IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-010993
[2018] NZDC 6626

COMMERCE COMMISSION

v

SDL TRADING

Hearing:	26 March 2018
Appearances:	J Barry for the Prosecutor R Coltman and H Powrie for the Defendant
Judgment:	26 March 2018

NOTES OF JUDGE P A CUNNINGHAM ON SENTENCING

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[1] SDL Trading Limited has pleaded guilty to six charges under ss 30 and 40(1) Fair Trading Act 1986. All charges relate to one product, a bathtub baby toy that SDL supplied to 63 different retailers over a three year period.

[2] The first charge relates to a charge for the period 8 November 2013 to 1 June 2014 and represents 784 units of this toy, which is 16 percent of the total. That number of toys is isolated in that charge period because in June 2014 the maximum fine increased from $200,000 to $600,000 so the lower fine applies to those 784 items of the toy.

[3] The other five charges span a period from 9 September 2014 until 28 December 2016 and they are broken down into periods of just over two months in relation to the second charge, just over five months in the third period, five months in relation to the fourth period and five and a bit months in relation to the fifth and five

months in relation to the sixth. That final period of 1 July to 28 December sold the highest number, being 1387 and altogether the total number is 4704 units.

[4] Section 29(1) Fair Trading Act provides for the making of regulations in relation to goods and may prescribe product safety standards for the purpose of preventing or reducing the risk of injury to any person. Section 30 Fair Trading Act provides that if a product safety standard applies to s 29, "A person must not supply or offer to supply goods unless that person complies with the product safety standard."

[5] The Product Safety Children's Toys Regulations 2005 were issued pursuant to s 29 Fair Trading Act and they apply to toys marketed for use by children up to and including three years of age, whether or not they are designed for children under the age of three years. That last part is relevant in this case and that is because on the back of the package there was a warning that the toy was not suitable for children under the age of three because there might be a choking hazard.

[6] First of all, I am going to try to describe the toy, although if it is able to be reproduced as per page 3 of the summary of fact and attached to this decision, that would probably be more helpful.

[7] It is in a small plastic or cellophane bag and the largest item in it is a baby bath which is narrower at one end than the other. At its widest point is probably something like 15 centimetres in length, so that is five inches and it is narrow at the bottom. Inside the bath is a doll that looks like a baby and there is also a shower hose with a shower mixer attachment. At the foot end of the bath there are taps, presumably a hot and a cold tap and a faucet and then there are some other items that are described as, a soap dish in there and a duck and a fish.

[8] The bath is bright pink, the duck and the fish are both yellow and the baby doll is, I guess a flesh type colour with bright blue eyes, not a lot of hair and it looks like a girl baby. At the top are the words "baby bath" this is a little cardboard attachment to the cellophane outside the package and in the right-hand side there is a small child, at least naked from the waist up, who certainly looks under three to me.

[9] A copy of a photograph of the toy is attached to this decision.

[10] Ms Prue Vincent is a psychologist who was retained by the Commerce Commission to prepare a report in relation to this toy. Helpfully Mr Coltman has set out some relevant parts of her report in his sentencing decision which I am going to read:

> There is no indication from the labelling that the product is intended for children within this age range. On the contrary, there are four warnings visible on the back that the product is not suitable for this age range. This warning implies that the manufacturer is aware of the choking risk if young children played with the items. On the other hand, a person considering buying this item may think that it was intended for children aged 36 months and under. There is no warning sign on the front and the set has visuals in the word "baby" and a picture of a baby in a nappy on the front.

[11] That is a reference to the photograph of a baby that I described earlier.

> This suggests that the item would be seen as manufactured, designed and marketed for children aged 36 months and under. The items are the size and colour that would be seen as appropriate for a child aged 36 months and under.

[12] The defendant has clearly accepted that opinion by pleading guilty to the charges. It goes without saying that the safety of children, especially very young children, is imperative in terms of all products that young children are likely to come into contact with and toys is one of the important products that young children are likely to come into contact with.

[13] Playing with toys in the bath must be something of a rite of passage for children in this country and no doubt many other countries. Bath-time toys would be extremely common in most households in New Zealand.

[14] SDL Trading Limited was aware of the standards. However, it was not aware that the age specific regulations would apply to the toy sets in this case, presumably because of the warning on the back of the package.

[15] I have been told in submissions that the director of the company sourced these items from China. When SDL became aware of the investigation by the Commission it withdrew the baby bath set from sale and it attempted to recall the 4700 products it had sold to retailers and only 46 were recovered, which represents something like

one percent of all the items sold. The corollary of that is that the majority of the items that have been sold are still out there in the marketplace, either with retailers or in homes or in some cases they may have been disposed of.

[16] The Commerce Commission suggests a starting point of between $50,000 to $60,000 for the pre-2014 charge period, that is the first charge, and between $175,000 to $200,000 in the post 2014 charge period.

[17] The defendant's starting point is between $8000 to $10,000 for the pre 9 June 2014 charge period and $85,000 to $95,000 for the post charge period. From there the defendant has adjusted the total fine down to account for the pre 9 June 2014 period and the Commission has adjusted the fine up to include pre 9 June 2014 charge period.

[18] What I must do is first to identify what the aggravating features are here and there does not seem to be any argument that deterrence and denunciation and accountability are important principles that must apply to cases of this type. Parents of children rely on toy manufacturers and distributors to ensure that their products will not present a hazard to their children.

[19] Children, especially small children, do not have the skills to protect themselves from a variety of hazards, including toys. That leads inevitably to the conclusion that children are vulnerable and that is one of the aggravating features that I identify.

[20] When this toy was tested, eight of the detached pieces were considered to be hazards. There was a torsion test, which is a twisting of the product and six products detached with that twisting action. There was also a drop test and two additional items detached during the drop test. Of course, most of these were the smaller items and being the ones that could present a risk of choking.

[21] The extent of the offending is that there were 4757 of these items sold and only 46 have been recovered. In terms of the amount of items out there in the marketplace and in homes. Another aspect of the extent of the offending is that it was over a three year period. So the extent of the offending, including both the numbers of items sold

and the duration of it, the risk of choking and the fact that children are vulnerable, are the aggravating features that I identified.

[22] There have been some recent cases relating to children's toys and clothing in the District Court. For two of them, the Commission was unable to obtain the sentencing notes for. One of them, which is a decision of Judge Ronayne, I have his sentencing notes dated 13 October 2017 in the *Commerce Commission v The 123 Mart Limited.*[1].. They referred to a reserved decision, the defendant having defended at least some of the charges. I was not supplied with a copy of that decision.

[23] I was also referred to a decision of Judge Fraser's in *Commerce Commission v Brand Developers Limited.*[2] which was a case involving ladders. Items that are hazardous even when they are made properly. I am putting that to one side, because I have decided that what I should be focusing on are cases that involve children's toys.

[24] The Commerce Commission referred to a sentencing decision of Judge M-E Sharp on 9 February 2018, *Commerce Commission v Mega Import and Export Limited.*[3] That case confirmed three different toys, something like 1000 items sold over a four month period. The Judge adopted a starting point for a fine of $100,000 and described the behaviour, I am told, as, "highly careless." Then there is a case of *Commerce Commission v AHI Company Limited.*[4] and that is a decision of Judge Thomas. That involved 271 rattles. There the Judge adopted a starting point of $25,000.

[25] In the *123 Mart Limited* case, there were three categories of offending and one was children's toys and that was around 9000, then there was not labelling clothing with the correct fire rating and consumer information breaches, meaning that information such as country of origin and those types of details not being on the items. The total number of items altogether was in excess of 20,000.

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[1] *Commerce Commission v 123 Mart Limited* 20171013 District Court Auckland,
[2] *Commerce Commission v Brand Developers Limited* DC Christchurch, CRI-2015-004-003971, 23 October 2015
[3] *Commerce Commission v Mega Import and Export Limited* CRI-2017-000-009276
[4] *Commerce Commission v AHI Company Limited* 2017-004-009-958 23 February 2018

[26] Judge Ronayne referred at paragraph 28 of his decision as, "Taking an overall starting point of $330,000 for the toy breaches and adjusting that down to $280,000 taking into account the totality of the offending." I take that to mean the offending that was not the defective toys.

[27] So it seems to me that the Judge has taken a starting point of $330,000 but that was in relation to a greater number of products it seems to me, than the actual toys in that case. Otherwise the adjustment downward does not work.

[28] In the *123 Mart Limited* case, the offending was over a two and a half to three year period. Another factor that has been pointed out to me, is that in that case the Commission was sending warning letters and was in communication with the company over a period of time. Thus the Commission's concerns were well known to the company, at the time it was still selling at least some of the items.

[29] One factor that can be taken out of the *123 Mart Limited* decision, is that by increasing the penalty, Parliament has signified a clear message that breaches of these sorts of regulations are serious. Judge Ronayne also accepted that the trebling of the maximum fine, did not mean that one simply trebled the fines from earlier cases.

[30] What seems to me to have happened in this case, is that the director of the company or somebody designated by him, went to China, viewed this toy and was aware of the warning on the back of the package about it not being suitable for children under the age of three. But then did not do the thinking about whether it would appeal to children under the age of three, nor did the thinking about whether he could rely on that warning rather than focusing on safety standards applicable to that toy in New Zealand.

[31] Ms Vincent is undoubtedly right in her opinion about the appeal to under 3s. In my view, a real giveaway is the very young child, obviously still a baby in nappies on the piece of cardboard attached to the top of the packet.

[32] The Commission have suggested that the actions of the company here were highly careless or reckless. Mr Coltman submits that the fact that there was this warning on the package reduces the culpability in this case. Unlike other cases, this

director was aware that there were safety standards that applied in New Zealand and I do not have any evidence as to what he was thinking but it has been brought to my attention that the company was aware of the warning on the back.

[33] In my view, the company's conduct was negligent or careless. It was a failure to make their own judgement about whether more was required before this product went onto the shelves for sale. I am loathe to even put it at the high carelessness and I say that because the warning was something that was taken into account, when it should not have been, but in my view that does make a difference in this case.

[34] The company, SDL did not have a compliance regime in place in the company and that is probably because of two factors. Firstly, this product was not one that the company relied on highly in terms of its turnover. Its range of toys I am told is somewhere in the vicinity of 10 percent of the company's turnover. This was just one of those toy products.

[35] As a result of this case, the company has now chosen not to market toys that are suitable for children under the age of three. Of course that means that it does not have to be troubled by the product safety regulations that apply to children of that age. Mr Coltman submitted that was a factor that I could take into account in terms of remorse.

[36] I do not have anything in writing about what the director was thinking when that decision was made. It could equally be a pragmatic decision that was taken, because obviously there is a cost in setting up a compliance regime to ensure that the safety standards are met. I do not mean any criticism when I say that, particularly when I hear that the margin on the sale of these toys was very low, somewhere in the vicinity of $3000 in total. It was sold by the company for something like $2 and retailed for $5, so it was a cheap toy.

[37] I am going to come back to the starting point. The Commerce Commission suggested a starting point of $155,000 to $170,000 for the post 9 June charging period and $50,000 to $60,000 for the pre 9 June 2014 charging period, but a total starting point of $175,000 to $200,000.

[38] Mr Coltman approached it the other way around by saying that in relation to the five charges that are post the increase in the fine, that all could have been wrapped up into one or perhaps two charges. He submitted that the starting point could be reduced because the number of charges for the post 9 June 2014 period could have been in one or two charges. He suggested $85,000 to $95,000 for the $600,000 maximum fine and $8000 to $10,000 for the $200,000 fine.

[39] Taking into account the aggravating features that I have identified and what I call negligence or carelessness, that is knowing about the product safety requirements but not doing the thinking to decide:

(a) Whether this toy could apply to under threes, or;

(b) whether the product presented a risk of choking to children by some kind of testing or compliance regime

And taking into account the need for there to be deterrence and denunciation I have decided to adopt a starting point of $120,000. In doing so, I am focusing on the five charges that are post the 9 June 2014 charge period and effectively not giving any uplift for those 700 odd sales pre 9 June 2014. The vast majority of the sales, that is 84 percent of them, occurred in that post charge period.

[40] In reaching that level of fine, I have not given any consideration to an inability to pay, because that material is not in front of me. Mr Coltman told me that there was no suggestion that the company could not pay. However I have not ignored the fact that this business which I described as a modest sized company, that has about 10, sometimes 10 plus employees and an annual turnover of $4 million.

[41] It does have some restrictions because of size in terms of its ability to meet a number of the regulatory requirements, in this case safety standards for a small percentage of its turnover in terms of items that it sold. That does not excuse them, but it is a factor that I have taken into account. What I am saying is that if this was a large company with more means than a modest sized company, the behaviour in not having a compliance regime in place may have been more culpable.

[42] From the $120,000 figure, I now apply discounts. And it is agreed that there would be a 10 percent discount for previous good conduct and the fact that the company co-operated with the Commerce Commission by immediately withdrawing the product for sale and making an effort to recall the items.

[43] In terms of remorse, I am not prepared to give anything for remorse. I have earlier explained that the company's behaviour in deciding not to sell toys for children under the age of three, may well be a pragmatic decision. While I recognise that it is difficult for a company in this situation to show remorse, I have no evidence of remorse and in my view a discrete discount is not justified.

[44] There is no disagreement that the company is entitled to a full 25 percent for the guilty plea, that is a reduction of $30,000 and so the end fine is $90,000. I am going to put that on the charging document that is for the latest period, namely 1 July 2016 to 28 December 2016 and also impose the Court costs of $130. And there will be a convict and discharge on all the other charging documents.

ADDENDUM

[45] On 27 March 2018 the defendant applied to correct an erroneous sentence. And quite rightly. My arithmetic went astray. The end fine should be $81,000 calculated as follows:

		$120,000
Less 10%	Good character	12,000
		$108,000
Less 25%	Guilty plea	27,000
		$ 81,000

P A Cunningham
District Court Judge


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