

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2015-004-011471  
[2016] NZDC 16106**

UNDER	FAIR TRADING ACT 1986
BETWEEN	THE COMMERCE COMMISSION Prosecutor
AND	FROZEN YOGHURT LIMITED Defendant
AND	YOGHURT STORY NEW ZEALAND LIMITED Defendant

Hearing: 17 August 2016

Appearances: Mr J Dickson with Mr JG Donkin for  
No Appearance for the Defendant Companies in Liquidation

Judgment: 17 August 2016

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**RESERVED DECISION OF JUDGE D J SHARP**

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**Introduction**

[1] The defendant companies are in liquidation. I today received copies of email correspondence from the liquidators of both companies consenting to the continuation of the proceedings. The Commissioner alleges that the defendants, being in trade, have:

- (a) engaged in conduct that was liable to mislead the public as to the nature or characteristics of the produce, contrary to s 10 of the Fair Trading Act 1986 (the Act);
- (b) made false or misleading representations that the goods were a particular kind, standard or quality, contrary to s 13(a) of the Act;

- (c) made false or misleading representation that goods had certain performance characteristics, uses or benefits, contrary to s 13(e) of the Act.

[2] There are 19 representative charges under s 13(a) relating to “Yoghurt” website representations. These charging documents relate to Frozen Yoghurt Limited and are numbered CRN ending 4391 through 4409 (inclusive). The charging documents referred to above all are representative charges. As regards to s 10 “Yoghurt” website representations in the alternative there are 19 representative alternative charges these are numbered CRN ending 4411 through to 4430 inclusive. The s 10 alternative representations are preferred and the evidence supporting the charges which I will refer to in more detail is accepted as proof of the alternative charges. Accordingly the 19 charges first referred to with regard to s 13(a) are dismissed.

[3] There are 20 s 10 charges in relation to in-store representations. These are representative charges they are contained in CRN ending 4347 to 4365 inclusive. These charges are found to be proven to the requisite standard. The evidence in relation to the charges is referred to below. As regards the s 10 allegations regarding specific purchases, there are 15 specific charges relating to in-store representations at differing locations of sale. These are contained in CRNs ending 4431 through to 4447 inclusive. These charges are proven to the required standard, the material supporting the charge is referred to below.

[4] There are a number of s 13(e) charges. These relate to website health benefit claims, these are representative charges, contained in CRNs 4455, 4456, 4457, 4459 and 4461. In the alternative s 10 charges are contained in CRNs 4465, 4467, 4469, 4471 and 4472. The alternative representative charges under s 10 are found to be proven and accordingly the s 13(e) charges are dismissed. The evidence supporting the s 10 alternative charges is referred to below.

[5] Charging documents relating to Frozen Yoghurt Limited as regards Yoghurt Story New Zealand Limited are contained in s 13(a). Section 13(a) charges concerning “Yoghurt” website representations referred to in 16 charging documents,

CRN 4475 through to 4491 inclusive. These are representative charges, in the alternative under s 10 – “Yoghurt” website representations bring 16 alternative charges contained in CRNs documents 4493 through to 4510 inclusive. The s 10 charges are found to be established to the requisite standard. The evidence supporting the charges is referred to below. The s 13(a) charges will be dismissed.

[6] Section 10 in-store representations, there are 16 representative charges contained in CRN 4446, 4448, 4449, 4451, 4453, 4454, 4458, 4460, 4462, 4463, 4464, 4466, 4468, 4473 and 4474. The charges are found to be proven to the requisite standard. The evidence supporting the charges is referred to below.

[7] There are s 10 specific purchases. There are 15 in-store representations that the product was Yoghurt. The charges under s 10 charges contained in CRN 4511, 4512, 4513, 4515, 4516, 4517, 4518, 4519, 4520, 4521, 4522, 4523, 4524, 4225, 4529 are found to be proven to the requisite standard in relation to in-store representations. The evidence supporting the charges is referred to below.

### **Website Health benefit claims**

[8] There are 5 representative charges contained in charging documents under s 13(e) in CRNs ending 4530 to 4534 inclusive. These relate to website representations about health benefits, in the alternative there are 5 representative charges under s 10 in relation to website health benefit claims. These are contained in charging documents under CRN 4579 through to 4583 inclusive. The s 10 charges are found to be proven to the requisite standard and the evidence in respect of the claims is referred to below. The charges under s 13(e) are dismissed.

### **Background**

[9] The defendants in this company are two inter-related companies that together owned, operated or license “Frozen Yoghurt” restaurants throughout New Zealand under the brand “Yoghurt Story”.

[10] The prosecution arises from two misleading representations made by the defendant.

- (a) First, that the product the defendants sold in “Yoghurt Story” branded stores was yoghurt when it was not; and
- (b) Second, that the product the defendants sold in “Yoghurt Story” branded stores had certain health benefits, when it does not.

### **Evidence**

[11] The Commission relies on the evidence of 4 witnesses:

- (a) Dr Phillip Gendle an expert in marketing and a senior research fellow in the department of Marketing at the University of Otago;
- (b) Dr Pramod Gopal, an expert in probiotics and prebiotics and their application in human health. Dr Gopal is a science group leader in the food and nutrition science group of the New Zealand Institute for Plant & Food Research Limited, a Crown research institute;
- (c) Christopher Green, a technical manager, micro biology, employed by Eurofin NZ Laboratory Services Limited, a facility which analysed the defendants product;
- (d) Richard Morgan, a senior investigator with the Commission.

[12] Briefs of evidence for Dr Gendle, Dr Gopal and Mr Green were produced by Richard Morgan the investigator who provided evidence for the Commission for proof of the Commission’s case.

[13] In summary Dr Gendle’s expert evidence is that:

- (a) Frozen Yoghurt is typically marketed as a healthy alternative to ice cream or other deserts.

- (b) Frozen Yoghurt as a product description does not have the characteristics of a “trade puff” or an overt marketing angle. This means that consumers will interpret the advertising as follows:
  - (i) That it is real yoghurt and that it meets some sort of technical specifications to be called that; or
  - (ii) Although they may not assume that it is exactly the same as “real” yoghurt, they will assume it to be similar enough to “real” yoghurt that it has not lost its essential character as “real” yoghurt.

[14] These suggested assumption are further supported by:

- (a) The phrase “frozen” yoghurt is simply a noun describing a product. There is therefore no reason why consumers would interpret “frozen yoghurt” as anything other than in a literal sense: real yoghurt in a frozen form; and
- (b) The branding and logo use by the defendants, and the website representations which reinforce this conclusion. That is because the branding elements emphasise the word “yoghurt”, and the website describes the product as “yoghurt” or associates frozen yoghurt with the benefits of “real” yoghurt.

### **Dr Gopal**

[15] Dr Gopal’s evidence discusses the application of the requisite standard to yoghurt and the results of the product testing when compared to that standard. Dr Gopal also addresses how yoghurt can be made, the use of yoghurt powder, and how the defendants made their product (based on a hand book) which was distributed to all retail stores. Finally his evidence assesses the health claims made on the website against the body of relevant scientific literature.

[16] In summary, Dr Gopal’s expert evidence is that:

- (a) Standards define and set the compositional requirements for fermented milk, including yoghurt. To meet the definition of yoghurt as set by the standard, the product must:
- (i) Be a fermented milk product, where fermentation has been carried out with the lactic acid producing micro organisms;
  - (ii) Have a minimum of 30g of crude protein per kilogram;
  - (iii) Have a maximum pH level of 4.5; and
  - (iv) Have a minimum of 10 colony forming unit of bacteria per gram.
- (b) The 17 samples were taken from 8 different yoghurt stores, on 4 different dates, this means that the chances that the results of testing not being representative of the product are very low;
- (c) Of the 17 samples 15 did not meet all 4 criteria as required by the standard. This means that the defendants product cannot be defined as “yoghurt” according to the standard.
- (d) The recipe used by Yoghurt Story stores includes mixing yoghurt powder with milk, water and fruit paste. It is not clear how many colony forming units of bacteria are present in the powder, but the prescribed process calls for mixing the ingredients and shifting them immediately to the soft serve machine, which would leave little time for rehydration and the activation of any freeze dried bacteria;
- (e) Pouring the mixed product into a soft serve machine may reduce the level of bacteria in the product, because the addition of air during the whisking, sheering force and damage from the freezing process;
- (f) It is not clear whether the yoghurt powder used in Yoghurt Story stores contained insufficient bacteria, or if the defendants failed to add

stabilisers to protect the bacteria from damage during the freezing process. Either way, following the recipe resulted in a product that contained insufficient levels of colony forming bacteria to meet the standard for yoghurt;

- (g) Strong and credible evidence, derived from well designed chemical trials, is required before claims can be properly made about the health benefits of a food product. The health claims on the website are not supported by robust scientific evidence, and are therefore unjustified and misleading to the consumer.

### **Christopher Green**

[17] Mr Green's evidence relates to the Auckland laboratory operated by Eurofin NZ Laboratory Services Limited. In summary, his evidence is that:

- (a) The laboratory is accredited to NZ ISO – IEC 17025: 2,000 across multiple defined testing programmes;
- (b) It received the product samples from Richard Morgan on 4 different dates and conducted a series of tests on those samples;
- (c) Eurofin NZ Laboratory Services Limited produced a series of reports that set out the results of those tests and which form the basis for Dr Gopal's analysis referred to above.

### **Richard Morgan**

[18] Mr Morgan's evidence concerns the Commissions investigations including:

- (a) The capture of the health claims and other representations on the website.
- (b) The relationship between the defendants and how they operate the business.

- (c) The purchase of 17 product samples from 8 different Yoghurt Story stores in 2014 and the delivery to the testing laboratory and
- (d) Correspondence for the defendants interviews of representatives of Yoghurt Story in March 2014 and June 2015;
- (e) Obtaining information from the defendants concerning the methods used in respect of the provision of the product.

### **Elements of the charge**

[19] In relation to s 10 the prosecution must prove there is misleading conduct in relation to goods the act provide “*no person shall, in trade, engage in conduct liable to mislead the public as the nature, manufacturing process, characteristics suitability for purpose or quantity of goods*”. The Commission has proved that:

- (a) The defendants are persons within the meaning of the Act;
- (b) The defendant companies were in trade as defined in s 2 of the Act and
- (c) Were engaged in conduct that was liable to mislead the public as to the nature or characteristics of goods and namely the frozen yoghurt.

[20] In this case I consider that the material provided by the prosecution albeit by way of formal proof is sufficient to establish the elements under s 10 of the Act. I have dismissed the charges under s 13 as I see the representations to be inherent in misleading conduct as set out in the elements of s 10.

[21] In coming to the conclusion that the charges have been established as required I have taken into account the interviews that were given by the defendant. There are certain contradictions within the interviews which inclines me to the view that not only has the prosecution proved its case on a formal basis but that the material provided by the defendants in terms of their interviews supports the prosecution in the establishment of its case.



[22] Accordingly having found the s 10 charges proved in all cases to the standard of beyond reasonable doubt the defendants will be convicted and a date will be allocated for sentencing. I ask that the prosecution provide written submissions in advance to assist with identification of appropriate penalties. I also direct that a copy of this decision be forwarded to the liquidator in respect of each of the defendant companies. I would be grateful if the prosecution could also assist to ensure the liquidators have this decision as soon as possible.



D J Sharp  
District Court Judge