EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-005968
[2021] NZDC 2864

COMMERCE COMMISSION
Prosecutor

v

GLOBAL FIBRE8 LIMITED
First Defendant

and

TANGI TUAKE
Second Defendant

Hearing:	7, 8, 9 December 2020
Appearances:	A McClintock, D Taylor for the Prosecutor J Donkin (standby counsel) for the Defendants
Judgment:	19 February 2021

RESERVED JUDGMENT OF JUDGE K J PHILLIPS
Under the Fair Trading Act 1986

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[1] The defendants face a number of charges laid against them being charges alleging misrepresentations under s 13(e) of the Fair Trading Act 1986 (the FTA).

[2] The charges faced by each defendant are as follows:

1) Global Fibre8 Limited – CRN 19004502538

- Which alleges that between 1 June 2017 and 10 August 2018 at Auckland and elsewhere, it being in trade, in connection with the supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T a Chinese manufactured wall panel system had approval uses and or benefits particularised as being:

  - Representations on a website that CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 (CodeMark Certificate) certified its compliance with the New Zealand Building Code such representations being false and/or misleading because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.[1]

2) Global Fibre8 Limited – CRN 19004502539

- Which alleges that between 22 July 2015 and 31 December 2015 at Auckland and elsewhere, it being in trade, in connection with the supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T a Chinese manufactured wall panel system had approval uses and or benefits particularised as being:

  - Representations in a letter that CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 certified its compliance with the New Zealand Building Code such representations being false and/or misleading

[1] Fair Trading Act 1986 Sections 13(e) and s 40(1)

because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.

3) Global Fibre8 Limited – CRN 19004502540

- Which alleges that between on or about 23 May 2018 at Auckland and elsewhere, it being in trade, in connection with the supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T a Chinese manufactured wall panel system had approval uses and or benefits particularised as being:

    - Representations made in a TVNZ TV1 6pm News broadcast that a CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 certified its compliance with the New Zealand Building Code such representations being false and/or misleading because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.

4) Global Fibre8 Limited – CRN 19004502542

- Which alleges that between the 29 August 2016 and 23 March 2018 at Auckland and elsewhere, it being in trade, in connection with the supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T a Chinese manufactured wall panel system had approval uses and or benefits particularised as being:

    - Representations made to Licensees and Installers that a CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 certified its compliance with the

New Zealand Building Code such allegations including in writing; at meetings with individuals; and at Licensee and Installer Training Sessions such representations being false and/or misleading because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.

5) The defendant Mr Tangi Tuake is charged under CRN 19004502547 with the same allegations as is made against the defendant Global Fibre8 Ltd in CRN2538; alleging that between 1 June 2017 and 10 August 2018 representations were made that were false relating to the CodeMark Certificate. Mr Tuake is charged as a party to the offending alleged against the first defendant Global Fibre8 Ltd in that:

a) He was a director and Chief Operating Officer of Global Fibre8;

b) The website operated by Global Fibre8 where the representations are alleged to have made was his responsibility;

c) He provided feedback on the content of the information as was promoted on the website and therefore that he had a duty to ensure that Global Fibre8's website information was accurate and not misleading information; and

d) He approved the website's content without correcting the representations concerning the CodeMark certificate and the compliance therefore claimed by that certificate.

6) Mr Tuake – is charged under CRNs 19004502548, 19004502549 and 19004502550 faces similar allegations to those faced by Global Fibre8 Ltd in that:

- Under charging document CRN 2548 it is alleged that between 22 July 2015 and 31 December 2015 at Auckland and elsewhere, he being in trade, in connection with the supply or possible supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T, a Chinese manufactured wall panel system, had approval uses and or benefits particularised as being:

    - That he was the main author of and had signed off and sent a letter making representations that a CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 certified its compliance with the New Zealand Building Code. Such representations being false and/or misleading because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.

- Under charging document CRN 2549 it is alleged that Mr Tuake on or about 23 May 2018 at Auckland and elsewhere, he being in trade, in connection with the supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T, a Chinese manufactured wall panel system, had approval uses and or benefits particularised as being:

    - That he made representations in a TVNZ TV1 6pm News broadcast that a CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 certified its compliance with the New Zealand Building Code such representations being false and/or misleading because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.

- Under charging document CRN 2550 it is alleged that Mr Tuake between the 29 August 2016 and 23 March 2018 at Auckland and elsewhere, he being in trade, in connection with the supply of goods namely a construction product called K3T, made false and/or misleading representations that the K3T, a Chinese manufactured wall panel system, had approval uses and or benefits particularised as being:

    - That he made representations to Licensees and Installers that a CodeMark Certificate of Conformity issued in respect of K3T on 21 July 2015 certified its compliance with the New Zealand Building Code such representations including writing; at meetings with individuals; and at Licensee and Installer Training sessions such representations being false and/or misleading because the CodeMark Certificate only certified K3T's compliance with the Building Code of Australia and not the New Zealand Building Code.

[3] Each of these various charges was denied by both defendants. The Court appointed Mr James Donkin to represent both the first and second defendants as standby counsel. A hearing was conducted beginning on 7 December 2020. The hearing concluded on 9 December 2020. Counsel were given time to make written submissions at the conclusion of the evidence and written closing submissions have been received by the Court from the Commerce Commissions counsel and from Mr Donkin on behalf of the defendants.

[4] Section 13(e) of the FTA states:

> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—
>
> ...

> (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or

[5] The elements of the charges laid against each of the respective defendants, as argued by the Commission is helpfully detailed in Schedule One of the written submissions received by the Court as the Commission's closing address. They are detailed as follows:

> 1) In relation to each charge the Commission must prove that:
>
> a) The defendant is a "person" in "trade" within the meaning of the FTA;
>
> b) The named defendant made the particular representation at issue or, where relevant, was a party to its making;
>
> c) The representation(s) was in connection with the supply, possible supply, or promotion of goods, namely the wall panel system called K3T;
>
> d) The representation was that K3T had a particular approval, use or benefit, namely that a CodeMark Certificate of Conformity issued in respect of K3T certified its compliance with the New Zealand Building Code (NZBC); and
>
> e) The representation was false and/or misleading because the CodeMark Certificate only certified its compliance with the Building Code of Australia and not the NZBC.

[6] In its submissions the Commission argues that the only real issue in dispute is what the actual representations were.

[7] Mr Donkin on behalf of both defendants does not argue the law in relation to s 13(e) of the FTA. At paragraph 30.2 of his closing submissions he details the following:

1) Each defendant was a "person" within the meaning of the Act. That is not in dispute;

2) Each defendant was "in trade" as defined in section 2 of the Act. That is not in dispute;

3) That the defendants made representations in connection with the supply or possible supply of K3T;

4) It is disputed by the defendants that during the TVNZ interview the defendants made representations in connection with supply or possible supply of K3T;

5) That K3T had approvals, uses, and/or benefits, which Mr Donkin said is 'not in dispute'. The submissions do not say that it is accepted that there were representations made of a particular approval contained within a CodeMark Certificate of Conformity issued in respect of K3T, certifying its compliance with the NZBC. For the purposes of my decision, it is put by the defence that the fact that K3T had approval uses and/or benefits is not in dispute, but the details of the actual representations made are; and

6) The allegations that the various representations were false, or misleading is disputed.

[8] In paragraphs 3.3 – 3.6 Mr Donkin discuss the issue of 'false or misleading' and details Tipping J's comments in *Marcol v Commerce Commission.*[2] He also brings to the Court's attention the authority of *Godfrey Hirst Ltd v Cavalier Bremworth*.[3] Mr Donkin submits that Wild J.'s formulation of the test in relation to the assessment of the term "the average New Zealand shopper" as being an assessment more in the line than the "reasonable consumer" as is submitted in paragraph 4 of the schedule to the Commerce Commission's submissions.

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[2] *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502
[3] *Godfrey Hirst New Zealand Ltd v Cavalier Bremworth* [2014] NZCA 418

[9] The Commerce Commission submits that the representation made by the defendants were that K3T had an approval use and/or benefit in the form of CodeMark Certification, that certified compliance with the NZBC. At paragraph 4 the Commission submits that in assessing what the representation said or what could be implied from the representations, in the terms of this case, the Court should look to what a reasonable consumer would make of the representations found to have been made. I accept the submissions made by the Commission as authoritative as it is supported by a number of decisions in similar cases. The Commission argues that the identified and proven representations made by each defendant amount to claims of an approval, use and/or benefit to consumers within the context of s 13(e) of the FTA in relation to K3T. 'Approval' is put as meaning 'confirming, authoritatively sanctioning, or pronouncing to be good and commending.' I accept those submissions as correct statements of the applicable law.

[10] In relation to the allegation against the second defendant Mr Tuake where he is charged under charging document 2547, as being a party to the offending vis a vie the website operated by the first defendant, Global Fibre8, there does not appear to be any dispute in relation to the requirements of establishing party liability, i.e. as Mr Donkin puts it in his submissions, that the defendant Mr Tuake acted in aid of any established website offending by Global Fibre8.

[11] Under Section 66 of the Crimes Act 1961, (parties of an offence) I note that Mr Tuake is charged under s 66(1)(b). That particular provision states:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> ...
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or

[12] It is without dispute that 'aiding' in the terms of s 66(1)(b) means 'assisting helping or giving support to'. Refence is made to *Ashin v R*.[4] The duty falls upon the

[4] *Ashin v R* [2014] NZSC 153.

prosecution to prove in relation to that particular charge against the second defendant Mr Tuake that:

1) The offence to which he is alleged to have been a party has been committed by Global Fibre8;

2) That the defendant Mr Tuake assisted Global Fibre8 in the commission of the crime, by words or conduct or both;

3) That Mr Tuake intended to assist Global Fibre8 to commit that particular offence; and

4) Mr Tuake knew both the physical and mental elements of the essential facts of the offence to be committed by Global Fibre8.

[13] Mr Donkin emphasises at paragraph 3.7 of his submissions the particular point, that a person must know the essential facts of the offence to be committed by the principal offender in order to attract liability as a party.

[14] As the trial issues have been put in Mr Donkin's closing submissions, in relation to each charge the Court must consider and resolve what was being conveyed by any established representation made by the particular defendants. And, if the representations are proven to have been made has it been established that they were false or misleading.

[15] I accept the submissions made by the Commission at paragraph 2.4 of its closing address, that 'false' is to be taken as simply meaning untrue, erroneous or incorrect. Further that 'misleading' does not require proof of an incorrect statement of fact. I adopt the quoted passage from *Gault on Commercial Law* that "half-truths, representation causing confusion, ambiguous remarks, and some instances of silence may be misleading but not false."[5] Further that misleading representations can include those which though literally true in fact, lead into error.[6]

[5] At FT. 13.08 (3)
[6] From the same learned author.

[16] Because none have been put as being relied on, I disregard for the purposes of this decision, any of statutory defences contained within s 44 of the FTA.

[17] I accept that in relation to the second defendant, Mr Tuake involving the allegations of him being party to the website representations, that his state of mind is to the falsity or misleading nature of the representations, is directly relevant; but that on all of the other charges, his state of mind is irrelevant for the purposes of liability under the FTA. Again I accept the authority as discussed in the closing submissions of the Commerce Commission in that respect. Mr Tuake's state of mind is relevant to the degree of culpability only.

The background – CodeMark Scheme

[18] CodeMark is a voluntary building product certification scheme. It is a certification scheme developed by the Ministry of Business Innovation and Employment (MBIE) acting in conjunction with the Australian Building Code's Board (ABCB). In the terms of the scheme, products can be certified as meeting the requirements of the NZBC or the Building Code of Australia (BCA). If the products are certified, they are issued with a CodeMark Certificate of Conformity.[7]

[19] This does not appear to be in dispute by the defendants. Further it appears on the evidence that I accept that K3T never had a New Zealand CodeMark Certificate issued in respect of it. It is also common ground that K3T received certification under the BCA. The defendants appear to have attempted to have an application for certification of the product in New Zealand progressed, but this did not in fact occur.

[20] In the terms of the New Zealand Building Act 2004, s 19 details how compliance with the NZBC can be established. Further that section provides that the District Councils who are Building Consent Authorities must accept a current 'product certificate' (as it is called in the legislation) which is the New Zealand CodeMark issued under s 269 of the Building Act, if every relevant condition is met, as establishing compliance with the NZBC.

[7] From 2.1 and 2.2 of the prosecution opening submissions.

[21] The Building (Products) Certification Regulations 2008 establish how such certification is to be achieved. Matters that must be complied with, relate to the provisions of Clause B2 i.e. durability; Clauses F1 – F9 and any other provisions of the NZBC that relates to their intended use. The regulations set out all of the key information required for a New Zealand CodeMark Certificate in Schedule 2. Importantly, in this case, there is no mention made at all of the Australia CodeMark Certificates under s 19 of the Building Act. Building Consent Authorities are therefore not mandated to accept Australia CodeMark Certificates as establishing compliance with the NZBC.

[22] I accept the submissions made by the Commerce Commission at paragraph 3.6 that an Australia CodeMark certifying compliance with the BCA gives no evidence on a prima face basis as to whether a product complies with the relevant provisions of the NZBC, and particularly, Clause B2 as to durability. It was not disputed at trial that K3T's CodeMark Certificate does not contain the key information as is required by Schedule 2 of the Regulations i.e. what must be included in a New Zealand Certificate.

[23] Although not in dispute, that is a resume of the position in relation to the CodeMark Certification Scheme, so as to give a background to the matters that are in dispute and which are subject to this decision. Put quite simply, if a product does have a New Zealand CodeMark, then a Building Consent Authority has to accept it as that product's compliance with the NZBC; so long as the product is being used in accordance with the conditions listed on the CodeMark Certificate. The marketing advantage of such a CodeMark certification is therefore obvious.

[24] During the course of the hearing, there appeared to be reliance placed by the defendants on what is known as "JAS-ANZ." That is the Joint Accreditation System of Australia and New Zealand. That is a body responsible for accessing and accrediting product certification bodies. i.e. in order for a product certification body, to evaluate products for CodeMark certification it must be accredited by the JAS-ANZ body. JAS-ANZ plays no other role in the process.

[25] I accept the evidence that I heard that the need for such separate certification can be seen from the obvious differences in the New Zealand Building Code (NZBC)

and the Building Code of Australia (BCA); each of which provides for the differing specific physical and regulatory environments of New Zealand and Australia. The differences relate to issues such as durability, seismic structural loading, infestations, heat and similar such issues, which are different in respect of each of the two countries and where one certification scheme "obviously" could not work for both countries.

Background as to the K3T product and decedents

[26] Again, it was not disputed at the hearing, that K3T is an internal and external wall building system, consisting of magnesium-oxide boards held together by spacers which are filled with concrete once erected. It was marketed by the first defendant, Global Fibre8 as a 'cheaper and quicker' alternative building method. Global Fibre8 imported K3T for sale in New Zealand and also sold licences' to 'sale agents' (called 'licensees') in New Zealand. Such licensees helped promote K3T. The company also ran installer training sessions for a profit obtained from charging a fee to the attendees at such training.

[27] The first defendant, Global Fibre8 was incorporated by the second defendant, Mr Tuake in 2011. Mr Tuake together with a Mr Opeteaia, in November 2012 set up a separate company in Australia called Esttar Pty Ltd (Esttar). That company was to hold intellectual property including any CodeMark. Global Fibre8 was to be in charge of the sales of K3T.

[28] The second defendant, Mr Tuake and Mr Opeteaia engaged SAI Global Certification Service (SAI Global) which is a product certification body in Australia, to evaluate K3T for CodeMark certification. It appears from the evidence at hearing that the application initially sought certification under both the NZBC and the BCA, but Esttar decided to progress only the application for Australian certification. On 21 July 2015, SAI Global issued an Australian CodeMark Certificate to Esttar certifying compliance of K3T with the BCA.

[29] Both the defendants were involved in this process. This included Mr Tuake attending testing in New Zealand and manufacturing factory audits in China. Following the issue of the Australia CodeMark the defendants then sought to obtain

New Zealand CodeMark Certification, the application for which was never completed. SAI Global never issued a New Zealand CodeMark for K3T; and K3T has never received CodeMark certification in New Zealand.

[30] That resume follows the evidence that was called on behalf of the prosecution in relation to both the operation of the CodeMark scheme and the requirement, obvious as it is, for separate certifications between New Zealand and Australia.

[31] Mr Hobbs from MBIE in his evidence discussed the CodeMark Certification as giving 'certainty' both for the applicant and the Building Consent Authority. The certification provides certainty for consumers as per his evidence. Mr Hobbs emphasised that CodeMark Certificates are not interchangeable between New Zealand and Australia and discussed the difference in the regulatory systems applying in each country. He detailed what was required in New Zealand in relation to climatic, environmental and seismological issues. He put emphasis on the changes made in the NZBC as a result of the *Leaky Homes saga*. I accept Mr Hobbs' evidence that an Australian CodeMark Certificate could not and would not satisfy the requirements of the NZBC.

[32] The evidence from Mr Hobbs was supported by the evidence by Mr King from the Auckland City Council. He discussed a Building Authority's role in relation to building consent applications and the duty on such a consenting body to accept the New Zealand CodeMark Certificate as proof of a product compliance with the NZBC, so long as the scope of the work, as proposed in the building consent application was not outside the certificates scope.

[33] He spoke in his evidence about CodeMark certification streamlining the building consents process through an applicant not needing to prove when a CodeMark Certificate is filed in relation to the use of a product, that the product complies with the relevant clauses of the NZBC. In relation to the consumer, the existence of a New Zealand CodeMark Certificate can (in the evidence of Mr King which I accept) streamline the application process timewise. Mr King confirmed that an Australian CodeMark Certificate has no standing of itself in such an application albeit, that it can be submitted as part of the overall application process.

[34] As to the certification process, Heather Mahons evidence was that SIA Global was the certification body in relation to Global Fibre8's CodeMark Certification for Australia, i.e. under the BCA. She confirmed the necessity for separate certification, and she confirmed that the process to obtain certification is a separate process for a product in relation to New Zealand as against Australia. She also confirmed that there have been no CodeMark Certification for K3T under the NZBC.

[35] Again, none of this appears to be in dispute in relation to this case but is included as part of the overall background when considering the specific allegations against each of the defendants.

Website representation

[36] The website operated under www.GlobalFibre8.co contained various representations about K3T's CodeMark. Each of the defendants faces a charge in relation to those representations. The representation itself is detailed in the screen shot produced in the course of the evidence by witnesses and as per the exhibit bundles.[8] The representations made on the homepage of that website are:

> Launched in 2014, the K3T wall system has received notification under the CodeMark scheme. This certification scheme for Australia and New Zealand is one of the highest testing in the world and this sets the system apart from other products and systems.
>
> CodeMark certification for the K3T wall means guaranteed acceptance by regulatory bodies and demonstrates alignment with mandatory compliance requirements.
>
> ...

And under the heading of K3T Wall System Features there is the following paragraph:

> Certificate of Conformity: other systems are only assessed on a couple of areas unlike the K3T Wall Systems which is fully certified.

[37] The submission by the Commerce Commission in relation to this representation is that the website is a website operated by the first defendant, Global Fibre8. It states in relation to certification and the clear inference from what is said is

[8] BOD volume 3 Pages 1084 – 1085

that the system K3T wall system had received certification under the CodeMark scheme and that scheme provides for certification under Australia and New Zealand. It is then stated in the next sentence, that CodeMark Certification for the K3T walls means "guaranteed acceptance by regulatory bodies and demonstrates alignment with mandatory compliance requirements." The comment on the webpage under the heading of "Features" claims that the system is fully certified. The Commission submit that K3T's website page and the wording of the representations clearly carried the implication of that the CodeMark Certificate certified compliance with the NZBC and had to be accepted by Building Consent Authorities.

[38] The Commission submits that the representation on the website clearly infers New Zealand certification, and relates directly to consumers within New Zealand. The Commission further submits that its witnesses, [witness 1], and [witness 2]'s, evidence was that they had reviewed the website when making their decisions to purchase the K3T product. [Witness 1]'s evidence was that he came to the conclusion from the website that K3T was a product that could be used in New Zealand and that it had been certified i.e. that it was, in his evidence, a system already being used elsewhere. While I accept without question the submission that there is no necessity for actual proof of consumers using the website and reading the representations, that evidence is relevant to my assessment of how the representations were accessed and then interpreted by consumers.

[39] The defence argument is that the representations can be individually analysed as being correct, i.e. literally true. K3T was fully certified under the CodeMark scheme it is submitted, albeit that it was under the BCA. The CodeMark scheme is a trans-Tasman programme, that means that the product will be accepted by regulatory bodies. Mr Donkin submits therefore that the representations are true. For example in paragraph 4.1(b) Mr Donkin argues that the wording "the CodeMark Certifications Scheme for Australia and New Zealand is one of the highest testing in the world" is true, as is that it is used in both Australia and New Zealand. Further that CodeMark certification for the K3T wall "means guaranteed acceptance by regulatory bodies and demonstrates alignment with mandatory compliance requirements" is also submitted as true and reflects the benefit of a product receiving CodeMark certification.

Mr Donkin argues that K3T was certified per the express terms set out in the CodeMark certificate that Mr Tuake received against the BCA.[9]

[40] With due respect to the submissions of Mr Donkin, I do not accept the argument that he puts forward. A reading of the website page as it is presented establishes in my decision, that that the product has received certification under the CodeMark system. Further, that that system relates to Australia and New Zealand and that the inference from all of that is that such certification could only be gained by the "highest testing in the world" as is detailed in the statement on the webpage. Further it is specifically stated that the certification means a "guaranteed acceptance by the regulatory body" because it "demonstrates alignment with mandatory compliance requirements". There is no restriction detailed in the information that it does not mean any such guaranteed acceptance of K3T by regulatory bodies in New Zealand exists nor that the certification that K3T has got does not demonstrate alignment with mandatory compliance requirements in New Zealand.

[41] I find that the statements as I have detailed on the webpage are clearly misleading and are designed as such to confirm to prospective consumers in New Zealand that K3T wall systems has a CodeMark certification within the New Zealand regulatory requirements and is therefore a product which will provide 'guaranteed acceptance by regulatory bodies within New Zealand'.

[42] Mr Donkin argues that it is a New Zealand company making representations without referring to a New Zealand domain i.e. ".co.nz" and contains an Australian toll free number rather than a New Zealand toll free number. He accepts in his submissions however that the representations are made by a New Zealand based company selling the product in New Zealand.

[43] Accordingly, in relation to the first defendant, Global Fibre8, and charging document CRN 2538, I find the allegation has been established by the prosecution as I am satisfied that Global Fibre8 made representations in relation to K3T in respect of the supply of the wallboard that was misleading (but not in fact false).

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[9] At para 4.1(d)

[44] In relation to the second defendant Mr Tuake, and his involvement in the website, the submissions made by the Commission is that Mr Tuake was a party to the Global Fibre8 established misleading representations.

[45] My having made the finding that Global Fibre8 made the CodeMark representation on its website, the Commission then says in its submissions that Mr Tuake controlled the website; provided feedback on its contents and did not remove the representations as time went on, when it must have been obvious to him that the representations were at the very best misleading. Further the Commission submits it was established on the evidence from the defendant Mr Tuake's interview, that as the Chief Executive Officer of Global Fibre8, he held the responsibility for the website operated by the company. The Commission notes that the evidence from the interview of Mr Tuake that the company totally relied on the website in advertising K3T.[10] His evidence at interview was also that he provided 'feedback'; he reviewed the technical data and was the person responsible for giving instructions to take the website 'down', following the end of the SAI Global involvement.

[46] The defence position is that Mr Tuake's involvement with the website was limited, and that it was Mr Opeteaia and Esttar who were responsible for the website. He refers to passages from the interview of Mr Tuake in that respect. Mr Donkin submits a very clear delineation of responsibility was established with Mr Opeteaia being responsible for the website, the information contained on it and its final sign off. Mr Donkin accepts that Mr Tuake had general involvement with the website as the CEO of Global Fibre8, but that in the end there was a 'lack of evidence' that Mr Tuake was aiding Global Fibre8 to produce the website representation as is alleged. He submits that it would not be appropriate for the Court to infer that as Mr Tuake was CEO of Global Fibre8 that that fact amounted to him personally committing an act to aid Global Fibre8 to breach the FTA.

[47] It is for the Commerce Commission to prove beyond reasonable doubt that Mr Tuake's role in relation to the website was such, that he was aiding Global Fibre8 to produce the website's representation. The Commission's argument is that Mr Tuake

[10] BOD Vol 3 Pages 944 & 945 Interview exhibit 1

accepted he had responsibility for the website as CEO, but that he said that Esttar/ Mr Opeteaia had final sign off.

[48] Whilst I accept the submission that the defendant Mr Tuake would have seen the content and was in position to take control of it, as a CEO/Director of Global Fibre8 he did not do so. But he clearly exercised the type of control required when he instructed Mr Opeteaia to remove references contained within the website, to SAI Global and as he said, "then within 7 days to pull the website down straight away."

[49] Overall upon the overall evidence, I accept the submission that Mr Tuake was fully conversant with the position relating to the CodeMark certification and the lack of the ability of such certification to relate to K3T in New Zealand. He was aware of the content as is detailed above being on the Company's website. He did nothing about removing or reviewing the misleading information that he knew was giving erroneous information about the certification of K3T. Therefore the clear inference to be drawn is that as CEO and Director of the company he had knowledge of the misrepresentation and yet allowed it to continue. I am satisfied that by not taking the website down, when he had clearly, on his own admission, the power to do so, indicates to me that he was knowingly aiding by such inaction the Global Fibre8 breach of the FTA as I have found it did. Mr Tuake was prepared to allow the continuation of the publication containing the misleading representation to those persons referring to Global Fibre8's website and thus was a party to the misrepresentations accordingly.

Charges in relation to TVNZ

[50] These two charges of Global Fibre8 (CRN 2540) and Mr Tuake (CRN 2549) relate to a broadcast on TVNZ on 23 May 2018. There was a news feature conducted by TVNZ via TV1 relating to K3T. In the 23 May broadcast Mr Tuake is alleged by the Commerce Commission to have said the following:

> Statement of Tangi Tuake
>
> Tangi Tuake (TT): Yes (K3T) does meet the New Zealand Building Code
>
> Barber Dreaver (BD): Because according to a building consultant's report they don't meet the B2 durability and B1 structure. Would you agree with that?

> TT: No I don't agree with that. Yeah, I think that can be disputed with a, with a, CodeMark.
>
> *In the television broadcast there is then a screen shot of the CodeMark Certificate and a further shot of the defendant Mr Tuake holding up a framed version of the CodeMark.*

[51] So the Commission's case is that Mr Tuake being interviewed as a representative of Global Fibre8, is told that there are issues with K3T and answers, "Yes it does meet the New Zealand Building Code" and represents that it does by holding up the CodeMark Certificate and saying "No, I don't agree with that. Yeah, I think that can be disputed with a, with a CodeMark." The clear implication that the Commission said can be drawn from that is the CodeMark certification has the effect of certifying compliance of K3T with NZBC.

[52] On this issue, the argument by the defence is that the Commission cannot prove the elements of the charges against Global Fibre8 and Mr Tuake beyond reasonable doubt. It is submitted that Mr Tuake was not saying or doing what he is proved to have done and/or said in conjunction with the supply or possible supply of K3T as alleged by the Commission. It was a representation made in the context of a media interview and in terms of s 13 of the FTA, that section can only capture representations made by a trader in certain circumstances.

[53] It is submitted that the use of "connection with" does not allow the section to capture any representations of the trader about its business whatsoever. Mr Donkin submits that the representation has to be made in a setting where the 'defining dynamic' as he puts it, is the supply or possible supply of goods or services, or their promotion to achieve that end i.e. it is focused on the transaction between the trader and a consumer. The representations here were made as part of an investigation into Global Fibre8 by TVNZ. Allegations are put to Mr Tuake and he responds. The interview answers are not representations made in connection with the supply or possible supply of K3T; therefore there is no commercial element between Mr Tuake and Ms Dreaver (the interviewer). Overall, the defence submits that the type of conduct complained of, is not intended to be captured by s 13 of the FTA.

[54] With respect to Mr Donkin, I do not agree with his submission. Section 13 provides:[11]

> No person shall, in trade, in connection **with the supply** or possible supply **of goods** or services **or with the promotion by any means of the supply or use of goods** or services,—
>
> ...
>
> (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or (Emphasis added)

[55] I emphasis the wording "*with the supply*" ... "*of goods*" and "*with the promotion by any means or use of goods.*" The interview was being conducted by Ms Dreaver, where she had already interviewed and spoken with people who had purchased or had had supplies of the product i.e. K3T. When one has regards to the transcript, it can be seen that Ms Dreaver had spoken with a [witness 3 and witness 4] about wall panels.[12] That is before she spoke with Mr Tuake who advised her that the product did meet the New Zealand Building Code (answering [witness 3]'s query) and disagreeing with the Building Consultant's report, i.e. by the use of the CodeMark reference. When one has regards to that background, Mr Tuake was clearly making a representation relating to a product that had been supplied and was being promoted in the marketplace for sale.

[56] In analysing the provisions of s 13, Mr Tuake was being interviewed by and through his involvement with Global Fibre8, the company that had supplied the wall panels that were the subject of the TV1 presentation. Clearly, Mr Tuake was representing Global Fibre8 and was in 'trade.' He was speaking with Ms Dreaver about the supply of a product and the promotion of it. I note the wording of the section says, "*with the promotion by any means of the supply*" and "*use of."*

[57] Therefore, it is my view, that there is nothing restricting the representations being made and he was acting in relation to the supply or possible supply of goods through his role in trade. He clearly was being interviewed because of his position with the defendant Global Fibre8. He was clearly speaking on behalf of Global Fibre8.

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[11] FTA section 13(e)
[12] BOD page 1089

He was speaking about criticisms made of the goods (K3T) that his company had supplied.

[58] In my view there is nothing in the terms of s 13 that restricts s 13 to future supplies or supplies being made at the immediate moment in time. Mr Tuake was speaking to a reporter about goods supplied earlier, but in the nature of an interview relating to criticisms of the product and its future supply to consumers generally. I do not accept the submission of the defence in relation to its narrow perception of s 13 of the FTA, restricting its clear wording in the view that I have of the ambit of the section.

[59] I find that it was conduct on the part of Mr Tuake speaking for the defendant Global Fibre8 and is captured by the terms of section 13 of the FTA. Clearly, Mr Tuake was being interviewed about product supplied in New Zealand to certain persons. Further, he was being asked specifically about whether the product met the requirements of the New Zealand Building Code. He said that it did. And then by clear implication and direct inference, in holding up the CodeMark Certificate and saying that the CodeMark disputes the allegation that it does not meet the NZBC, he was to his knowledge, acting in a misleading way, in my view and making a false representation.

[60] I am satisfied therefore, that:

1) In relation to the interview with TV1 on 23 May 2018, at the time Mr Tuake was in 'trade'. Global Fibre8 were also in 'trade';

2) I am satisfied that Mr Tuake as a CEO and Director of Global Fibre8 was making and did make the representations at issue;

3) The representation was in connection with the supply and promotion of the wall panel system called K3T; and

4) The representation clearly made, was that K3T had a CodeMark Certificate of Conformity and therefore was certified as to its compliance with NZBC, and that representation in my view was false.

The Letter

[61] The charges in relation to the letter are in respect of charging documents – Global Fibre8 Ltd – CRN 2539 and Mr Tuake – CRN 2548. The letter in question is a letter dated 22 July 2015. It is on the Global Fibre8 letterhead. It signed by the second defendant Mr Tuake with the designation "CEO" and a Kim Bloom also carrying the designation of "CEO". The letter states inter alia:

> We are extremely happy to inform you the K3T wall panel system is now completed and SAI Global has now issued our CodeMark which we have attached for your information.
>
> This means that as of today you are welcome to use this document as a tool to prospect and finalise any dealings you have with your clients. You won't need to convince your clients with any technical reports on past tests conducted this CodeMark covers all that and will also supersede all Councils.
>
> It has been a long and challenging journey for the company however this has been a tremendous result. We wish to thank you for your patience in believing in us and we look forward to working with you all.
>
> We will advise you in due course of our way forward.

[62] The Commission submission is that the letter gives the unequivocal impression that the K3T wall panel has a CodeMark, and that CodeMark has the effect that New Zealand Councils will be obliged to accept it, and that K3T is compliant with NZBC. Emphasis by the Commission is placed on the contents of the letter where it refers to the CodeMark covering "any technical reports." That is that it would supersede all past tests and all previous Councils tests. There is no mention that it relates to one part of a package of documents to go to a Council; rather in the Commission submission it is *the* document and *the* answer.

[63] Mr Donkin in his submissions on this particular issue, notes that the letter was not sent to the public at large. He submits that it was sent to the defendant company's licensees, who already were engaged with Global Fibre8 and who would have been told about the CodeMark previously. (I note the wording of the submission "would have been told.") Mr Donkin refers back to the *Godfrey Hirst* decision and suggests that Court should approach the question on the basis of asking itself:

1) Do the statements in the letter amount to particular representation as alleged by the Commission and as understood by the typical recipient?

2) Whether the typical recipient would derive from it, a message which is in fact misleading?

[64] Emphasis is placed by Mr Donkin that the typical recipient had already been told about K3T and the CodeMark process, and further that the defendants' position is that the recipients were told that the CodeMark was 'useful' in dealings with building consent authorities but should be accompanied by other appropriate documents that evidenced K3T's compliance with the NZBC.

[65] The letter also enclosed a copy of the CodeMark Certificate which certifies K3T's compliance with the Building Code of Australia. The question that Mr Donkin suggests the Court should answer is whether the letter contains misleading representations and that if it is found that it does, one must consider that in light of the typical recipient's knowledge from what the recipients had been informed previously i.e. that the CodeMark was useful but must be a part of other documents that satisfy Councils that K3T would be an acceptable product.

[66] When I assess the letter, I have no doubt at all in finding that the letter was unequivocal as to the position of the CodeMark certification in the building consent process in New Zealand. There is no mention in the letter of the certification only as to conformity with the BCA. It is sent to persons in New Zealand who are involved with the product either as to its sale, its supply, or in its use. The letter is emphatic about it covering *"all that"* with reference to past testing and that the certification will *"supersede*" all Councils testing. In other words it is a paramount document. There is absolutely no mention of any earlier advice about its use. The Certification 'supersedes' in any event.

[67] I note that the Commission says that the impression gained is that, the CodeMark will now require Councils to accept K3T as being compliant with the NZBC. In my view it is the only inference or impression that can be gained from the overall nature of the letter and its particular contents. The writers of the letter would

have had the knowledge that the actual certification was for Australia and Australia only. In my view, the letter is a clear misrepresentation of the true position. Indeed it appears from the evidence that [witness 5] held the view that the issuing of the certificate meant that no Council could refuse an application for a building consent using K3T. She believed the wording "JAS-ANZ" meant that the certification was a joint Australia New Zealand venture. When in fact, JAS-ANZ was a product certification process. She therefore considered that it was an authorisation enabling building consents to be obtained using K3T in both Australia and New Zealand. That is further supported by her evidence as was detailed in the notes of evidence that she thought K3T had an 'international CodeMark'.

[68] Accordingly, using Mr Donkin's suggested process, it is clear from the evidence that a person who had previous dealing with the product and with Global Fibre8 understood the representation meant that K3T had CodeMark certification for New Zealand. Further, I find that from reading the contents of the letter in the knowledge of what the witnesses said they had been told previously (e.g. [witness 2]) the view that it would be interpreted as part of a bundle of documents is entirely revoked by the terms of what is written in the letter itself. There is no mention in the letter, as to the certification being part of a 'bundle of documents', if that was in fact ever said, but was is said is that the CodeMark now answers all of the queries.

[69] I am satisfied that the representations made were made on behalf of the first defendant Global Fibre8, on its letterhead and were signed off by the second defendant Mr Tuake, as representing his views and assertions in relation to the CodeMark certification.

[70] The representations were entirely false and, in my view, would have mislead the suppliers of the product who would have passed that information on to the end user and totally misinformed them as to the correct position.

[71] I am satisfied on the evidence that therefore that each of the elements of charges alleged in the charging documents against Global Fibre8 – CRN 2539 and Mr Tuake CRN – 2448 are made out and established beyond reasonable doubt accordingly.

Licensee and Installer representation and charges

[72] This relates to the charging documents against Global Fibre8 – CRN 2542 and Mr Tuake - CRN 2550 and relates as previously said to representations made by the company and by Mr Tuake to licensees and installers that a CodeMark Certificate of Conformity in relation to the K3T wall panel had been issued. That is the certificate issued 21 July 2015. The period of offending is alleged to be between the 29 August 2016 through until 23 March 2018. In relation to each separate charge, the charges are laid representatively of an alleged number of such representations and therefore in order to satisfy each charge it must be proven beyond reasonable doubt that the essential ingredients forming the basis of each charge occurred on at least one separate occasion during that period of time.

[73] It is the Commerce Commission's case that the representations in writing were made by the company in three separate documents being a Material Safety Data Sheet (MSDS) of 25 September 2016, and two emails from [person A] on 23 March 2018, and from the defendant Mr Tuake on 6 March 2017.

[74] MSDS is a document which contains technical information about the wall panel K3T and is referenced in seven pages of the exhibits.[13] Particular refence is made to section 15 of that document headed "Regulatory Information". The document says:

> The K3T wall system has been certified and launched into the Australia, New Zealand, and South African markets.
>
> Global Fibre8 Ltd and Esttar International Pty Ltd Australia and New Zealand are audited by SAI Global and certified under the CodeMark scheme issued by JAS-ANZ.
>
> Global Fibre8 Ltd and Esttar International Pty Ltd, South Africa are certified and audited by Agreement, South Africa.

[75] The Commerce Commission submits the inference to be drawn from these representations is the CodeMark applies in New Zealand to the K3T Wall System. The MSDS was copied to Licensee, [witness 6] on 23 March 2018; in an email from Global

[13] EX BOD Vol 2 from page 0396

Fibre8 staff member to an architect regarding a project that was in front of the Kapiti Coast District Council; Mr Opeteaia sent the MSDS to [witness 1] in response to [witness 1]'s queries about the composition of K3T.

[76] [Person A] who is Mr Tuake's son, emailed [person B] of Kapiti Council on 22 March 2018, attaching various documents including the MSDS. In that email [person A] stated, in relation to K3T CodeMark Certificate that it "…works in conjunction to support the manual, superseding the building code in New Zealand under these particular standards…." [Person A] forward this email on 23 March 2018 to [person C] and also copied in [witness 6].[14]

[77] Mr Tuake emailed [person D] on 6 March 2017, saying (inter alia):

> All testing relating to the application for the CodeMark covers both Australia and New Zealand Building Standards completed and met.

[Person D] forwarded that email to [witness 3], [witness 5] and [person E]. This emailed referred to a letter from a [person F] of SAI Global and misrepresented (in the Commerce Commission's submission) what that letter said.[15]

[78] The defence position is that

1) The written representations made are literally true;

2) The wall panel system had been certified (against the BCA);

3) That Esttar and Global Fibre8 had been audited by SAI Global (to some extent);

4) That the product had been certified by the CodeMark scheme produced by JAS-ANZ (although the CodeMark had been issued to Esttar); and

5) The fact K3T had been certified against particular Australia and New Zealand standards does demonstrate that the product complies

[14] BD volume 2 page 845
[15] BOD volume 1 page 348-350

with those standards (although the defence accepted that a different compliance was required in respect of the NZBC and K3T's suitability for use in New Zealand conditions).

[79] In reading the written representations, it is my view that the representations contained within the MSDS document must be read as they are written, they must be as stated. The regulatory information is pinpointed as saying that the wall system has been certified and it relates to the markets launched in Australia, New Zealand and South African markets, i.e. as a certified product; that Global Fibre8 both in Australia and New Zealand are audited by SAI Global and certified under the CodeMark scheme. Those statements are clear and unambiguous on my reading of them. I do not accept that, if one reads them as 'literally true', that they can be restricted as Mr Donkin submits in his paragraph 7.2, they can be.

[80] Those representations in my view, are entirely misleading and state as fact matters in relation to the NZBC and certification which are basically incorrect and untrue.

Oral representations

[81] The Commerce Commission argues that various representations were made to licensees and installers, in relation to the CodeMark and its applicability to K3T.

[82] [Witness 6]'s evidence was that he had a signed license agreement, and that on 27 March 2017, he attended a Global Fibre8 installer training session. His evidence was that he had been told by Global Fibre8 staff that K3T's Australia CodeMark was applicable in New Zealand and that the use of the CodeMark was a reputable way of getting this different process through Councils.[16] He acted upon the information given, by marketing the product he was selling i.e. K3T as having a CodeMark applicable to New Zealand. In his evidence said that he had been drawn to K3T by the CodeMark, because of the process having been made simpler and that the wall panel system was a different process. I do not see that his evidence was in any way brought into question under cross-examination. He did accept that other documents

[16] NOE page 224.

would need to go with the CodeMark as part of the standard practice required in such applications.

[83] [Witness 7] was another Licensee. He attended two training sessions at Global Fibre8 factory in 2012 and 2013, and his evidence was that he had been told by the defendant Mr Tuake, that because of agreements between Australia and New Zealand if a product had CodeMark in Australia the CodeMark would be accepted in New Zealand.[17] He also gave evidence about a meeting with Mr Tuake. This followed the issue of the CodeMark. The CodeMark certificate was presented by Mr Tuake to attendees at one of these sessions Mr Tuake saying that it could be used in New Zealand. Therefore [witness 7] assumed K3T's CodeMark applied in New Zealand. The words from Mr Tuake that [witness 7]'s evidence brought to the Court's attention was that the CodeMark had been accepted and that the attendees at the training sessions could go out and find customers for K3T.

[84] In relation to [witness 7], the defence submits that he could not remember whether he was told other documents needed to accompany the CodeMark and was uncertain as to the detail of what he had been told about the system generally. While acknowledging that submission overall, I am satisfied on [witness 7]'s evidence as to what was said at these training sessions by Mr Tuake was a misrepresentation of the existence of, and the ability to use, the Australian CodeMark.

[85] [Witness 8]'s evidence was that he was present at a training session on 29 August 2016, and from what he had been told at that session he understood that the CodeMark had been issued in New Zealand and that it was all (as he put it) "good to go". That he said was an assumption on his part, rather than an explicit comment from someone. He also had knowledge of houses being built using K3T.

[86] [Witness 5], a licensee, says that in June 2013, at a training session she had been told that no Council would be able to refuse K3T's CodeMark. Later and during the particular charge period, she promoted K3T through her company's website at Home Shows by showing the CodeMark. She in fact informed [witness 3] that her understanding was that the company's CodeMark superseded any Council. She did

[17] NOE page 308

accept that the CodeMark would be a part of a package of documents needed to be submitted to the Council, and she had told customers that.

[87] The PS1 form that Mr Donkin mentions in his submissions was in [witness 5]'s evidence 'a standard thing'. She did not accept that she was in any way confused about what was the position was relating to the CodeMark that K3T had received and the trans-Tasman JAS-ANZ system.

[88] The evidence before the Court from consumers came from:

1) [Witness 3]

   [Witness 3] was shown the CodeMark by [witness 5] and told that Councils could not turn down applications based on the CodeMark and that it was a worldwide CodeMark. His evidence was that he and his wife visited Mr Tuake at the factory in late 2016 and spoke with Mr Tuake. Mr Tuake confirmed that what [witness 3] had been told was correct. Acting upon that confirmation [witness 3] purchased $106,981.79 of K3T.

2) [Witness 2]

   [Witness 2]'s evidence was that she had been told by the defendant Mr Tuake during a first visit that the CodeMark would supersede 'any of the Councils'; and although it was an Australian CodeMark it would 'automatically go through a New Zealand Council'. That advice was confirmed on a later visit; that K3T would have no problem with the Council and because the certification through the CodeMark superseded Council regulations it would automatically take them (i.e. [witness 2 and her family members]) through Council consent.

   She also received the letter which is the subject of previous charges.

[Witness 2]'s evidence was criticised by the defence on the basis that she could not remember certain matters about the JAS-ANZ system and could not remember what she was told about it being needed to be accompanied by other documents. (Whether she was actually ever told that or not remains in question).

3) [Witness 1]

[Witness 1]'s evidence was that in July 2015, at a visit to the Global Fibre8 factory, Mr Tuake told him that Global Fibre8 had just received the CodeMark for K3T. Mr Tuake in front of [witness 1] told a colleague to send [witness 1] a copy of the Certificate. The words [witness 1] could recall were that; "Council see the product has a CodeMark, and it is relatively easy to go through Council".

[89] The evidence given by the Commerce Commission's witnesses was overall to the point and effect that the representations made to them was that the CodeMark was either in the process of being issued or had been issued and that its impact upon New Zealand building consent process was that Councils could not turn an application based on the CodeMark down.

[90] [Witness 9] was called as a witness by the defence. His evidence was that he had been to a large number of training sessions, approximately 17. His understanding (as per his evidence) was that, a certain process had to be followed in order to use K3T's CodeMark in New Zealand, which required that a plan and a PS1 also needed to be presented to Council. It was clear on his evidence that he understood from what he had been told, the Australia and New Zealand CodeMark systems were different; and there was a process that needed to be followed in using the Australia CodeMark in New Zealand, i.e. a PS1 and a suitable design.

[91] I note his evidence and accept that no Council is going to accept a building consent application which does not contain plans and engineering details. But I note on the clear evidence given by the witnesses before me for the Commission who were challenged on the point and who repeated to Mr Donkin under cross-examination what

they had said in their evidence in chief, about what they had been told the whole purpose of the CodeMark was.

[92] I also note that [witness 9]'s evidence did not include him having been told that the Australia CodeMark as issued for K3T wall panel, would have little impact on New Zealand consent applications which would require full detailed reports and specifications on various issues but particularly on durability and that the Australia CodeMark would not have any impact upon that issue.

[93] I accept that when it was put to the Commerce Commission's witnesses it became abundantly clear that none of them had been told that there would need to be a separate process gone through in New Zealand in order for any K3T certification that the defendants had to be of any real benefit. I refer to the evidence that I have discuss earlier, in relation to Mr King and Mr Hobbs. A PS1 is part of the overall building consent application process and that the Australia CodeMark was of no immediate value to a New Zealand Council. Although it could be useful in the overall assessment made of the various reports on the K3T wall panel be of value, it was of limited use.

[94] I also consider [witness 5]'s evidence about the standard documents needed for any Council consent. Her evidence was that she had been told that the *key* document was the CodeMark certification. [Witness 3]'s evidence that there was no discussion about the CodeMark certificate being accompanied by other evidence. [Witness 1] did not accept that he was told that either.

[95] I further note the reference as made by the Commission at paragraph 8.24 of its closing submission when referring to page 959 of exhibit one, Mr Tuake's interview, where he says, and I quote:

> so really then I can wipe this out (refers to the Australia CodeMark) totally irrelevant and then just go by this document (refers to 2015 SAI Global letter) give it to an engineer, an engineer signs the PS1 and we are all good to go in the market.

[96] That in my view, represents a totally erroneous view of the requirements in the overall process and is where Mr Tuake is saying that the CodeMark itself is irrelevant to the process.

[97] The [person F] letter, is one where the writer is careful not to say that the product complies with NZBC. I accept that I should place some weight on the fact that Mr Tuake does not submit a defence of reasonable reliance based on the [person F] letter.

[98] Overall, when I have regard to both the written and oral statements that I have gone through, I am satisfied that the second defendant Mr Tuake, is jointly responsible with the first defendant Global Fibre8 for the oral and writing representations as I have detailed. He made a number of the oral representations himself. He made them particularly to a number of the witnesses and repeated them to those witnesses in their evidence which I accept, that a CodeMark would mean automatic acceptance of K3T by Council.

[99] This is totally in line with the earlier representations; the later representations that I have found Mr Tuake has made on the website; in the letter he wrote, and then in his TV interview.

[100] On the evidence I have heard, and I accept, there is no doubt in my mind that the defendants knew that what they were saying was false. Esttar, upon its initial application applied for CodeMark certification for K3T under the BCA and the NZBC. Esttar later withdrew the NZBC application. SIA Global confirmed that the application would result in two CodeMark Certificates – one for each country and each application required a separate fee.

[101] The letter of 22 July 2015 was sent out when the CodeMark issued on 21 July 2015, clearly certified compliance with the BCA only. Seven days later Mr Opeteaia emailed SIA Global asking for the revisiting of the application for CodeMark in New Zealand, and for the required documentation to be sent to him. A quote was issued in October 2015, revised in September 2016, with Mr Opeteaia finally agreeing

to the quote in February 2017. Representations as discussed above were continually made during this period.

[102] [Witness 9]'s evidence given on behalf of the defendants after attending Global Fibre8 training sessions both in 2015 and 2016, was aware of a separate certain protocol separate process to have K3T's CodeMark approved in New Zealand. When it was put to him in cross-examination that Global Fibre8 would need to make it very clear that the CodeMark was Australian and not valued in New Zealand, [witness 9] accepted that would need to be made clear.

[103] Mr King's evidence was that he met with Mr Tuake on 12 April 2016 and discussed K3T and told Mr Tuake that the Australia CodeMark could not be accepted. He confirmed that meeting with an email to Mr Tuake from MBIE highlighting the need for separate certification.

[104] On 14 September 2016, Mr Tuake was present at SIA Global's audit at his factory, to monitor the Australian CodeMark compliance and to assess the pending application for a New Zealand CodeMark.

[105] With all that knowledge neither defendant took any steps to withdraw the representations made on the company's website or made to the recipients of the Global Fibre8 letter or made to the licensee and installers. Then Mr Tuake repeated the representations in the TVNZ interview.

[106] The excuses given for the various complaints about alleged failures of the K3T wall board was for the company either to blame a non-existent rule change at JAS-ANZ or to suggest that the K3T product had been installed in a manner that did not complying with the CodeMark certification requirements. As a result of the knowledge of the falsity of the various representations made, and their misleading nature I note that the K3T wall board did not have a New Zealand CodeMark; and that any certification it did have, was incapable of certifying compliance with the NZBC. That could only be done through a New Zealand CodeMark which K3T has never had.

[107] Although I do not need to be so satisfied, I note the impact of the false and misleading representations on consumers who had place reliance on the representations. I note the impact particularly upon the witnesses [witness 1] and [witness 2]. I also note the losses suffered by licensees and installers who had backed the product and made capital investments upon their understanding of the K3T certifications.

[108] I am satisfied beyond reasonable doubt that each of the elements making up the charges contained within the charging documents Global Fibre8 – CRN 2542 and Mr Tuake – CRN 2550 have been proven.

Conclusion

[109] Upon the evidence and my findings as detailed, in the respective areas of the charges, I find that the prosecution has made out its case beyond reasonable doubt in relation to each charging document in relation to each defendant, and accordingly the defendants will be convicted on each charge that they face.

_____
Judge K J Phillips
District Court Judge

Date of authentication: 19/02/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.