

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2015-409-000053
[2016] NZHC 832**

UNDER the Fair Trading Act 1986
IN THE MATTER of an application for a declaration and
injunction under s 41 of the Fair Trading
Act 1986
BETWEEN COMMERCE COMMISSION
Plaintiff
AND NEW ZEALAND NUTRITIONALS
(2004) LIMITED
Defendant

Hearing: 29 February 2016

Appearances: J C L Dixon and J G Donkin for Plaintiff
D A Webb and R J Ardagh for Defendant

Judgment: 29 April 2016

JUDGMENT OF VENNING J

This judgment was delivered by me on 29 April 2016 at 2.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Meredith Connell, Auckland
Lane Neave, Christchurch
Copy to: J C L Dixon, Auckland

Introduction

[1] New Zealand Nutritionals (2004) Limited (NZ Nutritionals) produced and distributed dietary supplements in New Zealand. This case concerns two of NZ Nutritionals' products, goats' milk tablets and goats' milk powder. The Commission alleges that NZ Nutritionals' labelling of the products as "New Zealand made" and in the case of the powder, "100% NZ made & proud of it", contravened the Fair Trading Act 1986 (the Act). It seeks declarations to that effect.

[2] NZ Nutritionals says that, given their natural and ordinary meaning the words "New Zealand made" are not misleading in this case; that it has not breached the Act; and in any event a declaration should not issue because the company no longer trades, and the labels are no longer used. Any declaration would have no utility.

Background

[3] The evidence for the Commission was produced by Ms Pa'o, a senior investigator. In addition the Commission obtained an affidavit from Professor Philip Gendall, an expert in marketing research. Professor Gendall also gave oral evidence and was cross-examined.

[4] The evidence for NZ Nutritionals was given by Ms Joseph, the company's operations manager. She described the steps involved in developing the product which ultimately became the goats' milk powder and tablets and the purchasing production and process undertaken at the NZ Nutritionals' factory.

[5] With the exception of the challenge to Professor Gendall's evidence (which I return to later) the evidence was not contested. The relevant background facts are largely admitted or agreed.

[6] Until 31 March 2015 NZ Nutritionals carried on business at Sheffield Crescent, Burnside, New Zealand and was in trade producing, packaging, distributing and selling health products. NZ Nutritionals says that, in addition, it also made health products. Together with a related company it sourced raw ingredients from both domestic and international suppliers. It sold its health

products under a variety of brand names, advertised its health products through a number of websites and offered the health products for sale directly to consumers through a website.

The goats' milk tablets

[7] From on or about 29 January 2008 until 2 September 2013 NZ Nutritionals produced and packaged tablets at its Christchurch factory labelled as “Pro-life Junior goat’s milk & calcium” (the tablets). From on or about February 2008 until 31 March 2015 it sold and distributed the tablets to New Zealand retailers of health products, including specialist nutrition and health stores and supermarkets. In doing so it knew and intended that retailers would onsell the tablets to consumers in physical stores and online.

[8] From on or about April 2010 until 31 March 2015 NZ Nutritionals also offered and sold the tablets directly to consumers in New Zealand and elsewhere through a web page.

[9] The Pro-life Junior goat’s milk and calcium tablets weigh approximately 680 mg and contain 12 ingredients. The principal active ingredients are 200 mg (29.4 per cent weight) of goats’ milk powder and 50 mg (7.4 per cent) of dicalcium phosphate. In addition there are 10 other ingredients. Eight of the 12 ingredients are imported into New Zealand, including the two active ingredients. Four of the 12 ingredients are produced in New Zealand, being approximately just over 50 per cent by weight. The four ingredients produced in New Zealand are excipients or pharmacologically inactive substances.

[10] From 29 January 2008 until 2 September 2013 the bottles containing the tablets had a label which included the words “New Zealand made” surrounding a kiwi as depicted in Schedule 1.

The goats' milk powder

[11] From on or about 16 August 2012 until on or about 16 October 2012 NZ Nutritionals blended, bottled and labelled VitaFit goats’ milk powder in one kilogram

containers at its Christchurch factory. From on or about 24 August 2012 until on or about 29 October 2012 NZ Nutritionals sold and distributed the goats' milk powder to New Zealand retailers of health products, including specialist nutrition and health stores and supermarkets. It knew that the retailers would onsell the goats' milk powder to consumers in physical stores and online.

[12] The Vitafit goats' milk powder contains goats' milk powder (99 per cent) and calcium citrate (1 per cent). NZ Nutritionals and its associated company imported the two ingredients contained in Vitafit goats' milk powder, goats' milk powder and calcium citrate in powder form from overseas. (Most of the goats' milk powder was sourced from either Spain or the Netherlands).

[13] The milk powder containers were labelled in the form attached as Schedule 2 to this judgment. The label included the following:

- (a) "100% New Zealand made" as a headline on the front of the label;
and
- (b) "100% NZ made & proud of it!" together with a stylised kiwi in two other places on the label.

The production process

[14] Ms Joseph described the background to the production of the tablets and milk powder. NZ Nutritionals has 25 employees based at its Christchurch factory. The first stage of product development involved the research team which considered the initial aspects of product development. The next phase was handled by the design team who designed the image for the product, including the pictures or illustrations on the label, the size and shape of product containers, labelling and marketing materials. Ms Joseph says NZ Nutritionals discussed the issue of labelling with Food Safety New Zealand. Once Food Safety New Zealand confirmed the labels were acceptable from their point of view the product progressed to the manufacturing side. The purchase team then arranged the purchase of all the raw materials which were shipped to NZ Nutritionals' factory in Christchurch. When received the raw material ingredients were checked for food standard purposes. The

production manager then liaised with the research team and obtained recipe sheets for the product.

[15] The raw material was taken to the weighing room, weighed, sieved and mixed. The materials were then weighed into a bag-lined container and transferred to the blending/mixing machine where they were blended together. When the powder achieved uniform distribution the mix was transferred into another bag-lined container prior to packaging. It was then placed into a large hopper where it was weighed and packaged into its containers before the containers were labelled and distributed.

[16] A similar process was followed in respect of the tablets. After receipt of the raw materials and review of the recipe the raw materials were taken to the weighing room, weighed, sieved and mixed. Each of the raw materials were weighed into a bag-lined container and then transferred into the blending/mixing machine where they were blended and mixed. When the various ingredients were uniformly distributed the mix was transferred to a bag-lined container and to the hopper of the pill punching machine. The machine took the powder and compressed it into tablet form. The tablets were then placed into a large hopper where they were bottled or packaged into containers which were then labelled and distributed.

[17] At various stages during the process quality assurance checks were carried out by a quality controller. Strict hygiene standards were followed in the factory.

The Commission's case

[18] The Commission alleges that in representing the tablets and powder as "New Zealand made" in the context of the imagery and wording on the labels, NZ Nutritionals is in breach of ss 9, 10 and 13(j) of the Act as the labelling would lead consumers to believe that the goats' milk was sourced from goats milked in New Zealand and that the milk was converted into powder in New Zealand.

[19] The sections of the Act the Commission relies on provide:

9 Misleading and deceptive conduct generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

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.

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,—

- (j) make a false or misleading representation concerning the place of origin of goods or services.

NZ Nutritionals' case

[20] NZ Nutritionals accepts it was in trade during the relevant period and that the powder and tablets are goods. It also accepts that the labels in each case amount to conduct and representations for the purposes of the sections.

[21] It says that the statements on the labels, along with their surrounding imagery, would lead potential purchasers to conclude that the manufacturing process takes place in New Zealand which is not misleading as the products were manufactured in New Zealand. The statements on the labels are not a representation of where the ingredients were sourced.

Is the labelling misleading or deceptive or likely to mislead or deceive (s 9)?

[22] There is no statutory definition of the terms “misleading” or “deceptive”. The scope of s 9 is very wide. There is no need to show that any person has been misled or deceived: *Taylor Bros Ltd v Taylors Textile Services (Auckland) Ltd*.¹

[23] The context is important. In *Red Eagle Corporation Ltd v Ellis* the Supreme Court noted s 9 is directed at promoting fair dealing in trade by proscribing conduct

¹ *Taylor Bros Ltd v Taylors Textile Services (Auckland) Ltd* [1988] 2 NZLR 1 (HC).

which, examined objectively, is deceptive or misleading in the particular circumstances:²

Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. ... The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so.

(footnotes omitted)

[24] Mr Webb submitted that the Court should consider first, was the statement true, and if “technically true” could it nevertheless induce a reasonable person into believing something false. Even a literally true statement may be misleading or deceptive: In *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd* the Court of Appeal held:³

[41] ... advertising which is literally true may be misleading or deceptive by conveying a half-truth, for example by making comparisons which, in all the circumstances, are unfair. We also accept ... that the focus must be on the overall impression likely to be received by a member of the public viewing a television commercial or reading an advertisement in the print media.

Mr Webb submitted that given the processes leading up to and involved in the production of the milk powder and the tablets, the substantial transformation and substantial manufacturing tests from the cases confirm the products were made in New Zealand so that the representation “New Zealand Made” was true.

[25] Mr Webb relied in particular on the following comments of Harrison J in *Carter Holt Harvey Ltd v Cottonsoft Limited*:⁴

A statement on packaging material that a product is made in New Zealand is a representation not so much about the source and origin of its raw materials but about the place where it was produced or manufactured. The average shopper is alive to the modern economic reality that some New Zealand companies manufacture products here from imported raw materials.

² *Red Eagle Corporation Ltd v Ellis* [2010] 2 NZLR 492 at [28].

³ *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd* [2012] NZCA 357 at [41].

⁴ *Carter Holt Harvey Limited v Cottonsoft Limited* (2004) 11 TCLR 161, at [30].

[26] And:⁵

... the average New Zealand shopper would exclude harvesting timber from the tissue manufacturing process, just as he or she would exclude growing and gathering wool from the suit manufacturing process.

[27] Mr Webb also referred to the observations of Tipping J in *Marcol Manufacturers Ltd v Commerce Commission* where the Judge referred to the process undertaken in Korea as "... made, ie put together in Korea".⁶ Mr Webb submitted that both the powder and the tablets were "put together" in New Zealand when the mixing and blending took place in the case of the powder and, in the case of the tablets when they were produced.

[28] The cases Mr Webb relied on were decided under s 13(j) which focuses directly on the issue of origin of the goods. But when the facts, and the ultimate conclusions in them are considered in context, they are not particularly helpful to NZ Nutritionals. The *Carter Holt Harvey* case involved the manufacture of toilet tissue and paper towels in New Zealand from large, jumbo reels of basic tissue produced from wood pulp. Both the pulping of the wood and the subsequent manufacture of the large reels of tissue were carried out overseas. Harrison J rejected the defendant's submission that the further processing and conversion of the tissue from the jumbo rolls into toilet paper and paper towels in New Zealand meant the product was made in New Zealand. Harrison J held that the average New Zealand shopper would conclude from a representation that the tissues are New Zealand made that the entire conversion process occurred in New Zealand, not just the last or specific stage. On a comparative scale the Judge did not consider the last stage to be of such manufacturing significance as the two preceding stages which took place overseas.

[29] *Marcol* involved leather jackets made in Korea. Marcol attached a label reading "Marcol Christchurch New Zealand" to the jackets. Marcol was convicted of a breach of s 13(j). Tipping J upheld the conviction holding that the label conveyed a message apt or likely to mislead the mind of the average shopper. The Judge rejected a submission that as the leather was sourced in New Zealand and the jackets were designed and "finished" in New Zealand the jackets could be said to be

⁵ At [34].

⁶ *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 at 509.

made in New Zealand. The Judge held the jackets were in “substance” made in Korea.

[30] In *Australian Competition & Consumer Commission v Lovelock Luke Pty Ltd* Lockhart J noted,⁷ citing from the earlier case of *FCT v Jack Zinader Pty Ltd* and *McNicol v Pinch*:⁸

The essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made.

[31] Lockhart J continued:⁹

Whether an article of commerce is “Made in Australia” must be determined by reference to the circumstances of each case. Some articles may consist of parts manufactured either wholly abroad or partly abroad yet fully assembled here. ...

[32] In the present case, the products are dietary supplements made up of goats’ milk fortified with calcium presented as a powder and in tablet form. In the case of the powder, the label confirms the product is goats’ milk powder. The substantial transformation of the basic ingredient or the key step in producing the final product is the conversion of the goats’ milk into milk powder. That occurred outside New Zealand. The blending of the goats’ milk powder with calcium citrate in New Zealand Nutritionals’ Christchurch factory is an insignificant step in the manufacture of the final product which is goats’ milk powder fortified with calcium. The goats’ milk powder blended with calcium is not a sufficiently different thing to the goats’ milk powder so that the final product can be said to have been made in New Zealand.

[33] The statement “100% New Zealand Made” in respect of the goats’ milk powder is not technically true as Mr Webb suggested.

[34] While the Commission is the complainant in this case (on behalf of the public), the Court must consider the effect of the labelling on a reasonable consumer of the goats’ milk powder and goats’ milk and calcium tablets. Would that

⁷ *Australian Competition & Consumer Commission v Lovelock Luke Pty Ltd* [1997] FCA 1100, (1997) 39 IPR 439.

⁸ *FCT v Jack Zinader Pty Ltd* (1949) 78 CLR 336; and *McNicol v Pinch* [1906] 2 KB 352 at 361.

⁹ *Australian Competition & Consumer Commission v Lovelock Luke Pty Ltd*, above n 7, at 445.

reasonable person, with the characteristics of a typical consumer of the products have been likely to be misled or deceived? In *Godfrey Hirst NZ Limited v Cavalier Bremworth Ltd* the Court of Appeal revisited the definition of target group of consumer.¹⁰ The Court noted:

[20] ... “the consumer” comprises all the consumers in the class targeted except the outliers. The “outliers” encompass consumers who are unusually stupid or ill equipped, or those whose reactions are extreme or fanciful.

[35] What would such a consumer take from the representation or conduct of NZ Nutritionals in labelling the products “New Zealand Made” in this case?

[36] It is necessary to identify the relevant class of persons to whom the representation is made. The relevant group is made up of those members of the public who may purchase the dietary supplement in powder or tablet form. They will be members of the public who may purchase by retail either from the website, health food outlets (or supermarkets) as the pleading establishes. It is for the Court to determine objectively in the light of the group of persons identified as to whom the representations are directed, as to the effect of the representations.

[37] Professor Gendall gave evidence on this issue. He noted that goats’ milk products as dietary supplements are not a routine purchase, so that the origin of the product was likely to be more salient than for food producers generally. In his opinion consumers were likely to understand a representation that a goats’ milk supplement is made in New Zealand to mean that the key ingredient, the goat’s milk powder, was obtained from goats’ milk in New Zealand. The addition of “And proud of it” to a representation of “100% New Zealand made” in the case of the label on the powder would, he believed, further intensify the country of origin impression created by “100% New Zealand made” alone. That was reinforced by the juxtaposition of the country of origin representation and the company’s address in New Zealand.

[38] Under cross-examination Professor Gendall accepted that he had not done any work in respect of dietary supplements. He also accepted that consumer survey

¹⁰ *Godfrey Hirst NZ Limited v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611.

evidence was the best and most reliable way of establishing the presence of deceptiveness and to provide evidence of materiality. He accepted there was no such survey in the present case. Professor Gendall rejected a challenge to his evidence on the basis of a report by Inch and Jackson.¹¹ He noted that it was not his opinion or position that the country of origin is important for all products, or even all food products. It depends on the products themselves and how integral to safety and quality the country of origin is or is perceived to be. He noted that the only way to tell what people understood “made in New Zealand” to mean is to ask them a series of closed questions which was not what had occurred in the Inch and Jackson report.

[39] In short, despite Mr Webb’s cross-examination Professor Gendall remained of the opinion that it was reasonable to assume that in this case consumers would assume the powder would have come from goats in New Zealand. I accept that evidence.

[40] I do not consider the lack of survey evidence in the present case to be an answer to the Commission’s claim. In *Geddes v New Zealand Dairy Board* (a case involving consideration of s 9) the Court noted that:¹²

There may be some cases where the misrepresentation is made to the public at large and where the misleading nature of the conduct is sufficiently [obviously] that the court can make findings without actual evidence of confusion.

[41] In *Marcol* Tipping J said:¹³

To hold that the informant has to prove that the representor intended to make a representation or knew that it was making a representation goes beyond the compass of the section. It is clearly established that whether the representation is misleading must be determined on an objective rather than a subjective basis: ...

What the Court must do is look at what the alleged representor has said or done and ask whether objectively a misleading representation was made. ...

¹¹ A Inch and E Jackson “Consumer understanding and use of country-of-origin in food choice” (2012) *British Food Journal* 116(1) at 62-79.

¹² *Geddes v New Zealand Dairy Board* CA180/03, 20 June 2005 at [94].

¹³ *Marcol Manufacturers Ltd v Commerce Commission*, above n 6, at 506-507.

The correct approach in my judgment is to ask (1) whether the material alleged to amount to a particular representation in a case such as this would be viewed as such by the average New Zealand shopper and (2) whether such shopper would derive from it a message which is in fact misleading. The mind of the representee is likely to work more by impression than analysis and to be prone to some looseness of thought. ...

[42] In my judgment a reasonable person would take from the labelling of the powder that it was made in New Zealand from goat's milk that had itself been processed in New Zealand. It is unrealistic to suggest that such a reasonable person would deconstruct the process in their mind and consider that if the powder was imported into New Zealand and then blended as in the present case it could be said to be made in New Zealand.

[43] Mr Webb's argument that the representation is technically true, may at first sight appear stronger in relation to the tablets. The tablets are made in New Zealand insofar as they are produced from the tablet machine in the New Zealand Nutritionals Christchurch factory. However, while the tablets were made in New Zealand that begs the question of whether the statement "New Zealand Made" can be said to be technically true in relation to the product.

[44] The product is in a tablet form but the content represented and promoted in the label is "goat's milk & calcium". For example the label states:

"healthy as a goat" goat's milk is a natural food with high nutritional characteristics especially for newborns. Calcium is an essential mineral in the human body for supporting the health of bones and teeth. The combination of goat's milk and calcium provides a beneficial source of nutrition for growing children, together with enzymes that aid digestion.

[45] Professor Gendall rejected the proposition that making something means manufacturing it. In his opinion a statement "made in New Zealand" on a label implied something to consumers. The only reason to put that on the label was to try and influence their perceptions. The essential character of a nutritional supplement derived from a food product is a health food status, an ingredient status, rather than the fact a machine might have turned the powder into pellets.

[46] The tablets are the means by which the product, which is goats' milk powder, is packaged. The only two active ingredients in the product are the goats' milk

powder (which is the principal ingredient) and dicalcium phosphate. Both are imported. Again, in my view the significant conversion process in the manufacture of the principal ingredient which is the focus of the label is not the tableting, but the conversion of the goats' milk into the powder which forms the basis of the product in the tablets.

[47] Mr Webb placed emphasis on the recipe, the design, purchase and checking of the powder in its factory. However, in the *Carter Holt* case the basic bulk jumbo rolls of tissue were converted and packaged into a variety of printed toilet tissue and paper towels. That conversion, production and packaging process was not sufficient to support the statement "made in New Zealand". In *Marcol* the jackets were designed in New Zealand and the leather originated in New Zealand. Again however the principal conversion process was putting the jackets together which occurred overseas. Similarly in the present case the principal conversion of the underlying ingredients of the end product was the conversion of goats' milk to powder. Again, in relation to the tablets, a reasonable person would take from the labelling of the powder that it was made in New Zealand from goat's milk that had itself been processed in New Zealand. The label on the tablet's bottle is misleading.

[48] Two further matters need to be addressed. Food Safety New Zealand approved the labels. But that body's responsibility only extends to compliance with food safety regulations. Its approval does not affect or address whether the labels were likely to mislead or deceive.

[49] I also accept from Ms Joseph's evidence that NZ Nutritionals did not set out to mislead members of the public but the issue is whether that was nevertheless the effect. As I have found, it was.

Is the labelling liable to mislead (s10)?

[50] Section 10 is also expressed in general terms but in relation to goods. It requires the conduct be "liable" rather than "likely" to mislead and identifies that the conduct must be tied to the nature, manufacturing process, characteristics, suitability for purpose or quantity of the particular goods. The Commission relies on the nature and characteristics of the powder in this case.

[51] Mr Webb submitted that the representation that the dietary supplements were New Zealand made could not be said to be a representation as to the nature or characteristics of the supplements. Rather it was a representation of the origin of the supplements and so fell more appropriately within s 13(j) of the Act.

[52] He noted that in *K-Swiss Inc v Federation of the Swiss Watch Industry FH* the use of the mark K-Swiss and its representation that the watch originated from Switzerland was considered under s 10 of the Act as well as s 13(j).¹⁴ That however was justified on the grounds that the particular country of origin had a specific reputation in relation to the class of product, namely Swiss watches and as such was a particular characteristic of the item. There was no such connection or reputation in relation to goats' milk.

[53] The definitions of nature and character in this context overlap. "Nature" is relevantly defined in the Oxford online dictionary as the inherent or essential quality or constitution of a thing, the inherent and inseparable combination of properties giving any object its fundamental character. "Characteristics" is relevantly defined as that which serves to identify or to indicate the essential quality or nature of a thing.

[54] As McGechan J said in *Taylor Bros Ltd v Taylors Textiles Services (Auckland) Ltd*:¹⁵

On the recognised Australian approach, the provisions concerned are to be construed in their natural and ordinary meaning. In particular, they are not to be read down either by reference to other provisions of the legislation or by reference to the general law relating to intellectual property: *Parkdale Custom Built Furniture v Puxu Pty Ltd* (1982) 149 CLR 191. The intention in New Zealand no doubt is similar, but with an obvious consumer protection orientation room may exist for application of s 5(j) of the Acts Interpretation Act 1924.

[55] In some cases, where the principal ingredient is produced or manufactured will be a feature of the nature or characteristic of the goods. In this case the milk powder is such a significant feature of the end product in both the powder and tablets

¹⁴ *K-Swiss Inc v Federation of the Swiss Watch Industry FH* (2009) 83 IPR 635.

¹⁵ *Taylor Bros Ltd v Taylors Textile Services (Auckland) Ltd*, above n 1, at 27.

that where the powder was produced is an aspect of the nature or characteristics of the final goats' milk product in both powder and tablet form.

[56] As Mr Dixon observed in his supplementary submissions for the Commissioner it is difficult to reconcile Ms Joseph's evidence that the fact the products are made in New Zealand is an important marketing factor for the business with the submission that the products are made in New Zealand does not relate to the nature or characteristics of the products.

[57] The source of the goats' milk powder falls within both definitions of nature and characteristics. "New Zealand Made" is a statement as to the essential quality or fundamental quality of the goats' milk powder. I conclude that the representation the powder is made in New Zealand is liable to mislead a reasonable consumer as to its nature or characteristics.

The origin of the goods (s 13(j))

[58] The issue under s 13(j) is whether by referring to "New Zealand made" on the labels for the tablets NZ Nutritionals has made a false or misleading representation concerning the place of origin of the goods.

[59] NZ Nutritionals relies on Harrison J's observation in the *Carter Holt* case which I repeat:

A statement on packaging material that a product is made in New Zealand is a representation not so much about the source and origin of its raw materials but about the place where it was produced or manufactured. The average shopper is alive to the modern economic reality that some New Zealand companies manufacture products here from imported raw materials.

[60] It is however implicit in the balance of Harrison J's reasoning in the *Carter Holt Harvey* case that the Court determined the origin of manufactured goods (in the context of a representation the goods were made in New Zealand) by reference to where the key steps in the manufacturing process occurred. Tipping J had taken a similar approach in *Marcol*.

[61] In *Netcomm (Australia) Pty Ltd v Dataplex Pty Ltd* Gummow J considered the meaning of “place of origin” in relation to a similar Australian provision as follows:¹⁶

“Origin” directs attention, consistently with the *Oxford English Dictionary* meaning, to the beginnings of existence of the goods with reference to a source or cause of that existence; the concept is that of beginning regarded in connection with its cause.

[62] Gummow J went on to note:¹⁷

With minerals or crops, it may be quite easy to state what is their place of origin and so to characterise representations concerning that place of origin as being or not being false or misleading. The concept of “place of origin” will present difficulties where sophisticated articles derive their value and character as articles of commerce by various circumstances involving design and manufacture. There is then more likely to be a complex of integers constituting the origin of those articles.

[63] Section 13(j) is not particularly apposite where the focus is on a manufacturing process. It has more direct resonance with products that have not been manufactured or made. As Professor Gendall set out in his evidence:

When it comes to labelling of food products, consumers tend to take the meaning of “made in [country]” to mean the place where the food products were born or grown and raised or harvested, rather than, for example, “place of last substantial change”.

Where however the products involve a manufacturing process as was the case in *Carter Holt* and *Marcol* for example, the focus is on the substantial transformation or, when something different has been created or manufactured. In the present case, that was when the goats’ milk was converted into powder, which occurred overseas. I conclude that s 13(j) is also breached.

Relief

[64] Mr Webb submitted that, if the Court found breaches of the Act, nevertheless declarations should not issue. While accepting that the Court has a general discretion to grant declaratory relief he submitted the discretion was not unfettered

¹⁶ *Netcomm (Australia) Pty Ltd v Dataplex Pty Ltd* (1988) 81 ALR 101 per Gummow J at 106.

¹⁷ At 106–107.

and that a declaration was not justified in this case, noting the delay, and lack of utility.

[65] I consider the relevant considerations in terms of delay to be the length of the delay and also whether it can be said the delay has prejudiced the defendant. The investigation commenced in early 2013. It involved consideration of information supplied by NZ Nutritionals, both by letter and interview. The last letter from New Zealand Nutritionals was on 13 February 2014. The issue of proceedings within a year of that was not unreasonable. Further, as the defendant is no longer using the labels and indeed is no longer trading, the only prejudice to it is the cost of defending the proceedings. That is not a sufficient prejudice to defeat the claim for a declaration.

[66] As to utility, while the defendant may no longer be trading, an associated company is, and in any event:

- (a) the public nature and effect of the Court's declaration will act to deter the defendant and others from engaging in similar conduct in the future;
- (b) a declaration is a public record of breach which, apart from publicly censuring the defendant's conduct, may be material should the defendant (or a related company) come before the Court again for a further breach of the Act; and
- (c) a declaration will, to some extent, confirm to the public and the commercial community generally that the Commission is willing to and will act to enforce the Act where appropriate.

Orders

[67] The following declarations are to issue:

- (a) NZ Nutritionals has acted in contravention of s 9 of the Act in relation to both the powder and tablets by engaging in conduct that was misleading or deceptive or which was likely to mislead or deceive;
- (b) NZ Nutritionals has acted in contravention of s 10 of the Act in relation to both the powder and tablets by engaging in conduct that was liable to mislead the public as to the nature and/or characteristics of the powder and tablets;
- (c) NZ Nutritionals has acted in contravention of s 13(j) of the Act in relation to both the powder and tablets by making a misleading representation concerning the place of origin of the powder and tablets.

Costs

[68] Costs on a 2B basis to the plaintiff together with reasonable disbursements as fixed by the Registrar. Second counsel is certified for.

Venning J

SCHEDULE 1

Tablet Label

"healthy as a goat"
goat's milk & calcium

"Healthy as a goat", goat's milk is a natural food with high nutritional characteristics especially for newborns. Calcium is an essential mineral in the human body for supporting the health of bones and teeth. The combination of goat's milk and calcium provides a beneficial source of nutrition for growing children, together with enzymes that aid digestion.

SUGGESTED USE: Children (age 3-7): Chew 1-2 tablets twice daily. Children (age 8+): Chew 2-3 tablets twice daily. Take preferably with food, or as professionally recommended.

Each tablet contains: Goat Milk Powder 200mg, Calcium (Phosphate) 11.5mg, Bromelain 1mg, Amylase 250mcg, Lipase 250mcg. This product contains dextrose, tableting aids and flavour.

USE BY:

Pro-life Junior

CREAMY VANILLA FLAVOUR

"healthy as a goat"
goat's milk & calcium

TEETH • DIGESTION • BONES

VALUE PACK

500 chewy tablets
dietary supplement

DO NOT USE IF LID SEAL IS BROKEN OR MISSING.
STORE IN A COOL DRY PLACE.
STORE AWAY FROM CHILDREN'S REACH.
ADULT SUPERVISION RECOMMENDED.
YEAST, STARCH & GLUTEN FREE

PURE QUALITY
GUARANTEED

NEW ZEALAND MADE

Pro-life NZ Ltd
17 Sheffield Cres
PO Box 871
Christchurch
New Zealand
PUJ-44-500CT*0

also available in
bottles of 60
chewy tablets



SCHEDULE 2



VitaFit Nutrition Ltd
 17 Sheffield Cres, PO Box 871
 Christchurch, New Zealand
 FREE (0800) 0800 358 7809
 (03) 358 7809
 www.vitafit.co.nz



FROM

USE BY:

Goat's milk is a natural food with high nutritional characteristics particularly calcium and protein. It helps support strong bones and teeth, and maintain a healthy gastrointestinal system. Goat's milk is a nourishing alternative to cow's milk for both children and adults especially those with difficulty in digesting cow's milk.

INGREDIENTS:
 Goat's MILK Powder (99%)
 Calcium Citrate (1%)

This Goat's Milk Powder has been spray dried from fresh goat's milk.

SUGGESTED USE: Mix 14g (2 level dessertspoons) with boiled and cooled water, then gradually top up to 100ml, or add to milk shake, smoothie, yoghurt or other foods. (Adult supervision is recommended for children.)

Not suitable as an infant formula or used as a sole source of infant nutrition under one year of age. Not recommended for those with lactose intolerance.

Nutritional Information	
Serving size: 14g (2 level dessertspoons)	
per 100g (353g)	
Energy	2100kJ
Protein	3.20g
Fat, total	4.20g
- saturated	2.80g
- unsaturated	1.40g
Carbohydrate, total	4.80g
- sugars	3.6g
Sodium	35mg
Calcium	240mg
	(20% RDI 120mg)

*One serving: 14g powder mixed with 100ml water

STORAGE: After opening, keep container airtight and use contents within 8 weeks of opening. Always use a clean dry spoon. Tighten the lid firmly after each use. Some settling of the powder may occur. Do not use if security seal is damaged.

STORE IN A COOL DRY PLACE
 KEEP OUT OF REACH OF CHILDREN
 NO ADDED YEAST, STARCH OR GLUTEN

