

VT
Disposed

**IN THE DISTRICT COURT
AT HAMILTON**

**I TE KŌTI-Ā-ROHE
KI KIRIKIROA**

**CRI-2019-019-002548
[2019] NZDC 23398**

COMMERCE COMMISSION
Prosecutor

v

TORPEDO7 LIMITED
Defendant

Hearing: 19 November 2019

Appearances: A McClintock and D Taylor for the Prosecutor
M Sumpter and Y Spittle for the Defendant

Judgment: 19 November 2019

NOTES OF JUDGE A C ROBERTS ON SENTENCING

[1] Torpedo7 Limited has admitted two representative charges pursuant to s 30(1) Fair Trading Act 1986 relating to bicycles it supplied or offered to supply that did not comply with the applicable product safety standard. As I indicated to counsel I am grateful for the submissions that have been provided me and I again provide the assurance in return that I have read these submissions.

[2] The summary of facts is one that has been agreed as between the parties. I consider it important that some recital be reflected in my decision. Referring to the summary, appended now to the complainant's submissions I note the charges relate to bicycles Torpedo7 through its 1-day business offered to supply, advertised and sold between 4 October and 17 November 2017 that did not comply with the applicable

product safety standard. Torpedo7 offered to supply and advertise 100 bicycles on 1-day.co.nz and subsequently supplied 53 bicycles during the charge period that did not comply with the applicable product safety standard. Section 31 Fair Trading Act provides if a product safety standard applies a person must not supply, offer to supply or advertise to supply goods unless the person complies with that product safety standard. The maximum penalty for each offence is \$600,000.

[3] Torpedo7 is a wholly owned subsidiary of The Warehouse Group, one of the largest retail groups operating in New Zealand encompassing The Warehouse, Noel Leeming, Warehouse Stationery and Torpedo7. Torpedo7 is a specialist retailer of bicycles, sporting goods and outdoor goods. There are 16 retail stores. It operates to an online trading website named 1-day. 1-day sells a wide range of consumer goods through online daily deals which are renewed every 24 hours. Although it is part of Torpedo7's legal entity 1-day operates as a separate trading division and is managed from a distinct office in Hamilton. All 1-day's stock is held and orders are fulfilled from the same fulfilment centre as Torpedo7, situated at Sharpe Road, Hamilton.

[4]

1-day supplied 609 bicycles in 2017/2018, 272 in 2016/2017, 339 in 2015/2016.

[5] Regulation 4 of the Product Safety Standard Regulations prescribes the Australian and New Zealand safety requirements. The safety standard imposes requirements in relation to amongst other things:

- a) The design of bicycle brakes.
- b) The marketing and labelling of bicycles.
- c) Information that must appear in an owner's manual accompanying the bicycles.

[6] Bicycles to which the regulations apply must comply with the safety standards including both the brake design requirements and information requirements. The brake design requirements in clause 2.14.1 of the safety standards require:

- a) That all bicycles shall be equipped with not less than two brakes, one acting on the front wheel and one the rear wheel.
- b) The information requirements set out in the safety standard require amongst other things that bicycles be permanently and legibly marked with particular information including the name and address in Australia or New Zealand or either the manufacturer, importer or other supplier.

[7] Under clause 1.7, that an owner's manual containing instructions for use and maintenance must be attached. Appendix A provides that this should include:

- a) A warning concerning increased braking distance in wet weather.
- b) Recommended torque requirements for certain components and recommendation to use a torque wrench.
- c) A warning that handlebar handgrips or tube end plugs should be replaced if damaged as bare tube ends have been known to cause injury.
- d) A warning that replacement forks must have the same rake and same tube inner diameter as those originally fitted to the bicycle.

[8] As to the investigation. On 10 August 2017 Torpedo7 ordered 120 bicycles from PTX Performance Products in the United States. The order included amongst other things 100 Hang Ten Cruiser bicycles with the following specification:

- a) Hang Ten 26 3-Speed Cruiser bicycles.
- b) Hang Ten 1-Speed Cruiser bicycles in Shaka Military Green

[9] None of the Hang Ten Cruiser bicycles had a front brake installed as required by safety standard. Torpedo7 offered the Hang Ten Cruiser bicycles for sale to consumers on the 1-day website on several occasions between 1 October and 17 November 2017. Again the same figures are mentioned. Sales of 53 bicycles to 46 different customers. The first supply occurring on 9 October.

[10] On 17 November the Commission received a complaint that Hang Ten Cruiser bicycles were being sold without a front brake, Torpedo7 was informed by a customer on the same day through 1-day's customer services team. On 23 November the Commission emailed Torpedo7 advising of the complaint. On 1 December the Commission wrote to Torpedo7 notifying it of the investigation and advising its initial view that the Hang Ten Cruiser bicycles were at risk of failing to comply with the safety standard. The Commission requested that Torpedo7 immediately stop selling the Hang Ten Cruiser bicycles and cancel any further orders. That same day 1 December Torpedo7 published a recall notice for the Hang Ten Cruiser bicycles.

[11] The Commission's inspection then commenced. During a visit Torpedo7 told the Commission that the Hang Ten bicycles if inspected were representative of all those sold in all respects apart from the colour. The Commission's inspection of the Hang Ten Cruiser bicycles and subsequent inspection of the owner's manual confirmed that:

- a) They breached the brake design requirements because they did not have a front brake mechanism.
- b) They breached the information requirements because the Hang Ten Cruiser bicycles were not marked with the name, address in Australia or New Zealand of the manufacturer.
- c) The owner's manual did not provide all required torque settings and contained no recommendation to use a torque wrench.
- d) The owner's manual did not contain the following warnings that were required:

- (i) A warning regarding increased braking distance in the wet.
- (ii) A warning regarding the replacement of handgrips, tubes, end plugs.
- (iii) A warning, the rake of any replacement fork.

[12] Torpedo7 cooperated. On 22 March 2018 the Commission wrote to Torpedo7 requesting information. Torpedo7 sent a response on 4 May advising that on 17 November 2017 it withdrew the Hang Ten Cruisers from sale pending further investigation. That on 1 December 2017 it contacted customers who had purchased directly by email informing them that product recall had been initiated giving the customer options to rectify brake issues including return of bike for full refund.

[13] It followed up with emails or telephones. It also advised that amongst other things the Hang Ten Cruisers was a first purchase Torpedo7's 1-day business had made of parallel imported bikes from a US supplier and other bikes previously sold through its website were purchased through domestic suppliers. That 1-day and Torpedo7 operate as separate business units that are part of the same legal entity. Responsibility for compliance with 1-day is separate from Torpedo7 and rest with the individual staff member who places the order for product.

[14] Torpedo7 acknowledged its 1-day compliance processes were inadequate and required improvement. It alerted that it had updated its product submission process from buyers to determine compliance with appropriate legislation. It has recruited an additional employee tasked with responsibility for understanding and advising the buying team on compliance matters across all categories including bicycles. In future, all bicycles will be purchased through agents or companies with a proven history in New Zealand and in future 1-day staff will seek further compliance clarification from Torpedo7 if necessary.

[15] The summary of facts contains a concession by the Commission that Torpedo7 acted responsibly in issuing the product recall. It has not been entirely successful and as at 4 April 2019 there is information provided about the effectiveness of recall.

Nineteen bikes have been returned. Five have been fitted with retro fitted brakes. There were non-responses and there were items pending with courier tickets. Nineteen bikes as I have said were returned. Eighteen non-compliant and unsafe bikes remain with customers who did not respond or who could not be traced.

[16] Torpedo7's conduct in failing to comply risk causing potentially significant harm to consumers including possible death or serious injury. Braking mechanisms are an essential safety device. The information requirements contain important information aimed at keeping cyclists and other persons on the carriageway safe. A safety standard provides consumers with assurance that goods they are purchasing are safe and built to minimum standards. It is recorded finally the defendant company has no previous convictions.

[17] I did hear oral submissions from both the informant and from the defendant's counsel at the commencement of the hearing this morning. For the moment the issue is on the extent of the fine. The Commission has pitched at a higher level than the defendant considers to be appropriate. In all other respects there is consensus. Allowances will be made as to 10 percent for previous good behaviour, a lack of previous convictions and 25 percent to recognise the full extent of a concession reflecting an early plea.

[18] The informant has underscored in the material placed before me:

- a) The bicycles are used in situations that are inherently dangerous.
- b) The sale of bicycles that did not comply with safety standards exposed as I have stated individuals on the informant's contention to the risk of serious injury or even death.
- c) As such, such is the significant of the breach a deterrent penalty is required.

[19] The informant submits that a global start point of between \$130,000 and \$150,000 is appropriate. With those concessions that I have already acknowledged,

an end sentence on the informant's submission would thus lie between \$87,750 and \$101,250.

[20] Torpedo7 is a specialist supplier and a wholly owned subsidiary of The Warehouse Group. It forms part of one of the largest retail groups in New Zealand. 1-day is a large business on its own right. Torpedo7 acted with best intentions ultimately with a product recall. Not all bikes have been returned, there is thus the prospect of some faulty product out there still in circulation. Ideally the Fair Trading Act seek to promote the interests ultimately of the consumer.

[21] On behalf of the company it is submitted that:

- a) The bikes were only sold over a six week period.
- b) The breaks met American safety standards.
- c) Sales ceased immediately once notice was received from a customer.
- d) Additional staff have been recruited to deal with the amended internal processes.
- e) The defendant responded immediately and responsibly.

[22] On behalf of the company it is submitted the elevated pitch sought by the informant is, in effect, over the top. Where the informant pitches, the defence submission is that such a penalty would ultimately represent the second highest award of any matter decided previously. The cases involving children's toys and the choking hazard is, the defendant submits, more in line with reality. That in relation to charge 1 the defendant contends a penalty between \$20,000 and \$30,000 is appropriate and in relation to charge 2 a fine between \$5000 and \$10,000 is proper. As I have noted, the end sentence submitted by the defendant is a penalty between \$16,875 and \$27,000.

[23] Both counsel have made reference in their submissions to a number of decisions. Nothing falls exactly on all four legs with the matter that I have before me. *Commerce Commission v L D Nathan & Co Ltd* is relevant as to the factors assessing

appropriate penalty. The conduct there undermined the objectives of the Fair Trading Act.¹ The informant submits that the safety standard is to protect here cyclists from physical harm in the inherently dangerous environment on our roads. Cyclists are vulnerable because of their reduced visibility on the road. There is limited protection in case of accident and vulnerability to the poor driving of others. An unsafe cycle poses risks to other road users, pedestrian and the general public alike.

[24] Selling the bikes that did not comply exposed consumers to an unacceptable risk. The informant points out that consumers are often people less familiar with cycles and may not readily appreciate the need for a front brake and the need to replace handlebar grips as they wear. The Hang Ten Cruisers would likely have appealed to consumers given that they were relatively low-cost and were sold online without inspection.

[25] The breach the informant contends is at an elevated level. An effective and efficient braking system is an essential safety device. The failures to ensure that the Hang Ten cycles complied with information requirements meant consumers did not have all the necessary and relevant information as to operation and maintenance of these items. Consumers rely on the product to perform as required. In order to avoid serious harm these must be regarded as important.

[26] The defendant accepts 1-day's failure to comply but argues that specialised knowledge is not required to see that there is one break and not two. With respect I disagree with that submission. I note that the bikes were sold online and undoubtedly opportunity for considered inspection does not there exist. The price would have been an attraction. The bike had one break only. The breach here I see to be at least a moderate level.

[27] The informant contends that the degree of culpability is high. Torpedo7 ought to have considered whether the Hang Ten Cruisers were subject to safety regulations. Torpedo7 was aware of the safety standards, 1-day was not. Torpedo7 should have ensured compliance. 1-day is a significant business entity operating on its own. It

¹ *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160.

does retail bikes and has sold a large number over the past three years. Torpedo7 ought to have known and taken steps to ensure compliance.

[28] As to the extent of the offending. The Hang Ten bikes were for sale for a short time between 4 October and 17 November. Torpedo7 offered 100 for sale and sold 53. Consumers were placed at risk. Reference is made to other District Court decisions. The fact no harm was actually registered misses the point, again in my consideration. The Hang Ten bikes the informant submits were an accident waiting to happen. The latent risk was always there. The informant, I repeat, contends that this is a serious breach of the Fair Trading Act.

[29] As to the need for deterrence. The informant contends both general and specific warnings need to issue. Compliance is demanded. Fines have markedly been increased, larger commercial entities should be applying appropriate resources to development of a robust compliance regiment. This was a comment of Judge Ronayne in the case of *Commerce Commission v The 123 Mart Ltd*. The Court the informant contends should emphasise both the general deterrence and specific deterrence with a fine representative or commensurate with the extent of the breach.²

[30] I have already said there is no tariff decision. The informant sees the following cases of some assistance. *R v NZ Sale Ltd* is similar but yet not as serious in my determination as the case in hand. The company there had pleaded guilty to four representative charges under s 30 Fair Trading Act for supplying four types of children's pyjamas that did not comply with labelling requirements of the prescribed safety standards related to fire risk information. The business supplied 73 units of non-compliant children's pyjamas all through a company website. One of the products was sold at \$39. NZ Sale Ltd published a recall notice, eight units were returned and 15 discarded by customers. NZ Sale Ltd was a wholly owned entity by an Australian company which in turn was a subsidiary of an English company. NZ Sale Ltd had an annual turnover for the year March 2016 of \$32 million. The start point of \$110,000 was engaged.

² *Commerce Commission v The 123 Mart Ltd* [2017] NZDC 23286; *R v NZ Sale Ltd* [2018] NZDC 20513; *Commerce Commission v Argyle Performance Workwear Ltd* [2018] NZDC 9443.

[31] *Commerce Commission v Argyle Performance Workwear Ltd* is another. *Commerce Commission v Argyle Performance Workwear Ltd* involved a different offence. Argyle Performance Workwear Ltd was involved in supply of 12 jackets. These were safety jackets and it was falsely represented these were suitable for use in hazardous electrical condition. The prices ranged between \$315 and \$369.60. Notified, the company successfully recalled nine of the 12 jackets. A start point of \$100,000 was engaged. Counsel for the defendant company contends that this was a case involving blatant untruths and that as such it is at an elevated level to the facts in hand. The informant submits the start here should be elevated for that nonetheless.

[32] *R v NZ Sale Ltd* as I have said involved 73 items being sold over 18 months. Here with Torpedo7, 53 items sold and 100 offered in total over a period of shorter duration. It is contended that the breach of the brake design requirements here directly meant the goods posed a more immediate danger. One of these NZ Sale charges fell under the pre-amendment maximum. The value of the goods in *R v NZ Sale Ltd* was significantly less.

[33] *Commerce Commission v Argyle Performance Workwear Ltd* involved goods to an approximate value to the Hang Ten bikes. Only 12 however were supplied. The breach was possibly more serious as the jackets were intended to be life-saving devices. I have already made mention, 53 bikes provided by Torpedo7.

[34] Company counsel dismissed the culpability assessment of the complainant, particularly in relation to the two above matters. There is a significant differential as between the decisions and the case in hand. That start point counsel properly reminds me was fixed by agreement. Nonetheless, it was fixed by agreement but it does not really undermine the efficacy of that start.

[35] Dealing now with Torpedo7. Each cycle failed to comply. The failure to ensure compliance with the information requirements prescribed really compromised the ultimate consumer's ability to maintain and operate in a safe condition. The Torpedo7 conduct was highly culpable and as the informant contends, a deterrent sentence is required.

[36] I have no difficulty in accepting the case in hand is more serious than *R v NZ Sale Ltd*. The bicycles posed a more immediate danger. One of the charges within *R v NZ Sale Ltd* fell under the pre-amendment maximum.

[37] With all information now before me and recognising the extent of the fine as the only matter that is truly in dispute I consider that a start point of \$125,000 is appropriate in all the circumstances. That start would reaffirm the importance of compliance with safety standards, it would recognise Parliament's clear intention, it would also accommodate a high level of carelessness and accommodated too specific deterrence and general deterrence. As I have indicated the concessions that attach to the lack of previous conversations and accommodation and the 25 percent that attach to the plea would see an end sentence that I round off at \$80,000. That will be apportioned as between the charges:

- a) As to the CRN0807, that is providing or supplying brakes without a front brake component, \$50,000.
- b) As to the other charge a fine, \$30,000.
- c) In each instance Court costs of \$130.

[38] I make an order recording on the charge relating to the lack of brakes, order non-publication of commercially sensitive material as to business trading in relation to defendant company.



A C Roberts
District Court Judge