

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2016-004-005349  
[2016] NZDC 15542**

**COMMERCE COMMISSION**  
Prosecutor

v

**BUDGE COLLECTION LIMITED  
SUN DONG KIM**  
Defendants

Hearing: 12 August 2016  
Appearances: A McClintock for the Prosecutor  
K Prendini for the Defendants  
Judgment: 16 August 2016

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**RESERVED JUDGMENT ON SENTENCING OF JUDGE R G RONAYNE**

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***Introduction***

[1] By notice given pursuant to s 38 Criminal Procedure Act 2011, the defendants have entered guilty pleas to charges as follows:

Budge Collection Limited

- (a) CRN-16004500043 – offending between 1 January 2014 and 16 June 2014, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the representation being on invoices issued to customers – contrary ss 13(a) and 40(1) Fair Trading Act 1986 (FTA).

- (b) CRN-16004500045 – offending between 17 June 2014 and 31 March 2015, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the representation being on invoices issued to customers – contrary to ss 13(a) and 40(1) FTA.
- (c) CRN-16004500048 – offending between 1 January 2014 and 16 June 2014, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the representation being on the labelling and packaging of its alpaca wool duvets – contrary to ss 13(a) and 40(1) FTA.
- (d) CRN-16004500050 – offending between 17 June 2014 and 31 March 2015, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the representation being on the labelling and packaging of its alpaca wool duvets – contrary to ss 13(a) and 40(1) FTA.

Sun Dong Kim

- (a) CRN-16004500053 – offending between 1 January 2014 and 16 June 2014, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the defendant being a party to Budge Collection Limited’s offending in that he did or omitted an act or acts for the purposes of aiding the company to commit the offence – the representation being on invoices issued to customers – contrary to ss 13(a) and 40(1) FTA and s 66(1) Crimes Act 1961.
- (b) CRN-16004500055 – offending between 17 June 2014 and 31 March 2015, being in trade in connection with the supply or possible supply

of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the defendant being a party to Budge Collection Limited’s offending in that he did or omitted an act or acts for the purposes of aiding the company to commit the offence – the representation being on invoices issued to customers – contrary to ss 13(a) and 40(1) FTA and s 66(1) Crimes Act 1961.

- (c) CRN-16004500059 – offending between 1 January 2014 and 16 June 2014, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the defendant being a party to Budge Collection Limited’s offending in that he did or omitted an act or acts for the purposes of aiding the company to commit the offence - the representation being on the labelling and packaging of its alpaca wool duvets – contrary to ss 13(a) and 40(1) FTA and s 66(1) Crimes Act 1961.
- (d) CRN-16004500060 – offending between 17 June 14 to 31 March 2015, being in trade in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular kind, quality or composition – the defendant being a party to Budge Collection Limited’s offending in that he did or omitted an act or acts for the purposes of aiding the company to commit the offence - the representation being on the labelling and packaging of its alpaca wool duvets – contrary to ss 13(a) and 40(1) FTA 1986 and s 66(1) Crimes Act 1961.

[2] Each of the two types of offending by the company and Mr Kim is divided into two charges to recognise the fact that maximum penalties under the FTA increased from 17 June 2014 from \$60,000 to \$200,000 for individuals and from \$200,000 to \$600,000 for bodies corporate.

## *Facts*

[3] The company was incorporated on 30 March 2012 with Mr Kim being the sole director and employee. He and his wife are equal shareholders.

[4] The company's main business is the manufacture of New Zealand lambskin jackets. It also imports alpaca duvets and wool duvets from Hang Zhou Shun Downfilled Products Co Limited ("Hang Zhou") in China.

[5] The alpaca duvets in question were imported in completed form. On arrival, Mr Kim would re-package them before supplying them to two retail outlets being Shims International, trading as Royal Deer of New Zealand ("Royal Deer") and Kiwi Discovery ("Kiwi Discovery").

[6] Mr Budge was responsible for the day-to-day operation of the business, including ordering the duvets from Hang Zhou, arranging for their transportation to New Zealand, inspecting them on arrival, re-packaging them and arranging for orders to the retail outlets and invoicing the retail outlets.

[7] In October 2013, the Commerce Commission ("the Commission") investigated the company over allegations that it was falsely representing the country of origin of the alpaca duvets, claiming that they were "made in New Zealand" and falsely representing the alpaca fibre content, describing the duvets as "alpaca duvet" knowing that they only contained 28 percent alpaca fibre.

[8] On that earlier occasion the Commission spoke to Mr Kim and following an investigation, sent a compliance advice letter to Mr Kim on those two issues. Following the sending of that letter, Commission staff met with Mr Kim in Rotorua and provided him with FTA education and compliance information.

[9] The company made misleading representations as to the composition of the alpaca duvets in several different places on the packaging and labelling of the duvets and in invoices issued to retailers.

[10] The representations on the external packaging included:

- (a) “Alpaca wool duvet and underlay”;
- (b) “Premium alpaca fibre and wool”;
- (c) “Alpaca duvet and underlay with premium wool”;
- (d) “Noblesse premium alpaca fibre and wool”;
- (e) Alpaca pictures and words “natural alpaca fibre” on the base of packaging;
- (f) Alpaca pictures and words “alpaca mark” and “wool mark” on the base of packaging.

[11] The product packaging did state “this product contains moderate amount of premium wool and polyester blended with premium alpaca wool”, but that statement was in small print at the base of the packaging. Photographs of the labelling have been provided to the Court.

[12] A rectangular label was sewn across the corner of each duvet. This corner label represented that the duvets were either “premium alpaca fibre and wool” or “alpaca fibre”.

[13] A small rectangular label was sewn into the seam of the duvets. This seam label represented on one side that the product was an “alpaca wool duvet” and, on the reverse, that it was 28 percent alpaca, 60 percent wool and 12 percent polyester.

[14] During the relevant charge periods, the company issued invoices to retailers for duvets supplied to them for resale to consumers. The invoices represented that the duvets were “premium alpaca duvet” or “alpaca (premium)”.

[15] In April 2015, a Commission employee purchased two alpaca duvets from KFL Gifts in Queenstown for \$690 each. The Commission’s investigation

established that those duvets were originally supplied by the company. The packaging and labelling of those duvets represented, in general terms, that the duvets contained predominately alpaca wool.

[16] Testing of the purchased duvets, together with two further duvets that Mr Kim gave the Commission in an interview on 9 June 2015, revealed that all four duvets contained only a minimal level of alpaca fibre ranging from 2.1 percent to 17.8 percent.

[17] Comparing the premium price received for alpaca duvets with the price received for a standard sheep wool duvet, it is accepted that the direct unlawful gain to the company amounted to approximately \$21,400.

[18] Although it is possible that part of the overcharge to retailers would have been passed on to end consumers, the detriment to retailers would include at least part of the overcharge. Retailers would have also suffered other detriment, such as reputational damage and the lost opportunity to sell other products.

[19] Detriment is also likely to have been suffered by end consumers who believed themselves to be buying predominantly alpaca duvets. But for the misleading labelling and packaging it is unlikely that consumers would have paid the higher price for the duvets. This is particularly so for customers of Kiwi Discovery who paid up to \$430 for an alpaca duvet when a sheep wool duvet could have been purchased for \$220.

[20] Offending of this type is likely to also harm competitors. The offending also results in a breach of trust placed by consumers in retailers. Furthermore, this type of offending is said to reflect negatively on New Zealand's reputation as a desirable tourism destination.

[21] At interview, Mr Kim stated that he believed that the duvets contained 28 percent alpaca fibre.

[22] The company continued to sell the incorrectly labelled alpaca duvets following the October 2013 meeting, but, at interview, Mr Kim claimed that that was due to a misunderstanding of the meaning of the warning letter.

[23] The company made some changes to the labelling of the new duvets imported in July 2014, including:

- (a) Removing the “made in New Zealand” wording from the packaging sleeve representation;
- (b) Changing the headline representation from “alpaca” to “alpaca and wool duvet/underlay”;
- (c) Replacing the “Royal New Zealand” embroidery on the duvets with “Royal natural alpaca and wool”;
- (d) Stating that the duvet was a blend of alpaca, wool and polyester in small print on the packaging.

[24] Mr Kim was asked to provide documentation relating to his instructions to the Chinese supplier that the duvets should contain 28 percent alpaca fibre. No supporting documentation was provided.

### ***Submissions***

[25] The prosecutor submits that for the company the Court ought to adopt a starting point for sentence of a fine in the range of \$60,000-\$90,000 and for Mr Kim in the range of \$15,000-\$20,000.

[26] Although reference can be made to a large number of sentencing decisions, the Court’s attention is drawn particularly to *Premium Alpaca and Ors v Commerce Commission* [2014] NZHC 1836 (“*Premium Alpaca*”) and *Commerce Commission v Yun Quiang Hou & Nangong Limited* [2016] NZDC 9291 (“*Nangong*”).

[27] For the defendants, it is submitted that the Court ought to adopt a starting point for the company is a fine in the range of \$40,000-\$55,000 and for Mr Kim a fine in the range of \$8,000-\$12,000.

[28] It is further submitted that there should be a discount of five percent to reflect an absence of previous convictions and cooperation and 25 percent for the guilty pleas.

***Aggravating and mitigating factors***

[29] I identify the aggravating factors of the offending as follows:

- (i) While some misrepresentations can be discovered more easily than others, in this case the misrepresentations were virtually impossible for retailers and individual consumers to check. Consumers are plainly not in a position to test the composition of such goods. In these circumstances, as with most retail purchases, consumers place trust in the accuracy of representations. Here, there was a breach of trust.
- (ii) Because the alpaca duvets are marketed as a superior product and priced accordingly, the retailers and consumers paid unwarranted premiums for the products.
- (iii) There was a significant degree of wilfulness in Mr Kim's offending and thus the offending of the company, which he personifies. Mr Kim was served with a letter in late October 2013 addressed to him as the managing director of the company. A copy of that warning letter has been provided to the Court by counsel for the defendants. The terms of the warning contained in the letter are perfectly clear. Furthermore, the letter indicated that there would be continued monitoring and the prospect of further enforcement action against non-complying businesses was also made clear. Further to the warning letter, Mr Kim was provided with FTA education and



compliance information. Mr Kim admitted in an interview with the Commission that he had never tested the content of the “alpaca” duvets. The defendants’ offending was brazen. Even the new labels (para [23] (b), (c) and (d) above) could hardly be described as paragons of accuracy.

- (iv) Given that the duvets in fact contained a minimal amount of alpaca wool, the packaging and invoices amounted to a significant departure from the truth.
- (v) There was significant dissemination of the misrepresentations, although primarily in Auckland. However, Auckland is a major tourist destination and, it is not disputed that tourists will have returned home with falsely labelled products. It is self-evident that consumers and the retailers have significantly overpaid for the products.
- (vi) The offending was ongoing over a significant period of time with no efforts to correct the misrepresentations. There was a direct unlawful gain to the company of approximately \$21,400. Allied to that, there was financial detriment to retailers and the individual consumers and likely reputational damage to the retailers. It is too difficult to identify or quantify any reputational damage to New Zealand as a tourist destination for that to affect sentencing.

[30] Clearly, the defendants are entitled to credit to reflect a lack of prior convictions. A full discount of 25 percent is then available to reflect early guilty pleas.

### ***Authorities***

[31] *Premium Alpaca* and *Nangong* are of assistance. However the Court is informed by the prosecutor that the present case is the first to come before the Courts where a significant majority of the offending has occurred after the maximum

penalties under the FTA were increased on 17 June 2014. Self-evidently, those penalties were increased more than threefold for individuals and threefold for bodies corporate.

[32] In the *Premium Alpaca* case, sentences imposed on four companies which had pleaded guilty to misrepresenting the composition and/or country of origin of alpaca rugs and alpaca and wool duvets sold to the tourist market were upheld by the High Court.

[33] While the prosecutor acknowledged that much of the conduct of the various companies involved in the *Premium Alpaca* case was more serious than here, one company in that case, Premium Alpaca itself, behaved in a similar way. It had imported 3,214 rugs from Peru, serviced them and sold them to retailers as a New Zealand product with 100 percent alpaca content. Both of those statements were misleading. The offending took place over eight months with an estimated profit of just over \$91,000.

[34] The High Court upheld a fine imposed on Premium Alpaca of \$56,000 calculated from a starting point of \$80,000 and a fine imposed on each of two young directors of \$6,700 calculated from a starting point of \$10,000. While they were young and inexperienced, it was not accepted that they had simply been naïve. The penalties imposed related to offending prior to 2014.

[35] In *Nangong*, the company faced eight charges and the director four. Representations had been made that duvets contained alpaca wool when there was none. The duvets were also packaged and labelled representing that they had come from New Zealand when, in fact, they had been made in China. Two compliance advice letters had been provided to the director. The offending occurred over a nine-month period, from 1 January 2014 until 30 September 2014. The unlawful gain made was said to amount to \$39,000. Self-evidently, some of the offending occurred post the increase in penalties.

[36] In the District Court for six charges against the company, where the offending had occurred pre-penalty increase, a starting point of \$90,000 was adopted. Before

charges against the company post-penalty increase, a starting point of \$40,000 was adopted. The two charges against the director pre-increase a starting point of \$8,000 was adopted and for two charges post-increase a starting point of \$18,000 was adopted. The resulting total fine for the company was \$91,000 from a starting point total of \$130,000 and \$18,200 for the director from a starting point of \$26,000.

### ***Application***

[37] The defendants took no issue with the prosecutor's submission that the increased penalties were designed to act as a deterrent and also to bring the penalty regime closer to that of comparable consumer laws and Australian consumer law. Furthermore the High Court noted in the *Premium Alpaca* case that the increase in penalties demonstrates "Parliament's intention to denounce and deter breaches of the Act", an approach which is "consistent with the Act's focus on consumer protection."<sup>1</sup>

[38] It is self evident that the Court must reflect Parliament's intention in the approximate threefold increase in penalties although to do so does not require a simple multiplication of what might otherwise have been the starting point under the previous regime. Nevertheless, on any analysis, a substantial increase to sentencing levels is called for to reflect Parliament's clear intention.

[39] Here the misrepresentations related to composition rather than country of origin and somewhat lower revenues from sales.

[40] No serious issue was taken with the prosecutor's submission that this present prosecution followed on from a series of well publicised prosecutions for the same sort of conduct. That early conduct resulted in significant penalties under the earlier regime.

[41] Half the charges faced here are for conduct which postdates the increase in penalties. However the offending continued for a significantly longer period of time post increase. It was about five and a half months' offending pre increase and about

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<sup>1</sup> *Premium Alpaca Limited v The Commerce Commission* [2014] NZHC 1836 at [76].

nine and a half months' offending post increase. This matter is not susceptible to some sort of precise mathematical analysis. What is required is an overall evaluation of the defendants' culpability bearing in mind the increase in the maximum penalty part way through the offending and also particularly bearing in mind the warning letter and training received.

[42] For the company I adopt a starting point for the overall offending of a fine of \$80,000.00.

[43] For Mr Kim, whose conduct was similar to the conduct of the director in *Nangong* I adopt a starting point of a fine of \$20,000.00.

[44] For the company I give a discount of 5% to reflect a lack of prior convictions. Nothing more is justified given the duration of the offending after proper clear warning was given. From the resultant \$76,000.00 a 25% discount for guilty plea results in an overall penalty of \$57,000.00.

[45] The fines imposed on the company are apportioned as follows:

- (a) On CRN 16004500043 fined \$7,125.00 and ordered to pay Court costs of \$130;
- (b) On CRN 16004500048 fined \$7,125.00 and ordered to pay Court costs of \$130;
- (c) On CRN 16004500045 fined \$21,375.00 and ordered to pay Court costs of \$130;
- (d) On CRN 16004500050 fined \$21,375.00 and ordered to pay Courts costs of \$130.

[46] For Mr Kim the same approach as to discounts is appropriate. For his lack of previous convictions I allow a discount of 5% from the starting point of \$20,000.00. From the resulting \$19,000.00 I allow a 25% percent discount for guilty plea

resulting in an overall penalty of \$14,250.00. For Mr Kim the fines are apportioned as follows:

- (a) On CRN 16004500053 a fine of \$1,780.000 and ordered to pay Court costs of \$130;
- (b) On CRN 16004500059 a fine of \$1,780.00 and ordered to pay Court costs of \$130;
- (c) On CRN 16004500055 a fine of \$5,343.00 and ordered to pay Court costs of \$130;
- (d) On CRN 16004500060 a fine of \$5,343.00 and ordered to pay Court costs of \$130.

Dated at Auckland this 16<sup>th</sup> day of August 2016 at 10.40 am/pm.

  
R G Ronayne  
District Court Judge