event of an earthquake. It is a product that consumers cannot readily evaluate for themselves. The Standard was created accordingly to ensure that earthquake grade steel would perform to expectations. Steel & Tube appreciated all of this. In its marketing material the company emphasised compliance, stating for example that the mesh was "made to New Zealand standards", "NZ Building Code Compliant" and "seismic rated".

Extent to which the false statements were misleading

[108] Compliance with the Standard is mandatory for mesh used in certain applications. The compliance and independent testing representations were accordingly very important. They were also widely disseminated; they were made not only in marketing materials but also in batch tags on some 480,000 sheets of mesh.

[109] However, it cannot be said that the mesh failed to comply for want of the necessary chemical, mechanical and dimensional properties. It was designed to perform to the Standard's specifications. It failed because Steel & Tube did not follow the prescribed sampling and testing requirements, but rather adopted alternative testing practices. The independent testing representations were highly misleading.

Extent, duration and systematic nature of the offending

[110] The offending was systematic; the Former Employee adopted his own testing processes and implemented them (with variations) at both company facilities. As Mr Dixon submitted, Steel & Tube placed much emphasis on compliance in its marketing material. The offending continued for four years and, as just noted, it occurred on a large scale.

The company's state of mind

[111] The Former Employee was not part of the company's senior management team, but he was senior in status, entrusted with the development and production, and to some extent, the marketing of the mesh.

[112] We have explained that the courts below held the Former Employee's state of mind should not be attributed to Steel & Tube for sentencing purposes. They sentenced the company on the basis that the conduct of its senior management was "grossly negligent" (Judge Cathcart) or "gross[ly] careless[] by omission" (Duffy J).[101] We have taken a different view, holding that the Former Employee's state of mind is appropriately attributed to the company. The parties join issue about what his state of mind was at the time.

[113] Helpfully, the courts below did address the point. Judge Cathcart accepted that some of the misconduct was deliberate. The Judge drew an inference that the Former Employee chose to allow dissemination of the independent testing misrepresentation.[102] He found that decisions to depart from the requirements of the Standard were also deliberate; the Former Employee thought his alternative methods were better or equivalent and more efficient. Duffy J found that the Former Employee engaged in deliberate misconduct.[103] The Commission invited us to reach the same conclusions.

[114] We agree that the Former Employee chose not to comply with the Standard's testing requirements. He considered that ageing had negligible impact and delayed production and he believed his methods for measuring elongation were superior. Lacking statistical training, he chose not to record failed tests, used his own method for retesting, and did not undertake long-term testing.

[115] The compliance failures were accordingly intentional, but as we have explained above offending should be considered "wilful" or "deliberate" when the offender acted with a specific intent to mislead or deceive in the relevant respect.

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101 District Court decision, above n 2, at [93]; and High Court decision, above n 3, at [93].
102 District Court decision, above n 2, at [98].
103 High Court decision, above n 3, at [68] and [93].

We do not think the Former Employee did that. He believed rather that the mesh complied with the Standard's chemical, mechanical and dimensional specifications. It had been engineered and produced to do so. The compliance failures are explained by his belief that his testing processes were equivalent or superior to those prescribed by the Standard. Contrary to the Commission's submissions, he was not trying to pass non-seismic mesh off as earthquake grade. There are indications in the summary of facts that to some degree the Former Employee was trying to control costs of production or testing, but that purpose did not extend to producing mesh of lower quality than the Standard requires and the Commission does not allege that he acted for commercial gain. These considerations distinguish this case from those in which a trader knowingly passed its product off as something else[104] or deliberately duped consumers about their rights.[105]

[116] The independent testing representations are a different matter. We agree with Judge Cathcart that the Former Employee's explanation for using the Holmes logo on batch test certificates cannot be accepted and we consider the inference is almost inescapable that his decision to use the logo in that way, on batch testing certificates purportedly signed off by a laboratory manager, amounted to a knowing misrepresentation that Holmes had tested batches to which the certificates were attached.[106] Other representations the steel was "independently tested and certified" were clearly false and amounted to knowing misrepresentation.

Compliance culture and systems

[117] As noted, it is common ground that the company's board and senior management did not know of the offending. That lack of knowledge could mitigate the company's culpability if the offending had happened notwithstanding appropriate governance processes and systems. In fact it happened and persisted over time because the Former Employee was not supervised and his work was not audited. Good compliance processes were essential given the nature and use of the product. Their absence, in a company of Steel & Tube's size, was inexcusable. Counsel could not resist the lower courts' characterisation of these omissions as grossly careless.

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104 For example see *Commerce Commission v Weedons Poultry Farm Ltd*, above n 84.
105 For example see *Budget Loans Ltd v Commerce Commission*, above n 82.
106 District Court decision, above n 2, at [59].

It follows that Steel & Tube cannot mitigate its culpability by pointing to its guiding minds' ignorance of the offending.

Impact on consumers and other traders

[118] We accept the Commission's argument that consumers who bought the mesh have been left in some degree of uncertainty about its properties. This could be an important consideration, but it does not appear to be so in the particular circumstances of this case. The company maintains that the mesh meets the Standard's performance specifications, and on the evidence before us it may well do so. There is no evidence of any loss to owners whose buildings contain the non-compliant mesh.[107]

[119] There is no indication that other suppliers of building mesh were victims of Steel & Tube's conduct. Several of them have been prosecuted by the Commission for misrepresentations about compliance with the Standard. The cases are relied on for comparison purposes, and we mention them at [135] below.

Extent of any commercial gain or benefit from the offending

[120] The Commission estimates Steel & Tube's unlawful gain at approximately $4 million, representing the difference in price between SE62 mesh and non-seismic mesh sold in the relevant period. Its reasoning is that the mesh could not be sold as compliant; and that being so, the price of non-seismic mesh is the proper comparator. It characterises the sum of $4 million as "super profit". Mr Dixon argued that gain is the dominant sentencing consideration in this case.

[121] We accept that SE62 small mesh was sold for $51.74 per sheet, rather than some lesser figure, because it was said to comply with the Standard. It is a reasonable inference that its market price would be close to that of non-seismic mesh given that it could not be used in some building applications.

[122] However, we are not prepared to treat the difference between the prices of seismic and non-seismic mesh as the company's gain. It was not "super profit".

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[107] Reparation has not been sought. We were told that the Commission does not know who ended up with the mesh.

The company was not passing off standard mesh, a different product, as seismic mesh. It was attempting to comply with the Standard. On the summary of facts, SE62 mesh is not materially more likely to fail than the product it was represented to be.

[123] How is gain to be assessed in these circumstances? We would be prepared to offset the company's marginal revenue by making some allowance for costs that were directly incurred in producing SE62 mesh and would not have been incurred in the production of non-seismic mesh. We infer that the production costs of SE62 mesh are higher than those of non-seismic mesh, if only because the steel is of higher quality.

[124] The summary of facts contains no information that might allow us to quantify those costs. Mr Heron submitted that the company's profit margins are slender — its total after-tax profit in 2016 was $25.8 million on revenues of $515.9 million — but that is not a measure of the marginal costs of producing SE62 mesh. However, we recognise the case was dealt with below on a simpler basis, consistent with existing authority, so the absence of such information should not be held against Steel & Tube in the circumstances.

[125] In the result, we are unable to estimate gain attributable to the offending. All that can be said is that it is less than $4 million, and perhaps much less.

The starting point

The parties' positions

[126] Mr Heron submits that the fines imposed on Steel & Tube should properly sit somewhere between $540,000 and $1,080,000, those figures representing the fines imposed in *Commerce Commission v Brilliance International Ltd* and *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, which we discuss below.[108] That suggests a starting point of about $800,000 to $1,650,000. The Commission contends for an adjusted starting point of between $4 million and $4.5 million, rather than the $3.8 million actually adopted in the High Court. It would assign about 75 per cent of that to the compliance representations and the balance to the

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[108] *Commerce Commission v Brilliance International Ltd*, above n 27; and *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd* [2017] NZDC 1956.

independent testing representations. Both parties seek support for their positions in comparable cases.

Comparable cases generally

[127] We make two introductory points about the cases cited. First, the maximum penalty increased in 2003 (from $100,000 to $200,000) and in 2014 (to $600,000). Second, in some of the cases the sentencing court endorsed a negotiated penalty, which detracts from the authority of those decisions. Absent contradictors a court may not be well placed to assess the appropriate penalty for itself.[109]

Building timber: *Commerce Commission v Carter Holt Harvey* and *R v Reid*

[128] These cases, which the Commission contends are the most relevant examples, concerned timber used in construction. The timber was graded for its structural properties using a machine stress technique. Australian and New Zealand Standards set minimum properties that each grade of timber must meet. Carter Holt Harvey, a large company, sold timber which was labelled as compliant but most of it was not. These were not testing failures; the timber did not meet the performance requirements of the relevant Standards. Dissemination of the misrepresentations was very extensive and the offending covered a three-year period. On investigation, it was found that Carter Holt managers had known for some time that it was marketing and selling non-compliant timber. The company made no attempt to alert the market to the fact that the standard was not being met. It appears that over the three-year period Carter Holt reported $177 million in net sales revenue from timber sold as compliant.[110] The parties agreed that a fine of $45,000 should be imposed on each of 20 charges; that is a total of $900,000.[111] (The Commission based its proposed starting point in this case on that figure, allowing for increases in the maximum penalty.) Mr Reid, who was the general manager of the wood products division, was also prosecuted, but was sentenced some months later.[112] It appears from Judge Bouchier's sentencing

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109 Chris Noonan "Of Arsenic, Antitrust and Agreed Penalties for Price Fixing" (2006) 12 NZBLQ 253 at 264–267.

110 This figure does not appear in the *Carter Holt Harvey* sentencing decision but it is contained in the summary of facts appended to the decision and appears to have been accepted by the Judge.

111 *Commerce Commission v Carter Holt Harvey*, above n 25, at [15].

112 *R v Reid* DC Auckland CRI-2007-004-5790, 5 April 2007.

decision in Mr Reid's case that the Commission alleged the offending was deliberate but that was disputed and no clear findings were made.[113]

Pain medication: *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*

[129] A manufacturer passed off versions of its standard product, Nurofen, as superior by representing that they were formulated to target various specific pains. Judge Jelas described the conduct as grossly misleading.[114] Gain was estimated on what appears to be a "super profit" basis, at more than $1 million.[115] The offending continued over a five-year period ending in December 2015 and some of the charges were subject to the $600,000 maximum fine. The company persisted despite being on notice that its representations were potentially misleading and despite having been directed by Australian authorities to withdraw the same misleading packaging in that jurisdiction.[116] The penalty of $1,080,000 (from a starting point of about $1.6 million) was largely negotiated.[117]

Deer velvet: *Commerce Commission v Gate Solutions Ltd*

[130] This 2020 case concerned deer velvet supplements sold for their alleged health benefits. The capsules contained less velvet than was described on product labels and were topped up with a filler. The offending was large scale — more than 11 million capsules were affected — and Judge Phillips found that the defendant knew the claims were false but did not deliberately deceive or mislead.[118] The company had instructed its suppliers to produce products containing less deer velvet than was stated on the labels. It pleaded guilty but did not cooperate with the Commission and the penalty was fixed only after a lengthy disputed facts hearing.[119] It was fined $194,400, but the starting point was fixed using the bands adopted by Duffy J in this case.[120]

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113 At [37].
114 *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 108, at [21].
115 At [33].
116 At [36].
117 At [54]–[55].
118 *Commerce Commission v Gate Solutions Ltd* [2020] NZDC 10193 at [95].
119 At [370]–[372].
120 At [366]–[367].

Heat pumps: *Commerce Commission v Fujitsu General New Zealand Ltd*

[131] Counsel did not focus on this 2017 case but we mention it because it involved a major business that made, via television and other advertising, very widely-disseminated representations about the quality of its product. Fujitsu claimed that its heat pumps were more energy-efficient than those of its rivals and also claimed that tests proved this. These claims were unsubstantiated. The company complied immediately when challenged.[121] It was found to be careless.[122] Judge Mill could not quantify gain but appeared to accept it was not determinative in these circumstances.[123] The starting point was $510,000.[124]

Bicycles: *Commerce Commission v Bike Retail Group Ltd*

[132] In this 2017 case the defendant had engaged in a very extensive marketing campaign in which it falsely represented the normal price of its bicycles over a two-year period, claiming that advertised stock was being sold at half price or as clearance stock. The offending was calculated. Judge D J Sharp was satisfied that the campaign increased the defendant's turnover and noted that it poured $2 million per annum into advertising, but he was not able to estimate its profit.[125] A starting point of $1.2 million was adopted.[126]

Consumer credit: *Budget Loans Ltd v Commerce Commission*

[133] We have already mentioned this 2018 case. It involved especially egregious offending, in which the defendant cynically misrepresented to vulnerable consumers its rights to repossess their property and to charge additional sums. The company faced 125 charges and the maximum fine at the time was $200,000. The starting point adopted was $800,000.[127] A fine of $720,000 was upheld on appeal.[128]

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121 *Commerce Commission v Fujitsu General New Zealand Ltd* [2017] NZDC 21512 at [51].
122 At [75].
123 At [58].
124 At [81].
125 *Commerce Commission v Bike Retail Group Ltd* [2017] NZDC 2670 at [10]–[11].
126 At [15].
127 *Budget Loans Ltd v Commerce Commission*, above n 82, at [35].
128 At [2] and [94].

Billing beyond termination: *Commerce Commission v Spark New Zealand Trading Ltd*, *Commerce Commission v Vodafone New Zealand Ltd* and *Commerce Commission v CallPlus Services Ltd*

[134] In each of these cases the Commission prosecuted large telephone companies for billing customers for services after a relevant termination period had ended. In *Spark*, a $675,000 fine was imposed for conduct that continued for three and a half years and resulted in customers overpaying approximately $6.5 million.[129] In *Vodafone*, a $350,000 fine was imposed for conduct that continued for almost seven years and resulted in overpayments of $285,359.[130] In *Callplus*, a $121,500 fine was imposed for conduct that continued for more than six years and resulted in over payments of $132,578.[131] In the *Vodafone* and *Callplus* cases, staff were aware that billing beyond termination issues existed but protocols for making manual adjustments were not consistently used.

The other steel mesh cases: *Commerce Commission v Timber King Ltd*, *Commerce Commission v Brilliance International Ltd*, and *Commerce Commission v Euro Corporation Ltd*

[135] There are three other steel mesh cases arising from the same Commission investigation that revealed Steel & Tube's offending. The cases are *Timber King Ltd*,[132] *Brilliance International Ltd*[133] and *Euro Corporation Ltd*.[134]

[136] Timber King faced five charges covering the period from June 2015 until February 2016. It represented that the mesh was 500E grade and compliant with the Standard, when it did not comply and had not been tested and sampled as the Standard required. The performance of the mesh was seriously substandard. It was manufactured and tested overseas, and the defendants said that they had relied heavily on the mesh producer. On one occasion, however, the defendants falsely represented, using a forged certificate, that mesh had been tested by a New Zealand agency. The offending was on a small scale; about 2600 sheets of mesh were sold. The defendants pleaded impecuniosity. Judge Ronayne adopted the Commission's

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129 *Commerce Commission v Spark New Zealand Trading Ltd* [2019] NZDC 7801.
130 *Commerce Commission v Vodafone New Zealand Ltd* [2019] NZDC 15705.
131 *Commerce Commission v Callplus Services Ltd* [2020] NZDC 2655.
132 *Commerce Commission v Timber King Ltd*, above n 27.
133 *Commerce Commission v Brilliance International Ltd*, above n 27.
134 *Commerce Commission v Euro Corporation Ltd* [2020] NZDC 13297.

suggested starting point of $600,000 for most of the conduct and $60,000 for the fraudulent testing representation.[135] No allowance was made for totality.[136]

[137] Judge Ronayne also sentenced Brilliance International for similar offending involving imported mesh. In this case, the defendant was heavily involved in setting up the testing processes used by the overseas manufacturer. Its testing processes were similar to those of Steel & Tube. However, the mesh was still better quality than non-seismic mesh. Some of it was independently tested but most was tested by the manufacturer. The defendant was charged with falsely representing that the mesh complied with the Standard and had been independently tested. These claims were widely disseminated but the offending was on a moderate scale; the defendant sold up to 56,125 sheets of mesh. The Judge was satisfied that it gained some revenue as a result of the misrepresentations but it seems no estimate was provided.[137] Some of the offending predated the increase in maximum penalty. The Judge adopted a starting point of $600,000 for the compliance representations and $200,000 for the testing representations.[138] No allowance was made for totality.[139]

[138] Euro Corporation was the last of these defendants to be sentenced, on 10 July 2020. Its conduct covered the period 1 January 2012 to 31 August 2015. It, too, falsely represented that its imported mesh complied with the Standard. It had no reasonable basis for asserting that the mesh met the Standard's performance requirements, although it seems that the mesh did in fact comply, and the mesh had not been tested as the Standard required. The defendant also misrepresented that its mesh had been independently tested, although this was the result of an initial oversight that became careless over time. The parties agreed on a starting point of approximately $470,000 but Judge M-E Sharp, who characterised the offending as careless, fixed it at a lower figure, $420,000.[140] She declined to find that consumers suffered detriment, noting

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135 *Commerce Commission v Timber King Ltd*, above n 27, at [102] and [103].
136 At [104].
137 *Commerce Commission v Brilliance International Ltd*, above n 27, at [77].
138 At [109] and [114].
139 At [115].
140 *Commerce Commission v Euro Corporation Ltd*, above n 134, at [20].

the absence of any evidence that the mesh failed to meet the Standard's specifications.[141] A modest allowance was made for totality.[142]

Conclusion: the global starting point in this case

[139] Some of the defendants in the cases cited to us offended in a calculated and highly deceptive way, intending to profit by misleading consumers. Sometimes the product sold was materially different from what it was represented to be or the defendant persisted after being put on notice of its contraventions. Sometimes the offending resulted in significant gains for the defendant and corresponding harm to consumers. These are serious aggravating features which may require a court to consider s 8(c) of the Sentencing Act and might have justified the starting points sought by the Commission had they been present in this case. But they were not. To that extent we accept Mr Heron's submission that Steel & Tube's offending was substantially less culpable than that of either Reckitt Benckiser or Carter Holt Harvey.

[140] What makes Steel & Tube's offending serious is the important use to which the product is put, the vital importance of compliance with the Standard, the absence of any adequate excuse, and the large scale and long duration of the offending. These features must dominate sentencing in its case. It bears repetition that these are strict liability offences.

[141] All the cases are instructive for their diversity of offending and their treatment of culpability factors, but they were cited principally for the fines imposed and we do not find those very useful, even when allowances are made for changes in the maximum penalty. Every case depends on its particular circumstances, and on our approach to the legislation the fines imposed in some of them could have been materially larger. The other steel mesh cases involved very similar offending but the defendants' culpability varied along with the scale of the offending.

[142] We agree with the Commission that the compliance charges are the more serious charges in this case, notwithstanding that they did not involve intentional

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141 At [14]–[15].
142 At [19].

deception. They went to compliance with the Standard (which did not mandate independent testing). Compliance was critically important for this product having regard to its intended use and the reliance that would be placed on it. The representations were widespread and a very large quantity of the mesh was sold.

[143] Against that, the representations were not intended to mislead or deceive. Steel & Tube believed the mesh did comply and that its testing processes were equivalent or superior to those of the Standard. The company did not mislead for gain, and we are not able to estimate what gain it actually made. The company responded by withdrawing the mesh from the market as soon as it was put on notice that its testing processes did not comply.

[144] The starting point calls for an evaluative judgment against applicable sentencing purposes, principles and factors. We would adopt a global starting point of $1.5 million for the compliance representations if sentencing Steel & Tube at first instance. We do not accept that deterrence calls for a higher figure, partly because the offending was misguided rather than deliberate and partly because we cannot estimate the company's gain. As noted above, we do not accept the Commission's estimate of $4 million. The substantial starting point reflects the considerations mentioned at [140] and [142], as well as the change in maximum penalty during the period of offending. It would be higher but for the considerations mentioned at [143].

[145] We agree with the Commission that the independent testing representations are somewhat less significant than the compliance representations, but they were clearly made and widely disseminated, and we have accepted that the offending was deliberate albeit not as culpable as some of the comparable cases. We would adopt a global starting point of $900,000 on those charges. That results in an overall starting point of $2.4 million taking into account all aggravating and mitigating features of the offending.

Circumstances of the company

Remedial action and commitment to future compliance

[146] Judge Cathcart accepted that Steel & Tube took significant remedial steps to ensure future compliance.[143] It engaged independent laboratories to conduct testing; invested in new software to record, store and produce test certificates and monitor long-term quality data; provided additional training for staff; and hired an additional quality manager.

Guilty pleas and co-operation

[147] It is common ground that Steel & Tube co-operated with the Commission, took remedial action and entered early guilty pleas. The allowance of 35 per cent made by Judge Cathcart is not in dispute.

Financial resources

[148] As noted at [8] above, Steel & Tube is a large company by New Zealand standards. There is no doubt that it can afford to pay a fine of $1,560,000. The question is whether it ought to be required to pay more for accountability, denunciation or deterrence reasons. The Commission complains that the courts below never answered the question whether the fine that would otherwise be imposed was adequate having regard to the company's means.

[149] For this purpose it is appropriate to consider the company's profitability, which we have mentioned at [124] above. The substantial fines we would impose are a material cost for this company, and we think they sufficiently serve the relevant sentencing purposes. The company's resources do not call for an increase.

Totality

[150] The Sentencing Act provides that concurrent sentences of imprisonment are generally appropriate for offences that are of a similar kind and connected in some

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143 District Court decision, above n 2, at [144].

relevant way.[144] Individual sentences must reflect the serious of each offence, but where cumulative sentences are imposed they must not result in a total sentence that is wholly out of proportion to the gravity of the overall offending.[145] The totality principle applies to other sentence types, including fines. Section 40(2) does not exclude the totality principle in sentencing under the Fair Trading Act, but rather prescribes how it is to apply in qualifying cases.

[151] The offending in this case was all of the same or very similar kind and very closely connected. Cumulative sentences are necessary because the offending was extensive in scale and duration and the appropriate penalty exceeds the maximum available for any single offence. As noted above, it is not in dispute that Steel & Tube is unable to invoke s 40(2).

[152] A totality adjustment may be necessary in such a case if the court has calculated the sentence for each offence separately.[146] The required totality adjustment could be substantial, as we have explained at [84] above and as Duffy J correctly recognised. In practice courts do not always sentence in that way. Offending of this type, in which a course of conduct is the subject of a number of near-identical charges, may be sentenced on a global basis, with the resulting penalty being distributed in an appropriate manner among the charges. We accept what we take to be the Commission's underlying point about totality, namely that when a global starting point has been set a totality adjustment should not be necessary. On the approach we have taken, we would not make a totality adjustment here.

Overall assessment

[153] In the result, we would impose the following global fines if we were sentencing Steel & Tube at first instance: for the compliance representations, $1.5 million, and for the independent testing representations, $900,000.

[154] The appellate question is whether the sentence substituted in the High Court is manifestly excessive. We are satisfied that it was and should be reduced to the sums

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144 Sentencing Act, s 84(2).
145 Section 85.
146 Section 85(1).

just mentioned. That penalty will be distributed among the charges as a proportion of the maximum penalty.

Result

[155] The appeal of Steel & Tube is allowed, and that of the Commission dismissed. We set aside the fines substituted in the High Court and impose the following fines, totalling $1,560,000:

	CRN	**Date Range**	**Offence**	**Penalty**
Compliance representations				
1	17004502002	1 March 2012 to 30 June 2012	s 10	$44,318.18
2	17004502000	1 July 2012 to 31 October 2012	s 10	$44,318.18
3	17004501999	1 November 2012 to 28 February 2013	s 10	$44,318.18
4	17004501998	1 March 2013 to 30 June 2013	s 10	$44,318.18
5	17004501997	1 July 2013 to 31 October 2013	s 10	$44,318.18
6	17004501996	1 November 2013 to 28 February 2014	s 10	$44,318.18
7	17004501995	1 March 2014 to 16 June 2014	s 10	$44,318.18
8	17004501994	17 June 2014 to 31 October 2014	s 10	$132,954.55
9	17004501993	1 November 2014 to 28 February 2015	s 10	$132,954.55
10	17004501992	1 March 2015 to 30 June 2015	s 10	$132,954.55
11	17004501991	1 July 2015 to 31 October 2015	s 10	$132,954.55
12	17004501990	1 November 2015 to 6 April 2016	s 10	$132,954.54
Holmes representations				
13	17004501989	1 March 2012 to 31 August 2012	s 13(e)	$24,375.00
14	17004501987	1 September 2012 to 28 February 2013	s 13(e)	$24,375.00

15	17004501986	1 March 2013 to 31 August 2013	s 13(e)	$24,375.00
16	17004501985	1 September 2013 to 28 February 2014	s 13(e)	$24,375.00
17	17004501984	1 March 2014 to 16 June 2014	s 13(e)	$24,375.00
18	17004501983	17 June 2014 to 31 December 2014	s 13(e)	$73,125.00
19	17004501982	1 January 2015 to 30 June 2015	s 13(e)	$73,125.00
20	17004501981	1 July 2015 to 13 December 2015	s 13(e)	$73,125.00
21	17004502008	1 January 2016 to 6 April 2016	s 13(e)	$73,125.00
Independent testing and certification representations				
22	17004502011	20 May 2013 to 16 June 2014	s 13(e)	$24,375.00
23	17004502010	17 June 2014 to 16 May 2015	s 13(e)	$73,125.00
24	17004502009	17 May 2015 to 6 April 2016	s 13(e)	$73,125.00
Total				**$1,560,000**

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