

**IN THE DISTRICT COURT
AT AUCKLAND**

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

**CRI-2018-004-007430
[2019] NZDC 3795**

THE COMMERCE COMMISSION
Prosecutor

v

GOODVIEW TRADING NZ LIMITED
First Defendant

JOINT FUTURE WHOLESALE LIMITED
Second Defendant

EBENEZER TRADE LIMITED
Third Defendant

Hearing: 5 February 2019

Appearances: Ms A McClintock for the Commerce Commission
Mr S Winsett for Goodview Trading NZ Limited
Mr J Donkin for Joint Future Wholesale Limited
Mr M Phillipps for Ebenezer Trade Limited

Judgment: 19 March 2019

Reissued: 18 April 2019

SENTENCING NOTES OF JUDGE C J FIELD

Introduction and Summary of Submissions on behalf of Informant

[1] Goodview Trading NZ Limited (Goodview), Joint Future Wholesale Limited (Joint Future) and Ebenezer Trade Limited (Ebenezer) (together, the Defendants) appear for sentence on charges under s.30 of the Fair Trading Act 1986 (FTA). The charges arise from the defendants' conduct in having supplied and offered to supply defective and potentially unsafe toys to retailers and members of the public (the Offending Toys).

[2] The Offending Toys failed to comply with the relevant safety standard (AS/NZS ISO 8124.1: 2002, the Standard),¹ as the toys broke into small parts when tested, creating choking risks for young children.

The Defendants

[3] Goodview and Joint Future are importers and distributors of consumer products, including children's toys. Ebenezer is a distribution company which also operates a chain of retail shops throughout New Zealand, trading under the name "Goods 2 U". The prosecutions are linked in that Goodview and Joint Future each sold Offending Toys to Ebenezer, which in turn offered them for sale to the public.

[4] The charges relate to:

- (a) Goodview's conduct in supplying and offering to supply 446 units of a defective toy musical instrument set (Instrument Set);²
- (b) Joint Future's conduct in supplying;³

¹ The Standard also comprises some variations to AS/NZS ISO 8124: 2002, which are set out in Schedule 2 of the Product Safety Standard (Children's Toys) Regulations 2005 (Regulations).

² For which Goodview faces two charges (one relating to supplies in 2011 (totalling 315 Instrument Sets), and the other relating to supplies in 2012 (totalling 131 units).

³ For which Joint Future faces six charges, two for each of the Toy Piano, Toy Rabbit and Toy Trike.

(c) Ebenezer's conduct in supplying 80 units of the Instrument Set (which it purchased from Goodview) and 36 units of the Toy Piano (which it purchased from Joint Future).⁴

(i) 1296 units of a defective toy piano (Toy Piano);⁵

(ii) 1244 units of a defective toy rabbit (Toy Rabbit);⁶

(iii) 1040 units of a defective toy trike (Toy Trike);⁷ and

[5] The maximum available penalty on each charge is a fine of \$200,000 for conduct before 17 June 2014, and \$600,000 for conduct on or after that date. Of the Defendants, Goodview's conduct occurred entirely before 17 June 2014 (and is therefore subject to the lower maximum penalty), whereas the conduct of Joint Future and Ebenezer occurred both before and after 17 June 2014.

Summary of Submissions

[6] The Commerce Commission (Commission) submits that the appropriate starting points are as follows:

(a) for Goodview, in the range of \$40,000 - \$50,000;

(b) for Joint Venture, in the range of \$160,000 - \$180,000; and

(c) for Ebenezer, in the range of \$65,000 - \$75,000.

⁴ Ebenezer faces two charges for its conduct (one for each of the Instrument Set and the Toy Piano).

⁵ Consisting of 76 units supplied to retailers between January 2011 and October 2015, and a further 1220 units supplied to consumers at ASB Showgrounds and the Auckland Lantern Festival between January 2011 and December 2016.

⁶ Consisting of 33 units supplied to retailers in May/June 2016 and April 2017, and a further 1211 units supplied to consumers at ASB Showgrounds and the Auckland Lantern Festival between November 2010 and December 2016.

⁷ Consisting of 96 units which it sold to retailers between June 2016 and July 2017, and a further 944 units which it sold to consumers at ASB Showgrounds and the Auckland Lantern Festival between October 2014 and December 2016.

[7] The Commission submits that Goodview is entitled to a discount of no more than 10%, and Joint Future and Ebenezer to discounts of no more than 5%, to reflect the extent of their cooperation and lack of previous convictions.

[8] The Commission submits that the Defendants are each entitled to a further discount of 25% for the timing of their guilty pleas.

[9] This approach would result in the following end penalties:

- (a) for Goodview, in the range of \$27,000 - \$34,000;
- (b) for Joint Future, in the range of \$114,000 - \$128,000; and
- (c) for Ebenezer, in the range of \$46,000 - \$53,000.

Key Facts

Goodview's offending

[10] Goodview operates a distribution business based in Onehunga, Auckland. Its directions are Ling Ha and Michael Ha.

[11] Goodview's core business is in budget homeware, hardware and toys. It imports approximately 1000 different product lines from China, which it distributes to retailers throughout New Zealand. It estimates that toys account for about 10-15% of its business.

[12] Goodview has supplied toys to approximately 60-70 retailer clients, most of whom are repeat customers. Retailers purchase products from Goodview online, by phone order, or on site at Goodview's warehouse in Onehunga.

[13] Between 14 January 2011 and 13 June 2013 Goodview:

- (a) supplied 286 units of the Instrument Set to retailers throughout New Zealand, including to retailers based in Ashburton, Auckland,

Dannevirke, Gore, Huntly, Invercargill, Kaikohe, Porirua, Rotorua, Taupo and Upper Hutt, including 80 which it supplied to Ebenezer; and

- (b) offered to supply a further 160 units of the Instrument Set to its retailer clients.

[14] The Instrument Set consists of a toy trumpet, a toy saxophone and two toy maracas. It is a toy manufactured, designed and/or marketed for use by children aged 36 months or under, and is therefore covered by the Standard.

[15] On 28 February 2017, the Commission purchased three units of the Instrument Set from “Goods 2 U” Richmond, a retail shop owned and operated by Ebenezer.

[16] The Commission sent the Instrument Set for testing by two independent testing facilities, Materials & Testing Laboratories Limited (MTL) and Choice Test Research (CTR).

[17] During tests by MTL and CTR which were designed to replicate reasonably foreseeable abuse:

- (a) the mouth piece of the saxophone broke off and the left key rod was liberated;
- (b) the saxophone broke into multiple pieces;
- (c) the trumpet broke into multiple pieces; and
- (d) the maracas broke into multiple pieces, some of which were very small (shards of less than 1 mm in length). Four plastic balls from the inside of each of the maracas were liberated.

[18] The components of the Instrument Set that broke or were liberated failed the small parts test and, accordingly, created a choking risk for young children. As such, the Instrument Set breached clause 4.4.1 of the Standard.

[19] After being contacted by the Commission, Goodview contacted all retailers to which it had supplied the Instrument Set, offering credits for any unsold products and issuing recall notices. Goodview also provided recall photographs of the Instrument Set for display by the retailers that purchased the toys.

Joint Future's Offending

[20] Joint Future operates a distribution business based in East Tamaki, Auckland. The company was incorporated in 2003 and its directors are Francis Pak Yee Ma and Wai Kuen Wong. Joint Future employs another 5-6 employees in a mixture of part-time and full-time roles.

[21] Joint Future's core business is in kitchenware, stationery and toys. It carries approximately 2000-4000 different product lines which it distributes to retailers throughout New Zealand. It imports its products from China and sells them largely via its website. It has approximately 220 customers. It estimates that toys account for approximately 10-30% of its business.

[22] Joint Future's offending relates to three different toys, as follows:

- (a) Between 1 January 2011 and 31 December 2016, Joint Future supplied approximately 1296 units of the Toy Piano (including 36 which it supplied to two retail stores operated by Ebenezer);
- (b) Between 16 November 2010 and 29 April 2017, Joint Future supplied approximately 1244 units of the Toy Rabbit; and

- (c) Between 10 October 2013 and 19 July 2017, Joint Future supplied approximately 1040 units of the Toy Trike.

[23] Each of those three toys are manufactured, designed and/or marketed for use by children aged 36 months or under, and are therefore covered by the Standard.

[24] During 2017, Commission staff purchased units of the Toy Piano, Toy Rabbit and Toy Trike from retailers who had been supplied with those toys by Joint Future. Relevantly, the Toy Pianos were purchased from Goods 2 U in Blenheim, a retail shop owned and operated by Ebenezer.

[25] The Commission sent all three toys for testing by MTL and CTR, to test whether each complied with the Standard.

[26] During tests by MTL and CTR designed to replicate reasonably foreseeable abuse:

(a) The Toy Piano failed the tests because:

- (i) the wheel attachment detached;
- (ii) the shell of the piano broke apart, liberating internal parts which had also broken, and the wheels were liberated; and
- (iii) the slider switch was liberated.

(b) The Toy Rabbit failed the tests because:

- (i) one of the toy's arms, its handle, and the pull card were liberated; and
- (ii) the clear dome section cracked open, which liberated an impeller and a number of polystyrene spheres from inside it.

- (c) The Toy Trike failed because the handlebars were liberated during testing.

[27] The components of the Toy Piano, Toy Rabbit and Toy Trike that broke or were liberated failed the small parts test and, accordingly, created a choking risk for young children. The Toy Trike also had removable components which failed that test. As such, all three toys breached clause 4.4.1 of the Standard.

[28] After being notified by the Commission in 2017 of the need for a product recall, Joint Future contacted some of its Auckland-based retailers to advise them to withdraw the Offending Toys from sale. It subsequently contacted all of its retail customers to ensure that they were no longer selling the toys and asked those retailers to advise their customers to destroy the toys or return them for a refund. However, it was not until 23 March 2018 – following three separate requests from the Commission⁸ – that Joint Future issued a formal product recall notification in respect of the Toy Rabbit and the Toy Trike. Joint Future only issued a recall notification for the Toy Piano on 21 August 2018, after the Commission had advised it of its decision to prosecute.

Ebenezer's Offending

[29] Ebenezer operates a distribution and retail business based in East Tamaki, Auckland. The company was incorporated in February 2004 and its directors are Joon Ho Choi and Mi Ok Choi.

[30] Ebenezer's core business is in budget homeware, hardware, party ware, giftware and toys. Ebenezer imports approximately 40% of its stock from overseas (mainly China) and sources the rest from New Zealand. It carries approximately 10,000 product lines which it distributes to 23 retailers throughout New Zealand. It estimates that toys account for approximately 10% of its business.

⁸ On 11 September 2017, 31 October 2017 and 8 February 2018.

[31] Of the 23 retailers it supplies to, 13 are “Goods 2 U” branded retail stores, which are owned and operated by Ebenezer.

[32] Between 10 January 2011 and 28 February 2017, Ebenezer:

- (a) supplied or offered to supply 80 units of the Instrument Set (as received from Goodview, and noted above at paragraph [13](a)); and
- (b) supplied or offered to supply 36 units of the Toy Piano (as received from Joint Future, and noted above at paragraph [22](a)).

[33] The Commission’s purchase of the Instrument Set and Toy Piano from retail outlets owned and operated by Ebenezer are as outlined above at paragraphs [14] and [22]. The failure of those toys during independent testing by MTL and CTR are as outlined above at paragraphs [15] to [17], and [23] to [25], respectively.

[34] After being contacted by the Commission, Ebenezer immediately contacted its Goods 2 U retail stores advising them to stop selling the Instrument Set and the Toy Piano, but otherwise took no recall action regarding either product.

Principles and Purposes of Sentencing

[35] The Court is required to take into account the purposes and principles of sentencing set out in the Sentencing Act 2002. The Commission submits that the purposes of deterrence, accountability and denunciation are of particular relevance in this case. If not these Courts must be balanced against the need to impose the least restrictive outcome appropriate in the circumstances and the general desirability of consistency with appropriate sentencing levels in respect of similar offenders committing similar offences in similar circumstances.

The Statutory and Regulatory Context

[36] The FTA is consumer protection legislation. The purposes of the FTA are to contribute to a trading environment where the interests of consumers are protected,

and in which consumers can participate confidently.⁹ Those interests are especially heightened in product safety cases, given the risks that unsafe goods post to the welfare, or lives, of consumers.

[37] The monitoring and enforcement of product safety standards allows consumers to participate confidently in the market, in the knowledge that the goods they purchase comply (or ought to comply) with prescribed safety standards. Compliance with safety standards is particularly important in cases involving toys for use by young children. Consumers are not able to readily assess whether products comply with the applicable safety standards and required to take such goods on trust.

Culpability Factors

The conduct undermined the objectives of the Fair Trading Act 1986 (the FTA)

[38] The FTA is designed to facilitate consumer welfare and effective competition through fair trading practice. In respect of product safety, it requires traders to follow minimum safety standards for products that may expose members of the public to particular risk.

[39] The Standard is designed to protect a vulnerable class of consumers (children aged 36 months and under) from hazards which are recognised as giving rise to risks of serious injury or death. The penalty imposed in cases under that Standard ought to reflect the seriousness of those risks, along with the limited capacity of the targeted consumers to appreciate or protect themselves from those risks.

[40] The factors from *Commerce Commission v L D Nathan & Co Ltd*¹⁰ are relevant when assessing the appropriate penalty here.

⁹ FTA, s 1A(1).

¹⁰ *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160.

The conduct undermined the objectives of the FTA

[41] The FTA is designed to facilitate consumer welfare and effective competition through fair trading practice. In respect of product safety it requires traders to follow minimum safety standards for products that may expose members of the public to particular risk.

[42] The standard is designed to protect a vulnerable class of consumers (children aged 36 months and under) from hazards which are recognised as giving rise to risks of serious injury or death. The penalty imposed in cases under that standard ought to reflect the seriousness of those risks along with the limited capacity of the targeted consumers to appreciate or protect themselves from those risks.

The failures to comply were important

[43] The Offending Toys failed tests designed to replicate reasonably foreseeable abuse. The pieces that broke or were liberated during these tests were small enough to be swallowed or ingested by a child, creating a choking risk. This is a particular concern for the targeted age group – children 36 months and under – whose coughing reflexes are not fully developed, and who have limited ability to detect or avoid hazards.

The conduct was highly careless

[44] The conduct of all Defendants can be characterised as careless to highly careless. All three Defendants failed to make themselves aware, in any meaningful sense, of their obligations under the FTA. This resulted in the supply and offer for supply of thousands of non-compliant toys throughout New Zealand.

[45] During his interview with the Commission, Michael Ha (a director of Goodview) confirmed that Goodview did not have a compliance programme in place and instead relied on the age determination for the toys to be set by the manufacturer and placed on the packaging. He also stated that he was not aware of the toy safety standards (but was aware that the toys needed to be safe for children).

[46] During both of his interviews with the Commission, Keith Ma, a manager of Joint Future, stated that he had no knowledge of the product safety standards relating to toys.

[47] During his second interview, Mr Ma additionally stated that the only check Joint Future carried out on toys prior to the Commission's intervention was a visual inspection to check if they had been damaged. He also stated that Joint Future did not check whether the toys it sold were compliant and safe.

[48] During his interview with the Commission, Bryan Hong, a senior manager of Ebenezer, confirmed Ebenezer's limited understanding of New Zealand's product safety regulations, stating that the company's only understanding of New Zealand Product Safety Regulations is that which is provided via the emails and information sheets sent by government agencies, such as MBIE, and from information provided by the Retail Association in relation to health and safety issues.

[49] Mr Hong also advised that, rather than informing of the legal requirements, Ebenezer tried to reduce the risk of breaches occurring by sourcing products primarily from local suppliers. Ebenezer's staff do not perform checks on products source from New Zealand wholesalers, instead relying on the wholesalers as having done so.

[50] The Commission submits that Ebenezer's conduct can be regarded as being reckless, given that it has previously been the subject of four previous product safety investigations by the Commission, three of which related to toys (the fourth relating to cigarette lighters).

[51] The toy investigations resulted in the Commission issuing two compliance letters (in November 2009 and May 2014) and a warning letter (in March 2013). All three of those letters referred Ebenezer to the Standard and set out the steps Ebenezer was required to take to comply with it. The warning letter in particular advised Ebenezer that:

To assist you in ensuring that this type of conduct does not recur, we suggest that you initiate checks of any other toys that you sell to ensure that those covered by the Standard meet the requirements of it. We further advise that

when making future orders of toys that you advise the manufacturer or supplier that the toys must meet the Standard [...]

[52] The compliance advice and warning letters also set out the Commission's view that Ebenezer's conduct in each case had likely breached the FTA, and referred to the maximum penalties applicable on conviction.

[53] The compliance advice and warning letters put Ebenezer on notice that its purchasing processes were inadequate and that it was running the risk of breaching the FTA. By failing to address those deficiencies on the previous three instances when it was advised to do so, Ebenezer's conduct in this case can properly be regarded as being reckless.

The Extent of the Offending

[54] Every defective product made available for sale carries with it a latent risk of harm to consumers. This risk persists regardless of where the trader is situated within the supply chain but crystallises at the point when the goods are sold to an end-consumer. In this sense, each and every supply of a defective product can be regarded as a serious breach of the FTA.

[55] The existence of multiple Offending Toys (as is the case for Joint Future and Ebenezer) can also be seen as an aggravating feature in its own right, for two reasons. First, offering to supply multiple defective product lines increases the prospect that a consumer will be drawn to purchase at least one defective product. Second, and as noted above, the number of defective product lines demonstrates the extent of the systemic failures in Joint Future and Ebenezer's purchasing and compliance processes.

Goodview Trading NZ Limited

[56] Goodview supplied and offered to supply 446 Offending Toys to retailers across New Zealand. As noted above, Goodview has a wide customer base of approximately 60-70 retailer clients, most of whom are repeat customers. Of those, Goodview supplied 15 retailers with a total of 286 offending products.

Joint Future Wholesale Limited

[57] Joint Future has approximately 220 retailer clients throughout New Zealand. In addition, during the relevant charge periods, Joint Future attended the Auckland Lantern Festival and events at the ASB Showgrounds in Auckland, at which it sold its products directly to the public.

[58] In total, Joint Future supplied approximately 3580 Offending Toys comprising:

- (a) approximately 1296 units of the Toy Piano;
- (b) approximately 1244 units of the Toy Rabbit; and
- (c) approximately 1040 units of the Toy Trike.

[59] Of those, more than 3000 were supplied directly to individual members of the public at the Auckland events.

Ebenezer Trade Limited

[60] Ebenezer supplied and offered to supply 116 Offending Toys, from two different product lines, to retailers across New Zealand. Its customer base comprises 23 retailers. Of those, 13 are "Good 2 U" branded stores which Ebenezer operates, and from which it sells goods directly to the public.

The Resulting Prejudice to Consumers

[61] The Standard is designed to help reduce the risk of children suffering injury (including serious injury or death) by exposure to unsafe toys.

[62] As is common in cases of this nature, the prejudice to consumers from the offending will generally arise from the exposure to the risk of harm, rather than in any manifestation of that risk; each toy still in use presents an obvious risk of harm.

The Need to Impose Deterrent Penalties

[63] I accept the submission that product safety cases in particular, give rise to a strong need for general and specific deterrence. The Commission submits that general deterrence is required in this case in order to ensure that traders comply with the requirements set down in the Standard. The onus is on traders to sell safe products.

[64] General deterrence is also required to ensure that traders who do comply with mandatory standards and bear the costs of so doing, are not placed at a competitive disadvantage in relation to those who do not.

[65] The need to properly incentivise compliance is also reflected in Parliament's decision to treble the maximum penalties for offending by bodies corporate.

Cases Relevant to Setting the Starting Point

[66] There is no tariff case for offending of this nature in New Zealand. However, I have been referred to several cases involving broadly similar offending.

[67] AHL Co Ltd¹¹ (AHL) pleaded guilty to two charges under the FTA for supplying 271 units of a single product line which did not comply with the product safety standard for children's toys. One of the charges (relating to 259 toys) was subject to the pre-amendment penalty available under the FTA. The second charge (relating to the remaining 12 toys) was subject to the increased post-amendment penalty. The company was a moderately sized trader with a turnover of approximately \$1 million.

[68] At sentencing, the Court adopted a global starting point of \$30,000 on both charges.

¹¹ *Commerce Commission v AHL Co Limited* DC Auckland CRI-2017-004-009958.

[69] Manufacturers-Marketing Limited¹² (MML) pleaded guilty to two charges under the FTA for supplying toys that did not comply with the applicable product safety standard. The offending was subject to the increased available penalties under the FTA.

[70] MML operated a small distribution business based in Manukau, Auckland. It supplied a total of 334 defective toys, from a single product line, to various retailers. The defective toy was an Instrument Set consisting of a whistle, two maracas and a trumpet. The toys were supplied during two different periods, one which lasted approximately seven months, and another which lasted approximately one year.

[71] While MML sourced the majority of its products from China, the defective toy had been obtained from a New Zealand source. Product packaging displayed the words “baby concert”, but also a warning that it was not for use by children under three years of age.

[72] MML did not have a compliance regime in place, and its sole director was unaware of the applicable product safety standards. However, as soon as MML became aware of the problem, it contacted all retailers who had received the toy and offered credits for any unsold product. It also contacted MBIE and completed a product recall.

[73] At the sentence indication hearing, Judge Mabey QC confirmed that labelling a product as unsuitable for under threes did not determine whether the Standard would apply, and the presence of such labelling was neither a defence nor a mitigating factor.¹³ The offending was characterised as highly careless. At sentencing, a starting point of \$75,000 was adopted.

¹² *Commerce Commission v Manufacturers-Marketing Limited* [2008] NZDC 7913.

¹³ *Commerce Commission v Manufacturers-Marketing Limited* DC Manukau CRI-2017-092-014214, 10 April 2018 (sentencing indication notes).

[74] Mega Import and Export Limited¹⁴ (Mega Import) pleaded guilty to two representative charges under the FTA for supplying toys that did not comply with the applicable product safety standard. The offending was subject to the increased available penalties under the FTA.

[75] Mega Import supplied a total of 1163 defective toys, across two different product lines, to retailers throughout New Zealand. Specifically, it supplied 731 defective toy buggy sets to 50 different retailers, and 432 rattles to 35 different retailers. Those products were supplied over a four-month period. Both products failed to comply with the relevant standards by breaking into small parts during testing.

[76] At sentencing, Judge M Sharp described the offending as “highly careless” and adopted a starting point of \$100,000.

[77] SDL Trading Limited¹⁵ (SDL) pleaded guilty to six charges under the FTA for failure to comply with the safety standard applicable to children’s toys. It supplied 4757 units of a non-compliant bathtub baby toy to 63 different retailers over a three-year period. The charges traversed the increase in maximum available penalty.

[78] SDL were aware of the product safety standard but was not aware that it was applicable to this particular product. It did not have a compliance regime in place. At sentencing, Judge Cunningham characterised the company’s conduct as negligent or careless. Her Honour adopted a starting point of \$120,000.

[79] The 123 Mart Limited¹⁶ (123 Mart) operated 59 retail stores throughout New Zealand, specialising in low-cost consumer products such as toys, costumes and cosmetics.

¹⁴ *Commerce Commission v Mega Import and Export Limited* DC Auckland CRI-2017-009-009276, 9 February 2018. (The sentencing notes for this case have not yet been made available.)

¹⁵ *Commerce Commission v SDL Trading Limited* [2018] NZDC 6626.

¹⁶ *Commerce Commission v The 123 Mart Ltd* [2017] NZDC 23286.

[80] 123 Mart had pleaded or had been found guilty on a total of 22 charges, consisting of:

- (a) Seventeen charges in relation to the supply of 8967 units of defective children's toys, across seven different product lines. The toys had small parts that became liberated during testing, which presented choking hazards for young children (the Toy Breaches). Eight of the charges were subject to a maximum penalty of \$200,000, and the remaining nine were subject to a \$600,000 maximum. Charges relating to two additional product lines were dismissed at the defended hearing.
- (b) One charge in relation to the supply of 1205 units from a single line of children's nightwear which did not carry the prescribed fire danger labels (the Fire Labelling Breaches). This charge was subject to a maximum penalty of \$600,000.
- (c) Four charges in relation to the supply of 11,442 garments from four different product lines, each of which failed to comply with the labelling requirements for information regarding care, origin and content (the Information Breaches). The four charges were each subject to a maximum penalty of \$30,000.

[81] In sentencing 123 Mart, Judge Ronayne adopted starting points of \$330,000 for the Toy Breaches, \$80,000 for the Fire Labelling Breaches and \$20,000 for the Information Breaches.

[82] The Judge commented on the risks posed by the products, noting that both the Toy Breaches and the Fire Labelling Breaches "exposed young children to the risk of injury or even death."¹⁷ While acknowledging that no such harm occurred in this case, His Honour considered that lack of harm "is not the measure", and that the absence of any harm was "fortuitous" given the clear risks posed by the offending products.¹⁸

¹⁷ At [25](ii).

¹⁸ At [25](vi).

Analysis

Goodview Trading NZ Limited

[83] The informant submits that Goodview's offending is more serious is more serious than that of AHL and MML.

Defence Submissions

[84] On behalf of Goodview Mr Winsett submits that a starting point of \$30,000 is appropriate.

[85] It is difficult to place the case of this company (as indeed with the other defendants) on all fours with the authorities cited by the Commission. Each have their own aggravating and mitigating features and are liable to different potential fines, having regard to amendments to the law in some cases over the offending period. I accept the defence submission that balancing these factors as best I can, the starting point adopted in AHL is closer to the appropriate starting point here. In these circumstances I consider that a starting point of \$35,000 is appropriate. I accept also that Goodview should be entitled to the deductions submitted by counsel of 5% to reflect the company's previous good character, a further 10% appropriate to reflect remorse and cooperation with the prosecution and a full discount of 25% from that for a guilty plea at the earliest opportunity.

[86] In this regard I have considered the affidavit of Ms Helen Ha, who has set out the steps taken by the directors of the company and the history and circumstances of the company's trading.

[87] I note that before the company was prosecuted, Goodview had already filed for dissolution and removal from the company's register. Mr Ha Snr reached retirement age in 2015 which precipitated the sale of the business and the dissolution of Goodview. That dissolution was paused until the sentencing process is complete and Mr Ha will be paying the fine from his own resources. He has in my view taken an

entirely responsible approach to this matter and is entitled to receive due credit for that.

Joint Future Wholesale Limited

[88] The Commission submits that Joint Future's offending is more serious than that of AHL, SDL, MML and Mega Import, but less serious than that of 123 Mart.

- (a) The total number of Offending Toys supplied by Joint Future – 3580 – is more than double the amounts supplied by AHL (271), MML (334) and Mega Import (1163) combined. Although the offending in SDL involved a greater number of products (4757), Joint Future's offending can be regarded as being more serious by virtue of the longer period of offending, and the greater number of Offending Toys.¹⁹
- (b) 123 Mart's offending was more serious, involving over twice as many offending units across a greater number of product lines.

[89] Mr Donkin submits that a starting point in the range of \$100,000-\$110,000 is consistent with the sentencing decisions referred to above. The Court is required to take into account in particular, the number of toys that were supplied and that the offending spans the 17 June 2014 increase in maximum penalty. The defence accepts the aggravating and mitigating features of the offending as outlined by the informant but maintains that the offending should be categorised as careless rather than "highly careless". It is noted that the product packaging contained relevant warnings but acknowledges that it should have done more to ensure that it understood its obligations under the FTA. It is unclear what proportion of the toys were supplied before the 17 June 2014 increase in maximum penalty, but in general terms the charges periods evenly span the increase.

¹⁹ SDL's offending being limited to a single product line, compared with three product lines in Joint Future's case.

[90] In counsel's submission Joint Future's conduct falls squarely between that of Mega Import and SDL based on the number of defective toys supplied (3580) and the total number of units is the best measure to the extent of the offending. As noted I consider that the conduct of this company does not involve the degree of carelessness contended for by the informant of "highly careless", although it is rendered more serious by the longer period of offending and the greater number of offending toys. Balancing the circumstances of the offending indicated in the cases submitted to me I consider that the appropriate starting point is one of \$130,000. As the defendant submits taking into account Joint Future's cooperation with the Commission, the voluntary recall of its products, remorse for its conduct, efforts to overhaul its business practices and lack of previous convictions, a cumulative discount of 10% is warranted. I acknowledge these steps taken to remedy the issues as outlined in the submissions of counsel.

[91] In addition, the defendant company is entitled to a full discount of 25% in recognition of its early guilty pleas.

Ebenezer Trade Limited

[92] The informant submits that Ebenezer's offending is broadly comparable to the offending in MML. The offending in MML is approximately on par with that of Ebenezer. While MML supplied a greater number of offending products, its offending was confined to a single product line supplied over a significantly shorter period of time. Its offending is characterised as "reckless" having failed to improve its compliance procedures after having been subject to three previous interventions by the Commission.

[93] Mr Phillipps submits that the starting point proposed by the Commission is too high and is not in line with comparative authorities including MML. Further, there was a limited number of non-compliance products (116) and the products were all purchased prior to 17 June 2014 when the penalties increased, most were sold prior to that date.

[94] I consider that Ebenezer's culpability is greater than those of the other two defendants, given that it has been the subject of four previous product safety investigations by the Commission, including three relating to unsafe toys.

[95] The fact that there were no complaints from the public or reported harm is perhaps fortuitous and may be seen as the absence of a particular aggravating feature. I do not regard it as a mitigating feature of the offending in this case, any more than it was for either of the other two defendants, neither can I accept that the warnings through the eyes of a reasonable person is said to indicate that the toys are not obviously manufactured and designed for children up to 36 months.

[96] I accept however that Ebenezer stopped selling the toys when it was first advised of the investigation.

[97] Whilst I do not consider that the conduct could be characterised as reckless, I do consider that it is highly careless and that must be reflected in the starting point. It is submitted that Ebenezer has been entirely successful in its implementation of the regulations apart from eliminating the old stock from its stores. As counsel points out, the primary driver of compliance for a retailer is ensuring it deals with a trustworthy supplier. Systems are not in place but in my view should have been adopted at a much earlier stage given its previous interaction with the informant.

[98] I consider that this should be reflected in the starting point. The starting point in the case of this company should be \$60,000 with a deduction of \$4500 for the cooperation demonstrated and lack of previous convictions. In addition to that the defendant will receive a reduction of 25% for the guilty plea.

Result

[99] The amount and apportionment of fines has not been as finely tuned as one might hope. Certainly, in the case of Joint Future in particular, two of the charges carry a maximum penalty of \$600,000 and on the fact of it the starting point could well be three times the pre-amendment maximum. However, there are issues involved including the number of toys sold, the nature of the defects, the period over which they

were on sale and other matters of general culpability which could make such a calculation unfair.

[100] I have also adopted this view in the case of the other two defendant companies.

Goodview Trading NZ Limited

Starting point of \$35,000 less 5% to reflect previous good character
Less discount 10% to reflect remorse and cooperation with prosecution
Subtotal \$30,250 less 25% for guilty plea (\$7562)
Total \$22,723 with Court Costs of \$130 as follows:
CRN 2894 – \$11,361.50, Court Costs \$130
CRN 2898 – \$11,361.50

Joint Future Wholesale Limited

Starting point of \$130,000 less cumulative allowance for previous good record
and efforts to amend its business practice
Less discount 10% (\$13,000)
Subtotal \$117,000 less 25% (\$29,250)
Total \$87,750 with Court Costs of \$130 as follows:
CRN 2901, 2905, 2908, 2911 – \$11,935
CRN 2906 Court Costs \$130, 2909 – \$20,005 each charge

Ebenezer Trade Limited

Starting point of \$60,000 for cooperation and lack of previous convictions
Less discount (\$4500)
Subtotal \$55,500 less 25% (\$13,875)
Total \$41,625 with Court Costs of \$130 as follows:
CRN 2891 Court Costs \$130, CRN 2892 – \$20,812.50 each charge

Signed at Auckland this 19th day of March 2019 at

am / pm



C J Field
District Court Judge

ADDENDUM

[101] These sentencing notes have been reissued today, 18 April 2019, due to an error in *Goodview Trading NZ Limited* in paragraph [100]. It should have read:

Goodview Trading NZ Limited

Starting point is \$35,000

Less 15% for mitigating features \$29,750

Less 25% for guilty plea \$22,312.50

End Sentence Total \$22,312.50 with Court Costs of \$130 as follows:

CRN 2894 – \$11,156.25, Court Costs \$130

CRN 2898 – \$11,156.25

Signed at Auckland this 18th day of April 2019 at 3.40 ~~am~~ pm



C J Field
District Court Judge