IN THE DISTRICT COURT
AT MANUKAU

CRI-2017-092-014214
[2018] NZDC 7913

COMMERCE COMMISSION
Prosecutor

v

MANUFACTURERS-MARKETING LIMITED
Defendant

Hearing: 23 April 2018

Appearances: A Luck for the Prosecutor
R Connell for the Defendant Company

Judgment: 23 April 2018

NOTES OF JUDGE P G MABEY QC ON SENTENCING

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[1] On 27 February I presided at a hearing where the defendant, Manufacturers-Marketing Limited, sought a sentence indication on two charges brought under the Fair Trading Act 1986 and which allege that a certain imported toy failed to comply with applicable safety standards.

[2] On 10 April 2018 I issued a sentence indication decision. Mr Connell has advised that his client accepts the indication and this morning guilty pleas to both charges have been entered. I am thus in a position to sentence. Neither counsel sought to make further submissions today. I direct that my sentence indication decision be appended to these brief sentencing notes.

[3] In addressing matters raised at the sentence indication hearing I had to consider, among other things, the relevance of sentencing decisions brought down

prior to the increase in penalties under the Fair Trading Act, the relevance of Australian decisions under equivalent legislation and most significantly the tension between the primary purpose of deterrent sentencing and, as applies in this case, the ability of a defendant to pay a fine. For the reasons set out in my sentence indication I resolved that tension in favour of the consideration of ability to pay a fine.

[4] I adopted a start point consistent with other sentencing decisions delivered after the increase in penalties by application of the same principles and considerations to the particular facts of this case.

[5] However, a significant reduction to the start point was allowed for the defendant's limited financial means. As is evident from the sentence indication that reduction was in the range of 30 percent. The end result was that I determined a total fine of $35,000 should be imposed upon the defendant, divided equally between both charges at $17,500.

[6] Accordingly, the defendant, Manufacturers-Marketing Limited, is fined $17,500 on each of the charges in CRNs 1709504718 and 4719.

P G Mabey QC
District Court Judge

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IN THE DISTRICT COURT
AT MANUKAU

CRI-2017-092-014214

COMMERCE COMMISSION

v

MANUFACTURERS MARKETING LIMITED

Hearing Commenced:	27 February 2018
Appearances:	J Barry for the Prosecutor R Connell for the Defendant
Date:	10 April 2018

NOTES OF JUDGE P G MABEY QC ON SENTENCING INDICATION

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[1] The defendant, Manufacturers Marketing Limited (MML) faces two charges brought by the Commerce Commission. Both charges proceed under s 30 of the Fair Trading Act 1986 (FTA) and make identical allegations but over separate time periods.

[2] The allegations relate to the supply of a toy by MML as wholesaler to various retailers.

[3] The first charge (CRN-17092504718) covers the period between 27 May 2015 and 16 December 2015. It is alleged that in that period MML supplied 200 units of a toy known as the "baby concert" (the toy).

[4] The second charge alleges that between 12 May 2016 and 3 May 2017, 134 units of the toy was supplied.

[5] Both charges are particularised in the following way:

> *Components of the Baby Concert toy detached and liberated during the drop and torque tests. A number of the detached and liberated components failed to comply with the small parts test stipulated by clauses 4.4.1 and 5.2 of the Australian/New Zealand Standard for children's toys (AS/NZS ISO 8124.1:2002) as adopted under the Product Safety Standards (Children's Toys") Regulations 2005, issued pursuant to s 29 of the Fair Trading Act 1986.*

[6] The maximum penalty for each charge is $600,000.

[7] Mr Barry for the prosecutor submits:

(a) The appropriate start point for both charges (on totality) is in the range of $70,000 - $80,000.

(b) MML should receive credit of no more than 10% for its lack of previous convictions and co-operation with the prosecutor.

(c) Any guilty pleas would entitle to a further discount of up to 20%.

(d) On the above analysis an appropriate fine, and the least restrictive outcome, is in the range of $50,400 - $57,600.

[8] Mr Connell for MML challenges the start point nominated by Mr Barry submitting that it is arbitrary and without support from comparative authority. He does not nominate an alternative start point.

[9] Mr Connell also relies upon the limited ability of MML to pay a fine submitting that a defendant's financial position is a significant factor to be weighed in determining penalty.

[10] In this case it is clear that MML is not a large business and is not particularly profitable. I have seen the accounts for the years ended 2015 – 2017 which show a low nett profit and minimal return to the company's sole director and shareholders, all of whom are family members.

[11] There is no doubt that the means of a defendant are relevant in setting a financial penalty. But that factor is not relevant to a start point which must be determined according to the gravity of the offence and comparative sentencing decisions. It is however relevant to the end point.

[12] That issue gives rise to a consideration as to whether or not the fines should effectively be determined on a scale relative to the ability to pay. I address that issue below.

Facts

[13] MML operates a small distribution business based in Manukau, Auckland. It is an importer and supplies various items of homeware and toys. It has been operating since 1993 and sources most of its products from China.

[14] MML distributes to retailers directly from its store or through the internet and at the time of the offending toys accounted for approximately 5% of its product range.

[15] The toy the subject of the prosecution was not imported but obtained from a New Zealand source, having previously been imported from China.

[16] The toy comprises a series of musical instruments including a whistle, two maracas and a trumpet.

[17] Those items are made of plastic and are bright and colourful. The words "baby concert" feature largely on the packaging although there is a warning that the toy is not for use by children under three years of age. I comment on this labelling in my analysis below.

[18] In early 2017 Commerce Commission staff purchased three units of the toy from a Nelson retailer. They had been supplied by MML to the retailer.

[19] They were subject to testing by an independent and certified laboratory. The toy failed the relevant tests.

[20] As soon as MML became aware of the problem it contacted all retailers who had received the toy and offered credits for any unsold product.

[21] MML provided recall photographs of the toy for display by the retailers and contacted MBIE and completed a product recall.

[22] Throughout, MML has fully cooperated with the Commission's investigation and at interview the sole director advised that MML did not have a product safety compliance programme and was not aware of the applicable product safety standards. MML has not previously been prosecuted.

Testing

[23] The Product Safety Standards (Children's Toys) Regulations 2005 (the regulations) are issued pursuant to s 29 of the FTA. Section 29 provides for the making of regulations which prescribe a product safety standard for goods.

[24] The regulations apply to toys manufactured, designed, labelled or marketed for use by children up to and including 36 months of age.

[25] Toys subject to the regulations must comply with aspects of the Australian/New Zealand standard AS/NZS ISO 8124.1:2002 (the standard).

[26] The regulations declare that the standard is the official safety standard for toys for children up to and including 36 months.

[27] Those parts of the standard that are relevant to the charges against MML are:

(a) Clause 4.4.1 which stipulates that removable components of toys, or components which are liberated during testing, must not fit entirely into a prescribed small parts cylinder. The cylinder is of a specified dimension set out in the standard.

(b) Clause 5.2 which stipulates how small parts are to be tested. This clause provides that any component liberated in the course of testing should be fitted (or attempted to be fitted) into the small parts cylinder in any orientation and without compressing the component.

(c) Clause 5.2.4 stipulates the tests designed to simulate situations in which possible damage can occur to a toy as a result of reasonably foreseeable abuse, including the drop test, the torque test and the tension test.

[28] Upon testing it was found that:

(a) As a result of the drop test one side of the whistle detached and the seams of a maracas began to split.

(b) As a result of the torque test:

(i) The bell of the trumpet snapped with very little force, liberating component parts. The yellow valve surrounding the trumpet snapped in half, exposing sharp points and edges.

(ii) The main body of the whistle snapped into multiple small pieces, exposing sharp points and edges.

(iii) The maracas both snapped into multiple pieces, liberating small beads and exposing sharp points and edges.

(c) It was not possible to conduct the tension test because of the damage caused by the previous tests.

(d) Multiple parts liberated by the testing fitted into the small parts cylinder with the result that the toy failed to comply with the standard as adopted by the regulation in breach of s 30(1) of the FTA.

Labelling

[29] As noted above, the toy was labelled as unsuitable for use by children under three years of age.

[30] Such labelling has been the subject of judicial comment in the past. Pankhurst J in *Commerce Commission v Myriad Marketing Limited* said that the subjective intention of a manufacturer or marketer cannot determine for what and for whom a product is manufactured, designed, labelled, or marketed for the purposes of the regulations. [1]

[31] At [36] the Judge said that in his view the operative element is usage and the required approach is an objective test, that through the eyes of a reasonable person can it be said that the object or product in question was either manufactured, designed, labelled or marketed as a plaything for use by children up to three years.

[32] If on that objective test the answer is yes, then the relevant standard applies.

[33] His Honour Judge Ronayne in his liability decision in *Commerce Commission v The 123 Mart Limited* found that certain toys the subject of his decision were

[1] *Commerce Commission v Myriad Marketing Limited* (2001) 7 NZBLC 103,404 at [35].

manufactured, designed, labelled or marketed for use by children up to and including 36 months of age – despite a label to the contrary.[2]

[34] In this case Mr Connell makes no issue on this point but I address it to emphasise the fact that such labelling is no defence or is in any way a mitigating factor.

[35] Mr Barry makes the obvious points that notwithstanding the labelling:

(a) Musical toys are listed in the relevant safety of toys standard as toys appropriate for children from 12 months of age. [3]

(b) The maracas in the set could be used both as a rattle used by infants because of their light weight and colourful appearance and as a rhythm instrument which children begin to enjoy from two years of age.

(c) The size, weight and colours of the toys suggest that the components of the toy are for children up to and including 36 months of age.

(d) The word "baby" is part of the description of the toy.

Submissions on penalty

[36] Mr Barry commences by reference to s 40 of the Act which provides penalties:

(a) In case of a body corporate, up to $600,000.

(b) In the case of an individual, up to $200,000.

[37] Those maximum penalties were increased in 2014 from $200,000 and $60,000 respectively.

[2] *Commerce Commission v The 123 Mart Limited* [2017] NZDC 23286.
[3] SA/SNZ TR ISO 8124.8:2016.

[38] The select committee report on the proposed amendment referred to the increase in penalties as a deterrent and to bring the New Zealand penalty regime closer to that which applies in Australia.

[39] In Australia the maximum penalties are $1.1 million for companies and $220,000 for individuals.

[40] Mr Barry submits that in light of empirical data which establishes that internationally product safety risks are increasing, in particular in relation to small children unable to defend themselves against such things as choking hazards, a proactive and deterrent approach is justified. The increased maximum penalties are directed at those who are most able to influence the safety of products be they importers or distributors.

[41] In his submissions Mr Barry refers to the High Court decision of *Commerce Commission v LD Nathan & Co Limited* when he identifies what he says are relevant culpability factors in this case. [4]

[42] *LD Nathan* is a decision of his Honour Justice Greig and is the first appeal brought to the High Court under the Act. The case is distinguishable on its facts from the case now before me. It involved misrepresentations that certain items of children's nightwear complied with the relevant safety standards.

[43] The Judge identified eight culpability factors some of which relate directly to misrepresentations but others of which have general application to prosecutions under the Act. Notwisthstanding the age of the decision in *LD Nathan* those culpability factors remain relevant and are regularly referred to.

[44] The particular culpability factors from *LD Nathan* relevant to this prosecution and referred to by Mr Barry are:

(a) The objectives of the Act

[4] *Commerce Commission v LD Nathan & Co Limited* [1990] 2 NZLR 160 (HC).

[45] The Act is designed to promote fair trading practice and facilitate consumer protection. In cases of product safety the Act requires compliance with minimum safety standards.

[46] The regulations are expressly designed to protect a subset of vulnerable consumers (children three years and under) from hazards which risk injury and which can be fatal. Any penalty must reflect the seriousness of the risk in the particular case and recognise the inability of such a vulnerable class of citizens to protect themselves against those risks.

(b) Failure to comply

[47] As demonstrated in the laboratory tests the toy broke into small pieces when dropped or twisted. The degree of force applied to the twist was equivalent to that of a small child. The small pieces were a clear choking risk. Undisputed medical knowledge is that as the coughing reflexes of such young children are not fully developed they are thus less able to expel choking objects let alone detect the very risk those objects pose.

(c) Carelessness

[48] Mr Barry submits that although MML's conduct falls short of recklessness it is highly careless. Evidence of a high degree of carelessness is MML's admission that it knew nothing of the product safety standard that applied to the toy and made an assumption that the suppliers of the toy would have addressed any consumer protection issues. Mr Barry submits that a careless breach, although less flagrant than a reckless breach or persistence in the face of warnings, is none the less a significant departure from the standards imposed to achieve the objects of the FTA. Mr Barry however acknowledges MML's responsible response when the issue was brought to its attention. It took the steps that I have detailed above.

(d) Extent of offending

[49] 344 defective products with significant defects.

(e) Consumer prejudice

[50] The purpose of the legislation is to avoid risk. It is not a mitigating factor that no harm was actually done to an infant. The risk is in the exposure to the potential harm and as was noted in Australian Authority each toy was an "accident waiting to happen."[5]

(f) Deterrent penalties

[51] The governing sentencing purpose in consumer protection cases is to deter. Importers and traders who make unsafe products available to the consumer, whether they are aware of the relevant standards or not, need to be deterred to avoid the very risks the legislation, regulations and standards are aimed at. Mr Barry notes that the Commerce Commission is currently involved in a large number of product safety prosecutions with no sign of abatement notwithstanding the increase in penalties. He promotes general deterrence and an emphasis upon the onus that applies to traders not to sell unsafe products.

[52] He refers to Mr Connell's submission that MML simply did not have the resources to carry out the necessary testing and says in response that product safety compliance should not be seen as an optional or discretionary revenue item. The standards apply. Compliance is necessary. If a trader is unable to meet the cost of compliance the trader should not be trading. Mr Barry says it is as simple as that.

[53] Furthermore, he says that penalties should not in reality amount to a licencing fee. They should not be at a level that would make any risk worth taking. This point was made by Judge Ronayne in his sentencing decision in *Commerce Commission v The 123 Mart Limited* where he said at [25]:

> (vii) … 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.

[5] *Australian Competition and Consumer Commission v Dimmeys Stores Pty Ltd* [1999] FCA 1175.

[54] Against that analysis Mr Barry refers to sentencing comparators to support his start point.

[55] He makes the point that product safety cases decided before the increase in penalties have limited value but may form a reference point against which the impact of the increased penalties can be assessed but care needs to be taken in that assessment. A slide rule approach is not appropriate.

[56] Judge Ronayne noted in *Commerce Commission v Budge Collection Ltd and Sun Dong Kim* at [38]: [6]

> It is self evident that the Court must reflect Parliament's intention in the approximate threefold increase in penalties although to do so does not require a simple multiplication of what might otherwise have been the starting point under the previous regime. Nevertheless, on any analysis, a substantial increase to sentencing levels is called for to reflect Parliament's clear intention.

[57] As I refer to below, Mr Connell refers to a range of pre-increase sentences to support his submission that Mr Barry's start point is too high and arbitrary. However for the reasons I give I have some difficulty with Mr Connell's analysis.

[58] More reliable are post-increase sentences of which there are few. I anticipate that at some stage the higher Courts will need to consider sentencing in this area and produce guidance, perhaps in the nature of the full Court decision in *Department of Labour v Hanham and Philp Contractors Ltd* delivered under the Health and Safety in Employment legislation. [7]

[59] Mr Barry also refers to certain Australian product safety sentencing decisions which emphasise the need for deterrence and make the obvious points about the risk to young children but which are delivered under a regime of higher penalties and

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[6] *Commerce Commission v Budge Collection Ltd and Sun Dong Kim* [2016] NZDC 155548.
[7] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).

which I consider have limited value in setting the start point and ultimate penalty in this case.

[60] The post-increase decisions referred to by Mr Barry are.

(a) *Commerce Commission v Mega Import and Export Limited*[8]

[61] In this case products including children's toys distributed to retailers throughout New Zealand over a period of four months failed to comply with the standard. Of 1136 units supplied 315 were successfully recalled and *Mega* ceased supplying those particular toys.

[62] *Mega* had no compliance programme and was unaware of the standard. Her Honour Judge Sharp adopted a start point of $100,000 and allowed 10% for cooperation and lack of previous convictions and then the full discount of 25% for guilty pleas. *Mega* was fined $65,000.

[63] Her Honour made the point (as did Judge Ronayne in *123 Mart*) that the pre-increase product safety authorities are of no real assistance in setting a post-increase start point.

[64] She emphasised the need for deterrence particularly in the face of Commerce Commission advice that product safety breaches are escalating and the quality of imported products, including toys intended for the very young, is in substantial decline.

(b) *Commerce Commission v The 123 Mart Limited* [9]

[65] *The 123 Mart* operated 59 retail stores throughout New Zealand specialising in low cost consumer products including toys. It was sentenced on 22 charges.

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[8] *Commerce Commission v Mega Import and Export Limited* [2018] NZDC 2355.
[9] *Supra*

[66] 17 charges related to the supply of 8967 units of defective children's toys across seven different lines. Some charges were pre-increase but some were post-increase.

[67] A separate charge related to the supply of 1205 units of children's nightwear not carrying the prescribed fire danger labels. This charge was subject to the post-increase penalty of $600,000.

[68] Four charges relating to the supply of 1442 units of other items of clothing failed to comply with the necessary labelling requirements. Those charges have little impact on the analysis I must make as the maximum penalty for each was $30,000 only.

[69] Judge Ronayne adopted a start point of $330,000 on the charges relating to toys. He noted that *123 Mart* continued to sell its products after warnings not to do so and lied to the Commerce Commission during the investigation of one particular type of toy. The Judge considered the company was acting in a flagrantly cavalier and brazen way.

[70] By reference to those decisions Mr Barry supports his start point of $70,000 - $80,000. He acknowledges that the scale of MML's offending is well short of the offences committed by *123 Mart* and there is the lack of the aggravated factors of continued trading and misleading the Commerce Commission.

[71] Closer to home is the offending committed by *Mega* but, again, the offending by MML is less serious in terms of its scale. *Mega* distributed a greater number of toys across two separate product lines but in other respects there are matters in common.

[72] *Mega* was highly careless, had no knowledge of the standard and no testing regime. It cooperated and pleaded guilty. Any relativity analysis between MML and *Mega* is the scale of the offending.

[73] As noted, Mr Connell refers to pre-increase sentencing decisions but there is difficulty in meaningfully analysing and applying those decisions. In addition to the fact they relate to lesser maximum penalties, they apply to an environment where fewer low priced children's toys were being imported and sold in this country and no sentencing notes appear to be available, certainly counsel could not extract them from the databases. I do however have Commerce Commission media releases for those cases.

[74] Without sentencing notes there is difficulty in determining the sentencing Judge's reasoning with an inability to assess a starting point or what discounts may have been allowed for mitigation.

[75] Mr Connell in further submissions makes the following points:

(a) The goods were not imported but sourced from an importer.

(b) Only a small percentage of the total amount imported was actually distributed to retailers. The balance remaining in the MML warehouse and will be destroyed.

(c) Some items were returned as a result of the recall instigated by MML.

(d) MML will make no profit from its involvement with the toy.

(e) MML cooperated fully.

(f) MML is not in a strong financial position and a large fine is likely to put it into liquidation.

[76] Some of the above points are relevant but the fact that MML is not the actual importer and will not make profit on its contracts concerning the toy are not. The Act imposes obligations on those that distribute goods including importers, wholesalers and retailers.

[77] That no actual profit is made does not change the fact that the entire exercise in relation to the toy was for the purpose of making a profit. That is why MML is in business.

[78] I am persuaded by Mr Barry's submissions and adopt a start point of $75,000.

[79] For cooperation and lack of previous convictions that is reduced by 10%.

[80] Mr Barry has submitted for a guilty plea discount "up to 20%" but in my view the full discount of 25% per *Hessel v R* is due.[10]

[81] On a rounded basis that will result in total fines of $50,500 divided equally between both charges $25,250 each.

[82] However that is not the end of it. There is the factor of ability to pay to be brought into the mix.

Ability to pay

[83] Section 40 of the Sentencing Act 2002 provides:

> **40 Determining amount of fine**
>
> (1) In determining the amount of a fine, the court must take into account, in addition to the provisions of sections 7 to 10, the financial capacity of the offender.
>
> (2) Subsection (1) applies whether taking into account the financial capacity of the offender has the effect of increasing or reducing the amount of the fine.
>
> (3) If under an enactment an offender is liable to a fine of a specified amount, the offender may be sentenced to pay a fine of any less amount, unless a minimum fine is expressly provided for by that enactment.
>
> (4) Subsection (4A) applies if a court imposes a fine—
>
> (a) in addition to a sentence of reparation; or

[10] *Hessel v R* [2009] NZCA 450.

> (b) on an offender who is subject to an earlier sentence or order of reparation.
>
> (4A) In fixing the amount of the fine, the court must take into account—
>
> (a) the amount of reparation payable; and
>
> (b) that any payments received from the offender must be applied in the order of priority set out in sections 86E to 86G of the Summary Proceedings Act 1957.
>
> (5) When considering the financial capacity of the offender under subsection (1), the court must not take into account that the offender is required to pay a levy under section 105B.

[84] The scheme anticipated by s 40(1) is an orthodox analysis of sentencing purposes, principles and aggravating and mitigating factors. Where appropriate any measure to make amends must be taken into account. In addition to those matters the "financial capacity" of a defendant must be considered.

[85] That capacity may have the effect of increasing or reducing the amount of a fine – s 40(2). The mandatory requirement to take into account the financial capacity of a defendant existed prior to the Sentencing Act 2002 in the form of s 27 of the Criminal Justice Act 1985. Section 27(1) provided:

> (1) In fixing the amount of any fine to be imposed on an offender, a court shall take into consideration, among other things, the means and responsibilities of the offender so far as they appear or are known to the court.

[86] Decisions applying that provision, and which I consider continue to have application notwithstanding its revocation, emphasized the need to impose fines appropriate to a defendant's means to pay.

[87] In *R v Briggs* the Court of Appeal said that any fine imposed should not be excessive in relation to an offender's financial resources. Those resources include existing resources but also future assets and earning capacity.[11]

[11] *R v Briggs* CA 323/84, 9 May 1985.

[88] A full High Court bench in *Ministry of Agriculture and Fisheries v Finn* dealt with an appeal which inter alia:[12]

> … Raises the question of how Courts are to deal with impecunious offenders when the only penalty provided by Parliament is a fine and it is clear from the nature and purpose of the legislation and the maximum penalties provided that substantial fines are intended.

[89] In that case the Ministry of Agriculture and Fisheries as appellant challenged the level of fine imposed by the District Court for breaches of certain fisheries regulations. The Ministry considered the fines to be too low having regard to the importance of the conservation of the fishery resource and the need for deterrent penalties.

[90] The Court condoned an approach whereby a start point was adopted appropriate to the offence (what would now be a *Taueki* analysis) before any consideration for financial circumstances for reason that:

> … If publicized it may bring home to other potential offenders who *do* have means the likely penalty to be imposed if they offend and, if there is an appeal, either by the offender or the informant, it is helpful to the Appellate Court to know the steps by which the Judge at first instance has arrived at the penalty imposed.

[91] The Court acknowledged that sentencing principles cannot be seen as absolute and that each case must depend on its own facts but said that in the "ordinary run of cases" the approach taken by Wallace J in *Kale v Weir* is that which should be followed.[13]

[92] In that case Wallace J noted:

> … It has also frequently been stated that a fine must be within the capacity of an offender to pay: *R v Churchill (No 2)* [1967] 1 QB 190 … The general principle is that, while the Court may require a fine to be paid by instalments, the fine should not be of such magnitude as to require payment over a very lengthy period of time: see Hall on Sentencing in New Zealand (1987) at page

[12] *Ministry of Agriculture and Fisheries v Finn* (1994) 12 CRNZ 127.
[13] *Kale v Weir* HC Gisborne AP23/89, 5 February 1990.

> 139 and the English cases there cited, which indicate that approximately 12 months is normally an appropriate maximum period …

[93] In response to submissions for the Ministry of Agriculture and Fisheries that:

> If the financial penalties which the Court may impose in accordance with the law are not in fact a deterrent, other penalty options should be available.

The Court in *Finn* said:

> That is a matter for Parliament and the Ministry's objective cannot be achieved by overriding the long-established requirement that when an offender is being subject to a financial penalty his means and responsibilities must be taken into account.

[94] The above references reflect long standing and general principle but consideration needs to be given as to whether penalties imposed on companies and also in the area of commercial and consumer regulatory offending require a different approach.

[95] It is clear that ability to pay must be taken into account. If a fine is to be reduced to reflect an inability to pay that then raises a tension in sentencing between that consideration (ability to pay) and the need for deterrence and what Judge Ronayne observed was the need to avoid "no more than a licence fee".

[96] Some assistance in addressing that tension and in considering if in the area of commercial and consumer regulatory offending, ability to pay should be given less weight in favour of deterrence and avoiding a "licence fee" can be gained from *Machinery Movers Ltd v Auckland Regional Council*[14] and the English Authority of *R v Rollco Screw and Rivet Co Ltd.*[15]

[97] In *Machinery Movers* a full bench of the High Court was considering an appeal under the Resource Management Act. Counsel for the appellant referred to the pre-

[14] *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492.
[15] *R v Rollco Screw and Rivet Co Ltd* [1999] 2 CR APP R(S) 436.

RMA decision of Tipping J in *BJ Thom v Otago Regional Council* where the Judge said: [16]

> "…one obviously has to take the maximum with a grain of salt in relation to small operations."

[98] In addition to disparaging reference to pre-Act authorities the Court noted however that:

> We feel sure that Tipping J did not intend to give endorsement to the proposition that "small operations" must always be treated more leniently. In each case, it is a matter of degree: how small is a "small operation", what has been its relative degree of culpability for the offence, and what has been the extent of the damage caused?

[99] Nonetheless the Court ultimately concluded in relation to penalty that:

> However, it is important that the fine not place the company at risk, especially in the current climate where the continuation of employment is so important.

[100] In *Rollco* the English Court of Appeal was dealing with Health and Safety in Employment legislation. Financial penalties imposed by the lower Court were challenged.

[101] In addressing the position of a corporation subject only to financial penalties the Court referred to its own observations in prior cases.

[102] In *F. Howe & Sons (Engineers) Ltd* where, having noted the same safety standards apply equally to small and large organizations it said: [17]

> Any fine should reflect not only the gravity of the offence but also the means of the offender, and this applies just as much to corporate defendants as to any other.

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[16] *BJ Thom v Otago Regional Council* HC Dunedin AP21/91, 8 April 1991.
[17] *F. Howe and Sons (Engineers) Ltd* [1999] 2 Cr.App.R.(S.) 37.

[103] In addressing the balance between the need to deter and the ability to pay the Court in that case went on to say:

> The objective of prosecutions for health and safety offences in the work place is to achieve a safe environment for those who work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders.

[104] The Court in *Rollco* went on to consider its prior decision in *Olliver and Olliver* where the Court noted that for a corporate defendant the authorities would support in principle a longer period to pay than might apply to an individual. [18]

[105] The Court in *Rollco* said:

> We would be inclined to accept that with a personal defendant, with a fine hanging over him, there are arguments for keeping the period of that continuing punishment within bounds. It appears to us that those arguments are much weaker (if indeed they apply at all) when one is considering a corporate defendant. There is not the same sense of anxiety as is liable to afflict an individual, and it appears to us to be acceptable on proper facts and in appropriate circumstances for a fine to be payable by a company over a substantially longer period than might be appropriate in the case of an individual. We would, however, accept a further submission made by Mr Hegarty to the effect that one must avoid a risk of overlap. In a small company the directors are likely to be the shareholders and therefore the main losers if a severe sanction is imposed on the company. We accept that the court must be alert to make sure that it is not in effect imposing double punishment. On the other hand, it seems to us important in many cases that fines should be imposed which make quite clear that there is a personal responsibility on directors and that they cannot simply shuffle off their responsibilities to the corporation of which they are directors.

[106] I have considered the above cases as they relate to regulatory offending and have relevance in addressing the extent to which ability to pay must be factored into sentencing in the regulatory context. Consumer protection legislation is classically within that context.

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[18] *Olliver and Olliver* (1989) 11 Cr.App.R.(S.) 10.

[107] In [94] and [95] I raised the issue as to whether in sentencing for regulatory offending ability to pay should take a back seat in favour of deterrence and avoiding an effective licensing fee. I also raise the issue as to whether in sentencing a company any consideration for ability to pay may be addressed by a longer period over which a financial penalty can be met.

[108] I have resolved that issue by concluding that ability to pay should not be given lesser weight simply because a financial penalty has been imposed for a regulatory offence.

[109] Section 40 of the Sentencing Act 2002 imposes a mandatory requirement to consider financial means. That requirement applies to all sentencing regardless of the arena and regardless of the fact that a financial penalty is the only sanction provided for the particular offence.

[110] Any subsequent Court considering a sentence where ability to pay has resulted in a reduction in the fine will have the sentencing Judge's analysis on start point. That was made in *Ministry of Agriculture and Fisheries v Finn*.

[111] In *Rollco* the English Court of Appeal considered that an extended time for a corporation to pay a fine may dilute the effect of its inability to pay *but* in the case of a private company which is effectively the embodiment of a family business the family members are directly affected by the fine imposed on the company.

[112] I consider that in the case of a small family company, such as MML, the impact of financial penalty would be the same as if the individual family members were themselves being sentenced.

[113] The result therefore is that in determining the appropriate sentence for MML full weight will be given to the mandatory requirement to take into account its ability to pay.

[114] I commented above on the annual accounts provided in submissions. MML is a family company of modest means and which provides little return to its shareholders.

[115] It is however solvent and on my observation efficiencies in terms of its operating overheads could be easily achieved.

[116] Even with those efficiencies the company's profitability would remain modest and it would be wrong in principle to impose a fine that would threaten its ongoing solvency and viability.

[117] I consider that a total fine in the region of $35,000 can be justified.

Decision – sentence indication

[118] By reference to [78] – [81] above my sentence indication is $35,000 divided equally between both charges calculated as follows:

(a)	Start point	$75,000.00
(b)	10% reduction for cooperation and lack of previous convictions	-$7,500.00
		$67,500.00
(c)	A further reduction of 30% to acknowledge limited financial means, rounded to	-$21,000.00
		$46,500.00
(d)	Less 25% for guilty plea, rounded to	-$11,500.00
		$35,000.00
	Divided equally between both charges	$17,500.00 each

P G Mabey QC
District Court Judge