IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI-2013-463-000070
CRI-2013-463-000071
CRI-2013-463-000072
[2014] NZHC 1836

BETWEEN	PREMIUM ALPACA LIMITED First Appellant
	YUN DUK JUNG Second Appellant
	BO SUN YOO Third Appellant
AND	COMMERCE COMMISSION Respondent

Continued over

Hearing: 15 April 2014

Counsel: W Lawson for Appellants
A M McClintock for Respondents

Judgment: 6 August 2014

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 6 August 2014 at 2.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Lance Lawson, Rotorua
Meredith Connell, Auckland

CRI-2013-463-000073
CRI-2013-463-000074

BETWEEN	HYEON COMPANY LIMITED First Appellant
	HAN YOUNG CHAE Second Appellant
AND	COMMERCE COMMISSION Respondent

CRI-2013-463-000075
CRI-2013-463-000076

BETWEEN	JM WOOL LIMITED First Appellant
	JONG MYUNG LEE Second Appellant
AND	COMMERCE COMMISSION Respondent

CRI-2013-463-000077

BETWEEN	DUVET 2000 LIMITED Appellant
AND	COMMERCE COMMISSION Respondent

[1] The appellants are four companies and four individuals who are directors of those companies. They all pleaded guilty in the District Court at Rotorua to charges laid against them under s 10 of the Fair Trading Act 1986 ("the Act") and in the case of one of them, JM Wool Limited ("JM Wool"), charges under s 13 of that Act as well. They now appeal against the sentences imposed on them in that Court. The appeals were heard together.

[2] The respondent ("the Commission") opposes the appeals.

Facts

[3] Hyeon Company Limited ("Hyeon") and Premium Alpaca New Zealand Limited ("Premium Alpaca") were importers and suppliers of alpaca rugs. Duvet 2000 Limited ("Duvet 2000") and JM Wool were retailers of alpaca rugs and manufacturers and retailers of duvets. Han Young Chae was a director of Hyeon and of Duvet 2000. Yun Duk Jung and Bo Sun Yoo were directors of Premium Alpaca. Jong Myung Lee was a director of JM Wool.

[4] Tourist groups from Asia often travel around New Zealand with In-bound Tour Operators ("ITOs"). Some of the ITOs are licensed by Tourism New Zealand, but many, including the one that brought the tourists to the retailers involved in this case, are not. The ITOs then organise the travel and sightseeing of the tour groups and direct the tourists to certain retail souvenir outlets. In return, the retailers pay a commission to the ITOs. In this case, tours typically began with a trip to Rotorua's Agrodome, where tourists saw and interacted with live alpacas as part of a farm tour. Groups were then taken to individual retail premises where they received a welcome and an introduction speech from the host. They were then taken to a showroom and sales staff promoted the products and their quality. The appellants' offending was discovered as a result of an investigation by the Commission into allegations of misleading representations by importers and retailers of alpaca rugs, and manufacturers and retailers of alpaca duvets, merino duvets and Southdown wool duvets. The conduct under investigation involved sales of thousands of mislabelled rugs and duvets, valued at millions of dollars, to groups of tourists from China, Korea and Taiwan. The tourists were brought to Auckland and Rotorua and to the

retail outlets by ITOs on the basis that what those shops were selling were genuine products, that is that the rugs they were selling were made in New Zealand and that the duvets they were selling contained the proportion of New Zealand alpaca fibre, merino or Southdown wool that they were said to contain. In fact, the reality was otherwise.

[5] The offending falls into two categories:

(a) False representations regarding the country of origin of alpaca rugs; they were made in Peru, not New Zealand (country of origin charges); and/or

(b) False representations about the composition of alpaca, merino and Southdown duvets; the duvets either did not contain the type of fibre or wool represented at all, or, where they did, they contained less than the percentage that had been represented (composition charges).

[6] The precise representations varied, but included false representations: on labels affixed to the rugs and/or duvets (all appellants); made verbally by sales staff (Duvet 2000); and in brochures at the point of sale (JM Wool).

[7] Hyeon imported medium or large sized alpaca rugs from Peru at a cost of around $400 per item. It serviced them at a cost of around $200 per rug. It then removed the "made in Peru" labels and relabelled the rugs as made in New Zealand. The rugs were supplied to retailers, including Duvet 2000 and Wild Nature Limited ("Wild Nature"). Hyeon imported 3,500 rugs in its own name, 4,029 rugs on behalf of Duvet 2000 and 2,428 rugs for Wild Nature. The retailers sold the rugs for between $4,000 and $6,000 each. Sometimes the prices were as high as $8,000. In Rotorua, Peruvian alpaca rugs usually sold for between $1,000 and $1,600 per rug. Sales invoices between 5 January 2010 and 22 August 2011 showed Hyeon enjoyed sales of $2,136,935. Over the same period, Hyeon enjoyed a revenue stream of approximately $3,428,335. Hyeon pleaded guilty to 30 representative charges in total: 10 charges for affixing false labels on alpaca rugs; 10 charges for being a party

to the offending of Duvet 2000; and 10 charges for being a party to Wild Nature's offending.

[8] Han Young Chae was the sole director of Hyeon. He pleaded guilty to 10 charges for being a party to Hyeon's offending. Han Young Chae was also one of three directors of Duvet 2000. He pleaded guilty to 10 charges for being a party to Duvet 2000's offending.

[9] Hyeon was sentenced to pay a fine of $105,000. Its director, Mr Chae, was sentenced to pay a fine of $24,500 on all charges as a party to the offending by Hyeon and Duvet 2000.

[10] Premium Alpaca pleaded guilty to 10 representative charges under s 10 of the Act. The two directors, Yun Duk Jung and Bon Sun Yoo, pleaded guilty to 10 charges as a party to Premium Alpaca's offending. Mr Jung was responsible for the relabelling and the servicing of the rugs. Mr Yoo was responsible for the importation and marketing.

[11] Premium Alpaca offended in a similar fashion to Hyeon by importing rugs from Peru, servicing them and selling them to retailers with a label that said "Premium Alpaca New Zealand naturally fine and soft 100% baby Alpaca fur rug". Between June 2010 and July 2011, Premium Alpaca imported 3,214 alpaca rugs, the majority of which being a medium or large size. The imported rugs had a value of approximately $574,870.80. The company supplied 90 per cent of the mislabelled rugs to JM Wool and Wild Nature. The remaining 10 per cent were sold to smaller retailers. Again, retailers sold the rugs for between $4,000 and $6,000 a rug and, at times, as high as $8,000. Comparable rugs were sold by other retailers for between $1,000 and $1,600. The estimated profit between January 2011 and August 2011 was approximately $91,201, once the importing and servicing costs were accounted for. Premium Alpaca imported fewer rugs than Hyeon and, unlike Hyeon, the labels that Premium Alpaca used did not specifically assert that the rugs were made in New Zealand.

[12] Premium Alpaca was sentenced to pay a fine of $56,000. Its two directors were each fined the sum of $6,700.

[13] Duvet 2000 pleaded guilty to 30 representative charges under s 10 of the Act. Ten charges relate to the offer of sale of falsely labelled alpaca rugs purchased from Hyeon. Hyeon ordered the alpaca rugs on Duvet 2000's behalf. Duvet 2000's sales staff also made false oral representations about the alpaca rugs to Chinese tour shoppers, such as, "this one kind (alpaca skin) is definitely a special product of New Zealand". Between 31 July 2010 and 10 July 2011, Duvet 2000 imported 4,029 alpaca rugs with a value of $1,442.500.

[14] Duvet 2000 also manufactured and sold duvets that were falsely labelled as to their contents. Duvets labelled as 100 per cent pure alpaca wool had only 20 per cent alpaca wool. Ten charges relate to this misrepresentation. The other 10 charges were for duvets labelled as containing 100 per cent New Zealand merino lamb wool when it in fact had no merino wool in it. The wool products were purchased from Wool Products of New Zealand Limited. Between 8 January 2010 and 10 June 2011, that company supplied Duvet 2000 with 42,960 metres of duvet wool fill product at a cost of $349,626. On average, each manufactured duvet contained two metres of duvet wool fill. The cost of manufacturing the duvets varied, but on average it was up to $70. The duvets were then retailed at prices of $400 to $1,000, depending on the size of the duvet and the labelled content. Duvet 2000's annual turnover in 2009 and 2010 was around $8 million.

[15] Duvet 2000 was sentenced to pay a fine of $200,000.

[16] JM Wool was another retailer of rugs and duvets. JM Wool purchased rugs from both Hyeon and Premium Alpaca. The specific quantity is unknown. JM Wool also manufactured and sold duvets with the same misleading labels as Duvet 2000. In addition, JM Wool sold Southdown wool duvets which contained no Southdown wool. The company pleaded guilty to 40 representative charges under s 10 for the sale of alpaca rugs, alpaca duvets, merino duvets and Southdown wool duvets.

[17] JM Wool also used promotional booklets to misrepresent the merino wool duvets and alpaca rugs. This conduct attracted one representative charge under s 13(a) and one representative charge under s 13(j) of the Act.

[18] Between 9 April 2010 and 9 July 2011, over $11.5 million was deposited into the accounts of JM Wool. Between 8 January 2010 and 3 June 2011, the company, Wool Products of New Zealand Limited supplied 28,785 metres of duvet wool fill to JM Wool at a cost of $383,481. On average, each manufactured duvet contained approximately two metres of duvet wool fill. The cost of manufacturing of the duvets was on average $70 each, and the duvets were sold for prices between $200 and $1,000.

[19] Jong Myung Lee was the director of JM Wool. He pleaded guilty to 40 charges for being a party to the company's offending against s 10 of the Act. Mr Lee was also a director of an ITO that indirectly profited from the false representations.

[20] JM Wool was sentenced to pay a fine of $182,000 and its director, Mr Lee, was fined $21,000.

District Court

[21] Judge Thomas sentenced all offenders together on 10 September 2013. After canvassing the background facts, the Judge took into account the common factors for the purpose of determining the appropriate penalty for each offender. They were:

(a) The objectives of the Act, which was to facilitate fair competition;

(b) The importance of any untrue statement made;

(c) The degree of wilfulness or carelessness involved in making such a statement;

(d) The extent to which the statements departed from the truth;

(e) The degree of their dissemination;

(f) The prejudice to consumers; and

(g) Whether any efforts were made to correct the statements.

[22] These factors were identified in *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160 (HC).

[23] Regarding the objectives of the Act, the Judge said the Act is designed to facilitate fair competition. Traders who conduct business fairly and lawfully should not be disadvantaged by those who do not.

[24] In assessing the importance of the untrue statements, the Judge noted the Commission's submission that there is a premium that attaches to New Zealand made products in the tourism market. The offenders' rugs were four to five times more expensive than equivalent rugs sold by other retailers. This shows that the untrue representations about the country of origin were very important in the eyes of the target market.

[25] The offenders submitted that the misleading labelling had minimum importance. It was suggested that the rugs would have been purchased, even if the labelling had not been misleading. The Judge concluded that the untrue statements were very important in achieving high levels of sales, and at a higher price than was merited.

[26] Under the factor of wilfulness or carelessness, the offenders submitted that there was neither deliberate nor intentional conduct. The Judge considered the contrary view taken by the Commission, and concluded that it was clear that there was a degree of wilfulness and carelessness involved in making the untrue statements and misrepresentations.

[27] Under the fourth factor, the Judge found that the statements as to the origins of the alpaca rugs departed entirely from the truth, and the statements as to the wool content of duvets departed to a significant extent from the truth. The Judge did not accept the argument, put forward by the offenders, that the false country of origin

labelling was not a marked departure from the truth because of the work that was carried out on the rugs before sale.

[28] The Judge rejected the offenders' submissions that the degree of dissemination was limited as the general population of New Zealand, and the vast majority of tourists would not have had access to the mislabelled rugs to purchase as the shops were open to specific tour groups only. The offenders argued that it was the ITOs who were primarily responsible for the dissemination. The Judge concluded that the untrue statements were disseminated in Auckland and Rotorua, and then through word of mouth in Asia. In the Judge's view, the degree of dissemination could not be underestimated in light of the Commission's investigations that revealed "fraud on a very large scale".

[29] Regarding the prejudice to customers, the Judge was not convinced by the offenders' arguments that there was limited harm to consumers. It was argued that even if the rugs were labelled correctly, the customer would have been unable to shop elsewhere. The Judge rejected this view, and said that if the products were labelled correctly the consumers would have paid a fraction of the price that they did. As they had no opportunity of going elsewhere, there was significant prejudice to consumers.

[30] Regarding whether efforts had been made to correct the untrue statements, the Judge noted the views from both sides. The Commissioner submitted that it was likely that the conduct would have continued if the complaints were not made. The offenders relied on the efforts made to correct the situation once they were made aware of the situation.

[31] The Judge noted the Commission's indications about the substantial revenues and/or profits made, and the defence submissions regarding the lack of profit made. The Judge said that the amount of profit made was of little importance. The offenders acknowledged that there should be a deterrent penalty, but submitted that a significant deterrent was not warranted.

[32] The Judge concluded that the penalties to be imposed should be closer to the statutory maximum than the lower figures suggested by the offenders' counsel.

[33] In terms of mitigating factors, the Judge referred to the decision of *Commerce Commission v Chen* DC Auckland CRI-2012-004-019312, 28 March 2013, where a 30 per cent discount was allowed for similar offending. The Judge said that 30 per cent would be a fair discount in all the circumstances in recognition for the cooperation from the offenders and the early guilty pleas.

[34] The Judge then turned to consider the individual offenders. In relation to Hyeon, the Judge considered the viewpoint that the company believed it could legitimately label the rugs as made in New Zealand due to the work it carried out on the imported rugs. The Judge rejected this argument, and said that it did not affect his view of the seriousness of the offending. Further, a greater discount than 30 per cent was sought to take into account good cooperation, ignorance of the Act, and the subsequent changed labels. None of those factors persuaded the Judge that a discount of more than 30 per cent was warranted. The Judge then noted that the company had ceased trading, but in the absence of any other financial information, there was no need to reduce the penalty imposed. For Hyeon, the Judge adopted a starting point of $150,000, which resulted in an end sentence of $105,000 after a 30 per cent discount.

[35] With regards to Hyeon's director, Mr Chae, it was submitted that as his charges were linked to the principal offence of labelling, he should be convicted and discharged. The Judge was satisfied that there was sufficient personal liability, over and above the liability of the companies of which Mr Chae was a director such that an individual penalty should be imposed on him. The Judge adopted a starting point of $35,000, which was reduced to $24,500 after a 30 per cent discount.

[36] With regards to Premium Alpaca and its two directors, Mr Jung and Mr Yoo, the Judge stated that it was in a similar situation as Hyeon, except that the number of rugs imported was less and the representation was not as serious. On behalf of the company, it was submitted that the false labels merely reflected the company name. The Judge rejected this contention, as the labels did not refer to a limited liability

company. Further, the offenders' counsel stressed the small nature of the business, the directors being young and inexperienced, and the financial position of the company and the directors. None of those factors swayed the Judge from concluding that the company's conduct was serious offending that must be denounced. For Premium Alpaca, a starting point of $80,000 was adopted, which was reduced to $56,000 after a 30 per cent discount.

[37] In respect of the two directors, the Judge accepted that there was some merit in the argument of double accounting. Nonetheless, he found that individual responsibility must be recognised, despite the arguments that the directors were naïve about the Act. For both directors, starting points of $10,000 were adopted, which were reduced to $6,700 after 30 per cent discounts.

[38] The Judge then moved on to considering the culpability of Duvet 2000, noting that the company purchased rugs from Hyeon, and that the company's staff members had made a number of misleading comments to customers in store. The Judge did not accept the argument that as the company bought rugs from Hyeon, Duvet 2000 had the same honestly held belief that the labels were correct. With the duvets, the Judge said that he found it hard to accept the company did not realise what the original composition was, given that they purchased the wool. In the Judge's view, it was "serious dishonestly offending at a high level": [34]. Much the same mitigating features were relied upon as for the other offenders. The Judge again did not see any good reason for a discount of greater than 30 per cent. A starting point of $300,000 was adopted, which was reduced to $200,000 after a 30 per cent discount.

[39] Regarding JM Wool and its director, Mr Lee, the Judge noted that Mr Lee had admitted that he knew the rugs were imported from Peru and that the duvets were incorrectly labelled as to wool content. The Judge said that given Mr Lee's actual knowledge, the false labelling of duvets could not be characterised as "careless behaviour". Again the submission was made that Mr Lee should not receive a penalty. This was rejected. For JM Wool, a starting point of $260,000 was adopted, which was reduced to $182,000 after a 30 per cent discount. For Mr Lee, a starting

point of $30,000 was adopted, which was reduced to $21,000 after a 30 per cent discount.

Grounds of appeal

[40] The appellants appeal against their sentences on the ground that the fines are manifestly excessive. The common grounds of appeal are that the District Court Judge:

(a) Adopted a starting point that was excessive in the circumstances;

(b) Placed undue weight on the view that the appellants' conduct was fraudulent when fraud was neither an assertion, nor a charge;

(c) Placed undue weight on the role of the In-bound Tour Operators as contributing to the overall view of fraud;

(d) Did not properly assess the level and impact of the misrepresentation;

(e) Incorrectly assessed the criminality of the misrepresentation;

(f) Did not consider the appellants' mitigating factors separately from the other offenders sentenced at the same time;

(g) Did not consider the aggravating factors of the offending and the appellants separately from the other offenders sentenced at the same time; and

(h) Did not consider the factors which could give the appellants credit in a reduction of the starting point separately from the other offenders sentenced at the same time.

[41] With the exception of Duvet 2000, the appellants raise another ground of appeal, namely that the Judge:

(a) Failed to properly consider the distribution of criminality between the company and the director/s.

[42] With the exception of Hyeon and Mr Chae, the other appellants raise another ground of appeal, that the Judge:

(a) Failed to give credit for the cooperation that the appellants gave to the Commission, which aided the prosecution process.

[43] JM Wool and Mr Lee raise an additional ground of appeal, that the Judge:

(a) Erred in considering Mr Lee's role as the sole director of NZ Operation Ltd.

Appellant's submissions

Common submissions between all eight appellants

[44] The appellants submit that the District Court Judge did not discriminate between the role of retailers and wholesalers in the analysis of the misrepresentations and the degree of dissemination of the misrepresentations.

[45] With regards to fraud, the appellants submit that the Judge misdirected himself by considering the misrepresentations in terms of fraud. The appellants were not charged with fraud and it was not asserted by the Crown that the offending involved fraud. The charges under s 10 and s 13 are strict liability offences without a mens rea element, therefore, fraud should not have been considered. By assessing the criminality of the appellants in terms of the collective offending and "wide scale fraud", the Judge unfairly elevated the criminality of the appellants: at [9] of the District Court judgment. In addition, the offending should not be viewed as "wide scale", as the appellants only operated in Rotorua and Auckland.

[46] The appellants submit that the Judge should not have assessed the criminality of the appellants against the background of the involvement of the ITOs. In doing so, the Judge wrongly elevated the criminality of the appellants. With regards to the

cost of the products, the Judge accepted that the rugs were sold at a price that was four to five times more expensive than equivalent rugs sold elsewhere. However, the Judge failed to consider that 55 to 70 per cent of the prices demanded by the appellant retailers went directly to the ITOs, therefore, the prejudice suffered by the tourists were partly due to the actions of the ITOs. The appellants submit that even if the labels were correct, the prices would still have been very high.

[47] The appellants submit that the Judge misapplied *Commerce Commission v Chen* in applying the 30 per cent discount. The Court in that case gave a 30 per cent discount for the early guilty plea and no previous convictions. Judge Thomas took into account cooperation as part of the 30 per cent discount when it warranted an additional discount of five to 10 per cent. The extent of the appellant's cooperation saved the informant considerable time and cost. As an additional mitigating factor, the Judge should have considered that the appellants did not understand the meaning of "made in New Zealand" and were unaware that the labelling was a misrepresentation. Further, another mitigating factor is that the appellants were unable to correct the labelling before being approached by the Commission because they did not know that the labelling was a misrepresentation.

[48] The appellants argue that by sentencing all the offenders together, the Judge failed to consider the factors in *LD Nathan* specifically to each offender. In particular, under one of the factors, "prejudice to consumers", the Judge failed to consider that the prices charged depended upon size, quality and grade. Therefore, a proper analysis of comparative prices should have been carried out.

[49] With regards to the degree of dissemination of the misrepresentation, the appellants contend that the Judge did not consider their specific circumstances. The Judge failed to consider the role of the ITOs to the dissemination. In addition, the Commission provided no evidence of the number of customers who brought the retailer's products and the alleged degree that the misrepresentation had spread across Asia. This artificially elevated the criminality of the appellants' actions exponentially.

[50] The appellants submit that the Judge erred in considering total revenue in his analysis of the collective offending. The Judge ignored the level of actual profit and failed to consider the financial circumstances of each appellant in sentencing. The appellants submit that it is the actual profit that is the true indicator of the appellants' individual criminality.

[51] With regards to party liability, the appellants submit that if an appellant is charged as a party to another appellant, the totality of the criminality should first be established and then apportioned accordingly. Further, where directors are charged as being the controlling mind of the company, the Judge erred in doubling up the criminality. The same apportioning approach should apply.

[52] The appellants submit that the starting points were too high for all appellants. In particular, with regards to the companies, the level of fines imposed equated to fines that major corporations have received. The appellant companies say that they are not major corporations, but small niche companies that are carrying out business in their own right and not as part of some cartel or wide scale fraud.

Submissions specific to each appellant

[53] Hyeon and its director, Mr Chae, submit that the Judge erred in elevating the criminality of Hyeon above that of Premium Alpaca. As both companies misrepresented their rugs as "made in New Zealand", the misrepresentations of Hyeon should not have been seen to be more serious than that of Premium Alpaca. Further, the Judge ignored the fact that Mr Chae was a Korean national with limited English and could not understand the legal nuance of what makes a product "made in New Zealand". Hyeon and Mr Chae submit that they did not advertise, and the only dissemination of their misrepresentation was to the retailers. Further, the misrepresentations were mitigated to a degree as they had informed their retailers that the rugs were imported from Peru. This mitigating factor was ignored by the Judge. Hyeon submits further that it only pleaded guilty to importing over 3,500 alpaca rugs and the Judge erred in basing his decision on it importing over 10,000 rugs. The Judge also failed to consider the financial information provided by Hyeon and Mr Chae regarding the low level of actual profit that they made.

[54] Hyeon and Mr Chae further submit that the Judge sentenced them individually, without considering that Hyeon had pleaded guilty as a party to the conduct of two other offenders, and Mr Chae had pleaded guilty as a party to Hyeon's conduct. Further, the Judge failed to consider Mr Chae as a shareholder of Hyeon and Duvet 2000. Therefore, Mr Chae will indirectly bear some costs of the fine imposed against both Hyeon and Duvet 2000. Also, the Judge erred in concluding that Mr Chae's personal liability was over and above that of the company.

[55] The submissions specific to Premium Alpaca stressed the financial circumstances of the company. It submits that the Judge ignored the financial information provided and if this information was properly considered, the fines would likely have been reduced. Premium Alpaca submits further that it is not the role of the Court to destroy the business capacity of the company. As in the submissions for Hyeon and Mr Chae, Premium Alpaca and its directors submit that the Judge erred by assessing the criminality of Premium Alpaca and the two directors individually. Instead, the totality of the criminality should have been established and then apportioned. Further, the Judge failed to consider the fact that Mr Jung and Mr Yoo are directors and shareholders of Premium Alpaca, and will indirectly bear some of the fine imposed against Premium Alpaca.

[56] Duvet 2000 submits that it did not advertise and the only dissemination of the misrepresentation was to the consumer. Any assertion that the misrepresentations were disseminated beyond the customer base is speculation. Duvet 2000 submits that it did not understand the legal nuance of what made a product "Made in New Zealand" and that Hyeon's belief was passed onto Duvet 2000. The Judge failed in not considering the financial circumstances of the appellant. It is not a large corporation with divergent incomes to absorb such an excessive penalty. Further, the company is a singular enterprise, wholly dependent on the ITOs to bring a niche customer set to its showrooms.

[57] JM Wool submits that it also did not advertise, and that the only dissemination of the misrepresentation was to the customer. Further, the director, Mr Lee, did not understand the nuance of what made a product "Made in

New Zealand". The Judge also failed to fully consider JM Wool's financial circumstances that it was in a trading deficit in excess of $300,000.

[58] Regarding Mr Lee's criminality, the Judge erred in considering his involvement as a director of the ITO. Mr Lee was not charged with being a party to the actions of the ITO. That company faces no charges. Further, the totality of the criminality between JM Wool and Mr Lee should have been first established and then apportioned between the two.

Respondent's submissions

[59] Much of what the respondent submits is relevant for all eight appellants.

[60] The respondent submits that the Judge was correct to find the conduct to be serious. The distribution and sale of falsely labelled products was the entire business of the appellants over the charge period. Consumers were misled about virtually all products that the appellants had for sale. Further, the scale and repetitive nature of the offending was a pivotal reason why the offending was amongst the most serious of its kind.

[61] The respondent submits that the Judge did not err in referring to the appellants' conduct as fraudulent, provided there was an appropriate evidential basis for finding that the conduct was deliberate and intentional. The respondent says the Judge had an ample basis for the finding he made regarding the deliberate nature of the conduct. Further, the Judge was aware of the strict liability nature of the offence, but the degree of wilfulness involved in the offending is an important aspect of the sentencing process. The more deliberate the offending, the higher the penalty.

[62] The respondent submits that it was not open to the appellants to claim a lack of knowledge that the misrepresentations were false. Party liability for offenders under the Act has a mens rea requirement: see *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 NZBLC 103,834 (HC). The guilty pleas of the appellant directors, and the guilty plea of Hyeon as a party to the offending of Duvet 2000 and Wild Nature involve an acceptance that each had the relevant

mens rea, and, therefore, had knowledge that the representations were false. Therefore, the appellant directors intended to assist the companies by their actions.

[63] Section 45(1) of the Act provides for the attribution of knowledge to a body corporate. Under this provision, the knowledge of a director, servant or agent of a body corporate is attributable to that body corporate. Accordingly, the knowledge of the directors and the knowledge of Hyeon (where charged as a party) is able to be imputed to the appellant companies that are charged as principals. It follows that it was not open to the directors, or Hyeon to argue that they did not know that they were making false representations.

[64] Further, the respondent submits that the Judge's finding of deliberate and intentional conduct was entirely justified in light of the undisputed facts before the District Court. The respondent relies upon the scale of the misrepresentations made, the wording on the labels themselves and the tour process that was wholly consistent with deliberate conduct. The respondent says that the customers were brought to the retail stores, having seen and interacted with alpacas and were given talks on New Zealand products. The misrepresentation was a clear and effective marketing strategy. Further, the appellants used "New Zealand made" as part of their business model. This was particularly evident in the statements made by Duvet 2000's sales staff to customers. The price difference between comparable rugs also indicates that the false representations were relied upon to achieve a significant margin.

[65] The respondent also refers to the connections between those involved in the offending. Mr Chae was both an importer and a retailer. Mr Lee benefited from misrepresenting the position, not only through JM Wool, but also as the director of the ITO. In light of these factual circumstances, the respondent submits that the inference that the appellants' actions were deliberate and intended to secure inflated prices can clearly be made.

[66] Regarding the Judge's approach to sentencing, the respondent submits that the Judge did not err in setting out his findings on the aggravating factors before considering the sentence to be imposed on each of the appellants. Further, contrary to what the appellants submit, the Judge did not give weight to the role of the ITOs.

The Judge expressly set out that his view of the role of the ITOs was irrelevant to the sentencing: [9].

[67] The respondent submits that the Judge adequately considered aggravating and mitigating factors specific to each appellant. The respondent refers to a number of District Court cases to support its case that the starting points were not excessive. Further, the respondent says the 30 per cent discount was adequate. It included credit for cooperation and is on par with the discount applied by Judge Dawson in *Commerce Commission v Chen*. The respondent accepts that the appellants pleaded guilty at an early opportunity. But the weight to be accorded to such pleas must be determined having regard to all the circumstances of the case, including the strength of the case against the defendant. In addition, the appellants' cooperation was limited, and was not of the type that would justify a significantly greater discount.

[68] Regarding the sentences for the directors, the respondent submits that there are no tariff cases for breaches of the Act in respect of individuals. The respondent cited a number of District Court authorities to support its case that the starting points for the directors were not excessive. The respondent says that the cases cited demonstrate varied approaches taken to the sentencing of individuals. Further, the penalties imposed on individuals should reflect the reality of their role in the offending of the company, and that the penalties will be at the higher end of the scale where the conduct has been found to be deliberate.

[69] The respondent advises the Court that it is not aware of any cases under the Act where appellate courts have expressly stated that the apportioning approach in sentencing companies and directors must apply. The respondent notes District Court cases where the apportioning approach seems to have some support. The respondent submits that it would have been difficult for the Judge to adopt the apportioning approach in this case, as the charges faced by the parties to the offending did not mirror the charges faced by the companies.

[70] The respondent submits that the Judge was correct to have regard to the revenue of the companies, as opposed to actual profit. The actual profit for most of the appellants was unknown.

[71] The appellants submit that the Judge did not take into account their financial capabilities to pay the fine. The respondent argues that limited financial information was provided to the Judge. For each company, a statement of financial performance for the year ended 31 March 2011 was provided. The respondent submits that these statements were too outdated and more current evidence was needed to demonstrate an inability to pay.

Appeal against sentence

Approach to appeal

[72] An appeal against a sentence is a general appeal which is by way of rehearing. Section 121(3)(b) of the Summary Proceedings Act 1957 provides that the High Court may quash or vary a sentence where it is "clearly excessive or inadequate or inappropriate", or if the Court is "satisfied that substantial facts relating to the offence or the offender's character or personal history were not before the Court imposing sentence".

[73] The approach to be taken to appeals under s 121(3) were set out in *Yorkton v Police* HC Auckland CRI-2010-404-164, 14 September 2010 at [13]–[15] where the Court said:

> (a) There must be an error vitiating the lower Court's original sentencing discretion: the appeal must proceed on an "error principle".
>
> (b) To establish an error in sentencing, it must be shown that the Judge in the lower Court made an error whether intrinsically or as a result of additional material submitted to the appeal Court.
>
> (c) It is only if an error of that character is involved that the appeal Court should re-exercise the sentencing discretion.

[74] The High Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. The level of appellate review in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 does not apply to appeals against a discretion, which is the category that most appeals against sentence fall within: see *Heke v R* [2010] NZCA 476 at [18]. However, when a sentencing Judge makes an assessment of the evidence, this is not

a discretionary exercise; it is the determination of relevant facts. Accordingly, the standard of appellate review then requires the appellate Court to consider the evidence and reach its own opinion on the facts in accordance with the approach taken in *Austin, Nichols*: see *Heke* at [19]. In *Paia v R* [2014] NZCA 107 at [14], the Court of Appeal followed *Heke* and determined that the appellate Court:

> … may reconsider the evidential basis for the conclusions reached by the sentencing judge, by undertaking an evidential review and reaching its own opinion.

General observations of sentencing under the Act

[75] The principles of sentencing, particularly the need to hold the offender accountable, denunciation and deterrence under s 7 of the Sentencing Act 2002 are relevant to offending under the Act. In *Megavitamin Laboratories Ltd (NZ)* at 103,851, Tipping J noted that the Act should be seen to have teeth, and the teeth should be sharper when the falsity is deliberate.

[76] Under s 40(1) of the Act, the maximum statutory fines were doubled in 2003 from $30,000 to $60,000 for natural persons, and $100,000 to $200,000 for a body corporate. Therefore, sentences prior to the 2003 uplift are not as useful as more recent cases. It must also be noted that the maximum fines were tripled, from 17 June 2014. Under s 27(2) of the Fair Trading Amendment Act 2013, the maximum fine for individuals is now $200,000, and in the case of a body corporate, $600,000. Whilst the appellants' sentences must be assessed with reference to the maximum penalties they faced at the time of the offending (s 25(g) of the New Zealand Bill of Rights Act 1990 and s 6(1) of the Sentencing Act 2002), the increase in penalties shows Parliament's intent to denounce and deter breaches of the Act. This is consistent with the Act's focus on consumer protection.

[77] Secondary liability pursuant to the party provisions of s 66 of the Crimes Act 1961 requires proof of mens rea, despite the primary liability under s 10 and s 13 of the Act being one of strict liability. In *Megavitamin Laboratories Ltd (NZ)*, Tipping J held at 103,850:

> I can see no injustice or conflict with the policy of the Act for the law to require that the secondary party must be shown to have mens rea – in the

present case knowledge of the falsity of the representation. Indeed as a matter of policy and principle I consider that should be the position.

Therefore even if the offence in question is one of strict liability a secondary part must have mens rea. To establish mens rea the prosecutor must show that the secondary party:

(i) Performed the actus reus (e.g. gave assistance deliberately)

(ii) Had knowledge of the essential factual features of the offence (e.g. the falsity of the representation) whether or not he knew they constituted an offence.

(iii) Intended the conduct constituting the actus reus to assist the principal to perform the conduct constituting the offence.

Step (ii) is a necessary precondition to step (iii) because unless the secondary party has the required knowledge he could hardly intend his conduct to amount to qualifying assistance.

[78] Under s 45 of the Act, knowledge held by the directors, servants or agents of a corporate body is attributable to the company. Section 45 provides, where relevant:

45 Conduct by servants or agents

(1) Where, in proceedings under this Part of this Act in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.

…

(5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.

Setting a starting point – appellate level decisions

[79] The starting point for offending under the Act varies greatly depending on the specific facts of the case and the maximum penalty at the time of the offending.

[80] The appellate Court decisions on sentencing have mostly dealt with s 13 offending. However, decisions on s 13 are relevant to s 10 offending.

[81] Section 10 states:

> **10 Misleading conduct in relation to goods**
>
> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

[82] Section 13 is more specific and the nine subsections set out the different types of false or misleading representations that could be made:

> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,
>
> (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
>
> …
>
> (j) make a false or misleading representation concerning the place of origin of goods or services.

[83] In practice, conduct that is caught by s 13 is also likely to be caught by s 10. In *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502, Tipping J stated at 508:

> The question whether a representation is misleading is to be judged objectively. … On an objective approach there is therefore no practical difference between the concepts of misleading (s 13(j)) and likely to mislead (s 9) and liable to mislead (s 10). Something which is objectively misleading for the purposes of s 13(j) is something which is likely to mislead the representee.

[84] In *Commerce Commission v Shukla* HC Auckland CRI-2007-404-229, 11 November 2007, Baragwanath J allowed an appeal by the Commission against a District Court decision to discharge Mr Shukla without conviction. Whilst not directly on point, the discussion on the gravity of the offence is useful. Mr Shukla and his company, 230 Marua Limited, each pleaded guilty to six charges of breaching s 10 for misrepresenting the price of leather lounge suits sold in competing stores and misrepresenting sale periods when no discount was given. The sentencing

Judge took a starting point per charge of $9,000 ($54,000 in total), with an end sentence of $36,000 for the company to recognise the guilty plea. This penalty against the company was not challenged on the appeal. The offending took place after 2003 when the maximum fine was uplifted to $200,000 for a body corporate.

[85] In *Zenith Corp Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008, the High Court dismissed an appeal against conviction but allowed an appeal against sentence. The company was convicted for 23 offences under s 13(e) and three offences under s 13(a) of the Act in respect of false or misleading representations of a "Body Enhancer" product.

[86] In *Zenith*, the sentencing Judge categorised the offending by dividing it into two main groups, each of which was broken down into four sub-groups for the purpose of s 40(2) of the Act. The two main groups were: nature of offending; and time of offending.

[87] Regarding the nature of the offending, the representations made as to the Body Enhancer product fell into four categories. These were:

(a) Body Enhancer will assist in preventing collagen depletion and will heal cartilage, strengthen joints, tendons and the building of new bone and tendon cells;

(b) Body Enhancer will assist with weight loss;

(c) Body Enhancer will assist with increased vitality; and

(d) Body Enhancer will assist with detoxification.

[88] As to when the offending occurred, the sentencing Judge regarded the phrase "at or about the same time" in s 40(2) as meaning within three or four days. Four categories of time were identified:

(a) The representations in pamphlets enclosed with bottles of Body Enhancer, purchased in March 2000;

(b) The representations in the magazine advertisement in October 2000 and on the website, accessed in October 2000;

(c) The representations in the radio broadcast in December 2000; and

(d) The representations on the website, accessed in June 2001.

[89] The sentencing Judge assessed the seriousness of each group of representations and decided on an appropriate penalty for each group. Although the collagen, bone and muscle misrepresentations were put into one category, there were individual charges relating to representations within that category.

[90] Regarding the weight loss claims, the sentencing Judge thought it was within the most serious of cases, which the then maximum penalty of $100,000 prescribed for. There were four weight loss charges. $95,000 was imposed for two charges each and $45,000 for two other charges to comply with s 40(2). Two charges related to the radio broadcast involved representations that the product will "help break down fat". A fine of $45,000 was imposed on each of those two charges to comply with s 40(2).

[91] The healing and strengthening representations were subject to three charges. $30,000 was applied for each charge. In two of the three charges, the representation was split into two. An additional $12,500 was imposed on each of those two charges.

[92] $15,000 was imposed upon each of the four detoxification charges. $10,000 was imposed for each of four "depletion of collagen" charges. $10,000 was imposed for each of three vitality charges. $10,000 was imposed for a representation that the product will replenish and rebuild muscle tissue. There were also three labelling charges, which the Judge imposed fines of $2,500 each. The total fines amounted to $637,500.

[93] On appeal, Andrews J considered that the Judge applied s 40(2) correctly. With regards to the weight loss representations, where those representations were at

different times, the Judge imposed a fine of $95,000 for each charge. Where two representations were made "at or about the same time", fines of $45,000 were imposed. The sentencing Judge only applied this approach with regards to the weight loss representations, as the fines imposed in respect of the remaining representations were less serious and, therefore, there was no likelihood of the maximum sentence being exceeded.

[94] Andrews J did not consider the sentencing Judge to be at fault in his consideration of the relevant factors. However, Her Honour held that the benchmark was set too high when finding that the weight loss representations required fines of, effectively, the maximum penalty. A fine of $65,000, or two-thirds of the maximum, was seen to be an appropriate penalty for the weight loss charges that attracted a fine of $95,000 each. The balance of the remaining fines was adjusted to approximately two-thirds of what was imposed in the District Court "as a consequence" of the readjustment of the weight loss penalties: [252]. The reasoning behind the readjustment of the other fines was not spelt out. The total penalty was reduced to $394,500.

[95] The use of terminology such as starting and end points was not used. However, the sentencing Judge took into account the cost of corrective statements and advertising in coming to the figures above. It should be noted that the company was sentenced at a time when the statutory maximum of $100,000 applied.

[96] In *Ecoworld New Zealand Ltd v Commerce Commission* [2006] DCR 716 (HC), Asher J dismissed an appeal against conviction and sentence. The company was convicted of nine charges under s 13(e) of the Act for misrepresentations as to the benefits of a water treatment unit. The company falsely represented that the unit would improve the pH of water, allow water to absorb more oxygen and give energy to water. In addition, the treated water was said to enable the body to detoxify, reduce skin and allergy disorders, and other benefits. The sentencing Judge imposed a fine of $60,000 for all charges, which Asher J considered to be fair and balanced.

[97] Asher J noted that the District Court judgment did not apply the modern approach to sentencing set out in *R v Taueki* [2005] 3 NZLR 372 (CA). But, as at the

time, *Taueki* was only recently released, the Judge did not err in taking into account all matters in reaching the appropriate penalty in a single process. The offending took place between September 2000 and March 2003, which was a time when the previous maximum penalty of $100,000 applied under s 40(1): see *Commerce Commission v Ecoworld New Zealand Ltd* [2005] DCR 921 (DC) at [9].

[98] In *Commerce Commission v O'Neil* [2008] 8 NZBLC 102,086 (CA), Chambers J upheld the sentence imposed by the High Court. Mr O'Neil and his company, Martini Limited, were fined $34,000 and $25,000 respectively in the District Court for six charges under s 13 of the Act for falsely misrepresenting the composition and performance characteristics of a product called Celluslim. Brochures falsely claimed that the tablets would reduce fat and cellulite and had been scientifically tested by a research centre. These fines were reduced to $7,500 and $15,000 respectively in the High Court. The Commerce Commission appealed to the Court of Appeal. The Court partly allowed the appeal but upheld the reduced fines imposed by the High Court. The Court of Appeal held that the High Court was justified in reducing the level of fines. The High Court Judge had considered that a refund order also imposed an economic penalty, which was relevant in determining the level of fine to be imposed.

[99] Again, the offending took place at a time when the previous maximum penalties of $30,000 for individuals and $100,000 for a body corporate applied.

Analysis

Common factors

[100] A central plank in all the appellants' arguments was the contention that the Judge had erred in considering the misrepresentations of the appellants in terms of fraud. They hang this argument on the fact that s 10 and s 13 offending is strict liability. They assert that they were naïve and because English was not their first language, they did not realise the mislabelling of rugs and duvets was false or misleading. This argument is not tenable, given the circumstances of the offending.

[101] The respondent's argument is that: (a) guilt as a party requires mens rea; (b) the guilty pleas of the directors are an acknowledgement of their guilty knowledge; and (c) under s 45(1) of the Act, that guilty knowledge is attributable to the corporate appellants. This argument provides a complete answer to the appellants' denial of knowledge of the false and misleading nature of their offending.

[102] Further, the factual circumstances of the offending strongly supports an inferential conclusion that each of the appellants knew the representations that each had made about the subject products were false and misleading.

[103] There is no basis, therefore, for being critical of the Judge's consideration of the relevance of fraud in relation to the appellants' offending. Whilst fraudulent knowledge and conduct are not elements of offending under ss 10 and 13, their presence is an aggravating feature of this offending. The Judge was right, therefore, to place this offending at the upper end of the scale of offending under s 10 and s 13 of the Act. I reject, therefore, the appellants' contention that the Judge incorrectly assessed the criminality of the offending.

[104] Another common argument made by the appellants is regarding the Judge's decision to adopt a discount of 30 per cent overall that took into account guilty pleas and cooperation. I accept that the established approach is to identify a discount for a guilty plea separately from a discount for personal mitigating factors, those here being cooperation and the appellants being first offenders: see *Hessell v R* [2010] NZSC 135; [2011] 1 NZLR 607. On this approach, the Judge should have applied a five per cent discount first and then a 25 per cent guilty plea discount after that. But the outcome would almost be the same. *Hessell* makes it clear that 25 per cent is generally at the top of the range for a guilty plea. There is nothing about this case to take it out of the ordinary. Ordinarily, a discount of somewhere between five per cent and 10 per cent can be given for cooperation and previous good character. Given the circumstances, the Judge's discount here of five per cent is not so far out of the accepted range that it would lead to an error in his reasoning. Thus, an overall sentencing discount of 30 per cent was within the acceptable range of discounts for mitigating circumstances of the offenders.

[105] I have considered the appellants' argument that the Judge misapplied the case of *Commerce Commission v Chen* in applying the 30 per cent discount. The appellants say that the Court in *Chen* gave a 30 per cent discount for an early guilty plea and no previous convictions. As a result, the Judge should have allowed for an additional discount for cooperation. For the reasons that I have given in the previous paragraph, I consider that 30 per cent for all mitigating factors was appropriate in the case. The Judge was not bound by the decision in *Commerce Commission v Chen*.

[106] The Judge was not persuaded that the efforts the appellants went to in order to change the misleading labels should be reflected in a sentencing discount. The appellants argue that their poor grasp of the English language was the reason for them not making changes to these labels until directed to do so by the respondent. I do not accept that submission. The findings that I have made regarding the appellants' fraudulent knowledge and conduct also lead me to reject any suggestion that they lacked the ability to realise earlier on the need to correct the false labels. Their correction of the labelling was something that they needed to do if they were not to continue offending. I see no reason, therefore, to treat this conduct as a mitigating factor that warrants a separate sentencing discount.

[107] The appellants argue that the Judge placed undue weight on the role of the ITOs. However, on my reading of the sentencing notes, the Judge was careful to note that the role of the ITOs was to be put to the side when it came to sentencing the appellants: see [9] of the sentencing notes.

[108] There is a common criticism of the Judge's approach along the lines that he failed to consider the mitigating and aggravating factors of the offending and the offenders on an individual basis. The sentencing notes show that at times the Judge regarded the matter globally, and at other times he considered individual offenders. I see nothing wrong with the approach that he took. Much of what the appellants submitted was common to each of them. Unless individual circumstances are so distinguishing that they require a discrete approach, there is nothing wrong with a Judge taking a global approach to sentencing co-offenders. Here the presence of fraudulent knowledge and conduct was present in all the offending. Aggravating features of the offending are reflected in the choice of starting point: see *Taueki* at

[28]. I consider, therefore, that the level and impact of the offending was given individual consideration in the context of choosing an appropriate starting point for each offender. The mitigating factors relating to each offender were much the same. There were no aggravating factors relating to any one offender. I am satisfied that sufficient individual consideration was given to each offender.

[109] The appellants also argue that the Judge ignored the financial information provided by the appellants in sentencing. Limited financial information was presented to the Judge and no up to date financial statements were put forward on appeal to demonstrate an inability to pay the fine. I consider that the Judge did not err in considering revenue instead of profit in sentencing.

[110] Another common criticism of the sentencing decision is the way in which the Judge dealt with the directors of the corporate offenders separately. The appellants argue that the Judge should have determined a fine based on the overall criminality of each company and its directors, and then apportioned liability for that fine between the company and the director/s. However, there is no legal requirement for him to have proceeded in that way. Further, such an approach overlooks the separate legal identities of an offending company and its directors. I see nothing wrong with the way the Judge approached the sentencing in this respect.

Individual factors

Hyeon

[111] Hyeon argues that the Judge committed an error when he erroneously considered at [24] that Hyeon imported and sold nearly 10,000 rugs. The Judge gave weight to this figure and noted that it was three times what Premium Alpaca imported.

[112] I am satisfied that the Judge did not commit an error. While Hyeon only imported about 3,500 rugs in its own name, it also imported about 4,000 rugs for Duvet 2000 and about 2,400 rugs for Wild Nature. Therefore, Hyeon was involved in the false relabelling of 10,000 rugs. I agree with the Judge that the degree of

Hyeon's misrepresentations was more serious than Premium Alpaca. Unlike Premium Alpaca, Hyeon attached labels that explicitly stated "made in New Zealand". These factors combined justified a much higher starting point than Premium Alpaca.

[113] The starting point of $150,000 for Hyeon is within range when compared with the starting points in *Zenith* and *Ecoworld*. I note that the misrepresentations in *Zenith* were more serious than the case at hand, the revenue earned was greater, and when it came to the end sentence, the company did not have the benefit of a guilty plea discount. But Hyeon faces more charges (30 compared with 26) and the maximum statutory fine has doubled since the offending in *Zenith* and *Ecoworld*. In *Ecoworld*, the company had only nine charges and was fined $60,000.

[114] In *Shukla*, a starting point of $9,000 per charge was adopted for offending "in the moderate range": [20]. Hyeon's offending is on par, if not more culpable than the offending in *Shukla*. If the same starting point of $9,000 per charge was applied here, it would give a starting point of $270,000 for all 30 charges.

[115] I am satisfied, therefore, that the starting point was within range and the discount for mitigating factors was reasonable.

Mr Chae

[116] Mr Chae is the sole director and shareholder of Hyeon. He is also a director of Duvet 2000 and one of the three shareholders. He has a 25 per cent share in Duvet 2000. His guilty pleas are an acknowledgement by him that he knew the mislabelling was unlawful and that as a director of both companies, he allowed that conduct to occur. The revenue that each company received as a result of the misrepresentations was significant. As a director of each company, he is responsible for permitting their offending to occur. His conduct as a director requires denunciation and deterrence. Given the level of offending by each company and the level of maximum fine for individuals, I do not consider the starting point of $35,000 to be too high. I also consider that appropriate recognition was given to the mitigating factors relating to him.

Premium Alpaca

[117] Premium Alpaca's offending was at a lower level than Hyeon's. The company imported fewer rugs than Hyeon and the misrepresentations it made were less serious. Those factors warranted a lower starting point. The starting point that the Judge adopted of $80,000 seems to me to be suitable, given that this was medium range offending. The maximum penalty is a fine of $200,000, so the starting point here was less than half of the maximum penalty. The discount for mitigating factors was appropriate.

Mr Chung and Mr Yoo

[118] Mr Chung and Mr Yoo were directors of Duvet 2000. The Judge adopted a starting point of $10,000 for each director. As in the case of Mr Chae, the directors here were the persons responsible for Premium Alpaca's criminal conduct. Thus, their unlawful conduct warranted denunciation and deterrence. I consider that the starting points of $10,000 for each director were reasonable. Those starting points were less than what was applied to Mr Chae as, in the present case, Premium Alpaca's offending was not as grave as that of Hyeon and Duvet 2000. I also consider that the discount of 30 per cent for mitigating factors was reasonable.

Duvet 2000

[119] The Judge found that Duvet 2000 had engaged in "serious dishonest offending at a high level": [34]. I agree with this finding. Mr Chae's knowledge of the fraud can be attributed to Duvet 2000. Further, as a director of Hyeon as well, he would have known that the imported rugs that Duvet 2000 bought from Hyeon were falsely labelled. Duvet 2000 was the retail outlet for many of the mislabelled rugs imported by Hyeon. It knowingly sold those rugs to customers, who, because they were mainly overseas visitors and English was their second language, had little, if any means of discovering this fraud. The company also sold mislabelled duvets to the same customers. Duvet 2000 attempts to decrease the degree of dissemination by saying that it did not advertise. However, given the number of customers that would have gone through the retail outlet, I consider that the degree of dissemination

was high. The Judge did not err in drawing the inference that the misrepresentations might be further disseminated through word of mouth. The 30 charges were representative charges. The magnitude of this fraud required a stern sentence. It is an aggravating feature that justified the Judge adopting a high starting point of $300,000. I consider that the discount for mitigating factors was reasonable and one that was open to the Judge to apply.

JM Wool

[120] The Judge adopted $260,000 as a starting point for JM Wool. JM Wool's offending is similar to Duvet 2000's offending. The comments I made regarding Duvet 2000's degree of dissemination of the misrepresentations are also applicable here. However, JM Wool faced 42 charges, which was 12 charges more than Duvet 2000 for the same type of offending. JM Wool made misleading representations about Southdown wool duvets, which Duvet 2000 did not. Therefore, a higher starting point greater than Duvet 2000 would have been justified. The starting point of $260,000 is in line with the comparable cases. I also consider that the discount for mitigating factors was reasonable.

Mr Lee

[121] Mr Lee's starting point of $30,000 is half of the maximum fine for an individual. I reject the argument for Mr Lee that the Judge gave weight to Mr Lee's role as a director of the ITO. I have already found that the Judge put matters regarding the ITOs to the side. Mr Lee is the sole director of JM Wool and holds 65 per cent of the shares in the company. Given the magnitude of JM Wool's offending and Mr Lee's position in the company, I consider that his personal culpability required recognition. I am satisfied that a starting point of $30,000 was well within the available range of starting points for his offending.

Conclusion

[122] I have carefully considered all the appellants' arguments. There is nothing in the way that the Judge approached the sentencing of the appellants that reveals an

error. He properly assessed their culpability as well as other factors relevant to them individually. He adopted starting points that are within the available range. The end sentences that he reached are consistent with the sentencing assessments that he made. There is nothing about the end sentences that leads me to think that they are manifestly excessive. The appellants have been unable to identify any error in their sentencing that would warrant setting their sentences aside and replacing them with lower fines.

[123] The appellants argue that regarding offending by a company and its directors, the Judge should have taken an apportioning approach to sentencing. I have found that to be unnecessary. But even if an apportioning approach were adopted, I consider that here such an approach would not have lead to a different outcome. It follows that all appeals against sentence are unsuccessful.

Result

[124] The appellants have not succeeded in their appeals against their sentences. Accordingly, the appeals are dismissed.

Duffy J