

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-003014
CRI-2017-004-003035
[2018] NZDC 510**

COMMERCE COMMISSION
Prosecutor

v

TIMBER KING LIMITED
First Defendant

NZ STEEL DISTRIBUTOR LIMITED
Second Defendant

Hearing: 8 December 2017
Appearances: A McClintock and B Thompson for the Prosecutor
T Simmonds for the Defendants
Judgment: 24 April 2018

**RESERVED JUDGMENT OF JUDGE R G RONAYNE
[On Sentencing]
[Revised 21 May 2018 to correct error - see addendum]**

Introduction

[1] The defendant, Timber King Limited (“TKL”), is for sentence having pleaded guilty to five charges under the Fair Trading Act 1986 (“FTA”). The second defendant, NZ Steel Distributor Limited (“NZSD”), is for sentence having pleaded guilty to two charges under the FTA. TKL was the retailer and NZSD was the importer of the relevant product to which the charges relate.

[2] The charges relate to representations made by the defendants about steel mesh known as “TS10” and its compliance with the Australian/New Zealand Standard for reinforced steel, AS/NZS 4671:2001 (“the Standard”).

The charges

<p>Charges 1 & 2 (TKL) Representative charge (Batch One: tags and receipts) 1. CRN 17004501034 2. CRN 17004501035</p>	<p>Between about 1 November 2015 and 29 February 2016 at Auckland and elsewhere in New Zealand, being in trade, in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular standard, quality, or grade.</p>
	<p>Act: Section 13(a) and 40(1) of the FTA</p>
	<p>Particulars of representation: represented on batch tags attached to “TS10” steel mesh (charge 1) and receipts given to purchasers (charge 2) that the steel mesh was of 500E grade and that it complied with the Standard.</p> <p>Particulars of falsehood or misleading nature: the requirements of the standard had not been satisfied, because:</p> <p>(a) The goods failed to meet the physical and mechanical requirements of the Standard, including, in particular the requirements regarding uniform elongation; and/or</p> <p>(b) The goods were not sampled and tested in accordance with the requirements of the Standard.</p>
	<p>Penalty: Maximum fine of \$600,000</p>
<p>Charge 3 (NZSD) Representative charge (Batch One: tags) CRN 17004501043</p>	<p>Between about 18 June 2015 and 3 September 2015 at Auckland and elsewhere in New Zealand, being in trade, in connection with the supply or possible supply of goods, made a false or misleading representation that goods were of a particular standard, quality, or grade.</p>
	<p>Act: Sections 13(a) and 40(1) of the FTA</p>
	<p>Particulars of representation: represented on batch tags attached to “TS10” steel mesh that the steel mesh was of 500E grade and that it complied with the Standard.</p> <p>Particulars of falsehood or misleading nature: the requirements of the Standard had not been satisfied, because:</p> <p>(a) The goods failed to meet the physical and mechanical requirements of the Standard, including, in particular the requirements regarding uniform elongation; and/or</p> <p>(b) The goods were not sampled and tested in accordance with the requirements of the Standard.</p>
	<p>Penalty: Maximum fine of \$600,000</p>

<p>Charge 4 &5 (TKL) <i>Representative charges</i> (Batch Two: tags and invoices) 4. CRN 17004501036 5. CRN 17004501037</p>	<p>Between about 1 November 2015 and 29 February 2016 at Auckland and elsewhere in New Zealand, being in trade, in connection with the supply or possible supply of goods, made an unsubstantiated representation, which a reasonable person would expect to be substantiated.</p>
	<p>Act: Sections 12A and 40(1) of the FTA</p>
	<p>Particulars: TKL represented on batch tags attached to the steel mesh (charge 4) and on invoices given to purchasers of the steel mesh (charge 5) that the steel mesh was of 500E grade and that it complied with the Standard, when at the time those representations were made, TKL did not have reasonable grounds for making them, because:</p> <ul style="list-style-type: none"> (a) The goods were not sampled and tested in accordance with the requirements of the Standard; and/or (b) The test report documentation obtained by TKL from the mesh manufacturer and the testing agency contained information and omissions that should have alerted TKL to deviations from the Standard in sampling and testing.
	<p>Penalty: Maximum fine of \$600,000</p>
<p>Charge 6 (NZSD) <i>Representative charge</i> (Batch Two: tags) CRN 17004501041</p>	<p>Between about 1 November 2015 and 29 February 2016 at Auckland and elsewhere in New Zealand, being in trade, in connection with the supply or possible supply of goods, made an unsubstantiated representation, which a reasonable person would expect to be substantiated.</p>
	<p>Act: Sections 12A and 40(1) of the FTA</p>
	<p>Particulars: NZSD represented on batch tags attached to the steel mesh that the steel mesh was of 500E grade and that it complied with the Standard, when at the time these representations were made, NZSD did not have reasonable grounds for making them, because:</p> <ul style="list-style-type: none"> (a) The goods were not sampled and tested in accordance with the requirements of the Standard; and/or (b) The test report documentation obtained by NZSD from the China based mesh manufacturer and a China based testing agency contained information and omissions that should have alerted NZSD to deviations from the Standard in sampling and testing.
	<p>Penalty: Maximum fine of \$600,000</p>

Charge 7 (TKL) (Batch One: certificate) CRN 17004501038	On or about 30 July 2015 at Auckland being in trade, in connection with the supply or possible supply of goods, made a false or misleading representation that the goods had an approval or endorsement.
	Act: Sections 13(e) and 40(1) of the FTA
	<p>Particulars: TKL emailed to a purchaser a test certificate, dated 28 July 2015, which:</p> <ul style="list-style-type: none"> (a) Was on the letterhead of SGS New Zealand Limited (“SGS NZ”); (b) Stated that the goods had been tested in accordance with the Standard; (c) Included the word “complies” next to each of the tests referred to in the certificate; and (d) Included the words “tested by: G Schoutens” and “checked by: W Chen”. <p>Together, these representations conveyed that the goods had been test by SGS NZ, an external building product testing laboratory, and had been found to comply with the Standard when, in fact, SGS NZ had not tested the goods or made any such finding.</p>
	Penalty: Maximum fine of \$600,000

Facts

Background

[3] Steel mesh is used for reinforcing concrete in construction. 500E is a particular grade of steel mesh which has certain characteristics, including, in particular, ductility, which provide strength and stability to buildings in the event of an earthquake. The Standard provides for three ductility classes: “L” (low), “N” (normal) and “E” (earthquake). Steel mesh used for structural applications in New Zealand is required to be of the “E” ductility class. Ductility is determined by measures of “uniform elongation” and the ratio of “tensile strength” to “yield stress”.

[4] In order to be described as “500E”, steel mesh must comply with the chemical/mechanical and sampling/testing requirements for that grade set out in the Standard.

[5] The charges relate to misrepresentations and unsubstantiated representations on:

- (a) batch tags;
- (b) invoices and receipts; and
- (c) the certificate.

[6] The charges relate to the period from June 2015 to February 2016 (“Charge Period”).

The defendants

[7] TKL and NZSD are companies incorporated in New Zealand and based at premises at 4 Morrin Road, Mount Wellington, Auckland.

[8] TKL was incorporated on 7 August 2013 and has two directors, Jackie (Yong) Liu and Ringo (Wengui) Liu.¹ Jackie and Ringo Liu were the shareholders of TKL from its incorporation until 29 February 2016 when their shareholdings were transferred to Three Brothers Group Limited, a holding company they also control.

[9] NZSD was incorporated on 10 March 2015. Jackie Liu is the sole director. Jackie and Ringo Liu are the shareholders of that company.

[10] TKL was the primary entity that sold steel products in New Zealand. NZSD was incorporated for the purpose of importing steel from China, which would then be on-sold by TKL to retail customers.

[11] Information obtained by the Commerce Commission (“Commission”) indicates that NZSD made a small number of sales of TS10 steel mesh to one customer and issued invoices for those sales in its own name. However, the defendants have advised the Commission that those sales were actually made

¹ The two directors are referred to using their Anglicised names as these were the names they used when carrying out business.

through TKL, and that the invoices produced in the name of NZSD were credited back and then re-invoiced by TKL.

TS10 steel mesh

[12] The charges relate to two batches of TS10 steel mesh which were imported, and supplied by the defendants. NZSD ordered both batches of TS10 from a Chinese supplier, Anping Sanxing Wire Mesh Factory (“Mesh Producer”). “TS10” is a brand/product designation given to the product by the defendants. At all relevant times, TS10 was sold as 500E grade. Each sheet of TS10 steel mesh is approximately 5.2 metres by 2.2 metres in size.

Batch One

[13] The first order of TS10 was for 1,540 sheets of mesh and was placed in March 2015 (“Batch One”). The specifications for Batch One were provided to the Mesh Producer by NZSD and stated the mesh needed to comply with the Standard, as reflected on the invoice provided by the Mesh Producer.

[14] The first sales of Batch One began on or about 18 June 2015. Information provided by TKL to the Commission indicates that 614 sheets of TS10 from Batch One were sold by it between June 2015 and August 2015. TKL withdrew Batch One from the market on, or about, 29 August 2015 after witnessing testing of the product which indicated it did not comply with the Standard (see paragraph [54] below).

Batch Two

[15] The second order of TS10 was placed in August 2015 for 6,000 sheets (“Batch Two”). Again, the specification was provided to the Mesh Producer by NZSD. Again, the invoice from the Mesh Producer recorded the requirement that the mesh comply with the Standard.

[16] NZSD also instructed the Mesh Producer to ensure that:

- (a) the mesh was not made from ribbed steel, as Batch One had been, because it did not want it to appear different to other steel mesh in the market, which was made from non-ribbed steel; and
- (b) the raw material that the mesh was made from was 6.5 mm diameter steel wire, rather than 8.0 mm which was then stretched to 6.5 mm, as had been used to make Batch One.

[17] Batch Two was tested by a third party laboratory in China, and a certificate was obtained before the Chinese supplier shipped the batch. However, as described in those paragraphs, the testing carried out by the laboratory in China was not properly carried out in accordance with the Standard.

[18] The first shipment from Batch Two arrived in New Zealand in November 2015 and started to be sold immediately. TKL sold approximately 1,970 sheets from Batch Two from November 2015 through to February 2016.

The Standard

[19] The Standard specifies requirements for the chemical composition and the mechanical and geometrical properties of reinforcing steel used for the reinforcement of concrete in the form of machine-welded mesh (among other forms). It provides a single specification of material requirements for steel bars, wire and mesh, intended for use in reinforced concrete structures.

[20] The Standard requires:

- (a) that particular types of steel mesh satisfy certain chemical, mechanical and dimensional requirements; and
- (b) that manufacturers and suppliers of steel mesh follow particular sampling and testing in order to ensure compliance.

[21] In order to be designated “500E” grade, steel mesh must meet certain requirements, including, in particular, having uniform elongation of greater than or equal to 10%. This requirement is specific to “E” grade steel. The “E” indicates the “earthquake” ductility class. The requisite uniform elongation is vital in order to ensure that buildings maintain their structural integrity in the event of an earthquake.

[22] In 2011, following the Canterbury earthquakes, the Acceptable Solution and Verification Methods² commonly used to demonstrate compliance with clause B1 (Structure) of the Building Code were amended to require the use of 500E grade steel mesh (with its minimum uniform elongation of 10%) in concrete slabs. Before then, according to the Ministry of Business, Innovation and Development, mesh in concrete slabs generally had an elongation of about 2%.

[23] Appendix B of the Standard sets out manufacturing control requirements that are to be followed by manufacturers of steel mesh and requires, among other things, particular testing to be carried out per batch of steel mesh. Batch sizes for testing purposes are to be no greater than 1,000 sheets.

[24] Appendix C of the Standard sets out the requirements for the determination of mechanical and geometric properties of reinforcing steel.

Complaint

[25] The Commission received a complaint regarding TS10 steel mesh in August 2015. The complaint stemmed from the events detailed below.

² Acceptable Solutions and Verification Methods are issued by the Ministry of Business, Innovation and Employment and provide one way of demonstrating compliance with the relevant clauses of the Building Code. A person who complies with a Verification Method or Acceptable Solution will be treated as having complied with the provisions of the Building Code to which the Verification Method or Acceptable solution relates. If a person wishes to design or construct a building that does not follow the relevant Acceptable Solution or Verification Method for a particular part of the Building Code, it is necessary to demonstrate with evidence that the proposed “alternative solution” will satisfy the performance criteria in that part of the Building Code, which is a more complex process. The relevant documents that relate to the use of steel mesh in concrete structures are Acceptable Solution B1/AS1 and Verification Method B1/VM1. The use of these documents to demonstrate Building Code compliance is understood by the Commission to be widespread to the extent that the requirement to use 500E grade steel mesh is essentially treated as compulsory in all cases.

[26] In July 2015, a customer (“the Customer”) purchased three sheets of TS10 steel mesh from TKL. Noting that the mesh had no tags on it, the Customer asked TKL to provide a copy of the test certificate demonstrating compliance with the Standard. He was sent first a photograph of a batch tag which stated, among other things, the following:

- (a) “NZ Steel Distributor Limited”;
- (b) “TS10 Mesh”;
- (c) “AS/NZS 4671:2001 500E Titan Series”; and
- (d) “Grade: 500E”.

[27] The Customer asked for further verification that the product complied with the Standard. In reply, TKL sent the Customer the certificate, purported to be from SGS NZ.

[28] The certificate was on SGS NZ letterhead and state that:

- (a) the mesh had complied with all relevant testing;
- (b) the mesh was 500E grade; and
- (c) the mesh complied with the Standard.

[29] The certificate included the word “complies” next to each of the tests referred to and also included the words “Tested by: G Schoutens” and “Checked by: W Chen”. As a result of further enquiries, it was revealed that the certificate was fake and had not been produced by SGS NZ. SGS NZ had not carried out testing of the mesh to determine compliance with the Standard.

[30] Instead, the certificate had been created by an employee of TKL using a genuine SGS NZ test certificate that had been obtained in relation to testing of a different product and altering it so that it appeared to show that TS10 had been tested

and found to comply. G Schoutens and W Chen, whose names appeared on the forged certificate, were employees of SGS NZ who had carried out the testing of the other product but had nothing to do with TS10, nor with the fake certificate.

[31] Two of the purchased sheets were independently tested. The results indicated that the sheets failed to comply with the mechanical requirements under the Standard. For the first sheet tested, the results for uniform elongation were between 2.04% and 3.01%, when the Standard requires an average of at least 10%. The results for the second sheet tested were between 3.7% and 8.0%.

[32] The two sheets also failed to meet the requirements for the weld shear test provided for in the Standard, in seven out of eight tests that were carried out. This test measures the strength of the weld points at the intersections of the wires which form the mesh.

Requests for substantiation

[33] Following the complaint, the Commission requested information from TKL and NZSD on 11 September 2015. In particular, the Commission sought information substantiating the claims that TS10 was 500E grade and complied with the Standard.

[34] Jackie Liu, on behalf of both defendants, provided information to the Commission on 16 September and 28 October 2015. The information provided included source material supplier details (i.e. the supplier of the steel wire that was later processed into mesh by the Mesh Producer), source material test reports, sale and purchase agreements between NZSD and the Mesh Producer, mesh test reports and further information relating to the two batches of TS10.

Other enquiries

[35] The Commission spoke with representatives from SGS NZ in October 2015 who confirmed that the certificate had not been produced by SGS NZ. SGS NZ advised the Commission that the certificate was a forgery, in that it did not relate to testing carried out by it as stated.

[36] On 31 August 2015, the Commission attempted to purchase some TS10 sheets from TKL in order to test the product for compliance with the Standard. TKL advised the Commission's representatives, who had not at this time identified themselves, that the product was not available. At 2:43 pm that same day, TKL sent an email to the Customer entitled "Product Recall" which stated:

Our recent stocktake indicates we may have supplied you with 500L mesh instead of 500E mesh on 29 July 2015, as our staff put the stocks on the wrong spot in our warehouse.

The email offered a refund or exchange of the product.

[37] On 5 April 2016, the Commission executed a search warrant at the premises of the defendants.

[38] The Commission seized documents relating to TS10 as well as samples of the product itself from Batch Two. Following the search, Jackie Liu subsequently provided the Commission with samples from Batch One, which were no longer being sold and were instead being stored at a rural property he owned.

[39] Significant quantities of loose batch tags for TS10 steel mesh were observed at the defendants' premises and further evidence was obtained from the defendants' computers of templates for the batch tags. The defendants advised the Commission that they had provided the design for the batch tags to the Mesh Producer. The Mesh Producer provided loose batch tags to replace any that fell off the mesh in transit. If a sheet of mesh did not have a batch tag affixed when it arrived from the Mesh Producer, the defendants would affix a batch tag prior to supply.

[40] Both Jackie and Ringo Liu were present during the search. Jackie Liu verbally acknowledged to Commission representatives carrying out the search that:

- (a) Batch One would fail to meet the uniform elongation requirements of the Standard if tested. Mr Liu advised that TKL had stopped selling this batch of steel mesh when it realised that it did not comply with the Standard.

- (b) The certificate was false and had been created and provided to a purchaser. The certificate's forgery was attributed to an ex-employee. The certificate was provided on one occasion, to one purchaser. This was the first and only time the defendants had been asked by a purchaser to provide a copy of a test certificate.

[41] The defendants were aware of the obligation to be satisfied that steel mesh being imported and sold in the New Zealand market complied with local standards. One document obtained by the Commission as a result of the search was a business plan put together for the defendants by an employee who worked with them for a short time. The business plan was prepared around the time that the defendants began importing TS10 steel mesh and notes:

We decided to import our own reinforcing steel product sourced from overseas in order to maintain our competitiveness in the current market. Before this TK purchase the steel from local supplier such as Brilliance Steel or Steel & Tube and this has limits [sic] the business opportunity significantly.

[42] Importantly, the document acknowledges the importance of having the product properly tested before being offered for sale, stating:

When the steel has arrived we need to do a test with local material laboratory such as SGS NZ to produce a compliant test certificate for distribution. This can only be started after the steel arriving but we can pre-apply the process beforehand. SGS Inspection guy will then come to the yard and get the sample off the steel on site to bring back to the lab for testing. The testing process would take approximately 5 working days to complete. [sic]

[43] A soft copy of the business plan document was located on a computer at the defendants' premises and a hard copy was found lying on the floor. Jackie Liu advised the Commission that he was aware of the document having been created but had not reviewed its content.

Commission testing of samples from both batches

[44] The Commission sent three sheets from Batch One and three sheets from Batch Two to be tested by two separate agencies – SGS NZ and SAI Global (NZ) Limited (“SAI Global”). The test results from both SGS NZ and SAI Global were consistent and showed that, of the samples tested:

- (a) the samples from Batch One failed to meet the requirements under the Standard for ratio, uniform elongation and shear strength; and
- (b) the samples from Batch Two failed to meet the requirements under the Standard for uniform elongation.

[45] The test results for the samples from Batch One were particularly bad, with uniform elongation results of between 1.2% and 2.0% when the Standard requires a minimum of 10%. The samples from Batch One were uplifted from a property owned by Jackie Liu in Whenuapai, where they were being stored after the decision had been made to stop selling that batch.

[46] The results from the samples of Batch Two that were tested, while better, still failed to achieve the required 10% and were between 8.2% and 9.1%.³

Interviews

[47] On 20 July 2016, the Commission interviewed each of:

- (a) Jackie Liu who is a director of both TKL and NZSD and, for all intents and purposes, the controlling mind of both companies. He owns 75% of the shares in NZSD. He effectively controls a 55% holding in TKL through holding companies, Three Brothers Group Limited and NZ Liu Family Trustees Limited, both of which have him as their sole director.
- (b) Ringo Liu who is also a director of both TKL and NZSD. He owns 25% of the shares in NZSD and effectively controls a 45% holding in TKL through holding company, Three Brothers Group Limited.

³ Charges have not been laid alleging the representations made about Batch Two were false and/or misleading. However, as set out at paragraph [74], [75] and [80] below, these representations were unsubstantiated.

[48] On 15 September 2016, the Commission interviewed Ellen (aka Xuexiang) Liu, Jackie Liu's sister, who acted essentially as an office manager for the defendants.

Jackie Liu

[49] Jackie Liu provided information regarding the order, import and supply process of TS10.

[50] He acknowledged that the defendants relied almost entirely on the Mesh Producer regarding compliance of the product with the Standard.

[51] Mr Liu advised that a relative in China had found the Mesh Producer at a trade fair and that the Mesh Producer had been established for approximately 12 years. He said that the Mesh Producer told him that it supplied to customers in Australia and New Zealand but was unable to provide the names of any importers of its products into New Zealand. When asked whether there were any other reasons for him to believe that the Mesh Producer was reliable, Mr Liu pointed to the fact the company had been in business for 12 years and also stated that the Mesh Producer had produced test reports from SGS for 500L mesh that it had supplied to Australia. No verification was sought of the Mesh Producer's capability to produce 500E steel mesh in accordance with the Standard. Mr Liu subsequently advised the Commission that he had thought it was sufficient to rely on the documents set out at paragraph [53] below and that he had little understanding of the manufacture process of the product.

[52] When ordering Batch One, the defendants took no steps to ensure compliance other than providing instructions to the Mesh Producer that the product was to be manufactured to comply with the requirements for 500E grade mesh in the Standard. The defendants undertook no sampling or testing themselves.

[53] The Mesh Producer provided the following documents to the defendants in relation to the quality and compliance of Batch One:

- (a) A “product quality certificate” from Hebei Jingye Steel Co Ltd (“the Mill”), the steel mill that had produced the raw material that was processed into mesh.
- (b) A document entitled “test certificate of mechanical and chemical analysis” that was produced by the Mesh Producer.

[54] As to the physical and mechanical properties of Batch One, Mr Liu admitted to the Commission that it did not comply with the Standard. After hearing about concerns in the market regarding the potential non-compliance of seismic steel mesh, he had asked the Mesh Producer to show him a test being carried out over video conference around August or September 2015.⁴ In Mr Liu’s words, “it breaks and then the data doesn’t look good.” He said that the uniform elongation results were around 4%, well below the 10% required under the Standard. Mr Liu advised that the defendants stopped selling this product having observed the video of the testing.

[55] Mr Liu advised the Commission that the defendants took further steps in relation to the compliance of Batch Two. For Batch Two, the defendants arranged for a third party, SGS-CSTC Standards Technical Services (Tianjin) Co Limited (“SGS-CSTC Tianjin”) to carry out testing of the samples. Two sets of testing were carried out in September 2015 and January 2016.

[56] All three representatives of TKL interviewed by the Commission admitted that the certificate had been forged. The Commission was advised that Ellen Liu was responsible for creating the false certificate. Ms Liu stated that neither Jackie nor Ringo Liu were involved in the creation of the false certificate and she had acted alone. As noted above, the certificate was sent on one occasion to one purchaser, being the only purchaser who asked for a copy of a test certificate.

[57] SGS NZ subsequently telephoned TKL to ask about the fake certificate being sent to the Customer on its letterhead. As a result of the call from SGS NZ, on 31 August 2015, Ellen Liu sent an email to the Customer which read as follows:

⁴ The Commission commenced its investigation into seismic steel mesh in August 2015.

Dear Valued Customer

Our recent stocktake indicates that we may have supplied you the 500L mesh instead of 500E mesh on 29 July 2015, as our staff put the stocks on the wrong spot in our warehouse.

Your invoice number is #1159073, we would like to recall the products, and provide you with full refund of \$315 plus GST or exchange them with 500E products.

Sorry for the inconvenience [sic], please contact us immediately if you have any issues.

The representations

Tags

[58] The defendants designed batch tags to be affixed to both batches of TS10 when they arrived from the Mesh Producer.

[59] The tags affixed to Batch One mesh were in the name of NZSD, and stated that the product was of 500E grade and complied with the Standard. The tag included two express references to “500E” and one to the Standard.

[60] The defendants advised the Commission that they did not always attach the batch tags to the steel they sold, meaning it is impossible to know how many, of the approximately 614 sheets sold from Batch One, were sold with the tag affixed.

[61] Batch Two was also sold with batch tags that had been designed by the defendants. The tags contained a reference to “AS/NZS 4617:2001” which contained a typographical error, as there is no such standard. Purchasers of the product would have understood the batch tag to be confirming the compliance of the product as 500E grade under the Standard or, more generally, that the product complied with the requisite New Zealand standard for seismic grade steel mesh. Again, the tag is printed in the name of NZSD and made express reference to the Standard (albeit with the typographical error noted above) and to “500E”.

Invoices and receipts

[62] The Commission obtained copies of invoices and receipts for sale of TS10 from both batches.

[63] Receipts obtained by the Commission and produced by TKL, for sales of TS10 from Batch One, describe the product as “REINFORCING MESH TS10 500E”.

[64] Invoices obtained by the Commission and produced by TKL for sales of TS10 from Batch Two described the product as “Seismic 500E House Mesh”.

[65] Both the receipts and the invoices contained a representation that the product was 500E grade and by implication, complied with the Standard.

The certificate

[66] As noted above, in July 2015, the Customer who had purchased TS10 from TKL asked for a copy of the test certificate showing that the mesh complied with the Standard. On 30 July 2015, Ringo Liu, on behalf of TKL, emailed the certificate to the Customer.

[67] The certificate represented that the product had been tested and certified as compliant with the Standard by SGS NZ.

False and misleading representations

Batch tags: Batch One

[68] The representations on the Batch One tags that the steel mesh was 500E grade and complied with the Standard were false and/or misleading, because Batch One did not comply with the physical and mechanical requirements under the Standard as established by:

- (a) the test results obtained by the complainant;

- (b) the test results obtained by the Commission from two separate agencies;
- (c) the testing that Jackie Liu advised the Commission he witnessed via a video conference.

[69] In all cases, the mesh failed to meet the requirements of the Standard, particularly the requirements for uniform elongation.

Receipts: Batch One

[70] The representation made on receipts given to customers for purchases of TS10 from Batch One were false and/or misleading for the same reason as the batch tags. The mesh from Batch One did not comply with the physical and mechanical requirements of the Standard. It was false and/or misleading to state that the mesh was 500E grade and, by implication, complied with the Standard.

The certificate

[71] The certificate represented that Batch One had been independently tested by SGS NZ and found to comply with the Standard. This representation was false.

[72] As noted above, all three employees of TKL admitted that the certificate sent to the purchaser had been forged.

The unsubstantiated representations

[73] In addition to the representations on the batch tags, receipts and certificate in relation to Batch One being false and/or misleading, they were also unsubstantiated.

[74] The representations made on the batch tags and invoices relating to Batch Two were also unsubstantiated.

[75] At no stage during the Charge Period were the defendants able to substantiate the representations that the mesh was 500E grade or that it complied with the Standard.

Batch One representations

[76] As noted above, the defendants advised the Commission that they had relied heavily on the Mesh Producer to ensure that the TS10 complied with the Standard. However, the documentation provided to the defendants by the Mesh Producer was inadequate for this purpose. The Mesh Producer provided the following documents to the defendants to demonstrate compliance:

- (a) A “product quality certificate” from the Mill relating to the raw material that was processed into the mesh. This document made no reference to the Standard and instead referred to a British standard, GB 1499.2-2007. Moreover, it referred to 8 mm diameter wire, when TS10 was formed from 6.5 mm diameter wire. According to Jackie Liu, the defendants later learned that the 8 mm steel wire was stretched out to form 6.5 mm wire, as part of the process of manufacturing the mesh.
- (b) A document entitled “test certificate of mechanical and chemical analysis”. This indicated that the product had not been tested in accordance with the Standard for the following reasons:
 - (i) The certificate referred to only one set of tests being carried out on a batch of 1,540 sheets. The Standard requires testing to be carried out on each batch of 1,000 sheets.
 - (ii) The certificate referred to the shear test having been carried out on only one specimen, whereas the Standard required two separate intersections to be tested.
 - (iii) There was no reference to ISO 15630-2, which is incorporated into the Standard and sets out the procedure for measuring

uniform elongation. Instead, it appears that uniform elongation has been tested with reference to another standard, AS 1391-2007.

- (iv) There was no reference to the ageing conditions applied to test pieces, nor to the free length of the test pieces. Each is required under ISO 15630-2 and, by reference, under the Standard.

[77] The defendants did not provide any other testing documents to substantiate the representations that Batch One complied with the Standard. Given the omissions and errors in the certificates discussed above, any such representations were thus unsubstantiated for the purposes of s 12A of the FTA.

[78] It is not reasonable for the defendants to rely so heavily on the Mesh Producer to ensure compliance with the Standard without taking further steps themselves to ensure compliance. The Mesh Producer advised the defendants that it had manufactured “500L” grade steel mesh but had not manufactured “500E” grade. The mechanical properties of 500E steel mesh are quite different to 500L. In particular, it does not have the same uniform elongation characteristics as 500E mesh. 500L mesh is not suitable for structural use in New Zealand, due to the risk of earthquakes.

[79] Batch One was manufactured from round ribbed steel. 500E grade mesh, however, does not ordinarily have a ribbed appearance. When interviewed, the defendants confirmed to the Commission that the 500E steel mesh that they had previously obtained from other suppliers was not ribbed.

Batch Two representations

[80] While the defendants took further steps in relation to the compliance of Batch Two, they still did not have adequate documentation to substantiate their claims that Batch Two TS10 was 500E grade and complied with the Standard.

[81] For this batch, the defendants arranged for a third party, SGS-CSTC Tianjin, to carry out testing of samples.

First SGS-CSTC Tianjin test report

[82] The first SGS-CSTC Tianjin test report, dated 11 September 2015, indicated that the testing was not in accordance with the Standard, even though it stated, “The results comply with the requirement of AS/NZS 4671:2001 Grade 500E and the client’s information”. The omissions from the report included:

- (a) It referred to only one item being tested, whereas the Standard requires a number of pieces to be tested.
- (b) The Standard requires testing to be carried out on every batch of 1,000 sheets. Batch Two had 6,000 sheets. The first report was produced before the arrival of the first shipment of sheets of Batch Two. The defendants advised the Commission that the first shipment contained approximately 1,100 sheets.
- (c) The test report did not include information required to be included under the Standard, such as references to ISO 15630-2, ageing conditions and free length of test pieces.

Second SGS-CSTC Tianjin test report

[83] After starting to sell the second batch of TS10, the defendants decided to have further testing carried out by SGS-CSTC Tianjin. This was because they realised that the first SGS-CSTC Tianjin test report indicated only one sample had been tested, when the Standard required multiple samples to be tested.

[84] The second test report was dated 12 January 2016, and indicated testing had been carried out on two sheets of mesh. The report showed the correct number of samples from each of those sheets being tested and noted that, “The results comply with the requirement of AS/NZS 4671:2001 500E”. The defendants advised the Commission that the second test report was produced before the arrival of the second

shipment of sheets from Batch Two. The defendants advised that this shipment also contained approximately 1,100 sheets.

[85] However, the report revealed two of the same omissions as the first report, which were required to show the testing had met the Standard; namely the report had the same omissions detailed at paragraph [82](b) and (c) above that were in the first report.

[86] The defendants did not provide any other testing documents to substantiate the representations that Batch Two complied with the Standard. The defendants advised the Commission that they believed Batch Two complied with the Standard based on the testing carried out in January 2016. However, in February 2016, they stopped selling mesh from that batch after becoming aware of ongoing concerns in the market surrounding the compliance of imported steel mesh.

[87] Given the omissions in the testing reports for Batch Two, the representations that Batch Two steel mesh was 500E grade and that it met the Standard were unsubstantiated for the purposes of s 12A of the FTA.

Submissions

[88] Both the prosecutor and defendants have filed substantial and helpful written submissions and made oral submissions at the sentencing hearing.

Commerce Commission submissions

[89] In a very truncated form, the Commission's submissions can be summarised as:

- (a) TS10 is a type of steel mesh used for reinforcing concrete construction. It is sold as "500E" grade steel mesh which is an earthquake grade mesh. That requires it to have certain characteristics including ductility which provide strength and resilience in the event of an earthquake. It is used to provide reinforcement in concrete slabs

for residential buildings, and in suspended floors and structural walls of multi-storey buildings.

- (b) The defendants' conduct was particularly serious conduct on a small scale. The steps taken by the defendants prior to making the claims of compliance with the Standard were completely inadequate. The provision of a fake testing certificate to a consumer was fraudulent.
- (c) Deterrence is a critical aspect in the circumstances.
- (d) An appropriate starting point for the representations relating to Standard compliance is one of \$540,000 to \$720,000.
- (e) The representation made in the test certificate is distinct, and very serious, conduct that warrants its own starting point. A starting point range of \$60,000 to \$80,000 is appropriate, resulting in a global starting point of \$600,000 to \$800,000.
- (f) It is accepted that a discount of up to 10% is available to the defendants as a result of their cooperation with the Commission and up to 25% for their guilty pleas.
- (g) Thus, it is suggested that a fine in the range of \$405,000 to \$540,000 should be the result.
- (h) The defendants assured customers of the compliance of TS10, a construction product, to earthquake standard. That was done without any real attempt to verify that assertion. The assertions were followed up on one occasion with the additional reassurance of compliance by the provision of a fake, forged testing certificate. In light of this conduct, it is submitted that a deterrent response is called for.

- (i) It is accepted that the gravity of the conduct has to be assessed in light of the additional fact that the offending occurred over a relatively short period and involved limited dissemination of the product.
- (j) It is submitted that the claimed impecuniosity of the defendants has not been sufficiently established and in any event, in all the circumstances, should not be taken into account.

Defendants' submissions

[90] In summary, the defendant has submitted:

- (a) Any sentence imposed has to be based only on what is contained in the agreed Summary of Facts.
- (b) The misrepresentation charge and the charges relating to unsubstantiated representations ought to represent the lead offending and attract a starting point of a fine in the region of approximately \$400,000.
- (c) The conduct represented in the charge relating to the forged test certificate, being discrete conduct, ought to result in an uplift of up to \$50,000, resulting in a global starting point of no more than \$450,000.
- (d) There should be a 15% discount to reflect absence of any previous convictions, cooperation and remorse, and then a further discount of 25% to reflect guilty pleas.
- (e) The defendants take the position that their respective financial positions are such that a very substantial discount ought to be allowed with an overall fine being imposed on TKL not exceeding \$78,750, and for NZSD, not exceeding \$63,750.

Post sentence hearing submissions

[91] At the sentencing hearing, the Court queried whether there was any proper factual basis upon which a discount for impecuniosity ought to be allowed. As a result, further time was allowed for the defendants to file any further material providing an evidential basis for allowing such a discount.

[92] An affidavit has been filed by a chartered accountant, Jerry Liang, and simply annexes the financial statements of the defendants with the commentary “I hereby verify the contents of the attached financial statements”.

[93] The Commerce Commission’s position in response is that there is now a disputed fact as to whether or not the defendants are impecunious, but that the dispute is not one of material consequence requiring a disputed fact hearing, because this is an appropriate case in which to impose fines irrespective of the defendants’ financial position.

[94] The defendants maintain that their impecuniosity is established and cannot be ignored. They invite the Court to proceed to determine an appropriate level of fine for each of the defendants without proceeding to a disputed facts hearing, but having proper regard to the verified financial position of the defendants.

Aggravating factors of the offending

[95] The context in which aggravating factors of the offending fall to be identified is as follows:

(a) Purposes of the FTA

The purposes of the FTA are to contribute to a trading environment in which the interests of consumers are protected, businesses can compete effectively and consumers and business participate confidently. To promote those purposes, the Act prohibits unfair conduct and practices in relation to trade, promotes fair conduct and practices, provides for the disclosure of consumer information relating

to the supply of goods and services and promotes safety in respect of goods and services.⁵

(b) Case law

The High Court in *Commerce Commission v LD Nathan and Co Limited*⁶ identified considerations relevant to the punishment to be imposed as follows:

- (i) the objectives of the Act;
- (ii) the importance of any untrue statement made;
- (iii) the degree of wilfulness or carelessness involved in making such a statement;
- (iv) the extent to which the statements in question depart from the truth;
- (v) the degree of their dissemination;
- (vi) the resulting prejudice to consumers;
- (vii) whether any, and if so what, efforts have been made to correct the statements;
- (viii) the need to impose deterrent penalties.

(c) The objectives of standards:

- (i) Notwithstanding the time period of the offending, it is noteworthy that a 2016 Standards NZ and MBIE brochure entitled “Why Standards?”, stated “Standards are solutions that help keep our homes, public buildings, playgrounds, electrical

⁵ Fair Trading Act 1986, s 1A.

⁶ *Commerce Commission v LD Nathan and Co Limited* [1992] NZLR 160 (HC).

appliances and health services safe”. That somewhat states the obvious.

- (ii) “Structure to the New Zealand Building Code”, at cl B1, describes the following purpose:

The objective of this provision is to:

- (a) safeguard people from injury caused by structural failure;
- (b) safeguard people from loss of amenity caused by structural behaviour; and
- (c) protect other property from physical damage.

[96] In light of the foregoing, the identifiable aggravating features are as follows:

Objects of the Act

- (a) Batch One of TS10 was non-compliant with the physical and mechanical, as well as the testing, requirements of the Standard. By offering Batch One for sale as grade 500E, without any proper attempt to determine its compliance with the Standard, undermined both the objectives of cl B1, referred to above, and the objectives of Standards in general.
- (b) It is unknown whether Batch Two complied with the physical and mechanical requirements of the Standard, but it is known that the testing requirements were not met. The consequence of this is that consumers were left in a position of uncertainty and the true position cannot now be determined. This behaviour also undermined the safeguards that would arise from compliance with the Standard.

Importance of untrue statements

- (a) It is quite obvious in New Zealand, given our history of earthquakes and the consequences of them, that there is a vital need for consumers to rely on representations as to Standard compliance and, in particular,

earthquake Standard compliance. The impact on consumers, competitors and the industry generally is relatively self-evident. Thus, the need for compliance and the importance of any untrue statement is very high.

- (b) The defendants, within their own business documentation, including their business plan, clearly acknowledge a need to remain competitive in the market and have thus responded in the market dishonestly clearly knowing of the need for compliance with earthquake Standards. The defendants were well aware of the need for proper testing.
- (c) The use of non-compliant steel mesh, especially in the context of earthquake compliant mesh, has actual and potentially enormous consequences for consumers, for competitors and for the reputation of the building industry.
- (d) It is self-evident that consumers should be able to expect claims of Standard compliance to be susceptible to proper substantiation. That is especially so in relation to earthquake compliance.
- (e) In the same context, independent testing representations are very important. This representation provides consumers with additional assurance as to Standard compliance. In this case, the representations were deliberately false. The use of the name of an independent tester, when the tester had had no involvement with testing, places the misrepresentation in a very serious category. These sorts of misrepresentations damage the industry.

Degree of wilfulness or carelessness involved

- (a) For Batch One, the defendants did no more than give instructions to the mesh producer to manufacture in compliance with grade 500E in the Standard. No sampling or testing was undertaken. No steps were taken to satisfy themselves as to compliance. No due diligence took

place. Even the physical appearance of Batch One did not match what is ordinarily produced for grade 500E. Prior grade 500E mesh obtained by the defendants had a different appearance.

- (b) Insofar as the unsubstantiated representations are concerned, the defendant's conduct fell far short of what a reasonable consumer would expect of a trader. The steps that were actually taken, while positive, were completely inadequate. The first test certificate provided to the defendants was self-evidently deficient, and it was in the defendants' possession prior to Batch Two going on sale. The certificate was only scrutinised after the product had gone on sale. Even when scrutinised, the defendants appreciated only one and not all of the testing deficiencies.
- (c) The independent testing representation was nothing short of fraudulent. While the creator of the certificate is said to have been a TKL employee, Ellen Liu, the Court notes that her title was that of Office Manager. Ms Liu is said to be the sister of the other director of TKL, Jackie Liu, who is also the sole director of NZSD. The creation of the fake certificate can only have been deliberately carried out in order to provide an additional false assurance of compliance with the Standard. Both directors deny any knowledge of Ms Liu's actions. That, in my view, is disingenuous. TKL is a small company with hands-on directors. The provision of that certificate was plainly deliberate on the part of Ms Liu, and at least negligent on the part of the directors.
- (d) In my view, the compliance representations and unsubstantiated representations were grossly negligent.

The extent to which the statements in question depart from the true

- (a) The independent testing representation was completely untrue.

- (b) The compliance representations were completely untrue. Batch One failed both limbs of the Standard, namely the physical and mechanical requirements and the testing requirements. Batch Two failed the testing requirements. I accept the prosecutor's submission that the specific failures need to be considered cumulatively in assessing the departure from the Standard. There was thus substantial departure from the truth. Steps taken to substantiate representations were entirely inadequate.
- (c) The independent testing representation was, as described above.

Degree of dissemination

- (a) The degree of dissemination is not a specific aggravating factor. A total of approximately 2,600 sheets of TS10 were sold over a nine-month period, of which 614 are known to have failed both aspects of the Standard and the remaining to have failed its testing requirements. It appears that in respect of the 614 sheets these were placed into 32 homes.

Resulting prejudice to consumers

- (a) The Auckland Council has had to conduct an assessment. Thirty-one residential homes had the non-compliant mesh in ground slabs, and one in a suspended concrete floor. A number of risk factors were considered by Auckland Council in order to triage the risk. Five homes were considered to be high risk, 24 medium risk and three low risk. The five high risk homes were then referred to an engineer who considered one of them to be "of concern". Obviously, this exercise has not been without cost
- (b) It is difficult to assess the results that might flow, should any of the homes be subject to earthquake events. The Court is not in a position to speculate.

- (c) As part of this aggravating factor of resulting prejudice, there has obviously been an undermining of confidence in the industry.
- (d) The misleading conduct appears to have been carried out with a focus to remain competitive in the market. It can therefore be assumed that this gave an unfair competitive advantage over compliant competitors.

The need for deterrent penalties

- (a) A combination of the foregoing aggravating factors clearly raises the need in this case for both specific and general deterrence. That is all the more so when earthquake standards are involved.

Mitigating factors

[97] Mitigating factors relating to the offending are as follows:

- (a) TKL withdrew the first batch of product from the market, on or about 29 August 2015, after seeing testing of the product indicating it was non-compliant.
- (b) After placing an order for the second batch, further steps were taken with the aim of achieving compliance.
- (c) The defendants took account of general concerns heard in the market around compliance regarding steel mesh and made a decision to cease sales of the product prior to identifying deficiencies.

Starting point

[98] It is unrealistic to separate each of the defendant's conduct to be dealt with discretely. There is a need to make an evaluation of the offending in a global way and consider the totality of the offending.

[99] In *Commerce Commission v Carter Holt Harvey*,⁷ the defendant had deliberately, over about three years, sold about \$177 million of timber representing that it was high grade structural timber, when it was of a lower grade. The consequence was that safety margins in house building were reduced. Sagging roof trusses, deflections in roofing and squeaky floors were likely results. This large company was fined \$900,000 after a 33 percent discount (then standard) had been allowed for an early guilty plea. Thus, the starting point was around \$1.35 million.

[100] The charges in *Carter Holt* were predominately subject to a maximum penalty of \$100,000 with about one-sixth of the charges subject to a maximum penalty of \$200,000. It is noteworthy that there have been two increases in the maximum penalty since the *Carter Holt* decision resulting in a six-fold increase in the maximum penalty. As a consequence, in today's terms, a likely starting point in the *Carter Holt* decision if decided now would be in the range of \$3.6-\$4.8 million. Proper assessment, by way of comparison, is not susceptible to a precise mathematical analysis.

[101] There are obvious differences between the present case and the *Carter Holt* case:

- The defendants in this case are far smaller and offended over a shorter period.
- Only a tiny fraction of the revenue generated in the *Carter Holt* case will have been generated here, although the precise figures are unknown.
- The degree of culpability arising from the level of negligence was similar.
- It was said in the *Carter Holt* case that houses are overengineered and the use of a lower grade timber would reduce the built-in safety margins, with catastrophic failure therefore being unlikely. On the

⁷ *Commerce Commission v Carter Holt Harvey* [2009] NZSC 120 [2010] 1 NZLR 379.

other hand, the failure of concrete slabs may be more fundamental, but contingent on the occurrence of another event such as an earthquake.

[102] In taking into account the following:

- (a) The defendants' conduct is all subject to the \$600,000 maximum; and
- (b) The defendants' conduct was grossly negligent; and
- (c) Important statements of assurance of Standard compliance were made in this case relating to earthquake Standards, against a history of poor performance of buildings in the Canterbury earthquakes; and
- (d) The relativity of size between *Carter Holt* and the defendants, and the extent and time periods of the representations;

an appropriate starting point is \$600,000. This starting point applies to both the compliance representations and the unsubstantiated representations.

[103] The representation by TKL regarding the independent testing involved the creation of a false certificate naming an innocent third party as having conducted testing. This occurred on one occasion with one certificate, but was a serious and deliberate misrepresentation. This was straight out fraud. An appropriate starting point is \$60,000.

[104] The combined starting point is thus one of \$660,000 which requires no adjustment for totality.

Mitigating factors personal to the defendants

[105] The defendants are entitled to a discount for co-operation with the Commission's investigation. Records requested were provided and voluntary interviews were given. The investigation had some complexity, and this assisted the

Commission. Steel mesh specimens were provided to the Commission from off-site. A 10 percent discount is appropriate for co-operation.

[106] A 25 percent discount is appropriate for early guilty pleas.

Result

[107] The global starting point of \$660,000 is reduced by \$66,000 for co-operation and \$148,500 to reflect the guilty pleas, with the interim end point being \$445,500.

Ability to pay fine

[108] Section 40 of the Sentencing Act 2002 relevantly provides:

40 Determining amount of fine

- (1) In determining the amount of a fine, the court must take into account, in addition to the provisions of sections 7 to 10, the financial capacity of the offender.

...

[109] The defendants have put material before the Court suggesting an inability to pay a fine anywhere near that suggested by either the prosecutor or defence counsel.

[110] Initially, with written sentencing submissions, the defendants simply put before the Court documents purporting to be financial statements of the defendants. In the Court's view, they raised more questions than answers. Further time was given to clarify their position.

[111] Jackie Liu has, on 8 December 2017, sworn an affidavit. He deposes to payments totalling \$388,726 to a related party, another company "Just Hire NZ Limited", which was registered on 30 March 2015, and in respect of which he is the sole director and 62.5 percent shareholder, along with his cousin who holds the balance of the shares. This is said to be a scaffolding services company.

[112] The payment above was made in the 2016 year, and in the 2017 year, payment was made in the sum of \$357,580. I note also that Ringo Liu was, in the

2017 year, paid almost \$100,000 wages. A job list is also annexed to Mr Liu's affidavit.

[113] The extent to which the financial accounts have been verified is that they have simply now been annexed to an affidavit from the chartered accountant who prepared them. He simply verifies them as accurate, but it is not evident that any proper audit of the accounts has taken place.

[114] The information provided by the defendants is unsatisfactory in the sense that it could have been far more detailed. The accountant, in the absence of proper audit, is simply organising and reporting on the information that has been provided by the defendants. All prosecutions were launched on 20 March 2017, although, of course, it was well before that, that the defendants knew of the investigation.

[115] Although the Court must take into account a defendant's financial capacity, it is not bound to slavishly accept what is put before it. Notwithstanding full opportunity to inform the Court of its capacity to pay a fine, or pay a fine over time, inadequate information has been provided, especially with regard to time payment.

[116] I have approached this matter on the basis that I have set out what the end overall sentence should be.

[117] There is always a need to sentence any defendant on the basis of proven or admitted facts. That said, the sentencing process cannot take place in a vacuum. With that in mind, it cannot escape the attention of the Court that earthquakes are a feature of the New Zealand landscape, both metaphorically and literally, and that is a matter of ubiquitous knowledge. The defendants have, in that environment, chosen to deliberately offend in the way described. Very strong specific and general deterrence is required in these circumstances.

[118] With all that in mind, I am prepared to make what I consider to be a moderate and balanced adjustment to take into account the defendants' claimed financial position. I therefore allow a further 10 percent discount bearing in mind the information put before the Court and the Court's inability to properly assess the defendants' ability to pay over time.

[119] The result is that the end sentence is reduced by a further \$44,550 with the net end result being a total fine of \$400,950.

[120] I set out below the fines and Court costs imposed.

Defendant	Charge	Fine	Court Costs
TKL	1	\$81,000	\$130
TKL	2	\$81,000	\$130
NZSD	3	\$81,000	\$130
TKL	4	\$40,500	\$130
TKL	5	\$40,500	\$130
NZSD	6	\$40,500	\$130
TKL	7	\$36,400	\$130




R G Ronayne
District Court Judge

ADDENDUM:

[121] Since this judgment was issued on 24 April 2018, it has been brought to the Court's attention that errors are apparent. This judgment now:

- (a) Correctly describes the Second Defendant as "NZ Steel Distributors Limited";
- (b) Corrects typographical errors to make it clear that NZSD is the correct defendant in charge 6;
- (c) Corrects the "starting point" referred to in paragraph [102] to \$600,000.



R G Ronayne
District Court Judge

21 May 2018