

**IN THE DISTRICT COURT  
AT PALMERSTON NORTH**

**I TE KŌTI-Ā-ROHE  
KI TE PAPAIOEA**

**CRI-2019-054-000625  
[2019] NZDC 14839**

**COMMERCE COMMISSION**  
Prosecutor

v

**FARMLAND FOODS LIMITED**  
Defendant

Hearing: 30 July 2019

Appearances: S Carter for the Prosecutor  
J Scragg and C Feng for the Defendant

Judgment: 30 July 2019

---

**NOTES OF JUDGE L C ROWE ON SENTENCING**

---

[1] Farmland Foods Limited appears for sentencing having pleaded guilty to three charges of engaging in conduct that was liable to mislead the public as to the nature or characteristics of goods, these being offences under s 10 Fair Trading Act 1986.

[2] The three offences cover the period 1 October 2015 to 1 September 2018 and relate to three products called “Heritage Cooked on the Bone Ham”. The only difference between the three products and respective charges, is the products’ size. One was a third of a ham, one a half ham and the other a whole ham.

[3] There are several other charges covering the same period of offending laid on a more specific basis. Those charges are withdrawn by leave.

[4] Farmland Foods Limited (“Farmland”) is a limited liability company. Its principal business is meat processing. It owns a meat processing plant near Bulls. The processing plant is on a farm owned by the company’s directors, but they are separate businesses. The farm is not run to produce meat for Farmland to process. Farmland is a private family owned company that was established as a small business some 40 years ago and has over time built up to a business of reasonable size employing over 100 people to carry out its operations near Bulls.

[5] The products at issue in this case were processed at Farmland’s plant. About 12 and a half percent of the pork used to make the Heritage Ham products was sourced in New Zealand. The balance was imported pork from countries such as Canada, Ireland or the United States. The ham was received in frozen form, thawed, cured, rested, netted, wrapped and then smoked and cooked before being chilled, packed and labelled.

[6] Between 1 October 2015 and August 2016 all three sizes of the ham had the same type of packaging with the same statements on them. The only difference occurred in August 2016 when the third sized ham product was packaged with different statements on the rear. The whole and half ham sizes continued with the same packaging and the same statements through until 1 September 2018.

[7] The rear of the packages contained the following statements:

It’s made in the country in our on-farm processing facility located in the untouched Rangitikei Region adjacent to the Santoff Forest and within the Pukepapa rainfall catchment area.

And further down:

If it’s Farmland you can be sure it comes from the best nature has to offer.  
Made by New Zealanders for New Zealanders...it’s where good things grow.

[8] When the third hams were repackaged from the end of August 2016 the statements on the rear of that package included the words:

Our products are made in the country on our family farm in select batches ensuring freshness every time.

And further down:

If it says Farmland you can be sure it comes from the best nature has to offer.  
Made by New Zealanders for New Zealanders...the tradition continues.

[9] The front packaging of all sizes of the ham products contained different types of badges. One stating:

100 percent New Zealand owned Farmland fresh, made in the country.

and another reading:

Gluten-free, produced in New Zealand.

The first of those badges appeared multiple times on the packaging. The address provided on the packaging was the address of the processing facility near Bulls. None of the packaging indicated that imported pork was used to make the ham products.

[10] The packaging also contained images of rural scenery and a farm building.

[11] The cumulative effect was that the labelling on the packaging represented the ham was made from New Zealand reared pork. Studies conducted in New Zealand, Australia and the UK conclude that consumers are likely to understand a representation that a product of animal origin is made in New Zealand or produced in New Zealand to mean the key ingredient, in this instance pork, was from animals reared in New Zealand. An opinion obtained from a marketing expert concludes that the description of the ham products as “produced in New Zealand” and “made in the country” together with a combination of symbols, other words and images on the packaging, created the strong impression that the products were produced from New Zealand reared pork.

[12] Two consumers laid a complaint with the Commerce Commission in December 2017. After purchasing ham, they realised the packaging did not explicitly state “Made in New Zealand”. They rang Farmland to confirm the origin of the pork used to make the ham and Farmland advised them that the pork had been imported from Ireland before being cured and packaged in New Zealand.

[13] The Commerce Commission began their investigation into these representations on 10 April 2018. Farmland were interviewed both by written questions and answers and then in person. They were candid about the origin of the products and promptly provided all information requested by the Commission.

[14] Farmland advised that its intention was to emphasise the company's point of difference as a rural, 100 percent kiwi family owned business, and to emphasise its processing facility is located in a rural area, has its own water supply, in contrast to its competitors who were typically located in urban centres or high density industrial centres. Farmland had thought it was correct to say the ham was made in New Zealand because it was processed in New Zealand, and the process of turning pork into ham was the key influence on the quality of the final product. Farmland emphasised its belief that the imported pork was not of lesser quality to New Zealand grown pork.

[15] The issues raised by the Commerce Commission about the extent to which this packaging was liable to mislead the public was in terms of consumers' increasing concern about food miles, animal welfare, transparency of origin, consumer support for New Zealand based products, and the extent to which it put competitors at a disadvantage.

[16] The maximum penalty for each charge is a fine of \$600,000 for a corporate offender. Relevant sentencing factors were identified in *Commerce Commission v L D Nathan*,<sup>1</sup> and slightly modified in *Budget Loans v Commerce Commission*.<sup>2</sup>

### **Difference in culpability between s 10 and s 13 offences?**

[17] At this point I note a discussion with counsel about whether there is a difference in culpability between conduct that is "liable to mislead" under s 10 (the present charges), or "making misleading statements" under s 13. An offence under either provision carries the same maximum penalty of a \$600,000 fine.

---

<sup>1</sup> *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160

<sup>2</sup> *Budget Loans Ltd v Commerce Commission* [2018] NZHC 3442.

[18] I have derived help on this issue from the observations of Tipping J in *Marcol Manufacturers Ltd v Commerce Commission*<sup>3</sup> where His Honour assessed breaches of these provisions from the point of view of “the average New Zealand shopper” and what they would understand from a message which is in fact misleading. He suggested that the mind of such a shopper was likely to work more by impression than analysis and be prone to some looseness of thought.<sup>4</sup>

[19] If one translates that to the realities of shopping in a supermarket or similar retail outlet, it is likely shoppers would be moved to make a purchasing decision by an impression, rather than close reading and analysis of words, and the semantic differences they may contain.

[20] For that reason, Tipping J observed that, on an objective approach, there is no practical difference in liability between the concepts of “misleading”, “likely to mislead” and “liable to mislead”.

[21] I conclude that, given breaches of s 10 and s 13 carry the same maximum penalty, and what may be misleading or liable to mislead is unlikely to make any objective difference from the point of view of a consumer or a competitor, culpability is better assessed by reference to blameworthiness characterised by carelessness, recklessness, or deliberateness. In that way a breach of s 13 due to carelessness should have the same sentencing consequence, in terms of culpability assessment, as a breach of s 10 due to carelessness. Such an approach is also consistent with the objectives of the Fair Trading Act in terms of consumer protection and promotion of fair trading. Both are likely to be equally undermined whether the conduct is misleading or liable to mislead.

[22] I now apply the *L D Nathan* factors.

---

<sup>3</sup> *Marcol Manufacturers Ltd v The Commerce Commission* HC Christchurch, AP 166/89, 18 December 1990, Tipping J

<sup>4</sup> At p 10.

## **Objectives of the Fair Trading Act**

[23] The purposes of the Fair Trading Act at s 1A include, to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively, consumers and businesses participate confidently. To this end the Act prohibits certain unfair conduct and practices in relation to trade, promotes fair conduct and practices in relation to trade, provides for the disclosure of consumer information relating to the supply of goods and services and the promotion of safety in respect of goods and services.

[24] The most relevant purposes identified by the Commission in this case relate to consumer confidence when making purchasing decisions, and the extent to which conduct that is liable to mislead the public undermines public confidence or the public interest, but also the extent to which it may hamper competition by giving an unfair advantage over trade rivals.

## **The importance of the misleading representation**

[25] The evidence filed by the Commerce Commission is to the effect that there is strong consumer support for locally sourced meat and other products. Most consumers are prepared to pay a premium for New Zealand sourced products. Labelling that is liable to mislead consumers about this is therefore important in the context of the New Zealand market.

## **Type and degree of blameworthiness**

[26] The Commerce Commission's position is that, when this labelling is assessed along with pictorial representations of rural New Zealand and discussion of the locality and rural attributes, the conduct in this case was at the very least grossly careless, even to the point the Court could properly infer that it was reckless.

[27] The defendant's position is that this was a matter of carelessness only in the nature of oversight or perhaps "description over-reach".

[28] The wording of the statements on the packaging support the Commerce Commission's position, particularly the statement on the half ham and whole ham products that: "If its Farmland you can be sure it comes from the best nature has to offer. Made by New Zealanders for New Zealanders. **It's where good things grow**" (My emphasis). This statement conveys, on an objective basis, an obvious meaning that the product was locally grown. On an objective reading, this statement is patently liable to mislead a reasonable consumer that the ham was made from New Zealand reared pork.

[29] Against that, however, recklessness in this case required a conscious appreciation of risk that these statements were liable to mislead as to the origin of the goods, and then a deliberate decision to run that risk. There are two main reasons I find the company was not reckless in this way.

[30] Firstly, Farmland engaged an independent marketing company from whom Farmland took advice before arriving at the labelling in question. I accept the evidence of Garth Davis, one of the company directors, that the brief for the marketing company was to identify points of difference in terms of the rural location and attendant marketing qualities of the defendant company.

[31] Secondly, this company has no previous convictions. It has a good reputation, and deservedly so after 40 years of offence free operation. Having read Mr Davis' affidavit and considered all of the facts in the round, I consider it would be contrary to this company's practice to have deliberately run the risk of breaching the Fair Trading Act.

[32] I assess that this was an instance of perhaps over enthusiasm to emphasise points of difference without careful assessment of what was actually being represented, and in particular, and objective assessment of how that would be seen by consumers. As I say, an objective assessment demonstrates that the extent to which these words were liable to mislead the public are obvious and should have been obvious to Farmland.

[33] I therefore consider the conduct to have been careless, and highly so, but well short of the type of conduct mentioned in other cases of identification and deliberate running of risk, and certainly well short of an intent to deliberately mislead.

### **The extent to which the representations depart from the truth**

[34] Here there was a significant departure. Eighty seven percent of the pork used was imported. None of it was sourced from the defendant's own farm and it appears that when New Zealand pork was sourced it was more in the nature of bulk movement of pork where suppliers had an excess and would sell it at a reduced cost.

### **The degree of dissemination**

[35] The three pork products were sold over a three-year period. 168,043 units were sold to over 400 retail outlets, mainly supermarkets, seventy percent of them half-hams, 10 percent whole-hams and 20 percent third-hams.

[36] Farmland's revenue from the Heritage Ham products was about four percent of its total annual revenue. Over the three years that amounted to approximately \$5.7 million of turn-over at an approximate gross profit of \$670,000. The product was sold nationwide.

[37] The degree of dissemination is therefore strongly engaged in this case.

### **Resulting detriment**

[38] Detriment should be measured in terms of the extent to which the conduct undermined the purposes of the Act, here, detriment to consumers and secondly, detriment to trade competitors.

[39] This is not able to be empirically measured and has been the main point of difference between the Commerce Commission and the defendant's counsel. It is accepted, however, that conduct that is liable to mislead the public about the origin of goods sold in New Zealand tends to undermine the "Made in New Zealand" brand and consumer confidence in that brand. I refer again to what could be regarded as the



average shopper and that most shoppers would be unlikely to take the care to study actual meaning. Impression is likely to carry the day.

[40] From the research produced by the Commerce Commission, it is likely to make a difference to a significant proportion of the shopping public that they may think a product is made in New Zealand. This is likely to feature as a reason for purchasing that product over similar products. How far that goes, of course, is not capable of fine measurement.

[41] There is also the issue of fair trading practice. Labelling that is liable to mislead the public that goods are made in New Zealand would place a business at a competitive advantage over businesses that overtly identified that their similar product was sourced from overseas.

[42] In short, there is value in a “Made in New Zealand” brand and detriment should be measured by reference to that value. This factor is at least moderately, and perhaps, more than moderately engaged in this case.

[43] I do, however, take the point raised on behalf of the defendant that many sentencing authorities in this area relate to misrepresentations as to the quality of products or their benefits. I accept such cases are likely to engage more serious or obvious detriments to consumers for sentencing purposes. Here, there is no issue at all about quality.

#### **Size of defendant company**

[44] This factor arises from the observation of Moore J in *Budget Loans* that highly careless conduct by larger companies is of equivalent seriousness to deliberate conduct by smaller companies. Both will attract heavy penalties up to the maximum.<sup>5</sup> Moore J’s statement was made in the context of a loans company where comparisons were made with much larger financial enterprises. It is correct that a larger company is likely to engage a greater degree of dissemination, and that is properly a factor to

---

<sup>5</sup> N 2.

be weighed when assessing culpability. Care must be taken, however, not to double count the extent of dissemination.

[45] While Farmland Foods is a substantial business it is not a multi-national corporation or a large-scale enterprise. I consider its culpability is best assessed having regard to the degree of dissemination rather than an assessment of its size.

### **Difficulty of detection for consumers**

[46] A second point made by Moore J in *Budget Loans* is that misleading claims are more serious where it is difficult or impossible for consumers to test their accuracy. As noted, consumers in New Zealand are likely to purchase based on impressions and are unlikely to make any further enquiry. It is clear, however that when persons did make an enquiry of Farmland Food, the company did not hesitate to specify the country of origin. Therefore, in this instance, it was no more difficult than making the enquiry. The real harm at issue here was simply the extent to which the average consumer would likely be misled and the advantage that created for the defendant.

### **Deterrence**

[47] The decision of *L D Nathan* identified a need to impose deterrent penalties for breaches of the Fair Trading Act. Here I consider the need for deterrence is general rather than specific.

[48] The key message from this case is that persons conducting trade in New Zealand need to take care, and here we are talking about objective care, of how their products and their descriptions are likely to be perceived by members of the public. The public is entitled to a high degree of care in relation to their interests and the confidence they place in businesses in New Zealand.

[49] I do not consider Farmland Foods requires specific deterrence for the two main reasons that the company has no previous convictions and has received what it regards as highly embarrassing publicity for what occurred in this case, to the extent, I assess, the company is highly unlikely to repeat it.

## **Cumulative or concurrent?**

[50] The next issue is how to approach the sentencing exercise, having regard to the factors identified but, in particular, the appropriate process required across the three charges.

[51] The Commerce Commission's position is that the Court ought to assess an appropriate penalty for each charge, aggregate or accumulate them, then make an allowance for totality.

[52] The defence position is that the Court ought to identify this as one course of conduct and assess an appropriate penalty having regard to that course of conduct and the factors identified.

[53] Counsel have referred to s 40(2) Fair Trading Act which provides:

Where a person is convicted, whether in the same or separate proceedings, of 2 or more offences in respect of contraventions of the same provisions of this Act and those contraventions are of the same or a substantially similar nature and occurred at or about the same time, the aggregate amount of any fines imposed on that person in respect of those convictions shall not exceed the amount of the maximum fine that may be imposed in respect of a conviction for a single offence.

[54] While s 40(2) is a provision designed to address the issue of totality for offences of a similar nature committed at the same time, it does so only in terms of ensuring that a maximum penalty does not exceed the maximum fine for a single offence.

[55] I derive more assistance from the Sentencing Act's guidance on the use of cumulative and concurrent sentences in s 84 by comparison. Where two or more offences are committed by an offender, and are a connected series of offences, the Court may consider the time at which they occurred, the overall nature of the offending, or any other relationship between the offences that are relevant.

[56] Where offences are unrelated, comprise different forms of criminality, or there is a clear distinction between separate instances of offending, then a cumulative approach is appropriate. Where, however, there is a single course of conduct forming

a connected series of offences, or the decision that gave rise to that course of conduct was, in effect, a single decision rather than a series of decisions, a concurrent or global approach is more appropriate.

[57] In some of the cases referred to by counsel, misleading statements have been published in different forums, different statements have been published and different or distinct products have been separately represented. Such cases are more amenable to a cumulative approach.

[58] Here, in effect, the decision as to what was going to be placed on the labels was a single decision. There was a change in wording in relation to the one-third hams but, if anything, that was a change that was similar in kind, and possibly less misleading than had first been the case. But, overall, this was one course of conduct for what was the same product, the only distinction being the sizes of the product. They were appropriately charged as separate offences but, for sentencing purposes, it is proper to assess this as one course of conduct requiring a global approach, particularly in terms of issues such as dissemination, likelihood of misleading the public, and assessment of detriment.

### **Starting point**

[59] I therefore propose to adopt a global approach when setting a starting point sentence across the three charges. I do so having regard to the cases referred to by counsel of *Topline*, *New Zealand Nutritionals*, *Budget Loans*, *Honey NZ International Ltd*, *Nature Care Products*, and *Premium Alpaca*.<sup>6</sup> Some of these cases involve deliberate misstatements at times amounting to fraud. Others less so.

[60] I consider the factors that are most strongly engaged here are the degree of dissemination, the extent to which the conduct undermined the interests protected by

---

<sup>6</sup> *Commerce Commission v Topline International Ltd* [2017] NZDC 9221; *Commerce Commission v New Zealand Nutritionals (2004) Ltd* [2016] NZHC 832; *Commerce Commission v Honey New Zealand (International) Ltd*, DC Auckland, CRN-2009-004-514773-775, 2 May 2011; *Commerce Commission v Nature Care Products*, DC Auckland, CRI-2009-004-18045, 4 May 2010; *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.

the Fair Trading Act, general deterrence and the degree of harm to the extent it can be assessed. I assess those factors against what I regard as a high degree of carelessness.

[61] Against a maximum penalty of \$600,000, this is not the worst case of its kind by any margin. I consider the length of time over which this conduct occurred makes it a bad case of carelessness and that a great deal more care ought to have been taken in drafting the wording for this labelling. I am required to identify the least restrictive sentence appropriate when considering these factors.

[62] The Commerce Commission submits the starting point ought to be \$600,000 or more. Defence counsel submits the starting point ought to be between \$150,000 and \$200,000.

[63] I consider a proper analysis of what occurred here requires a starting point in the mid-range when compared to the maximum. I identify a starting point in this case of \$300,000 as a global starting point across the three charges.

#### **Aggravating/mitigating factors**

[64] The company as I say has no previous convictions and there are no other personal aggravating factors that would increase that penalty. There are, however, mitigating factors.

[65] The first is the extent of co-operation, remorse and remedial steps taken by Farmland Foods. Farmland Foods was co-operative, and prompt in its responses. This is an important factor to recognise because any business that engaged in an obstructive way would create more cost for the Commerce Commission when investigating matters.

[66] The issue of remorse is relevant when assessing future risk. I assess the company's remorse conveyed through Garth Davis' affidavit as genuine.

[67] In terms of remedial steps, the investigation began in April 2018, the company received requests for information from the Commerce Commission through May and June followed by interviews. The company set about redesigning its packaging, at

least in terms of the half-ham product which was the most widely sold, by June or July 2018. The half-hams were sent out in the new packaging from October 2018 onwards. The packaging identified the pork as having been sourced either locally or imported.

[68] The company had labels printed for the whole-ham and one-third ham products, but it does not seem they were applied until about May 2019. The company could have been more proactive in relation to those products. I accept the company may have wished to take advice about its packaging and the extent to which it might have been in breach of the Fair Trading Act, but the rationale for the new packaging for the half-hams, which was to ensure there had been no breach, ought to have informed the response in relation to the other products. Nevertheless, the company, while it could have acted more promptly, at least set about from an early stage to remedy the situation and the situation was remedied in full by more clear packaging from early this year.

[69] I consider the mitigating factors of co-operation, remorse and remedial steps are worth a discount of 10 percent.

[70] The next issue is good character. I consider this requires discrete recognition as a mitigating factor. This company has been in business for 40 years. It is a family owned company. It is a strong contributor to the Rangitikei community and examples have been given in Mr Davis' affidavit. Testimonials have been produced by people in the business community and the Mayor of the high degree of integrity they consider this company displays, and the regard the community has for this company and its contribution.

[71] This is the first offence of any kind by this company as far as I am aware. A company does not get through 40 years of business accruing no convictions and gaining this sort of reputation without earning it. Farmland Foods Limited is a good corporate citizen which has made a substantial contribution to its community and deliberately so. Good character of this kind is worth distinct recognition and in this instance ought to itself provide a discount of 10 percent.

[72] The issue of publicity has been raised as a mitigating factor. There is no particular harm identified from the publicity in this case. The examples referred to me appear to be fair and balanced reporting in the public interest. Publicity is a consequence of a prosecution and is part of the process of conveying what happens in the Courts to our communities. While it may be embarrassing and difficult to take for a company such as this, it is simply part and parcel of what occurs and is not itself a mitigating factor when assessing penalty.

[73] Overall, the mitigating factors I have identified result in a 20 percent reduction from the starting point. That is a reduction of \$60,000.

[74] It is then accepted by both prosecution and defence that a full 25 percent discount is warranted for the early guilty pleas entered in this case. As the sentencing authorities note, the guilty plea discount is to be applied after other discounts. Adopting that approach a 25 percent discount from \$240,000 is \$60,000. That leaves an end fine of \$180,000.

### **Penalty**

[75] I step back and assess the totality of that as a penalty having regard to the factors I have identified.

[76] A useful touchstone in this case is the estimated gross profit from these products of some \$670,000. A penalty of \$180,000 is approximately a quarter of that gross profit. While that is not the determining factor, it does assist in assessing whether the total penalty identified is excessive. I consider it is not. I consider an overall penalty of \$180,000 to be the least restrictive penalty appropriate in all of the circumstances.

[77] The penalty is applied as a fine of \$100,000 on charge 219 (the half-hams), \$40,000 on charge 217 (the whole-hams) and \$40,000 on charge 220 (the third-hams).

[78] I am grateful to the directors of the company for being present and demonstrating the sorts of qualities that are reflected in the affidavit that has been

provided, for the Commerce Commission's approach, and also for the care that counsel have taken.

---

Judge L C Rowe  
District Court Judge

Date of authentication: 23/08/2019  
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.