IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2017-004-009958
[2018] NZDC 27400

COMMERCE COMMISSION
Prosecutor

v

AHL CO LIMITED
Defendant

Hearing: 23 February 2018

Appearances: A Luck for the Prosecutor
E Boshier for the Defendant

Judgment: 23 February 2018

NOTES OF JUDGE E M THOMAS ON SENTENCING

The defendant is fined $20,000.

REASONS

The offending

[1] The defendant AHL is a New Zealand importer and distributor of various products. Among them is a child's rattle, branded the Baby Toys Red Cow Rattle. The target market is children aged under three.

[2] AHL imported a number of these. It sold them to various retailers. In November 2016, the Commission undertook its own testing of a sample of the rattles. Based on what it discovered, it forwarded them to an appropriate facility for independent testing. The brief accompanying the request for testing was to establish how the product performed under reasonably foreseeable use and abuse.

[3] During drop testing the product failed. Fragments came apart that failed the minimum size test. During direct force testing the rattle broke apart, failing that test. The force applied was consistent with the target market, in other words the force that a small child might reasonably be expected to apply to such a product.

[4] The purpose of the minimum size test was self-evident. The particular harm that the testing is designed to guard against is choking. That harm is perfectly foreseeable with a product of this kind if it is not able to withstand the necessary testing. The fragments that resulted from the failed test failed the minimum size test.

[5] As a result, AHL has pleaded guilty to two breaches of the Fair Trading Act 1986 by supplying products that did not comply with the relevant safety standards. It was charged as a result of that testing. I should stress that. It has not been charged as a result of any consumer mishap.

Charges and penalty

[6] The charges are separate. The first charge is a representative charge relating to supplies to 20 New Zealand retailers between August 2011 and December 2012. 259 rattles are the subject of that charge. The maximum penalty in respect of that charge is $200,000.

[7] The second charge relates specifically to a single supply in November 2016. AHL supplied 12 rattles to one retailer. That is the specific incident it seems that has led to these charges and to the testing. The maximum penalty in respect of that charge is $600,000. That maximum penalty reflects an amendment that occurred in the meantime trebling the maximum penalty for breaches of this kind. That maximum penalty increase reflects the well accepted principles of deterrence, accountability and denunciation that are required for sentencing offending suppliers. It represents also a message from the legislature that greater culpability is now recognised for companies and entities who fail to deliver products that comply with the relevant safety standards.

[8] I must impose an appropriate penalty by applying the factors now well established and set out in *Commerce Commission v L D Nathan & Co Ltd*.[1]

Objectives of the Act

[9] The Act is designed to protect, among other things, vulnerable consumers from products that may cause serious injury or death.

The importance of the failure

[10] It is significant, going to exactly that sort of risk.

The degree of wilfulness or carelessness

[11] AHL was unaware of the standards. It did no testing of its own. It did not check with the overseas manufactures of any testing of any kind had been done at any time.

[12] It has failed to take or make inquiries that would have been very straight forward to undertake. There was a lot at stake both for it and its consumers in ensuring that products complied, not simply because of a legal obligation but also as a matter of pure common sense.

[1] *Commerce Commission v L D Nathan I Co Ltd* [1990] 2 NZLR 160.

[13] The company or AHL has an annual turnover or around $1 million. It had resources then at its disposal to make the necessary inquiries to take the necessary safeguards.

[14] I assess the level of carelessness then as high.

The extent to which the products depart from the standard

[15] This again is significant.

The degree of dissemination

[16] This is reasonable; 271 rattles were sold in total.

The result in prejudice to consumers

[17] This is potential rather than actual. There are no cases of the rattles breaking and causing any harm to anybody as a part of the charges that the company faces. Having said that, not all products have been recalled.

If the company is to correct or remedy

[18] These I will discuss in a moment when I am dealing with mitigating features.

The need to impose deterrent penalties

[19] There is a high need for deterrent penalties when it comes to general deterrence. There is no suggestion that there is a high need in relation to AHL specifically.

The starting point

[20] The lead offending, in other words where we begin in setting a fine, has to be with the pre-amendment offending. That is because it relates to 259 out of the 271 rattles. Both sides have referred to cases that are relevant to offending prior to the change in the legislation. In truth there is a wide variation and a wide range of fines because of the number of factors that are relevant. Ultimately this case falls like those

did to be decided on its own combination of factors. Bearing in mind those cases however, and considering the factors that I have already discussed, I take a starting point of $25,000 for the pre-amendment charge.

[21] I need to uplift that fine to reflect the second charge. I recognise immediately that this charge carries a much higher penalty. That this was a deliberate policy reflecting the need to prevent against serious harm. That I need to reflect that in setting a fine. But here we are only talking about 12 units. That takes it some distance from the New Zealand authorities that counsel have referred to dealing with post-amendment sentence levels.

[22] I also must apply what is known as the totality principle. We don't just add one fine to another. That would result in a fine that is too high and not fair to the company. What I must do is stand back and arrive at a level of fine that represents the global picture. That necessarily would mean reducing the level of fine that would be appropriate for the second charge. Applying that principle then, I increase the starting point for a fine in respect of both charges to $30,000.

Discounts

[23] AHL immediately stopped sales when it was advised of the failed test. It destroyed remaining stock. It issued a recall. It has co-operated fully with the Commission since its failures were brought to its attention. For that the company deserves credit and will be given some.

[24] The company also claims a discount for remorse. However, that would be to double count AHL's post-investigation response.

[25] It has taken steps to become compliant and seeks a discount for taking those steps. It does not get a discount for taking those steps. Those are its legal obligation and those were steps that should have been taken prior to the distribution of the rattles.

[26] AHL has no previous convictions. It is entitled to recognition for that.

[27] The Commission suggests that a 10 percent discount is appropriate, I agree. I reduce the starting point to $27,000 to reflect that.

[28] The company immediately pleaded guilty. That warrants a discount of 25 percent.

Result

[29] I therefore fine AHL $15,000 on CRN ending 3513 and $5000 on 3515 making a total of $20,000.

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Judge EM Thomas
District Court Judge

Date of authentication: 04/03/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.