IN THE DISTRICT COURT
AT HAMILTON

CRI-2014-019-003017

WORKSAFE NEW ZEALAND
Prosecutor

v

1-DAY LIMITED
Defendant

Hearing: Teleconference 17 July 2015

Appearances: S Symon for the Prosecution
A Ross for the Defendant

Judgment: 17 July 2015

RESERVED JUDGMENT OF JUDGE T R INGRAM

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[1] The defendant 1-Day Limited has pleaded guilty of one charge of breaching Regulation 80 of the Electrical Safety Regulations 2010 and one charge of breach of Regulations 84 and 85 of the same regulations.

[2] The two charges are similar. The Regulation 80 charge alleges a sale or offer of sale of an appliance knowing or being reckless as to whether the appliance was electrically unsafe. The Regulations 84 and 85 charge alleges a sale or offering to sell a declared high risk article which had not been approved for sale by the secretary under Regulation 85.

[3] A further charge laid under CRN 14019501188 alleging a breach of s 163(c) of the Electricity Act has been withdrawn by leave.

[4] The procedural history is convoluted and does not require explanation. Having dealt with this matter at various stages in the Hamilton District Court, both prosecution and defence counsel asked me to attend to sentencing on the basis of written submissions supplied to me. Counsel confirmed that view at a teleconference, and I advised counsel that I would provide written reasons for my decision. The result of which will be announced at 2.15 pm in the Tauranga District Court on 17 July 2015. Counsel's attendances are excused and the registrar is directed to forward a copy of my sentencing remarks to counsel by email.

[5] The facts of the matter are uncomplicated. The defendant company runs a website retail operation selling goods for a limited time, usually 24 hours only. The sales are direct to the public. On 25th March 2014 a bubble machine was offered for sale, and on inspection by a compliance officer from the Energy Safety Unit of the Ministry of Business Innovation and Employment, it was noted that the device was incorrectly labelled as being rated for 220-240 volts, when in fact the device was rated at 220 volts, and the power plug attached was not of an approved type. On 28th March, Energy Safety wrote to the defendant asking to be provided with the basis upon which electrical safety had been established for the bubble machine. That enquiry was responded to on 1st April with the information then available to the defendant. Through no fault of either party, the relevant documents were not received by Energy Safety.

[6] On 8th April 2014 bubble machines were once again made available for sale on the defendant's website, and a compliance officer expressed concerns about compliance issues to a staff member. On 11th April a compliance officer spoke with a manager at the defendant company and followed that call with an email advising that it was an offence to sell the machine, and recommending notification to all purchasers of safety risks attaching to the machines. On 15th April the defendant notified purchasers that they should destroy or return the bubble machines.It is accepted by the prosecution that subsequent to these events the defendant company has taken steps to improve its systems to ensure compliance.

[7] It is clear from the material before me that a total of 188 purchasers brought the machine. I also accept the uncontradicted defence evidence that the two

compliance defaults leading to each charge arose from insufficiently critical analysis by the company of compliance documentation provided by a previous reliable source of compliance information.

[8] It is also important to note that in the nature of the defendant's business operations, the machines are only offered for sale through a website for a period of 24 hours, and the items are withdrawn from sale at the conclusion of that period. Because sales are via the internet, detailed and accurate customer information is obtained for each sale, allowing a prompt and highly effective recall operation to be undertaken in a way that is not necessarily possible with other business models.

[9] Regulatory offences of this kind carry high maximum penalties, which are intended to act as a deterrent to vendors who might be tempted to treat a modest fine as a licensing cost. Counsel have referred me to a number of authorities, which I do not propose to detail. Suffice it to say that the sentencing principles are clear and settled. Fines levied under these provisions should have practical deterrent effect, and it is the purpose of the regulations to place an obligation on the vendor to ensure that the device is compliant with New Zealand law both as to labelling and safety. Total fines in individual cases have varied between $25,000 and $40,000 depending on the scale of the offending, the nature of the risk and the commercial venality of the vendors operations in relation to the offending item.

[10] The aggravating features of the offending require to be assessed. It was submitted that commerciality is an aggravating feature. There is little in this point, given that the charge in each case contains as an element, sale or offering to sell. The scale of sales was moderate, at 188 items sold on the website over two separate 24 hour periods at a price of about $30. There is accordingly a risk of harm to several hundred people. The total sales income would have amounted to something in the order of $5,650. As the sales are direct to the public, all the sales income was received by the defendant.

[11] This defendant had previously received warnings in 2012 and in 2013. The enquiry made on 28th March was not sufficient to trigger a rigorous check of the compliance requirements as to labelling and approval, and accordingly it took more

than two weeks for the defendant company to identify the nature and scope of the problem and react appropriately. The defendant's performance could and should have been better having regard to its prior involvement with Energy Safety.

[12] In terms of mitigation, the defendant company has entered a guilty plea at the earliest available opportunity, and is accordingly entitled to a 25% reduction in penalty. The defendant has also acted effectively to remove the risk from purchasers, fully refunding their money and ensuring destruction of the offending items. The defendant's regulatory compliance procedures have been overhauled and tightened and the prosecution accepts that a 10% reduction in penalty is appropriate to cover that aspect of matters.

[13] Turning to the assessment of the fine, it is my view that this case is rather less serious than some others which have come before the courts. In making my assessment, I take particular account of the fact that the defendant had placed reliance on a previously reliable supplier for information on regulatory compliance, rather than simply ignoring its obligation. The items were sold only in two separate 24-hour periods, in circumstances where a completely effective recall could be undertaken immediately. The company has no prior convictions, although it has previously been warned on two occasions.

[14] The prosecution submitted that the starting point for the fines should be a total of $50,000. I consider that starting point to be a little too high by comparison with other cases, and after reflecting on the matter I have come to the view that a starting point of $44,000 would be appropriate to recognise the seriousness of the offences and the need for deterrent penalties in the particular circumstances of this case. That figure should be split equally between the two charges, producing the sum of $22,000 as the high water mark.

[15] The defendant is entitled to a reduction in that penalty of 25% for prompt guilty pleas, and a further 10% to reflect to cover the prompt and effective recall and improvement in its compliance oversight measures. That would produce a figure of $14,300 per charge, or a total of $28,600. In my judgement that is an adequate

deterrent penalty for this defendant and others in the industry having regard to the particular features of this offending.

[16] The defendant is accordingly convicted and fined the sum of $14,300 on each charge.

T R Ingram
District Court Judge

Reserved Decision delivered by me at 5.25pm 17 July 2015 pursuant to S 106 Criminal Procedure Act 2011

A. M. Matlock
Deputy Registrar
District Court
Tauranga