

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2018-092-013803
[2019] NZDC 19267**

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| IN THE MATTER OF | THE FAIR TRADING ACT 1986 |
| BETWEEN | COMMERCE COMMISSION Prosecutor |
| AND | ACQ DEVELOPMENT LIMITED Defendant |

Hearing: 30 September 2019

Appearances: J Phillips for the Prosecutor
R Coltman for the Defendant

Judgment: 10 October 2019

NOTES OF JUDGE R G RONAYNE ON SENTENCING

Introduction

[1] The defendant has pleaded guilty to four representative charges under ss 30 and 40(1) of the Fair Trading Act 1986 (“FTA”) relating to the supply of toy ducks that did not comply with prescribed product safety standards. Each charge attracts a maximum penalty up to \$600,000.

The facts

[2] Charge 1, CRN ending -4441, relates to the supply of 561 sets of four toy ducks between 2 May 2017 and 31 July 2017.

[3] Charge 2, CRN ending -4442, relates to the supply of 495 sets of four toy ducks between 3 August 2017 and 30 October 2017.

[4] Charge 3, CRN ending -4443, relates to the supply of 369 sets of four toy ducks between 1 November 2017 to 19 December 2017.

[5] Charge 4, CRN ending -4444, relates to the supply of 398 sets of four toy ducks between 3 January 2018 to 22 March 2018.

[6] The defendant was incorporated in February 2001, has two directors, Qin Wan and Gang Chen, and operates in Auckland. It imports products from China and supplies retailers across New Zealand. Its core business is houseware, kitchenware, hardware, tools, sporting goods, electrical accessories and beauty products. Of approximately 4,000 product lines stocked fewer than 0.5 percent are children's toys.

[7] The ducks supplied are children's toys to which product safety standards apply.

[8] The relevant Standard requires that the toys do not fail a "reasonably foreseeable abuse test" and a "template test". Essentially the reasonably foreseeable abuse test stipulates that the removable components of toys or components which may be liberated during the test must not fit into a prescribed small parts cylinder. The test conducted is designed to replicate reasonably foreseeable abuse of the toy in order to ensure that no parts presenting choking or suffocation hazards are present or liberated. The template test is designed to test removable or liberated parts. If those parts fit into a small parts cylinder then they constitute choking and/or suffocation hazards.

[9] On 22 March 2018, Commerce Commission staff purchased two duck sets from a "Dollar 1 2 3" store in Browns Bay, Auckland. The defendant was identified as the supplier of the duck sets. Each duck set consisted of one large yellow rubber duck and three smaller yellow rubber ducks packaged, without labelling, in a plastic mesh bag.

[10] The duck set is manufactured, designed, labelled and/or marketed for use by children aged 36 months and under because it is brightly coloured and would be

attractive to and able to be used by children up to and including those who are 36 months of age. There was no warning on any part of the packaging.

[11] The Commission submitted the purchased samples to independent testing facilities.

[12] The submitted toys failed to comply with the Standard because:

- (a) During tests designed to replicate reasonably foreseeable abuse a squeaker, which is a sound-making device, was liberated from the large duck and from each of the small ducks; and
- (b) The squeaker devices liberated during testing fitted completely within the small parts cylinder when tested in accordance with the Standard and thus constituted choking and/or suffocation hazards; and
- (c) The three small ducks passed completely into the test templates and thus constituted choking and/or suffocation hazards.

[13] The defendant advised the Commission that it imported 2,160 units of the duck sets from China on 2 March 2017 and had supplied 1,823 sets to over 100 retail stores during the period covered by the charges.

[14] The defendant fully cooperated with the Commission during the investigation, including taking the following steps:

- (a) It contacted all retailers that were supplied with the duck set, asking them to remove the product from sale and offering credits for any unsold product;
- (b) It provided recall notices for the duck set in multiple languages for display in store by the retailers;
- (c) It contacted MBIE and completed a product recall for the duck set;

- (d) It advertised the product recall in the New Zealand Herald;
- (e) It created a Facebook page for the purpose of advertising the product recall.

[15] As a result of the steps referred to above, 165 units of the duck sets were recalled.

[16] During an interview with the Commission, the director, Qin Wan, advised the Commission that:

- (a) She was the person responsible for the defendant's product purchasing;
- (b) Her knowledge of the safety standard relating to toys was poor, and limited to being aware that it existed;
- (c) The defendant does not do a safety check of toys or check their suitability. It does not ask for compliance certificates from its suppliers and does not have a compliance programme.

[17] The defendant has no previous convictions.

Submissions

[18] Helpful and detailed written and oral submissions have been made by both parties and the following is a summary only.

[19] The prosecutor has made reference to the way in which it says the defendant's behaviour should be viewed in relation to the culpability factors referred to in *Commerce Commission v L D Nathan & Co Ltd*¹ as applied under the Sentencing Act 2002 in *Commerce Commission v Ticketek Ltd*² and approved by the High Court in *Zenith Corporation Ltd v Commerce Commission*.³

¹ *Commerce Commission v L D Nathan & Co Ltd* [1992] NZLR 160.

² *Commerce Commission v Ticketek Ltd* [2003] DCR 910 at [47].

³ *Zenith Corporation Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008 at [220].

[20] The prosecutor also draws to the attention of the Court various exemplar cases.

[21] The prosecutor submits that the appropriate starting point for the defendant's offending is a fine in the range of \$110,000-\$130,000 bearing in mind the ongoing need for denunciation and deterrence. That is so, it is submitted, because the defendant's conduct constitutes breaches of product safety standards.

[22] The prosecutor submits that the defendant is entitled to a discount of no more than 10 percent to reflect the extent of its cooperation and lack of previous convictions with a discount of 25 percent to reflect the entry of guilty pleas.

[23] The defendant has filed and spoken to submissions and also, by means of an affidavit sworn by its director Qin Wan, given evidence.

[24] The defendant submits that an appropriate starting point would be a total fine in the range of \$80,000-\$90,000, followed by a 15 percent discount to reflect cooperation and remorse followed by a 25 percent discount to reflect early guilty pleas.

[25] The defendant then submits that a further discount should be allowed because of the defendant's claim that it only has the ability to pay a total fine of \$20,000 by annual instalments of \$5,000.

The evidence

[26] The prosecutor objects to the admission of the further evidence of the defendant's director Qin Wan.

[27] Ms Wan's affidavit addresses the recall process adopted and the profitability from sales of the duck sets.

[28] Ms Wan annexes to her affidavit unaudited financial accounts in order to support an assertion that the defendant will have difficulty paying any fine.

[29] Ms Wan's affidavit also annexes letters from the prosecutor to other parties supposedly selling non-compliant products where those parties were not prosecuted. This material is wholly irrelevant.

[30] It is open to this Court to entirely reject, as inadmissible, Ms Wan's affidavit. However, it is important that the company, personified by its directors, does not feel that it has not had a fair sentencing. Accordingly, with real reservations, I admit the affidavit as evidence such as it is and leave the assessment of the assertions contained therein as a separate issue.

Analysis

[31] I identify the aggravating or culpability factors below.

Conduct undermining the objectives of the FTA

[32] Plainly the defendant's conduct undermined the objectives of the FTA which requires traders to follow minimum safety standards for products that may expose members of the public to particular risk. Choking hazards, in this case, plainly relate to very young children and give rise to risks of serious injury or death. Young children are inherently vulnerable.

The importance of the failures to comply

[33] The liberated parts and the small ducks were small enough to be swallowed or ingested by a child, creating a choking risk. Young children have limited ability to detect or avoid such hazards. Thus, the failures were important.

Degree of carelessness

[34] The defendant's initial failure arose from its failure to make itself aware, in any meaningful way, of its obligations under the FTA. As a result, it then supplied 1,823 non-compliant duck sets throughout New Zealand. During interview, Ms Wan

confirmed that the defendant did not conduct any of its own checks on the duck sets and nor did it make any inquiries of the suppliers regarding compliance.

[35] Ms Wan, in her affidavit, also points out that the Commerce Commission came to the defendant's warehouse approximately three years ago to give an explanation of the safety standards relating to the size of children's toys. She then makes the, in my view disingenuous, statement that:

... we did not realise that the bath ducks would be classified as toys. We import and sell a number of bathroom products such as toothbrush holders and soap dispensers. The bath ducks were imported with the intention of expanding our bathroom product range and for it to be included in the bathroom range as a bath accessory.

[36] It is asserted that there was never any intention for the duck sets to be imported and sold as toys.

[37] Ms Wan's affidavit contains the assertion that the defendant has never been a primary importer of toys but rather instead focuses of homeware, kitchenware and hardware products. She says that therefore the defendant's knowledge on product safety standards is "...mostly directed towards the aforementioned products". This is simply an admission of a high degree of carelessness.

[38] I reject the foregoing assertions. The duck sets are plainly toys and have squeakers. No information is provided to the Court by the defendant to suggest that the duck sets were only sold in homeware stores. The agreed summary of facts remains the basis upon which sentence is to be imposed.

[39] Given the warning by the Commerce Commission three years ago specifically referring to the size of children's toys, I find the defendant's behaviour highly careless.

Extent of the offending

[40] 1,823 duck sets were supplied to retailers between 2 May 2017 and 22 March 2018. The product recall resulted in approximately 102 duck sets being returned. The extent of the offending was therefore significant and risk remains.

Resulting prejudice to consumers

[41] The prejudice here arises from consumers being exposed to the risk and here clearly toys are likely to remain in use. The number of toys sold is relevant to this assessment.

The need for deterrent penalties

[42] Here, safety issues arise.

[43] Specific deterrence is required in some measure. That is so given the visit by the Commerce Commission to the defendant's premises prior to the offending.

[44] While the actual efficacy of general deterrence can never be known with any degree of accuracy, general deterrence is required to ensure that traders comply with safety standards and to ensure that traders who do comply and bear the costs of doing so are not placed at a competitive disadvantage in relation to those who do not comply.

[45] The size of penalties must be meaningful in order to ensure that fines are not simply seen as a cost of doing business or a mere licencing fee. It cannot be ignored that Parliament, in 2013, trebled the maximum penalty for corporate offenders. In the present case, the cost of compliance would not have been high.

Mitigating factors

[46] I reject the explanation by the defendant's director that the duck sets were intended as bathroom accessories rather than toys. That is akin to a labelling argument which carries no weight. It would be cold comfort to a choking child.

Case law

[47] A number of cases have been drawn to the attention of the Court.

[48] In *Commerce Commission v Manufacturers-Marketing Ltd*,⁴ the defendant operated a small distribution business and supplied a total of 334 defective toys from a single product line to various retailers. There were two different supply periods of approximately seven months and one year. There was warning labelling. The sole director of the defendant company had no compliance regime in place and was unaware of applicable product safety standards. Once the defendant became aware of the problem, it contacted all retailers who had received the toy and offered credits for any unsold products. It also contacted MBIE and completed a product recall. Judge Mabey QC, presiding at a sentence indication hearing, characterised the offending as highly careless and adopted a starting point of \$75,000.

[49] There are parallels in the present case with the *Manufacturers-Marketing* case, but the present defendant supplied nearly six times the number of units.

[50] The key features here were:

- (a) The supply of 1,823 duck sets;
- (b) Significant safety related defects creating clear and obvious choking risks;
- (c) Highly careless behaviour.

[51] Taking all matters into account, I adopt a starting point of a fine of \$120,000.

Mitigating factors

[52] The defendant is entitled to some discounts to reflect the extent of its cooperation and lack of previous convictions. I consider that a discount of 10 percent is appropriate to reflect cooperation, lack of previous convictions and expressed remorse.

⁴ *Commerce Commission v Manufacturers-Marketing Ltd* [2018] NZDC 7913.

Ability to pay a fine

[53] Unaudited financial accounts for the years 2017 and 2018 have been annexed to Ms Wan's affidavit. Shareholders are drawing salaries and the balance sheet strengthened. It seems that the company is suffering in the latest financial year an extraordinary cost in relation to a temporary relocation of its warehouse operation because of difficulties with its existing warehouse.

[54] The size of the defendant company was taken into account in setting the starting point.

[55] I take the view that a reduction of the end penalty is not justified. The company turnover is increasing significantly and inability to pay a fine has not been established. Time may be required, but that does not constitute inability to pay. It has not been established that the end sentence sought by the prosecutor would, if imposed, affect the viability of the defendant. It may be difficult for the defendant to pay the fine I intend to impose but therein lies the deterrence.

[56] It is appropriate that a discount of 25 percent should be applied to reflect very early guilty pleas.

[57] The final calculation is thus.

- (a) An overall starting point of \$120,000.
- (b) A 10 percent reduction of \$12,000 resulting in a notional penalty of \$108,000.
- (c) A 25 percent discount of \$27,000.
- (d) A resulting overall fine of \$81,000.

Result

[58] On each charge the defendant is fined \$20,250 and ordered to pay Court costs of \$130.



R G Ronayne
District Court Judge

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