IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-003522
[2020] NZDC 895

COMMERCE COMMISSION
Prosecutor

v

CONTAINER DOOR LIMITED
Defendant

Date of Ruling: 20 January 2020

Appearances: N Flanagan and D Taylor for the Prosecutor
B Keown for the Defendant

Judgment: 20 January 2020

RULING OF JUDGE D J SHARP
[ON S 106 APPLICATION and NOTES UPON SENTENCE]

---

[1] The defendant company is for sentence on two representative charges under s 30(1) Fair Trading Act 1986. These relate to bicycles which did not comply with the applicable product's safety standard.

[2] The charges related to bicycles known as Huffy Cruiser bicycles. The period of offending was between 1 April and 23 November 2017. The bicycles lacked a front brake. Also, they were not accompanied by the required information on the cycle, or the packaging which accompanied the cycle.

[3] The maximum penalty under s 40(1) Fair Trading Act is $600,000 on each offence.

[4] Container Door Limited has applied for a discharge under s 106 Sentencing Act 2002. The discharge application is opposed by the Commerce Commission.

[5] The following purposes and principles of sentencing are required to be considered in the course of the sentencing. I must consider denunciation and deterrence.

[6] There is a difference between the stance of the defendant and of the Commerce Commission with regard to the requirement for deterrence. It is accepted by the Commerce Commission that there has been a degree of accountability on the part of the defendant company, it is accepted there is a lesser degree of specific deterrence that is required, given the company's stance and its attitude as far as the offending has been concerned.

[7] The Commerce Commission does submit that general deterrence is a significant factor in relation to this case. The reason for this is that the public are entitled to be protected, and product safety is an important area that the Courts are required to uphold.

[8] Because commercial penalties are seen as effective in relation to commercial matters, the efficacy of deterrence sentencing in terms of the market being aware that the requirement for compliance with product safety is serious and will be upheld with supporting fines, is a factor the Commerce Commission say is significant as far as sentencing is concerned.

[9] There is a suggestion from the defendant company that, although the maximum penalty for such offences was trebled, that that was not an indication that Parliament was placing a great deal of stress upon deterrence, given the presence of compliance regimes and other means that could be applied in relation to breaches of the Act.

[10] The defendant's position is that specific deterrence is not required and that there should be less emphasis on general deterrence than was suggested by the Commerce Commission. The defence say that the enforced undertakings that can be

applied is an example of non-punitive measures to support the compliance regime that is called for.

[11] The Sentencing Act, says that I must take deterrence and denunciation into account in terms of sentencing, and the Sentencing Act also requires that I examine the offending for consideration of gravity.

[12] I need to temper any emphasise on denunciation and deterrence with the requirement:

(a) To treat the defendant, as far as is possible, consistently with other persons who have offended in a like way;

(b) Further, that I am required to impose the least restrictive outcome that is consistent with the purposes and principles of sentencing.

[13] The decision of *Commerce Commission v L D Nathan & Co Ltd*, with its similarities to ss 7 to 9 Sentencing Act 2002, also provides guidance in respect of sentencing.[1]

[14] For the purposes of this sentence, and for consideration of the application under s 106 (and the application of the test which is set out in s 107 Sentencing Act) culpability must be assessed.

[15] The Fair Trading Act is designed to facilitate consumer welfare and to create a position where there is effective competition. Product safety and minimum standards are required to be upheld. This is to avoid consumers being exposed to known risks. Here, the limitation of potential physical harm to cyclists is the objective. Cyclists are vulnerable. To supply bicycles that do not comply with safety standards is something that I regard as serious.

[16] Consumers may not recognise the extent of the risk that those who set the safety standards have endeavoured to protect people from. Individuals who are

---

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

uninformed or, on a reckless basis, may take known risks. It provides little comfort to someone who has been badly hurt, or their families if they are killed, to say that they chose not to have benefit of a recognised additional safety factor in a front brake. Such might potentially have made the difference in terms of the circumstances of an injury or worse.

[17] The provision of general safety standards is something that must be upheld. Further, the standard is accessible through the website made available by the Commerce Commission. The defendant makes the point that a fee is necessary for consideration of this and, further, that although the bicycles in question here had no front brake, there was a rear brake.

[18] The defendant's conduct needs to be assessed for what category it fell into. The Commerce Commission says that the defendant was highly careless, and refers to Judge Mabey in *Commerce Commission v Manufacturers-Marketing Limited.*[2]

> "Where a company has no knowledge of the product safety standard that applied, such a breach is not reckless but is nonetheless a significant departure from the standards imposed to achieve the objects of the Fair Trading Act".

[19] The Commerce Commission says the defendant company should have had a compliance regime in place, and the degree of carelessness here was high.

[20] The defence says culpability is low. It says that this was not deliberate conduct; that it was a situation in which the defendant company had imported bicycles for the first time; that these bicycle purchases were from a company that had a good reputation, namely Walmart; that company is a respected multinational; and that product safety in the United States is something that is a serious issue; that the defendant company was not a specialist involved in bicycle importations; and so that the company had through inadvertence found itself in a position where it did not comply with the New Zealand product safety standards.

[21] The defence say the defendant company accepted its responsibility to get this right, but that the culpability was at the low end of the spectrum. The defence

---

[2] *Commerce Commission v Manufacturers-Marketing Ltd* [2018] NZDC 7913 at [48].

emphasises that these acts related to only 14 customers; no harm has occurred to any individual customer; and that the company has had the costs of recovering the items, informing the people that had purchased them, legal costs, and other compliance costs associated with these proceedings.

[22] The response of the Commerce Commission is that the absence of harm does not detract from the offence; that the absence of harm was and is a matter of good fortune; that the risks that present in unsafe products are all present in relation to bicycles and the vulnerability of cyclists makes these breaches significant.

[23] The reference is made by the defence to *Commerce Commission v L D Nathan* where Greig J said that the punitive penalties imposed in fines should be reserved for the more culpable breaches of the Act.

[24] The Commerce Commission asked me to consider *Commerce Commission v Torpedo7 Limited*.[3] The conduct in that case was in relation to bicycles that lacked front brake and lacked product information. The missing information here was different from the information that was lacking in that case, but the lack of the information and the failure to have a front brake on a bicycle were regarded by District Court Judge Roberts as highly culpable. The failure to supply information as required was seen as compromising the consumer's ability to maintain and operate the bicycles in a safe condition.

[25] In the present case, the requirement to have a trained person assemble the bicycles was not noted on the bicycles or the packaging which accompanied it.

[26] The Commerce Commission make the point that every defective product made available carries with it the latent risk of harm to the consumers. Every supply of a defective product is said by the Commerce Commission to be a serious breach of the Fair Trading Act.

[27] In terms of importing products, there are six standards that relate to six different types of product, accordingly it cannot be said that the range and degree of

---

[3] *Commerce Commission v Torpedo7 Ltd* [2019] NZDC 23398 at [26].

information that is required to successfully comply with the duties of an importer are particularly onerous. The cost of visiting the Commerce Commission's website is $82. That is set against the potential risks of supplying products that do not meet the required safety standard. The compliance issue seems to pale into insignificance in contrast to the risk inherent in not providing a safe product.

[28] In *Commerce Commission v 2 Boys Trading Ltd*, it was accepted that product safety cases give rise to a strong need for general and specific deterrence.[4] The publicity of substantial penalties heighten the business community's awareness of the need to comply with product safety standards. As was stated in *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd.*[5]

[29] The Commerce Commission refers to the raising of the maximum penalties from $200,000 to $600,000 as showing Parliament's desire to make penalties adequate as sanctions against offending behaviour. The Commerce Commission complains that the frequency of small to medium sized businesses having no knowledge of product safety standards makes the requirement for general deterrence that much more important.

[30] Both the Commerce Commission and the defence have provided examples of cases said to support the propositions which they rely upon for the various starting points that have been suggested.

[31] The Commerce Commission relies upon *Commerce Commission and Torpedo7 Limited.* In that case there were two representative charges, breaches of s 30(1) Fair Trading Act in respect of non-complying bicycles sold. They were sold between 10 October and 17 November 2017. There were 53 bicycles supplied, together with an absence of the required information. A global starting point of $125,000 was adopted in that case.

---

[4] *Commerce Commission v 2 Boys Trading Ltd* [2019] NZDC 22557.
[5] *Australian Competition and Consumer Commission v Dimmeys Stores Pty Limited* [1999] FLA 1175.

[32] In *Commerce Commission v Coles Myers New Zealand Limited*, there were three non-compliant bicycles sold. Total fines of $25,000 were imposed. This was at a time when the maximum penalty relation to such offences was $100,000.

[33] Other cases involving non-compliant processes such as *Commerce Commission v Argyle Performance Workwear Ltd*, and *R v NZ Sale Ltd*, show a consistent approach of significant fines following product safety breaches.[6]

[34] The Commerce Commission says the range of starting points in this case should be from $80,000 to $100,000.

[35] Defence says this case is less serious than *Commerce Commission v Torpedo7 Limited.* The reason for this being that there are 14 bicycles in this case, as opposed to 53 in that case; that Torpedo7 Limited was in a position of not contacting some 18 consumers as to recall of the products, whereas the efforts made by this defendant were such that there was only customer who was not notified and recall indicated. Torpedo7 Limited were more involved with bicycle sales, better resourced, and better able to withstand adverse publicity.

[36] The defence says, reliant upon *Torpedo7* and also by reference to *Commerce Commission v AHL Co Ltd*, that a starting point of $27,500 would be sufficient to meet the purposes and principles of sentencing.[7]

[37] The reliance on the *AHL* case comes from the fact that a vast proportion of toy rattles that were likely to produce choking hazards were before the increase in penalties had taken place, but there were some 12 of the rattles sold in the period that was subsequent to the increase in penalties. The approach of the District Court Judge in that case was to uplift the first representative charge for the charges that arose after the increase in maximum penalty but, that said, it brought about total penalties with a starting point of $27,000.

---

[6] *Commerce Commission v Argyle Performance Workwear Ltd* [2018] NZDC 9443; and *R v NZ Sale Ltd* [2018] NZDC 20513.

[7] *Commerce Commission v AHL Co Ltd* [2018] NZDC 27400.

[38] Accordingly, the point is made on the behalf of the defendant company that where there is offending that spans the earlier period and the present, and that earlier offending was greatly more significant, it brought about the unusual situation of a lower sentence being imposed. This being driven by the greater offending impacting upon the uplift imposed for period in which the higher penalty applied.

[39] In this case all the offending relates to the period of greater fines. The defence point out that the number of non-complying bicycles is similar to the number of unsafe products found in *AHL* after the increase in maximum penalties.

[40] The circumstances of separate cases are not always easy to rationalise and sometimes the different situations do not allow for the same approach.

[41] The real question comes down to the distinctions which this case has between *Commerce Commission v Torpedo7 Ltd.* The primary concern here is with the public safety aspect, and the general deterrence that is required. It is not a case that specific deference is necessary as far as the defendant company is concerned, but the considerations around safety of consumers is a significant matter. Parliament's increase in the penalties to reflect the desire to see general deterrence seems to me to be manifest.

[42] I consider the conduct here was careless to a significant extent. One would have thought that an importer across such a wide range of goods would have been aware that there were six categories of goods that required product safety standards to be met. To rely on the standards from another country, to me, is not taking into account the fact that there are recognisable standards here that are designed to protect people. Those standards need to be upheld.

[43] Accordingly, when I consider the culpability of this case, it is at least moderately serious, and that is driven by the need to ensure product safety. This is well-known to be a factor that will otherwise draw significant penalties.

[44] I consider the appropriate starting point in this case to be $80,000.

[45] Turning to the company itself, no prior history is found for the company, but the company was only formed in 2015. The company was co-operative with the Commerce Commission. The company also did everything that it could reasonably be asked in relation to recall of the goods, and can rightly submit that it is a good corporate member of society.

[46] The position is that the company allows for a discount in relation to any penalty. It is also entitled to a discount for plea. All of those calculations, really, are in order to reach a point at which the gravity of the offending can be assessed with some accuracy.

[47] I, at this stage, turn my attention to the application for discharge pursuant to s 106. As I have said, the application requires the application of the principles in s 107 Sentencing Act, and there is no onus upon the defendant company to reach any standard of proof. It is an assessment to be made on the available material, and the defendant company has provided affidavit evidence from Mr Nathan to support the application, together with the submissions that have been filed on its behalf.

[48] I have to consider the gravity of the offending, not only to the point where it would reach a certain level of fine, which I have done, but also I am entitled to consider the defendant's conduct post the offence. That includes the assistance made in recalling the product. That is the way that the company has responded to the investigation, and to any other factors that are able to be advanced.

[49] The company has submitted that it is a responsible corporate body, that it has no other convictions, that it is serious about these matters, and has accepted accountability. Those factors can be taken into account in the gravity assessment.

[50] On the other side of this assessment, as I have already said, the company has to meet the fact that this was, on my estimation of the position, highly careless in terms of reaching a point where the offence was committed. Further, that the type of offence is one that calls for general deterrence.

[51] Safety is a significant issue. I am required to support that, and product safety is a particular area that depends on there being an approach which is more than licensing for conduct that falls below the required standard. There must be sufficient in any penalty to ensure the corporate world is aware that these standards will be upheld.

[52] Those factors that count in terms of the gravity assessment. The gravity suggested by the applicant is that this is a situation where the gravity is relatively low. The fact that this is a fine-only offence is referred to. The submission is made that in the criminal calendar of offending this would have to be regarded as significantly lower in the scale, because there is no penalty of imprisonment.

[53] The Commerce Commission's response was to say that gravity must be assessed by reference to the particular category of offence. This is a category involving public safety and so assumes a moderate degree of seriousness simply by the requirement that the public interest be supported.

[54] When I assess the level of gravity I take those factors into account. I come to the assessment of this being moderately serious offending, and I refer to the calculation that I have made previously to the starting point and likely sentence to be imposed.

[55] From there, I have to assess the actual and potential consequences of a conviction. This is to be assessed on the basis of whether a real and appreciable risk that such consequences may be visited on the defendant company. I again refer to the fact that there is not an onus of proof, it is a matter of considering whether that standard exists.

[56] There are general consequences that accompany every conviction. There is the loss of a clean record. There is the potential for the publication of the details of the conviction, and in this case the material provided to me has shown there have already been press releases which the company has had to weather, and which have had an impact upon the company's endeavours to improve its position, to raise finances, and to develop its ongoing progress as a corporate entity.

[57] It is also generally required that persons or corporations will disclose convictions in a number of circumstances, such as seeking finance or loans from institutions, or obtaining insurance, and those disclosure requirements are general consequences that would accompany any first conviction.

[58] In this case, there are particular matters that are raised by the applicant company. They are that the company is in a position of having to raise some $1.8 million in a relatively short period. My recollection is that before July these funds must be in the company's hands, and that although significant amounts of finance have already been raised, the potential for this to be upset by publication of a conviction is said by the company to be a real and significant problem for the company as far as maintaining its growth and its potential.

[59] In addition, there are arrangements which are being made for Mr Nathan to attend, in some nine days' time meetings with overseas potential partners who it is hoped will provide support and a further basis for the company to be developed. The affidavit material from Mr Nathan has suggested that if there is a conviction, the company's position in such negotiations will be considerably weakened and there may be people who will not deal with the company if there is anything which damages the company's reputation. In particular, a criminal conviction would be something of a kind which would be extremely harmful to the company.

[60] In addition to that, Mr Nathan has spoken of investor hesitancy and that the company perceives the position to be, and has an email which is attached to Mr Nathan's first affidavit at BN5 of his affidavit, which is suggested by the company to show that persons would be unwilling to raise capital for a company that had negative assets and pending litigation.

[61] I am assured that the only pending litigation which the company has is this proceeding. The inference which the company invites me to draw is that this email is indicative of other comments that have been made of the limiting effect of a conviction in terms of the company's financial position.

[62] The Commerce Commission have said that the evidential basis for seeing the negative position, as far as investor certainty and overseas partnerships, is not at a level where there is sufficient to support an actual or potential detriment resulting from convictions even on the basis of 'real and appreciable risk'.

[63] I tend to differ as far as that is concerned. It does seem to me that the company has got real issues in terms of how a conviction might be dealt with, facing the requirements to raise significant capital, and the hopes to develop the business further in respect of its partnerships and co-operation with other overseas persons who may be able to support the company's growth.

[64] The issue becomes whether these actual and potential consequences wholly outweigh the gravity of the offending. This is not an easy consideration to make. The defence have relied upon *WorkSafe New Zealand v Southland Disability Enterprises Limited*, which was an example of a work safety case in which there was an employee quite severely injured, with fractures to his leg, and the potential for his leg to be required to be amputated.[8]

[65] The decision in the end in that case was that a discharge was appropriate for a corporate organisation, the discharge being on the basis that there were potential donors to a charitable institution that might not invest, or might not make donations, if the company had been found to be criminally responsible.

[66] It was a situation in which there were factors that the sentencing Judge saw as exceptional in relation to that case. The Commerce Commission submit that case should be distinguished as far as the circumstances are concerned.

[67] The District Court in that case said:

> However, I wish to make it very clear that this should not be seen as a precedent for future WorkSafe prosecutions. Ms Self has made a number of valid submissions to me in terms of the need for employers to be vigilant in terms of their health and safety requirements and obligations, and, as many of the cases I have read state clearly, cases need to be looked at on their individual merits.

---

[8] *WorkSafe New Zealand v Southland Disability Enterprises Ltd* [2019] NZDC 18787.

[68] The particular circumstances there involved a company that employed a large number of persons who were disabled. It was not in a position to meet monetary penalties and had factors associated with it that the learned District Court Judge felt justified a significant departure from the usual approach.

[69] Similarly, in relation to the case in *Otago Central Electric Power Board v Ministry of Transport*, Ellis J took the view that this was a case in which a strict liability offence would be the subject of a discharge without conviction, given the quite exceptional history of the defendant in that case, and the Board's conscientious operations over a long period of time. That together with the circumstances that had led to the strict liability offence brought about a truly exceptional result.[9]

[70] I mention these cases because the opportunity for discharges without conviction for Fair Trading Act prosecutions are infrequent and, the Commerce Commission submits, should be a rare event.

[71] The situation here is that I have to balance potentially significant adverse effects upon the company if a conviction is entered against a requirement of a public safety nature, where general deterrence is recognised as required. The test is that the actual and potential consequences of a conviction wholly outweigh the gravity of the offending.

[72] I come to the conclusion that the actual and potential consequences here do not wholly outweigh the gravity of the offending, and therefore I am bound to enter convictions.

[73] As I said, I reached the starting point of $80,000 as the necessary starting point in terms of the sentence. The mitigating factors I saw as justifying a reduction of 10 percent in relation to the fine that was to be imposed, and that the 25 percent for plea was appropriately entered, that bringing a penalty of $54,000, that penalty being imposed in relation to 50 percent for each of the two representative charges.

---

[9] *Otago Central Electric Power Board v Ministry of Transport* AP33/90.

[74] There will be an order for Court costs of $130 in relation to each of the charges, and that fine and Court costs constitutes the orders, together with an order that the s 106 application is declined, and the defendant will have convictions to accompany the fines that are imposed.

D J Sharp
District Court Judge