

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI 2017-004-012646
[2020] NZDC 13297**

THE COMMERCE COMMISSION
Prosecutor

v

EURO CORPORATION LIMITED
Defendant

Judgment: 10 July 2020
(In Chambers)

NOTES OF SENTENCING OF JUDGE M-E SHARP

Introduction

[1] Euro Corporation Limited (Euro) has pleaded guilty to 14 representative charges under the Fair Trading Act 1986 relating to one product – SE615-500E Steel Mesh (SE615/Xtra ductile 500 E grade steel mesh) which is a concrete reinforcing product used mainly in domestic context, such as driveways. The charges relate to representations made by Euro about SE615’s compliance with the applicable standard for reinforcing steel and that SE615 had been independently tested and certified as compliant with the standard.

[2] Euro accepts that the requirements of the applicable standard for reinforcing steel (A/NRX 4671:2001) (the Standard) was not met in relation to two aspects of its product testing. The first was that Euro failed to maintain running “long-term quality

data” records (LTQD) at the time (it appears that the relevant information was and is available but not properly collated). The second was that some of the batches exceed 1000 sheets of mesh.

[3] In essence, Euro assured customers that because its SE615 product complied with the Standard it was thus able to be used in applications where an “Earthquake Grade” product (known in the industry as “500E”) was required. Because Euro had failed to comply with the testing procedures set out in the Standard for locally manufactured mesh, that representation was false. In respect of the imported mesh, its representation that it was of the necessary grade, was unsubstantiated. In addition Euro represented that all of its batches of SE615 mesh had been independently tested and certified when that was not the case. All of the mesh manufactured in New Zealand was independently tested but only five of 78 batches of imported mesh were independently tested.

[4] The charges relate to the period 1 January 2012 to 31 August 2015. During this charge period, the maximum penalty for the charges increased. Six charges relate to conduct/representations from 1 January 2012 to 16 June 2004 and carry a maximum fine of \$200,000 per charge. Eight charges relate to conduct/representations from 17 June 2014 to 31 August 2015 and carry a maximum penalty of \$600,000 per charge.

Recommended sentencing

[5] The Court is advised that the parties have agreed on an appropriate sentencing starting point and discounts for Euro’s offending. They jointly submitted that it would be appropriate for the Court to adopt:

- (a) a starting point for all of the charges together, adjusted for totality, of approximately \$470,000;
- (b) discounts of 5 per cent for co-operation and 15% for guilty pleas;
- (c) final sentence being a fine of \$379,000.

[6] As the Commerce Commission (the Commission) submitted, at para [9.2] of its Memorandum of submissions:

The practice of parties presenting an agreed position on a fine is ordinary and well-established. There is a long line of District Court cases where the parties have put in an agreed position on sentencing before the Court.

[7] As the District Court said in *Commerce Commission v Trust Power Ltd* [2016] NZDC 18850 at [5]:

While agreement as to penalties sought reached by responsible and experienced counsel is an important and relevant consideration, the Court of course must remain independent and make a proper assessment of culpability and penalties. The purposes and principles of sentencing apply here in the usual way.

[8] That view is consistent with the decision of a full bench of the High Court in *Commerce Commission v NZ Milk Corporation Ltd* [1994] 2 NZLR 730; (1994) 5 TCLR 550.

Agreed facts

[9] Attached to these sentencing notes is an agreed summary of facts which sets out the background to the charges and the detail of the offending.

[10] I agree with the manner in which the Commission has summarised the key points at paras [2.2] – [2.5] (inclusive) of its Memorandum of Sentencing submissions:-

[2.2] The standard specifies requirements and the testing methodology for determining the chemical composition and mechanical and geometrical properties of reinforcing steel used for the reinforcement of concrete in the form of machine-welded mesh (among other forms)

[2.3] The standard requires that:

(a) particular grades of steel and steel mesh satisfy certain chemical/mechanical and dimensional requirements; and

(b) the testing of steel and steel mesh to measure the mechanical and dimensional requirements must follow particular sampling and testing procedures.

[2.4] Euro manufactured just over one third of its SE615 mesh itself (locally manufactured mesh) using steel supplied by New Zealand supplier

Pacific Steel (NZ) Limited. Euro imported the other almost two thirds of its SE615 from a Malaysian company which manufactured the mesh to Euro's specifications.

[2.5] The charges fall into two primary categories:

(a) representations on Euro's web site that each batch of its SE615 steel mesh had been independently tested and certified when although all manufactured mesh was independently tested, *Holmes Solutions Limited* (Holmes) had tested only five out of 78 batches of imported mesh (independent testing representations); and

(b) representations made on Euro's website, on identification tags and labels attached to the SE615 steel mesh and on test certificates supplied to purchasers, relating to compliance with the standard were false because the batch sizes for its mesh were larger than the maximum required by the standard and no long term quality evaluation was carried out as required by the standard and in respect of the imported mesh Euro had not been provided with evidence by the supplier that it had carried out long term quality evaluation.

AGGRAVATING FEATURES OF EURO'S OFFENDING

(1) Aggravating features

- (a) Euro's conduct undermined the objective of the standard;
- (b) the representations were important;
- (c) the statements were either false or unsubstantiated;
- (d) there was dissemination of the representations to customers;

Euro's culpability

[11] In relation to the independent testing representations, Euro's conduct came about as a result of an initial oversight by it which became careless over time; the specification sheet was removed from the web site when Holmes stopped testing every imported batch in April 2013 but was inadvertently reinstated by a contractor who incorrectly created a link to it when upgrading the website. Euro did not check this page of its web site or otherwise become aware of the misrepresentation during the seven months that it was contained on the web site. The Q & A page was supposed

to have been removed from the web site in April 2013 but due to an oversight was not although it was some time between 21 February and 8 August 2015.

[12] As to the compliance representations the size of each batch for testing was under Euro's control. Euro ought to have known that in producing its steel mesh it had not complied with the standard in respect of long term quality evaluation and in respect to imported mesh it had no reasonable grounds to say that all batches were being tested in accordance with the standard.

[13] Overall I categorise Euro's conduct as careless rather than deliberate especially with respect to the testing of local product in respect of which Euro consulted with Dr Allington of Holmes who told it that a manufacturer could specify a different batch size (being the one cast) to that defined in the standard, or a customer could likewise specify a different batch size to its manufacturer. But this exception does not apply when Euro is itself a manufacturer of the mesh.

Mitigating features of offending

There are none.

[14] The Commission submits that there was resulting prejudice to consumers because consumers were getting a product that was not what was described at a price that reflects compliance with the standard. Euro does not accept that there is any evidential foundation to assert that there was consumer detriment in terms of the likely performance of the SE615 product nor that there is any evidential foundation at all for the Commission's suggestion at para [4.25] of its submissions that Euro's errors could have an effect on "how councils may go about issuing compliance certificates and on property values".

[15] Given the Summary of Facts acknowledges neither of Euro's errors/carelessness call into question the physical (chemical or mechanical) properties of the product (the Commission expressly acknowledges that "there is no allegation that SE615-500E did not in fact satisfy the chemical/mechanical and physical performance requirements required by the standard"), I share Euro's concern that the

Commission seeks that the Court find as an aggravating feature of Euro's offending that there was resulting prejudice to consumers if this is not proven.

Purpose of sentencing

Deterrence within the industry

[16] Standards are solutions that are promulgated in order to make buildings, inter alia, safe. Failure to comply with them, can lead to significant prejudice to the consumer public especially where the departure has been such as to render unsafe the use of a product. The Commission is correct therefore in suggesting, given that we are dealing here with a product related to earthquake safety, compliance is critical and a deterrent response is appropriate.

Authorities

[17] In its submissions the Commission has discussed the following judgments in respect of prosecutions that it commenced following its investigation into allegations of misrepresentations by steel mesh producers: Steel and Tube Ltd, Brilliance International Ltd and Timber King Ltd (including NZ Steel Distributor Ltd). Euro does not accept that its conduct is analogous to the conduct at issue in Brilliance, Timber King or Steel and Tube where there were deliberate and conscious departures from the standard and active knowledge of products failing the relevant tests; or grossly negligent representations which were "little short of fraudulent" (*Commerce Commission v Timber King Ltd & NZ Steel Distributor Ltd* (2018) NZDC 510 at page 28).

[18] I agree with Euro's submissions at para [9] that the only overlap between these cases and the charges at issue there are that the representations involve similar products and the same Standard. There is no basis to draw a parallel in terms of sentencing Euro; it is the nature and seriousness of the conduct that is important.

Totality

[19] Whilst the Commission asserts that the representations constituted two distinct types of conduct thereby not justifying a reduction of the combined fine for totality due to the judgment of Duffy J in *Steel and Tube*, the Commission acknowledges that a distinct of 5 % should be applied in order that the final sentence reflect the totality of the offending. I agree.

Starting point

[20] I assess the appropriate starting point for the compliance misrepresentations at the lower end of the range suggested by the Commission:

I start with \$420,000 on each;

I assess the appropriate starting point for the independent testing misrepresentations also at the lower end of the range suggested by the Commission - \$55,000 on each charge;

After applying the totality discount of 5%, I reach a starting point, before applying personal mitigating features of \$451,250.

Personal aggravating and mitigating factors

[21] There are no personal aggravating factors. However there are mitigating factors which are agreed should reduce the fines:

- (i) Euro is entitled to a 5% discount for its co-operation and;
- (ii) 15% for its guilty pleas which were not entered at the earliest opportunity but immediately after amended charges were laid.

End sentence

[22] Whilst the parties have agreed the end sentence of \$379,000 is appropriate, given that I have placed Euro's offending at the lower end of the range suggested by the Commission, I reach a lower final figure of \$361,000 which I consider truly reflects the aggravating features of the defendant's offending, its totality and the personal mitigating features described above. This is my assessment of culpability and penalty notwithstanding the agreement reached between the parties.

[23] That fine is to be allocated as follows:- on the independent testing misrepresentations: CRN 17004504599, 17004504607, \$9,000 each. CRN 17004504608, 17004504612 \$14,000 on each (being subject to increased penalties). On the compliance testing misrepresentations: CRN 17004504614, 17004504617, 17004504620, 17004504622, 17004504626, 17004504627, 1700450453, 17004504655, 17004504685 and 17004504687, \$31,500 each.



M-E Sharp
District Court Judge