IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-002387
[2017] NZDC 885

COMMERCE COMMISSION
Prosecutor

v

BABY CITY RETAIL INVESTMENTS LIMITED
Defendant

Hearing: 19 January 2017

Appearances: S Lowery for the Prosecutor
A Horne and L Yoon for the Defendant

Judgment: 19 January 2017

NOTES OF JUDGE A E KIERNAN ON SENTENCING

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[1] Baby City Retail Investments Limited has pleaded guilty to six charges under s 30 Fair Trading Act 1986. Each charge carries a maximum penalty of $600,000. The charges relate to offending between October 2014 and October 2015 and they are:

- Firstly, that on or about 8 October 2014 Baby City supplied goods that did not comply with a prescribed product safety standard, in particular in this charge, a Milano three in one sleigh style household cot.

- Secondly, between 8 October 2014 and 6 October 2015 and this is a representative charge, the company supplied goods that did not comply with the prescribed product safety standard, also referring to the Milano three in one sleigh style household cot and Milano Phoenix household cots and the

details in the particulars include with information on leaflets that did not comply with the product safety standard.

- Thirdly, between 7 October 2014 and 28 July 2015, as a representative charge, the company offered to supply goods that did not comply with the prescribed product safety standard. The particulars are the Milano three in one sleigh style household cot with a mattress base marking that did not comply with the relevant product safety standard.

- The fourth charge, on or about 27 July 2015, the company offered to supply goods that did not comply with the prescribed product safety standard. This relates to the offer to supply Milano Phoenix household cot, again with a mattress base marking that did not comply.

- The fifth charge, on or about 10 August 2015, supplying goods that did not comply with the prescribed product safety standard relating to Milano Phoenix household cot with leaflet labelling and mattress base marking that did not comply and lastly on or about 5 October 2015 supplying goods that did not comply with the prescribed product safety standard and this relates to selling a Milano Phoenix household cot with leaflet labelling and mattress base marking that did not comply.

[2] The guilty pleas were entered on 16 June 2014. Today three further charges have been withdrawn. The resolution of this matter today depends on the facts in the agreed summary of facts which runs to some pages which I will attempt to summarise. The charges relate to two models of household cots that Baby City supplied and offered for supply, the Milano three in one sleigh style cot called the Sleigh cot and the Milano Phoenix cot. Packaging, leaflet labelling and mattress base marking did not comply with the safety standards.

Facts summarised

[3] Baby City is a company that operates 15 stores across New Zealand and also sells online. During the period of the charges, the summary says that the company

operated 16 physical stores. The cots are manufactured in China. During the period relevant to the charges, Warwick Edward Services Limited imported the cots to New Zealand for Baby City. The Sleigh cot, during the period the charges are concerned with, was sold at a normal retail price of $449 and the Phoenix cot at a normal retail price of $299. During the period, 75 Sleigh cots with a total sales revenue of $29,869 including GST and 252 Phoenix cots with a total sales revenue of $63,462 were sold.

[4] As to the safety standard that has been breached, the standard is to ensure that household cots are safe for the infants that use them and as the summary states, the safety standard sets out minimum specifications for cots and establishes tests for determining whether a cot meets those specifications. The specifications include requirements for packaging, informative labelling, mattress base marking, materials, construction, design, safety and performance. In the summary the particular sections of the safety standard relevant to the charges are set out.

[5] On 3 October 2014 the Commerce Commission received a complaint that a customer's child had become trapped between the mattress and the side of a Milano brand Sleigh cot supplied by Baby City. The Commission advised Baby City of the complaint on the same day. Baby City provided the customer with a refund and the customer purchased a replacement cot of a different brand from the company.

[6] During the investigation conducted by the Commerce Commission, three Milano cots were purchased from Baby City for testing and others were examined in the stores. Each of the cots purchased or observed by the Commission violated the safety standard in one or more respects, however they did comply with the measurement standard which was the basis of the complaint that was originally received in October 2014.

[7] On 8 October 2014 the Commission purchased a Sleigh cot from Baby City's store in Botany Downs in Auckland and engaged Materials and Testing Laboratories Limited to test it. The testing identified a number of packaging and labelling failures which are set out in the summary.

[8] On 10 August 2015 the Commission purchased a Phoenix cot from the Baby City store in Albany, Auckland. Again, MTL were engaged to test that cot against the safety standard and some packaging and labelling failures were identified. On 5 October 2015 a second Phoenix cot was purchased from Baby City's store in Christchurch and again was tested and there were packaging and labelling failures identified.

[9] On 7 October 2014 and 28 July 2015 the Commission investigator observed a Sleigh cot offered for sale in the Baby City store in Albany which had no labelling affixed to the mattress base. On 27 July 2015 an investigator observed a Phoenix cot offered for supply in the Botany Downs store which had labelling affixed to the mattress base which had the same deficiencies already identified.

[10] So in relation to the charges which have been accepted, there were a number of packaging, leaflet information and mattress base markings that did not comply with safety standard in relation to the Sleigh cot and the Phoenix cot. Those are set out in detail in the summary.

[11] Baby City informed the Commission that it was provided with test results for Sleigh and Phoenix cots before it began to sell them, and in the summary there is listed what Baby City provided; a test report dated 15 April 2011 from a reputable tester which records tests conducted, a test report dated 19 April 2012 similarly which records tests conducted, 4 June 2013 declaration from the manufacturer certifying that its Sleigh cots are manufactured in accordance with the standard, and a test report dated 21 January 2015 from the same reputable testing company recording tests conducted.

[12] In August 2013 Baby City recalled Sleigh cots it had sold between 3 March 2012 and 31 October 2012 due to a glue failure on the cot's drop side panel that caused the bottom rail to detach from the slats on a small number of the units in that batch. Despite Baby City's awareness of this defect it did not commission further testing of the Sleigh or Phoenix cots following that 2013 recall. It obtained a manufacturer's declaration as stated. It did commission further testing of the Sleigh

cot but that was in April 2015 after the Commission advised that testing during the present investigation had revealed further defects.

[13] In relation to actions taken by the company in response to the Commission's investigation, the Commission advised Baby City of the results of testing of the Sleigh cot by telephone on 19 February 2015 and provided the company with a written test report on 4 March 2015. On or about 28 April 2015 Baby City commissioned independent tests on the Sleigh cot and a report of those tests was provided, recording a pass result.

[14] The company advised that after the test results for the Sleigh cot, it suspended future orders while reassessing the product. It also advised that it had reworded the non-compliant instructional and safety information and then placed a new order for the product.

[15] With regard to the Phoenix cot, on 6 October 2015 the Commission informed Baby City that preliminary test results supplied on 10 August 2015 indicated non-compliance with the safety standard. On 6 October 2015 after being advised of those preliminary test results Baby City cancelled an existing order of Phoenix cots and stopped selling the Phoenix cots it had in stock.

[16] On 15 October 2015 the Commission provided the company with a written test report containing the results of tests of the Phoenix cot supplied on 10 August 2015 and the company then commissioned independent tests of a different model of the Phoenix cot which it provided to the Commission in a test report dated 6 November 2015 recording a pass result.

[17] On 24 November 2015 the Commission supplied Baby City with a written test report containing the results of tests of the Phoenix cot supplied on 5 October 2015, that test report noted the deficiencies already mentioned.

[18] In January 2016 Baby City issued a product recall for Sleigh and Phoenix cots it had sold between March 2012 and October 2015 and there is a copy of that

product recall notice with the summary of facts. This is the second time that Baby City has recalled Sleigh cots.

[19] The company has informed the Commission that it has not received any reports of injury or harm due to either the Sleigh or Phoenix cots. As to product testing procedures, the company has improved its compliance procedures in relation to product testing as a result of the Commission's investigation. Also, the company has provided the Commission with an enforceable undertaking in which Baby City agrees to follow a series of testing and quality control procedures designed to ensure that only cots that are compliant with the standard in every respect are supplied or offered for supply. The company does not have any previous convictions.

Submissions on sentence

[20] In preparation for this disposition hearing today, the Court has received a number of written submissions and also decided cases in the general Fair Trading area, supplied both by the Commission and counsel for the company.

[21] I am now going to summarise the submissions that have been made. I may not mention every single submission that has been made but I have of course read all the submissions and indeed the authorities that have been provided.

[22] The Commerce Commission's position is that a starting point for a penalty for each charge (which carries a maximum penalty of $600,000) is warranted in the range of $80,000 to $120,000. The Commission accepts that the company is entitled to discounts in the region of 35 percent, so 25 percent for early guilty pleas and 10 percent for co-operation, and it is suggested that an appropriate end penalty would be in the range of $52,000 to $78,000.

[23] The company's position is that a discharge without conviction would be appropriate or failing that, a starting point for a penalty in the range of up to $15,000. That should then be discounted by the same percentage, 35 percent overall to reflect early guilty pleas and the other factors including particularly co-operation. An end fine of about or of under $10,000 is said to be appropriate.

[24] The Commerce Commission and the company differ in their approach to a suggested starting point though of course there is agreement about the 25 percent discount that should be accorded for pleas and a further 10 percent for mitigating factors including lack of previous conviction and co-operation. The Commission submit that the factors to be taken into account in imposing a penalty under this legislation include the objectives of the Fair Trading Act which are to facilitate consumer welfare and effective competition through fair trading practice, the importance of the failures to comply and the Commission argues that these failures to comply with safety standards were significant with the packaging and labelling omitting safety information designed to ensure the wellbeing of vulnerable infants. The duration of the failures to comply, reportedly a period of about a year, the degree of dissemination, 327 cots with defective packaging and/or labelling and also the degree of wilfulness or carelessness involved. The Commission argued that Baby City's behaviour was careless up until March 2015 when failures were identified and after that date should be viewed as reckless.

[25] Counsel for the Commission, Mr Lowery, emphasised the need to impose a deterrent penalty and the importance of not just specific but general deterrence to ensure that traders comply with minimum requirements set down in safety standards and that traders who do comply and bear the costs of doing so are not placed at a competitive disadvantage.

[26] With regard to specific deterrence, counsel for the Commission suggests that Baby City has demonstrated a failure to appreciate the importance of adhering to safety standard. It points to the significant size of the company and there was no suggestion that the failures were the result therefore of a lack of sophistication or resources. An enterprise of the size of this company would be expected to have robust compliance procedures in place.

[27] Both counsel for the Commission and counsel for the company recognise that there is very little authority directly relevant to this particular prosecution. The Commission refers to *Commerce Commission v Insight Infotech Limited*[1] where baby

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[1] *Commerce Commission v Insight Infotech Limited*, DC Christchurch CRI-2006-009-010421, 19 March 2007, Judge Callaghan

walkers were supplied that did not comply with the relevant safety standard, and had both structural and labelling defects. An ultimate fine of $10,000 was imposed. At the time the maximum penalty was $200,000. It was of course increased to $600,000 in June 2014.

[28] The Commission submit in this case that Baby City's culpability is significantly higher. Reference is also made to the case of *Commerce Commission v Brand Developers Limited*[2] where the trader supplied over 2000 ladders which did not comply with the requisite load rating and failed prescribed tests, although the company represented they did comply. There, the ultimate fine was $153,000 also against a maximum penalty at the time of $200,000. That case however does appear to be quite a lot more serious than the offending in this case, though it has some relevance in that it highlights that failure to comply with safety standards merits a deterrent penalty and that larger companies can expect to face higher penalties if they fail to comply with standards.

[29] Mr Lowery during this hearing has made some oral submissions in opposition to the discharge without conviction that the Court is asked to consider. He points out that a discharge would be almost without precedent in this area, though no specific authority can be pointed to. He has given me two High Court decisions and one District Court decision where discharges have been considered. It is clear that none of them are on all fours with the facts in this case, and in the main involve individuals for whom consequences of conviction might have included issues about overseas travel and other matters which are not relevant here. His submission is that there is no specific authority for a discharge without conviction for offending of this sort in these circumstances.

[30] To address the statutory test, first of all in assessing gravity of the offending, he acknowledges on behalf of the Commission that it is not the most serious offending under the Fair Trading Act and this section, but submits nevertheless it is not the most trivial, it concerns cots intended of course for babies. There are material failings set out in the offending and referred to in the summary that I noted.

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[2] *Commerce Commission v Brand Developers Limited,* DC Christchurch, CRI-2015-004-003971, 23 October 2015, Judge Fraser

He points to the period of time over which the offending occurred, and laid some emphasis on continued offending, as he put it, after March 2015 when the company were aware of official testing. He says on a conservative estimate, some seven months of continued trading when the company was on notice. They did not take prompt steps, in his submission, after the test report was first supplied.

[31] As to the direct and indirect consequences of conviction outlined by counsel for the company, he says really they can only point to reputational damage which would necessarily follow perhaps from a prosecution of this nature. He says that would not be out of all proportion to the gravity of the offending, and he again referred to the importance of a deterrent sentence in this area. He submits it would not be proper for the Court to take into account that the company was out of pocket because they could not sell products that did not comply, as a consequence.

[32] Mr Lowery, did traverse some of the factors in the written submissions, emphasised the aggravating features and discussed some of the cases in more detail. He accepted there is little in the way of case law precisely on the point and emphasised the importance of compliance and the responsibility on a company, a trader, especially a significant company to comply with safety standards. He pointed out that the *Insight Infotech Limited* decision which has been referred to as perhaps one of the New Zealand decisions that is of assistance, is to do with baby walkers and did not concern as in this case sale of 370 cots.

[33] In response to submissions made by counsel for the company, he acknowledged that the company arranged for testing to be done by a reputable tester but there was, he submitted, some tardy action in doing so and less urgency than might have been expected.

[34] Counsel for the company, Mr Horne, in written submissions proposes a much lower starting point than the Commission. In response to aggravating factors highlighted by the Commission, it is submitted that Baby City did not receive a copy of the test results for the Sleigh cot until some three months after the Commission says they did. He emphasised that following receipt of the results, the company did contact the supplier for comment. He acknowledged that it did place undue reliance

upon the supplier to act promptly to provide the revised labels and instructions. With regard to the Phoenix cot, when Baby City learnt of the preliminary test results it did take steps including withdrawing all affected cots from sale and cancelling an existing order.

[35] Counsel referred to a number of mitigating factors to be taken into account, including and emphasising the fact that there had been no incidents where babies or children have been harmed by the cots. That is of course fortunate, but it is really the lack of an aggravating feature rather than a mitigating factor in my view. Counsel emphasised in written submissions and indeed orally today, that the company has fully cooperated with the investigation, did not wilfully breach the standards having relied on the supplier, Warwick Edwards Services Limited, that reliance was reasonable since the cots had previously been tested to the 2010 version of the standards and had passed.

[36] It is emphasised that the company entered guilty pleas at the earliest opportunity, is remorseful and has no previous convictions. The company has incurred significant costs and losses as a result of the prosecution, takes it very seriously and took prompt steps when it was informed of potential concerns. It is submitted from that point on the company kept the Commission updated and indeed that is apparent from the summary.

[37] Counsel referred to a number of cases. I am just going to refer to some of them. *Commerce Commission v Southern Gold Limited (trading as Just $2)*[3] where a defendant failed to comply with a product safety standard for children's toys which posed a physical hazard to the children, ultimately fined $12,000. Also *Commerce Commission v Deco Fashions Ltd*[4], toys which failed tests regarding ingestion or inhalation hazards and seam strength but no harm reported, fined $4000 for each offence, totalling $8000.

[38] Both Mr Horne for the company and Mr Lowery for the Commission have referred to two Australian cases but as is noted they are limited in their relevance

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[3] *Southern Gold Limited (trading as Just $2)*, DC Christchurch, CRN06009504361, 11 January 2007
[4] *Commerce Commission v Deco Fashions Ltd,* DC Auckland CRN 908/502/1764/65, 14 August 2000.

given the different sentencing regimes, aside from emphasising the seriousness of a breach of such standards.

[39] Mr Horne asks the Court to consider a discharge without conviction and he says that would be appropriate in the circumstances. Baby City has already suffered reputational damage as a result of media statements, this will be exacerbated by convictions and may risk creating a wrong perception that the products are unsafe. There are also direct costs in implementing the recall of products. Given there were no instances of actual harm as a result of the failures, and that factor perhaps lowering the gravity of the offending, counsel argue that a conviction would be out of all proportion to the gravity of the offending.

[40] If the Court does not see fit to grant discharges without conviction, counsel propose that a penalty of no more than 50 percent of the penalty in cases discussed where physical safety was compromised, would be appropriate and that would produce a figure of between $4000 to $7500 applying the increased maximum penalty, perhaps a range of between $8000 and $15,000.

[41] Mr Horne has emphasised on several occasions that these breaches were regarded even by the investigators as technical. They are he says unusual charges, there were no physical defects, these were labelling transgressions. He has drawn my attention to passages in his written submissions and has also addressed the most relevant New Zealand cases, in particular the *Insight Infotech* case which he suggests is a worse example of offending than here because there was no effort to test. *Southern Gold* as he points out involved a physical danger and he has traversed the sequence of events from late-2014 to 2015 and the correspondence between the Commission and the communications between them and the company.

[42] He suggested that the company's behaviour in those early months may have been influenced by what they perceived as the Commission's lack of urgency. There was no suggestion of a product recall, but once the testing report was received he emphasised that the company acted promptly in contacting their supplier. He accepted on behalf of the company that in relying on the supplier, they got it wrong and acknowledged that more speedy action perhaps should have been taken. As I

have already noted, he emphasised that there had been previous testing and this was not a new supplier. He has referred to the Australian decisions in passing.

[43] Mr Horne has emphasised the mitigating factors which I have already referred to and urges the Court to consider this a suitable case for a discharge without conviction. He points out, as is apparent, that customer confidence is particularly important in the marketplace and perhaps particularly important when a company is in the sort of business that Baby City is, in selling products which members of the public purchasing them are particularly anxious are safe for their children. He suggests that the public, in reading of the result of this prosecution, may not understand perhaps the finer detail and may presume that Baby City products are unsafe.

Decision

[44] I have attempted to summarise the submissions of counsel for which I am grateful. I am now going to identify the principles and purposes of sentence and the aggravating and mitigating features of this offending. The principles and purposes of sentencing in this area are deterrence and denunciation and holding the defendant accountable. Deterrence is particularly important in Fair Trading sentencing, both specific and of course general deterrence.

[45] I am aware in deciding this case of the objectives of the Fair Trading Act and in assessing the aggravating feature I bear those in mind. I consider first of all in assessing the aggravating features, the importance of the failures and in this case it was labelling failures and compliance failures in relation to cots intended for babies, infants, obviously vulnerable. So that is a feature that I need to take into account. Secondly the duration of the offending, as is apparent from the dates in the charges, over a period of about a year. The degree of dissemination, well there were 327 cots sold during this period and those products were sold all over the country.

[46] Next, the degree of carelessness has to be assessed. Up until the test result was provided in March 2015, certainly the company's conduct could be regarded as careless. After the test reports were seen in March, I accept as is submitted by the Commission that the conduct could be seen as reckless because non-compliant cots were in fact sold for a further at least seven months.

[47] The next aspect that might be considered aggravating is the scale of the business, this is a significant company which needs to have robust compliance procedures and lastly there is a specific need for deterrence, as I have said, in this area.

[48] The mitigating features that I would identify are obviously the early guilty pleas for which a 25 percent discount is available, a lack of previous convictions and clear co-operation with the Commission to be accorded a further 10 percent as indeed counsel agree and the Court would deem that appropriate.

[49] I consider now whether discharges without conviction are appropriate on these matters. I must not grant a discharge unless the direct and indirect consequences of conviction are out of all proportion to the gravity of the offending. So the first task is to identify the gravity of the offending. Given the features that I have identified and factoring in the guilty plea and co-operation, in this case I would identify the gravity of the offending as at the moderate or medium level.

[50] The consequences of conviction for the company really are the reputational damage that may occur and the consequent potential loss of business that might follow if the public perception is that if the company has been convicted of these offences, then they are not reliable. I do not accept that the consequence of loss of revenue, because products had to be recalled because they did not comply, is a consequence for the purposes of a discharge consideration.

[51] So the third part of the test is to balance whether the consequences, so the potential reputational damage, is out of all proportion to the gravity of the offending. It is important that in considering a discharge without conviction, particularly in this area, I have in mind the principles and purposes of sentencing.

[52] My decision with regard to the discharge application is that it should not be granted. In my view, the consequence, the reputational damage is not out of all proportion to the gravity of the offending which I have characterised as moderate. So in my view, it is appropriate for convictions to be entered and fines to be imposed.

Sentence imposed

[53] In a statutory regime where the maximum penalty is $600,000 on each charge and there are some representative charges, where the period of offending is over about a year, and where the products concerned are children's cots, and further taking account of the fact that the offences accepted relate to labelling failures and there was no injury or damage to any child or indeed any person involved as a result of these, it seems to me appropriate having considered the submissions of counsel and all the authorities before me, for the totality of this offending that a starting point should be $60,000. That is for all the charges. I then apply the discount of 35 percent which essentially would bring the final figure down to $39,000. So that is the fine that I now impose. I will impose a fine of $6500 on each charge, even though some of them are representative but I have considered the totality of the offending. Court costs $130 on each charge.

A E Kiernan
District Court Judge