IN THE DISTRICT COURT
AT AUCKLAND

CRN-10004506466
CRN-10004506467

THE COMMERCE COMMISSION
Informant

v

SUNG YUB PAIK
Defendant

Hearing: 14 December 2010

Appearances: Ms C Paterson and Ms E Wilson for the Informant
Mr S Lance for the Defendant

Judgment: 22 December 2010

RESERVED JUDGMENT OF JUDGE G DAVIS

---

[1] Sung Yub Paik has pled guilty to two breaches of ss.10 and 40(1) of the Fair Trading Act 1986. Mr Paik is the Managing Director of Healthway Products Corporation Limited ("Healthways").

[2] The two charges relate to the marketing and distribution of Healthways' royal jelly capsules on 22 July 2008, 29 August 2008 and 27 February 2009. Each charge carries a maximum fine of $60,000.00.

[3] In respect of the first offence it is alleged that Mr Paik engaged in conduct that was liable to mislead the public as to the nature or characteristics of royal jelly capsules, specifically he supplied Healthways Natural Products royal jelly capsules in which it was represented on the label that the content of 10 HDA ("10-Hydroxy-2-Decenoic Acid") in the capsules was between 6-6.3%.

[4] In respect of the second charge it was alleged that the labels on the royal jelly capsules displayed the label "Made in New Zealand" and displayed the word "Healthways New Zealand No. 1 Food Health Maker" and "Proudly New Zealand Owned" and "We are dedicated to bringing you premium quality natural products which have been sourced from pristine environments" and "Fresh Healthways".

[5] The prosecution is brought by the Commerce Commission ("the Commission") in which the Commission allege that in respect of the first offence the conduct was liable to mislead the public because testing by ESR confirmed that the percentage of 10 HDA contained in the goods was in fact 4.32% not between 6-6.3%.

[6] Secondly the Commission allege the label was likely to mislead because it implied the goods were made in New Zealand and the produce was "fresh". Rather, most of the ingredients including the key ingredient royal jelly were sourced from overseas.

[7] As I have indicated Mr Paik has pled guilty to each of the charges and appears before me for sentence.

The Fair Trading Act 1986

[8] The purpose of the Fair Trading Act 1986 ("the FTA") is, amongst other things, to provide for the disclosure of consumer information relating to the supply of goods and services. It is designed to create an informed market place where consumers are in a position to make decisions fully informed and aware of their options. The FTA is also designed to create an environment that allows free and equal competition to exist between traders.

[9] The FTA creates strict liability for offences. It does not matter whether the defendant intended to convey information that was misleading.

[10] The FTA plays an important role in providing protection for consumers in situations where it is highly unlikely that the consumers themselves will be in a position to test the royal jelly to confirm the accuracy of the representations made on the label as to the content of the 10HDA.

[11] Similarly, it is unlikely that the consumer purchasing the product will be able to determine the source of the ingredients that go into making up the final product.

The offences

[12] Between January 2008 and July 2008 the Commission received complaints alleging royal jelly traders were falsely labelling their products and the Commission commenced an investigation. One of those complaints related to 10HDA levels in Healthway capsules. The Commission had the Healthways capsules tested for 10HDA levels by ESR. The test results showed the level of 10HDA in the royal jelly product was lower than that represented on labels and packaging.

[13] On 18 September 2008 the Commission interviewed Mr Paik. At the interview Mr Paik admitted he was:

(a) Aware the ingredients of the product were sourced overseas by a third party, Good Manufacturing Practice Pharmaceuticals;

(b) Responsible for the design and the wording of the labels and he authorised the printing of the labels and packaging;

(c) The Healthways label was subject to proof reading and sign-off by Good Manufacturing Practice Pharmaceuticals;

(d) That the 6-6.3% of 10HDA represented on the labels was not the true level of the ingredient in the product.

[14] Having entered guilty pleas to each information it is my job to fix the appropriate fine, or fines, for the two offences.

The sentencing exercise

[15] Each of the parties accept the correct approach to sentencing was set out by His Honour Judge Abbot in *Commerce Commission v Kearney* (District Court Christchurch, CRN700900539, 11 December 1998). His Honour suggested the following factors to be relevant:

(a) The objectives of the FTA;

(b) The importance of the untrue statement;

(c) The degree of culpability;

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

(e) The extent of the dissemination of that statement;

(f The extent of prejudice or (harm) to consumers or other traders;

(g) The attitude of the offender;

(h) The importance of deterrence;

(i) The financial circumstances of the offender;

(j) Any guilty plea;

(k) The previous record of the offender;

(l) The effect of any publicity regarding the prosecution.

[16] I have briefly touched on the objectives of the FTA in this judgment and do not propose to add more to that discussion.

[17] The importance of the untrue statements cut to the heart of the matters at issue. This case was presented in an unusual manner because no evidence was presented by either party in support of the propositions they advanced. The matter

was set down for a two day defended hearing but resolved a week or so before hearing. I say this without intending to sound critical of either party. Therefore, the Court has not had the advantage of hearing the evidence and being in the advantageous position for sentencing of having findings of fact before it.

[18] I was invited by the Commission to accept that New Zealand royal jelly is believed to be of higher quality than imported royal jelly with higher readings of the active ingredient 10HDA than royal jelly found in other parts of the world. Added to that the Commission alleges the representations traded on New Zealand's "clean and green" image. I had no evidence before me – other than that from the bar – to support either proposition.

[19] A further example of the difficulty presented by the sentencing exercise was highlighted by an issue raised by counsel for the defendant. The defendant made a series of admissions to the Commission that I have summarised in paragraph [13]. Counsel for Mr Paik asked me to treat those admissions with caution as Mr Paik's comprehension of the English language and his ability to speak was not as good as counsel for each of Mr Paik and the Commission who were each brought up with English as a first language. Counsel for Mr Paik advised the Court that Mr Paik's English was of sufficient fluency to allow the sentencing submissions to be presented to the Court, but if there were any matters that Mr Paik was not clear about counsel would clarify those matters with Mr Paik outside the Court. However, counsel submitted because of those language difficulties with English the admissions should be treated with caution.

[20] That proposition needs to be contrasted with Mr Paik having sufficient comprehension of English to design the labels and to create the words on the labels. If that is the case, it appears that Mr Paik's comprehension of English and his general literacy is of a very high standard - even if, as the defence say, Mr Paik based his label on what he saw from others in the market.

[21] The significance of this point is that it goes to the heart of the question of Mr Paik's culpability. The informant says the defendant's offending was deliberate – the defendant says the offending was not deliberate, but rather careless. In my view

the offending was deliberate. Mr Paik said that he had pre-printed the packaging and did not want to destroy them. That suggests a level of knowledge of the errors in the packaging and a deliberate decision to use the erroneous packaging.

[22] Similarly, the Commission say the level of 10HDA (4.32%) was a significant departure from the amounts recorded on the labels (6-6.3%). The defendant says the departure was lower – it was "not much lower". It was somewhere in the order 25-30% lower which in my view is a significant variation.

[23] The principle of deterrence is important in all FTA matters. This is particularly the case when the consumer is not in a position to check the accuracy of the representations made by the trader and is therefore relying on the accuracy of those representations by the trader. Any fine must send the appropriate message to other traders making false representations to consumers.

[24] As to the principle of harm and prejudice to others, there can be no doubt that each of Healthways' customers and competitors were disadvantaged by the representations. For the customers - they were buying products that they rightly assumed contained 6-6.3% 10HDA. The 10HDA was to be sourced from New Zealand and part of the attraction to Healthways **may** have been the perception that New Zealand 10HDA was of a superior quality to that sourced elsewhere. For competitors, the market environment they were operating in was not level and the likelihood remained that product thought to contain higher levels of 10HDA sourced from New Zealand would be priced differently from a similar product with either lower levels of 10HDA, or ingredients sourced from overseas, or both.

[25] Some weight was placed by Mr Paik on the point that there were no complaints by consumers about Healthway's products. I do not consider that to be surprising given the unlikely prospect that consumers would go to the expense of having the product tested. While Mr Paik placed weight on that submission, I do not and reject it.

[26] As it transpired the complaint came form one of Healthways' competitors. Those competitors are protected by the FTA, as are consumers of the royal jelly product

[27] It is agreed by all parties that Mr Paik assisted the authorities and was co-operative throughout the investigation.

[28] The Court heard evidence from the bar that Healthways is a small time operator. No financial information about either Mr Paik or Healthways was made available to the Court. Counsel for Mr Paik made on two points from the bar that may be of relevance, namely that Mr Paik will be closing the business once a lease premises on Albert Street expires. Secondly Mr Paik has other business interests he will pursue. The prosecution is against Mr Paik and not Healthways. Given that no financial information about Mr Paik was presented to the Court any fines set will be without the ability to assess Mr Paik's ability to pay any fine.

[29] Turning to the appropriate starting point I assess that as being $7500.00 for each information, or $15,000.00 in total. In arriving at that starting point I assess the aggravating features of the offending as being: the vulnerability of consumer and competitors, the fact that Mr Paik designed and worded the labels himself, and he knew the products were not sourced in New Zealand. I also add into that mix the fact Mr Paik had undertaken his own testing of the royal jelly 10HDA and noted that the percentage of the product **before** other products were added was 6.12%. Any person with Mr Paik's experience ought to have known that diluting the 10HDA further would dilute the final product available to the consumer.

[30] The mitigating features are Mr Paik's co-operation with authorities and that Mr Paik's has not previously appeared before the Courts. Taking a broad assessment of the aggravating and mitigating features I think on balance those features are on par with each other and do not propose to adjust the initial sentence either way.

[31] Having determined the initial sentence, I also give Mr Paik separate credit for his guilty plea. I assess that at 15%, given the fact that the pleas were entered after negotiations and a two day fixture had been set down. A suite of charges against

Mr Paik and Healthways were withdrawn and two new charges were laid by the Commission. Guilty pleas were entered to those charges at the first call of the new charges.

[32] Applying a discount for a guilty plea of 15%, or $2250.00, I arrive at a final fine of $12750.00, or $6375.00 for each information. Convictions will be entered accordingly.

Signed at Auckland this 22nd day of December 2010 at 4:45 ~~am~~ / pm

G Davis
District Court Judge