IN THE DISTRICT COURT
AT AUCKLAND

CRI-2015-004-003971
[2015] NZDC 21374

COMMERCE COMMISSION
Prosecutor

v

BRAND DEVELOPERS LIMITED
Defendant Company

Hearing: 23 October 2015

Appearances: N Flanagan and B Hamlin for the Prosecutor
M Dunning QC and C Herbert for the Defendant Company

Judgment: 23 October 2015

NOTES OF JUDGE G A FRASER ON SENTENCING

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[1] Brand Developers Limited has pleaded guilty to five charges under the Fair Trading Act 1986. The charges relate to the advertising and sale of two types of multi-purpose ladders over three years. The lead charges relate to the breach of the Unsafe Goods Notice ("UGN") and the other charges relate to making false representations about the compliance of the ladders with the relevant product safety standard.

[2] In summary, the prosecution submissions set out that the defendant is an Auckland-based company trading as the TV Shop. The defendant sold ladders directly to the public via infomercial sales. A total of 7881 ladders were sold over the period 11 March 2010 to 15 March 2013.

[3] The Commerce Commission submits the ladders did not meet the standard to that load rating and that the ladders failed to meet the standard in two respects,

namely they failed tests known as a permanent set test and the walking test. Labels affixed to the ladders during the charge period prominently stated that they met the standard. Similarly, a 180 kilogram load rating was highlighted in three different television advertisements which also stated that the ladders met and in some cases far exceeded the standard. On 22 November 2012, the Ministry of Consumer Affairs issued a UGN declaring that the multi-purpose ladders, that did not comply with the standard, to be unsafe goods. It has meant that the advertising and sale of ladders from that point on was an offence against s 31(5) Fair Trading Act.

[4] A total of 2001 ladders were supplied in breach of the UGN and a total of 515 television advertisements were screened by the defendant after the UGN was in force. The defendant stopped supplying the ladders in mid-March 2013 following the Commission's investigation. At that time, the defendant contacted all consumers who had purchased the ladders directly from the defendant to inform them that the load rating had been downgraded to 120 kilograms, and the defendant also provided replacement labels.

[5] Turning to the lead charges, that is the charges in relation to the UGN of which there are two, the Commerce Commission submits that the substance of the breach in relation to these two matters is particularly serious when a statutory notice designed to protect consumers from potentially injurious goods is ignored. The Commerce Commission has set out the well established factors to be taken into account when imposing a penalty under the Fair Trading Act, including considerations set out in the decision of *Commerce Commission v L D Nathan & Co* [1990] 2 NZLR 160.

[6] The prosecution submit the factors in that case are equally applicable and able to be adapted to highlight the aggravating factors relevant to an UGN breach. The prosecutor references an emphasis on deterrence in the interests of safety and the submission that the breaches were serious particularly breaching a UGN and a consequence of that was that the physical safety of consumers was put at risk and that those who purchased the ladders could have suffered serious injury or even death from a fall or collapse.

[7] It is submitted that was an obvious and reasonably foreseeable risk. It is submitted that the defendant engaged in two types of conduct in breach of the UGN by advertising the ladders and then proceeding to sell them over a four month period. The advertising of ladders was extensive, with 515 television advertisements screening once the UGN had come into force. It is submitted the offending was reckless, if not deliberate. The basis for that is a submission that the UGN was issued on 22 November 2012 and, in addition, at that time the defendant was already on notice from MBIE that the compliance certificate relied on for the ladders was inadequate to demonstrate compliance.

[8] What is submitted is at that point, at the very least, the defendant needed to further investigate whether the ladders complied with the UGN but instead it continued to sell and advertise the ladders for several months without taking any steps to confirm compliance. It was not until two weeks after the Commission tested the ladders and they failed that the defendant actually stopped supplying and advertising the ladders. That conduct, the Commerce Commission submits, substantially aggravates the offending.

[9] In regards to stopping sales, it is submitted it took intervention from the Commission to stop the defendant's conduct.

[10] The defendant's processes were insufficient to identify and respond to product safety issues and that a deterrent response is essential recognising that in the Commerce Commission's view there was a reckless disregard for compliance with the UGN and that that must be met with a significant penalty.

[11] The Commission submits that the safety risks are paramount when making goods the subject of an UGN and that the starting point must recognise the inherent seriousness of breaching a Ministerial notice issued to protect public safety.

[12] The Commission has referenced various Australian cases cited to support a deterrent response and I suspect that the most relevant of all of those is the decision of *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* [2014]FCA 1434 where the penalties imposed are set out and they are of some significance.

[13] Rightly, the Commission submits that the principles from the Australian decisions can be drawn on for sentencing here and the underlying point is that the Australian decisions clearly demonstrate that breaches of banning orders and product safety standards are met with a significant response. The Commission points out of particular note the number of goods sold in breach and the resulting profit which are important considerations where a company washes its hands of product safety responsibilities, or are slow to respond when notified of an issue. In that instance it will be treated more harshly and the penalties are likely to be higher for larger companies that can be expected to have compliance programmes in place.

[14] The Commission's submissions concluding the UGN breaches are that there is a significant risk to consumers given the number of items sold and the fact that the breaches occurred over a relatively prolonged period, and that those factors are most influential in setting the start point.

[15] Finally, it is submitted for the Commerce Commission when considering all of the relevant factors, a starting point range of $165,000 to $185,000 is an appropriate reflection of the seriousness of the conduct, its scope, and the fact that it properly takes account of the principles that can be gleaned from the limited case law on the point.

[16] For the defendant company, it is submitted that the response to the Commission's investigation where the ladders failed two of the 18 performance standard tests that the company promptly withdrew the ladders from sale and embarked on a highly successful corrective action that was developed, implemented and monitored over a period of more than six months, and incurred costs in the sum of $739,313.74.

[17] The defendant submits that the conduct in this case arose from a belief and misplaced confidence in the actions of third parties commissioned in regard to testing the ladders, and that misplaced confidence then coloured the defendant's approach to the UGN as well. The defendant accepts culpability but submits its conduct should not be characterised as deliberate in the morally egregious sense.

[18] The defendant submits that the requirements for multi-purpose ladders include 18 performance tests, and that the ladders complied with all of the general requirements except for the requirement for a label to state the minimum working length and all but two of the performance tests, the walking test and the permanent set test.

[19] The defendant submits the primary deficiencies of the walking test and the permanent set test, however, are why the owner of the company considered that the tests did not relate to product safety per se, insofar as they do not reflect safety of the transformer ladder under normal use.

[20] In terms of testing of the ladders by the defendant, it is set out that the ladder manufacturer and two testing companies and an Australian certification company had been instructed to arrange to test the ladders. The company submits that it did not ever have testing to the whole of the standard at the load rating of 180 kilograms but it relied on the partial testing results together with earlier testing to 120 kilograms when developing its market and strategy for the ladders. Testing in early 2014 showed that the ladders both complied in full with the standard 120 kilograms.

[21] In regards to aggravating and mitigating circumstances, the defendant's submissions differ to the Commerce Commission's to the following extent. The defendant submits that the risk to public safety presented by these ladders in the particular circumstances is possibly overstated, and that the company ceased direct sales within three days of notification to it by the Commission. In stating that, though, the company also accepts that the processes it had in place to respond to product safety issues in the late 2013/early 2014 period were not adequate.

[22] In relation to starting points, the defendant makes reference to the *Alpha Flight Services* case. It submits that the Australian cases cited are not UGN equivalent cases and are product safety standard cases, and submits that there is no absence of New Zealand product safety standard cases so that in fact the need to reach across to the Australian case law for that comparison is not required.

[23] Likewise the defendant has referenced a number of decisions and they are acknowledged in terms of reaching a sentencing outcome.

[24] With regards to the misrepresentation offending, the Commerce Commission submits that a false representation that a product complies with the applicable safety standard is a significant breach which risks physical safety by misleading consumers into reliance on a product below the regulated standard and that prejudice to competitors can also occur.

[25] The Commission submits that the untrue statements as to compliance were significant because there was no proper basis at all for the defendant to have purported to have met the standard. The misrepresentations made provided consumers with a safety assurance that was simply wrong and overstated the safe load the ladders could carry by a significant margin and that is 60 kilograms.

[26] The Commerce Commission submits that the safety ratings clearly play some part in consumer purchasing decisions and that the defendant used compliance with the standard and the representative 180 kilogram load rating of the ladders as a point of difference in the ladder market, and that it was used extensively in advertising in order to boost ladder sales. The Commission submits that the offending involved both careless and highly reckless or deliberate conduct but concedes that the majority of the charge period the misrepresentations made in the media were the result of carelessness, but at a high level.

[27] The Commission submits that from the point when MBIE notified the defendant that it did not consider the documents provided to be evidence that the ladders met the standard, the defendant's conduct can be described as highly reckless. It submits the statements were a significant departure from the truth

and that the ladders had never been fully tested to the standard and that, worse, having been tested, they failed to meet it.

[28] The Commission submits the statements were widely disseminated, that consumer safety was put at risk, and that the efforts to correct the statements were appropriately but belatedly made and that the defendant made no efforts to correct the false statements when it became first aware of the issue through MBIE, but that correction did ultimately occur but that without intervention from the Commission, it is likely the defendant's conduct would have continued. The Commission submits deterrent penalties must follow breaches that risk consumer safety and that the importance of deterrence is particularly acute.

[29] Likewise, as for the UGN charges, the Commission makes reference to a number of authorities and then submits that a starting point range of between $120,000 to $130,000 properly reflects where the defendant's conduct falls in comparison to those cases, and there is particular reference back to the *GlaxoSmithKline* case which is set out. The Commission states that the starting point range takes into account the serious nature of the misrepresentations and the extent of dissemination and balances that with the size of the company, the sales volume and the characterisation of the conduct.

[30] There are no mitigating features in relation to the offending which is the submission by the Commerce Commission.

[31] The defendant in relation to these charges submits that this was not a case of a flagrant falsehood for advantage, or highly reckless or deliberate conduct, and that the defendant required that the supplier manufacture the ladders according to the standard. The defendant further involved two agencies to ensure that this occurred in what it thought to be "certifying the ladder."

[32] It is submitted that the defendant relied on a company called CSI to check that the testing was against the standard, that is, that the test results meant that the ladders could be sold as rated at 180 kilograms, as well as checking on the process quality of the factory the ladders were being produced in.

[33] The defendant submits that ultimately the documentation created an impression of compliance but that regrettably its belief and misplaced confidence in the actions of third parties commissioned in regard to testing the ladders coloured the reaction to the UGN. The defendant submits that it had no choice but to use overseas testing companies and that this is not a case of turning a blind eye, at least not up to the point in time until MBIE informed the defendant on 16 November as to the inadequacy of the certification. The defendant submits that there was no reason to suspect the manufacturer's representation was incorrect and the defendant relied upon the representation in that regard. The defendant accepts the starting point in regards to this offending.

[34] The Commerce Commission accepts that the defendant took mitigating steps and they are set out in the submissions including contacting or endeavouring to contact all of the purchasers of the ladders, providing customer refunds, placing notices in the stores and placing newspaper advertisements, and sending out new labels for ladders that corrected the load rating to 120 kilograms.

[35] The Commerce Commission acknowledges that the company has spent a significant sum of money on remedial action and whilst acknowledging that, it submitted that must be balanced against the fact that on analysis there was profitable conduct by the defendant during the period of the charge and that profit was clearly made as a result of the sales.

[36] In terms of credit for the guilty pleas it submits a discount of up to 40 percent including that discount is an appropriate one, and that a fine in the range of $141,000 to $159,000 reflects the aggravating and mitigating features.

[37] The defendant submits in regards to mitigating factors the remedial action that I have referred to earlier, and submits that it was able to reach almost 94 percent of its direct customers and about 30 percent of customers who had purchased a ladder at retail between 2010 and 2013.

[38] The cost of remedial action is significant in this case and the defendant submits that the defendant has no previous convictions, it co-operated with the

Commission throughout. It pleaded guilty at the first reasonable opportunity, and spent a considerable time working with the Commission to assess and arrive at an appropriate agreed penalty.

[39] A submission is made that this is a first prosecution under the Fair Trading Act, s 31, and that the most significant mitigating feature is the company's response to the need to remedy its sale of ladders that were wrongly sold and labelled as rated to 180 kilograms. The defendant submits that the total quantified costs were $739,313.74 and the basis of that is set out in the submission. Finally, it concludes that clearly the amount spent by the company in its efforts to remediate were considerable. Likewise the defendant submits that a discount from the starting point of 40 percent is appropriate for the guilty plea credit and the mitigating circumstances.

[40] Looking at the various authorities that have been submitted, the discounts range depending on circumstances, and it has to be said that each turns on its own facts. Interestingly for prosecutions such as this, the Courts have welcomed an approach where the parties attempt to conclude an agreed outcome as to penalties. In *Commerce Commission v NZ Milk Corporation* [1994] 2 NZLR 730, the Court said:

> Thus a procedure allowing for a negotiated settlement is in the interests of the parties; it is equally in the interests of the community in that it avoids clogging the Court lists with potentially complex and lengthy litigation and the attendant expense.

Further on the Court said:

> Further in considering the level of the penalty, it would be proper for the Court to take into account the benefit to the community by the early disposal of proceedings in this manner.

[41] Those sentiments were repeated in *Commerce Commission v Air New Zealand* [2006] DCR 709 - and further in *NZ Milk Corporation Ltd* and *Commerce Commission v Koppers Arch* 2009] NZCCLR 1 - where the Court affirmed the position set out in the previous authorities and in that decision it said:

> Where it is clear that counsel have adopted a careful and responsible approach to arrive at a recommendation which is suitable on legal principle with integrity it is appropriate that the Court respect that.

[42] The resolution proposed is set out in the Commerce Commission's submissions and endorsed by the defence. That resolution recognises a starting point range of $165,000 to $185,000 for the UGN charges, a starting point range of $120,000 to $130,000 for the misrepresentation charges, an adjustment of $50,000 to the overall starting point recognising totality, and then a discount of 40 percent to reflect the mitigating features that have been referred to.

[43] The Court agrees with the careful and principled approach taken by both parties. The submissions have been helpful and clearly express the views of the parties. In the end of course the primary concern of the Court is to impose a sentence that is deterrent and is in the interests of safety.

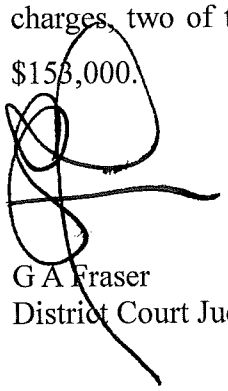
[44] The breaches were serious particularly when the offending continued after the UGN was issued and, at that point, I agree that the offending was reckless. It was a matter of good luck that no one was seriously injured or worse. There must be a condign sentence particularly where public safety is at issue.

[45] The Fair Trading Act is designed to protect consumers from physical as well as financial harm. In acknowledging all of that and pulling of this together with an eye to the authorities cited for the UGN charges, I take a start point of $185,000. This is at the top of the suggested and agreed range but in adopting that it is recognition of the breach of the UGN, which must always be egregious.

[46] For the misrepresentation charges, a start point of $120,000 is adopted and that takes into account the reliance that the company placed on others for testing until November 2014. I agree that a totality adjustment of $50,000 is appropriate and a further discount of 40 percent for all of the mitigating factors.

[47] That is set out as follows. For the UGN matters $185,000, for the misrepresentations $120,000, and that is a total sum of $305,000, less a totality adjustment of $50,000. That leaves a sum of $255,000, less the 40 percent is

$102,000. The end point fines are $153,000. I have determined it in this way. In terms of the UGN charges, $50,000 for each charge and for the misrepresentation charges, two of those, at $17,666 and the third at $17,668, which makes a total of $153,000.



G A Fraser
District Court Judge