

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0030 of 2020
[In the High Court at Lautoka Case No. HAC 68 of 2019]
[Magistrates court at Lautoka case No.134 of 2018]

BETWEEN : **CARPENTERS FIJI LIMITED T/A MAX VAL-U SUPERMARKET**

Appellant

AND : **FIJIAN COMPETITION AND CONSUMER COMMISSION (formally known as Fiji Commerce Commission)**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. E. Narayan for the Appellant**
: **Mr. K. Gauna for the Respondent**

Date of Hearing : **19 August 2022**

Date of Ruling : **22 August 2022**

RULING

[1] The appellant had been arraigned in the Magistrates' Court at Lautoka on one count of False and Misleading Representation contrary to section 77(1) (g), 132 and 129 (1A) (2) and (4) of the Fijian Competition and Consumer Commission Act, 2010. Particulars of offence were as follows:

'Carpenters Fiji Pte Limited trading as Max Val-u Supermart being a trader of Naviti Street, Lautoka in the Western Division did on the 25th day of November 2017, made a representation concerning a price advantage of certain goods that did not exist, namely 3 packets x 375 grams FMF Breakfast Crackers represented and displayed at \$1.30 per packet whereas the scanned price at point of sale is \$1.37.

- [2] At the end of the trial the learned Magistrate had convicted the appellant and imposed a fine of \$25,000.00 on 18 October 2017.
- [3] The appellant had appealed against conviction and sentence to the High Court and the High Court had delivered the judgment on 22 May 2020 dismissing the appellant's appeal.
- [4] Thereafter, the appellant had filed a timely appeal against the High Court judgment to the Court of Appeal. Subsequently, both the appellant and respondent had filed written submissions.
- [5] According to the appellant's notice of appeal, it had sought to invoke the jurisdiction of this court under section 21 of the Court of Appeal Act. Section 21 permits an appeal against conviction, sentence, and acquittal on a trial held before the High Court and an order refusing bail pending trial by the High Court. The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 22 of the Court of Appeal Act. Therefore, the notice of appeal is null and void and has no effect in law. The appellant has not duly invoked the jurisdiction of this court and there is no appeal on foot as far as the aforesaid High Court judgment is concerned.
- [6] The appellant was warned of the effect of such an invalid notice of appeal by this court in an earlier Ruling involving the same parties in **Carpenters Fiji Ltd (trading as MH Hypermarket) v Fijian Competition and Consumer Commission** [2020] FJCA 194; AAU0064.2018 (16 October 2020). However, the appellant seems to have taken no cognisance of court's observations and taken steps to properly invoke the court's jurisdiction.
- [7] Thus, the appellant's 'appeal' is liable to be dismissed on that account alone in terms of section 35(2) of the Court of Appeal Act, for want of right of appeal under section 21 of the Court of Appeal Act. However, without proceeding to dismiss the appeal *in limine* on this ground, I shall still consider it as if it is an appeal under section 22 of the Court of Appeal Act, for according to the appellant's counsel there are some areas concerning section 77(1)(g) of the Fijian Competition and Consumer Commission

Act, 2010 which need some clarification from this court for guidance of the lower courts.

- [8] In a second-tier appeal under section 22 of the Court of Appeal Act, a conviction could be canvassed on a ground of appeal involving a question of law only [see also paragraph [11] of **Tabekusi v State** [2017] FJCA 138; AAU0108.2013 (30 November 2017).
- [9] A sentence could be canvassed only if it was unlawful or passed in consequence of an error of law or if the High Court had passed a custodial sentence in substitution for a non-custodial sentence [vide section 22(1)(A) of the Court of Appeal Act].
- [10] However, designation of a ground of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). It is therefore counsel's or an appellant's duty properly to identify a discrete question (or questions) of law in promoting a section 22(1) appeal (vide **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005).
- [11] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)]. Some examples of such questions of law could be found in **Naisua v State** (supra), **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018), **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) and **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016).

Jurisdiction of a single Judge under section 35 of the Court of Appeal Act

- [12] There is no jurisdiction given to a single judge of the Court of Appeal under section 35 (1) of the Court of Appeal Act to consider such an appeal made under section 22 for leave to appeal, as leave is not required under section 22 but a single judge could still exercise jurisdiction under section 35(2) [vide **Kumar v State** [2012] FJCA 65;

AAU27.2010 (12 October 2012] and if the single judge of this Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal the judge may dismiss the appeal under section 35(2) of the Court of Appeal Act (vide **Rokini v State** [2016] FJCA 144; AAU107.2014 (28 October 2016)].

[13] Therefore, if at least one of the appeal points taken up by the appellant in pith and substance or in essence is not a question of law then the single judge could act under section 35(2) and dismiss the appeal altogether [vide **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) followed for example in **Bachu v State** [2020] FJCA 210; AAU0013.2018 (29 October 2020)], **Munendra v State** [2020] FJCA 234; AAU0023.2018 (27 November 2020) and **Dean v State** AAU 140 of 2019 (08 January 2021), **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) and **Narayan v State** [2021] FJCA 143; AAU39.2021 (10 September 2021) and **Wang v State** [2021] FJCA 146; AAU47.2021 (17 September 2021)].

[14] Further, under section 22 of the Court of Appeal the appellants cannot seek to re-open and re-argue the facts of the case in a second tire appeal. The narrow jurisdiction under section 22 of the Court of Appeal Act is for the Court of Appeal to rectify any error of law or clarify any ambiguity in the law and not to deal with any errors of fact or of mixed fact and law which is the function of the High Court. That is the intention of the legislature and the court must give effect to that legislative intention.

[15] Grounds of appeal urged on behalf of the appellant are:

(a) THAT the Learned Judge erred in law in holding that the respondent has proved the charge in accordance with section 77(1)(g) of the Commerce Commission Act 2010 that the appellant was making a representation concerning that a price advantage of goods or services exist if it does not when it did not and did not meet the elements of the charge being:

- (i) The accused on the dates as per the Charge (identification and date);*
- (ii) In trade or commerce;*
- (iii) In connection with the supply of goods and services or*
- (iv) In connection with the promotion of goods and services*
- (v) Makes a representation concerning a price advantage of goods or services exists when it does not.*

(b) THAT the Learned Judge erred in law in holding that there was a “price advantage” when in fact there was no evidence by the respondent produced that the appellant had offered an advantage with the price displayed;

(c) THAT the Learned Judge erred in law in holding that there was a false misrepresentation when the respondent had not submitted sufficient evidence to conclude that a member of the public that intended to purchase the produce would have done so knowing that it was a price advantage if there was merely a pricing display;

(d) THAT the Learned Judge erred in law in imposing a harsh and excessive sentence of \$25,000.00

(e) THAT the appellant reserves its rights to argue and/or file further or revised grounds of appeal.

[16] It is useful to look at the grounds of appeal that had been urged in the High Court. They are as follows:

(a) That the Learned Magistrate erred in law and in fact in holding that the Respondent has proved the charge in accordance with Section 77(1) (g) of the [Fijian Competition and Consumer Commission Act 2010] that the Appellant was “making a representation concerning that a price advantage of goods or services exist if it does not” when it did not”;

(i) That the Respondent had failed to complete its investigation before laying charges on the Appellant in terms of obtaining statements of the FMF Merchandising Officer and obtaining the video footage of the Appellant.

(ii) That the [complainant’s evidence] was inconsistent and unreliable when compared against the written statement.

(b) That the learned Magistrate erred in law and in fact by holding on the available evidence that the Appellant is guilty for the Count under Section 77 1(g) of the [Fijian Competition and Consumer Commission Act 2010] when there was no such evidence adduced by the Respondent.

(i) That the Appellant did not attempt to show that the Representation was made by a FMF Sales Merchandiser when in fact this information was provided by the Complainant “Mr. Mohammed Shamsher Khan” in his Statement dated 29th November 2017 given to the Respondent;

(ii) That the [complainant’s evidence] was inconsistent and unreliable when compared against the written statement provided;

(iii) That the conduct of pasting the new price display sticker on top of the old price display sticker by the Merchandising Officer be regarded as a Reasonable Mistake as per Section 114 (1) (a) of the Fijian Competition and Consumer Commission Act 2010;

(iv) That the Appellant made no false and misleading representation on the price advantage of goods exists if it does not since the complainant knew and was advised the price of FMF Breakfast Cracker is \$1.37 and not \$1.30 before he purchased the item.

(v) That the Respondent has failed to prove its case beyond reasonable doubt and accordingly the Appellant should have been acquitted.

(c) That the learned Magistrate erred in law and in fact in imposing a harsh and excessive sentence against the appellant without giving a reason why the fine imposed is out of line with the fines imposed in similar cases.

(d) That the Learned Magistrate erred in law and in fact in imposing a harsh and excessive sentence that is totally inconsistent in comparison with the like cases which has been decided by the Magistrates Court in Fiji.

[17] It is clear that all grounds of appeal raised by the appellant under the rubric of questions of law are in fact issues of fact and law. None of them could be considered without an accompanying factual scenario.

[18] It is also clear that the gist of grounds of appeal (a) and (b) canvassed in the High Court is that the prosecution had not proved an offence under section 77 1(g) of the Fijian Competition and Consumer Commission Act, 2010. The appellant had raised the same complaint under grounds of appeal (a), (b) and (c) before this court, though somewhat differently couched.

[19] The High Court being the first appellate court had carefully and meticulously considered the appellant's above grievance with reference to the evidence led before the Magistrate court from paragraphs 7- 45 and dismissed the appeal for lack of merits. The appellant is trying to re-open and reargue the same grievance with reference to evidence before this court under the guise of questions of law.

[20] The drafting of grounds of appeal leaves much to be desired for a second tier appeal under section 22. No discernible question of law has been framed. However, at the

hearing the counsel for the appellant submitted that some elements of the offence under section 77(1)(g) denoted by the words ‘*Makes a representation concerning a price advantage of goods or services exists when it does not*’ need some clarification from this court in the light of difference of legal or judicial opinion prevalent on the correct scope and interpretation of that part of the offence. Section 77(1)(g) is as follows:

False or Misleading Representation

77. - (1) A person shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services –

(g) make a representation concerning that a price advantage of goods or services exist if it does not;

[21] The Counsel cited the judgment of Labasa Magistrate court case in **Fiji Commerce Commission v R C Manubhai and Company Limited** (21 June 2018) as one often cited in the Magistrates courts for some sort of guidance on this section. However, this judgment has not been subjected to any judicial scrutiny by any of the appellate courts. He also submitted that there is no uniformity in accepting the views expressed therein among other courts. The appellant’s counsel had not cited it before the High Court either, for he was not aware of it at that time.

[22] In **Fiji Commerce Commission v R C Manubhai and Company Limited** (supra) the accused was charged under section 77(1)(g) of the Commerce Commission Decree No. 49 of 2010 (now Fijian Competition and Consumer Commission Act, 2010) for displaying the price of 01 meter of No. P 120 Garnet Roll as \$2.37 while the customer was charged at the point of sale a price of \$2.57 with a price variation of \$0.20. The following are the relevant paragraphs of the Magistrate’s judgment.

‘23.0 According to the prosecution’s evidences, there was a price displayed for the garnet roll on the shelf. This form of pricing on display is usually practiced in retail shops around Fiji. The evidence of prosecution was at the point of sale when he was prepared to purchase the garnet roll at \$2.37 that the accused sold it at \$2.57, a difference of 20 cents. The prosecution’s submission is that the price displayed at \$2.37 was a price advantage.

24.0 *The court when weighing out the evidence finds that there was an error as to price at the point of sale. However this error of the price was not a false misrepresentation of a price advantage as there was no evidence by prosecution that the accused had offered an advantage with the price displayed. Examples of price advantages are discounts, freebies or price comparison with different brands or other retail shops.*

25.0 *From the evidence of prosecution, the complainant when cross-examined admitted that the offer for refund was made to him for the error in pricing but he refused to accept the remedy. Quite clearly the accused shop had intended to refund the difference as the price displayed was not charged leading to a pricing error.*

26.0 *However, the court finds that this is not a false misrepresentation of a price advantage as the prosecution has not submitted sufficient evidence to conclude that a member of the public that intended to purchase the product would have done so knowing that it was a price advantage if there was merely a pricing display.'*

'False or Misleading' Representation

- [23] From section 74 of the Fijian Competition and Consumer Commission Act, 2010, it can be gathered that a misleading representation is a representation (including an act or omission) made without reasonable grounds (the onus of establishing it on the person claiming it) which is misleading in a material particular **or** conduct that is misleading or is likely or liable to mislead. Section 74 does not define the word 'false'. Subsections (b) to (h) and (k) of section 77(1) do not figure either of the words. Section 77(1)(a) uses the word 'false' only and rest of the subsections use both '*false*' or '*misleading*' [see 77(1)(i) and (j)]. Thus, it is not permissible to read the word 'false' into section 77(1)(g) when the legislature has deliberately omitted it from section 77(1)(g).
- [24] If and when applicable, whether a representation is false or misleading will depend on the circumstances of the particular case and similarly whether silence is false or misleading will depend on the circumstances of each case.

'Representation'

[25] In **Tesco Supermarkets Ltd v Natrass** [1971] UKHL 1 (31 March 1971), the appellant was convicted at the Magistrates Court at Northwich of an offence under section 11(2) of the Trades Descriptions Act, 1968, which read, as follows:

'If any person offering to supply goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.'

[26] Though differently worded, in gist section 11(2) of the Trades Descriptions Act, 1968 is similar to section 77 (1)(g) of the Fijian Competition and Consumer Commission Act, 2010.

[27] Trades Descriptions Act, 1968 was replaced by Consumer Protection Act 1987 which under section 20 (1) sets out a similar offence.

'(1) ...a person shall be guilty of an offence if, in the course of business of his, he gives (by means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons).'

[28] Section 20(1) Consumer Protection Act 1987 too is similar in pith and substance to section 77 (1)(g) of the Fijian Competition and Consumer Commission Act, 2010.

[29] Section 21(1) of Consumer Protection Act 1987 (UK) *inter alia* states:

an indication given to any consumers is misleading as to price if what is conveyed by the indication, or what those consumers might reasonably be expected to infer from the indication or any omission from it, includes any of the following, that is to say-

(a) that the price is less than in fact it is;.....

- [30] Although, the word '*representation*' is used in section 77(1)(g) of the Fijian Competition and Consumer Commission Act, 2010 instead of '*indication*' as in the UK statutes and '*indication*' may be wider than some such words as '*representation*' (see **Doble v. David Greig Limited** [1972] 1 W. L. R), considering the overall scheme of the Fijian Competition and Consumer Commission Act and its objectives as expressed in section 2, the word '*representation*' should be interpreted to include an indication of any form, for there is little doubt that the offences including section 77 (1)(g) under 'PART 7 - CONSUMER PROTECTION AND UNFAIR PRACTICES' have been expressed in wide terms aimed at protecting consumers. Section 77 (1)(g) covers *inter alia* a situation where an indication of some sort amounting to representation is given to the effect that the price is less than that actually being charged; example, the shelf price \$1.40, price charged at checkout \$1.48.
- [31] The words '*by any means*' in section 77 (1) of the Fijian Competition and Consumer Commission Act, 2010 mean that it does not matter how the representation is given. It obviously covers prices on goods, on shelf edges, in holiday brochures and on estate agents' photographs, indications by word of mouth, and bar-coding. This list is not exhaustive.
- [32] Increasingly, the goods are not priced individually and the consumers rely on the price on the shelf and then assume that the laser at the checkout reads out the same price from the bar-code. A number of supermarkets have been prosecuted successfully in the UK and elsewhere because of discrepancies between the shelf price and the checkout price, usually because the computers at head office feeding the information to the tills have been altered without staff at the local supermarket altering the shelf prices. The Supermarkets and traders should be vigilant not to fall into this kind of situations, for they will face prosecutions under Fijian Competition and Consumer Commission Act, 2010.
- [33] Looking beyond Fijian Competition and Consumer Commission Act, 2010 into other jurisdictions, according to Australian Consumer Law, for instance, a business must not make false or misleading representations about (i) the standard, quality, value or

grade of goods or services (ii) the composition, style, model or previous history or use of goods (iii) whether the goods are new (iv) a particular person agreeing to acquire goods or services (v) testimonials by any person relating to goods or services (vi) the sponsorship, approval, performance characteristics, accessories, benefits and uses of goods or services (vii) **the price of goods or services** (vii) the availability of repair facilities or spare parts (ix) the place of origin of a product—for example, where it was made or assembled (x) a buyer’s need for the goods or services (xi) any guarantee, warranty or condition on the goods or services (xii) the requirement to pay for any guarantee, warranty or condition on the goods or services.

‘Price advantage of goods or services’

[34] Advantage is something that benefits the one it belongs to. Advantage is a condition while benefit is its result. The term *‘price advantage of goods or services’* is not defined in Fijian Competition and Consumer Commission Act, 2010. From the point of view of the supplier, one instance of price advantage is when a supplier claims to have a product with a low price relative to competition. Price advantage also could be employed by a supplier as a superior capability to use price as a source of competitive advantage that at the end of the day makes that supplier more successful. There are other advantages such as purchasing advantage, cost advantage, innovation advantage, distribution advantage or a service advantage. When a supplier talks about having a price advantage it means that he prices better than the competitors do.

[35] How the method that the price advantage is made known, notified, or brought to the attention of the consumer may be different. It could be merely by stating the price as in this case where the customer knows generally this given price offers an advantage. Sometimes the way the price advantage offered may be more conspicuous with a great deal of advertisements. Sometimes it may not be so explicit. Nevertheless, what matters is the fact that a price advantage is conveyed in some form rather than how emphatically it is conveyed. The main reason is that in today’s highly monetized society price is one of the critical factors if not the decisive critical factor that a consumer would consider in deciding whether to buy or not.

[36] Closer and more relevant to the issue at hand is a situation when a supermarket (or any other seller) displays a product at a certain price on the shelf (or newspaper etc.), the price advantage a potential customer has is to buy it at the price so indicated and thus, when he makes up his mind to do so at that price he acquires a price advantage concerning the product which eventually leads to all other benefits of acquiring it. Price advantage in this situation is inbuilt in the shelf-price displayed. He may or may have not compared the price of the same product available in the market. Even if he has not, the consumer is not expected to be charged a higher price than displayed for that product on the shelf. Similarly, the price may or may not be the sole criterion for his decision to buy. Nevertheless, the seller's representation that the product will be sold at the price indicated on the shelf is a price advantage (there may be other advantages to the consumer) that cannot be denied to him at the point of sale. This is the only purposive interpretation that could be given to section 77(1)(g) of the Fijian Competition and Consumer Commission Act, 2010 to give effect to the legislative intention.

[37] The fact that the consumer proceeds to pay regardless or the seller later offers to return or returns the overcharged amount is of no consequence for the offence. What section 77(1)(g) requires is making of a representation concerning that a price advantage of goods or services exists when it does not. The fact that a customer has actually been overcharged is one item of evidence of the commission of the offence. Therefore, when the consumer is charged at the counter over and above the marked price it amounts to clear evidence that the supermarket has indeed made a representation that a price advantage has existed when it has not on that product. The fact that there is a difference between the price displayed on the shelf and the price charged at the counter shows that the price advantage represented has been denied to the consumer.

[38] I shall now turn to the learned Resident Magistrate's remarks in **Fiji Commerce Commission v R C Manubhai and Company Limited** (supra). According to him, the overcharging of the customer was only a pricing error but not a false representation of a price advantage as there was no evidence to conclude that a member of the public that intended to purchase the product would have done so knowing that it was a price advantage if there was merely a pricing display. He had also held that there was no evidence by prosecution that the accused had offered an

advantage such as discounts, freebies or price comparison with different brands or other retail shops with the price displayed.

- [39] There was clear evidence in the above case that the customer was charged at the point of sale a price of \$2.57 when the displayed price was \$2.37. Thus, the customer was overcharged \$0.20. The fact that the offer for refund was made to him had possibly made the Resident Magistrate conclude that it was only a pricing error. However, this subsequent conduct was relevant only in the matter of sentence and not with regard to the conviction.
- [40] Further, the Resident Magistrate had read the word ‘false’ into section 77(1)(g) when the legislature has not done so, which may have, to a large extent, shaped his line of thinking. Thus, the guidance he has sought from Australian decisions which have dealt with ‘false and misleading’ or ‘misleading or deceptive’ representations, is not all that helpful in the context of section 77(1)(g).
- [41] The Resident Magistrate had also looked for evidence regarding any knowledge on the part of a member of the public intending to purchase the product that there was a price advantage as opposed to a mere pricing error in order to make the supermarket liable. The Resident Magistrate appears to have been led into hold that view, perhaps, by the remarks by Winter J at paragraph [39] in **Australian Competition and Consumer Commission v JH. J Heinz Company Australia Limited [2018] FCA 360 (19 March 2018)** that in order to establish ‘false representation’ it is necessary to establish that an ordinary or reasonable consumer (objective consideration) is likely to be led into error. However, as already stated, under section 77(1)(g) there is no requirement for the representation to be ‘false’ or ‘false and misleading’ or ‘misleading or deceptive’. Thus, Winter J’s remarks, though helpful as they are, cannot be imported for guidance to interpret section 77(1)(g). Even if one would apply an objective test, I do not think that there is any doubt that an ordinary or reasonable consumer would not have expected to pay anything more than the price displayed for the product at the point of sale.

- [42] How would it serve the objective of protecting consumers under the Fijian Competition and Consumer Commission Act, 2010 if it is to be accepted that every time a consumer goes to the counter or point of sale expecting to be charged at the displayed price to be overcharged because he should ordinarily assume that the price on the shelf could be an error?
- [43] Thus, representation concerning a ‘price advantage’ in the context of section 77(1)(g) has to be inferred from any indication made by the supermarket on the shelf or the product; not from the point of view of an ordinary or reasonable consumer.
- [44] Similarly, in order to conclude from the price displayed on the shelf that there is a price advantage there need not necessarily be an additional benefit such as discounts, freebies etc. from buying that product as adverted to by the Resident Magistrate. If adopted, it is a very narrow interpretation of the term ‘price advantage’ and is against the general scheme of the statute which will defeat the purpose of this vital piece of legislation. A price advantage can exist with or without such additional benefits.
- [45] Further, it also appears that the Magistrate has not given his mind at all to the possibility as to whether Manubhai and Company Limited could have been convicted alternatively for an offence under section 75 (1) which states that a person shall not, in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Displaying a lower price on the shelf and charging the consumer at a higher price at the counter is certainly misleading or deceptive conduct.
- [46] There is no meaningful difference to any rigid dichotomy or distinction between phrases ‘false and misleading’ and ‘misleading or deceptive’ found in sections 77 and 75 and they can be used *mutatis mutandis* [see the remarks at paragraph [14] in **Australian Competition and Consumer Commission v Dukemaster Pty Ltd** (ACN 050 275 226) [2009] FCA 682 (24 June 2009)]. For example section 14 (1) of Consumer Protection Act, 2002 in Ontario, Canada states that it is an unfair practice for a person to make a false, misleading or deceptive representation.

[47] Section 14(2) of Consumer Protection Act, 2002 in Ontario, Canada states that without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

- 1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.*
- 2. A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have.*
- 3. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.*
- 4. A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph.*
- 5. A representation that the goods have been used to an extent that is materially different from the fact.*
- 6. A representation that the goods or services are available for a reason that does not exist.*
- 7. A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.*
- 8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.*
- 9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.*
- 10. A representation that a service, part, replacement or repair is needed or advisable, if it is not.*
- 11. A representation that a specific price advantage exists, if it does not.***
- 12. A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement.*
- 13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.*
- 14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.*

15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.

16. A representation that misrepresents the purpose of any charge or proposed charge.

17. A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers. 2002, c. 30, Sched. A, s. 14 (2).

[48] Therefore, more often than not, any alleged breach of section 77(1)(g) of the Fijian Competition and Consumer Commission Act, 2010 could be coupled with a breach of section 75(1) as an alternative charge in a prosecution launched under the the Fijian Competition and Consumer Commission Act, 2010.

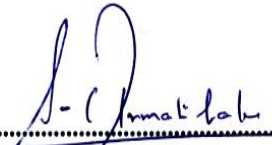
[49] Coming back to the current appeal, I am convinced that there was unequivocal evidence in the form of the price sticker on the shelf to prove the element of ‘representation’ and there was equally convincing evidence that the complainant was charged \$1.37 at the point of sale as opposed to the displayed price of \$1.30. The store manager had admitted that the purchasing officer might have forgotten to remove the ‘old’ sticker from the shelf. Thus, the offence under section 77(1)(g) had been established as held by the Magistrates court and High Court.

[50] There is no question of law only to be determined by the full court and the appeal should accordingly be dismissed. In view of my discussion to clear any lack of clarity arising from **Fiji Commerce Commission v R C Manubhai and Company Limited** (supra) on the scope and application of section 77(1)(g) of the of the Fijian Competition and Consumer Commission Act, 2010, I refrain from ordering any cost.

Order

1. Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act.




.....
Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL