IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2021-092-009187
[2022] NZDC 13480

COMMERCE COMMISSION
Prosecutor

v

1ST MART LIMITED
Defendant

Hearing: 5 July 2022

Appearances: V Fowler for the Prosecutor
H Johnson for the defendant

Judgment: 5 July 2022

NOTES OF JUDGE A M WHAREPOURI ON SENTENCING

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[1] The defendant company 1st Mart Limited appears for sentence having pleaded guilty to one representative charge of supplying goods which failed to comply with the prescribed safety standards contrary to ss 30 and 40 of the Fair Trading Act 1986. The maximum penalty for this offence is a fine up to $600,000.

[2] The facts are set out in an agreed summary which runs for some seven pages. Rather than repeat its detail for the purposes of this hearing I simply propose to set out the salient features of the offending. The defendant is primarily an importer and wholesale distributor of goods, toys, fittings and other homewares. It was first incorporated in March 1999, employs a number of staff, and on-sells goods to multiple retailers within New Zealand of items largely sourced from China.

[3] One of the toys which the defendant imported was a battery operated toy train labelled "Thomas train set," which bears a strong resemblance to the well-known children's character Thomas the Tank Engine. While the toy manufactured carries a three-plus age label, given the toy's size, weight, colour and correspondence with Thomas the Tank Engine, it is accepted that the toy was at least manufactured, designed and/or marketed for use by children three years old or younger.

[4] Based on business records, the defendant supplied 144 units of the Thomas train set across an 18 month period or so starting 1 August 2018 and concluding 25 February 2021. In November 2020 agents for the Commerce Commission purchased two units of the toy in question from a retailer called Bargain City in Botany. Bargain City confirmed that they had purchased the toy from the defendant. The units purchased by the Commerce Commission were then tested for compliance with the applicable regulations. The regulations prescribed specifications by the Australian/New Zealand Standards which the toy subsequently failed. The testing carried out involved replication of handling based on reasonably foreseeable abuse in the hands of a child such as for example but not limited to dropping, twisting or pulling. The various standards which were breached during testing based on reasonably foreseeable abuse included an axle and cover piece becoming liberated from the main unit following dropping, a small figurine associated with the engine having its various parts capable of being disarticulated or liberated during a tension test and the subsequent pieces which were liberated being individually capable of being passed through a small parts cylinder. The toy also failed to conform with the appropriate safety standard given that its battery compartment cover, whilst secured with a screw, became partly opened during the test meaning that the batteries contained within would have been easily accessible.

[5] When contacted by the Commerce Commission, the defendant removed those items still within its possession from sale. A product recall was issued but I understand that none of the toys having been previously sold were in fact returned. The defendant by its directors also co-operated with the Commerce Commission in full.

[6] What must also be taken into account however when assessing the defendant's offending and its overall gravity is that around the time the toys were being sold

a separate investigation and prosecution was underway which in turn led to a conviction in relation to a separate toy or toys. During this overlapping period, and while the investigation was notified and underway, 1st Mart imported the Thomas train set toy and supplied the same while assurances were made on behalf of the defendant to the Commerce Commission in the first prosecution that all toys imported would be accompanied with a comprehensive safety report evidencing compliance with the relevant safety standard, that each of the toys that it would sell would first be required to undergo independent testing to ensure product safety standards were met, that its staff would be trained in conducting in-house testing, and that any other toys which it stopped and supplied that was deemed to be unsafe would be destroyed. The assurances given at that time and the investigation carried out, and exchanges between the defendant's officer's and the Commerce Commission mean that there can be little doubt the defendant was aware of the standards which need to be complied with, the importance of meeting those standards and the importance of not supplying to vulnerable children in the marketplace toys which failed to meet one or other of the relevance safety standards. These assurances however meant little given the present offending.

[7] It follows that in my view the gravity of the present offending can only be assessed at the reasonably high level carelessness, perhaps even bordering on recklessness.

[8] In sentencing I must deter and denounce, I must hold the defendant accountable for the potential harm caused whilst also imposing the least restrictive sentence.

[9] Both parties have referred me to a number of other cases in this area. Those cases include *Commerce Commission v SDL Trading*, *Greenstar Holdings Limited*, *Commerce Commission v Manufacturers-Marketing Ltd* and *Ebanezer Trade Limited*.[1] It has been important to review these cases because there is no tariff for this type of offending. Based on the cases, the most comparable to the present is that of

[1] *Commerce Commission v SDL Trading* [2018] NZDC 6626*; Greenstar Holdings Limited; Commerce Commission v Manufacturers-Marketing Lid* [2018] NZDC 7913*;* and *Ebanezer Trade Limited*.

SDL Trading. In that case there was admitted offending involving the supply of 348 fire engines which when tested yielded small parts that created a choking and/or suffocation risk. Judge Paul in that case characterised SDL's conduct as highly careless given that it involved a defendant having a previous conviction for similar offending. I acknowledge that SDL involved a greater number of units sold and supplied over a longer period of time and the company there was a much larger organisation than 1st Mart. (1st Mart appears to have been successful in its first years of operation yielding a significantly sizeable turnover of $1,000,000 but over time since 2016/2017, yielded more modest results). These additional facts makes SDL's offending slightly more serious than the present case, but it is still helpful in in setting a starting point here.

[10] The Commerce Commission submits that a starting point here should be a $65,000 to $75,000 fine which has been adjusted to reflect that in *SDL Trading* the starting point there was $80,000. For the defendant Ms Johnson submits that a starting point closer to a $60,000 fine is all that is required and better reflects the facts of this case. She recognises that some uplift will need to be applied to reflect the previous conviction but that the Court should take care to avoid double-counting when arriving at the uplift given that the facts of the previous conviction are fused with the Court's assessment of the gravity of the offending which informs the starting point adopted. I accept Ms Johnson's submission that care needs to be taken to avoid the perception of double-counting, or double-penalisation.

[11] After considering both counsel's submissions, I regard that a starting point of a $65,000 fine is all that is required here. From this starting point of $65,000 I intend to apply an uplift of 10 per cent to reflect the aggravating feature of the previous conviction. In terms of the guilty plea discount, the guilty plea was entered at its earliest opportunity, a trial has been avoided and some meaningful adjustment needs to be reflected accordingly. The maximum discount which I can extend for an early guilty plea is 25 per cent. I can make no further adjustment for previous good record and in my view whilst there has been full co-operation, no acknowledgment is required for this given that the defendant's co-operation is hardly surprising, even to be expected, given the company's previous conviction for similar offending. Once the

adjustments have been made for the previous conviction and the guilty plea discount, the end sentence for the defendant is a fine of $55,250.

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Judge M Wharepouri
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 27/07/2022