

**IN THE DISTRICT COURT
AT AUCKLAND**

CRI-2012-063-003511

COMMERCE COMMISSION

v

**WILD NATURE NZ LIMITED
SUNG HO PARK**

Hearing: 12 December 2014
Appearances: A McClintock for the Crown
D Webster for the Defendant
Judgment: 12 December 2014

NOTES OF JUDGE DAVID SHARP ON SENTENCING

[1] This is a sentencing in respect of Wild Nature Limited, a company in liquidation, and in respect of Mr Sung Ho Park.

[2] The sentencing here is part of a sentencing which relates to eight interrelated proceedings which have been set down in Rotorua and in Auckland. The sentencing is in relation to sales of alpaca rugs and Merino and Southdown duvets. The underlying wrong which the Commerce Commission has pursued is that misrepresentations about, firstly, where the alpaca rugs were made and, secondly, in relation to the composition of the duvets. These misrepresentations found their way to tourists at various locations, principally in Rotorua but in some outlets in Auckland also.

[3] At this stage of sentencing there are some particular principles and purposes of sentencing which need to be firmly kept in mind. There is a need for deterrence in

respect of persons involved in the tourist industry and personal deterrence in relation to the incorporated bodies and individuals. There is a need for accountability which has to sheet home the responsibility to protect an industry which is of major importance nationally, and also to ensure that persons who are subject to information provided can rely on that information.

[4] Also, because this is the last part of the sentencing process it is important that the sentences here have parity with other persons who have already been sentenced and that there is a correct assessment of the gravity in relation to the parties who are for sentence.

[5] The Crown has commenced its sentencing submissions with a view that Wild Nature Limited is of greater culpability than the other defendants who have been sentenced, and in relation to Mr Park, that he is at least as culpable as the most culpable of the other individuals who have been sentenced to date. The Crown suggests that a starting point for sentence in respect of the origin offending is a fine between \$170,000 and \$190,000. The contention is also made in respect of the composition of the duvet and other material offending that the starting point should be between \$180,000 and \$200,000. As far as Mr Sung Ho Park is concerned the Crown suggest a \$20,000 starting point for the origin offending and \$20,000 to \$30,000 for the composition offending. All of the starting points, and because there are 37 separate charging documents in relation to the company and a number of charging documents in relation to Mr Park himself, needs to be kept with totality in mind and an overall sentencing figure needs to be applied that effectively deals with the principles and purposes of sentencing but also does not lose sight of totality by virtue of the nature of the charges themselves and the number.

[6] The Crown also submits that the High Court resolution of appeals in relation to Judge Thomas' sentencing fortifies the position of the Crown, those sentencing notes being found in *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836. This decision, which I have considered, is said to support the starting points and the discounts for pleas and prior lack of convictions and for co-operation. It is also useful in terms of analogous positions being able to be considered from the sentencing decisions and for the way that the subject matter has been dealt with.

[7] There is a difference of opinion between counsel for Wild Nature Limited and the Crown in respect of the mental elements of the charge. This is a charge in which strict liability for corporate entities is present but it is also a charge under which Mr Park has been brought into the picture by virtue of s 66 Crimes Act 1961. The position with parties is that there is always, or at least there is in this case, a mental element which must attach to the charge. The reasons for that are clear, a corporate structure can be diverse and persons with absolutely no knowledge whatsoever of corporate offending could assist that corporate offending, and if they were able to be prosecuted in the same way and with the same liabilities as parties have, that could create injustice. Accordingly, a mental element of the offending is a requisite for individuals who are charged parties to corporate offending.

[8] Mr Park has pleaded guilty. I am bound by that plea. The elements of the charge must be accepted as being present. In addition, the Crown point to statements that are made on behalf of Mr Park. It is said that that was after knowledge had been gained in relation to the process itself but, notwithstanding that, I have to assess the position on the basis that guilty knowledge was present at the time of the offending. I cannot consider the matter any other way. And s 45(1) Commerce Act 1986 provides that knowledge by corporate officers necessarily must be attributed to the corporate body itself. Accordingly the legal position requires me to accept that this was behaviour, not of inadvertence or of carelessness, but of deliberate mens rea present misrepresentation. Misrepresentations of the type that occur here have been categorised as fraud, and although Judge Thomas was criticised for adopting that language the High Court saw nothing out of order in respect of it, and in the traditional basis with which fraud is regarded it seems to me to be an occasion on which that label can appropriately be applied.

[9] That said, counsel for Wild Nature Limited has pointed to the influence that was had over the officers of the company by older, more experienced operators, and that the cultural dynamic of things made questioning that information and the stance taken difficult.

[10] The starting points that are suggested on behalf of Wild Nature Limited are, in respect of the origin offending, fines from zero to \$23,030, and as regards the

composition matters, between \$26,800 and \$54,300. For Mr Park, it is suggested that for the origin offending a commencement point of \$3500.00 and for the composition offending a starting point of some \$19,580.00. Accordingly, there is a considerable gap between that position and the position which is called for by the Crown.

[11] The Crown take the position that Wild Nature has high culpability, that it sold a high number of products, that it aggravated this by the use of false brochures and certificates. It is submitted that that demonstrated cynical deception for profit, that the company took advantage of tourists who were in a poor position to test the certificates and other materials. Also that Wild Nature Limited got to a position by its own imports and by imports provided by Premium Alpaca to reach the stage where 3585 high value rugs were, as a derivative figure, provided to tourists who thought they were something different from what was represented to them.

[12] To suggest that the other companies involved in this matter had greater culpability seems to me difficult when Wild Nature Limited was the entity through which the actual products were provided to the tourists who were misled. I have to say that I regard the dressing up of the representations as an aggravating aspect and an aspect that was not present in relation to other companies involved.

[13] The prosecution point to the High Court views on appeal, those appeals being brought by Premium Alpaca. The prosecution maintain that the decision supports the contentions made as regards sentence. As I have said, I need to impose consistency in relation to sentencing and denunciation, deterrence and accountability.

[14] I have read the decision of Venning J in respect of the grant of leave for the prosecution to continue, notwithstanding the liquidation of Wild Nature Limited. I note the comments referred to in the judgment that are attributed to the liquidator. The liquidator swore affidavit material before the High Court that there should be sufficient in the assets of the solvent liquidation to meet fines imposed. Certainly, at that hearing the Crown echoed the submissions that are made before me that the culpability would be a high level and the company's liquidator must have been aware that fines of a significant nature were contemplated.

[15] I have to take into account a starting point, bearing in mind the aggravating matters that I have referred to and endeavouring to see consistency with other sentences. The starting point that I select is \$350,000, this being an overall figure designed to reflect the totality principle. From that figure I deduct 30 percent for plea, co-operation and the lack of previous history. On that basis a total fine of \$243,444 will be payable by Wild Nature Limited and that is on the following basis.

[16] On CRN-12063501541 a fine of \$143,444 is imposed. On CRN-1263501552 a fine of \$100,000 is imposed, that bringing a total imposition of a fine of \$243,444. On each of the other informations, there being 35, there are convictions and discharges recorded.

[17] As regards Mr Park, his liability is as a party. There is a need to ensure that his position reflects his part in relation to culpability. In his case I adopt a starting point of \$35,000, taking into account the matters in relation to his culpability and the aggravating aspects that I have referred to in respect of the company. I see no reason why those aggravating aspects are not attributable to Mr Park also, notwithstanding the influence that others may have had upon him. From that I deduct 30 percent in relation to his plea and his co-operation and his formerly good record. Accordingly, I reach a point where the fine in total which he will receive is one of \$25,000. That will be made up as follows.

[18] On CRN-12063501636 there will be a fine of \$15,000. On CRN-12063501674 there will be a fine of \$10,000. On all the other matters there will be convictions and discharges. The total fine in relation to Mr Park is \$25,000.

[19] Those are the fines imposed.



David Sharp
District Court Judge