IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-007869
JUDGE VIA AVL NELSON
[2021] NZDC 10894

COMMERCE COMMISSION
Prosecutor

v

THE QUICK DOLLAR LIMITED
Defendant

Hearing:	1 June 2021
Appearances:	V Fowler for the Prosecutor E McGill for the Defendant
Judgment:	1 June 2021

NOTES OF JUDGE J E RIELLY ON SENTENCING

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[1] The defendant company, The Quick Dollar Limited, appears for sentence today on three representative charges under s 30(1) of the Fair Trading Act 1986 related to products it sold which did not comply with the applicable product safety standard. The products concerned were all toys.

[2] The maximum penalty available to the Court for each of the three charges is a $600,000 fine.

[3] Each charge relates to the company's supply of a particular toy; a pink guitar that I will from now on refer to as "the guitar"; an 11 piece beach toy set that I will

refer to as “the beach set”; and a two piece go-go mini-car toy set that I will refer to as “the car toy set”.

[4] In total, the defendant company supplied approximately 1,348 toys across the three product lines between 23 November 2015 and 12 December 2019, a period of just over four years.

[5] In respect of each of these product lines, 221 guitars were supplied over a three year period, 670 beach sets were supplied over the four year period, and 457 car sets were supplied over a four year period. The circumstances of the offending are as follows.

[6] The defendant company operates a wholesale importation business based in East Tamaki, Auckland. The company was incorporated on 7 May 2015 and, when investigated and charged, its directors were three members of the Manocha family. Mr Rahul Manocha is also the sole director and shareholder of a company named Dollar Street Limited, which operates a retail store in Dunedin trading as Crazy Dollar Deals, which sells goods supplied by Quick Dollar, including the three toys that are the subject of these charges.

[7] At the relevant time, the company imported goods, predominantly from China and India, and supplied retailers across New Zealand. Its core business was the supply of homeware, hardware, stationery and toys. The company estimated during the investigation that toys make up 10 to 15 per cent of its business and estimated that it had imported approximately $300,000 worth of children’s toys into New Zealand in the past three years. That index point of the preceding three years is to be taken from when the investigation took place in late 2019 through until early 2020.

[8] At the relevant time, the company had two full-time employees, which I infer meant two full-time employees earning wages.

[9] During an interview in January 2020, one of the company directors reported that the company had an annual turnover of between $900,000 and $1.1 million.

[10] Pursuant to s 31 of the Fair Trading Act, if a mandatory product safety standard applies, a person must not supply goods unless that product complies with the safety standard concerned.

[11] The safety standards regulations are issued pursuant to s 29 of the Fair Trading Act. The regulations apply to toys manufactured, designed, labelled or marketed for use by children up to and including 36 months of age, whether or not the toys are manufactured, designed, labelled or marketed for use by children over that age. Thirty-six months of age, of course, is up to three years of age. Accordingly, the regulations regulate the safety of toys for the most vulnerable in our society, young children.

[12] One of the standards that relates to testing of products involved in this case is the reasonably foreseeable abuse test. It is designed to replicate reasonably foreseeable abuse of a toy in the hands of a child up to the age of three years, during which small parts may become liberated that may in turn present a choking and/or suffocation hazard.

[13] Further, the access to batteries test, which is part of a set of requirements in the standards specific to battery-operated toys. This test is designed to address risks of injury associated with batteries overheating, leaking, exploding, or combusting, and the risks of children choking or swallowing accessible batteries.

[14] The tests are intended to simulate possible damage which may occur to a toy when used by a small child.

[15] The Commission's investigation into the defendant company included making purchases of the toys concerned as follows.

[16] There were purchases made from a Waikato-based retailer on 23 August 2019, and purchases made on 26 November 2019 of all three products from the company owned by one of the company directors based in Dunedin. In each case when the toys were purchased, the Commission is satisfied that the toys had been supplied by the defendant company.

[17] A sample of each of the toys was sent to an Australian research test laboratory. The results were as follows:

(a) In respect of the guitar, small parts were liberated from the guitar, and there was more than one that was able to be liberated during testing. Those parts that were liberated fit in the small parts cylinder designed to replicate the likelihood or ability of a child to swallow that particular part.

(b) Also, in respect of the guitar, it did not comply with the battery standard test because the cover to the battery compartment did not have a screw, allowing it to be opened with a single prying action, such as with a fingertip. It is obvious to all that access to batteries by young children is a serious hazard to their health if they are ingested.

(c) In respect of the beach set, there was a particular part to the beach set, a duck-shaped mould, that was capable of fitting entirely within the small parts cylinder.

(d) In respect of the car set, the test results showed that small parts able to be liberated from the car set, the front and rear wheels and their axles, were able to fit within the small parts cylinder.

[18] Quick Dollar co-operated with the Commission's investigation by providing import records and some sales data. A company director also attended an interview with the Commission.

[19] On 16 September 2019 Commission staff visited the East Tamaki premises of the company and advised the company of its concerns regarding the safety risks of the guitar.

[20] The company was then formally notified by the Commission's investigation team by letter dated 29 November 2019 which referred to the concerns in respect of

all three toy products. This letter included information about the voluntary product recall system operated by the Ministry of Business, Innovation, and Employment.

[21] Although the defendant company co-operated with the Commerce Commission in regard to their investigation, they were not able to provide all sales records, as there had been some computer issues. Despite that, the Commission accepts that the defendant company, and in particular its main director, co-operated throughout the investigation. Mr Rahul Manocha attended a voluntary interview with the Commission on 21 January 2020.

[22] During that interview, Mr Manocha acknowledged that he was the person responsible for the company's product purchasing; that he was aware that there were safety standard requirements for toys targeted at small children, but that he had never seen the standard itself. He said that the company avoids buying toys for young children and generally only orders products that specify that they are for children aged three years and older; that they avoid buying low-quality or recycled plastic toys; and that the reason they had not undertaken a voluntary re-call through MBIE following receipt of the letter in November 2019 is that he had not understood it was necessary. He acknowledged that there were no formal measures in place to ensure their products complied with the applicable New Zealand standards.

[23] The company had emailed its retailer customers advising them that the toys that were the subject of the investigation and notification were unsafe and inviting them to return the toys to the company for a full credit. They did that after receiving the 29 November 2019 letter. It seems that there was a misunderstanding by Mr Manocha about the expectations in regard to re-call of goods.

[24] The defendant company has no previous convictions for offending under the Fair Trading Act.

[25] I now turn to consider the relevant principles in sentencing.

[26] The Court must take into account not only the quantity of toys involved but also the period over which the offending occurred. The Court must also take into

account the nature of the breaches and if there are any particular aggravating circumstances. Then, taking into account these factors, the Court must assess the level of culpability of the offender.

[27] The Commission submits that the defendant company's conduct is best categorised as highly careless. That is due to the company's carelessness in respect of being aware of safety requirements for toys targeted at young children and also the failure to take steps about what those safety requirements were. In respect of the beach set, that one of the parts was very obviously a choking risk and that this should have been apparent to anyone who was able to see it, that the company's compliance systems were lacking, and that in circumstances where importing and on-selling consumer goods of this kind, and in particular toys to very young children, the company had failed to have in place a proper safety compliance regime to avoid the potential for supply of products that did not meet the safety standard.

[28] The Commission submits that the defendant company's conduct was extensive because it endured for a period of four years and 1,348 toys from three different product lines were distributed to retailers across the country.

[29] The Commission points out that deterrent penalties are required in sentencing for offending of this kind.

[30] On the defendant's behalf it is submitted that the conduct is careless, not necessarily highly careless, and that the reason for that is because the defendant company and its principal director naively thought that if toys were ordered that were labelled three years and older, that those toys would not be considered toys for young children and accordingly would not be subject to the product safety standard.

[31] The defendant also asks the Court to take into account the early and full responsibility that the company has taken in this case, fully co-operating with the Commerce Commission's investigation and pleading guilty very early.

[32] The defendant company submits that it has learned its lesson and now understands its obligations. Further, that as a result of the Commerce Commission's

inquiry, it has changed its practices to ensure similar breaches will not occur in the future.

[33] It is submitted that there is no evidence of any harm having resulted from the defendant company's supply of these products. Despite that submission the defendant company has acknowledged that there remains the potential for there to be ongoing harm, as it is unknown how many of these toys remain in the homes of young New Zealand citizens.

[34] Both parties have provided a very helpful analysis of other cases involving offending of this kind.

[35] Because sentencing proceeds in the District Court, and it would seem is very rarely elevated to the higher Courts on appeal, the decisions that have been provided are District Court decisions.

[36] Before assessing the start point applicable in this case, I note that neither party is far from the other in regard to the appropriate start point for sentence. Counsel for the defendant submits that the appropriate starting point should be between $90,000 and $100,000. Counsel for the Commerce Commission submits that the appropriate starting point should be between $110,000 and $125,000.

[37] I now refer to the summary of case outcomes that is set out at paragraph 20 of counsel for the defendant's submissions. I include this table within my judgment as it is a very helpful summary, setting out start points for sentence and adjustments in other recent cases. These decisions demonstrate a consistency in approach, particularly in regard to assessment of start point.

Case	**Brief Summary**
Espoir	**Judgment date:** 5 June 2020 **Period of offending:** 4 years **Number and nature of charges:** 5 charges relating to three sets of rubber toys (frogs, dolphins and ducks) **Number of items supplied:** 600 **Starting point:** $90,000 **Discount from starting point:** 35% to reflect guilty plea, cooperation, lack of previous convictions **End fine:** $60,750

ACQ Development	**Judgment date:** 10 October 2019 **Period of offending:** 10 months **Number and nature of charges:** 4 charges relating to toy ducks **Number of items supplied:** 1,823 **Starting point:** $120,000 **Discount from starting point:** 35% to reflect guilty plea, cooperation, lack of previous convictions and remorse **End fine:** $81,000
2 Boys Trading	**Judgment date:** 20 June 2019 **Period of offending:** 5 years, 11 months **Number and nature of charges:** 13 charges relating to three sets of toys (rattles, plastic doll and aquatic toys) **Number of items supplied:** 1,700 **Starting point:** $110,000 **Discount from starting point:** 35% to reflect guilty plea, lack of previous convictions and steps taken to remedy the situation **End fine:** $74,250
Joint Future Wholesale	**Judgment date:** 18 April 2019 **Period of offending:** approx. 6.5 years **Number and nature of charges:** 6 charges relating to three sets of toys (toy piano, toy rabbit and toy trike) **Number of items supplied:** 3,580 **Starting point:** $130,000 **Discount from starting point:** 35% to reflect guilty plea, lack of previous convictions and steps taken to remedy the situation **End fine:** $87,750
Manufacturers Marketing	**Judgment date:** 23 April 2018 **Period of offending:** approx.. 1.5 years **Number and nature of charges:** 2 charges relating to one "baby concert" toy **Number of items supplied:** 344 **Starting point:** $75,000 **Discount from starting point:** 35% to reflect guilty plea, lack of previous convictions and cooperation **Appropriate end fine**: $50,500 **Adjusted end fine for financial incapacity:** $35,000
SDL Trading	**Judgment date:** 26 March 2018 **Period of offending:** approx. 3 years **Number and nature of charges:** 6 charges relating to one bathtub baby toy **Number of items supplied:** 4,704 **Starting point:** $120,000 **Discount from starting point:** 35% to reflect guilty plea, lack of previous convictions and cooperation **End fine:** $81,000
Mega Import & Export	**Judgment date:** 9 February 2018 **Period of offending:** 4 months **Number and nature of charges:** 2 charges relating to two sets of toys (baby buggy set and baby rattle) **Number of items supplied:** 1,200 **Starting point:** $100,000

	Discount from starting point: 35% **End fine:** $65,000

[38] In the decision of *Commerce Commission v Espoir*, a judgment dated 5 June 2020, the Court was dealing with a period of offending of four years, where there were five charges, and the number of toys supplied was 600.[1] The starting point adopted by the Court was a fine of $90,000.

[39] In *Commerce Commission v ACQ Development Limited*, a judgment dated 10 October 2019, the period of offending was 10 months, and there were four charges, with the number of items supplied 1,823.[2] The starting point adopted was a fine of $120,000.

[40] In the case of *Commerce Commission v 2 Boys Trading Limited*, a judgment dated 20 June 2019, the period of offending was five years 11 months, the Court was dealing with 13 charges related to three sets of toys, and the number of items supplied was 1,700.[3] The starting point adopted by the Court was a fine of $110,000.

[41] In *Commerce Commission v Joint Future Wholesale Limited*, a judgment with a date of 18 April 2019, there was a period of offending of approximately six and a half years, there were six charges relating to three sets of toys, and the number of items supplied was 3,580.[4] The Court adopted a starting point of a fine of $130,000.

[42] In *Commerce Commission v Manufacturers-Marketing Limited*, with a judgment date of 23 April 2018, the period of offending was approximately one and a half years, there were two charges related to one toy, the number of items supplied was 344, and the starting point adopted by the Court was a fine of $75,000.[5]

[43] In *Commerce Commission v SDL Trading Limited*, a judgment from 26 March 2018, the period of offending was approximately three years, there were

[1] *Commerce Commission v Espoir Limited* [2020] NZDC 10670.
[2] *Commerce Commission v ACQ Development Limited* [2019] NZDC 19267.
[3] *Commerce Commission v 2 Boys Trading Limited* [2019] NZDC 22557.
[4] *Commerce Commission v Joint Future Wholesale Limited* [2019] NZDC 3795.
[5] *Commerce Commission v Manufacturers-Marketing Limited* [2018] NZDC 7913.

six charges relating to one toy, and the number of items supplied was 4,704, with a starting point of a fine of $120,000 adopted.[6]

[44] Finally, in *Commerce Commission v Mega Import and Export*, with a judgment date of 9 February 2018, the period of offending was four months, there were two charges relating to two sets of toys, the number of items supplied was 1,200, and the starting point adopted was a fine of $100,000.[7]

[45] It is accepted by both parties that the appropriate approach, commensurate with that adopted in all of those other cases, is for the Court to look at the overall offending behaviour, have regard to the totality principle, and then adjust for personal circumstances and pleas, where pleas have been entered, prior to then setting the fine for each individual charge.

[46] There are a number of factors that need to be taken into account, including the level of seriousness of the breaches of the regulations. It seems to me that there is no absolute pattern to the starting points adopted.

[47] I consider that in this case, having regard to the fact that there were three toys involved, that in respect of one of the toys there were two separate breaches of the regulations and standards, that the offending was for a period of four years, and involved over 1,300 toys being supplied, that the appropriate starting point for sentence is a fine of $110,000.

[48] In respect of matters that are mitigating, I remark as follows.

[49] It seems well accepted that a full 25 per cent credit for plea is appropriate in circumstances where within a period of two months of the date of charge there was an indication of a guilty plea. It is clear to me that the defendant company should receive a 25 per cent credit for the timing of their guilty pleas in this case.

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[6] *Commerce Commission v SDL Trading Limited* [2018] NZDC 6626.
[7] *Commerce Commission v Mega Import and Export Limited* [2018] NZDC 2355.

[50] It is also accepted by the parties that absence of previous convictions, co-operation with authorities during the investigation, remorse, and efforts to ensure that there will be no further breaches of the regulations and standards, attract a credit. Having regard to the credits applied in other cases, I consider that the appropriate additional credit that should be applied in this case is 10 per cent. Overall there will be a credit of 35 per cent.

[51] The next matter to deal with is the issue of financial capacity of the defendant company to pay a fine. I have been asked by the defendant to consider a further adjustment to the end fine to take into account financial incapacity to pay the fine.

[52] Each party has made detailed submissions about this aspect of sentencing.

[53] It is important to note at this point that sentencing in respect of this matter was scheduled to proceed earlier this year. It did not proceed because it was put forward on behalf of the defendant company that there were financial circumstances related to the company that meant that they had a very limited ability to pay a fine. The submission at that point – and it is maintained now with further evidence offered – is that the company only has the ability to pay an end fine of $10,000, and so there should be a significant adjustment to ensure that the overall penalty is not disproportionately severe, having regard to the company's personal circumstances.

[54] At the time sentencing was to proceed in January this year, the defendant company was nine months into its financial year in circumstances where during the financial year, the COVID-19 lockdown period had taken place, which meant that the company, for a period of months, had been unable to trade. The company's means were only able to be based on an assessment for three quarters of the financial year because of when sentencing was to take place.

[55] There was a concern expressed on behalf of the defendant company that it had a very uncertain future because of the period it had been unable to trade during the financial year and there was a concern of an inability to trade effectively going forward. It was submitted that there was an ongoing uncertainty about how the company would be able to move its stock; that the financial future of the company was

grim and that it was possible that the company may not actually be able to continue to trade. They submitted then, and maintain the submission now, that in all the circumstances, the defendant company will not be able to meet a fine that is more than $10,000 in total.

[56] Although the adjournment was opposed by the Commerce Commission I granted the adjournment because, in my view, the company had been operating in a very unusual financial climate, and it was at that stage a real unknown how the company would be able to operate in the future and what its financial position would be at the end of the financial year in which this unusual event had occurred.

[57] Since that time, I have received a very helpful affidavit from the managing director, the same one who provided the initial affidavit, together with updated financial records in regard to the financial position of the defendant company.

[58] It is put forward on behalf of Mr Manocha that the overall financial position of his company, whilst its sales have increased, is similar to what it was in January of this year; that the company directors have taken limited drawings, which can be seen in the financial records and that the company has never really generated a huge profit. It is submitted that the increased sales that have taken place in the last three months have not generated much of a profit due to having to sell stock at discounted prices and no longer being able to source stock from overseas markets, which is cheaper, than that sourced from local, more expensive markets, which makes their profit margins less.

[59] It is submitted that although the company has money in the bank, that it is needed to pay wages, rent, and other business outgoings; that it is unknown when and how much the debtors will pay of what is owed to the company; and that the Court needs to look at the book value of the company assets. In respect of the most valuable assets of the company, the vehicles, the Court will see that they have limited value. Finally, it is submitted that in all the circumstances of this particular company, a total fine of $10,000 will deter it in the future and properly denounce its offending behaviour.

[60] The Commerce Commission's position is that the position outlined by Mr Manocha of hardship for the company is not borne out or supported by the financial documents filed. They submit that the financial position is such that the defendant company can pay a fine commensurate with the fine that would be imposed on any other company who committed similar offending, having regard to other cases that are comparable.

[61] The Court's attention is drawn to the decisions of *Commerce Commission v ACQ* and *Commerce Commission v MML*, where it was noted by the judges that shareholders drawing salaries were only one matter to be taken into account and that fines must have a deterrent aspect to them.

[62] The Commission submits that the end fine should involve "a sting" to the defendant company to ensure deterrence.

[63] The Commerce Commission draws the Court's attention to the financial documentation filed, which shows that there are current assets that could be realised that could assist them in meeting the fine imposed; that there is evidence of a future earning capacity which also means that a fine will be able to be met by the defendant company even if by way of instalment; and that in the last three months, the company has significantly improved its sales position with a net surplus being recorded prior to wages and depreciation.

[64] The Commerce Commission notes that the company has low debts, low liabilities and readily accessible assets in the form of money in bank accounts and due to it from trade debtors.

[65] In his affidavit, Mr Manocha sets out a number of circumstances that he says are relevant to the Court's assessment as to what is actually shown in the accounting records. He ends his affidavit by expressing a view that the future of the company, at least in the current climate, with international borders closed, is fairly bleak.

[66] I must say that in January, when I heard submissions and also had regard to my wider knowledge of what was predicted for the future of companies in the retail sector

in New Zealand, that I was concerned for the ongoing ability for the defendant company to trade. Whilst I consider that my initial view is consistent with the emphasis that Mr Manocha has put on the business records in his affidavit, I consider that at least some of his latest submission has been selective.

[67] I note that the book value of the vehicles, when I have regard to the purchase date of the vehicles, may well be very different to what the actual value of those vehicles is in real terms.

[68] I find it interesting that the company purchased a new vehicle in June 2020, shortly after the level 4 lockdown period, and I note that they certainly had the ability to borrow tens of thousands of dollars to purchase that vehicle, which means that from the lending company's perspective, the defendant company was not seen as a financial risk at that time.

[69] It seems to me that it is possible that the financial position that is put forward is one that is focused on book values as opposed to real or realisable values.

[70] I also note that it is clear from the information contained in the defendant company's financial records that this is a mid-sized shareholder company. The company has recovered significantly in the last three months. Whilst it may not have made the profit margins it would have previously, or that were desired by its shareholders, the company has demonstrated adaptability, and it appears to me that it is very unlikely that they are about to enter insolvency.

[71] I also have regard to the fact that the company is operating in an economy that is widely reported as being more buoyant than it was six months ago and that the managing director, Mr Manocha, wants the Court to place significant weight on his ability to be able to pay the total fine off in one lump sum payment.

[72] I need to ensure that the fine is commensurate with the offending behaviour. As long as I am satisfied that the defendant company can pay off the fine on a time payment basis that is not unrealistic, the fine should be measured in that way.

[73] I have considered the records closely. Whilst my analysis may be rudimentary, my analysis is that the defendant company is in a relatively stable state at the current time.

[74] That said I do take into account that this sentencing is proceeding shortly after a financial year which was very unusual for the defendant company and probably in fact, most companies operating in the retail sector in New Zealand.

[75] What I intend to do is recognise that latter factor by recognising that sentencing proceeds when the company has been affected by an unexpected international event, namely the COVID-19 pandemic, and I give them a further 10 per cent credit to take that into account.

[76] That arrives at overall credits to be applied, from the start point of a $110,000 fine, of 45 per cent, which totals $49,500. That arrives at an end point of $60,500.

[77] In my assessment, that level of fine is an appropriate outcome, having regard to my assessment of the level of culpability for the offending behaviour and having regard to the mitigating factors applicable in this case.

[78] I round the total fine down to $60,000.

[79] In respect of each charge the defendant company faces, a fine of $20,000 is imposed.

[80] In respect of one charge, CRN ending 2760, court costs of $130 are also awarded.

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Judge JE Rielly
District Court Judge

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