IN THE DISTRICT COURT
AT AUCKLAND

CRI-2010-063-004397

COMMERCE COMMISSION
Informant

v

ECO-PAL LIMITED
Defendant

Hearing: 19 November 2013

Appearances: A McClintock for the Informant
J Fell for the Defendant

Judgment: 19 November 2013

NOTES OF JUDGE L I HINTON ON SENTENCING

[1] Eco-Pal limited is for sentence today in relation to 15 representative charges laid under s 10 Fair Trading Act 1986, which were found proven at a defended hearing before me.

[2] Section 10 of the Fair Trading Act proscribes conduct in trade that is "liable to mislead the public as to the characteristics, suitability for purpose" and so forth of goods. The goods in question here were Eco-Pal's plastic bags, bags that were intended for widespread domestic use that were distributed through a network of distributors. The conduct related to Eco-Pal's advertising or marketing in relation to the bags, on the bags themselves and on Eco-Pal's website.

[3] Put broadly the case for the Commerce Commission as informant was that Eco-Pal's bags did not have the environmentally friendly characteristics Eco-Pal contended for. Specifically, the charges concerned claims in relation to the bags, of

degradation in landfill, suitability for domestic composting, biodegradability, oxo-biodegradability and general environmental friendliness.

[4] The claimed benefits were said to derive from, as I stated in my judgment at para 3, the inclusion of the additive or prodegradent d2w to make the plastic bags "oxo-biodegradable" and facilitate breakdown and conversion (ultimately) into a compost.

[5] The Commerce Commission accepted the science as sound but it was the Commission's case that the science was sound only in the theoretical environment of a laboratory and of no utility in the real world when end of life destinations, under real conditions for plastic bags, were considered.

[6] At para 4 of my judgment I stated in that regard the Commission's case as a general proposition was that there was no end of life advantage presented by use of an Eco-Pal plastic bag with the metallic additive d2 as compared with an ordinary plastic bag without the prodegradent.

[7] At para 5 I noted that Eco-Pal strongly denied the Commission's thesis that its bags were not environmentally friendly and did not have the beneficial features and characteristics which Eco-Pal markets. Eco-Pal denied that its marketing contained representations which were false or misleading or liable to mislead the public. Eco-Pal had, in any event, relied upon the science and wisdom of Eco-Pal's supplier Symphony Environmental Limited whose research and claims were reasonably the genesis and basis of Eco-Pal's marketing. Thus if necessary s 44 Fair Trading Act afforded Eco-Pal a statutory defence of reasonable reliance on information supplied by Symphony.

[8] I found the 15 charges proven after a defended hearing of some three weeks. There was substantial evidence that I heard at trial, including expert evidence from marketing academics, scientists and engineers.

[9] I found, for example and I refer to para 102 of my decision in relation to landfill and degradation:

> The unmistakable message of the representations is that Eco-Pal's bags are suitable for disposal to landfill and that they will degrade within a reasonably short time. I accepted broadly the conclusions of Professor Gendall's survey. ... I think overall that what the Eco-Pal message conveys is distinct advantage in relation to landfill over conventional plastic, in any event.

[10] At para 105 I stated:

> There is very likely a misleading message conveyed by Eco-Pal in relation to landfill and degradation. It is not (necessarily) a false message in my view. Literally, the Eco-Pal refuge bags may actually degrade in a landfill and have advantages over conventional plastic or plastic without the additive. But it is very likely a misleading message, because in effect the promised or represented solution is not evidentially realistic.

[11] In relation to sentencing today, I have received submissions from Ms McClintock on behalf of the Commerce Commission and from Mr Fell for Eco-Pal. The submissions are substantial and have been accompanied, over recent weeks, by ancillary submissions dealing, amongst other things, with Eco-Pal's current financial position. I thank Ms McClintock and Mr Fell for the submissions which have been made.

[12] There are here obvious purposes and principles of the Sentencing Act 2002 that are relevant and are relevant in all sentencing situations. Of course here, under this prosecution under the Fair Trading Act, there are particular other sentencing issues which must be considered.

[13] Dealing with the Sentencing Act, Eco-Pal must be held accountable and responsible for its conduct. There must be an element of deterrence to the sentence that the Court hands down. The Courts must be consistent with the sentences that are handed down and of course, as in any sentencing exercise, it is the company's culpability that is of the gist of the enquiry that the sentencing Judge must make.

[14] Ms McClintock notes in her submissions, and it is relevant, that the Fair Trading Act is designed to protect the interests of consumers and to promote competition. In this regard, as the Commission points out and as has been emphasised in the oral submissions, it is important to recognise the attractiveness for the modern consumer of environmentally friendly claims for products. They are, as

Judge Kiernan put it in *R v Environmental Air Care Ltd* DC Auckland CRN-03004511015-018, 16 September 2004, a

> "Powerful selling tool," to those who are not in a position to know or to test the science.

[15] There are sound policy reasons for policing traders. Competition can easily be undermined and direct competition facilitated with competitors with actually superior and environmentally friendly products. The public are entitled to reasonable accuracy. The public want to do the right thing and traders too are entitled to a level playing field. Overall culpability is informed also by, for example, the degree of carelessness or wilfulness involved in infractions in this area. Here the Commission submits that Eco-Pal's conduct was virtually reckless and this is said to be so because no independent or proper advice was allegedly taken by Eco-Pal. Eco-Pal, the Commission submits, was aware of the limitations of its product and the science but continued to make unjustified claims in relation to it.

[16] Essentially the Commission is saying that Eco-Pal preferred its own selected not tested and not satisfactory science over available science which was put to one side recklessly. So that the Commission says Eco-Pal simply cherry picked information to rely on.

[17] The Commission says that a combination of factors like this meant that there was recklessness at a high level and points to apparently merely careless conduct in other cases in contrast.

[18] Mr Fell has taken serious issue with this. He has pointed out, in his submissions, written and orally, the steps that the company had taken. Of course Mr Fell's position in this regard is something that I heard from him on at trial. I heard also from Ms Shaw on aspects that are relevant here although not to the depth of Mr Fell's evidence. So that I was in a position to both know the company's position clearly and to have formed, as the trial Judge, a view on it. I add that I had also the benefit of many discussions with Mr Fell who represented Eco-Pal during this three week hearing.

[19] Some of my views are in fact recorded in my decision. It was necessary to record those views in my decision because they were relevant to my reasoning. At paras 226 through 232 of my decision, for example, I referred to steps taken by Mr Fell. I referred to his reliance on the manufacturer. I refer initially there to Mr Fell's knowledge of concerns with conventional plastic because Eco-Pal's birth, from recollection in 2003, was for the very reason of addressing those concerns. Mr Fell had settled on science then or following his initial investigations, which was technically sound as the solution. At para 227 I state:

> He certainly relied on the manufacturer itself. But he did also other research and investigation, and in fact considered a reasonable volume of scientific papers.

[20] At para 228:

> Mr Fell, I do not doubt, took some steps earnestly and in good faith to check out the science he was introducing into the New Zealand marketplace.

[21] I allow that my judgment was that Mr Fell could have, and probably should have, done more in the circumstances:

> The science came from the (offshore) manufacturer and was going to be used in the New Zealand marketplace. It is doubtful that wholesale translation or repetition of the manufacturer's materials was appropriate for wide dissemination. ... That Symphony might 'market' those advantages elsewhere does not impress immediately as underwriting or assuring compliant marketing here, especially if merely wholesale.

[22] So that certainly the company did take some steps but those steps were not, in my view, sufficient.

[23] In a careful analysis Ms McClintock has proposed in her submissions, by reference to several decisions, that a starting point of a fine of between $90,000 and $100,000 is appropriate. A discount of five to 10 percent is suggested appropriate by the Commission for mitigating factors because Eco-Pal has no previous history, co-operated with the investigation by the Commerce Commission and made some efforts to correct Eco-Pal's advertising.

[24] In assessing a starting point the Court must take particular note of accountability and deterrence factors and here there is, in my view, a need for

particular as opposed to general deterrence as well. This is serious offending. There is a sure appetite for environmentally friendly products, especially those for everyday or frequent use, such as plastic bags or rubbish bags. There are very good policy reasons to penalise and deter traders who disappoint or might be tempted to disappoint customers irrespective of the degree of knowledge of a customer and who take, in effect, economic advantage of other traders.

[25] Here, well intentioned shoppers wanting to do their bit for the environment and other traders, were prejudiced on (and I agree with the Commission here) a reasonably substantial scale. The Eco-Pal product was widely distributed and available. I have considered the various authorities that the Commission has referred to in Ms McClintock's submissions. They are relevant.

[26] Here Eco-Pal has not, in my view, made technically false claims or blatantly ignored negative science. Whilst many claims that were made were likely technically correct, they needed to be accompanied by more.

[27] Was Eco-Pal reckless? I do not think so. As I referred to earlier I heard Mr Fell and Ms Shaw give evidence. I do however think that Eco-Pal was careless to a reasonably high level. After all, the genesis of Eco-Pal in 2003 was to find a solution, Mr Fell did a lot of research; he well understood the limitations of the prodegradent additive and landfill issues. He conveyed, for example, some of this to Mr Anthony at the interview with the Commerce Commission in 2009.

[28] In all the circumstances, by way of example, the wholesale translation of the Symphony story into the New Zealand marketplace was unacceptable. This offending is significantly more serious than in the *Pacrite* case. There Judge Collins assessed a starting point of $40,000. The offending here is of greater scale involving broader scope in terms of both misrepresentations and media spread. Moreover, Judge Collins in *Pacrite* found carelessness to exist at a lower level than is the case here, for here the carelessness is serious.

[29] With the knowledge Eco-Pal had here the situation simply cried out for more explanation and substantially fewer bold unqualified assertions. It might be careless

and not reckless to simply press a button and translate an offshore supplier's material into a local brochure or website, but it is highly culpable carelessness.

[30] Ms McClintock is not unrealistic in her assessment of the starting point. It is a reasonable assessment, in my view, for careless infractions of s 15 that I have found in the manner I have described in my judgment and earlier on today.

[31] Reckless conduct, that is to say more serious conduct than I have found, would have attracted a higher starting point in my view. I note, for completeness, that I have not overlooked Eco-Pal's submissions in relation to what I describe broadly as a suboptimal investigation process, charges that were not proven and criticism of expert witnesses. None of these matters are relevant for me with respect to today's sentencing process.

[32] I do appreciate that Mr Fell has misgivings about the Commerce Commission investigation; he is disappointed that resolution may not have been possible. The fact that there were initially more charges or that some, including the alternative charges, were not found proven does not detract from Eco-Pal's culpability with respect to these charges I found proven. I had no issue with the expert witnesses.

[33] The appropriate starting point for a fine in relation to these charges is $90,000. Eco-Pal is entitled to a discount for its previous good record and co-operation with the Commission. I take also into account, as one must, the ability of Eco-Pal to meet a fine. In that regard Mr Fell has filed a memorandum and accompanying financial statements for the period until 31 March 2013 and for the six month period until 30 September 2013.

[34] Under s 40 Sentencing Act the Court, broadly, must take into account the ability of an offender to meet a fine. The Court can take into account the present financial circumstances of Eco-Pal and also its future circumstances so far as this can be determined.

[35] Here, the company is clearly not in a very sound financial position. On the other hand the company does have the ability to meet a fine. This is frankly

acknowledged by Mr Fell albeit this morning with the caveat that one would need to know what the fine is. Mr Fell so submitted in answer to Ms McClintock's submissions this morning that the financial information provided clearly did not show inability of Eco-Pal to meet a fine. Indeed I rather thought Ms McClintock to oppose any suggestion that the fine could be eroded significantly. I think however she fairly recognised that there may be room for some reduction overall but requested that any deductions from the starting point be clearly identified.

[36] My view is that s 40 could not apply to significantly erode a fine. However, my view is that under s 40 the Court must see, overall, that justice is done having regard to the particular circumstances of this case, Eco-Pal's financial position and otherwise.

[37] There is room for a reduction in the fine which should not be substantial. That is because this is serious offending with a substantial appropriate starting point for a fine where the twin purposes of the Fair Trading Act, including protection of consumers and other traders and the promotion of competition, are paramount.

[38] That is not to say that the Court should, under those circumstances, ignore Eco-Pal's position for Eco-Pal here was self represented, has been put to substantial expense, is a small tightly held family company, conducted the defence under circumstances of evident strain so far as the family were concerned and so forth.

[39] I am not unmindful of those aspects as the sentencing Judge and it is not that there are particular discounts given for that but it is that those factors inform my view of the ability of Eco-Pal ultimately to sustain a fine that would normally be imposed absent Eco-Pal's particular financial circumstances.

[40] The result for me is as follows: from a starting of $90,000 there should be a deduction of $30,000 so that the end fine is $60,000 spread across 15 charges at the rate of $4,000. The particular deductions that I have made are firstly $15,000 for Eco-Pal's previous good record, co-operation with the Commerce Commission investigation, and $15,000 on account of Eco-Pal's financial position to alleviate otherwise hardship, in the interests of justice.

[41] I note in conclusion that Eco-Pal, I expect, will be able to make arrangements with the registrar to pay that fine off over a reasonable period. That period, I would have thought myself, should be at least a period of 12 months if not longer.

L I Hinton
District Court Judge