IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2020-092-009749
[2021] NZDC 2041

THE COMMERCE COMMISSION

v

THE NEW HUB FURNITURE WAREHOUSE LIMITED

Hearing:	4 February 2021
Appearances:	A Luck and O Klinkum for the Prosecutor R Marchant and Ms Robinson for the Defendant
Judgment:	4 February 2021

NOTES OF JUDGE A M WHAREPOURI ON SENTENCING

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[1] The defendant company New Hub Furniture Warehouse Limited appears for sentence having pleaded guilty to five representative charges 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 each offence is a fine up to $600,000.

[2] The facts are set out in agreed summary which runs on for some 13 pages. Rather than repeats its detail, for the purpose of this hearing, I simply propose to set out the essence of the offending. New Hub is primarily an importer/exporter of household items, but during the relevant period, also sold toys. It operates a retail store in Ōtāhuhu, stocked with goods principally sourced from China. In addition to selling locally, it also sells its goods to customers in Fiji and Samoa.

[3] The company was incorporated in May 1989 and is a family operation. In the 2018 and 2019 financial periods it had a turnover of $1.65 million. In my assessment, given this level of turnover, its overall financial position, and its number of employees, it is perhaps best characterised by a small family operation but with a sizeable business.

[4] Between 2015 and 2019 the defendant sold 423 toys across five product lines which failed to comply with the relevant safety standards. The first relevant standard to be observed is that toys should not break apart under reasonably foreseeable abuse by a child. Such pieces, once liberated, can present a choking hazard for children. Another standard relates to the access to batteries test, which is designed to address the risk of a child removing batteries, swallowing and choking on the same. The standard is, that no batteries should be accessible without a tool unless two simultaneous movements need to be applied to open the battery compartment. On independent testing, samples of the toys all failed to meet one, or other, or both of these standards.

[5] The toy products, save for one, were all labelled for use by children three years and older, but based on photographs included in the agreed summary, it is clear that by design the toys would reasonably have appealed and been played with by younger children.

[6] When contacted by the informant, the defendant removed the five separate toys from sale. Then when notified of the testing results, issued a product recall. To date, however, none of the toys have been returned by customers both locally and overseas.

[7] On being interviewed, the defendant's director Ms Rup, stated being aware of the Fair Trading Act but did not realise there were mandatory safety standards for children's toys. She only became aware of this after the investigation was commenced by the informant. No testing reports, certifications or assurances were sought from the manufacturers or Chinese suppliers as to compliance. However, Ms Rup thought the toys would be safe to supply in New Zealand because their packaging were labelled with CE markings which she knew to be a safety indicator in Europe. When the goods

arrived in New Zealand, she only inspected them for damage due to delivery, and not to see if any small parts could come free from the same.

[8] In sentencing, it is important to deter, denounce and hold the defendant accountable for the harm that it's offending has caused. I must of course, however, impose the least restrictive outcome that is appropriate in the circumstances, and observe the general desirability of consistency with appropriate sentencing levels in respect of similar offenders committing similar offences in similar circumstances.

[9] Section 29 of the Fair Trading Act enables regulations to be made in respect of goods of any description, prescribing for the purpose of preventing or reducing the risk of injury to any person, a product safety standard. With this background in mind, the purpose of regulations made, pursuant to s 29 is the prevention of, or reduction in, the risk of injury to person arising, from products. In this sense the Fair Trading Act and its associated regulations form a consumer protection piece of legislation. Thus, I consider that the most relevant sentencing purposes when dealing with a failure to comply with these standards must be denunciation and general deterrence.

[10] The Commerce Commission submits that based on the agreed facts and the relevant sentencing authorities, the appropriate starting point is a fine in the range of $90,000 to $100,000. It submits that the defendant is entitled to discounts for its guilty pleas, cooperation and lack of previous convictions. Further discounts and/or adjustments might also be extended for remorse, and the defendant's means by which to meet a fine, but that these adjustments should be small to modest. The defence submits that based on the defendant's culpability and relevant sentencing authorities, that the starting point should be a fine in the range of $75,000 to $80,000. Mr Marchant further submits that the defendant is entitled to discounting for remorse, cooperation, previous good character and, of course, guilty pleas. While not a mitigating circumstance, Mr Marchant submits that some further adjustment should be made to reflect the defendant's current financial circumstances due to the current COVID-19 pandemic.

[11] I note that there is no tariff case for this type of offending. Instead a useful list of considerations, or culpability factors, were discussed in *Commerce Commission v*

L D Nathan & Co Ltd and then adopted by approval in the *Commerce Commission v Steel and Tube Holdings*.[1] They are relevant when assessing the appropriate penalty and I adopt the same considerations.

[12] In this case, when assessing the defendant's culpability, I find it relevant that the standards concerned are aimed at protecting young children from the risk of serious injury or death. These children fall into a vulnerable class of consumers. Further, there were two sources of choking risk. The first, by liberated pieces, the second, from accessible batteries. The degree of carelessness here is also best assessed at the high end, given the defendant made no effort to familiarise itself with the relevant standards for toys despite being aware of the Fair Trading Act and the European Safety Standard.

[13] While I find that the defendant by its director did not know of the product safety standards, ignorance of the law here is no excuse. Having decided to engage in the sale of products to consumers, including toys intended for young children and it being reasonably foreseeable that those children might be very young, the defendant should have made efforts to seek advice and make itself familiar with the appropriate standards. A retailer, in my view, cannot simply point to its supplier and trust that they are provided by them with safe compliant goods. Greater vigilance is required when dealing with goods aimed at young children. The defendant here ought to have made checks, as to its obligations and the appropriate standards relating to its toys. Thus, the company completely failed to take any steps in this regard. The fact that the defendant is a small family operation, in my view, does not excuse it from vigilance in assessing product safety.

[14] And finally, the conduct in issue involved not only local sales over four years, but also recorded sales to customers in Fiji and Samoa. It is also relevant here that the number of toys sold was over 400. Thus, the scope of potential harm, which still exists given that none of the toys sold have been returned, is wide and involves three separate countries.

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[1] *Commerce Commission v L D Nathan & Co Ltd* [1990] 2 NZLR 160; *Commerce Commission v Steel and Tube Holdings Ltd* [2019] NZHC 2098.

[15] The court has been referred to a number of relevant sentencing cases. The defence has submitted that the facts of this case are similar to the *Commerce Commission v First Mart Limited*.[2] In *First Mart* the defendant pleaded guilty to a single representative charge covering 540 toys from a single product line which failed to comply with the small parts product safety standard. The offending occurred over a period of two years. The present offending however involved more charges committed over a longer period of time and included overseas sales. In my view the potential for harm here is greater than that than was discussed in *First Mart*. For these reasons I consider *First Mart* to be less serious than the present offending. In my view the present offending is closer on the facts to the *Commerce Commission v Espoir Limited*.[3] In that case the defendant supplied approximately 600 toys from three separate product lines over four years which failed to comply with the small parts product safety standard. That case also involved five representative charges. The starting point adopted in *Espoir* was $90,000. After discounts were applied to reflect cooperation, lack of previous convictions and guilty pleas, the fine was reduced to $60,750 divided over the five charges.

[16] Taking into account, therefore, all which I have set out above I make it clear that in my view a fine of $90,000 is appropriate as the starting point.

[17] I agree that a guilty plea discount of 25 per cent for the early guilty plea should be applied. And that a further discount should also be extended to reflect cooperation and previous good record. The real issue is whether the adjustments should be made as Mr Marchant urges. In other words, whether further discounting should be made for remorse, and recognition given to the fact that the financial circumstances of the defendant here have been greatly and adversely affected by a global pandemic beyond its control. Mr Marchant has referred me to an affidavit sworn by the company's accountant Martin Smith. Mr Smith's affidavit has attached to it, a letter which lays out the current financial position of the defendant, as well as the likely projected position of the company given the COVID-19 environment. Mr Smith's letter dated 28 January 2021 states:

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[2] [2017] NZDC 23286.
[3] (200618CA-3886).

> "New Hub's business has been greatly impacted by COVID-19 (loss of rental income and increased import costs) and this is reflected in it's latest trading results to 30 November 2020 showing a net profit before tax of $48,529. The cashflow forecast for the period ended December 2021 shows that if New Hub were to pay a fine of $60,000 this will have significant detrimental impact on New Hub's cashflow. By October 2021, New Hub is forecast to have a negative bank account balance of -$5,859 which will continue to decline to -$49,549 by December 2021."

[18] Relying on this unchallenged detail Mr Marchant submits that the end fine which must be imposed should be one that recognises the overall culpability of the defendant, but which also takes into account the current and forecasted means of the defendant. I note that by conventional principles, and as done in *Commerce Commission v Ticketek New Zealand* and *Commerce Commission v Steel and Tube*, the court can and often does have regard for the financial circumstances of an offender when imposing a fine.[4] The Commerce Commission submits that while it does not take great issue with Mr Smith's affidavit that the company is still in a position where it has currently financial reserves and further that the forecasting is somewhat speculative. While I accept that there is an element of conjecture about the cash position of the defendant come December 2021, in my view, it is not baseless speculation. It is a forecasted position based on general accounting principles based on the current and actual trading position of the defendant and likely current trends. Thus, I consider that a discrete adjustment should be made to take into account the defendant's reduced financial means by which to pay a fine.

[19] I am also persuaded that there should be some recognition of what Mr Marchant describes as clear remorse, evidenced by the demeanour exhibited by Ms Rupp when interviewed. I have not had the benefit of seeing the interview, but I note that Mr Luck, for the Commerce Commission, did not suggest that Mr Marchant was wrong in his description of the Ms Rup's display.

[20] I apply a 25 per cent discount to reflect the early guilty pleas and 10 per cent for cooperation and previous good character. I also discount the fine by a further 5 per cent to reflect the remorse which, in this instance, I accept as being evident, genuine and sincere. In terms of the defendant's precarious financial circumstances I intend to make a further downward adjustment of approximately 10 per cent. When these

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[4] *Commerce Commission v Ticketek New Zealand* [2007] DCR 910 and *Commerce Commission v Steel and Tube Holdings* [2019] NZHC 2098.

adjustments are made the end fine which I impose is $48,600. This is to be divided between the five representative charges, so that on each charge this fine is $9,720. I decline to order court costs.

Judge M Wharepouri
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 23/08/2021