IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-009916
[2018] NZDC 9443

COMMERCE COMMISSION
Prosecutor

v

ARGYLE PERFORMANCE WORKWEAR LIMITED
Defendant

Hearing: 10 May 2018

Appearances: A McClintock and A Luck for the Prosecutor
B Cuff and C Henley for the Defendant

Judgment: 10 May 2018

NOTES OF JUDGE M-E SHARP ON SENTENCING

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[1] Argyle Performance Workwear Limited ("Argyle") appears for sentence on one charge brought under s 13(a) Fair Trading Act 1986, the Act, in relation to safety jackets which it supplied and falsely represented to be suitable for use in hazardous electrical conditions, namely that they were 70 Cal jackets, ie that the jacket in question was Arc rated to 70 Cal per centimetre, a measure of how much energy the jacket could be exposed to before the wearer was at risk of electrical burns. The jacket did not provide this level of protection. In fact it had no Arc rating at all.

[2] Four jackets were sold by Argyle over a period of a year and another eight were given to consumers as free samples. Another 37 jackets were for sale at the time that the Commission brought the misrepresentations to Argyle's attention. Nine of the 12 jackets have been returned. There are still in circulation despite the best efforts of Argyle to retrieve them. Refunds have been given to all customers who purchased jackets.

[3] This sentencing has come before the Court after the parties agreed a summary of facts. That summary is attached to the Crown's memorandum of sentencing submissions. I do not propose to traverse it in any detail. Suffice to say that Argyle commissioned a company called Nalder Protective Clothing to manufacture 50 jackets for it, these to be for one specific customer who had had difficulty sourcing what it needed elsewhere.

[4] The sequence of events in respect to the order placement with Nalder by Argyle was of an email which did refer to wanting a jacket which had an Arc rating. That was followed by a purchase order requesting a product described as JTPWOFR Arcguard FR wool hi-vis jacket 70 Cal. Nalder accepted the order but did not produce a jacket which in fact had any Arc rating at all, let alone 70 Cal. The odd thing about all this is that in fact the customer did not need a jacket with an Arc rating of 70 Cal which would have placed it well above a hazard risk category 4 garment but only needed a hazard risk category 2 garment of at least 8 Cal per centimetre, based on the National Fire Protection Association's NFPA 70E Standard for Electrical Safety in the Workplace.

[5] However Nalder accepted the order and provided first of all to Argyle a very small sample of the material that it intended to use in the jackets. But for some reason known only to itself, Argyle did not take any steps to test the material or indeed to check that the garment and the material from which it was to be manufactured would in fact achieve the rating that it had requested in its email and order. It now says that the piece of material which was provided as a sample was too small to test, however that is immaterial given that it did not go back to Nalder to either say this or to ask for it to undertake testing.

[6] There has been some discussion today over just what Nalder told Argyle and just what culpability Nalder has for its part in this debacle. Much of that is immaterial because it is not Nalder that is on trial. Nalder has not been prosecuted and whilst that may or may not be unjust, it was Argyle as the trader taking the garment to market that had the legal responsibility to inform the public truthfully of the nature of the garment which it did not do. It grossly misrepresented what the jacket was and that could have had lethal consequences. Fortunately, only a very small number of garments were made and as most have been retrieved there was in fact no harm done.

[7] To compound Argyle's deficiencies in respect of this matter, Nalder's invoices did not refer to the jackets as having a particular Arc rating merely describing them as FR wool hi-vis. But Argyle, without asking any questions or testing the garments themselves, went on to label the jackets with care instructions, a contents description and a statement that the jackets were flame-retardant when they were not, as well had additional labelling and swing tags attached to the jackets representing that they were 70 Cal providing Arc protection and that they were lifetime fire retardant. The prices Argyle charged for the jackets ranged from between $315 to $369.60. Thirty seven of the jackets were held in stock at the time that the Commission brought the misrepresentation to Argyle's attention.

[8] Basically, what it seems to me has occurred here and is acknowledged openly by counsel who appears for the defendant is a series of errors, oversights and misjudgements by some people or one person within Argyle. In fact defence counsel referred to an overzealous salesman who bypassed compliance procedures and undertook for a particularly valuable customer to find and have these jackets manufactured, so that the compliance regime which was in place then was simply not complied with. I am told that since then the compliance regime has been tightened substantially to ensure that this cannot happen again and that the employee in question has been disciplined as one might imagine.

[9] There are, as I said, conflicts between what it appears Nalder told Argyle and what Nalder's responsibility is. From the Court's point of view none of that is particular relevant as I have already said to this sentencing exercise but I will make the observation that Nalder itself appears to have been grossly negligent as well.

[10] The false representations were made both in labelling on the jackets, in email communications with existing customers of the defendant, on swing tags and in an advertisement on its website. This was over a period of one year but there were only 46 views of the web page jacket whilst it was advertised online and this figure includes views during the Commerce Commission's investigation.

[11] In addition, between 4 and 8 April 2016, Argyle distributed the Transpower Guide via electronic format to 32 Transpower contractors making representations about the jackets Arc rating and being lifetime fire-retardant. I should

add that the marketing email was sent to 4546 different recipients. Clearly, given that there were only 12 sales, the uptake was not very good.

[12] To assess the starting point, one must look at culpability factors:

(1) The Commission asserts that the conduct undermined the objectives of the Act. Well of course it did. Breaches of the Fair Trading Act usually do and I accept of course that the Fair Trading Act is designed to facilitate consumer welfare and effective competition through fair trading practice and to ensure that traders do not make false or misleading representations which entail risks to consumer safety but the fact that the conduct undermined the objectives of the Act cannot be said to be an aggravating feature, given that it is inherent in the charge itself.

(2) The Commission says that the representations were important and this is an aggravating feature. I agree, the representations were as the Commission says plainly integral to consumers decisions to purchase the jacket because the jacket's core purpose was to provide safety and protection to its wearer.

(3) The contraventions were highly careless, if not grossly negligent. I agree. There was nothing reckless or wilful however about the misrepresentations and the conduct in making them. A catalogue of errors on the part of, it would seem, both Argyle and Nalder contributed to the outcome and I have no doubt that both regret hugely that this was so.

(4) The representations were a complete departure from the truth. I agree but I am not at all sure that the degree of departure from the truth is necessarily relevant or not as an aggravating feature of the offending, given that the charge itself requires a misrepresentation but I do accept of course that the jackets were represented to be safe to a 70 Cal Arc rating when in fact they have no Arc rating whatsoever.

(5) The Commission submits that the length of time over which the offending occurred, ie a one year period, is an aggravating feature. I do not agree that this should be treated as an aggravating feature given that whilst the jacket was offered for sale over a year long period, in fact the main marketing of the jacket was only done over a period of three weeks and never to the public at large.

(6) Consumers were prejudiced by the risk they were exposed to. This is an aggravating feature. Those who purchased or indeed were given the sample jackets were placed at great risk. Presumably the only people that would have worn the jacket were those who required protection from the possibility of electrical burns in their particular occupations and therefore the potential for huge harm to them, in the event of an electrical fire, is not to be understated.

(7) And lastly the Commissioner asserts that there is a need for deterrence. I agree that there is a need for general deterrence, not, however, individual deterrence. I doubt that the defendant is likely to ever do such a thing in the future and the need for deterrence cannot be said to be an aggravating feature of the offending of course.

Mitigating features of the offending

[13] I agree with the Commission there are none.

Starting point

[14] The starting point must be assessed by applying a combination of the aggravating features of the offending and the decisions of the Courts in other similar cases, although there are none that are on all fours. There are a number of product safety cases however, many of which I am familiar with because I have sentenced other defendants for breaches of Fair Trading Act in respect to unsafe products.

[15] Those that the parties rely on here are the well known cases *Commerce Commission v Brand Developers Ltd*[1], *Commerce Commission v*

[1] *Commerce Commission v Brand Developers Ltd* [2015] NZDC 21374

Baby City Retail Investments Ltd[2] and in the defendant's case *Commerce Commission v Sales Concepts Ltd*[3]. Of course none of these cases do any more than provide examples of how different of my brother and sister Judges have determined both the starting point and the ultimate penalty based on the facts of that particular case, which is another way of saying that each case must turn on its own facts and it will seldom be the case that any two situations are sufficiently on all fours to use one decision as a complete guide for sentencing in respect of another.

[16] The Commission asserts that two factors loom large in this case, both of which are critical to setting the starting point, being:

(i) the falsity of the representations and;

(ii) the risks that they posed to consumers.

So, as it says, approaching the matter in the round, the Commission submits that the appropriate starting point is a fine in the range of $110,000 to $135,000 which it says is consistent with the authorities that it canvassed being *Brand Developers* and *Baby City*. Of course in respect to some of the charges in those cases, the prosecutions were brought under the increased penalty regime.

[17] Now the maximum penalty available is $600,000 but of course consonant with the Sentencing Act 2002, in assessing where the offending sits in the sliding scale of seriousness, a fine towards the maximum will only be appropriate for offending at the most serious end of the spectrum of such offending and a fine towards the lower end for offending which is at the opposite end.

[18] The defence explains how Argyle got itself into this situation and does attempt to convince me that there were faults that lay with Nalder which are relevant. I accept as I have already said, that it seems that there were some faults with Nalder but I do agree as I have already said as well, with the Commission that it was Argyle's ultimate responsibility not Nalder's and I must assess an appropriate starting point which does not take account of Nalder's operative deficiencies.

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[2] *Commerce Commission v Baby City Retail Investments Ltd* [2017] NZDC 885
[3] *Commerce Commission v Sales Concepts Ltd* [2017] NZDC 16387

[19] So the defence says that the appropriate starting point for a fine for this charge is in the range of $60,000 to $80,000 and then speaks to the discounts that it considers are appropriate. It is always difficult to judge exactly where in the offending penalty continuum a particular set of facts sits and I do accept the Commission's assertion that in at least one or two ways, this was very serious offending but as against that, it was only very serious offending because of the potential for huge harm. There was no actual harm. That is not a necessary component of the charge to be proved and ultimately will only be relevant to increase the starting point rather than anything else.

[20] The fact of the matter is however that it is accepted that this was offending of a careless, although highly careless, nature and negligent rather than wilful and that is a matter which I consider does count for something. So I consider that the Commission's starting point is too great and the defendant's starting point is too low, seeking as it does to reduce its culpability on the basis of Nalder's culpability.

[21] Taking all matters into account, I deem that an appropriate starting point is $100,000 on this one charge and I now turn to mitigating factors personal to Argyle to determine whether there are any discounts that are available to it. There are no aggravating factors personal to Argyle.

[22] The Commission accepts that Argyle is entitled to a discount to reflect the extent of its co-operation with the Commission but argues with Argyle as to the percentage that should be applied for that co-operation, really saying that most of what Argyle did once the Commission had raised its concerns with the company, was what it was required to do by law in any event and it should not receive credit for doing so. That is so with respect to a compliance regime but the company did definitely co-operate voluntarily and quickly, once concerns had been raised with it. It ceased offering the jackets for supply, as I understand it pretty immediately, it spent I think I read $5000 in having the jacket tested overseas and sent the results to the Commission, these results being blatantly against its own interests. It removed all of the advertising of the jacket from its website. It conducted a voluntary product recall, avoiding the need for the Ministry of Consumer Affairs to issue it with a compulsory recall notice. The business development manager for Argyle attended a voluntary interview with the Commission. It refunded all of those who purchased the jacket.

[23] Argyle suggests that there should be a discount of 20 to 25 percent. I do not agree that 25 percent is appropriate or warranted but I am prepared to give it a 20 percent discount.

Previous convictions

[24] In its written submissions the Commission was of the view that because this is a newly incorporated company, that is November 2013 and therefore it had only been in operation for less than 18 months, this relatively short period prior to offending did not demonstrate a sufficiently established track record of compliance to warrant a discrete discount. But in verbal submissions in Court, Ms McClintock for the Commission now accepts that a discount for lack of previous convictions is warranted, as she understands and accepts that the company (in a different guise) has been in operation manufacturing protective clothing for industry for a very long time. It is a longstanding family business based in Hawera and only had a name change or at least restructured to continue operating in the guise of this particular company. It is therefore entitled to a discount.

[25] I thought that I read somewhere that the company in one form or another had been operating for around 70 years. No, I see now from the defence's submissions that Argyle was incorporated in November 2013 due to a change in shareholding and name but is a longstanding family business established in 1976 when it began retailing workwear and footwear. The wholesale division was established in 1985 before the retail division was eventually sold off in the early-2000s. So it has an established record of compliance for over 40 years. That entitles it to a discount and I am prepared to give it a discount of a further 10 percent.

[26] Interestingly, Argyle suggests that the effect of publicity regarding this prosecution will be such as to warrant a further discount. That is an interesting submission and could be almost seen to suggest that a defendant who has committed wrong, should not have to suffer from the effects of that wrong. It is not a submission that finds favour with me, I am afraid. Argyle misrepresented a product. It could have been serious and any adverse publicity which damages its reputation is just part of parcel of offending and the results thereof, I am afraid.

[27] As an additional mitigating feature which may benefit the defendant, it is submitted that after receiving the New Zealand Wool Testing Authority Limited results on the jacket, Argyle was surprised that the cotton inner liner had not passed all basic flame-resistant test requirements because the supplier Nalder had represented to it that the jacket was flame-resistant.

[28] The jacket as manufactured in fact was not even flame-resistant, let alone had a Cal rating but it appears that independent testing on the jacket commissioned by Argyle indicated that one of the materials in the outer lining may have received an Arc rating in the vicinity of approximately 17 Cal per centimetre and therefore would meet hazard risk category 2 requirements. So although less than what was represented on the labelling, the jacket still provided some considerable protection. That is as may be but I do not find it relevant, certainly not as a mitigating feature that would warrant a further discount. In fact, it cannot be said because of the cotton inner lining which was not flame-resistant (I acknowledge that was Nalder's fault, not the defendant's) that the jacket was anything even vaguely approximating the way in which it was labelled and represented to the public and the defendant's customers. Accordingly, I take no account whatsoever of that submission.

[29] So from a starting point of $100,000 on this one charge, less discounts in aggregate of 30 percent, being 20 percent for cooperation and 10 percent for previous good record, I come down to a discount of $30,000. And in addition of course there is the 25 percent discount which the Commission acknowledges is appropriate for the guilty plea of the defendant coming in as timely fashion as it did.

[30] Thus with discounts of 30 percent as I have already indicated from a $100,000 fine, there is left the sum of $70,000 as a fine from which must be deducted the 25 percent for the guilty plea, leaving a fine of $52,500 to be imposed upon Argyle.

M-E Sharp
District Court Judge