

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2020-004-004575
[2020] NZDC 17530**

COMMERCE COMMISSION
Prosecutor

v

SDL TRADING LIMITED
Defendant

Hearing: 28 August 2020
Appearances: J Barry for the Prosecutor
K Petrie and E Boshier for the Defendant
Judgment: 28 August 2020

NOTES OF JUDGE E P PAUL ON SENTENCING

[1] SDL Trading Limited appears today for sentence on one representative charge under s 31 Fair Trading Act 1986, the maximum penalty is a \$600,000 fine.

[2] Essentially, over an 11 month period SDL Trading Limited sold 348 toy fire engines. By way of background, SDL Trading Limited imports goods directly from China and distributes them to retailers across New Zealand. SDL Trading Limited is a moderately sized company with 15 full-time employees, approximately 20 per cent, perhaps a little less, of its turnover relates to toy sales.

[3] Over an 11 month period SDL supplied 348 fire engines that failed to comply with the relevant safety standards, the models were either the ladder model or the

firehose model. When tested the ladder model and the firehose model each broke into small parts, creating choking and/or suffocation risk for young children. The fire engines were subject to the Australia New Zealand Standard because the manufacturer had designed and/or marked it for the use by children aged 36 months and under.

[4] In November 2018 Commission staff purchased eight of the fire engines from two different retailers. They then submitted five of the fire engines to an independent laboratory for testing. Choice, the laboratory, tested the fire engines in accordance with the reasonably foreseeable of use tests under the standards and during those tests small parts may become liberated and presented a choking or suffocation risk. During testing the following parts broke off, the side panels, the rear ladder, the firehose and a piece of broken plastic.

[5] The Commission contacted SDL Trading Limited on 3 December. SDL Trading Limited told the Commission it had ceased supplying the fire engines in August 2018, that a voluntary re-call notice had been placed and that a formal re-call notification had been emailed to all retailers. The defendant confirms through counsel today of the 348 offending fire engines, 65 have been returned as a result of the re-call. Accordingly, there is potentially a substantial number still in the community with the obvious risks as identified by the Commission from the investigation.

[6] Mr Barry for the Commission today has filed full submissions, as has Mr Boshier. Both counsel have spoken to those today. In terms of fixing a starting point for the fine, Mr Barry has identified various, what he describes as, culpability factors. First, conduct which undermines the Fair Trading Act. He reminds me the Fair Trading Act is a piece of consumer protection legislation. It allows consumers to participate confidently in the marketplace in the knowledge goods comply with prescribed safety standards. Compliance is important he points out in cases involving toys for the use of children. I do not think anyone would dispute that observation.

[7] Mr Barry submits failure to comply was important and exposes young children to risk of serious harm, pieces that broke off and, if ingested, would create a choking risk. SDL Trading Limited supplied 348 fire trucks. Each of those fire trucks posed

a risk of serious injury or death and we now know there are still potentially a number of the 348 still in the community despite the re-call.

[8] Mr Barry has characterised the conduct by SDL as highly careless, in particular pointing to SDL having been previously prosecuted and sentenced in 2017 for similar type offending. So they were on notice about the importance of compliance with the standards given that past prosecution. He makes the point today that is relevant in terms of SDL Trading Limited's awareness and knowledge of the safety standards.

[9] It is submitted there was no critical review of the toys being undertaken by SDL Trading Limited. He notes SDL Trading Limited's response to that criticism is, Mr Lau explained he did undertake his own tests. But it is apparent those measures were insufficient. Mr Barry refers to the extent of the conduct and it is really demonstrated by the number of fire trucks, 348 over 11 months.

[10] He also submits a deterrence penalty is required here for general and specific deterrence, particularly where the young and vulnerable are placed at risk. A general deterrence is required to incentivise traders to invest in compliance rather than treating any fine as merely a licensing fee for non-compliance and part of trading.

[11] The Commission have referred to three cases for the Court's assistance, *Greenstar Holding Limited*, *Manufacturers Marketing Limited* and finally, *AHL Company Limited*.¹ The Commission say SDL Trading Limited offending is similar to Manufacturers Marketing Limited but warrants a higher starting point than the \$75,000 in Manufacturers Marketing Limited. Why? Because SDL Trading Limited is a moderately sized company employing 15 staff and a turnover of \$5 million. Manufacturers Marketing Limited was a small family company. Despite Mr Barry's efforts in reply, I do not think this is the Commission's strongest point.

[12] In terms of Greenstar Holdings Limited, he points out similarities there but again he says a higher starting point than the \$80,000 in Greenstar Holdings Limited is required, given Greenstar Holdings Limited involved just under two-thirds as many toys. In that case of Greenstar Holdings Limited 217 toys were involved. Also he

¹ *Greenstar Holdings Limited*; *Manufacturers Marketing Limited*; and *AHL Company Limited*

points out SDL Trading Limited were on notice that warning labels could not be relied on as any substitute for proper safety testing.

[13] The Commission, in light of those similarities and distinctions have indicated a starting point for the fine in the range of \$90,000 to \$100,000. Following that, they invite an uplift for the previous product safety offending for specific deterrence to the amount of 15 per cent. In particular, Mr Barry highlights in his submissions SDL Trading Limited was convicted for supplying toys in breach of the standard in 2017, having supplied 4,757 non-compliance bathtub baby toys to retailers. The company was fined \$81,000.

[14] In its sentencing submissions SDL Trading Limited provided the following assurances, "SDL Trading Limited has undertaken a change in company practice away from selling toys such as the toy said. It is submitted that this is further evidence of genuine regret for what has occurred and a desire not to reflect similar activity again." Mr Barry says that despite those assurances SDL Trading Limited has supplied the fire engine units between May and August 2018, between two and five months after it was sentenced in 2017. He goes on to refer to uplifts of 15 per cent, which go to indicating an offender's character, culpability and likelihood of re-offending, and closes on the basis that in those circumstances an uplift of 15 per cent is appropriate. That would take the starting point to one of \$103,500. He accepts the company is entitled to a 5 per cent discounts for cooperation and a maximum of 25 per cent discount for guilty plea.

[15] Applying the Moses formula in terms of the second step and sentencing, that would result in a discount of 30 per cent off the starting point, ending in a sentence around \$72,450 if we adopted the \$90,000 in the range.

[16] Mr Boshier, for the defendant company, has outlined some further background facts. For SDL Trading Limited, in particular, toy sales are only a minor part of their business. He submits less than 20 per cent. The profit margins on each toy was 35 cents. Accordingly, SDL Trading Limited made \$121.80 on 348 toys sold.

[17] The defendant responsibly accepts every toy has the potential for harm. He disputes there has been an absence of a critical review of the toy's safety. He refers to Mr Lau's actions in testing toys from height, a drop test, also twisting and pulling tests conducted by Mr Lau, although accepting clearly those must have been insufficient.

[18] Mr Boshier has then examined the cases relied on by the Crown in comparison to SDL Trading Limited. He points out SDL Trading Limited supplied fewer toys. SDL Trading Limited supplied fewer toys over a shorter period of time in comparison to the cases relied on by the Crown. SDL Trading Limited did have a safety testing regime. His submission is the fewer number of toys supplied by SDL Trading Limited reflects the less serious nature of the offending and he characterised SDL Trading Limited as an example of a company with an adequate compliance programme.

[19] On his submissions, a starting point would be in the range of a \$65,000 to \$75,000 fine. In terms of aggravating features, he made submissions that the Court needs to be careful not to double-count here by one, taking account of the previous offending to set a higher starting point and then again, taking account of the previous offending to set an uplift of 15 per cent, which I accept is getting close to top of the range for prior offending.

[20] In Mr Bosier's submission any prior offending should only attract a 10 per cent uplift and then certainly defence are on the same page in terms of discounts for cooperation and guilty plea, as is the Crown. That would result in an end fine on the defence submissions in the range of \$50,000.

[21] The facts I rely on for assessing the starting point are these. Failure by the company was important and exposed young children to risk of serious harm. 348 fire trucks means there is a potential for the risk of serious harm or death to 348 children. It is concerning to know of those 348 toys only 65 have been returned as part of the re-call so, potentially, there is a significant number still in the community. Equally, Mr Boshier pointed out some may have simply been destroyed rather than returned but, as he quite rightly acknowledged, that is simply speculation.

[22] I agree with the Crown. The conduct here cannot simply be confined to one of careless or something between careless and highly careless. I firmly arrive at the view that it was conduct of a highly careless nature. Why? Because SDL Trading Limited were on notice, they were armed with the necessary knowledge requiring compliance with the safety standards. That knowledge was not historic, it was recent given they were sentenced in 2017 and this offending occurred relatively shortly thereafter.

[23] I am satisfied, despite Mr Lau's efforts, there was no critical review of the toy's safety undertaken. Mr Lau's self-reported attempts were woefully inadequate. My view is that must be so given the Commerce Commission's investigations and the results of their own testing by Choice. Certainly, deterrence and the extent of the conduct engaged in here is important in setting any starting point.

[24] On that basis and those factors inform a starting point of \$80,000 for the fine. There must be an uplift for the previous offending and despite 15 per cent being at the upper end, I accept that is appropriate. Accordingly, your fine would be uplifted by \$12,000, taking it to \$92,000. When we reduce the discounts for cooperation and guilty plea by 30 per cent, that results in a fine of \$64,400, which I simply round out to a fine of \$64,000. That is the fine that will be imposed against the company.



E P Paul
District Court Judge