IN THE DISTRICT COURT
AT AUCKLAND

CRI-2012-004-017226

COMMERCE COMMISSION
Informant

v

BGV INTERNATIONAL LIMITED
Defendant

Hearing: 23 October 2014

Appearances: A McClintock for the Informant
S Lance for the Defendant

Judgment: 23 October 2014

NOTES OF JUDGE DAVID SHARP ON SENTENCING

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[1] BGV International Limited pleaded guilty to 10 charges under s 10 Fair Trading Act 1986. The charges relate to offering for sale alpaca rugs that were bearing labels that represented that the rugs were made in New Zealand. The rugs that were sold came from Peru. These rugs were sold to organised Asian tour shopping groups.

[2] Section 40(1) Fair Trading Act provides in the case of a body corporate the maximum penalty is to a fine not exceeding $200,000 for each offence. In this case the defendant faces 10 charges.

[3] The charges cover the period 1 January 2010 to 25 August 2011. The company operates from Auckland and sells souvenir products including alpaca rugs. It operates retail outlet in Auckland for Chinese, Korean and Taiwanese tourists who visit the premises as part of organised shopping tours.

[4] In addition, alpaca rugs supplied by the defendant company as New Zealand based suppliers were offered for sale at showrooms in Rotorua. The defendant company also exported a significant quantity of the alpaca rugs to its parent company in Australia. The alpaca rugs were sold predominantly to tour groups run by Inbound Tour Operators ("ITO"). The organisations are involved in organising tours from China, South Korea and Taiwan as a condition of the approved destination status agreement between the company's respective Governments.

[5] The ITOs are required by Tourism New Zealand Limited to control the tour group on arrival including the placement of the tour group in a hotel in New Zealand, transport around various shopping destinations in which they have an interest or a contact with. The ITO charges retailers such as BVG International Limited a commission which can be up to 60 to 70 percent on product sold.

[6] Over the charge period the tours organised by the ITO typically began in Auckland visiting outlet such as the defendant's and then travelling to Rotorua for a visit to the Agrodome. These tourists saw and interacted with live alpacas as part of a farm tour. The ITOs then took their groups into individual retail premises where they received a welcome introductory speech from the host. The tourists were taken to a showroom decorated with alpaca rugs. Sales staff further promoted the products and their quality by oral representation and use of promotional materials. Most arrangements were arranged by the tourist to purchase themselves but there were shipping arrangements to have the goods returned to their home country.

[7] The defendant purchased the bulk of the alpaca rugs sold to tourists over the charge period from Hyeon Company Limited more than 90 percent and less frequently from Premium Alpaca Limited and other suppliers, perhaps less than five percent. Both Hyeon and Premium Alpaca import rugs from Peru and service them. Servicing the rugs include repairing tears, replacing the backing material, brushing, placement of bad wool areas, dusting, cleaning, treatment (inaudible 14:50:44).

[8] Hyeon and Premium Alpaca also labelled the rugs. The rugs purchased were labelled "Alpaca New Zealand, 100 percent baby alpaca, proudly made in New Zealand by Alpaca New Zealand Limited." Rugs purchased from

Premium Alpaca were labelled as such over the charge period. No alpaca rugs were commercially produced in New Zealand.

[9] The Commerce Commission investigated complaints relating to prices being charged for alpaca products, the quality of such products and the country of origin representation. There was also feedback received from mystery shoppers about organised shopping excursions. The Commission executed a series of search warrants following which the defendants agreed to be interviewed. Representatives of the defendant company stated that BGV had previously imported from Peru one shipment of alpaca rugs itself, that being a sample, but there had been no attention paid to the labelling of the rugs, that ordering the alpaca rugs from New Zealand based suppliers was when this was required, that the representative had worked with the defendant company on a day to day basis, that he was unsure where the rugs came from but had seen the rugs being serviced at Hyeon factory.

[10] Further, BGV's main retail premises were in Auckland but that it traded of showrooms as JM Wool and Duvet 2000. The sales and income received by the defendant for the charge period was $3,195,543. The alpaca rugs comprised 46 percent of the total sales value.

[11] I do add that the defendant company's position is that the actual profit derived as opposed to the sales and income should be taken into account in assessing culpability. There is a difficulty with that and although the company has disclosed financial records, the volume of material traded does appear to indicate that the trading was in respect of a significant part of the company's operation. Invoices in Hyeon file show that 2187 alpaca rugs were sold to the defendant between 5 January 2010 and 31 August 2011 at an invoice value of $1,343.480. The export record show that between 21 July 2010 and 24 August 2011 1363 alpaca rugs were sold by the defendant to its Australian parent company. The value of these exports was $4,294, 410, an average selling price of $3150.50.

[12] The alpaca rugs sold by the defendant retail were between about $2000 and $4000 per rug. By comparison, Peruvian alpaca rugs sold by other suppliers in Rototua area were selling between $1000 and $1600 per rug. The tourists travelling

with the organised shopping groups were, therefore, paying two to three times more than the amount paid for imported alpaca rugs sold as such.

[13] The New Zealand tourist industry cannot avoid being harmed by conduct of the sort that is present here. The defendant company has not previously appeared before the Court for any matter. The defendant's submission is that this is a case in which the defendant had no knowledge the rugs which were sold were not made in New Zealand and that it had relied on Hyeon's misrepresentations about the rug's origins. It maintains the structure of the tourist industry contributed to the higher price that the rugs sold for and it maintains that the defendant's gross margin as a result of the sale of rugs was slow, that the defendant's previous importation from Peru was for comparative purposes with the New Zealand stock.

[14] There is a further matter which has arisen today and that is that the actual financial state of the company is at present unknown. Currently, it is properly listed as a company but there may be a liquidation that is near at hand. That is a matter that Mr Lance is unable to advance beyond the brief instructions which he has received and it was a matter of concern that this may in fact be a situation in which whatever result is achieved it may be subject to the actual financial position of the company.

[15] It has been advised to the court that, as is set out in the Sentencing Act 2002, if there is a question of impecuniosity, it is a matter that the company is entitled to raise at this point other than the instructions which Mr Lance has recently received. There is no material upon which such a consideration could be made.

[16] The prosecutor makes a submission in response to matters relied upon by the defendant's behalf that a starting point in respect of this matter should be on a totality basis in the range of $40,000 to $60,000 in respect of the country of origin representations alone. The prosecution submits discounts of up to 30 percent as applied in previous sentencings is appropriate, and in addition to this the prosecution has today added that there is no mitigation which has been advised which should incline the Courts to increase the degree of discounts allowed beyond that of 30 percent.

[17] The prosecution accept that it is correct that this defendant cannot be deemed to have fraudulent knowledge in the way that other defendant companies have and have accepted by virtue of the pleas that they have entered. The prosecution do, however, say that the High Court decision supports a conclusion that wider scale distribution of high value products such as these is serious conduct. If that conduct is deliberate, it will be a sentence at the highest end of the scale. Plainly a finding of a lesser level of mens rea will mean a lesser starting point.

[18] The prosecutor, however, maintains that it does not relegate the defendant's conduct to the lowest end of the sentencing range available and distinguishes particularly the *Commerce Commission v Ezibuy* DC Auckland CRI-2008-404-11440, 3 September 2008 case. The submission of the prosecution is that the defendant was at least wilfully blind as to the origin of the rugs. It points to the large scale of the misrepresentation. Prosecution maintains these were not isolated instances of incorrect labelling, easily attributable to carelessness or circumstances in which a trusted supplier had over a period of time earned the trust of the person selling the product and that trust was breached in a way that could only be described as careless. The further point is made that the company's representatives have said upon interview that they paid no attention to the labelling on the rugs and were not sure where the rugs had come from.

[19] The prosecution submits that it lacks credibility to suggest that the material provided was taken at face value. It also suggests that as this was sale of high individual value items, basic due diligence would have determined the origins of the product. The defendant on the other hand says that because it was told that these items had indeed come from New Zealand and that was certified to them, that they had relied upon the word that they were given.

[20] The defendant company has of course imported alpaca rugs via Peru and must known that source of product was also available. One would have thought that in that situation it was a case where enquiry was called for.

[21] The Commerce Commission in *Connell v LD Nathan & Co Ltd* [1990] 2 NZLR 160 suggests that the objectives of the Act, the importance of any untrue

statement, the degree of wilfulness, the degree of departure from the truth, the degree of dispersal of other product, the efforts at correction and the prejudice to consumers all call for consideration. Obviously in this case they are important factors in relation to culpability.

[22] In addition, the principles and purposes of the Sentencing Act need to be applied and counsel for the defendant company has referred to s 9 and the elements of mitigation that may be called upon by the company. The defence counsel's submission do not identify a starting point but the proposed end sentence of $5000 prepossess a starting point between $8000 and $10,000 as a fine on a totality basis. The prosecution starting point is the range of $40,000 to $60,000. There is a significant difference in the approaches that are called for.

[23] In this case, in addition to the principles I have referred to reference has to be made to the sentences imposed on the other six companies involved. Obviously this defendant is less culpable and the established fraudulent behaviour is not present. However, the description of reckless or wilful blindness seems to me to be more appropriate than a simple carelessness basis as submitted by the defendant's counsel.

[24] Accordingly, although less culpable than the other companies, I do not accept that this defendant can point to the lowest range of culpability. There are 10 charges present. I must have regard to totality in any fine. There is a need for deterrence in respect of persons involved in the tourist industry and in respect of the defendant itself. There is a need for accountability also and the cumulative effect of misstatements made on sales to tourists is a matter of general concern and is a matter of wider implication.

[25] In these circumstances, a starting point in my view of $30,000 on a totality basis is called for. I will allow a full discount in respect of the guilty pleas that have been entered. I add that the defendant is entitled to credit for assistance given to the authorities. Previous good record, further credit is provided for those matters.

[26] Given the total discount that has been allowed in this case and the fact that I allow the similar credits as are imposed in the other cases, and accordingly taking

into account those matters a fine in the sum of $22,000 is imposed in respect of CRN 12004504904 and I convict and discharge the company on the remaining nine informations.

David Sharp
District Court Judge