IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-011605
[2019] NZDC 25295

COMMERCE COMMISSION
Prosecutor

v

GO HEALTHY NEW ZEALAND LIMITED
Defendant

Hearing:	6 December 2019
Appearances:	A McClintock for the Prosecutor J Standage and M Toulmin for the Defendant
Judgment:	9 December 2019

NOTES OF JUDGE D J SHARP ON SENTENCING

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[1] Go Healthy New Zealand Limited, the defendant, is for sentence on three representative charges under s 13(j) Fair Trading Act 1986. That is for false and/or misleading representations concerning the place of origin of its goods. The goods are health supplements. Over a four year period to varying degrees the defendant has made a claim that its company's products and its brand involved New Zealand made produce. This was at times prominent in its marketing. The overwhelming majority of the defendant's supplements, over 85 percent, did not originate in New Zealand. The Commerce Commission maintain the offending was reckless. The general basis for this is that following a 2012 investigation the Commerce Commission gave notice to the defendant that representing "made in New Zealand" could mislead the public unless it was appropriately qualified.

[2] The defendant agreed to do so but the generic promotional bottle used to represent the brand failed to do so. The video material shown to me shows over the period of offending there were alterations to the promotional bottle that featured. Following a complaint in 2017 qualifiers were placed upon this promotional bottle.

[3] Some of the activities are said by the Commerce Commission to have been ineffective and insufficient in terms of qualification of the New Zealand made statement. The Commerce Commission complains that despite multiple communications from the Commerce Commission stressing the need for care, insufficient care was taken. The summary of facts, which is to the most part agreed, sets out the nature of the charges which I have already referred to, it details the defendant's company structure and the blend of ingredients used in the supplements which it sold. It details the misleading statements and the dissemination via the *Kia Ora* magazine, billboards, Go Healthy's website, social media, in store promotional materials, and retailer promotional material.

[4] In March 2018, a new advertising campaign was launched. This material was the subject of certain qualifications. The Commerce Commission say these were insufficient. The Commerce Commission on 1 March 2013 wrote to the defendant. The letter noted:

> In summary the Commission has concerns that Go Healthy misleads consumers by promoting its products as 'made in New Zealand.' Our investigation has established certain products in Go Healthy's product range contain exclusively key active ingredients that are sourced internationally. In our view it is likely to be misleading under the Fair Trading Act, [to claim that these products are made in New Zealand.]

[5] It went on to say:

> We recommend you continue your review of all your products in the Go Healthy range and where necessary qualify any country of origin claims to remove any ambiguity and provide consumers with accurate and useful information.

[6] The summary of facts contains some material which is not agreed between the parties. These are under the heading, "Detriment and gain."

[7] Detriment, 6.1:

> Go Healthy's false and misleading representations were capable of having the following effect:
>
> (a) Consumers may be less inclined to trust the "New Zealand made" claims made legitimately by other businesses resulting in a reduction in the promotional value of that claim.
>
> (b) Customers may have purchased Go Healthy products in the mistaken belief that the ingredients used were sourced in New Zealand.
>
> (c) Other supplement companies who made clear that the source of their ingredients was outside New Zealand may have been placed at a competitive disadvantage.

[8] Then a further subheading, "Gains," 6.2:

> Go Healthy's false and misleading representations had the potential to enable it to:
>
> (a) Enjoy the commercial benefits of having a "New Zealand made" brand when the significant majority of its products were comprised of ingredients sourced abroad.
>
> (b) Make sales it may not have made had it properly represented that the source of the significant majority of its ingredients was from outside New Zealand.
>
> (c) Gain an advantage over other supplement companies who made it clear that the source of their products was outside New Zealand.

[9] The Commerce Commission also say the defendant was a significant party in the supplement market holding a 24 percent market share. The time period of offending is also said by the Commerce Commission to be a factor justifying a deterrent fine. The defence position is that the misrepresentations were about the defendant's brand and company and not directed to specific products. The defence submit this substantially reduces the harm and is a primary basis for its disagreement about the harm and detriment caused. This is because the defence say the individual supplement products contained accurate information about the origin of the ingredients. Therefore correct information was present for the consumers. The defence say this was literally to hand in stores and because the product required dosage, people were likely to have their attention drawn to the accurately provided material.

[10] This is said to make other cases in which harm has been inferred distinguishable as a basis for inferences to be drawn. Also that the conduct here should not all be rolled together but each charge requires separate analysis rather than taking a global view of the offending. The defence submit on analysis the defendant was not reckless. The affidavit of Kurt Renner, a cofounder and former director of the defendant company, sets out what the company did and why it should be seen as behaving carelessly but not recklessly in relation to the representations made.

[11] The Commerce Commission position is the starting point for sentence should be fines in the range of $700,000 to $800,000. The defence submit $100,000 is the appropriate starting point. The respective parties maintain that these starting points deal with the aggravating and mitigating aspects that may be seen within the offending. There are individual mitigating features that relate to the defendant company. There does not seem to be any personal aggravating aspects that could be attributed to the company. These mitigating factors include co-operation, and the absence of prior convictions, attempts at remediation and the credit that the company should receive for its guilty plea.

[12] The defence and the Commerce Commission differ as to the appropriate levels of credit that should be applied to the mitigating factors.

What was the false and/or misleading representation

[13] In relation to charge 1, the original bottle, a branded supplementary bottle which prominently stated, "New Zealand made," was used as an advertising tool. This was shown without qualification and was available through the following media; there were full page advertisements in May, June and July 2017 in the *Kia Ora* magazine. There were two large billboards; one at Auckland Airport and one near Victoria Park. They were shown between 15 July 2016 and 31 August 2016. There were home pages shown on Go Healthy's websites on 14 December 2014 through to 27 April 2017. There were numerous posts on Go Healthy's Facebook and Instagram pages, these having 24,000 and 600 followers respectively. There were some posts included in the social media that exceeded the representations that are complained of in terms of their misleading nature.

[14] There was in store promotional material at pharmacies and health stores nationwide and there were window decals which were provided to retailers. They had some fine print which noted the materials making up the supplement products were local with some imported ingredients. This is said by the Commerce Commission to be overwhelmed by the size of the "New Zealand made" descriptions and were misleading as the majority of the key ingredients did not originate in New Zealand.

[15] As regards charge 2, between 18 March 2018 and 19 December 2018, six video advertisements which I have seen were published on the defendant's website shown on YouTube and also New Zealand television. These have a revised promotional bottle on it which does include the description that the product to be found in the supplements included imported and local ingredients. This is below the "New Zealand made" representation. The Commerce Commission maintain the qualification was too briefly shown and the message ineffective as a way to draw attention to the true nature of the goods. The impression still remaining that the products had an entirely New Zealand make up.

[16] The third charge relates to the defendant mistakenly using the original promotional bottle without the qualifiers. It is accepted by the Commerce Commission that this was the product of human error and there were steps taken by the defendant company to attempt to remedy the error that had occurred inadvertently in relation to the use of the initial and unqualified statement.

Defence submissions

[17] The defence accept a statement that all or a majority of the products made in New Zealand is incorrect. The defence say there is an important distinction between advertising brand and company and actual products. There is no charge or claim that any of the individual products that were provided by the defendant company had incorrect information recorded. The defence say that this is a case in which customers who looked into their purchase and considered the product itself had access to correct information. This information being on the product packaging.

[18] Although this may be a case involving credence and ingestible goods the customer could be reasonably expected to consider the actual material that came with the product, particularly as dosage needed to be considered in respect of the individual products. Each customer was able to evaluate the individual supplement bottles and so there is a distinction between this case and those in which the consumers had no opportunity to test the veracity or otherwise of claims made. Here the true material was available for inspection.

[19] The next defence submission is that the conduct was careless but not reckless. As regards Charge 1, there was engagement with the Commerce Commission, the defendant company took advice as set out in Mr Renner's affidavit. Steps were taken to have its advertising reach a standard that the company saw as being compliant with its duties. This may have been careless but it was not reckless. The receipt of the *Commerce Commission v New Zealand Nutritionals (2004) Ltd* was the watershed when it became clear to the company that their claims in relation to New Zealand made could not be sustained.[1]

[20] As regards charge 2, the six videos had qualifications which accompanied the statement. These are now accepted as being ineffective but they were an effort to discharge the defendant's duties. Even if ineffective they were careless about how this happened and not reckless.

[21] The defence submission is that the defendant was trying to do what was required. The advertising professionals who were engaged were taken on to carry out the advertising function. The New Zealand Commerce Approval Bureau was consulted and considered the advertising to be acceptable. The defence says that the failure to meet the standard and the lack of efficacy of the methods to qualify the statement was technical rather than any kind of reckless act.

[22] As regards charge 3, the defence maintain this is inadvertent as accepted by the Commerce Commission and such inadvertent human error could not be regarded as a reckless act is simply a failure to meet the appropriate standards when higher standards are imposed by the Commerce Commission.

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[1] *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832.

[23] The Commerce Commission's submissions both written and oral are that this was reckless conduct, that the commercial gain from advertising outweighed the risk that was seen by the defendant company and as a consequence deterrent penalties are required to ensure that major commercial companies will not find it worth the risk to challenge the Commerce Commission on what is or is not misleading and to take the risk on the basis that the gains that could be made from advertising outweigh the likely penalties if found to be non-compliant. The Commission's submission is deterrence is both effective and required. The Commission submits that this was the running of a known risk on an unreasonable basis.

Discussion

[24] The decision in *Commerce Commission v New Zealand Nutritionals* makes it impossible to argue that the statement 'New Zealand made' is appropriate for companies based in New Zealand who package and present products without there being a substantial transformation of the basic ingredients or a key step in New Zealand in producing the final product.

[25] Prior to the *Commerce Commission v New Zealand Nutritionals* in *Marcol v Commerce Commission*, it was clear that the test in relation to establishing a place of origin was an objective test.[2] It involved consideration of the circumstances. In that case labelling on a garment gave the false impression of being made in New Zealand. The finding of that being misleading was something that was upheld on appeal.

[26] The present case involves a situation where the defendant had the Commerce Commission raising this issue. The risks of the advertising being found to be capable of misleading must have been readily apparent. The exert from the letter which I have referred to and the summary of facts show a clear warning. The advertising went ahead. To suggest that the presence of the company's New Zealand base, the packaging, the small quantity of New Zealand product that was sourced in the company's products, provide a sufficient basis for an objective view that the products were "New Zealand made" is not sustainable.

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[2] *Marcol v Commerce Commission* [1991] 2 NZLR 502.

[27] The running of a known risk on an unreasonable basis brings a finding of recklessness. In this case to advertise on a substantial scale that the majority of products were "New Zealand made" in the face of the investigation and warnings, knowing that the law would call for an objective assessment and also knowing that only a small proportion of the product was sourced in New Zealand really leaves little alternative but to find that the conduct was reckless. I have referred to the affidavit of Mr Kurt Renner, the affidavit points out that the company took steps to make the origin of the agreed ingredients clearer. The risks that the brand claim of "New Zealand made" had to have been apparent. The decision to persist with it was, I find, unreasonable.

[28] As regards to the first charge I accept the Commerce Commission's submissions that this was reckless conduct and that submission is made out. As regards to the second charge, although there are reservations about how effective the remediations were, they can be seen. I do consider that they were ineffective and indeed that is the reason for the plea but in a number of areas it does appear to me that there was an attempt to try to right the wrong impression that was gained. It was not sufficient and it was to an extent careless to have only gone as far as the company did but I do not find the second charge to have the aspect of recklessness associated with it.

[29] In respect of the third charge, it is acknowledged that misleading advertising persisted by inadvertence and human error. This is careless and there was a delay in providing sufficient remediation to overcome the carelessness but again I find what happened to have been careless on the company's part and not reckless.

[30] I am required to take into account, as in every sentencing, the principles and purposes of sentencing as set out in the Sentencing Act 2002. One of the functions that is associated with this form of sentence is the need for deterrence. Financial penalties in the commercial world are generally regarded as an effective means of deterrence. The company in this particular case has in a series of acts shown itself to be working towards remediation and has pled guilty to the conduct which has been found to have been wrongful. For that reason accountability seems to me to have been made out. There is therefore less requirement for specific deterrence for this

defendant, but I still am required to impose deterrent sentences both individual and for others in the marketplace who may contemplate advertising misrepresentations.

[31] I am required to sentence in a way that is consistent as far as I can. I am also required to impose the least restrictive outcome that is consistent with the principles and purposes of sentencing

[32] The sentencing process is further informed by *Commerce Commission v L D Nathan.*[3] I have to take into account the objectives of the Fair Trading Act. I have to review and consider the importance of the representations and the information stated. I have to consider the degree of wilfulness or carelessness that applies. I have to consider the extent from which the representations departed from the truth. I have to consider the degree of dissemination and consider the resulting prejudice that may apply to consumers. Also to consider efforts to correct any misstatements and to bear in mind the need to provide deterrent penalties in accordance with the requirements for such.

[33] The objectives of the Fair Trading Act are to protect consumers from unfair and untrue representations, to promote fair and effective competition, to protect honest traders from disadvantage, to maintain standards for representations and to have product descriptions correct.

The importance of the representations

[34] New Zealand made representations are representations that may provide a sense of affinity to consumers. Consumers may see products as desirable as a result of being made in New Zealand. Consumers may also see beneficial aspects that they can attribute to the products such as products being provided from an environment in which there are standards and in which environmental concerns might be better met than some elsewhere.

[35] Also such untrue statements undermine the benefit of people who are truly able to make the representation that their products are New Zealand made.

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[3] *Commerce Commission v L D Nathan* [1990] 2 NZLR 160 at 165.

Such representations can provide an advantage in the market, not on a fair basis, and honest competitors may be unfairly disadvantaged by virtue of the fact that people are able to say that they have got a product of a certain kind when in fact they do not.

[36] As a matter of inference I do consider that it is possible to reach a reasonable conclusion that the representations here were likely to provide an unfair advantage, to disadvantage consumers in the making of decisions and accordingly the detriment as far as that is able to be ascertained can be seen in the representations that were provided to consumers and the unfair competition that that might bring.

The degree of wilfulness or carelessness

[37] In this case in relation to the first charge I see the conduct to be reckless. As regards to the second charge, I see it careless and to a relatively high degree and the third charge I see it as at the lesser level of carelessness. The impact of this will be in its application to considering what the appropriate penalties should be.

The degree of dissemination

[38] As I have previously set out, this material was widely disseminated. It was a calculated campaign to produce a basis for the brand of the defendant company to be shown to have strength and desirable characteristics. The advertising was to create an appealing impression of the products that the defendant company was promoting. This was an overall campaign, it was to create the environment in which the image of New Zealand as a clean and green place, to be able to produce healthy options for supplements, something which in the dissemination and in the videos in particular is the overwhelming impression. The divergence from the truth of the representation is significant. On an objective assessment there was only a small portion of the ingredients, that originated in New Zealand.

[39] Of the remedial effects that were used, these were piecemeal, but there has been an ongoing effort by the defendant company. Mr Renner's affidavit shows what appears to me to be a genuine attempt to meet the appropriate standards. It is always going to be in a situation in which the other side to it was commercial gain and

promotion of advertising that was not correct but there seemed to me to be a willingness to put the company in a position where it was not providing misleading statements to the consumers.

[40] The need for deterrent sentences is something which the Commerce Commission have submitted both in writing and orally is a strong factor that has to accompany the consideration of the circumstances.

[41] The starting points which have been proposed are divergent. As I have said the Commerce Commission suggests a range of $700,000 to $800,000 and the defence maintain that $100,000 meets the principles and purposes of sentencing and the other aspects that I have to take into account as results of the *L D Nathan* case.

[42] The factors that are set out favour the Commerce Commission's approach but the individual packaging and the opportunity for consumers to see for themselves with regard to the individual products is a factor that has significance. It means that cases such as *Commerce Commission v Topline International Ltd* are able to be distinguished.[4] The distinction is also present from a number of other cases where the consumer has no means of checking the validity of the misrepresentation. It has to be qualified however as the brand advertising and the strength of it was designed to create a significant impression as far as the consumer was concerned. I do not see the distinction as going as far as the defence submit but some recognition of it is required.

[43] Applying the statutory tests and looking at the aggravating and mitigating aspects of the offending, I consider that a starting point in the range of $500,000 is what is appropriate to reflect the liability and overall culpability. As regards mitigation I allow 10 percent for co-operation, lack of prior history and the post-charge conduct. I will allow 25 percent for the credit for guilty plea. It is true that the plea was not at the earliest opportunity but the situation is not simple and the complexity seems to me to qualify the extra time that was taken to reach a point where largely the facts have been agreed and the matter was able to be determined.

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[4] *Commerce Commission v Topline International Ltd* [2017] NZDC 9221.

[44] Accordingly the overall fine is reduced from the $500,000 starting point to $337,500. The makeup of this charge is as follows; in relation to charge 1, a $190,000 fine is imposed. The fact that the first charge to me involved recklessness rather than carelessness is a factor that contributed to the greater penalty that is applied to that charge.

[45] As regards charge 2, the fine is $90,000 and as regards to charge 3, the fine is $57,500. That is a total of $337,500 and it is the total fines. I should say that this is not a case in which I have given any consideration of the means of the defendant company, there was no submission to suggest that the company was not in a position to meet financial penalties. I also have considered the defendant's position with regard to causation of profit or loss and I note that there was a dispute between the parties as regards the summary of facts.

[46] Often finding loss or damage is inferential but in some cases such as *Commerce Commission v Farmland Foods Ltd*, evidence of loss was provided.[5] Here, I took the view that the brand of the defendant was supported by the misrepresentation. The advertising was to enhance and further the brand and I do not see it as necessary to directly prove loss or damage. The dissemination which was undertaken by the defendant was significant, the misrepresentation was prominent, the circumstances reasonably show an attempt to gain an advantage by the false and misleading representations. Specific proof of losses or gains is not required to assess penalty.

D J Sharp
District Court Judge

[5] *Commerce Commission v Farmland Foods Ltd* [2019] NZDC 14839.