

Supreme Court

New South Wales

Case Title: CHANT v THE NUANCE GROUP
(AUSTRALIA) PTY LIMITED

Medium Neutral Citation: [2012] NSWSC 399

Hearing Date(s): 21 September 2011

Decision Date: 27 April 2012

Jurisdiction: Common Law

Before: Hall J

Decision:

1. That an appropriate penalty in respect of the offence committed on 23 December 2009 the subject of Proceedings No 2011/96572, taking into account the matters on Form 1, after allowing the discount of 25% for the defence plea, is \$225,000.

2. In respect of each of the remaining 6 offences, I fix a penalty, after allowing a discount of 25% for the defendant's plea to each offence, a penalty of \$18,750. The total amount of the fines will be \$337,500.

As applied for by the Prosecutor and not opposed by the defendant, I make an order under s 122 of the *Fines Act* that one half of the fines be paid to the NSW Ministry of Health.

I make an order that the defendant pay the Prosecutor's costs of the proceedings in the amount of \$50,000 as agreed.

Catchwords: Sentencing - offences under s 16 of the Public Health (Tobacco) Act 2008 - prohibit advertising by display of tobacco

advertisement - sentencing principles for multiple offences - principle of totality - objective seriousness of offence - close to mid-range offences - penalties imposed.

Legislation Cited: Commonwealth Places (Application of Laws) Act 1970 (Cth)
Crimes Act 1914 (Cth)
Criminal Procedure Act 1986
Customs Act 1901 (Cth)
Public Health (Tobacco) Act 2008
Tobacco Advertising Prohibition Act 1992 (Cth)

Cases Cited: Connelly v Director of Public Prosecution [1964] AC 1254
Hunter v Chief Constable of the West Midlands Police [1982] AC 529
Jago v District Court (NSW) (1989) 168 CLR 23
Momcilivic v R [2011] HCA 34
Rogers v R (1994) 181 CLR 251
Walton v Gardiner (1993) 177 CLR 378
Williams v Spautz (1992) 174 CLR 509

Texts Cited:

Category: Principal judgment

Parties: CHANT, Dr Kerry, CHIEF HEALTH OFFICER, NSW DEPARTMENT OF HEALTH v THE NUANCE GROUP (AUSTRALIA) PTY LIMITED

Representation

- Counsel: P: I Bourke
D: R T Beech-Jones SC/K C Morgan
Attorney General (Intervenor): M G Sexton
SC SG/C Lenehan

- Solicitors: P: NSW Department of Health
D: Freehills
Attorney General (Intervenor): Crown Solicitor's Office

File number(s): 2011/96416

Publication Restriction:

JUDGMENT

INTRODUCTION

- 1 These proceedings, commenced by Summons filed on 30 March 2011, relate to a prosecution commenced by the plaintiff (the Prosecutor) pursuant to the *Public Health (Tobacco) Act 2008* ("*the NSW Tobacco Act*"). Dr Chant is the Director-General and Chief Health Officer for the NSW Department of Health (now known as the Ministry of Health).
- 2 The prosecution relates to what has been described as display of tobacco advertisements contrary to the provisions of that Act.
- 3 The defendant, which holds a licence under the Customs Act 1901 (C'th) to sell goods (including tobacco), was alleged to have established a freestanding display unit on 23 December 2009. The display was said to have been constituted by approximately 29 packages of tobacco product.
- 4 On 30 March 2011 the Prosecutor also commenced proceedings for offences alleged to have been committed on 31 March 2010 (5 offences), 2 June 2010 (2 offences) and on 14 March 2011 (4 offences). These were alleged to have been of the same kind of offence (display of tobacco advertisements) as alleged in the Summons to which reference has been made above.
- 5 The defendant at all material times has been the operator of the relevant, "Mega B" store at Sydney Kingsford Smith International Airport.

The proceedings

- 6 The prosecutions (18 in all) commenced by the plaintiff against the defendant all alleged contraventions by the defendant of the provisions of s 16(1) of the NSW Tobacco Act.
- 7 The defendant filed a Notice Motion in which orders were sought based on a contention that s 16 of the NSW Tobacco Act was inconsistent with a Commonwealth law.
- 8 The defendant filed and served a section 78B Notice dated 9 June 2011 under the Judiciary Act 1903 (Cth). The Attorney-General for the State of NSW participated in the proceedings as an intervenor and provided written submissions supplemented by oral submissions. The plaintiff adopted and relied upon submissions made on behalf of the Attorney-General.
- 9 On 20 September 2011 the defendant indicated to the Prosecutor and to the NSW Attorney-General that the constitutional argument was no longer required to be determined as the defendant proposed to enter pleas of guilty to certain charges.
- 10 The proceedings were then stood over for mention on 11 October 2011 on which date the proceedings were set down for a sentence hearing on 9 December 2011.
- 11 Agreement was reached between the Prosecutor and the defendant that the defendant would enter pleas of guilty to the 7 offences committed on 23 December 2009 with the other offences (those committed on 31 March 2010, 2 June 2010 and 14 March 2011 (to be taken into account under s 33 of the *Crimes (Sentencing Procedure) Act 1999*). The guilty pleas were formally entered at the commencement of the sentencing hearing as discussed below.

Statutory Provisions

- 12 Section 16 of the NSW Tobacco Act, so far as is relevant, is in the following terms:

"16 Certain advertising prohibited

(1) A person must not, in New South Wales and for any direct or indirect benefit, display a tobacco advertisement in, or so that it can be seen or heard from, a public place or a place prescribed by the regulations.

...

(3) This section does not apply in relation to any of the following:

...

(c) a tobacco advertisement (other than an advertisement involving an audible message) in or on a package containing a tobacco product, where:

(i) the advertisement was included in or on the package before it was sold by the manufacturer, and

(ii) the size of the package does not exceed the size (if any) prescribed by the regulations,

...

(4) Subsection (3)(c) does not operate so as to permit an advertisement to be created and displayed by means of:

(a) any arrangement of two or more packages containing a tobacco product, or

(b) such a package and any other thing,

unless every such package or other thing is displayed, in accordance with the regulations, within a shop at which tobacco products are sold by retail.

(5) In any proceedings for an offence under this section, if there is present in the relevant tobacco advertisement, or the relevant object alleged to constitute or contain a tobacco advertisement:

(a) The name of a person who manufactures or distributes any tobacco product, or

(b) a trademark of which a person who manufactures or distributes any tobacco product is the registered owner or the authorised user within the meaning of the [Trade Marks Act 1995](#) of the Commonwealth, or

(c) a brand name, used by a person who manufactures or distributes any tobacco product, it is to be presumed, until the contrary is proved, that that person displayed the tobacco advertisement, or distributed, sold, hired or supplied the object, for a direct or indirect benefit.

(6) in any proceedings for an offence under this section, if the thing that is alleged to constitute a tobacco advertisement contains the trademark or brand name of a tobacco product, it is to be presumed, until the contrary is proved, to be designed to promote or publicise the tobacco product to which it relates.

13 The NSW Tobacco Act, in s 4, defines the following:

"display" in relation to a tobacco advertisement includes cause or permit to be displayed.

"tobacco advertisement" means writing, or any still or moving picture, sign, symbol or other visual image or message or audible message, or a combination of two or more of them, that gives publicity to, or otherwise promotes or is intended to promote:

(a) the purchase or use of a tobacco product, or

(b) the trademark or brand name, or part of a trademark or brand name, of a tobacco product."

"tobacco product" means tobacco, or a cigarette or cigar, or any other product containing tobacco and designed for human consumption or use.

14 Mr B Hodgkinson SC who appeared with Mr I Bourke of counsel for the Prosecutor, observed that s 16, including the above definitions, are wide in scope and it was contended that this indicates a clear attempt by the legislature to cast a "very wide net".

- 15 Mr Hodgkinson observed that, in relation to the 7 charges alleging breach of s 16 the central element in each involved displaying a range of tobacco products by their respective brand names.

Factual matters

- 16 The offences committed on 23 December 2009, as indicated above, each relate to the display of an advertisement in breach of s 16 of the NSW Tobacco Act. The offences were all committed in the same store but, as the Prosecutor observed, they each concern the advertising of 7 different types of tobacco product.
- 17 In respect of each offence there was displayed in the relevant advertisement a brand name, used by the manufacturers or distributor of the tobacco products. The Prosecutor submitted that it is to be presumed that the tobacco advertisements were designed to promote or publicise the respective tobacco products to which the advertisements related:
s 16(6) NSW Tobacco Act
- 18 The Prosecutor further submitted that the offences were objectively serious, and involved a deliberate and planned course of action and that they were committed with the object of financial gain, in particular to promote the defendant's sales of tobacco. As discussed below it was contended that this was an aggravating factor under s 21A (2)(o) of the *Crimes (Sentencing Procedure) Act*.
- 19 The Prosecutor argued that the offences were not isolated incidences, reference being made in this respect to the matters on the Form 1 having occurred on 31 March 2010, 2 June 2010 and 14 March 2011 (discussed below). The submission was that the offences of 23 December 2009 could not be attributed to a momentary or a temporary lapse or error of judgment.

Pleas of guilty

20 At the hearing the defendant entered pleas in the following proceedings: 2011/96416, 2011/96481, 2011/96498, 2011/96524, 2011/96542, 2011/96558, 2011/96572, those proceedings respectively relating to the 7 offences committed on 23 December 2009.

Evidence

21 The Prosecution relied, for the purposes of the sentencing hearing, upon the affidavit of Dr Chant sworn 24 March 2011 to which were attached a number of annexures.

22 The Prosecutor tendered 5 photographs being copies of annexure B to the affidavit of Mr Larsen. The photographs became exhibit 1 in the proceedings.

23 The defendant also relied upon 3 affidavits as follows:

iAffidavit of Derek Howard Larsen sworn 11 November 2011 (tab D of the tender bundle).

iiAffidavit of Susy Di Paolo sworn 11 November 2011 (including the exhibit to the affidavit).

iiiAffidavit of Andrew Dougall Christopher Eastwood sworn 20 November 2011 (tab G in the tender bundle).

24 The deponents' to the above affidavits were not required for cross-examination. I accordingly have accepted the evidence contained within them.

Form 1 Matters

- 25 The Prosecutor noted that following the indication on 20 September 2011 by the defendant that it would enter a plea of guilty to certain charges, agreement was subsequently reached for the defendant to enter pleas of guilty to the 7 offences committed on 23 December 2009 with the other offences alleged to have occurred in contravention of s 16(1) of the NSW Tobacco Act on 31 March 2010, 2 June 2010 and 14 March 2011 to be taken into account under s 33 of the *Crimes (Sentencing Procedure) Act 1999*.
- 26 The defendant accordingly requested that offences charged on 31 March 2010, 2 June 2010 and 14 March 2011 which are all on a Form 1 dated 8 December 2011 be taken into account when being sentenced in respect of the principle offences.
- 27 The Form 1 was signed pursuant to clause 4 of the *Crimes (Sentencing Procedure) Amendment Certificate Regulation 2011*.

Discount for pleas of guilty

- 28 The Prosecutor accepted that the defendant is entitled to some discount for having pleaded guilty "*at a relatively early stage*": Prosecutor's Written Submissions at [25].
- 29 The Prosecutor further acknowledged that it was open to the Court to find that the defendant had shown a willingness to facilitate the course of justice, which can be favourably taken into account on sentence: Prosecutor's Written Submissions at [26]

Prosecutor's Submissions

- 30 The Crown Prosecutor noted that the offences committed on

23 December 2009 each relate to the display of an advertisement that constitutes a breach of s 16 of the *NSW Tobacco Act*, and that the maximum penalties for offences against that provision are:

aIn the case of an individual, 500 penalty units for a first offence or 1,000 penalty units for a second or subsequent offence, or

bIn the case of a corporation, 6,000 penalty units for a first offence or 10,000 penalty units for a second or subsequent offence.

- 31 It was noted that s 16 provided a maximum penalty of 10,000 penalty units (\$1.1 million) for a second or subsequent offence by a corporation.
- 32 The Prosecutor observed that the applicable maximum penalty for each offence in the present case is a fine of 6,000 penalty units (\$660,000).
- 33 The Prosecutor submitted that this represented a very significant increase in maximum penalties as compared with the maximum for an equivalent offence under previous legislation.
- 34 The submission for the Prosecutor was that the offences were objectively serious, and involved what was described as a deliberate and planned course of action committed with the object of financial gain namely the promotion of the defendant's sale of tobacco.
- 35 In the written submissions for the Prosecutor the legislative history of relevant legislation was reviewed. It was noted that exemption from tobacco-advertising restrictions contained in the *NSW Tobacco Act* is by regulation granting an exemption. No such regulation had been made pursuant to that power in favour of anyone including the defendant.
- 36 The Prosecutor referred to the evidence adduced on behalf of the defendant concerning the history associated with what had been termed

the "mistaken understanding" in certain employees of the defendant that an exemption had been granted in the past under the *Tobacco Advertising Prohibition Act 1991*.

- 37 The Prosecutor submitted that the Court would not be satisfied that any mitigating circumstance, based on such a belief, had been established by the defendant.
- 38 In his oral submissions Mr Hodgkinson detailed the specific facts concerning the tobacco advertising that had occurred by the displays at the Mega Store. Reference was made in this respect to the packaging and to specific aspects concerning displays. The submission was to the effect that the packages or cartons and their configuration with different brand names evident were matters that were intended to attract attention and promote the sale of the products.
- 39 The Prosecutor emphasised the importance of deterrence, in particular both specific and general deterrence. In this respect attention was drawn to the provisions of the *NSW Tobacco Act* which prohibits the advertising of tobacco with the objective of protecting and promoting public health.
- 40 In relation to sentencing for multiple offences it was submitted by the Prosecutor that the 7 offences in question did not involve a "common element" (such as where the one Act constitutes more than one offence). It was submitted that there were 7 separate offences although committed simultaneously.
- 41 As noted above the Prosecutor contended that there was one aggravating factor under s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* in that the offences "*were committed with the object of financial gain - namely to promote the Defendant's sales of tobacco*".

Defendant's Submissions

- 42 Detailed written and oral submissions were made on behalf of the defendant by (then) Mr Beech-Jones SC who appeared with Ms K C Morgan of Counsel.
- 43 It was submitted for the defendant that the objective seriousness of the offences in question fell well below the middle of the range of objective seriousness.
- 44 It was submitted that the displays did not involve advertising the product in any manner other than stacking it in the sales area and that each of the packages contained the standard health warnings.
- 45 The submission was that the conduct of the defendant was far removed from the worst class of case involving a contravention of s 16. Within the range of conduct prohibited by that provision it was submitted the defendant's conduct essentially involving the display of tobacco products in the manner described in evidence, involved a relatively low level of objective seriousness.
- 46 It was additionally submitted for the defendant that the Prosecutor could have commenced proceedings in the Local Court where the maximum penalty was only 1,000 penalty units rather than either 6,000 or 10,000 units.
- 47 It was contended in this respect that there was nothing to suggest that the defendant's conduct or any allegations made involved novel questions of construction. It was submitted that it was relevant to take into account that the defendant could have been dealt with in the Local Court and subject to a lower maximum penalty: *R v Sandford* (1994) 72 A Crim R 160 at 195
- 48 Detailed submissions were made to the effect that the offending conduct occurred on one day in the same store, in relation to different brands of

cigarettes. In this respect it was contended that the defendant was to be sentenced so that the aggregate penalty fairly and justly reflected the total criminality of its conduct.

49 The submissions emphasized the totality principle and its application to a case where the imposition of multiple fines was involved.

50 The defendant relied upon a number of subjective factors. These are considered below in the determination of the appropriate penalties in respect of the offences.

51 It was also submitted that there was no aggravating factor under s 21A(2) of the *Crimes (Sentencing Procedure) Act* 1999. This aspect is also considered below.

52 Finally it was submitted that the defendant had shown contrition and had taken constructive steps to conform with the requirements of the NSW Tobacco Act.

53 The pleas of guilty were said to demonstrate remorse. It was submitted that the pleas were early pleas that warranted a 25 % discount on sentence.

Decision

54 In determining the penalties to be imposed with respect of each of the 7 offences I am required to consider and evaluate the evidence as to the circumstances constituting the offences for the purpose of determining the objective seriousness of each. In that respect the photographs tendered in evidence clearly sufficiently identify the relevant matters constituting the "*tobacco advertisement*" arising from each display and relevant surrounding circumstances.

- 55 In determining the objective seriousness of the offences I have also considered the evidence introduced on behalf of the defendant corporation of the sentencing hearing as to the (mistaken) understanding held by its Compliance Officer that, the defendant as a duty free operator, was exempt from compliance with parts of earlier legislation that applied to tobacco retailing at its airside stores.
- 56 In the assessment it is, as senior counsel for the Prosecutor observed, necessarily to bring into consideration the objects of the *NSW Tobacco Act*. These include the reduction of the incidence of smoking based on the fact that the consumption of tobacco and smoking products has been recognised as adversely impacting on the health of the people in NSW and thereby placing a substantial burden on the State's health and financial resources.
- 57 The circumstances in which the subject offences were committed involved a display of packaged tobacco products in the manner described in evidence which involved the display of various brands of tobacco products on open shelving available in view of members of the public who were departing Australia having passed the Australian Immigration checkpoint.
- 58 The evidence in this respect establishes that the offences involved advertising tobacco products, packaged in individual cartons, in the specific formations in the relevant sales area of the defendant's "Mega B" store at Sydney International Airport. The products, subject of the individual offences, were distinguishable by brand as depicted in the photographs tendered in the prosecution case. The packaged cartons depicted in the photographs contained the standard health warnings that must be displayed with respect to tobacco products.
- 59 The evidence established that the "public place" associated with the offences was a place that was open to "a section of the public" being the "airside" of the Immigration checkpoint.

60 As observed in the submissions for the defendant s 16 of the *NSW Tobacco Act* creates an offence of a broad nature that is capable of embracing a number of different forms of tobacco advertisements. Relevant factors concerning the "advertisement", the subject of the displays in the present case, include:

The size of the packages.

The placement or stacking of the cartons side by side.

The number of packages constituting the display.

The number of brands or trade marks associated with the packaging.

The location of the displays in the Mega B store in prominent locations.

61 The nature and configuration of the displays were discussed and illustrated in Mr Cassidy's Statement (annexure A to the affidavit of Dr Chant sworn 24 March 2011), in particular by the photographs referred to and forming part of Mr Cassidy's Statement.

62 The displays in question gave prominence to the various cartons of cigarettes and in that respect constituted a means for advertising tobacco products. There were, however, no additional means implemented to enhance promotion through the use of apparatus or mechanisms such as moving pictures or other forms of visual images as a means of attracting attention and promoting the sale of tobacco products. I additionally note that the displays of the cartons were part of a self-service retail system.

63 Whilst the offences committed on 23 December 2009 involved separate advertisements of different brand tobacco products there were a number of common factors between them. These included the fact that the displays were in the same public area, the offences occurred on the same day and all involved the same area of the Mega B store. Additionally, the displays were of similar type and involved similar products (constituted by the cartons of tobacco products).

- 64 Whilst I accept the submission made on behalf of the Prosecutor that the tobacco advertisements were designed to promote or publicise the tobacco products to which they related (s 16(6)) and that they involved a serious and, to a point deliberate and planned action intended to promote the sale of those products for financial gain, it remains to consider where, in the range of offences under s 16, the subject offences, in terms of objective seriousness, lie.
- 65 The factual matters constituting the offences clearly constitute them as serious breaches of s 16 of the *NSW Tobacco Act*. In so concluding I have had regard to the objects of the Act as well as the particular facts concerning the displays constituting the tobacco advertisements.
- 66 As earlier noted, the Prosecutor submitted that "*the offences are objectively serious, and involve a deliberate and planned course of action*": Written Outline Submissions of the Prosecutor on Penalty at [29].
- 67 However, in oral submissions Mr Hodgkinson stated that he was unable to say that the evidence established "*a wilful, deliberate, intentional desire to breach the Act*": T 30.
- 68 Mr Hodgkinson, however, submitted that the defendant had been aware of its obligations under the legislation at the time of the offences and should be taken as knowing that the displays were established in contravention of s 16. It was further submitted for the Prosecutor that given the defendant's knowledge and the nature of each breach, the subject offences demonstrated "*a high level of culpability*": T 40.
- 69 The Prosecutor acknowledged however that there were common elements or factors involved in the 7 offences (as identified above), a matter to be taken into account in applying the principle of totality (discussed below).

- 70 On behalf of the defendant it was contended that, aside from the question of a "belief" as to the existence of an exemption under previous legislation, the evidence did not establish knowledge in the defendant that it was breaching the provision of s 16 although the evidence may have revealed *"...some form of deliberate recklessness on our part"*: T 45.
- 71 The defendant's submission was that the offences were below the middle of the range and towards the low end of it. In that respect it was contended that the evidence revealed that the displays lacked sophistication, essentially involving the stacking of tobacco packages. Having regard to the possible forms of advertising, it was submitted for the defendant that the offences could not be regarded as above middle of the range of objective seriousness for offences under s 16.
- 72 In the determination as to the defendant's culpability I have taken into account its conduct which was undertaken in disregard of its legal obligations to comply with the statutory prohibitions established by the *NSW Tobacco Act* concerning the advertising and promotion of tobacco products. I do not consider that the issue raised by the defendant as to "a belief" in one or more of its officers as to the supposed existence of an exemption under earlier legislation carries much weight at all in assessing the issue of objective seriousness. Further, I note that the evidence fails to establish any conscientious pursuit as to whether any exemption had in the past been granted or not.
- 73 I have, as earlier indicated, taken into account that the prohibited tobacco advertisements by means of the displays were to a section of the public rather than to the public at large and were not enhanced by other visual images etc of the kind discussed above. In all the circumstances proved in evidence, I consider that the subject offences involved objective seriousness close to but a little below mid-range of objective seriousness.

Form 1 offences

- 74 The offences on the Form 1 are to be taken into account in dealing with the offence charged in Proceedings No 2011/96572 pursuant to s 32 of the *Crimes (Sentencing Procedure) Act 1999*. The defendant accepted in its submissions that this may warrant a greater penalty being imposed for that offence compared with the remaining 6 offences.
- 75 In relation to offences on the Form 1, the focus is upon sentencing for the primary offence but the fact that the matters on a Form 1 are to be taken into account means that the greater weight should be given to personal deterrence and retribution. Accordingly, a higher penalty is to be imposed than if the primary offence the subject of the abovementioned proceedings had stood alone: *Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002) (2002) 56 NSW LR 146*.
- 76 In determining the appropriate penalty for each offence, I turn to consider the relevant subjective factors.

The defendant's pleas of guilty

- 77 The history of these proceedings following their commencement on 25 March 2011 establishes that, following Directions Hearings on 21 April 2011, 19 May 2011 and 2 June 2011 the defendant filed Notice of Motion in relation to the constitutional issue. That matter was promptly dealt with leading to an exchange of correspondence in which the defendant, on 20 September 2011, foreshadowed to the Prosecutor that guilty pleas would be entered in respect of the subject offences. The detail of the agreement reached in this respect has been referred to earlier.
- 78 The Court is required to take into account pursuant to s 22 of the *Crimes (Sentencing Procedure) Act 1999* the time at which the pleas were entered. I am satisfied having regard to the history of the proceedings, that

the pleas were entered at an early stage. In accordance with the sentencing principles on the appropriate range of discounts for the defendant's plea enunciated in *R v Thomson; R v Houlton* (2000) 49 NSW LR 303, I consider that the defendant is entitled to a 25% discount on sentence in respect of its pleas for each offence.

Remorse

- 79 I accept that there is evidence of genuine contrition and that the defendant has demonstrated both remorse and an acceptance of responsibility for its actions. I refer in this regard to the affidavit of Mr Larsen.
- 80 The evidence does indicate that the defendant commenced steps to comply with its legal obligations under the NSW Tobacco Act although the evidence does not establish that this has been completed satisfactorily as the occurrence of the matters on the Form 1 indicate. However, the defendant has taken significant steps since then to comply with its obligations under New South Wales law in relation to its operations in the Mega B store.
- 81 I take into account the above matters pursuant to s 21A(3)(i) of the *Crimes (Sentencing Procedure) Act 1999* in determining penalty.
- 82 I also note and have regard to the fact that the company has, so far as is known, not been previously charged or convicted of any other offence. Again I refer in this regard to the evidence of Mr Larsen.
- 83 I do not consider that the question of "financial gain" in the circumstances of the present case, can be taken as an aggravating factor. It was not disputed that, by virtue of s 16(6) the tobacco advertisements, containing as they did the trademarks and brand names of tobacco products, are presumed, until the contrary is proved, to be designed to publicise and promote the sale of tobacco product to which they relate. That is a

characteristic of the offences charged. A characteristic that is inherent in a charge is not to be taken into account as an aggravating factor under s 21A(2) unless its nature or extent in the particular case is unusual: *Mansour v R* [2011] NSW CCA at [46].

84 I do not consider that the evidence can be taken as establishing "an unusual" aspect in that sense. It has been noted that under s 16(4) "it is to be presumed", until the contrary is proved that the person displaying the tobacco advertisement did so "...for a direct or indirect benefit": s 16(5).

85 Finally, on this aspect, I accept the submission that there was no evidence directed to determining any specific or direct financial or economic gain sought or obtained by the defendant from the offending conduct. On the issue of the company's financial performance the defendant relied upon annexure A to Mr Larsen's affidavit which recorded a loss by the defendant in respect of years 2009 and 2010.

Deterrence

86 The penalties to be imposed must be determined so as to give effect to general and specific deterrence. The evidence does support the proposition that the defendant is unlikely to re-offend in the manner or circumstances constituting the subject offences. However, given the objects of the NSW Tobacco Act the penalties to be imposed must give effect to the principle of general deterrence.

Totality

87 It has been accepted that the totality principle should be applied with respect to the imposition of multiple fines: *R v Sgroi* (1989) 48 A Crim R 197 at [203]; *ACCC v Chubb Security Australia Pty Ltd* [2004] FCA 1750 at [141]-[142] and [192]. I will proceed to apply that principle in this case.

88 In *Dr Denise Robinson v Eureka Operations Pty Ltd* [2009] NSW SC 784 this Court (James J) considered the issue of totality in sentencing in respect of offences under s 61B of the former *Public Health Act*. In determining penalty in respect of 26 offences James J considered that he should, so far as was possible, apply the principles of sentencing stated by the High Court in *Pearce v The Queen* (1998) 194 CLR 610. His Honour proceeded in accordance with those principles to first fix an appropriate penalty for each offence. Apart from the discount for the pleas of guilty, James J stated that the penalty for each offence should, on the particular facts of that case, be in the same amount because all of the offences involved the same kind of conduct and the defendant's subjective circumstances were the same.

89 His Honour proceeded to give effect to the principle of totality in the way in which it was available where the only penalty that can be imposed is a fine. His Honour did so by reducing the amount of the penalty for each offence. His Honour stated:

"...the objective should be to ensure that the aggregate penalty should fairly and justly reflect the total criminality of (the defendant's) conduct":
see *R v Weldon* (2002) 136 A Crim R 55 at 62 [46]

90 In fixing the penalties for the 7 offences I have determined that I should apply the approach adopted by James J in *Eureka Operations*.

Prosecutor's choice of forum

91 I do not consider that the fact that the proceedings in respect of the subject offences were commenced in this Court rather than in the Local Court is a matter to which I should give any weight, contrary to the submissions made on behalf of the defendant.

92 It was submitted that the Court would have regard to the fact that had proceedings been brought in the Local Court the maximum penalty was

only 1,000 penalty units. It was submitted in that respect that there was nothing to suggest that the defendant's conduct or any other allegations involved a novel question of construction that required the prosecution to be brought in the Supreme Court.

- 93 Reference was made to authority for the proposition that the Court may take into account the fact that an offender could have been dealt with in the Local Court and subject to a lower maximum penalty: *R v Sindford* (1994) 72 A Crim R 160 at 195; *R v Doa* (2000) 50 NSW 115 at [123] - [124]
- 94 It was noted that if proceedings had been brought pursuant to s 9 of the NSW Tobacco Act then maximum penalty under that provision is only \$55,000.
- 95 I accept the submissions made on behalf of the Prosecutor that the proceedings were properly and appropriately brought in this Court. The offences, in accordance with the determination set out above were serious breaches of the provisions of s 16 designed to unlawfully promote or publicise tobacco products, the subject of the tobacco advertisements in each case. The several offences involved conduct that seriously challenged one of the objects of the Act, namely the object of reducing the incidence of smoking and consumption of tobacco products.
- 96 In determining an appropriate penalty for each offence I proceed upon the basis that it was common ground that the offences should be treated as a first offence and that there is, as earlier stated, a substantial amount of commonality in the factors concerning the offences.
- 97 I note that in accordance with the provisions of s 122 of the *Fines Act 1996* an order may be made that a portion of the fine imposed (not exceeding one half) be paid to the Prosecutor. The defendant did not oppose the payment of a moiety to the Prosecutor.

Determination

98 Taking into account the objective and subjective factors including the issues of specific and general deterrence I make the following determinations:-

(i) That an appropriate penalty in respect of the offence committed on 23 December 2009 the subject of Proceedings No 2011/96572, taking into account the matters on Form 1, after allowing the discount of 25% for the defence plea, is \$225,000.

(ii) In respect of each of the remaining 6 offences, I fix a penalty, after allowing a discount of 25% for the defendant's plea to each offence, a penalty of \$18,750.

(iii) The total amount of the fines will be \$337,500.

99 As applied for by the Prosecutor and not opposed by the defendant, I make an order under s 122 of the *Fines Act* that one half of the fines be paid to the NSW Ministry of Health.

100 I make an order that the defendant pay the Prosecutor's costs of the proceedings in the amount of \$50,000 as agreed.
