

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2015-004-011471
[2016] NZDC 19792**

UNDER	FAIR TRADING ACT 1986
BETWEEN	THE COMMERCE COMMISSION Prosecutor
AND	FROZEN YOGHURT LIMITED (IN LIQUIDATION) First Defendant
AND	YOGHURT STORY NEW ZEALAND LIMITED (IN LIQUIDATION) Second Defendant

Hearing: 17 August 2016

Counsel: JCL Dixon for the Prosecution
No appearance for first or second Defendant

Judgment: 28 September 2016

SENTENCING OF JUDGE D J SHARP

Introduction

[1] The defendant Frozen Yoghurt Limited (Frozen Yoghurt) and Yoghurt Story New Zealand Limited (Yoghurt Story) are for sentence having been convicted of charges under the Fair Trading Act 1986.

- (a) Frozen Yoghurt – section 10 x 58
- (b) Yoghurt Story – section 10 x 52

[2] The defendants make two types of misleading representations central to the sale of their core product, marketed “*Yoghurt*” and sold in “*Yoghurt Story*” branded stores.

- (a) First that the product had certain health benefits, when it did not; and
- (b) Second, that the product was yoghurt, when it was not.

[3] The representations were made in two media

- (a) In Yoghurt Story branded stores; and
- (b) On the website www.yoghurtstory.co.nz

[4] The defendants conduct was a cynical attempt to take advantage of consumers desire to make healthier food choices. The defendants themselves considered the product to be more akin to an ice cream product, yet they decided to call their stores “*Yoghurt Story*” because it was more attractive to consumers than calling it “*Ice Cream Story*”. As such the defendants deliberately co-opted the perceived health benefits of yoghurt to promote their product. They did this by misrepresenting the product generally and by claiming specific health benefits. They said these health benefits could be derived from consumption of their product.

[5] The Commerce Commission submit a starting point in the range of \$50,000 - \$70,000 is appropriate with regard to health claims. Further the Commerce Commission submits that the yoghurt representation warrants a starting point in the range of \$220,000 - \$280,000.

[6] Given the number instances and adjustment for totality it submitted that an appropriate overall starting point is in the range of \$250,000 - \$300,000.

[7] On 17 August 2016 I provided a decision in which I set out the facts supporting the convictions.¹ By way of brief summary the expert evidence was that

¹ Commerce Commission Frozen Yoghurt Ltd Yoghurt Story NZ Ltd [2016] NZDC16106

on examination, technical specifications for yoghurt were not met from sufficient samples to be representative. Of 17 samples 15 did not meet the four criteria required to meet accepted scientific standards for the compositional requirement of fermented milk (fermented milk includes yoghurt).

[8] In addition the health claims proposed were not supported by robust scientific justification. As a consequence misleading and deceptive conduct in the course of trade had occurred.

Principles and purposes of sentencing

[9] In a case such as this the primary focus is upon sections 7 and 8 of the Sentencing Act 2002. Deterrents and denunciation and holding the defendants accountable for their conduct are important in terms of this sentencing. In addition there is the general desirability of consistency. This is with a view to having the sentence here broadly comparable with other sentences that have been imposed.

Aggravating and mitigating factors of the offending

[10] Under the Fair Trading Act 1986 as set out in *Commerce Commission v LD Nathan & Co Limited*² the following factors are to be considered:

- (a) The Fair Trading Act 1986 is designed to facilitate consumer welfare and promote effective competition. It requires accurate '*in trade*' representations and fair trading practices. The Act recognises that consumers who buy products on the basis of representations do so with a great deal of trust. Those who breach that trust are required to be dealt with that in mind.
- (b) The importance of untrue statements. The description of the product as yoghurt and its links with healthy options were significant and aimed at consumers perception of a healthy choice.

² *Commerce Commission v LD Nathan & Co Limited* [1990] 2 NZLR 160

The degree of wilfulness or carelessness involved

[11] In this case the defendants conduct was a deliberate attempt to take advantage of consumer desire to make healthier food choices. The marketing approach of the defendants is consistent with them deceiving consumers without a sound basis to suggest health benefits would be derived from their products.

Extent to which the statements in question depart from the truth

[12] The health claims made were a significant departure from the truth. The product simply was not yoghurt. The samples taken showed the product provided rarely met with its description.

The degree of dissemination

[13] This was an extensive case for dissemination. There were up to 22 Yoghurt Story stores operating throughout New Zealand. The exposure via website, facebook, visits or sales was a nationwide trading situation.

Efforts made to correct statements

[14] The defendants did remove health claims after issues were raised but the defendants persisted in making claims that the product was yoghurt even after receiving the test results from the Commission.

[15] There do not appear to be any mitigating factors within the offending itself.

Starting Point

[16] There are no analogous cases. In *Commerce Commission v Muscle Marketing*³ *Commerce Commission v Eco World*⁴ and *Commerce Commission v Erdic (NZ) Ltd*⁵ a range of starting points and approaches to sentencing are shown.

³ *Commerce Commission v Muscle Marketing* DC Akld CRN 2004048863, 14 July 2004 Everitt DCJ.

⁴ *Commerce Commission v Eco World* [2005] DCR 921.

⁵ *Commerce Commission v Erdic (NZ) Ltd* CRI 2006-070-6303, 16 December 2008 Kerr DCJ.

[17] Those authorities typically involve products where the key aspect of the product was supposed health benefits offered. These were relatively high cost products. The Commission submits the health claims here warrant a starting point of \$50,000 to \$70,000. This figure places the offending at the less serious end of the spectrum when compared with other cases. It also takes into account that the maximum penalty of \$200,000 applies to all charges.

Yoghurt representations

[18] The Commissioner relies upon the following decisions; *Commerce Commission v Glaxo Milk Line (NZ) Limited*,⁶ *Premium Alpaca Limited v Commerce Commission*⁷ and *Commerce Commission v Nangong Ltd*⁸ the submissions is made that these cases together with the increase in maximum penalty in June 2014 from \$200,000 to \$600,000 suggest a starting point in the range of \$220,000 to \$280,000 for the yoghurt representations.

Totality and apportionment

[19] Combined starting points for the yoghurt representation and health claims is \$270,000 - \$350,000. The prosecution acknowledge the need to adjust this for totality to reflect the overall gravity of the offending and the culpability of the defendants. The Commerce Commission submits that the following adjustment a global starting point of \$250,000 - \$300,000 is appropriate.

[20] In terms of the relative culpability of each defendant the Commerce Commission submits there are no grounds on which to distinguish between them. Each entity was very closely related and essentially operated by the same person, Mr Son. The starting point identified as suggested for the overall conduct may be apportioned between each defendant (rather than imposed, in full, on each defendant).

⁶ *Commerce Commission v Glaxo Milk Line (NZ) Limited* DC CRI 2006-004-503913, 27 March 2007.

⁷ *Premium Alpaca Limited v Commerce Commission* [2014] NHC 1836

⁸ *Commerce Commission v Nangong Ltd* CRI 16004500064 20 May 2016 Bouchier DCJ.

Aggravating and mitigating factors of the defendants

[21] The Commission is unaware of any aggravating factors relevant to the defendants.

[22] The Commission acknowledges that the defendants did cease the health claims when the Commission raised concerns about them. In addition the defendants voluntarily provided information to the Commission and attended at interviews.

[23] The Commission submits the conduct might form the basis for a discount in the range of 5-10%.

Impecuniosity

[24] Both defendants have been placed into liquidation. There is no evidence before the Court as to the exact financial position of the defendants and of their means to pay the fines imposed on them.

[25] It is clear that the representations were transmitted through a franchising arrangement and individuals may have relied (as did their customers) upon the representations coming from the parent companies. Accordingly it is likely in terms of the liquidation that there are considerable claims from the persons who had paid to be involved in the Frozen Yoghurt Franchise. This needs to be taken into account in imposing a fine in order that the pool of unsecured creditors is not swamped to the point where they are unable to pursue legitimate economic redress because of the quantum of fines that are required in respect of the defendant companies conduct.

Sentence imposed

[26] Accordingly I consider that on a totality basis before mitigation \$300,000 is the appropriate fine in relation to the penalty divided equally between the two defendant companies.

[27] The total pre mitigation liability of Frozen Yoghurt being \$150,000 and Yoghurt Story of \$150,000.

[28] Because the fine I would have imposed needs to be deducted by 10% in respect of mitigating aspects that brings the fine down to \$135,000 for each company imposed on each charging document.

[29] Given the impecuniosity of the companies in liquidation and the potential for this debt to unfairly affect other unsecured creditors I reduce what would otherwise have been the appropriate penalty down to \$35,000 in respect of each defendant company imposed in respect of each charging document.



D J Sharp
District Court Judge