IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-002886
[2016] NZDC 9291

COMMERCE COMMISSION
Prosecutor

v

YUN QIANG HOU
NANGONG LIMITED
Defendants

Hearing: 20 May 2016

Appearances: A McClintock for the Prosecutor
P Finau for the Defendants

Judgment: 20 May 2016

NOTES OF JUDGE A-M J BOUCHIER ON SENTENCING

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[1] The defendant company and the defendant face a number of charges which have been prosecuted by the Commerce Commission and the charges are as follows. For the company there are four charges under s 13(a) of the legislation, meaning a false or a misleading representation, packaging and labelling of alpaca duvets, making a false or misleading representation that goods were of a particular kind, quality or composition. The company faces four charges of that. Mr Hou faces one charge of that. Then the company faces three charges under s 13(j) of the Act, false or misleading representation as to packaging and labelling of alpaca duvets, made a false or misleading representation concerning the place of origin of the goods, the company facing three such charges and Mr Hou three such charges. And then under s 13(a) false or misleading representation, making a false or misleading representation that goods were of a particular kind, quality or composition, the company has one charge. And in respect of the company again under s 13(a), making

a false or misleading representation that goods were of a particular kind, quality or composition, the company has two charges.

[2] The matters are further complicated by the fact that there are charges which predate the increase in penalties prescribed by Parliament and post-date the increase of penalties prescribed by Parliament. So in respect of the company facing 10 charges, there are six charges which predate the increase in penalties and four charges which date post the increase in penalties. In respect of the defendant Mr Hou, there are two charges pre the increase in penalties and two charges post the increase in penalties.

[3] The summary of facts which has been supplied to the Court and to which each of the defendants, being the company and Mr Hou, have pleaded guilty is as follows. The charges cover the period of 1 January 2014 to 30 September 2014. All charges, except charges in relation to specific representations made by an employee, are charged in three months' intervals. Then it is set out the retail sale of duvets, alpaca duvets are marketed as being a superior product to sheep wool duvets and, similarly, the same can be said of products made in New Zealand as perceived to be of superior quality.

[4] The company imports alpaca duvets, amongst other things, from the defendant Hou's sister's company in China. The duvets are imported in largely complete form and require only edge and label sewing in New Zealand. Some arrive fully completed. Nangong supplies its alpaca duvets to three main retailers, whose names are set out, and the operations of that company, Nangong, it is a family business largely run by Mr Hou.

[5] Previous Commission involvement is then set out. In October 2011 the Commission spoke with Mr Hou about the wool content in duvets, especially alpaca duvets, and provided educational material in Mandarin on country of origin, content and labelling representations. And in June 2012, as a result of a complaint, Mr Hou was spoken to by the Commission about false and misleading representations regarding country of origin. Mr Hou was interviewed by the Commission on 3 September 2013 about country of origin representations. A compliance advice

letter was sent to Mr Hou and at the time the labels at that time correctly stated that rugs were made in Peru but the company staff were alleged to have made a series of verbal representations including that the duvets were made in New Zealand from New Zealand snow alpaca.

[6] On 17 October the Commission sent a "Please explain" letter concerning labelling of alpaca wool duvets and on 19 November 2013 in relation to all of the issues above dealing with general compliance, a compliance advice letter was sent which provided relatively extensive compliance advice on the need for labelling accuracy. Therefore, in the submission of the Commission, there was a long history of warnings.

[7] The summary of facts then sets out the packaging and labelling misleading representations. During the charge period the company Nangong made a number of different misrepresentations as to the composition and origin of its alpaca duvets including on a rectangular label on the corner of each duvet which represented that the duvets contained alpaca wool and that they were made in New Zealand. Secondly, a small square label sewn into the seam of the duvet with the words "Made in New Zealand". Thirdly, embossing on the outer covering of the duvet. The embossed print was an alpaca figure surrounded by silver ferns and the words "New Zealand alpaca" repeated numerous times over the duvet. Fourthly, the external packaging of the duvet used words such as "Pure wool alpaca" in a box saying "Alpaca ticked" or "Alpaca wool duvet", "Made in New Zealand" or "Made in New Zealand from local and imported ingredients". From around August 2014 and after interaction with the Commission, Nangong changed some of its corner labels to state "Alpaca duvets contain 20 percent alpaca" but no changes had been made, however, to the actual composition.

[8] Invoices. Between 1 April 2014 and 30 September 2014 Nangong issued invoices to retailers for duvets supplied to them for resale representing that the duvets were alpaca.

[9] Oral representation. On 26 March 2014 a Commission employee covertly purchased a duvet from Mr Kevin Hou in his capacity as an employee of Nangong.

The label stated it was alpaca wool and alpaca wool filling. Mr Kevin Hou told the purchaser the labelling was incorrect and that the content was in fact 20 percent alpaca.

[10] Purchases. Between March and September 2014 the Commission purchased five duvets from different retailers that had been supplied by Nangong. The duvets made various representations earlier described which in general were that they contained alpaca wool, that the alpaca wool came from New Zealand alpacas, and that they were made in New Zealand.

[11] Testing. Between August and September 2014 the Commission tested five alpaca duvets. Of these, they were independently tested and none contained any alpaca wool, they were all sheep wool. On being advised of this Nangong itself engaged a company in China to test two sample results. Those duvets contained 4.2 and 13.6 alpaca wool in circumstances where extra alpaca wool had been added.

[12] Then the summary of facts sets out unlawful gain and that is set out between March 2013 and August 2014 the number of duvets being imported and it is set out in a table the gains that the company made. There were 657 established instances of supply but in fact the Commission submits that there were greater figures than that.

[13] Further, the Commission says in the summary that there was a detriment to retailers and end consumers plus a broader detriment because offending of this type is likely to harm competitors and consumers were buying credence goods and the potential breach of trust in this case was significant because of the significant premium attaching to New Zealand made products in tourist shopping markets.

[14] The defendant made statements initially declining to be interviewed but then making two voluntary statements, and it is set out there what was said in the statements.

[15] Photographs have been attached to the summaries of fact as well which support what is said in the summary of facts.

[16] I have then had both oral and written submissions from the parties. There has been considerable discussion about the way start points should be considered and also the Commission has of course supplied to the Court details of previous cases and, in particular, *Commerce Commission v Wild Nature NZ Ltd & Sung Ho Park*, *Commerce Commission v Prokiwi International Limited* DC Christchurch CRI-2010-009-009397, and also *Commerce Commission v Hyeon Company Ltd & Han Young Chae & Premium Alpaca New Zealand Ltd* DC Rotorua CRI-2012-063-004546, CRI-2012-063-004462, CRI-2012-063-004468 and including the judgment of Duffy J in the High Court in respect of the appeal of that.

[17] So in submissions it is set out what the defendants' conduct were during the charge period; the company making a number of representations as to the composition and country of origin of the duvets, Mr Hou personally sewing the offending labels on to the duvets, the invoices and the oral representations which have already been traversed by me in dealing with the summary of facts.

[18] The purposes and principles of sentence are then referred to and the aggravating features. The Commission notes the object of the Fair Trading Act which is designed to protect the interests of consumers by prohibiting unfair conduct in trade, the importance of any untrue statement made, and the Commission submits that products made in New Zealand are perceived to be of a superior quality, particularly in the tourist market, similarly alpaca duvets are marketed as superior to sheep wool duvets.

[19] The Commission then deals with the degree of wilfulness or carelessness and submits that the misrepresentations were deliberate and systematic and continued despite Mr Hou having been cautioned on previous occasions. The extent to which the statements depart from the truth; the Commission says that they were entirely untrue. The degree of their dissemination; it was primarily in Auckland which is a major tourist destination and then of course abroad when tourists return home with the products there is the resulting prejudice to consumers which the Commission submits is significant. The efforts made to correct; the Commission submits that the defendants did not make any efforts to correct the false statement during the offence period. And the need to impose deterrent penalties; those deterrent penalties the

Commission submits should be both specific for these defendants and in general as well.

[20] Also the Commission submits the fact that this conduct was targeted at organised tourist shopping groups is an especially aggravating factor. And regarding the unlawful gain, that is set out by the Commission; and the Commission submits there are no mitigating factors relating to the offending.

[21] This case is the most analogous to the *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836 and it was then set out how the start points should be calculated. And, as I said, we have had particular discussions as to how the start points should be calculated. So the Commission says in respect of the company that having regard to the aggravating factors, the start point in respect of one charge of the pre-change charges should be 90,000 to $100,000. The remaining then pre-change charges should be treated as conviction and discharge.

[22] With the company, the post-change start point should be between 40 to $60,000. When that start point is then taken by the Court, there should be an assessment for the plea of guilty, which the Commission acknowledges should be 25 percent, and then they submit that the lack of previous convictions and co-operation should merit solely together five percent because the company itself had only been in existence for a short time and that Mr Hou, despite warnings from the Commission, had failed to heed them.

[23] In respect of Mr Hou, the Commission submits that the pre-change charges should attract a 10 to 20,000 start point and the post-change charges should attract a 20 to 30,000 start point and then there should be applied a 25 percent discount as well and then a total discount of five percent for lack of previous convictions and co-operation.

[24] The Commission has noted what the defence has said in their submissions, which I will come to shortly, and said that the defence has criticised the amount that the company has profited by and suggests that the only documented number of items

is 657. The Commission says the records were not given to the Commission therefore they cannot assess the full amount.

[25] As far as the conduct of the company was concerned, the Commission submits that it was worse than the *Premium Alpaca* case because "Made in New Zealand" is all over the products when they were made in China and the content was simply not as stated. While the defence said that benefits to other companies amounted to the millions this was revenue but in this case we are dealing with profit. The label, the invoice and the oral representations as to the contents were, in the Commission's submission, simply not fact.

[26] In looking then at the submissions of counsel for the defendants, first of all I have already given a decision in respect of an application to discharge Mr Hou without conviction and refused that. In the alternative, the submission of the defence is that he should be convicted and discharged. I again state that due to the serious nature of the charges themselves, the seriousness with which Parliament obviously has decided they should be dealt with given the amount of the maximum fines available, that I cannot accept that submission either. Also, we are dealing with situations where the label, the invoice and oral representations as to contents were simply not fact.

[27] So in terms of the case law and the cases that have been provided by the Commission, the defence have made various submissions which seek to distinguish those. With respect to the defence, I am not going to traverse those because of the difference in the way I have decided we should deal with the start points of the charges here and because the submissions made by both the Commission and the defence were on a different premise to what we have now decided.

[28] So I look at the mitigating factors which the defence have made their submissions on. They submit that the guilty pleas were entered at an early stage therefore the usual 25 percent should be given. They submit that a further discount should be given for lack of previous convictions of 10 percent and a further 10 percent discount for co-operation. Also the products were supplied to a limited

number of retailers who were open to host Chinese tour groups and not the general public, which is a factor which defence submit is a mitigating factor.

[29] So the start point the defence submit that for the company the pre-change charges a start point would be in the vicinity of $50,000. The defence then submit that a start point for the post-change charges for the company should be between and $30,000. This takes into account the overall criminality and the numbers of products which were actually sold and the increase of profits and the increase of numbers of items sold is speculative and the Court should deal with the product sold being 657. There were only three retailers here. The charging period was from January 2014 to end of September 2014, which was approximately nine months. The profit was estimated at $38,781.48 but that was over a longer period, the defence point out, of November 2013 through to December 2014, longer than the charging period. In the *Premium Alpaca* case the offending period was 20 months.

[30] And the mitigating factors here, the guilty plea, lack of previous convictions and co-operation, that all leads, in the defence submission, to their submissions that the Court could accept a 25 percent discount and the 10 percent for lack of previous and 10 percent for co-operation.

[31] In respect of Mr Hou, the defence submit that the start point for the pre-change charges should be between 5000 and 8000 and for the post-change charges a $6000 start point with the same mitigating percentage factors applied to Mr Hou as to the company.

[32] My view of the start point is as follows. I take into account the aggravating features that have been pointed out by the Commission. I accept those as being the aggravating features, therefore I am not going to traverse them again. Those are the aggravating features in respect of both the company and Mr Hou. The mitigating features in respect of both the company and Mr Hou are guilty plea, the absence of previous convictions and the co-operation. I have not yet assigned the percentages to those and I will do so.

[33] Taking into account those factors, my view is that for the company for the pre-change charges, on one charge I take a start point of $90,000. I apply discounts as follows. I am of the view that it is absolutely clear that 25 percent discount for the guilty plea should be given. I am of the view that a further five percent combined for the absence of previous convictions and the co-operation should be given only. I say that because the company and Mr Hou were given a significant number of previous warnings and did not heed them. That then takes, minusing a 30 percent discount, a total fine of $63,000 plus Court costs $130 on one charge.

[34] For the company, for the post-change charges I take the start point on one charge to be $40,000. I consider for the same reasons given above that 30 percent discount should be given for the same three factors. That is less $12,000. So, accordingly, on one charge there is a fine of $28,000 levied together with Court costs of $130.

[35] For Mr Hou personally, on one charge I am of the view that there should be a start point of $8000. Applying the same 30 percent for the same reasons, the 30 percent there is $2400 leaving a fine which is levied on one charge of $5600.

[36] In respect of Mr Hou for the post-change charges, on one charge I take a start point of $18,000. For the same reasons I apply a 30 percent discount being $5400 and I then fine on one charge the sum of $12,600 plus $130 Court costs.

[37] And the remaining charges I convicted and discharge.

A-M J Bouchier
District Court Judge

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P Finau for the Defendant

Judgment: 20 May 2016

RULING OF JUDGE A-M J BOUCHIER
[ON S 106 APPLICATION]

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[1] In the charges faced by Mr Hou, which the Commission is the prosecutor of, guilty pleas have been entered. He seeks a discharge without conviction. An affidavit has been supplied by the defendant. It notes that he is aged 58, has four children, his youngest son being aged six. He first came to New Zealand in 1993 and has lived here since and is a New Zealand citizen.

[2] In about 1989 he started this kind of business. The particular company was only established in 2013 but he has been involved in this sort of business for a number of years. The company is the family's main source of income. He works hard to provide for his family. There are no other employees at the company except for his son. He has no previous convictions and this is the first time he has been charged with any offence.

[3] Looking at the circumstances of the offending, he says that he considers the language barrier and his inability to communicate as being a major part in the offending and does not raise it as an excuse, however, he states that he has co-operated fully with the Commission.

[4] Regarding the consequences of a conviction, he says he needs to travel to China to visit family members and to do business and whilst the government there does not publish guidelines as to how criminal convictions would affect the grant of a visa, he has found other people on the Internet being denied visas for having a criminal record and has attached one example.

[5] So he does need to travel to China for both business and family circumstances and he says regarding the business, many of the business customers know him personally. He refers to shame involved in the Chinese culture and he annexes an article which deals with that in his affidavit. He also attaches support letters from a business person here who shares the same belief.

[6] If the business' reputation is ruined, it might lead to a decline in the business and that would affect not only the business but his whole family, and he would find it difficult to obtain any other ability to provide for his family due to his age and only having experience in dealing with this kind of business.

[7] The submissions which have been put before the Court and spoken to by Ms Finau on his behalf and she sets out s 106 Sentencing Act 2002 and s 107 and the Court, according to s 107 must not discharge an offender without conviction, unless the Court is satisfied that the direct and indirect consequences of a conviction would be out of out of all proportion to the gravity of the offending.

[8] She then refers the Court to the well known cases of *R v Hughes* [2008] NZCA 546 and *Z v R* HC Hamilton CRI-2009-419-000047, 22 September 2009. *R v Hughes* sets out the three step approach, identification of the gravity of the offending, referring to the facts of the case, the direct and indirect consequences in determination whether such would be out of all proportion of the gravity of the offending. The aggravating and mitigating factors also go to the determination of the

gravity of the offending and any aggravating and mitigating factors relevant to the offender come into the residual discretion under s 106 of the Act.

[9] Looking at the gravity of the offending, it is submitted that that is not confined to the facts alone and the gravity of the offence, the Court should also consider all the aggravating and mitigating factors relating to the offending and the offender. And the circumstances here, the defence submits, are that the defendant is aged 58, has a limited English speaking ability, the carelessness was not intentional, and in his mind the product was not completed until certain things were done which justified the labels saying, "Made in New Zealand." The submission is not disputing that what he did was wrong, but he only came to learn of this when it was put to him by the Commission.

[10] Regarding the direct and indirect consequences, what he has deposed in his affidavit is then referred to and that he must apply for a visa, being a New Zealand citizen and a conviction could impede his Chinese visa application. Regarding the business and cultural shame, again it is set out in the submissions that he will be facing embarrassment and cultural shame from his Chinese community both here in New Zealand and in China and it is set out that in their culture, a criminal person gets disrespected and shunned by their peers, relatives, families and friends and that great embarrassment is a direct consequence of any criminal conviction and there is a huge stigma and shame.

[11] The defence submissions then go on to whether the Court needs to be satisfied that the direct and indirect consequences inevitably occur, but of course that is not the case. There needs to be a real, and as I pointed out to Ms Finau she missed out a word, a real and appreciable risk.

[12] Looking at proportionality, it is submitted here that there is nothing to show that the defendant is any form of threat to the community, he is of otherwise good character and that mercy is a recognised and proper discharge of the New Zealand Court's function. It is always a helpful one, especially in the 400 year anniversary of William Shakespeare to remember the bard's words, that "The quality of mercy is not strained. It droppeth as the gentle rain from heaven," and I do not forget it.

[13] However, as far as the factors before the Court. Section 107 Sentencing Act provides the gateway through which an applicant must pass to obtain a discharge and that section commodified the common law criteria for a discharge without conviction which were originally enunciated in *Fisheries Inspectors v Turner* [1978] 2 NZLR 233 (CA) in 1978 and the proportionality test is not a matter of discretion but a matter of fact, requiring judicial assessment and any suggestion that s 107 involves a stiff test or requires an extreme situation, it has been held that such qualifiers are not helpful and that the Court is either satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.

[14] There is also no specific onus on a person to prove to any particular standard what the consequences of a conviction would be. It is simply a situation where there is a real and appreciable risk as has been mentioned earlier. Very often, in cases of this nature it is argued that a conviction would be a barrier to a career or to travel and there are many different cases in respect of those two such limbs.

[15] In this case, looking at the seriousness of the offending, the Ministry in their submissions, both in respect of penalty and in response to the application, have been at pains to point out that this is offending which is regarded as serious. The reasons for their submissions are not only that originally the legislation provided for significant fines, but the legislation has also been amended to considerably increase the fines involved for penalties here in respect of both companies and individuals and that therefore Parliament intends that offending against these particular sections is a matter to be taken seriously.

[16] So, certainly this is not criminal offending of that type which involves a breach of the Crimes Act 1961 or Summary Offences Act 1981 but nonetheless, the prosecutor has made these submissions that it is serious offending. Therefore, the prosecutor submits that despite the issue of personal shame to the defendant and the company in the Chinese community and that there is a stigma in their culture, that that is not sufficient here for the Court to exercise a discretion under s 106 of the Act.

[17] Nor, in the prosecutor's submission, is difficulties with English, because the defendant has pleaded guilty to knowledge-based offences and that that is a complete

answer and not open to say that it was inadvertence here in this offending and that issue was addressed by Duffy J in the case of *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836. It is difficult also to see the shame aspect, the prosecutor submits, as a mitigating factor given that this is a knowledge-based offence.

[18] The prosecutor has also reminded me of the *Commerce Commission v Shukla* HC Auckland CRI-2007-404-000229, 21 November 2007 and reminded me because I did the initial District Court decision. In that particular case, the Commission being the prosecutor, the applicant there also made application on the basis of travel. He had, when making that argument, the affidavit of a well known immigration lawyer to assist him. On that basis, I decided that the grant should be made. However, in the High Court, His Honour Baragwanath J considered that the barriers which had been argued for were a mere inconvenience and it is fair to say that that case is particularly analogous to this case before the Court.

[19] So I am not persuaded that the gateway of s 107 is met here. Having said that this offending is serious, I have accepted the submission of the prosecution and I am not satisfied and nor would I have been satisfied, even without the authority of the *Commerce Commission v Shukla* case that in this particular situation, that the consequences of conviction outweighed the gravity of the offending. Accordingly, the application for discharge is refused.

A-M J Bouchier
District Court Judge