

**IN THE DISTRICT COURT
AT AUCKLAND**

CRN-2009-004-506857-93

COMMERCE COMMISSION
Informant

v

LARRY ROGER BINNS
Defendant

Hearing: 19 April 2010

Appearances: N.R. Williams and A. Herdson for Informant
W.D. Woodd for Defendant

Judgment: 28 April 2010

RESERVED JUDGMENT OF JUDGE A A SINCLAIR
[on sentence]

CHARGES

[1] The defendant, Larry Roger Binns, has pleaded guilty to 36 charges laid under 40(1) of the Fair Trading Act 1986 (“FTA”) in that contrary to s13(a), he made a false or misleading representation that goods were of a particular kind, standard, quality, grade or composition.

[2] Mr Binns was managing director of Total Frame and Truss Limited (“TFT”) This company went into voluntary liquidation on 6 April 2009. It is alleged by the Commerce Commission (“the Commission”) that Mr Binns represented on the various invoices the subject of the charges, that timber in frames and trusses was of a certain grade of structural timber (MSG8), when in fact it did not meet the requirements for that grade.

THE OFFENDING

[3] By way of background, in the period prior to 2004, various New Zealand timber mills producing structural timber, undertook a grading process either visually or by machine stress grading. There was little or no external quality control. In 2004, a new Standard (NZS3622:2004) was created. The object of the new Standard was to specify requirements for the manufacture, structural characteristics, evaluation and monitoring of stress graded sawn timber. There was a three year introductory period with the new Standard taking effect on 1 April 2007. This new process then became a Code of Compliance requirement in terms of the Building Act 2004.

[4] The Standard NZS3622:2004 process involved three stages. First, the timber passed through a stress grading machine to determine the appropriate grade having regard to the strength and stiffness of the timber. Secondly, the results were verified by physical testing on a statistical basis to ensure that the stress grading machine was calibrated correctly and thirdly, the stress grading and testing processes were independently audited.

[5] The offending occurred in the period from 1 April 2007 to 30 October 2008. During this time, TFT would provide quotes to customers of Bunnings Limited and

Placemakers Limited for frames and trusses in terms of design plans submitted. The quote commonly included the following wording: “*We have pleasure in submitting our quotation as per plan and specifications supplied*” (it was usually a prerequisite and stated in the design plans that the frames and trusses were to be manufactured in MSG8 timber): and “*Trusses to Pryda design – machine stress graded timber*” (Pryda was a software programme operated by TFT which enabled the company to design the trusses in accordance with accepted engineering principles and relevant Building Codes and Standards. The grade entered in the programme was MSG8).

[6] Mr Binns was responsible for the overall management of the company and was actively involved in the day to day running of the business. It was Mr Binns who dealt with the sawmills and customers and also directed the staff to enter MSG8 as the timber grade into the Pryda software programme.

[7] During this period TFT/Mr Binns purchased timber from Carter Holt Harvey (“CHH”) and from South Pine (Nelson) Ltd. CHH produced a product that was non-load bearing timber, being timber that did not meet the grade for structural timber. This timber was known as “NLB” and was identified by using a red paint marking on the stick of timber where the properties of the timber were lower than those identified for MSG8 grade (which were identified using black paint).

[8] South Pine produced a product known as “reman” (remanufacture) using the substandard timber from the MSG8 grading process. This product had the properties of MSG8 but was deemed unfit for use as MSG8 during the visual grading process as having for example, knots or twisting in the wood. Reman was identified by using a grey paint marking on the butt end of the timber.

[9] TFT/Mr Binns purchased NLB and reman timber and undertook a process known as “defecting” which involved cutting the red painted NLB and reman sections out of the sticks of timber. TFT/Mr Binns then used the remaining timber in the manufacture and supply of frames and trusses for Bunnings and Placemakers and represented that the timber was MSG8 grade. In fact, the timber had not been regraded, visually tested or independently audited, as required by Standard NZS3622:2004 and therefore did not meet the requirements of MSG8 timber.

[10] Furthermore, as the timber used was not MSG8, the specification had been wrongly entered into the Pryda software programme with the result that the computer software records for the relevant period did not accurately reflect the grade of timber that was actually used in the manufacturing process.

[11] The manufactured frames and trusses were delivered either directly to a building site or to a nominated address. TFT/Mr Binns then sent invoices to Bunnings and Placemakers in which it/he referred to the initial quotation by stating "Prenail frame and roof pack as per quote." Those retailers then invoiced their customers.

[12] In late October 2008, a Waitakere City Council building inspector noticed during a building inspection that some of the frames and trusses had red paint markings which identified the timber as NLB when the specifications had been for MSG8 timber. The timber was traced back via Placemakers, to TFT.

FACTORS TO BE CONSIDERED ON SENTENCE

[13] In *Commerce Commission v L.D. Nathan & Co. Limited* [1990] 2 NZLR 160 at 165, Greig J listed the factors to be taken into account in reaching an appropriate penalty for a breach of the FTA. In *Commerce Commission v Ticketek New Zealand Limited* [2007] DCR 910 at para 43 Abbott DCJ reviewed those factors having regard to the Sentencing Act 2002 and considered that the relevant factors when imposing a penalty for breach of the FTA, will generally include the following:

- The objectives of the Act.
- The importance of the untrue statement which was made or published.
- The degree of culpability, in the context of wilfulness or carelessness, which will generally involve a consideration of the circumstances in which the statement was made or published.
- The extent to which the statement departed from the truth.
- The extent of dissemination of the statement.
- The extent of prejudice or harm (if any) to consumers or other traders which resulted from the statement.

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

I turn now to consider those factors which are of relevance in relation to the present offending.

Objectives of the Act

[14] The purposes of regulatory legislation will always be a relevant factor when imposing a penalty for an offence which is created by that legislation. (*Commerce Commission v Ticketek (supra)* at para 49). The long title of the FTA states that one of its purposes is to provide for the disclosure of consumer information relating to the supply of goods and services. Its focus is to ensure the protection of the public and is of particular significance in the present case.

Importance of Untrue Statement

[15] It was not possible for consumers looking at the timber product to know whether or not the timber used was in fact MSG8. In these circumstances they were therefore very reliant on the representations made by TFT/Mr Binns as to the grade of timber used.

[16] TFT/Mr Binns represented on the invoices that the frames and trusses supplied by TFT were manufactured in accordance with the initial quote. In particular, TFT/Mr Binns represented that:

(a) timber meeting the requirements for the MSG8 grade of timber had been used and that the frames and trusses therefore complied with the requirements of the New Zealand Standard and the Building Code; and

(b) the trusses complied with the design plans in the Pryda software programme which provided that they were to be manufactured in MSG8 timber.

[17] I accept that these misrepresentations as to the grade of timber (which was not MSG8) were of particular significance as the timber was to be used specifically in the construction of residential dwellings. For most people the construction of a home is their biggest investment and they are entitled to rely on compliance with the requisite grade of timber specified in their design plans.

[18] I further accept that the misrepresentations were significant to the retailers who purchased the frames and trusses supplied by TFT/Mr Binns. Bunnings and Placemakers purchased items which they understood to be compliant and relying on the representations made, sold that product to their customers.

Degree of Culpability

[19] Mr Binns knew of the publicity surrounding the move from visual to machine grading and the machine applied paint in 2003 – 2004. However despite the wide dissemination of the information, Mr Binns was not aware of any publicity surrounding the introduction of grade verification from 1 April 2007. Neither Mr Binns, nor his company, subscribed to New Zealand Standards Notifications or held a membership or affiliation with the New Zealand Frame and Truss Manufacturers Association.

[20] Mr Woodds submitted that the verification procedures were aimed at the sawmills producing the timber and questioned why Mr Binns should have been aware of these changes. I don't accept that submission. TFT was in the business of the manufacture of timber products using a process of "defecting" the timber. Mr Binns has been in the industry for 23 years. He was aware of an earlier Standard NZ3604:1999 detailing the use of timber of different grades. It was incumbent on him to ensure that he was aware of any changes to the Standard in order to ensure that his company's operation remained compliant.

[21] I accept with regard to the reman timber, that Mr Binns had been advised by South Pine that reman timber met all the grade requirements of MSG8 and indeed that is still the position of South Pine. The Commission submitted that it was Mr Binns' responsibility to check the accuracy of that advice. I see that as a different issue from whether Mr Binns ought to have been aware of the Standard. I do not consider it unreasonable for Mr Binns to have relied on advice provided by the sawmill as to the grading of timber supplied by it in the absence of any cause to question that advice. The fact still remains however, that if Mr Binns had been aware of the Standard he would have been alert to the issue and ought to have recognised that reman timber did not comply or at least, he would have been on notice to make further enquiries in this regard.

[22] I consider that Mr Binns' conduct overall involved a moderate to high degree of carelessness.

Extent to which the statement departed from the truth

[23] The NLB and reman timber used by TFT/ Mr Binns during the period of the offending had not been regraded, tested or independently audited as required by Standard NZS3622.2004. Put simply, unless and until this was done, it did not meet the requirements for the MSG8 grade of timber and representations to that effect were a significant departure from the truth.

Extent of dissemination of the statement

[24] The mislabelled timber was sold by TFT/Mr Binns over a period of approximately 18 months principally in Auckland and Northland. The number of affected buildings can only be broadly estimated based on an audit of the Pryda software programme. It was estimated that between 4000 and 7000 buildings or building extensions could be involved. Even accepting the lower figure, I accept that Mr Binn's misleading conduct affected a significant number of people and properties over an extended period.

Extent of prejudice or harm

[25] Following the discovery of the problem various tests were carried out on samples of the timber. Those tests did not disclose that there were any resultant issues with regard to the structural integrity of the timber. In these circumstances, Mr Woodd submitted that the breach was largely technical in nature.

[26] The Commission contended that there was a possibility that the timber could cause bowing, cracked walls and sagging ceilings. No evidence that this had actually occurred was produced.

[27] The discovery that the trusses and frames were non compliant did however, cause significant financial and reputational damage to Bunnings and Placemakers. For example, Placemakers, in relation to its customers, reviewed the frames and trusses to ensure compliance with the Standard at a cost of approximately \$3000 per house and carried out remedial work as necessary. More than 200 houses were involved. The cost of this work has been met from monies owed by Bunnings and Placemakers to TFT of \$453,051.01 and \$92,930.31 respectively.

Attitude of Mr Binns

[28] Following the discovery of this issue, Mr Binns accepted immediate responsibility and co-operated throughout in the investigation process. He provided information as requested and assisted in decision making relating to remedial action.

In the period from November 2008 to March 2009, Mr Binns and volunteer builder friends who also provided their time free, travelled throughout Auckland and Northland regions carrying out various works required to expose framing for visual inspection and then to reinstate the dwellings.

Importance of Deterrence

[29] The Commission submitted that in terms of general deterrence, it was important that the penalty imposed in this case should send a clear message to individuals in the position of Mr Binns that they will be held personally responsible for their actions even if those actions were committed while acting as a director of a limited liability company.

[30] In relation to particular deterrence the Commission submitted that the following factors were relevant:

- (a) the wide dissemination of the representations about the timber used;
- (b) the period over which the representations were made (18 months);
- (c) the carelessness on the part of Mr Binns to comply with the Standard; and
- (d) the position of consumers who were not able to verify the grade of the timber used in frames and trusses supplied to them.

[31] Mr Woodds contended that Mr Binns had been following the same 'defecting' practices for the past 23 years. In this case he had failed to detect the introduction of a Standard. He submitted that punishment administered in the absence of any substantial fault on the part of Mr Binns was of questionable utility.

[32] Strict liability is designed to encourage the taking of appropriate care (*Megavitamin Laboratories Limited v WJ Stewart and the Commerce Commission* (1995) 2CLR 231 Tipping J at page 252). I consider that there is need in this case for an element of both general and individual deterrence taking into account the matters raised in the Commission's submissions previously mentioned.

Financial circumstances of Mr Binns

[33] Largely as a result of these events, TFT was placed into voluntary liquidation and Mr Binns has lost his financial investment in the company. He is now earning a living truck driving. On the financial information put before the Court, Mr Binns will be in a position to pay a fine over time but his overall financial position is not strong.

Guilty pleas

[34] Mr Binns entered guilty pleas at the earliest opportunity and is entitled to a 33% discount in accordance with *R v Hessel* [2009] NZCA 450.

Previous Convictions

[35] Mr Binns has no previous convictions relevant to this prosecution.

Comparable Cases

[36] The general desirability of consistency in sentencing (s8(g) of the Sentencing Act 2002) must also be taken into account. The parties have helpfully referred to a number of cases involving similar offending. Those cases principally involved corporate entities and occurred in different industries. While I have taken those decisions into account, I propose to only specifically refer to the two cases which counsel were agreed were of most relevance, being *Commerce Commission v Carter Holt Harvey* (unreported, Auckland District Court 12 October 2006 A-M Bouchier DCJ) and the related decision of *Commerce Commission v Maurice Reid* (unreported, Auckland District Court 5 April 2007 A-M Bouchier DCJ).

[37] The case against CHH involved charges laid under s 10 of the FTA of engaging in conduct liable to mislead the public as to the nature, characteristics and suitability for purposes of goods and related to the marketing of timber as MGP10(a premium grade of timber). The offending occurred over a three and a half year period between May 2000 and November 2003. During that period, CHH sold timber in packets which it labelled as MGP10. In fact, as well as MGP10 timber, the

packets contained lower grades of timber (MGP8 and MGP6). In three packets tested over a three year period, on average only 33% of the timber was MGP10 and the remainder was MGP8 or lesser grades.

[38] The grade of timber was entered into computer assisted design software (as in the present case). If MGP10 was entered, less timber was required as it was of a superior grade. Houses built during the period of offending and designed to be constructed using MGP10 timber, ended up containing timber of lesser grades.

[39] There was no issue of the structural integrity of the dwelling being seriously compromised. While there was mention in the summary of facts that incorrectly graded timber in a roof truss could for example, cause sagging or deflection, no evidence of such matters were put before the court at sentencing. It was described by the Judge as a possibility. In CHH's 2000 annual report it was noted that over 7 million tons of wood product was supplied to the New Zealand and export market with sales of over \$496 million. Stress graded MGP10 sales in that period were approximately \$80 million.

[40] CHH pleaded guilty to 20 charges. Having made allowance for the various sentencing factors including guilty pleas, the Court imposed a fine of \$45,000 on each of the 20 charges resulting in a total fine of \$900,000. Court costs were also imposed on each charge.

[41] Mr Maurice Reid faced 17 charges laid under s 10 of the FTA relating to offending between July 2000 and December 2002. Mr Reid was general manager of CHH Wood Products from 1999 to April 2001. He became Chief Executive of Ecopine (the timber and plywood production division of CHH) in April 2001 before retiring from the company in April 2003.

[42] Mr Reid was aware from at least 2001, that CHH was not producing MGP10 timber that complied with the applicable standards. Despite this, he continued to oversee the production of timber at the Putaruru, Nelson and Kopu mills that did not comply with the MGP10 standards.

[43] Mr Reid pleaded guilty to all charges. The Court took a starting point of \$30,000 and deducted one third for mitigating features including the defendant's guilty pleas. A final fine of \$20,000 was imposed.

[44] I consider Mr Binns' offending to be on a lesser scale than Mr Reid although it should be noted with regard to the penalty that was imposed that this case was decided at pre 2003 fine levels and also involved about half the number of charges. The value of the sales involved was considerably greater than in the present case. Mr Reid's offending went on for a period of about 30 months while Mr Binns' occurred over an 18 month period. Most importantly, Mr Reid's conduct was deliberate while Mr Binns' was careless. Mr Binns was unaware of the misrepresentation as to the timber grading until he was alerted to it by others. At that time he immediately accepted responsibility and took steps to remedy the situation.

Fine and Costs

[45] This is a case where because TFT has gone into liquidation, no proceedings have been brought against the offending company. Pursuant to s40(1), the maximum fine for an individual is \$60,000. Counsel were agreed that s40(2) did not apply and the court could adopt a starting point above the maximum for a single offence if appropriate.

[46] The Commission submitted that an appropriate starting point for all 36 charges was in the range of \$80,000 to \$90,000. Having regard to s9 of the Sentencing Act 2002, no aggravating features relating to Mr Binns were identified that would justify any uplift. Taking into consideration all relevant mitigating features, the Commission contended that a sentence between \$50,000 and \$60,000 should be imposed.

[47] Mr Woodd submitted that an appropriate start point would be \$5,000 with an end sentence allowing for mitigating factors, of \$3,300.

[48] Having regard to the various factors set out above and taking into account the totality of the offending, I consider that an appropriate start point is \$25,000. A

reduction of 33% is made for Mr Binns' early guilty pleas. I allow a further discount of 7% to recognise Mr Binns' remorse and co-operation with the authorities in addressing this matter. On this basis I fix a global fine of \$15,000 which to more fully reflect the seriousness of the offending, I intend to impose on one charge (the offending all being of the same nature).

[49] Accordingly on CRN-09-004-506857, Mr Binns is convicted and fined \$15,000. On each of the remaining charges he is convicted and discharged. Costs of \$130 are imposed on CRN-09-004-506857.



A A Sinclair
DISTRICT COURT JUDGES

*Reserved Decision delivered on
28 April 2010 by me pursuant
to Sec 68(3) Summary Proceedings
Act.*

*H. P. ...
Deputy Registrar*