IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2012-009-009069

COMMERCE COMMISSION
Informant

v

MI WOOLLIES LTD
Defendant

Hearing: 31 July 2013

Appearances: C Paterson for the Informant
P Egden for the Defendant

Judgment: 31 July 2013

NOTES OF JUDGE G S MacASKILL ON SENTENCING

The charges

[1] The defendant company is before the Court for sentencing on 10 charges laid under the Fair Trading Act 1986.

[2] Five of those charges are for offences against ss 40(1) and 13(j) of the Act and allege that on the specified occasion the defendant, in connection with the supply or possible supply of goods, made a false or misleading representation concerning the place of origin of goods.

Particulars

Represented to consumers that its sheepskin footwear was made in New Zealand when it was not.

[3] Five of those charges are for offences against ss 40(1) and 10 of the Act and allege that on the specified occasion the defendant, being in trade, engaged in conduct liable to mislead the public as to the nature and/or characteristics of the goods.

Particulars

Offering for sale sheepskin footwear that represented it was made in New Zealand when it was not.

Schedule of charges

[4] The following schedule contains additional details of each offence, including the date or period:

Charge	Date	FTA	Charge	Place	Final Plea
1837	3 Feb 11	13(j)	Represented sheepskin footwear was made in NZ	Christchurch	G
1838	3 May 11	13(j)	Represented sheepskin footwear was made in NZ	Invercargill	G
1839	9 June 11	13(j)	Represented sheepskin footwear was made in NZ	Auckland	G
1840	10 June 11	13(j)	Represented sheepskin footwear was made in NZ	Auckland	G
1841	24 August 11	13(j)	Represented sheepskin footwear was made in NZ	Rotorua	G
1842	1 April 09 - 33 September 09	10	Offering for sale sheepskin footwear that represented was made in NZ	Christchurch	G
1845	1 October 09 - 31 March 10	10	Offering for sale sheepskin footwear that represented was made in NZ	Christchurch	G
1848	1 April 2010 - 33 September 10	10	Offering for sale sheepskin footwear that represented was made in NZ	Christchurch	G

1851	I October 10 - 31 March 11	10	Offering for sale sheepskin footwear that represented was made in NZ	Christchurch	**G**
1854	1 April 11 - 31 August 11	10	Offering for sale sheepskin footwear that represented was made in NZ	Christchurch	**G**

Maximum fines

[5] The defendant is liable to a fine not exceeding $200,000 for each offence.

[6] I note provisions of s 42 which prevents the imposition of fines on the s 13(j) charge that in the aggregate exceed the maximum for a single offence. These provisions do not control the maximum fines that can be imposed on the s 10 charges because they did not occur "at or about the same time" but I think it appropriate to treat the s 10 charges as relating to a course of offending throughout the whole of the period of the charges which is the approach followed by counsel in their submissions. Even on that approach, the maximum fine for a single offence would not constrain the Court in assessing the appropriate penalty.

Guilty pleas

[7] The company pleaded guilty on 29 July 2013, the date scheduled as the start of a defended hearing. On that day the prosecution withdrew 10 charges under s 10 and amended the remaining five to include the periods originally covered by the withdrawn charges. While the amendments were indicated some weeks ago, the guilty pleas were indicated only on 26 July.

Prosecution summary of facts

[8] The following is a prosecution summary of facts which is not disputed by the defendant, except that it requires some amendment as will be explained.

Summary of facts

Introduction

1 Mi Woollies Limited (Mi Woollies) faces a total of 20 charges under the Fair Trading Act 1986 in relation to the offering for sale of its "UGG New Zealand" branded twin faced sheepskin footwear. Five charges laid under s 13(j)1 and five under s 102 allege Mi Woollies represented that its twin faced sheepskin footwear was made in New Zealand, when it was not.

2 The s 13(j) charges relate to five specific dates, between 3 February and 24 August 2011, on which representations were made to consumers or Commission staff that the footwear was made in New Zealand. The representations were made on labelling affixed to the footwear.

3 The s 10 charges relate to Mi Woollies' ongoing conduct of offering the twin faced sheepskin footwear for sale labelled in such a manner, from when they were first offered for sale in April 2009 through to August 2011, when the Commission's investigation finished. The charges are laid to cover six month periods of ongoing offending.

4 Mi Woollies products are offered for sale throughout New Zealand, both in retail outlets and online.

The defendant's business

5 Mi Woollies is based in Christchurch. It promotes itself as a New Zealand based manufacturing company, offering the highest quality New Zealand sheepskin and wool products at competitive prices.

6 Andrew Everist is the sole director and shareholder of Mi Woollies.

7 During the period of the investigation (April 2009 to August 2011), Mi Woollies' gross profit (sale price minus cost price) from sales of the offending products was approximately $750,000.

The product

8 Mi Woollies offers for sale five types of "UGG New Zealand" branded twin faced sheepskin footwear through a nationwide network of 71 retailers, 46 of whom are gift or souvenir stores, including Mi Woollies stores. As at 24 August 2012, a pair of original short style UGG New Zealand twin faced sheepskin boots retailed for between $144.99 and $169.90.

9 The cost price to Mi Woollies of the short style UGG New Zealand twin faced sheepskin boots is between $35 and $70. Over the offending period (April 2009 through to August 2011) 10,442 pairs of the offending sheepskin footwear were sold to retailers.

10 The UGG New Zealand footwear has the following labelling:

(a) Two cardboard swing tags are attached to the outside of the right boot. The first tag is rectangular in shape. The top side of this tag states 'UGG□' followed by 'new zealand'. The edge of this tag has an image of a rams head against a mountain scene. The reverse side of the tag has the headline statement '100% New Zealand owned and operated'. Underneath, in smaller print, it states:

For over 70 years Mi Woollies and the New Zealand sheep farmer have worked together to produce timeless, authentic, natural products using only the best quality New Zealand grown wool and sheepskin.

New Zealand, a country known world wide for its expertise in sheep farming and wool production is blessed with some of the purest water and air on earth, ensuring the clean green fields yield only the finest raw materials for Mi Woollies natural products.

Generations of New Zealanders have warmed their souls with Mi Woollies products. Now these same products are available worldwide to those seeking natural materials and classical styling from a brand known for its high quality, environmentally friendly products.

Why settle for anything less ... ...you deserve the best.

Under this text is the brand name, 'UGG□' and 'new zealand', followed by the contact details for Mi Woollies, in Christchurch.

(b) The second tag is shaped like a sheepskin. The top side of this tag states 'TWIN FACE', '100% PURE SHEEPSKIN', 'Premium Grade', 'UGG□', 'new zealand' and 'NEW ZEALAND', with 'OWNED & OPERATED' beneath in smaller font. The reverse side of the tag is covered with the words 'UGG□' and 'new zealand' and has a sticker that provides product details and a barcode.

(c) There are identical labels on the outside heel of each boot which state 'UGG□' and then 'new zealand'.

(d) There is a small label affixed to the inside seam of each boot. On one side of the label is 'Designed in NZ by Mi Woollies'. The reverse side states 'Made From Australian & NZ Sheepskin' and 'Assembled in China'. The 'Designed in NZ by Mi Woollies' and 'Made from Australian & NZ Sheepskin' wording is approximately 1.5mm in height. The 'Assembled in China' wording is smaller than the other wording and the capitals are just over 1mm high.

11 Photographs of a pair of UGG New Zealand, original, short style boots and the labelling of that product are attached as Attachment A.

12 UGG New Zealand twin faced sheepskin footwear is designed by Mi Woollies but manufactured entirely in China. The sheepskin used in its manufacture is said to be sourced from either New Zealand or Australia, although Mi Woollies is unable to advise what percentage of sheepskin is sourced from New Zealand compared with Australia. It has acknowledged that the greater proportion is sourced from Australia.

13 The Commission has contacted the Chinese manufacturer of the UGG New Zealand footwear, who was not willing to disclose the names of the companies it sources its New Zealand and Australian sheepskin from.

The investigation

14 The Commission's investigation began after it received two complaints, from a consumer and from a competitor of Mi Woollies who produces similar footwear in New Zealand.

15 Mr Everist, on behalf of Mi Woollies, provided information in response to Commission requests and attended a voluntary interview on 8 August 2011. In summary, Mi Woollies has advised:

(a) The UGG New Zealand brand of sheepskin footwear was first manufactured for Mi Woollies in April 2009;

(b) The footwear is manufactured entirely in China. The Chinese manufacturer is responsible for sourcing and tanning the sheepskin, and for sourcing the smaller components that go into the finished footwear;

(c) Mi Woollies has no input into the supply process;

(d) Mr Everist stated the footwear is made from Australian and New Zealand sheepskin. In relation to this, he advised:

(i) There is not enough good quality sheepskin available in New Zealand to be able to use only New Zealand sheepskin;

(ii) Mi Woollies prefers, but does not insist on, New Zealand sheepskin being used;

(iii) The greater proportion of sheepskin comes from Australia rather than New Zealand, but he is unable to say what percentage of sheepskin is sourced from each;

(iv) New Zealand and Australian sheepskins are treated the same in terms of quality and sourcing;

(e) The content and design of all of the labels, as well as where they are to be placed, is approved by Mi Woollies;

(f) All labels are manufactured and attached in China. Once the process is complete, the footwear is shipped back to Mi Woollies in Christchurch;

(g) Mi Woollies considers that the rectangular swing tag headed '100% New Zealand Owned & Operated' is a statement regarding the company, which is 100% New Zealand owned and operated, and not a statement regarding the footwear;

(h) That the label located in the inside back seam of the boot is the Country of Origin label, as required by the Consumer Information Standards (Country of Origin (Clothing and Footwear) Labelling) Regulations 1992.

Detriment

16 Between April 2009 and March 2011, 23,310 pairs of UGG New Zealand branded sheepskin footwear were manufactured. During this same period, 10,442pairs of UGG New Zealand branded sheepskin footwear were sold to retailers. As at 1 February 2011, Mi Woollies' retailers' catalogue for UGG New Zealand footwear listed five different styles of sheepskin footwear. The wholesale price for the sheepskin footwear ranged from $50 for the Kids Original boot through to $95 for the Cruiser Tall boot.

17 Mi Woollies offered for sale five different types of UGG New Zealand branded sheepskin footwear. The retail prices of the footwear varies between retailers. By way of example, the original short style of UGG New Zealand sheepskin footwear retails from $144.99 to $159.99. This pricing is consistent with other brands of sheepskin footwear manufactured in New Zealand.

18 The New Zealand tourism industry has also been harmed by this conduct. Tourism New Zealand has invested heavily under the auspices of its "100% Pure" brand, and the activities of retailers who misrepresent that their products are New Zealand made have the potential to harm Tourism New Zealand's efforts to drive sustainable growth for this market.

Previous appearances

19 The Commission has previously investigated Mi Woollies for alleged country of origin breaches in connection with both the Labelling Standard Regulations and the Fair Trading Act. A 2007 investigation resulted in the Commission issuing a warning letter and a 2008 investigation resulted in Mi Woollies agreeing to a settlement with the Commission.

Changes to the summary

[9] Despite my insistence that the Court be provided with a complete and agreed summary of facts upon which the defendant might be sentenced, the prosecution submissions on sentencing introduced statements of fact that were not in the summary or were not agreed. I note the following main points.

- The statement in paragraph 7 of the summary is inaccurate. It is agreed that the sales of 10,442 pairs of UGG footwear during the period April 2009 to March 2011 produced revenue of $750,000 of which the cost of sales was $375,000 leaving a gross profit of $375,000. (This does not account for the balance of the total of 23,310 pairs manufactured).

- Paragraphs 2.11 to 2.12 of the submissions and footnote 1 were deleted.

The defence contribution to the facts

[10] The defence submissions contain some background information about the industry. I take that information into account. I recognise that the defendant is a "one man" company, in contrast to the large enterprises the subject of some of the other prosecutions mentioned in the course of argument.

[11] I take into account that the defendant's labelling complies with the Country of Origin Regulations 1992 but that the defendant accepts that compliance does not overcome the effect of the general labelling that led to this prosecution.

[12] I decline to express any opinion as to whether the defendant's competitors are or are not compliant with the law.

Purposes of sentencing

[13] The specially relevant purposes of sentencing are the needs to denounce the offending, to hold the defendant to account and to deter it and others from offending and to protect the public from being duped into buying misrepresented goods.

Guideline decisions

[14] Counsel referred me to a number of sentencing decisions. I take them into account as indicative of the general approach that the courts take to sentencing in cases of this kind but they are decisions on their particular facts with respect to the penalties imposed and they provide little more than a guide to sentencing levels. Counsel were not able to derive any formula or method of calculation or any other tool or template to guide the Court in this case, in fact they derived quite different suggested starting points of $120,000 and $10,000 to $15,000. This is not at all surprising. In the end, sentencing in these cases is an evaluative exercise and depends on the Court's assessment and balancing of the various considerations.

Assessment of culpability

[15] In assessing the defendant's culpability I take into account the number of charges and the period of the offending and the following considerations.

[16] The labelling attached to the footwear did not state explicitly that they were made in New Zealand. The swing tags attached to the footwear and a label sewn into the outside heel were misleading in that they created the impression that the boots were made in New Zealand when they were not. The boots were made from either New Zealand or Australian sheepskin and were assembled in China. There was a small label tucked inside the boots stating that they were assembled in China but this was insufficient to correct the overall misleading impression created.

[17] The defendant is not charged with representing that the boots were made with sheepskin sourced in New Zealand.

[18] It is clear that the defendant calculated and blatantly set out to mislead consumers and its retail outlets into believing that they were buying products that were sourced and manufactured in New Zealand when this was not the case. The defendant did this in order to sell its products when otherwise it might not have sold them. It sought to obtain the advantage of the premium attached to New Zealand made products particularly in the tourist market when tourists are often keen to buy local products and are influenced by "Buy New Zealand" marketing by Tourism New Zealand and local retailers and manufacturers. I do not accept that the defendant was confused about its obligations.

[19] It is apparent from the labelling that the defendant deliberately pushed the boundaries of accuracy of the words used in an attempt to avoid the law. The general effect of the manner in which the goods were presented produced very distinct misrepresentations. For example, to suggest that the words "NEW ZEALAND OWNED & OPERATED" refers to the company, ignores the obvious implication that the word "operated" includes the manufacture of the goods in New Zealand. The overwhelming impression given by the labelling was that the goods were manufactured in New Zealand from material sourced in New Zealand which was simply untrue.

[20] The defendant clearly intended by its conduct to mislead consumers by misrepresentations they knew to be false and to profit those misrepresentations.

[21] The extent to which buyers were influenced by the misrepresentations is unknown. Only one consumer complaint has been received. It is reasonable to infer that the misrepresentations were an effective marketing strategy. The defendant must be taken to know its market and to have so conducted itself to maximise its sales.

[22] It is not suggested that the defendant's products were in anyway inferior or substandard or that products made from New Zealand materials or made in New Zealand would be in any respect superior.

[23] Consumers are completely reliant upon the truth of advertising and labelling with respect to the origins of products of this kind. They have no independent means of verification.

[24] While the defendant's conduct had the potential to provide unfair competition to suppliers of similar products it is not clear that this in fact happened. The defence asserts - and the prosecution is not in a position to contest - that two other suppliers, who have 60 percent of the market between them, also misrepresent their goods. If this is so it does not excuse the defendant, nor in my opinion does it establish any confusion on the part of suppliers as to their legal obligations as to labelling. However, I shall sentence the defendant upon the basis that its mislabelling was an illegal, competitive tool, although actual detriment to its competitors has not been demonstrated.

[25] The defendant's conduct tends to subvert the objectives of the Fair Trading Act that dealings between suppliers and consumers should be open, honest and accurate and that there should be free and equal competition between suppliers.

[26] The defendant's conduct has the potential to harm the tourist industry and, in particular, the Tourism New Zealand "100% Pure" brand. Whether such harm has or will occur has not been demonstrated.

The financial position of the defendant

[27] The defendant has not offered details of its financial position and I assume that it is able to pay fines in the order likely to be imposed.

[28] It has not been suggested that the defendant may suffer financially as a result of the adverse publicity that may result from this prosecution.

Neutralising of profit from unlawful conduct

[29] In cases of this kind the courts have, at least on occasions, acted on the "principle" that it is appropriate that the fines imposed should neutralise the profits gained so as to discourage unlawful conduct and that a premium should be added for deterrence. However, this may be simplistic and unjust and does not appear to sit comfortably with the provisions of the Sentencing Act 2002. The Court has no information about the net profitability of the defendant with respect to this product line or generally. The prosecution does not rely on this principle.

Aggravating and mitigating factors relating to offending

[30] As to the aggravating and mitigating factors relating to the offending, I refer to the matters mentioned in my discussion of the defendant's culpability.

[31] For emphasis, I note the following aggravating features of the offending:

- The deliberateness of the defendant's conduct.
- The vulnerability of the consumers, including tourists, to false and misleading labelling.
- Potential unfair competition to other suppliers and manufacturers. Among the objectives of the Fair Trading Act are to facilitate fair competition. Conduct of this kind tends to undermine fair competition in the market and to disadvantage traders who do not so conduct their business.
- The potential for damage to the tourist trade.

Aggravating factors relating to defendant

- The lack of prior convictions is not a mitigating factor. It is the absence of an aggravating factor.

- It is an aggravating feature relating to the defendant that as a result of previous investigations by the Commission for previous Country of Origin breaches the defendant was warned in 2005 and 2007 for Country of Origin labelling breaches and agreed to a settlement in 2008 whereby it made undertakings after acknowledging Country of Origin breaches.

Mitigating factors relating to defendant

[32] The prosecution agrees that some allowance should fairly be made for the defendant's co-operation with the Commission's investigation although no particular "product" of that co-operation was identified.

[33] The defendant is entitled to some credit for responding to the investigation by changing its labelling to conform with the law.

[34] I do not regard compliance with the Country of Origin regulations as a significant mitigating factor.

[35] I note the defendant has a significant connection with New Zealand but do not regard this as a very significant mitigating factor.

[36] The defendant co-operated with the investigation and changed its labelling to conform to the law after the informant commenced its investigation.

Credit for guilty pleas

[37] The defendant, as I have already noted, did not plead guilty until the date for the start of the fixture. Five of the charges to which it pleaded guilty were unchanged so the pleas were very late. Five of the charges to which it pleaded guilty were amended only by extending the period during which the offence is alleged to have occurred which is not a reduction in the seriousness of the charge. The amendments were indicated some weeks ago. I conclude the reduction of 10 percent is more than sufficient to give credit for the guilty pleas.

Sentencing

[38] My reference to some matters more than once in these sentencing remarks should not be taken as any indication that they have been "double counted." I have been careful not to do so.

[39] I shall assess the fines to be imposed on the defendant by establishing a starting point for the defendant's overall culpability, that is, on a totality basis. I have already assessed the defendant's culpability spread over the period of the offending.

[40] Taking into account the aggravating mitigating factors of the offending and the financial considerations identified, I take the starting point to be $80,000.

[41] I do not add an uplift for the Commissions prior interventions as no convictions resulted. Perhaps I might have done.

[42] I deduct $10,000 to take account of the mitigating factors I have mentioned.

[43] I deduct $7000 for the defendant's late guilty pleas from that subtotal.

[44] Of the net financial penalty of $63,000, I allocate $23,000 to the five s 13(j) charges and impose a fine of $4600 on each such charge.

[45] I allocate $40,000 to the five s 10 charges and impose a fine of $8000 on each such charge.

[46] On each of the 10 charges I order the defendant to pay Court costs of $132.89.

G S MacAskill
District Court Judge