IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2020-019-006414
[2021] NZDC 16449

COMMERCE COMMISSION
Prosecutor

v

ND IMPORT AND EXPORT LIMITED
Defendant

Hearing:	10 August 2021
Appearances:	K Mills for the Prosecutor Mr Lei Sun for the Defendant
Judgment:	16 August 2021

RESERVED JUDGMENT OF JUDGE P G MABEY QC ON SENTENCING

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[1] The prosecutor brings six charges against the defendant under the Fair Trading Act 1986 (the Act). Three charges relate to the supply of toys and allege a breach of ss 30(1) and 40(1) of the Act. Three charges relate to the supply of hot water bottles and allege a breach of ss 31(5) and 40(1) of the Act.

[2] The defendant (ND) has pleaded guilty to the charges. On 10 August 2021 I heard submissions on penalty. The company was represented by its director and shareholder Lei Sun.

[3] Mr Sun had received Ms Mills written submissions and has had time to consider them. He has filed documents on behalf of ND.

[4] It became clear at the hearing that Mr Sun takes no issue with Ms Mills submissions on start point and penalty but raises ND's ability to pay and focused his submissions solely on that issue.

The charges – Toys

Guitar Toy

Between 9 August 2017 and 24 August 2019 at Hamilton and/or Te Awamutu and/or Wellington ND Import and Export Limited supplied goods, namely a battery operated pink guitar toy, that did not comply with the prescribed product safety standard for those goods.

The charge is particularised as:

- ND supplied nine units of the Guitar Toy through its retail shops.
- Small pieces of the Guitar Toy were liberated during tests designed to replicate reasonably foreseeable abuse. All of these components failed to comply with the small parts test stipulated by clauses 4.4.1 and 5.2 of the Australian/New Zealand Standard for children's toys (AS/NZS ISO 8124.1:2002) as adopted under the Product Safety Standards (Children's Toys) Regulations 2005, issued pursuant to section 29 of the Fair Trading Act 1986.
- In addition, the Guitar Toy did not comply with clause A.2.3 of the Standard in that (i) the cover to the battery compartment could be opened without the use of a tool and without using at least two independent movements simultaneously on the battery compartment and (ii) the batteries became accessible in testing under clause 5.24.2 of the Standard.

Stacking Toy

Between 21 March 2019 and 23 July 2019 at Hamilton ND Import and Export Limited supplied goods, namely a colourful stacking toy, that did not comply with the prescribed product safety standard for those goods.

The charge is particularised as:

- ND supplied 14 units of the Stacking Toy through its retail shops.

- Removeable components of the Stacking Toy failed to comply with the small parts test stipulated by clauses 4.4.1 and 5.2 of the Australian/New Zealand Standard for children's toys (AS/NZS ISO 8124.1:2002) as adopted under the Product Safety Standards (Children's Toys) Regulations 2005, issued pursuant to section 29 of the Fair Trading Act 1986.

Drum Set Toy

Between 8 November 2017 and 24 August 2019 at Hamilton and/or Te Awamutu and/or Wellington ND Import and Export Limited supplied goods, namely a "Frozen" Drum Set Toy, that did not comply with the prescribed product safety standard for those goods.

The charge is particularised as:

- ND supplied 10 units of the Drum Set Toy through its retail shops.

- Small pieces of the Drum Set Toy were liberated during tests designed to replicate reasonably foreseeable abuse. All of these components failed to comply with the small parts test stipulated by clauses 4.4.1 and 5.2 of the Australian/New Zealand Standard for children's toys (AS/NZS ISO 8124.1:2002) as adopted under the Product Safety Standards (Children's Toys) Regulations 2005, issued pursuant to section 29 of the Fair Trading Act 1986.

The charges – Hot Water Bottles

First Charge

On or around 21 August 2019 at Wellington ND Import and Export Limited supplied goods, namely a 500ml PVC hot water bottle, in respect of which there was a notice in force declaring the goods to be unsafe.

The charge is particularised as:

- ND supplied three units of the 500ml Hot Water Bottle through its retail shops.

- The 500ml Hot Water Bottle was an unsafe good because it did not comply with clause 4 of the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016.

- The 500ml Hot Water Bottle did not comply with clause 4(a) of the Notice because it did not meet the BS1970:2012 Hot water bottles manufactured from rubber and PVC – specification as amended by schedule 1, in that it a) breached clause 7 because it was not permanently marked with the markings prescribed in that clause; b) breached clauses 8.1 and 8.2 because the written instructions provided with the 500ml Hot Water Bottle deviated from or did not include the instructions prescribed in those clauses, and c) breached clause 9 because the packaging of the 500ml Hot Water Bottle was not printed with the plastic bag warning prescribed in that clause.

- The 500ml Hot Water Bottle also failed to comply with clause 4(b) of the Notice, because ND did not hold the documents required by schedule 2 of the Notice. The test certificate provided by ND did not relate to the 500ml Hot Water Bottle, and nor did it state the full test results and all relevant tests for the 500ml Hot Water Bottle's construction and closure type had been met as per the Standard as modified by schedule 1 of the Notice.

Second Charge

Between 20 August 2019 and 24 August 2019 at Hamilton and Wellington ND Import and Export Limited supplied goods, namely a 1L PVC hot water bottle, in respect of which there was a notice in force declaring the goods to be unsafe.

The charge is particularised as:

- ND supplied seven units of the 1L Hot Water Bottle through its retail shops.

- The 1L Hot Water Bottle was an unsafe good because it did not comply with clause 4 of the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016.

- The 1L Hot Water Bottle did not comply with clause 4(a) of the Notice because it did not meet the BS1970:2012 Hot water bottles manufactured from rubber and PVS – specification as amended by schedule 1, in that it: a) breached clause 7 because it was not permanently marked with the markings required in that clause; b) breached clauses 8.1 and 8.2 because the written instructions provided with the 1L Hot Water Bottle deviated from or did not include the instructions prescribed in those clauses, and c) breached clause 9 because the packaging of the 1L Hot Water Bottle was not printed with the plastic bag warning prescribed in that clause.

- The 1L Hot Water Bottle also failed to comply with clause 4(b) of the Notice, because ND did not hold the documents required by schedule 2 of the Notice. The test certificate provided by ND did not relate to the 1L Hot Water Bottle, and nor did it state the full test results and that all relevant tests for the 1L Hot Water Bottle's construction and closure type had been met as per the Standard as modified by schedule 1 of the Notice.

Third Charge

On or around 15 June 2020 at Te Awamutu ND Import and Export Limited supplied goods, namely a 500ml PVC hot water bottle, in respect of which there was a notice in force declaring the goods to be unsafe.

The charge is particularised as:

- ND supplied three units of the 500ml Hot Water Bottle through its retail shops.
- The 500ml Hot Water Bottle was an unsafe good because it did not comply with clause 4 of the Unsafe Goods (Hot Water Bottles) Permanent Prohibition Notice 2016.
- The 500ml Hot Water Bottle did not comply with clause 4(a) of the Notice because it did not meet the BS1970:2012 Hot water bottles manufactured from rubber and PVC – specification as amended by schedule 1, in that it: a) breached clause 7 because it was not permanently marked with the markings prescribed in that clause; b) breached clauses 8.1 and 8.2 because the written instructions provided with the 500ml Hot Water Bottle deviated from or did not include the instructions prescribed in those clauses, and c) breached clause 9 because the packaging of the 500ml Hot Water Bottle was not printed with the plastic bag warning prescribed in that clause.
- The 500ml Hot Water Bottle also failed to comply with clause 4(b) of the Notice, because ND did not hold the documents required by schedule 2 of the Notice. The test certificate provided by ND did not relate to the 500ml Hot Water Bottle, and nor did it state the full test results and all relevant tests for the 500mol Hot Water Bottle's construction and closure type had been met as per the Standard as modified by schedule 1 of the Notice.

The facts

[5] In total the company supplied 33 toys across three different product lines and 13 hot water bottles.

[6] Pursuant to s 30(1) of the Act, if a mandatory product safety standard applies a person must not supply goods unless that product complies with the relevant safety standard.

[7] Pursuant to s 31(5) of the Act, if there is in force a notice declaring goods to be unsafe a person must not supply those goods.

[8] The company sources goods from local wholesalers and imports goods predominantly from China for sale in its three retail outlets at Hamilton, Te Awamutu and Wellington. Within a wide product range are toys and household goods. The toys the subject of the charges are covered by the Product Safety Standards (Children's Toys) Regulations 2005 issued pursuant to s 29 of the Act. Toys subject to the regulations must meet the Australian/New Zealand Standard (AS/NZS ISO 8124.1:2002).

[9] The standard provides for testing designed to replicate reasonably foreseeable abuse of a toy in the hands of a child during which small parts may become liberated and present a choking or suffocating hazard.

[10] Any liberated small parts are subject to further testing by use of a small parts cylinder designed to replicate the throat of a child. That testing determines if the liberated parts do present a choking and/or suffocating hazard.

[11] The unsafe goods (hot water bottles) permanent prohibition notice 2016 was issued by the Minister of Consumer Affairs under s 35(1) of the Act. The notice applies to rubber and PVC hot water bottles supplied, offered for supply or advertised for supply.

[12] The notice declares rubber and PVC hot water bottles are unsafe if they do not meet the hot water bottles manufactured from rubber and PVC specification (BS1970:2012) or if documents required to be issued in respect of the hot water bottles had not been issued or are not held by the supplier or importer.

[13] The standard provides for various tests to reach a minimum specification for safety of hot water bottles and thus prevent injuries to users. The relevant part of this standard relates to performance, marketing, informative labelling and packaging.

[14] The certificate certifying compliance with the standard must be dated no more than 36 months prior to the date of import, clearly identify the product including make, model, material, capacity closure type and photograph identification of the item with details of the date of testing and the results of that testing.

[15] ND has been subject to previous attention from the prosecutor and Mr Lei Sun has had the company's obligations under the Act explained to him.

[16] The current investigation was commenced as a result of a complaint concerning one of the toys which was being sold online. Inspections were subsequently carried out and which involved testing. As a result the charges were laid. The breaches of the regulations and standards are detailed in the particulars of each charge.

[17] ND has been partially co-operative with the prosecutor during the investigation by removing all items from sale but it was subsequently found that the Te Awamutu store continued to stock the water bottle. This was explained as an inventory oversight.

[18] When interviewed Mr Lei Sun acknowledged prior advice as to his company's obligations. He said that he relied upon the importer of the water bottles as to their safety and that ND could not afford to test the toys itself. He carried out some personal testing of toys by dropping them. If they broke they were removed from sale.

[19] The company had instituted no formal compliance programmes and explained that continued availability of one of the toys subject to a recall notice was also an administrative mistake.

Counsel's submissions

[20] Ms Mills referred to the relevant factors detailed by the High Court in *Commerce Commission v LD Nathan & Co*[1] recently reaffirmed by the Court of Appeal in *Commerce Commission v Steel and Tube Holdings*.[2] She addressed those factors noting that the Act was designed to facilitate consumer welfare and effective competition through fair trading practice. It provides minimum standards of product safety and is particularly designed to protect vulnerable consumers including children

[1] *Commerce Commission v LD Nathan & Co* [1990] 2 NZLR 160.
[2] *Commerce Commission v Steel and Tube Holdings* [2020] NZCA 549.

aged 36 months and under. They are at risk of serious injury or death from unsafe toys of the type subject of these charges and penalties should reflect that serious risk.

[21] She submitted that the toys and hot water bottles when tested showed a significant departure from the applicable standard and that in the prosecutor's view the company was highly careless in its conduct despite previous explanation of the Acts requirements.

[22] She submitted that in relation to one of the toys and one of the varieties of hot water bottle the company was beyond careless and was in fact reckless.

[23] She noted that the offending was over approximately three years with 33 toys and 13 hot water bottles supplied. Each sale carried with it risk of potential harm to consumers and was in breach of the standards expressly directed to prevent injury to young children in relation to the toys and consumers generally in relation to the hot water bottle.

[24] She correctly submitted that the dominant purpose in sentencing is specific and general deterrence beyond what may be seen as a licencing fee. She referred to *Commerce Commission v 2 Boys Trading Limited*[3] and *Commerce Commission v 123 Mart Limited.*[4] In the latter case the Judge observed that there was an expectation that larger commercial entities should apply the appropriate resources directed at developing a robust compliance regime.

[25] Ms Mills acknowledged that ND is of moderate size but nonetheless was well equipped to implement an inhouse robust compliance regime but did not do so.

[26] As to start point she refers to a variety of cases[5] and notes that some of those authorities were decided prior to the increased maximum penalty from $200,000 to

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[3] *Commerce Commission v 2 Boys Trading Limited* [2019] NZDC 22557.
[4] *Commerce Commission v 123 Mart Limited* [2017] NZDC 23286.
[5] *Commerce Commission v AHL Co Limited* [2018] NZDC 27400; *Commerce Commission v Ebenezer* [2019] NZDC 3795; *Commerce Commission v 1980 Trust* DC Manukau CRI-2017-092-1409, 29 March 2018; *Commerce Commission v Baby City Retail Investments Limited* [2017] NZDC 885; *Commerce Commission v Brand Developers Limited* [2015] NZDC 21374.

$600,000 for companies on 17 June 2014. She submitted an appropriate adjustment was needed to reflect that increase.

[27] By reference to the facts of this case and the sentencing comparators she submitted that for the toys a start point in the range of $40,000 - $45,000 is appropriate. For the water bottles a start point of $25,000 is appropriate and on application of the totality principle she contends for a start point in the range of $55,000 - $60,000.

[28] She acknowledges up to 10% for co-operation with the commission and a full discount of 25% for the guilty pleas entered. In her assessment that would result in an end fine of $35,750 - $39,000.

[29] I accept Ms Mills submission which accurately reflects her analysis of the facts and application of sentencing precedent. A fine in the region of $35,000 - $40,000 would serve to satisfy relevant sentencing principles and in the context of a modest sized company of limited profitability would amount to more than a licencing fee.

Ability to pay

[30] As noted, Mr Lei Sun focused his submissions on this issue. He said the company cannot afford to meet such a fine but acknowledged that a fine at some level must be imposed. He did not nominate the extent to which the proposed fine should be reduced and left that to me to determine.

[31] In *Commerce Commission v Manufacturers – Marketing Limited*[6] I provided a detailed analysis of the law relating to the imposition of fines relative to the ability to pay.

[32] The start point is s 40 of the Sentencing Act 2002 which provides:

> **40 Determining amount of fine**
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> (1) In determining the amount of a fine, the court must take into account, in addition to the provisions of sections 7 to 10, the financial capacity of the offender.

[6] *Commerce Commission v Manufacturers – Marketing Limited* [2018] NZDC 7913.

(2) Subsection (1) applies whether taking into account the financial capacity of the offender has the effect of increasing or reducing the amount of the fine.

(3) If under an enactment an offender is liable to a fine of a specified amount, the offender may be sentenced to pay a fine of any less amount, unless a minimum fine is expressly provided for by that enactment.

(4) Subsection (4A) applies if a court imposes a fine—

(a) in addition to a sentence of reparation; or

(b) on an offender who is subject to an earlier sentence or order of reparation.

(4A) In fixing the amount of the fine, the court must take into account—

(a) the amount of reparation payable; and

(b) that any payments received from the offender must be applied in the order of priority set out in sections 86E to 86G of the Summary Proceedings Act 1957.

(5) When considering the financial capacity of the offender under subsection (1), the court must not take into account that the offender is required to pay a levy under section 105B.

[33] A fine must be within the capacity of an offender to pay and financial hardship may be mitigated by an extended time over which the payment can be made. The English Authority of *R v Rollco Screw and Rivet Co Limited*[7] noted the distinction between a public corporation and a private company. In the case of the latter, the company is effectively an embodiment of the individuals that own it. Private companies are often family owned and it is the family that will bear the brunt of any penalty as it is their pockets that will be directly affected rather than the more remote impact upon shareholders in a large commercial enterprise.

[34] The reality is the impact of a financial penalty in the case of a family company such as ND any financial penalty would be the same as if the individual family members were themselves being sentenced.

[35] It is against that background that I must consider Mr Lei Sun's submissions on ability to pay.

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[7] *R v Rollco Screw and Rivet Co Limited* [1999] 2 CR APP R(S) 436.

[36] He has provided financial accounts for the years ended 31 March 2019 and 31 March 2020. He says that the accounts to 31 March 2021 have not yet been prepared but the turnover is about 20% less than for previous years. He put that down to the impact of the COVID-19 lockdown but I am not satisfied that is the case.

[37] Mr Lei Sun explained that he has closed the Wellington store, operated at Petone, as the rent was too high. The store has been relocated to Upper Hutt at a considerable rent reduction of around $300,000.

[38] The Petone store accounted for the lions share of the turnover of the group but there was a four month hiatus between closing the Petone store and opening at Upper Hutt. In addition there was a sale in the nature of a closing down sale at considerably reduced prices and that has impacted upon the top line.

[39] Contrary to what Mr Lei Sun submitted the accounts do not paint a picture of financial hardship or inability to pay. Indeed, now that the Upper Hutt store is up and running the considerable reduction in rent coupled with the fact that the lease in Upper Hutt is a gross lease, thus reducing rates insurance payments which applied under the Petone lease, will in fact enhance the company's ability to pay.

[40] The accounts to 31 March 2019 show a net trading profit of $8,171 but the balance sheet shows current account bank balances of approximately $80,000 and stock on hand exceeding $1 million. In addition there are accounts receivable of approximately $70,000. The balance sheet also shows a business bank loan of approximately $100,000.

[41] The accounts to 31 March 2020 show a net trading loss of approximately $24,000 but a reduction of the business loan balance of $25,000. The current account balance has increased to approximately $112,000 and stock on hand continues to exceed $1 million.

[42] The year ended 31 March 2021 for which accounts are in progress was not a full trading year due to events to do with the closure of the Petone store. The reduced turnover in that financial year is explained by that but in a full trading year the turnover

across the three shops (now including Upper Hutt which replaced Petone) can realistically be expected to reach previous levels and the substantial reduction in overheads will have a beneficial impact upon profitability.

[43] When questioned as to the state of the business loan which is shown in the March 2020 accounts at $75,000, Mr Lei Sun said it had now been fully repaid.

[44] My assessment of the accounts is that whilst the business is modest it has real potential for profit now that the overheads have been addressed and that, in any event, the ability to repay a $100,000 business loan over a two year period demonstrates access to capital despite modest or negative profitability. Now the business loan has been fully repaid, and that business overheads have been severely reduced the future is not as bleak as Mr Lei Sun would have it.

[45] The end result is that I do not consider there is any basis to reduce the proposed fines for reasons of financial hardship. A fine between $35,000 and $40,000 can be readily paid from income in the same way that the business loan had been repaid.

Result

[46] The company is fined $36,000. That fine is imposed across the charges at $6,000 each.

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Judge PG Mabey QC
District Court Judge

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