IN THE DISTRICT COURT
AT AUCKLAND

CRI-2013-004-004233

COMMERCE COMMISSION
Informant

v

PACRITE INDUSTRIES LIMITED
Defendant

Hearing: 30 August 2013

Appearances: A McClintock for the Informant
C T Walker for the Defendant

Judgment: 30 August 2013

NOTES OF JUDGE R COLLINS ON SENTENCING

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[1] These matters, or the 10 informations that the defendant Pacrite Industries faces, started in this Court in October 2010. Through lengthy negotiations, which were in the context of a vast number of other charges, were ultimately resolved quite some time ago and sentencing has awaited. From the parties point of view they had a reasonable expectation that sentencing may have proceeded a little bit earlier than it has and for that reason I am not going to delay matters now and reserve a judgment.

[2] The defendant, who I will simply refer to as Pacrite, faces 10 informations under s 10 Fair Trading Act 1986. The parties have helpfully agreed to a summary of facts and that covers some six and a half pages. I need to make some attempt to try and summarise that the best I can. An excellent organisation of that is captured in counsel for the informant's written submissions at 2.4 where it says, "The 10 informations relate to three different media of advertisement for the defendant's

product where representations were made about the science behind the oxo-biodegradable additive in the defendant's refuse bags and about the environmental impact of the defendant's product compared with conventional plastic bags."

[3] The three advertising media charged are for:

(a) The plastic bags themselves, two charges.

(b) The product brochure and two media releases, six charges.

(c) The defendant's website, two charges.

[4] Within each category of media there are two types of representations charged:

(a) Representations about oxo-biodegradability, five charges.

(b) Representations about the environmental impact of the defendant's product compared with conventional plastic bags, five charges.

[5] In essence I understand the criminality alleged and I do not use that word here in any pejorative way in terms of the defendant but just simply for the need to find an expression, liability may be a better expression. So as I understand matters, liability is said to have come about in this way. Firstly, the defendant actively promoted a particular type of rubbish bag as being oxo-biodegradable and through the media, which I have just referred to, positively asserted that these bags would break down in a landfill. From what I can see those representations through the three media referred to started in July 2009. But in August 2009 the Commerce Commission got in touch with the defendant and challenged those representations.

[6] Thereafter the second tier of liability arises where while the defendant may have withdrawn that specific claim it did not do it in such a way as to remove the impression that these bags would have that property or attribute and also left the

impression that this product had an otherwise general environmental advantage that the informant says it does not have.

[7] The informant's counsel has prepared also a helpful schedule of the charges. I will have that annexed to these sentencing notes. It sets out the charges and the particulars in relation to the representations and the misleading nature of them. The offending then falls for analysis within itself, but against the objects and purposes of the Act and also some analysis in relation to other cases. There was discussion between Mr Walker and myself regarding the expressions "carelessness" or "inadvertence". I was prepared at the end of the submissions I have heard to take the view that as opposed to this offending being in anyway wilful it was maybe best described as careless. Mr Walker submits that better terminology is inadvertence. I do not think that we really disagree and I am happy to use his expression.

[8] In essence the defendant relied on its suppliers and manufacturers of a product or ingredient called Reverte which gave the biodegradable quality to these bags. Its liability has come about because it accepted at face value that advice and information it was given. Probably elevating slightly the question of culpability, or maybe even more than slightly, was when the warning came from the Commerce Commission. When Pacrite were alerted that there were concerns or a challenge to the claims it was making the defendant was not explicit in its communications to retailers that these bags did not break down in landfills.

[9] Mr Walker submits that matters really were more complex and nuanced than that. I expressed the view at some point in the hearing, and albeit I stressed it was from a non-scientific perspective, that I did not suspect that the science around this was that complicated or would have been that complex. I am told that that is not the case and that the defendant, at least for some lengthy period of time, had credible scientific evidence available to it which may well have challenged the informant's position. I am reluctant to be seen to be critical of the defendant for not doing more, one can well imagine the position of management in an otherwise credible and reputable company with the circumstances they were faced with.

[10] However, as I say, that has to be seen against the purpose and objects of this legislation which is to protect consumers and to leave or create a fair playing field or level playing field for competitors. The leading authorities that have been around for many years have emphasised that time and again and in approaching matters today I have given consideration to the factors listed in the decision in *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160 and I have heard helpful submissions on all those matters.

[11] In the informant's written submissions a view was expressed that the Courts have not taken a consistent approach to the process by which penalty figures are reached. I possibly mistakenly interpreted that as a view that the Courts have been inconsistent in outcome but when asked about it Ms McClintock said, "Well, different Courts had approached this matter by different means." Some Courts had approached the setting of penalty by profit stripping. Other Courts had approached it by setting a penalty to remedy the harm that had been done. Another example of a different approach was to set the penalty in terms of the detriment which was seen to have accrued from the traders behaviour. I do not know what consistency can be achieved. It is clearly important that it is strived for so that defendants such as Pacrite believe that they have been treated fairly in comparison with others that have come before. However, while some urge consistency upon the Courts, others urge individual assessment of the merits of each unique case.

[12] There are a number of authorities that have been referred to me. Many pre-date the doubling of the penalty increasing the maximum fine for each charge from $100,000 to $200,000. I have been referred to the second reading of the Bill which increased those penalties, that was in April 2003 when the then Minister of Youth Affairs, the Honourable John Tamihere, on behalf of the Minister of Consumer Affairs moved the Amendment Bill. However, I agree with Mr Walker that Pacrite's behaviour here does not come into the wilful or deliberate type that parliament was really urging the Courts to deal with harshly.

[13] I have approached the matter by trying to assess Pacrite's culpability as fitting or deciding where it fits between that in the *Commerce Commission v Brownlie Brothers Ltd* [2005] DCR 219 and that of the *Commerce Commission v*

Environmental Air Care, DC Auckland CRN 030041511015-018, 16 September 2004. Mr Walker, on the facts in *Environmental Air Care* expresses some surprise at the findings that the Judge made. My view is that we work from the Judge's findings and she found a very low level of culpability so that is the point from which I have operated in assessing where this case falls in relation to that case and underneath or less than *Brownlie Brothers Ltd.*

[14] I do believe that a significant factor in this process is the use in 2013 and beyond by traders of an environmental benefit or an environmental attribute or advantage of their products. Without doubt many, many people are becoming more environmentally aware. While it is true we do not know exactly how many people bought this product because of its environmental claims, environmental issues will become increasingly important to society and to consumers as time goes by. Traders who wish to market on an environmental advantage need to do so carefully. Mr Walker is in one sense right to say, well, it was reasonable that Pacrite relied on the advice of its supplier and manufacturer especially when that manufacturer was a substantial and reputable overseas concern. However, the whole product was based around the supplier's ingredient which was to give it this claimed environmental advantage. The whole communication, the whole packaging, the whole branding around these rubbish bags was their environmental advantage. I may not have expressed this well but that is, I think in this case, extremely important. I have no doubt that as time goes by the Commission will be called upon to investigate in areas where traders claim an environmental advantage based on science. Retailers and consumers cannot be expected to check that but the person ultimately manufacturing the product and marketing it has a responsibility to ensure that it can live up to the environmental claim.

[15] Having said that, that still in my view, is consistent with placing Pacrite's culpability initially at the level of inadvertence. Thereafter, while it did not take the explicit steps it should have, it was in a situation where there was competing advice coming from all sorts of different directions and one can well understand that the more explicit steps that should have been taken to make it clear that this product did not break down in landfills was not taken.

[16] Having said all that, so bearing in mind the objectives of the Act, the culpability of this defendant in these circumstances, assessed in the context of past cases, the view that I have come to is that the global responsibility or the penalty which reflects the global culpability of prime care is set at the starting point of $40,000 from which I give a discount of 25 percent to reflect the guilty pleas, the company's previous good record and its cooperation with the Commission. That brings matters to a figure of $30,000 which will be spread as a fine of $3000 per information. There is no order for costs.

R Collins
District Court Judge