IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CRI-2022-090-004004
[2023] NZDC 23291

COMMERCE COMMISSION
Prosecutor

v

GENEVA DISTRIBUTORS LIMITED
Defendant

Hearing: 19 October 2023

Appearances: V Fowler for the Prosecutor
C Clayton for the Defendant

Judgment: 19 October 2023

NOTES OF JUDGE M PECOTIC ON SENTENCING

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[1] The defendant, Geneva Distributors, has pleaded guilty to a representative offence pursuant to s 30(1) and s 40(1) of the Fair Trading Act 1986. The offending involved the supply of 432 units of a plastic battery operated musical toy. The toys did not comply with s 29 of the Fair Trading Act 1986. The maximum penalty for this offence is a fine of $600,000.

[2] The relevant facts are as follows. Geneva Distributors Limited, who I now refer to as Geneva, was incorporated on 17 February 1998. The company directors are Nilesh Patel and Shailesh Patel. Geneva's reported turnover for the financial years 2018 to 2019 was $5,655,176 and for 2019 to 2020 was $6,120,181. Geneva's business involves the distribution of confectionary, beverages, snack foods, biscuits and similar goods throughout New Zealand and the Pacific Islands.

Geneva mainly supplies Foodstuffs Limited and dairies. Toys account for about four to five per cent of Geneva's business. The only type of toy it imports contains confectionary.

[3] Between 2 July 2020 and 1 February 2021, Geneva imported 9,216 units of a toy from Fantasy Toys & Candies, a company based in Murcia, Spain. The first batch of toys arrived in New Zealand on 1 August 2020. Between 7 August 2020 and 27 January 2021, 432 units of the toy were supplied to Canary Distributors Limited who in turn supplied the toy to retailers. The remaining 8,784 units were supplied to international distributors and were not distributed in New Zealand.

[4] The toy was a battery operated musical toy in the shape of a guitar. The toy had a removable container sealed with a small cap which contained small edible lollies. There were three coloured buttons that made different musical sounds when they were pressed. A photograph of the toy has been produced. A label present on the toy set an age limit of three plus, although given the weight, shape, and design and colour it is likely to be attractive to children under three years of age as well.

[5] In March 2021, three units of the toy were purchased by the Commission from Price Busters in Wellington. In May 2021 the toys were tested for compliance with the standard by an independent testing facility operated by CHOICE Test Research. Under testing, all the small edible lollies came free and presented a choking hazard to children aged three years and under. As a result, the toy did not comply with the applicable product safety standard. In response to the Commission's investigation, Geneva contacted Canary Distributors to recall the product; 216 of the units were successfully recalled, 216 remain in circulation.

[6] Geneva has co-operated with the Commission during the investigation by attending a voluntary interview on 4 February 2022 and voluntarily responding to written requests for information. Geneva told the Commission six things:

(a) That it had relied on the advice of its overseas supplier regarding compliance. The toy complied with the European standards. However, the overseas supplier did not provide evidence of compliance with the

European standards and made no assurance that the toy complied with New Zealand safety standards. The test reports provided to Geneva regarding the European standard in any event did not address the compliance with the small parts test. The European standard is different to the New Zealand standard;

(b) That it had carried out its own informal drop, twist and tension test. However, there was no record of the informal testing;

(c) That it relied on age grading on the packaging of the toy to determine its age appropriateness;

(d) That it was not aware of the standard prior to contact from the Commission and considered the European standard applied to the toy as it was supplied from Spain;

(e) That it only acquired a copy of the standard a few days before the interview with the Commission on 4 February 2022; and

(f) Finally, that it did not consider the toy to be suitable for children under the age of three years.

[7] Since notification from the Commission regarding concerns with the toy, Geneva has spent $16,000 to engage an expert of product safety and compliance for the toy industry in Australia and New Zealand to provide advice on its compliance system. It has implemented product safety compliance policies and processes. Geneva tested the toys and its existing stock for compliance and provided evidence of some of the testing, as well as other unrelated testing of products.

[8] Geneva has not previously appeared before the Court.

[9] I now address the submissions on behalf of the Commission. The Commerce Commission submit that the aggravating features of the offending are:

(a) That the conduct undermined the objectives of the Fair Trading Act. The standard was designed to protect a vulnerable class of consumers, namely children aged 36 months and under, from the hazards which are recognised as giving risks of serious injury or death;

(b) There was a departure from the standard as the toy failed a test designed to replicate reasonably foreseeable abuse. Pieces broke or were liberated during tests. These were small enough to be swallowed or ingested by a child;

(c) The actions were careless. Geneva has been in the distribution business for over 20 years and relied on the word of the overseas-based supplier regarding compliance with New Zealand laws and regulations; and

(d) The period and volume of distribution. The offending occurred just under a six month period and involved 432 units. While 216 units were recovered, that still leaves 216 in circulation.

[10] The Commission submit that deterrence is required in this case to ensure that traders comply with the requirements set down in the standard. The Commission submits there is no tariff for offending in this area. Reference is made to the decision of *Commerce Commission v SDL Trading Ltd* where a starting point of $80,000 was adopted with a 15 per cent increase for previous convictions.[1]

[11] In *Commerce Commission v Greenstar Holding Ltd*, the company pleaded guilty to four charges of supplying toys that did not comply with the relevant safety standard, with a starting point of $80,000 adopted.[2]

[12] And finally, the Commission referred to the case of *Commerce Commission v Manufacturers-Marketing Ltd* with a starting point of $75,000 adopted.[3] Taking these

[1] *Commerce Commission v SDL Trading Ltd* [2020] NZDC 17530.
[2] *Commerce Commission v Greenstar Holding Ltd* [2020] NZDC 6407.
[3] *Commerce Commission v Manufacturers-Marketing Ltd* DC Manukau CRI-2017-092-14214, 10 April 2018.

cases into consideration, the Commission submits that an appropriate starting point is between $75,000 to $80,000.

[13] The Commission accepts there are no personal aggravating factors in relation to Geneva.

[14] In terms of mitigating factors, the Commission submits that co-operation and attendance at voluntary interview would merit a discount of 10 per cent. Geneva has put in place compliance measures to ensure there are no further issues and it is submitted 10 per cent would be available for that, and that 25 per cent is available for a plea of guilty.

[15] For the defence, the summary of facts is accepted. Geneva's primary business supplied beverages, confectionary, snack foods, biscuits and similar goods. Confectionary with toys represent a very small part of the business, being about four to five per cent. Reliance was placed on the advice by the overseas buyer that the toy complied with European standards and wrongly assumed it would be good for New Zealand. Geneva carried out its own drop, twist and tension tests and the toy also contained a safety warning which Geneva relied on in its safety assessment that it was for children aged over three.

[16] In assessing the starting point, the defence submits that the conduct was inadvertent, not careless, it was a one-off isolated incident, that it has been appropriately and expeditiously remedied by the defendant, that the defendant actively turned its mind to the safety of the product and took steps to ensure it was safe. The defendant expresses regret due to not having a full appreciation of New Zealand safety standards, particularly given normally it is a food supplier and not a toy supplier, and the defendant has taken immediate steps to ensure no reoccurrence. An affidavit has been filed by Mr Nilesh Patel which supports the submissions advanced by counsel.

[17] The starting point submitted is between one of $40,000 to $50,000 with a 25 per cent credit for a plea of guilty and 15 per cent for co-operation, good past conduct and proactive steps for further compliance.

[18] In sentencing, I take into account the purposes and principles of the Sentencing Act 2002. In terms of purposes, that is to hold the company accountable for the harm caused, to promote responsibility and acknowledgement of that harm, to denounce and deter conduct, and to look to the protection of the community.

[19] In terms of s 8 principles, I take into account the gravity of the offending and the company's culpability, the seriousness of this case in comparison to other cases. I keep in mind that my approach needs to be consistent, but I also consider the least restrictive outcome in the particular circumstances of the company.

[20] In setting a starting point, I note that there are no set tariff decisions for offending under the Act. In *Commerce Commission v Steel & Tube Holdings Ltd*, the Court of Appeal considered the aggravating and mitigating factors which relate to prosecutions under the Fair Trading Act.[4] However, the Court emphasised that the decision was not a guideline decision.

[21] Counsel have referred me to a number of cases. I am assisted by the following decisions: *Commerce Commission v SDL Trading Ltd*, *Commerce Commission v Manufacturers-Marketing Ltd*, *Commerce Commission v 1st Mart Ltd*, *Commerce Commission v The New Hub Furniture Warehouse Ltd*.[5] In this case:

(a) The item or product is a confectionary toy designed to be played with and the contents, which was confectionary, eaten by children. Children are a vulnerable class of consumer which need protection from hazards that could give rise to risks of serious injury or death. The toy failed tests which are designed to replicate reasonably foreseeable abuse. Components of the toy came loose and were small enough to be swallowed by a child which could have created a choking risk;

    Even though the toy was not recommended to be used by a child under 36 months, I do not consider that the label warning it was not safe for children under the age of three as being a sufficient safeguard. Toys

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[4] *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549.

[5] *Commerce Commission v 1st Mart Ltd* [2022] NZDC 13480; and *Commerce Commission v The New Hub Furniture Warehouse Ltd* [2021] NZDC 2041.

can be shared among children in a family setting. They should be safe for any child capable of being able to hold the toy and use it. I consider the importance of the error to be at a high level;

(b) The duration of the offending was just under a six month period. Geneva supplied 432 units of the toy which was distributed throughout New Zealand. Half of this amount was recalled which left 216 units still in circulation, most likely in the community. Given the quantity of product involved, the potential for harm was high although the number distributed is at a modest level. I do note that half of the toys were recovered but some still remain in the community. It is speculative to draw an inference as to whether they are still in circulation or destroyed. I do not accept that the product would have necessarily been disposed of immediately after use;

(c) This offending was an isolated incident of non-compliance. Mr Patel was the managing director and responsible for the importation and distribution of products. The state of mind of the company and its agents was explained by Mr Patel at the interview with the Commission. Geneva believed that its supplier had done the appropriate testing and that as the toy complied with European standards it would therefore comply with New Zealand standards. The error was the mistaken belief that the European standards were equivalent to the New Zealand standards;

Had Geneva checked the New Zealand standards, as it ought to have done, the discrepancies between the New Zealand and European standards would have emerged. Any issues could have been corrected prior to distribution or the product not distributed at all. I consider the actions on the part of Geneva to be careless and not inadvertent;

(d) I do not regard the lack of an aggravating factor, for example the lack of evidence of harm to consumers or other suppliers, as reducing the

aggravating factors. Absence of an aggravating factor does not convert to a mitigating factor;

(e) Geneva is a medium-sized company. The turnover for the years 2018 to 2019 was $5,655,176 and for 2019 to 2020, $6,120,181. It employs a total of six staff. In the 2021 financial year the distribution of toy products made up approximately 2.4 per cent of Geneva's total business. The turnover of the company, however, shows that Geneva is a medium-sized company; and

(f) While this type of toy represents a small portion of the importation distribution enterprise of the company and the benefit to the company was low, the company did have resources to implement a robust compliance regime.

Other matters

[22] Geneva is a similar sized company to SDL in terms of turnover. There is a difference in terms of the number of staff employed. Geneva supplied a higher number of toys. The duration of the offending was longer in *SDL* and the company had previously offended.

[23] MML was not a large business and had a low net profit. Geneva supplied more toys, but MML offended over two time periods, more than three times the duration than Geneva.

[24] In the *1st Mart Ltd* case, the offending occurred over a longer period of time. However, the number of distributed toys was less than in Geneva's case. There were two aspects of the toy that failed in the *1st Mart Ltd* case. The gravity of the offending was at a high level as the company was facing a separate investigation and prosecution in relation to the other non-compliant toys. *1st Mart Ltd* had made assurances to the Commission that all toys would face a comprehensive safety report and undergo independent testing, including staff training and destruction of non-compliant toys and the supply of the same stopped. However, this was not the case.

[25] In *The New Hub Furniture* case, the offending occurred over a longer duration, the amount of products supplied were similar, none of the toys were returned. The case was considered to represent a high degree of carelessness.

[26] This case does not fall within the most serious category of offending of its kind. I consider that in the case of Geneva the offending occurred over a relatively short period of time in comparison to the other cases. A greater number of the products were returned after the recall than some of the other cases that have been provided by way of example. Geneva made an error in relation to the discrepancy in standards between European and New Zealand standards. However, the company did have means to ensure that a proper testing and compliance regime was in place. Taking all factors into account, I consider the carelessness in this case to be at a moderate level. I consider an appropriate starting point to be $70,000.

[27] I turn now to the mitigating factors. Geneva has pleaded guilty promptly. I allow 25 per cent. There has been co-operation with authorities with the product being returned. I allow five per cent.

[28] There has been also commitment to compliance and in this regard, I am prepared to accept that Geneva has engaged SGS to test a sample of all toys to ensure that no other products supplied by Geneva were unsafe to customers at a cost of $14,446. As discussed in Court, I do not expect that every single toy would be tested. However, I accept that there would have been at least a sample from each line. I also accept that Geneva has engaged an expert and put in place steps to ensure that there will be no future compliance issues, and I also accept that Geneva has learned from this experience and are unlikely to be in a similar situation in future. For these reasons I allow five per cent discount.

[29] I also look at the previous good record. The company has been in business for over 20 years with no issues previously and I allow a 10 per cent reduction to reflect that. This reduces the fine down to $38,500.

[30] Standing back and considering all matters in the whole, I do not consider any further alteration to this fine is required. Accordingly, I convict and fine the company $38,500.

ADDENDUM

[31] Paragraph [1] has been amended to reflect the correct sections of the Fair Trading Act 1986.

[32] Paragraphs [29] and [30] have been corrected to reflect the correct monetary fine of $38,500.

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Judge M Pecotic
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 31/10/2023