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**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

CRI-2018-090-004688

THE QUEEN

v

XUE (FRANK) CHEN

Date: 19 December 2019

Appearances: A McClintock for the Crown
F Pilditch for the Defendant

NOTES OF JUDGE C J FIELD ON SENTENCING INDICATION

[1] Mr Chen appears for a sentence indication on the four representative charges of obtaining by deception as a party, and a further four alternative charges under s 13(a) Fair Trading Act 1986. In accordance with the Crown submission, this sentence indication proceeds on the obtaining by deception charges.

[2] The Crown alleges that Mr Chen sold caged eggs as free range eggs through his company Blackwater Trading, trading as Gold Chick, by arranging for caged eggs to be purchased and packaged into egg cartons labelled as, "Free range." Falsely labelled caged eggs were sold by Gold Chick, to wholesalers and retailers who then

sold them to consumers as free range eggs at the higher price that free range eggs attract.

[3] The conduct, if established, could well be characterised as intentionally dishonest. Mr Chen capitalising on consumer's inability to distinguish between free range and caged eggs other than by their packaging. The incentive is said to be for financial gain.

[4] The Crown submits that the appropriate starting point is four years' imprisonment. Having regard to a particular case in this Court, which I will refer to shortly, and other cases involving similar degrees of dishonesty, in essence, and this is taken from the Crown submissions, the charge is alleged that between 3 September 2015 and 20 October 2017 Mr Chen was a party to Gold Chick, obtaining a pecuniary advantage by deception, in particular, by falsely packaging caged eggs into free range egg packaging and supplying those falsely packaged eggs.

[5] It is alleged that he was responsible for packaging approximately 3,113,000 caged eggs into free range egg packaging, resulting in a pecuniary advantage of approximately \$323,000. The pecuniary advantage was essentially one to Mr Chen as shares in Gold Chick are held exclusively by Mr Chen and his wife.

[6] The Crown submits that deterrence is a principle consideration in a case such as this and I acknowledge that to be the case here.

[7] I am required to take into account a number of factors. The actual and/or potential financial gain to Mr Chen, and I will refer to that again shortly, but, having regard to a number of other features referred to in the Court of Appeal judgment in *R v Varjan*, in which the Court stated that culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, its magnitude and sophistication, the type, circumstances and number of the victims, the motivation for the offending, the amounts involved, the losses and the period over which the offending occurred, the seriousness of breaches of trust involved and the impact on

ranged in terms of the quantum of loss alone, from cases involving an end sentence of approximately two and a half years, three years, four years to the case of, I think it was *Ross*, a loss of many millions of dollars.³ These cases serve to illustrate the point that circumstances can vary to a wide extent resulting in widely differing end sentences where the amount alone is taken into account but also, no doubt, the effect of victims, particularly in cases of commercial fraud, Ponzi type schemes and so forth.

[12] The aggravating features in this case referred to by the Crown, are the magnitude and sophistication of the offending and, I accept that the fraud was significant, as Ms McClintock for the Crown has emphasised, the \$323,000 profit was really described as a super profit but there were other considerable benefits achieved by the defendant and the company which could well amount to some hundreds of thousands of dollars more. So, I accept, without necessarily accepting the end figure, that the benefit to the defendant was significantly in excess of \$323,000.

[13] The offending, I accept, was highly premeditated. It is difficult to detect, of course. There were steps taken to conceal the extent of the offending, including the destruction of records and whilst the offending was highly premeditated, perhaps the sophistication might have been not as great as some. However, the fact remains that this offending is particularly difficult to detect no matter how it is carried out, and that is something the Court must take into account.

[14] The offending enabled the defendant and his company to retain its contract with Zeagold over the charge period. Again, this was one of those benefits to the defendant company to which counsel has referred.

[15] There are no identifiable persons as victims, as so often happens in fraud cases but there are of course the direct victims of the offending who purchased the eggs at free range egg prices, members of the public who purchased the eggs under false pretences. Third category, Mr Chen's competitors and I note with some concern, a comment made during the course of the *Commerce Commission v Garnett* hearing that, "Everybody is doing it." And, of course, the involvement of Mr Chen's employees to become complicit in the fraud in ways described by the prosecutor.

³ *Ross*.

There was a breach of trust, motivation of the offending and the period over which the offending occurred, approximately 25 months.

[16] Every case, of course, turns to a large extent, on its facts including, but not limited to, the amount involved. This is a case involving, among other things, consumer protection and the degree to which this has been affected, is something that I must and do take into account. The public is entitled to place reliance on the labelling of such products as these eggs.

[17] I do take into account the decision of the District Court in *Commerce Commission v Garnett* and I acknowledge the similar circumstances and scale of offending here. But as against that, I have to consider Mr Pilditch's submission and the need for consistency in sentencing, having regard to aggravating and mitigating features and the wide range of sentences available to the Court which demonstrates simply that there is such a wide range of sentences on record.

[18] As I say, I have to have regard to the need for consistency. There are a very limited number of cases, I am aware of only one case involving this type of offending and that of course, is the *Commerce Commission v Garnett* decision and I respectfully agree with the comment of the Judge that deterrence in cases such as this kind is of particular importance. There is, of course, the requirement pursuant to s 7 Sentencing Act, to hold the offender accountable for the harm done to the community by the offending and to denounce the conduct and, as I have already indicated, to deter him and others.

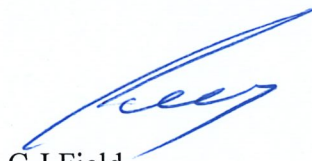
[19] I have reached the view that in the interests of consistency, that a starting point of imprisonment is warranted. Having regard to the submissions made by Mr Pilditch, I consider that a starting point of three years' imprisonment is appropriate here. There are, of course, differences that have been pointed out by Mr Pilditch which would justify a lesser starting point than that are considered appropriate in the case of *Commerce Commission v Garnett*.

[20] I therefore adopt a starting point of three years' imprisonment. Now, there may well be other personally mitigating factors which would reduce that starting point or

rather which would affect the end point including, of course, an allowance for plea. I take into account the fact that the plea would not have been entered, if it is entered, at the earliest opportunity but also the fact that a plea would result in a very significant saving in terms of Court time and expense in dealing with the case which is set down for a considerable period of time, I understand, in August of next year.

[21] I would therefore be prepared to indicate a deduction of 25 percent in addition or rather, at the end of any other mitigating features that might emerge from a pre-sentence report and a consideration of the defendant's offer to make a payment to the RSPCA or to the SPCA. It might be difficult to fit that within the confines of the Sentencing Act as such but it could be perhaps included in remorse or some other way.

[22] I therefore indicate a starting point of three years' imprisonment and it may be that a sentence of two years or less could be arrived at on a principle basis. I give no assurance that that would necessarily occur but it might wind up within that particular range. That is the sentence indication I give today.



C J Field
District Court Judge