IN THE DISTRICT COURT
AT AUCKLAND

CRN-2009-004-504773
CRN-2009-004-504774
CRN-2009-004-504775

COMMERCE COMMISSION
Informant

v

HONEY NEW ZEALAND (INTERNATIONAL) LIMITED
Defendant

Hearing: 2 May 2011

Appearances: A M McClintock for the Informant
A K Rawlings for the Defendant

Judgment: 27 May 2011 at 4:00 PM

RESERVED JUDGMENT OF JUDGE A A SINCLAIR

INTRODUCTION

[1] In September 2009 the Commerce Commission ("the Commission") laid three informations under the Fair Trading Act 1986 ("the FTA") against Honey New Zealand (International) Limited ("Honey NZ"). In March 2010 Honey NZ pleaded guilty to two charges laid under s 13(j) of the FTA namely that Honey NZ made false and/or misleading misrepresentations concerning the place of origin of goods. The third charge laid under s 13(a) of the FTA was set down for a defended hearing on 2 May 2011. When the matter came before the Court on 2 May 2011 that charge was withdrawn and sentencing proceeded in respect to the remaining charges.

SENTENCING

(1) Circumstances of Offending

[2] The charges under s 13(j) of the FTA relate to representations made by Honey NZ on the labels of its royal jelly capsules ("the product"), marketed and sold as a health supplement in the company's stores in the Auckland and Christchurch regions.

[3] The first charge (CRN 4774) relates to representations made on the label of the product purchased by a Commission investigator on 29 February 2008. The second charge (CRN 4775) relates to representations made on the label of the product purchased by a Commission investigator on 26 February 2009. In both cases the label displayed the following wording and images:

(a) The words "Made in New Zealand".

(b) The statement "Honey New Zealand has over a 90 year history working with premium honey bee products gathered from the heart of untouched native forest and wild field areas of New Zealand"; and

(c) An image of an iconic New Zealand fern on the cap of the product.

[4] These representations were false and/or misleading as they implied that the place of origin of the goods was New Zealand when in fact most of the ingredients, including the key ingredient royal jelly, were sourced overseas. Indeed, the only ingredients which were sourced in New Zealand were the purified water used to combine the contents of the capsule and the capsule itself.

(2) Factors to be considered on Sentence

[5] The factors to be taken into account in arriving at an appropriate penalty under the FTA were initially set out by Grieg J, in *Commerce Commission v L.D.*

Nathan & Co. Limited[1] In *Commerce Commission v Ticketek*[2] Abbott DCJ considered the impact of the Sentencing Act 2002 and taking into account this legislation, considered that the relevant factors when imposing a penalty for breach under the FTA, would generally include the following:

- The objectives of the Act.
- The importance of the untrue statement which was made or published.
- The degree of culpability, in the context of wilfulness or carelessness, which will generally involve a consideration of the circumstances in which the statement was made or published.
- The extent to which the statement departed from the truth.
- The extent of dissemination of the statement.
- The extent of prejudice or harm (if any) to consumers or other traders which resulted from the statement.
- The attitude of the offender in respect of remorse, co-operation with the authorities, and remedial action, in particular in respect of correction.
- The importance of deterrence, both particular and general.
- The financial circumstances of the offender.
- Any guilty plea(s).
- The previous record of the offender.
- The effect of any publicity regarding the prosecution and/or the defendant's activities.
- Where there are two or more defendants, the relationship between them and the respective culpability of each of them (*which I note, is not a factor in the present case).*
- Where there are two or more charges, the totality principle.

---

[1] [1990] 2 NZLR 160 at 165.
[2] Unreported, Christchurch District Court, June 2003

(3) Application of these Factors

[6] As Abbott DCJ noted in *Commerce Commission v Ticketek*, it is self evident that the purpose of regulatory legislation will always be a relevant factor when imposing a penalty for an offence created by that legislation. The FTA is particularly designed to create an informed market place where consumers are in a position to make decisions fully informed and aware of their options.

[7] Each of the representations made on the label reinforced the impression that this was a product originating in New Zealand. This country's royal jelly is believed to be of a higher quality than imported royal jelly because it has higher readings of the active ingredient 10 HDA than found in royal jelly in many other parts of the world. The country of origin is therefore of particular importance to customers in assessing the quality of the product.

[8] In an interview with the Commission held on 23 July 2008 the director of Honey NZ Mr Mathew Pringle stated that:

- Honey NZ was aware that six out of eight ingredients in the royal jelly were sourced from China;
- Honey NZ had inherited the labels and promotional material for its royal jelly from the company that sold its assets to Honey NZ in September 2006;
- That while 6 of the 8 ingredients of Honey NZ's royal jelly were sourced from China, the product was actually put together in New Zealand and was therefore justified in using the labels, as he considered that New Zealand is where the product got its essential character, based on New Zealand Food Safety Authority Guidelines (among others); and
- Honey NZ was willing to change the labelling of its royal jelly product to comply with the Act.

[9] The Commission says that Honey NZ was solely responsible for how its product was marketed. The company saw the advantages of using a marketing angle

that implied that the product originated in New Zealand and made the decision to use the labels inherited from the vendor company irrespective of their content. The Commission submits that in all the circumstances that conduct must be considered at least to be reckless.

[10] Honey NZ strongly disputes this assessment of its culpability. It says that the company relied upon a publicly available guideline and other information and that Honey NZ reached an erroneous view in reliance upon this guideline as to the extent of its legal obligations. The company says that at worst it was careless.

[11] Honey New Zealand submits that the circumstances of its offending are similar to those in *Commerce Commission v Knight Business Furniture Limited*[3]. In that case the defendant company was involved in the manufacture and sale of office chairs. The chairs were built in New Zealand but with major components manufactured in Taiwan, China and Italy to the company's specifications. The only parts that were made in New Zealand were the upholstery and padding to the seat and back. The imported parts were assembled in New Zealand. In that case, the company relied upon a booklet published by the Commission containing recommendations by the Commission as to how to represent the origin of goods. The company took a risk that its own interpretation of the Commission's guidelines was able to be justified. Ongley DCJ found that the offending in that case was not wilful but instead, was careless in that the defendant had adopted a favourable interpretation of the guidelines and did not seek professional advice.

[12] In the present case, sentencing proceeded on the basis of the summary of facts and counsels' submissions. I was also provided with a copy of the guideline relied upon by Honey NZ. This document was a poster published by Food Standards Australia New Zealand. In small print it is stated that "*This poster has been produced as a guide to consumers only. Industry and enforcement agencies should refer to the Food Standards Code*".

[13] In *Knight* the company relied on a Commission pamphlet. In the present case, I do not consider that it was reasonable for Honey NZ to rely upon a poster

[3] DC, New Plymouth CRN 06043500833-40, 21 November 2007 Ongley DCJ

stated as being for consumers only and containing a specific direction that those involved in the industry should refer to the Food Standards Code. In the face of such a direction, Honey NZ made no further effort to ascertain its legal obligations in relation to the country of origin description. Having turned its mind to the issue I consider that the company was reckless in then not making proper inquiry or taking legal advice to determine those obligations.

[14] In my view the statements made on the label departed significantly from the truth. The overall impression created by the three representations was of a product which was wholly made in New Zealand when in reality, it was only the water and capsule itself which were New Zealand sourced. As such the label led consumers to believe that they were buying a superior New Zealand made product when in fact they were not.

[15] The product was not a key component of the business of Honey NZ. Between 1 April 2007 and 23 July 2008 the wholesale value of the product supplied for resale was approximately $161,615.48 (excluding GST). The company ceased distribution of the capsules immediately after being put on notice of the Commission's concerns regarding labelling but left remaining stock in shops to be sold. I accept that overall, the extent of prejudice or harm to consumers as a consequence of the company's conduct was relatively low.

[16] It is acknowledged that the principle of deterrence is important in any sentencing under the FTA. In this case that deterrence is of a general nature only in view of the fact that Honey NZ has ceased distribution of royal jelly products. It is necessary however to reinforce to manufacturers/suppliers that they cannot misrepresent the true origin of a product.

[17] Honey NZ co-operated fully with the Commission in its investigation and entered guilty pleas to the two charges at an early stage. The company has never been warned by the Commission or previously convicted. Its financial position is such that it is able to pay a fine.

Relevant Cases

[18] Each case under the FTA will largely turn on its own facts. However I have helpfully been referred to a number of cases involving charges brought by the Commission relating to the marketing of royal jelly products and in particular, in relation to representations made as to the country of origin of the royal jelly.

[19] In *Commerce Commission v Natural Care Products Limited*[4] the defendant company entered guilty pleas to two charges under s 13(j) of the Act. The charges arose roughly one year apart and related to different labels containing misrepresentations about the country of origin. A warning was given to the company after the first offending. In terms of the degree of culpability, Watson DCJ found that the company was endeavouring to take advantage of New Zealand's clean green image. He classified this as deliberate conduct by the company. He did not consider that the conduct was careless but was not prepared to put it as high as being reckless. The Court adopted a starting point of $9,000 on each charge and allowed different discounts for the guilty pleas. A total fine of $15,000 was imposed.

[20] In *Commerce Commission v Shim's International Limited*[5] Cunningham DCJ sentenced the company on two charges under s 13(j) of the FTA. Again, the misleading misrepresentations related to the country of origin of the defendant's royal jelly product. Cunningham DCJ did not accept the conduct of the company was anything higher than careless. The company had been spoken to earlier about claims it had made as to the quantity of 10 HDA in its royal jelly product however the country of origin claims had not been addressed by the Commission at that time. In that case, Her Honour adopted a starting point of $7,500 and reduced that to one fine of $6,000 overall to take into account both the early guilty pleas and the fact that there were two charges before the Court.

[21] In *Commerce Commission v NZ Korea Health Limited* and *Sang Rae Kim*[6] Cunningham DCJ sentenced the defendant company on nine charges including six

---

[4] Auckland District Court CRI-2009-004-18045 4 May 2010 Watson DCJ
[5] Auckland District Court CRI-2009-004-1844 27 May 2010 Cunningham DCJ
[6] Auckland District Court CRI-2009-004-18035 29 September 2010 Cunningham DCJ

relating to country of origin claims and Mr Kim on two charges one of which related to country of origin.

[22] Her Honour found that Mr Kim (and therefore the company) must have known that the royal jelly was not sourced in New Zealand and considered that the defendants' offending was deliberate. A discount of one third was given for the defendant's early guilty pleas and an uplift was imposed in respect of Mr Kim for previous convictions on FTA offences. A further reduction was given to take into account the financial circumstances of each defendant. The company was ordered to pay a total of $16,000 and Mr Kim $12,000.

[23] In *Commerce Commission v Sung Yub Paik*[7] Mr Paik pleaded guilty to two charges under s 10 of the FTA one of which related to country of origin claims made in relation to royal jelly products produced by Mr Paik's company. Mr Paik had been aware that the royal jelly used in his company's products was sourced overseas and was responsible for the design and wording and of the labels. The Court found that his offending was deliberate. Mr Paik had pre-printed the packaging for his product and did not want to destroy it. The Court considered that this conduct suggested a level of knowledge of the errors in the packaging and that a deliberate decision had been taken by Mr Paik to use the erroneous packaging.

[24] The Court adopted a starting point of $7,500 on each of the charges. A discount of 15% was allowed for the guilty pleas entered at a late stage. Mr Paik was fined $6,375 on each information.

[25] Honey NZ submits that the culpability of the offenders in each of those cases was more serious than that of Honey NZ and contends that the most appropriate authority in relation to its offending is *Knight*. For the reasons which I have already set out I am of the view that the culpability of Honey NZ was greater than the culpability of the company in that case.

---

[7] Auckland District Court CRN-1000-4506466 21 December 2010 Davis DCJ

(3) Decision on Sentence

[26] Taking into account the above sentencing factors (including the totality of the offending) and cases to which I have been referred, I adopt as a start point an aggregate penalty of $16,000.

[27] Calculated in accordance with *Hessell*[8] I allow a discount of 5% for Honey NZ's co-operation with the Commission and previous history of no convictions or warnings under the FTA. I then allow a further discount of 25% for the company's early guilty pleas on these charges.

[28] Accordingly, on each charge, Honey NZ is convicted and fined $5,700 and ordered to pay Court costs of $132.89.

COSTS ON WITHDRAWAL OF INFORMATION

[29] Honey NZ has applied for costs following the withdrawal of information CRN 4773 under section 5 of the Costs in Criminal Cases Act 1967("CCCA") and Regulations, as follows:

(i) Appearance at status hearing $113;

(ii) Appearance for adjournment trial date at defendant's request (19 August 2010) $113;

(iii) Appearance for allocation of trial date at Courts request (26 October 2010) $113;

(iv) Disbursements reasonably and properly incurred being the cost of enquiries and scientific investigations and tests $7,649.50.

[30] In addition, pursuant to s13 of the CCCA Honey NZ also claims a contribution towards its total legal costs of $61,589.35 (inclusive of GST) incurred by it in relation to the withdrawn information.

---

[8] [2011] INZLR 607

(1) Background to the Application

[31] It is alleged in the information that Honey NZ supplied royal jelly capsules and represented on the label that the content of 10 HDA contained in the capsules was 11% ("the labelling charge"). It was further alleged that the representation was false and/or misleading in that testing by ESR confirmed that the 10 HDA contained in the capsules was in fact 0.47% ("the composition charge").

[32] Disclosure was provided to Honey NZ by the Commission's solicitors Meredith Connell under cover of a letter dated 14 September 2009. In relation to the composition issue the Commission disclosed two ESR reports of testing which had been carried out on Honey NZ's product in November 2008 and April 2009.

[33] By letter dated 22 February 2010 the solicitors for Honey NZ Minter Ellison advised the Commission in relation to the labelling charge that the company considered its product label represented that each 1,000 mg capsule contained 11 mg of the active ingredient 10 HDA or 1.1% and not 11% as the Commission alleged.

[34] Minter Ellison wrote again on 18 March 2010 advising the Commission in relation to the composition charge that Honey NZ had commissioned independent testing of its product by the Cawthron Institute. That testing had included both the gelatine capsule and the capsule content (whereas the ESR testing had tested the capsule content only). That testing had revealed that the percentage of 10 HDA contained in the company's capsules exceeded the level that Honey NZ considered it had represented on its packaging that each capsule contained.

[35] Honey NZ say that if the Commission had accepted at this time that the ESR testing was flawed or had commissioned testing of the gelatine capsule and its content then the company may have been required to face only the labelling charge and the composition charge might have been withdrawn at that stage.

[36] In their letter of 18 March 2010 Minter Ellison declined to provide the Commission with a copy of the testing noting that Honey NZ was under no obligation to do so until 14 days before the hearing. The letter went on to state that

Honey NZ was confident of its ability to defend the Commission's allegations on the basis of the testing it had conducted.

[37] Meredith Connell replied by letter dated 26 March 2010 stating that while Honey NZ was under no obligation under the Criminal Disclosure Act 2008 to provide the Commission with a copy of its testing at that time:

> "In the circumstances your client cannot realistically expect the Commission to act in any way upon testing that it has not sighted. Further, the fact that your client says it has test results that support that it is not guilty of the offending, but at the same time has declined to provide the results to the Commission, will be a relevant factor in any subsequent costs application in relation to this prosecution brought by either party".

Meredith Connell went on in the letter to again invite Honey NZ to provide the test results.

[38] In the meantime the Commission on 19 March 2010 instructed ESR to conduct further testing of Honey NZ's product. Mr Fa'amoana Fa'atupua Pa'o deposed that on 26 March 2010 he and other Commission staff met with scientists from the ESR to discuss retesting the product. The ESR was specifically asked to test both the capsule content and the capsule itself. On 13 April 2010 Mr Pa'o further deposed that a report was received from ESR which showed a test result of 0.32%. Mr Pa'o understood from the report that the testing had included both the product capsule and content. He further stated that he considered that the report in fact strengthened the case against Honey NZ. Regrettably as a result of an oversight this second report was not provided to Meredith Connell or to Honey NZ.

[39] The matter was to proceed to a defended hearing on 20 September 2010 but was adjourned at the request of Honey NZ. On 23 August 2010, Meredith Connell again wrote inviting Honey NZ to provide its report to the Commission. On 20 October 2010 the hearing was further adjourned at the Court's request to 2-3 May 2011.

[40] Mr Pa'o deposed that in January 2011 when enquiries were made by Meredith Connell as to the position regarding further testing, he realised that he had failed to disclose the second ESR report. Having provided that report to Meredith

Connell the Commission was asked to make follow up enquiries with ESR as to the methodology used in respect of the second report. The scientist who had conducted the testing had by this time left ESR. When he was eventually contacted, he was unable to confirm whether the testing had included both the capsule and content as requested. In view of the unsatisfactory position, the ESR was instructed to urgently retest the product.

[41] The third report showed that the level of 10 HDA present in the capsule and content was a total of 7.4 mgs which equated to 0.7% per capsule. However, Mr Pa'o deposed there were issues that arose with regard to the validity of the testing and other matters which could not be satisfactory resolved particularly as by this time both samples had passed their expiry date. Accordingly, having considered the results, the Commission reached the view that it could no longer rely on the ESR testing as a basis for supporting the composition charge and instructed Meredith Connell to advise Minter Ellison accordingly.

[42] On 15 February 2011 Professor Todd from the University Otago had been asked for her expert opinion on the implied level of 10 HDA represented on the label of Honey NZ's product. Professor Todd's opinion was received on 4 April 2011. Her opinion did not proceed beyond the draft stage. In light of the outcome of the ESR testing, the Commission also moved to reconsider the label charge. Mr Pa'o deposed that while the Commission remained of the view that the representation made was liable to mislead, it questioned the utility of proceeding to a defended hearing in circumstances where the product had now been withdrawn from distribution. He went on to say that an alternative charge under s 10 of the FTA was considered but the Commission decided in fairness to Honey NZ not to amend the charge or to lay any alternative charge. Accordingly, on 5 April 2011 Meredith Connell advised Minter Ellison that the Commission would be seeking leave to withdraw the information.

(2) Consideration of Application

[43] Section 5(1) of the CCCA provides that where, as in this case, there has been a withdrawal of a charge, the Court may order that a defendant be paid such sum as it

thinks just and equitable towards the cost of his or her defence. Without limiting or affecting the Court's discretion, s 5(2) states that the Court shall have regard to all relevant circumstances and in particular, where appropriate, the circumstances set out in that sub-section. In the present case, Honey NZ submits that the particular circumstances under s 5(2)which are relevant are:

(i) Whether the prosecution took steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty (s 5(2)(c));

(ii) Whether generally the investigation into the offence was conducted in a reasonable and proper manner (s 5(2)(d));

(iii) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards to the cost of his defence (s 5(2)(g))

In its written submissions, Honey NZ also raised whether the prosecution had acted in good faith in continuing the proceedings (s 5(2)(a) however this ground was not pursued at the hearing. I turn now to consider each of these circumstances:

(i) That the Commission did not take proper steps to investigate evidence which suggested that the defendant may not be guilty.

[44] In the letter of 18 March 2010 Minter Ellison declined to disclose the testing but went on to say that the results had been achieved after testing both the gelatine capsule and content. While continuing to request the copy of the testing by Cawthron Institute, the Commission did in fact instruct ESR to carry out further testing. The Commission's instructions were to complete testing of both the capsule and content. Mr Pa'o deposed that the results subsequently received supported the Commission's case.

[45] It is unfortunate that as a result of human error the second report was not provided to Minter Ellison but I did not consider that there are grounds for criticism that the Commission did not take proper steps to investigate the validity of the ESR test results having been given notice by Minter Ellison of the results of Honey NZ's independent testing.

[46] When the second report was focussed upon in preparation for the defended hearing, there was uncertainty as to the basis on which the testing was undertaken. The Commission immediately made inquiries of ESR and a further report was obtained as promptly as possible.

(ii) That the investigation was not conducted in a reasonable and proper manner

[47] The only ground for criticism is that relating to the failure by the Commission to disclose the second ESR report. As previously noted, it is accepted that this error was inadvertent. Furthermore, it did not specifically relate to aspects of the investigation so much as to the management of the litigation process.

[48] Having considered the steps taken by the Commission set out in the affidavit of Mr Pa'o I am otherwise satisfied that the investigation was conducted in a proper and reasonable manner.

(iii) The Conduct of the Defendant

[49] Honey NZ submits that an award of scale costs is justified by the company's responsible conduct in relation to the acts upon which the Information was based and in relation to the investigation which preceded the laying of the composition charge including:

(i) its full co-operation with the Commission's investigation;

(ii) ceasing distribution of royal jelly products to retailers and therefore having to dispose of product with a wholesale value of approximately $12,000.

(iii) promptly retaining an expert for independent testing of Honey NZ's product and summarising that testing for the Commission before it had entered pleas in Court;

(iv) preparing expert evidence for trial in expectation that the Commission intended to rely upon evidence provided on disclosure.

I accept that overall Honey NZ acted responsibly in relation to the investigation and subsequent prosecution.

(iv) Other Circumstances

[50] The meaning of s 5(2)(g) of the CCCA has been the subject of considerable judicial consideration in particular as to whether the sub-section contemplates behaviour of the defendant that would tell against an award of costs as being relevant, or whether only conduct that would support an award of costs can be taken into consideration.

[51] Whether or not both types of conduct are considered under s 5(2)(g) the Court is required in any case to have regard to all relevant circumstances in determining whether it is just and reasonable to make an award of costs.

[52] In the interview with the Commission on 23 July 2008 Mr Pringle stated that the number 11 on the label was the percentage of HDA in the product. In the letter from Minter Ellison dated 22 February 2010 Honey NZ stated that the representation was that the capsules contained 11 mg of 10 HDA to 1,000 mg or 1.1% of total content. The Commission submits that it should not be responsible for the cost of the Cawthron Institute testing because it could be expected that a supplier would have carried out its own tests and be aware of the content of its product before distributing it to retailers.

[53] Secondly, Honey NZ was invited on more than one occasion to disclose the test results. While it was not under any obligation pursuant to the Criminal

Disclosure Act 2008 to do so, the company was put on notice that its failure to provide the results would be a matter raised on any application for costs.

[54] The costs of an expert were awarded on withdrawal of an information in *Craig v Police*[9]. In that case Mr Craig received an infringement notice for failing to drive his car on the left hand side of the road. In preparation for his defence, he obtained a report confirming frosty road conditions which necessitated his driving towards the middle of the road. He recovered the costs of that report when the information was withdrawn.

[55] The situation differs here where the expert report is required as to the company's own product. I agree with the Commission's submission that in respect to prosecutions under the FTA where a manufacture or supplier is charged in relation to representations made about its product particularly as to percentages of particular ingredients, it is reasonable to expect that test results will be available. Where testing has to be undertaken then it is a cost for which the company ought to be responsible.

(3) Decision on Costs

[56] After careful consideration and weighing up all relevant circumstances, I am of the view that this is not a case where it is just and reasonable to make any award of costs to Honey NZ towards that company's defence in relation to the withdrawn information. Accordingly the application by Honey NZ for costs under s 5 of the CCCA is declined. In these circumstances, it is not necessary for me to consider the company's application for increased costs under s 13 of the CCCA.

A A Sinclair
District Court Judge

On 27 May 2011 (2011)
Reserved Decision delivered by me pursuant to Section 68 (3) of the Summary Proceedings Act 1957.

P.J.B.F. AKERSTEN
DEPUTY REGISTRAR
DISTRICT COURT
AUCKLAND
(4.48 pm)

[9] HC Christchurch CRI-2004-409-115, 30 September 2004