IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-004518
[2017] NZDC 23286

COMMERCE COMMISSION
Prosecutor

v

THE 123 MART LIMITED
Defendant

Hearing: 13 October 2017

Appearances: S Lowery for the Prosecutor
No appearance for the Defendant

Judgment: 13 October 2017

NOTES OF JUDGE R G RONAYNE ON SENTENCING

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[1] The 123 Mart Limited is for sentence today. I first remark that this matter proceeded with the defendant being The 123 Mart Limited, but it is now in liquidation, having been placed into liquidation only very recently and subsequent to the delivery of my reserved decision on 7 July 2017. In that decision I found the defendant guilty of 17 offences.

[2] Additionally, at the beginning trial the defendant entered guilty pleas to one representative charge of selling children's clothing with no fire hazard label and four charges of selling children's clothing with inadequate product information labelling.

[3] I note that while there were 17 offences before the Court there is some repetition in those to reflect various time periods which themselves reflect increases in the statutory maximum penalties available.

[4] The Fair Trading Act 1986 requires compliance with product safety. Section 30 of the Fair Trading Act provides as follows:

> **30 Compliance with product safety standards**
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> (1) If a product safety standard in respect of goods relates to a matter specified in section 29(1), a person must not supply, or offer to supply, or advertise to supply those goods unless that person complies with that product safety standard.
>
> (2) If 2 or more product safety standards in respect of goods relate to a matter specified in section 29(1), a person must not supply, or offer to supply, or advertise to supply those goods unless that person complies with one of those product safety standards.
>
> (3) Nothing in subsection (1) or subsection (2) applies to goods that are intended for use outside New Zealand if there is applied to the goods—
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> (a) a statement that the goods are for export only; or
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> (b) a statement indicating, by the use of words authorised by regulations made under this section, that the goods are intended to be used outside New Zealand,—
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> and it must be presumed for the purposes of this section, unless the contrary is established, that the goods so identified are intended to be so used.
>
> (4) For the purposes of subsection (3), a statement is deemed to be applied to goods if the statement is—
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> (a) woven in, impressed on, worked into, or annexed or affixed to the goods; or
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> (b) applied to a covering, label, reel, or thing in or with which the goods are supplied.

[5] Regulations promulgated under the Fair Trading Act include the Product Safety Standards (Children's Toys) Regulations 2005, which I will refer to as the regulations. Although the regulations do not in themselves include product safety standards they incorporate, by reference, an Australian/New Zealand standard and they make it clear that inappropriate age labelling results in the most stringent standards applying. That relevant Australian/New Zealand standard which resulted from very wide consultation was, or certainly should have been, very familiar to the defendant.

[6] Represented on the joint technical committee that worked on the creation of the regulations were such organisations as the Australian Chamber of Commerce, the Australian Retailers Association and the Commerce Commission of New Zealand. Also on the committee were the New Zealand Ministry of Health and the New Zealand Toy Distributors Association. That the defendant should have been familiar with the regulations is all the more so in light of the warnings contained in two letters to which I will refer shortly.

[7] I found that the relevant regulations do apply to the toys in question. In light of that finding the toys had to pass, for the purposes of this case, properly conducted tests. Contrary to the position adopted by the defendant I found that the tests were properly conducted and the toys failed in ways that I will come to.

[8] But first I need to outline some relevant background of the defendant.

[9] The defendant, during the charge period, owned and operated approximately 60 retail stores throughout New Zealand with a $22 million annual turnover and a very large number of product lines.

[10] Three investigations have been carried out.

[11] The first investigation in 2012-2013 involved the Commission making a test purchase of three types of toys, including the baby rattle. The toys were tested for compliance with the regulations. It was concluded that the baby rattle and two other toys did not comply with the small parts test.

[12] On 28 August 2012, the Commission sent a letter to the defendant advising that the baby rattle and the other two toys did not comply with the regulations. Receipt of that letter was acknowledged. The letter was followed up with a phone call from a Commission investigator. An employee of the defendant asked if the defendant could re-label non-compliant toys as not being suitable for children under three years of age. It was explained to the defendant that if a toy was one to which the product safety standard (adopted under the toy regulations) applied, then it had to comply with the product safety standard and that labelling it as being unsuitable for

children under the age of three years did not negate the need for it to comply. The baby rattle was given as an example of such a toy. That position appeared to be understood by the employee.

[13] In March 2013, the Commission sent the defendant a formal warning letter advising that seven toys did not comply with the toy regulations. The baby rattle was one of those toys. The letter said in part:

> … initiate checks of any toys that you supply to ensure those covered by the standard meet the requirements of it. You are also advised that when making future orders that you advise manufacturers and distributors that the toys must meet the standard and that warning labels will not remove this requirement.

[14] The 2015 investigation identified toys offered for sale by the defendant which had small parts that were choking hazards. The toys were the trumpet, the magnetic alphabet, the house set and the snake. The result was that various charges were laid on 4 May 2016.

[15] The following sales were admitted:

(i) From 1 April 2013 to 7 May 2015, 187 baby rattles were sold.

(ii) From 1 April 2013 to 12 October 2015, 3,111 magnetic alphabets were sold.

(iii) From 1 April 2013 to 10 October 2015, 890 house sets were sold.

(iv) From 30 January 2014 to 9 October 2015, 431 snakes were sold.

(v) From 6 January 2015 to 2 June 2016, approximately 913 Dream House sets were sold.

(vi) From 5 June 2014 to 21 June 206, approximately 2,225 Fairy Dolls were sold.

(vii) From 5 October 2015 to 8 June 2016, approximately 1,210 Beaut Dolls sets were sold.

[16] After test purchases were made by the Commission at the defendant's Christchurch store on 7 May 2015, telephone and email contact was made by the Commission with the defendant. The defendant then offered, in an email dated 8 May 2015, an explanation as to how the Christchurch store had come to sell the baby rattles in the following terms:

> We just confirmed this item also has been issued from Commerce Commission few years ago so we disposed the items straight away as soon as we were issued. However, our new shop manager at Maxout store in Christchurch have found these at the deepest side of storage and displayed it. After the investigation from the system, only Maxout store was involved in this matter so I informed our area manager James to dispose it immediately.

The above explanation was untrue. There had been regular sales of the baby rattle at stores other than the Christchurch store subsequent to a warning letter sent on 25 March 2013.

[17] The 2016 investigation revealed that the defendant had continued to supply and offer to supply toys that, in the Commission's view, breached the regulations. A further 10 additional charges (including some charges relating to clothing labelling in respect of which guilty pleas have been entered) were laid on 11 August 2016. The relevant charges relate to the Dream House sets, the Fairy Doll, the Musical Band set, Beaut Dolls set and some clothing.

[18] By reference to the toys and the charges the specific facts are these. For all of the toys some were intended for use by children over the age of three years, but all were intended for use by children under the age of 36 months. These findings resulted from the thoughtful, careful, logical approach of Ms Vincent who demonstrated in a consistent and thorough way how the objective test established by the High Court in the *Commerce Commission v Myriad Marketing Limited.*[1] should be applied. In my view her approach could well provide a template or at least

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[1] *Commerce Commission v Myriad Marketing Limited* [2001] BCL 731.

helpful guidance for the future. It is of note that some toys failed and others passed her assessment. She approached the matter as any objective expert should.

[19] The following are the results of product testing.

(i) *Baby Rattle*

The properly conducted drop test resulted in two yellow hearts detaching. Those fitted within the Small Parts Container ("SPC"). Thus the baby rattle failed the "reasonably foreseeable abuse tests".

(ii) *Magnetic Alphabet*

Fifteen pieces of this alphabet set fitted within the SPC. It thus failed the "small parts test".

(iii) *World of Toys House Set*

Nine separate pieces within this toy fitted into the SPC. It thus failed the small parts test. Three doors and a small shard of plastic detached in the drop test. All of those items fitted within the SPC. It thus failed the "reasonably foreseeable abuse tests".

(iv) *Snake*

One piece of this toy which could be assembled or dismantled fitted within the SPC. It thus failed the small parts test.

(v) *Dream House Set*

This comprised two different iterations of the toy. One with a mirror and coat hangers and eight pieces that fitted within the SPC and thus failed the small parts test. The other with a chair and bureau had five pieces which fitted within the SPC and thus failed the small parts test.

(vi) *Fairy Doll*

In its complete form and as tested by Mr Wheeler, this did not fail the small parts test. However, shoes were easily detachable from the doll. Those fitted within the SPC and thus failed the small parts test.

(vii) *Beaut Dolls*

In its complete form and as tested by Mr Wheeler, this did not fail the small parts test. However, shoes were easily detachable from the doll. Those fitted within the SPC and thus failed the small parts test.

[20] Additionally at the commencement of trial the defendant pleaded guilty to one charge that it supplied 1205 units of children's nightwear that did not have the prescribed fire danger labels.

[21] Also at the commencement of the trial the defendant pleaded guilty to four charges that it supplied 11,442 units of four different items of clothing that failed to comply with labelling requirements for information regarding care, origin and content.

[22] The Commission submitted starting points of:

- For the toy breaches a range of $250,000-$280,000 which incorporates an adjustment for totality.

- For the fire labelling breaches a range of $70,000-$90,000.

- For the consumer information breaches approximately $20,000.

[23] The defendant had not made any submissions or made any appearance on this sentencing. A day or two ago I granted Mr Lloyd, who was counsel for the defendant at the trial, leave to withdraw. That was done because Mr Lloyd sought leave to withdraw because the defendant company was placed into liquidation on 25 September 2017. Mr Lloyd has not been able to obtain any instructions from the

liquidators to appear. In all the circumstances it was entirely appropriate that he be given leave to withdraw. I do comment, however, that Mr Lloyd challenged in every way reasonably possible the case for the prosecutor, ultimately unsuccessfully at trial.

[24] The prosecutor has, since the defendant was placed in liquidation, written to the liquidator in an informative and detailed letter setting out the prosecutor's position and also indicating to the liquidator the level of fine sought by the prosecutor in this sentencing process. The prosecutor requested consent pursuant to s 248(1)(c)(i) Companies Act 1993 to continue with this case. In light of the prosecutor's position the liquidators have given consent to the continuation of this prosecution.

[25] The Sentencing Act 2002 is the framework within which any sentence is to be assessed. Additionally the High Court in the *Commerce Commission v L D Nathan & Co Ltd.*[2] has explained factors to be taken into account. In this case these factors arise:

(i) The degree of wilfulness or carelessness involved:

(a) With respect to all of the toys apart from the baby rattle the defendant was reckless. In August 2012 the Commission advised the defendant that its toys were subject to the toy regulations. Its continued supply was thus reckless.

(b) The defendant was highly reckless in its supply of the non-compliant toys subject to the third (2016) investigation. The defendant continued to supply and offer to supply these non-compliant toys even after it had been charged in May 2016 in relation to non-compliant toys identified in the Commission's 2015 investigation.

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

(c) I take the view that the risks taken with regard to the rattle were quite deliberate. I see this as a serious aggravating feature because, despite a clear warning, not only was nothing done, but sales continued and the Commerce Commission was lied to to cover up the ongoing sales.

(d) The fire labelling may have been at least initially careless, but this was not a case of inaccurate labelling. There were no labels. That in itself must have been self-evident to anyone and is evidence of the taking of a risk. It also indicates a lack of quality control on the part of the defendant. Even when charged, labels that were then added were non-compliant.

(e) There was carelessness in the product information breaches.

(ii) Importance of failures to comply: Choking hazards in this case exposed young children to the risk of injury or even death. The same can be said for fire labelling breached. It is particularly important that where babies and children are concerned product safety standards are complied with. The regulations are designed in part to protect against choking hazards. That risk for children under the age of 36 months is completely self-evident. Fire labelling is similarly and self-evidently very important for children's clothing.

(iii) Duration of the offending: This was considerable. The toy breaches occurred over a three year two month period. The fire labelling breaches occurred over a one year one month period. The consumer information breaches occurred over a two year three month period. It is noteworthy that no New Zealand product safety case has involved a longer period of offending.

(iv) The number of non-compliant products: The 123 Mart supplied and offered to supply 12 separate products that failed to comply with the

relevant product safety and consumer information standards. More than 21,614 units were supplied of those 12 products during the charge period.

(v) Degree of dissemination which is allied to the number of noncompliant products: The non-compliant products were supplied nationwide. The breakdown of that figure is: toy breaches 8967 units supplied; fire labelling breaches 1205 units supplied; consumer information breaches 11,442 units supplied.

(vi) Resulting prejudice to consumers: While the prosecutor is unaware of any actual harm occasioned the risk of exposure from this sort of dissemination is self-evidently high. The lack of harm is not the measure, because that is in my view fortuitous.

(vii) The need to impose a deterrent sentence: Prior to the liquidation of the company both specific and general deterrence were in my view required. The effect of general deterrence is self-evident, but it also ensures that traders are on an even commercial playing field and offenders are deterred from profiting from breaches. Put another way, any penalty has to be such that it is not seen as merely a licensing fee for offending. Were it not for the fact that this defendant has gone into liquidation specific deterrence was most certainly required. The defendant was twice warned and even after prosecution commenced it continued to offend and lied as a cover up. In my view its behaviour had been cavalier and brazen. For example, the defendant continued to supply the baby rattle for two years nine months after the Commission warned the company that it did not comply with the toy regulations and it should not be sold. The defendant continued to supply children's sleepwear with labelling in breach of the fire danger labelling regulations even after the Commission charged the company in relation to the lack of labelling on the same product.

(viii) Size of the company: At least in so far as the trading period is concerned the defendant was a sizeable company, owning and operating approximately 60 retail stores across New Zealand during the charge period. It employed 120 to 150 employees and operated across more than 10,000 product lines. In the financial year ending 31 March 2015 the defendant's gross annual turnover was $22 million. Therefore by any measure it was a large retailer. If it is to operate at such a size it should apply the appropriate resources and there is no suggestion that at least at that time it lacked resources and therefore it should have had a robust compliance regime.

Starting Points:

[26] I take into account Parliament's clearly expressed intention in raising penalties. In my view under the earlier penalty regime a starting point overall of $200,000 would have been justified.

[27] The approach to the three-fold increase in penalties from a maximum of $200,000 to a maximum of $600,000 has already been the subject of comment in three cases *Budge*[3] and *Ace Marketing*[4] and *Smartshop.*[5] I consider that there is logic in the approach suggested by the prosecutor in submissions. Namely that it would be appropriate to approximately double 60 percent of the likely starting point under the previous penalty regime, because that is the approximate percentage of toy breaches committed once the penalty had increased. In my view this approach suggested by the prosecutor and which I adopt, illustrates a measured approach that is not simply arithmetical.

[28] I therefore take an overall starting point of $330,000 for the toy breaches and I adjust that down to $280,000 to take into account the totality of this offending.

[29] Now I need to comment on the starting point as compared to the penalties imposed in some earlier cases such as *Southern Gold*[6] ($12,000),

[3] *Commerce Commission v Budge Collections Ltd and Sun Dong Kim* [2016] NZDC 15542 at [38].
[4] *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165 at [12].
[5] *Commerce Commission v Smartshop Ltd* [2016] NZDC 19377 at [64].
[6] *Southern Gold.*

Commerce Commission v Coles Myer New Zealand Holdings[7] ($5000) and *Commerce Commission v L D Nathan & Co Ltd*[8] ($8000).

[30] The defendant supplied much larger numbers of non-compliant products. Almost 9000 non-compliant toys were supplied. Those posed choking hazard or puncture hazards. In contrast, the *Southern Gold* prosecution proceeded on the basis of two sample toys, *Coles Myer* involved the sale of approximately 92 non-compliant items and *L D Nathan* involved the sale of 276. The defendant also supplied a wider range of non-compliant product lines (seven). The large number of non-compliant products indicates that the defendant had no effective compliance programme in place. Mr Choy, for the defendant company, accepted that, in an affidavit provided for an earlier sentence indication request. The defendant's offending occurred over a period of more than three years whereas the *Southern Gold, Coles Myer* and *L D Nathan* decisions do not detail prolonged offending. The *Southern Gold, Coles Myer* and *L D Nathan* offending stopped once the companies were advised of the relevant problem. Here, the defendant continued to supply non-compliant products even after being warned and charged. The defendant was a large, sophisticated business at the relevant time and, therefore, can be expected to have had a robust compliance procedure in place. The *Southern Gold, Coles Myer* and *L D Nathan* decisions involved lower maximum penalties. Also at that time, the Fair Trading Act was newer. The *L D Nathan* sentencing was the first imposed under the Fair Trading Act. It is fair to say that the sentencing climate has now changed almost 30 years on.

[31] I then deduct from the notional sum of $280,000 10 percent for co-operation, steps to recall product and prior good record. That reduces the penalty to $252,000.

[32] Turning to the starting point for the fire label breaches I adopt a starting point of $80,000. This in my view adequately compares to the case of *Commerce Commission v Baby City Retail Investments Ltd.*[9] I reduce that starting point by 10 percent for co-operation, which reduces the notional penalty to $72,000

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[7] *Commerce Commission v Coles Myer New Zealand Holdings Ltd.*
[8] Commerce Commission v *L D Nathan & Co Ltd.*
[9] *Commerce Commission v Baby City Retail Investments Ltd* [2017] NZDC 885.

and I reduce it by a further 5 percent for the guilty plea at trial, which is rounded at $4000. Thus the end penalty for the fire label breaches is $68,000.

[33] As to the starting point for the product information offending, I take a starting point of $20,000. I deduct 10 percent for co-operation and then 5 percent for a guilty plea at trial, which results in an end penalty of $17,000.

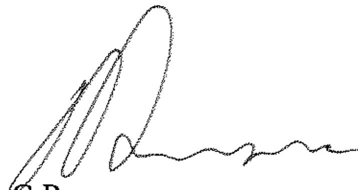
[34] The end result then is for the toy breaches a fine of $252,000. For the fire labelling breaches a global fine of $68,000. For the product information offending $17,000. Coming to a grand total of $337,000.

[35] I note s 41 Sentencing Act and in all the circumstances of this case I do not consider that a declaration as to financial means is necessary. It is appropriate in all the circumstances that the fines be imposed. I do not know whether there is going to eventually be any ability to pay, but it is appropriate to send the right message in this case.

[36] The breakdown of the fines by charge is as follows:

Charges	Date	Fines
CRN-16004502258	1/4/13 to 30/6/13	$10,280
CRN-16004502259	1/4/13 to 30/6/13	$10,280
CRN-16004502260	1/4/13 to 30/6/13	$18,000
CRN-16004502265	1/4/13 to 30/6/13	$10,280
CRN-16004502266	1/7/13 to 16/6/14	$10,280
CRN-16004502267	17/6/14 to 8/5/15	$18,000
CRN-16004502268	9/5/15 to 12/10/15	$18,000
CRN-16004502269	1/4/13 to 30/6/13	$10,280
CRN-16004502270	1/7/13 to 16/6/14	$10,280
CRN-16004502271	17/6/14 to 8/5/15	$18,000
CRN-16004502272	9/5/15 to 10/10/15	$18,000
CRN-16004502273	30/1/14 to 16/6/14	$10,280
CRN-16004502274	17/6/14 to 8/5/15	$18,000
CRN-16004502275	9/5/15 to 9/10/15	$18,000
CRN-16004503698	6/1/15 to 2/6/16	$18,000

CRN-16004503700	5/6/14 to 21/6/16	$18,000
CRN-16004503701	5/10/15 to 8/6/16	$18,000
CRN-16004503703		$68,000
CNR-16004503704		$4,250
CNR-16004503705		$4,250
CRN-16004503706		$4,250
CRN-16004503707		$4,250



R G Ronayne
District Court Judge