IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2023-404-000312
[2023] NZHC 3425

BETWEEN	COMMERCE COMMISSION Appellant
AND	NZME ADVISORY LIMITED Respondent

Hearing: 22 August 2023

Appearances: A M McClintock and J V Barry for Appellant
P F Wicks KC and K Wilson for Respondent

Judgment: 29 November 2023

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 29 November 2023 at 3.00 pm
pursuant to r 11.5 of the High Court Rules 2016

RD
~~Registrar~~ / Deputy Registr[redacted]

Date 29.11.2023

R. Dempster
Deputy Registrar
High Court

Introduction

[1] In the District Court, the respondent, NZME Advisory Limited,[1] pleaded guilty to a representative charge under ss 31(5) and 40(1) of the Fair Trading Act 1986.[2] It accepted that it supplied, offered to supply, or advertised for supply a product that was in contravention of an unsafe goods notice.

[2] The products were unsafe magnetic puzzle sets which had been advertised by NZME on the "daily deal" e-commerce website www.GrabOne.co.nz. 213 magnetic puzzle sets were supplied in total. A child had swallowed one of the magnets and required emergency life-saving surgery.

[3] The maximum penalty upon conviction for a charge under s 31(5) of the FTA is a $600,000 fine (s 40(1)(b)). The sentence imposed by Judge S J Maude in the District Court was a fine of $87,750; NZME'S culpability was assessed as being just over 20 per cent of the available maximum penalty, based on the starting point of $135,000.[3]

[4] The appellant, the Commerce Commission,[4] now appeals this sentence. The Commission has a broad statutory mandate to enforce New Zealand's consumer protection laws, and in particular the product safety regulatory regime under the FTA. The Commission submits that the sentence imposed by Judge Maude was manifestly inadequate in two respects. First, the setting of the starting point at a fine of $135,000 contained the following three errors:

(a) insufficient weight was given to the serious actual harm that resulted from the offending;

(b) the District Court Judge misstated GrabOne's turnover levels; and

(c) the Judge erroneously concluded that NZME's conduct was careless, rather than highly careless.

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1 NZME.
2 FTA.
3 *Commerce Commission v NZME Advisory Ltd* [2023] NZDC 10908.
4 The Commission.

[5] Second, the Commission alleges that the District Court Judge failed to apply the Court of Appeal's guidance from *Commerce Commission v Steel & Tube Holdings Ltd* and consider whether the end sentence was correct in all the circumstances or whether it was necessary to adjust the sentence at that point to achieve the purposes of accountability, denunciation and deterrence.[5]

[6] In the District Court, the Commission submitted that the appropriate starting point was between $200,000 and $240,000, with the end fine in the range of $130,000 to $156,000. That position necessarily involved assessing existing sentencing levels against the facts of this case. The Commission now says that that starting point was too modest and submits that it is open to this Court to set the starting point higher given the dearth of comparable cases. The Commission submits that a starting point of $300,000 could properly be viewed as the minimum starting point; this would reflect the seriousness of the offending, representing just 50 per cent of the available maximum penalty.

[7] NZME contends that the sentence imposed was appropriate and not manifestly inadequate; the District Court Judge did not make any material errors that would require a different sentence to be imposed on appeal.

Relevant facts

[8] The GrabOne website allowed third party vendors, referred to as merchants, to post deals that could then be purchased by members of the public. On several occasions between October 2020 and September 2021, a merchant called Fantasy Supply, based in China, sold a product called "Buckyball Magnets" via the GrabOne website. This product is sold as a magnetic DIY puzzle toy comprised of 216 pieces, sold in two different sizes and colours.[6]

[9] Small high-powered magnets of a certain size and magnetic flux are prohibited by an unsafe goods notice, specifically the Unsafe Goods (Small High-

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5 *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549 at [105].
6 Magnet Sets.

Powered Magnets) Indefinite Prohibition Notice 2014.[7] The UGN applies to separable or loose magnetic objects which:

(a) are able to fit entirely, in any orientation, into the small parts cylinder provided by clause 5.2 and figure 17 of the Australian/New Zealand Standard, Safety of toys – Part 1: safety aspects related to mechanical and physical properties (AS/NZS ISO 8124.1:2013); and

(b) have a magnetic flux index greater than $50(kG)^2mm^2$.

[10] On 18 August 2021, the Commission was notified by the Ministry of Business, Innovation and Employment[8] that an 11-year-old child in Auckland had recently ingested magnetic balls and required surgery to remove them. The Commission was subsequently advised by the child's parent that the magnetic balls were from a Magnet Set purchased by a friend's parent from GrabOne website on 28 July 2021.

[11] On 10 September 2021, and as part of its investigation, the Commission purchased two Magnet Sets (one silver and one multi-coloured) from the GrabOne website for testing. On 13 September 2021, the Commission contacted NZME in regard to this safety issue, notifying it of the complaint and test purchase. Upon receiving this communication, NZME immediately withdrew the deal, commenced a voluntary recall of the products, and requested confirmation of compliance documentation from Fantasy Supply. Fantasy Supply confirmed the Magnet Sets were compliant with EU law, but it was not apparent that they complied with the UGN. NZME contacted customers directly through email, phone calls, sent pre-paid courier bags for customers to return the Magnet Sets and, in some instances, carried out door knocking to contact consumers.

[12] Independent lab testing of the Magnet Sets in early October 2021 concluded that each magnet tested:

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7 The UGN.
8 MBIE.

(a) was capable of individually fitting, entirely, in any orientation, into the small parts cylinder stipulated by the standard referred to above (AS/NZS ISO 8124.1:2013); and

(b) had a magnetic flux index greater than $50(kG)^2mm^2$.

[13] The Magnet Sets were therefore prohibited by the UGN. Pursuant to s 31(5) of the FTA, if there is in force a notice declaring goods to be unsafe goods, a person must not supply, or offer to supply, or advertise to supply, such goods.

[14] On 1 November 2021, the Commission informed NZME of the results of the testing.

[15] Over the relevant period, specifically between 12 October 2020 and 21 September 2021, NZME, through the GrabOne website, supplied a total of 213 units of the Magnet Sets to 159 consumers. Units were priced between $15 and $25 depending on size and colour. Consumers purchasing the Magnet Sets made payments directly to GrabOne, which received a commission of between 25.02% and 26.52% for the sales of the Magnet Sets purchased through its site, in addition to a credit card and admin fee of 1.98%.

[16] GrabOne was owned by NZME for the entirety of the relevant period. In 2019/20, GrabOne had a turnover of $8,952,023. In 2020/21, it had a turnover (up until divestment of the GrabOne business to Global Marketplace New Zealand Limited) of $7,010,888. NZME had conditionally divested the GrabOne business on 24 August 2021 and that transaction was completed on 29 October 2021.

Sentencing decision

[17] Judge Maude began his decision by referring to a number of conventional and relevant sentencing principles: the need to hold a defendant accountable; the need to instil a sense of responsibility; the need to deter NZME and others from similar

behaviour; rehabilitation; public safety more widely; and the need to have regard to any victim of the offending.[9]

[18] The Judge acknowledged that NZME did have a process in place to detect unsafe products being sold through its platform. However, the process in this case failed because, in the Court's view, it was not robust enough to cope with human error. Serious injury "was an entirely foreseeable consequence of system failure",[10] and the serious injury suffered by the victim in this case informed the Court of the degree of risk that the company should have designed its processes to avoid.[11] Judge Maude acknowledged that NZME was entirely compliant with the Commission's investigation, but emphasised that any sentence must have a firm deterrent aspect to it.

[19] The Court considered that NZME's conduct was not to the degree of "high carelessness" as found in two earlier District Court product safety cases (*Greenstar Holding Ltd* and *2 Boys Trading Ltd*):[12] in *Greenstar* the company simply relied on a warning label on the product, and in *2 Boys Trading Limited* no compliance check system existed.[13] Judge Maude instead described NZME's conduct as "carelessness, with high consequence flowing from the carelessness, in a situation where the screening system adopted was not fit for purpose".[14]

[20] Judge Maude held that the offending here was "not dissimilar" to that in *Greenstar*, with similar risks. He noted that in *Greenstar* the defendant relied on labelling risk, and the product in this case was identified as suitable for over-14-year-olds; the assumption being that the product was not a toy.[15] His Honour noted that both companies "were compliant". I understand this to mean that they both took immediate steps to recall the product and were compliant with the Commission's investigations.

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9 *Commerce Commission v NZME Advisory Ltd*, above n 3, at [11].
10 At [41].
11 At [43].
12 *Commerce Commission v Greenstar Holding Ltd* [2020] NZDC 6407; *Commerce Commission v 2 Boys Trading Ltd* [2019] NZDC 22557.
13 *Commerce Commission v NZME Advisory Ltd*, above n 3, at [42] and [44].
14 At [42].
15 At [45].

[21] After reflecting on the $5 million turnover and $80,000 starting point in *SDL Trading Ltd*,[16] and the $1 million turnover and $65,000 starting point in *1st Mart*,[17] the Court then considered GrabOne's "$5,000,000 to $7,000,000 turnover" to arrive at a starting point of $110,000 "before allowing for the serious injury occasioned".[18]

[22] The Court then uplifted the starting point by $25,000 to take account of the injury, leading to an "actual starting point" of $135,000.[19] From there, 10 per cent was deducted for compliance, remorse and reparation, and 25 per cent for the guilty plea (i.e. a total discount of 35 per cent), resulting in an end fine of $87,750.

[23] The principal challenge to the sentence on appeal is to the starting point; there is no challenge to the discounts for mitigating factors.

Legal principles

Appeals against sentence

[24] Under s 250 of the Criminal Procedure Act 2011, the Court must allow an appeal against sentence if satisfied that:

(a) there is an error in the sentence; and

(b) a different sentence should be imposed.

[25] An appeal court will increase a sentence only where the sentence is manifestly inadequate or some error of sentencing principle has occurred.[20] Importantly, any interference with a sentence on appeal will be to the minimum extent required to remedy the manifest inadequacy.[21] There must be "a solid ground for treating the sentence as manifestly inadequate or inappropriate".[22]

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16 *Commerce Commission v SDL Trading Ltd* [2020] NZDC 17530.
17 *Commerce Commission v 1st Mart Ltd* [2022] NZDC 13480.
18 *Commerce Commission v NZME Advisory Ltd,* above n 3, at [48]–[49].
19 At [50].
20 *R v Cargill* [1990] 2 NZLR 138 (CA) at 140; *R v Muavae* [2000] 3 NZLR 483 (CA) at [10].
21 *Sipa v R* [2006] NZSC 52, (2006) 22 CRNZ 978 at [9].
22 *R v Cargill*, above n 20, at 140.

[26] As to the concept of "manifestly inadequate", in *R v Wilson* the Court of Appeal noted:[23]

> Whether a sentence can be said to be manifestly inadequate turns first on the maximum sentence for the particular offence; then on a consideration of comparable sentences, to the extent that those are considered to be appropriate; and above all, the focus is required to be on the totality of the offending and the culpability of the offender in the particular case.

[27] The considerations justifying an increase in sentence must be more compelling than those which might justify a reduction. Accordingly, the court is generally more reluctant to increase than it is to reduce a sentence.[24]

[28] On a prosecution appeal, the prosecutor is not ultimately bound by the position it took at first instance.[25] In the District Court, the Commission advocated for a starting point of between $200,000 and $300,000. It now contends that $300,000 is the minimum appropriate starting point.[26]

Analysis and decision

[29] I address each of the three grounds of appeal. They all relate to the starting point; there is no challenge to the discount applied for mitigating factors. These are the three critical questions I must determine in addressing the over-arching issue of whether the Commission has established that the end sentence of $87,750 was manifestly inadequate. The additional ground of appeal, whether the Court failed to apply the guidance in *Steel & Tube Holdings Ltd* and consider whether the starting point needed to be adjusted to reflect sentencing purposes, will be dealt with briefly at the end of my judgment.

[30] In addressing the over-arching issue of whether the end sentence was manifestly inadequate, Ms McClintock, for the Commission, contended that the

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23 *R v Wilson* [2004] 3 NZLR 606 (CA) at [41]; recently cited in *McCaslin-Whitehead v R* [2023] NZCA 259 at [30].

24 *McCaslin-Whitehead v R,* above n 23, at [31].

25 *R v Tipene* [2001] 2 NZLR 577 (CA) at [11].

26 This is not a case where the prosecutor acquiesced to a particular sentence it later says is wrong, or where the appeal seeks to substitute a non-custodial sentence for a custodial one, which are situations in which the authorities have suggested caution must be taken. See *Solicitor-General v Meyer* [2022] NZHC 2692 at [66]–[85].

Court should conduct a synthesis of the culpability factors and an evaluative judgment against the relevant sentencing principles, purposes and factors. That leads to the conclusion that the modest fine imposed here was manifestly inadequate.

[31] Before addressing those three grounds I shall make some general observations about sentencing under the FTA and the approach taken to date in comparable cases.

Sentencing under the FTA

[32] The Court of Appeal considered the approach to sentencing under the FTA for the first time in *Commerce Commission v Steel & Tube Holdings Ltd*.[27] In that case, Steel & Tube Holdings Ltd pleaded guilty to 24 representative charges of misleading conduct and false representations in connection to one of its products. While the Court was careful to note that it was not issuing a guideline judgment,[28] it nonetheless laid down principles for future cases. The Court reviewed the authorities, which recognise that sentencing should begin with the objects of the FTA, which pursues a trading environment in which consumer interests are protected, businesses compete effectively, and consumers and businesses participate confidently. To those ends the legislation promotes fair conduct in trade and the safety of goods and services.[29]

[33] The Court considered customary sentencing methodology applies, and that factors affecting the seriousness and culpability of the offending may include, amongst others:[30]

(a) the nature of the good or service and the use to which it is put;

(b) whether the offending was isolated or systematic;

(c) the state of mind of any servants or agents whose conduct is attributed to the defendant;

(d) any compliance systems and culture and the reasons why they failed;

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27 *Commerce Commission v Steel & Tube Holdings Ltd*, above n 5.
28 At [106].
29 At [90].
30 At [91].

(e) any harm done to consumers and other traders; and

(f) any commercial gain or benefit to the defendant.

[34] Factors affecting the circumstances of the offender include any history of infringement; guilty pleas; co-operation with the authorities; any compensation or reparation paid; commitment to future compliance and steps taken to ensure it.[31] The defendant's financial resources may justify reducing or increasing the fine.[32]

Comparable cases

[35] In their written submissions, counsel for the Commission helpfully set out all available product safety sentencing decisions since the maximum penalty increased to $600,000 in 2014. There are 27 decisions. Those decisions are listed in the attached schedule 'A'. All of the decisions are at District Court level, with the consequent effect that sentencing practice in the product safety arena has been set without any specific appellate consideration. Several key themes emerge from these cases:

(a) None of the cases involved actual harm.

(b) To the extent decipherable from the sentencing notes, the prosecutions mostly involve small to moderate sized traders, but with some notable exceptions.[33]

(c) The starting points adopted in all prosecutions, bar one, have been set at less than 25% of the maximum penalty for a single offence. The total end fine has only ever exceeded $100,000 on three occasions.[34]

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31 At [92].

32 Sentencing Act 2002, s 40(2).

33 See, for example, *Commerce Commission v Torpedo7 Ltd* [2019] NZDC 23398 and *R v NZ Sale Ltd* [2018] NZDC 20513.

34 In *Commerce Commission v The 123 Mart Ltd (in liq)* [2017] NZDC 23286, the end fine was $252,000; in *Commerce Commission v Paramount Merchandise Company Ltd* [2021] NZDC 17008, the end fine was $104,000 (note that this also included misrepresentation charges); and in *Commerce Commission v Brand Developers Ltd* [2015] NZDC 21374 the end fine in relation to two unsafe goods notices breaches was $100,000 (with additional fines in relation to misrepresentation charges, resulting in a total fine of $153,000).

(d) However, as submitted by the respondent, in each of the other three cases where the end penalty was greater than the fine imposed here, there were other significant aggravating factors which are not present in this case.[35]

[36] The Commission submits that comparisons between cases should bear in mind the effects of inflation over time and that penalty levels must rise over time to maintain the same deterrent effect.[36] The Commission contends, for example, that a $1 fine imposed today is roughly the equivalent of a 79 cent fine imposed back when the maximum penalty increased in 2014.[37] In the Commission's submission, this context should inform its principal ground of appeal: that the starting point imposed in the District Court was manifestly inadequate.

[37] I agree with that submission. I also agree with the Commission's contention that far from increasing over time, analysis of the relevant cases indicates that penalties have remained somewhat stagnant. If anything, they may have gone backwards since the largest fine imposed by the District Court in *Commerce Commission v The 123 Mart Ltd*.[38] While cases will always be fact specific, this context is important to the issues in this appeal.

[38] The various District Court decisions referred to by the parties tend to support the Commission's submission that the District Court has felt somewhat constrained by its own decisions in determining appropriate sentences under the FTA.

[39] In *Commerce Commission v Greenstar Holding Ltd*, a case specifically referred to by Judge Maude in the decision under appeal, Judge Blackie observed:[39]

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35 In *Commerce Commission v Paramount Merchandise Co Ltd*, above n 34, 2,280 non-compliant products were sold and the defendant pleaded guilty to multiple charges, including charges for false and misleading misrepresentation. In *Commerce Commission v The 123 Mart Ltd (in liq)*, above n 34, the defendant was found guilty of 17 offences relating to toys and children's clothing, with the toy breaches continuing for three years and two months. In addition, the defendant had a $22 million annual turnover. In *Commerce Commission v Brand Developers Ltd*, above n 34, the defendant pleaded guilty to five charges, including false representations; 2,001 non-compliant units were supplied; and the offending was found to be reckless.

36 See *Commerce Commission v Vodafone New Zealand Ltd* [2023] NZHC 2149 at [279].

37 Based on a $1 fine imposed in Q2 2023 expressed in Q3 2014 value: https:/www.rbnz.govt.nz//monetary-policy/about-monetary-policy/inflation-calculator.

38 *Commerce Commission v The 123 Mart Ltd (in liq)*, above n 34, in 2017 ($252,000).

39 *Commerce Commission v Greenstar Holding Ltd*, above n 12.

> [67] With the interests of the young and vulnerable in mind, I am of a view that substantially higher penalties could be justified in cases involving breaches of the standard required under the Product Safety Standards (Children's Toys) Regulations 2005. However, I have to have regard to the need for consistency in sentencing albeit that consistency is only in relation to District Court decisions. Having regard to those decisions, I accept that the appropriate starting point in this case [is] to be a fine of $80,000, to reflect the seriousness of the offending and the need for general deterrence for product safety breaches.

Ground one – insufficient weight given to the presence of actual harm

[40] In focusing on the presence of harm, the Commission's submissions emphasised just how serious the consequences of this offending were for the 11-year-old victim who ingested the magnet. The victim impact statement prepared by the victim's mother noted that her child was in "extreme pain" and that the surgeon told her that her daughter could have died if she had waited any longer to take her to hospital. The victim had to undergo an operation to remove the magnets, resulting in a long and painful recovery that included a week in hospital.

[41] The Commission accepts that the sentencing Judge made various references to actual harm but submits that he did so with a "narrow focus" which has led to a gross understatement of the significance of this harm.

[42] Judge Maude addressed the issue of actual harm in the following way:

> [43] The serious injury occasioned to the victim in this case operates to assist the Court [to] inform itself of the degree of risk that the company should have designed its processes to avoid.

[43] I accept, as Mr Wicks KC for NZME submitted, that Judge Maude uplifted the initial starting point to reflect the actual harm that resulted from the offending: an uplift of $25,000 "to take into account the injury occasioned" was applied.[40] However, I agree with the submission of the Commission and find that Judge Maude did understate the degree of harm and his reasoning does suggest a somewhat "narrow focus". The serious injury in this case has much broader relevance than simply informing the design of NZME's compliance systems. The extent of harm resulting from an offence is, where applicable, a mandatory aggravating sentencing factor

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40 *Commerce Commission v NZME Advisory Ltd,* above n 3, at [50].

under s 9(1)(d) of the Sentencing Act 2002. Absent a death caused by a prohibited or non-compliant product, it is difficult to conceive of a more serious case in terms of the impact of offending on a victim.

[44] The Judge attributed a value of $25,000, or slightly more than 20 per cent of the baseline starting point of $110,000, to account for the issue of actual harm. In my view, that was manifestly inadequate. The victim, who required emergency life-saving surgery, was only 11 years old. The interests of the young and vulnerable must inform the assessment of the nature and degree of the harm caused.

[45] I find that Judge Maude did give insufficient weight to the presence of actual harm.

Ground two – insufficient weight given to GrabOne's size

[46] In determining the starting point, Judge Maude took into account GrabOne's "$5,000,000 to $7,000,000 turnover".[41] However, as the parties agree, this figure is incorrect; GrabOne's turnover levels were in fact $7,000,000 to $9,000,000 over the relevant period. In addition to stating the turnover levels incorrectly, the Commission submits that the Judge did not explain how GrabOne's turnover levels were relevant to the starting point, nor did he make any material reference to GrabOne being part of the wider NZME group.

[47] The Commission notes that in the financial year prior to the GrabOne business being divested by NZME, it had approximately 35 employees, including sales managers and a marketing team. It also formed part of the NZME Group, a publicly listed group of broadcasting and media companies that owns and operates more than 50 of New Zealand's media brands, including the largest commercial radio stations and The New Zealand Herald.

[48] Whilst acknowledging the incorrect turnover figures, Mr Wicks KC, for NZME, submitted that this was not an error in principle, and neither was it a material error such as to render the sentence manifestly inadequate. Furthermore, he

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41 At [48].

submitted that GrabOne being part of the NZME Group is not relevant to any of the applicable sentencing principles. Therefore, there was no reason to expect Judge Maude to make any reference to this.

[49] As stated above, a defendant's financial means may justify reducing or increasing the fine it receives at sentencing to ensure it serves its purpose.[42] The authorities are clear that it appropriate to have regard to a wealthy defendant's means to ensure the fine does have the effect of punishing ("stinging") the defendant. However, it cannot be an aggravating factor in itself.[43]

[50] In *Commerce Commission v Steel & Tube Holdings Ltd,* the Court of Appeal observed that it was good practice to determine the amount that would be payable but for the offender's means, then adjust down or up as appropriate. That is appropriately done at the second stage of the sentencing analysis.[44] Having calculated the end sentence, the Judge must then step back and inquire whether it is correct in all the circumstances. The fine should retain proportionality to the offending.

[51] In that case, the Court of Appeal considered that Steel & Tube was a large company by New Zealand standards and there was no doubt it could afford to pay a fine of $1,560,000. In line with the practice outlined above, it then considered whether this fine should be increased for accountability, denunciation or deterrence reasons.[45] By reference to the company's profitability levels ($25.8 million after-tax profit on revenues of $515.9 million),[46] the Court considered that the fine of $1,560,000 was a material cost for the company and would therefore sufficiently serve the relevant sentencing purposes. The company's resources did not call for an increase.[47]

[52] Moore J followed this approach very recently in *Commerce Commission v Vodafone New Zealand Ltd*, applying a 25 per cent uplift to reflect Vodafone's

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42 Sentencing Act 2002, s 40.
43 *Commerce Commission v Steel & Tube Holdings Ltd,* above n 5, at [103].
44 At [105].
45 At [148].
46 At [124].
47 At [149].

financial means.[48] His Honour stated that the level of uplift to be applied is an evaluative exercise requiring judgement, having regard to all the circumstances.

[53] It is clear that Judge Maude did take into account the respondent's turnover levels in his ultimate determination of the fine of $87,750. It seems that the learned Judge took into account GrabOne's financial means as part of his assessment of the starting point rather than adopting the practice recommended by the Court of Appeal in *Commerce Commission v Steel & Tube Holdings Ltd* of adjusting the fine up or down at the second stage of the sentencing analysis. In principle, that approach was not a material error.

[54] However, the turnover figures adopted by the Judge as part of this analysis were substantially incorrect. The error made was of a material kind; the Judge misdirected himself in adopting figures that were substantially less than the actual turnover figures (a difference of several million dollars). That was an error in relation to a mandatory sentencing factor (s 40 of the Sentencing Act).

[55] The Commission's submission that Judge Maude was in error in not making any material reference to GrabOne being part of the NZME Group needs to be approached with caution. It is of course a basic principle of company law that a corporation is to be treated as a separate legal person, with separate assets, from its shareholder(s).

[56] This issue has been addressed by two recent UK decisions, albeit in a lightly different context (the Health and Safety at Work setting). Neither of these cases were referred to by counsel. I acknowledge that they involve the application of the Sentencing Council for England and Wales Definitive Sentencing Guidelines (for Health and Safety Offences),[49] but the general sentencing principles are of relevance.

[57] In *R v NPS London Ltd*, the English Court of Appeal held:[50]

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48 *Commerce Commission v Vodafone New Zealand Ltd*, above n 36, at [290].

49 See *Halsbury's Laws of England* (5th ed, 2020, online ed) vol 53 Health and Safety at Work at [841].

50 *R v NPS London Ltd* [2019] EWCA Crim 228.

> [15] … The mere fact, however, that the offender is a wholly owned subsidiary of a larger corporation or that a parent company or other "linked" organisation is in practice likely to make funds available to enable the offender to pay a fine is not a reason to depart from established principles of company law or to treat the turnover of the linked organisation as if it were the offending organisation's turnover at step two of the sentencing guideline.
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> [16] By contrast, whether the resources of a linked organisation are available to the offender is a factor which may more readily be taken into account at step three when examining the financial circumstances of the offender in the round and assessing "the economic realities of the organisation". It may certainly be relevant at that stage, when checking whether the proposed fine is proportionate to the overall means of the offender, to take into account the economic reality – if it is demonstrated to the court's satisfaction that it is indeed the reality – that the offender will not be dependent on its own financial resources to pay the fine but can rely on a linked organisation to provide the requisite funds.

[58] A similar approach was adopted in *R v Bupa Care Homes (BNH Ltd)*.[51] However, it appears that in that case the Court was also reluctant to take into account a parent company's turnover to increase the fine at step three of the relevant sentencing guideline, absent some special factor (and for the same reasons as it is wrong to take this into account at step two).[52]

[59] The Commission submitted that a realistic appraisal of GrabOne as an entity is that it had (or had the capacity to) have deep pockets. It refers to multiple press releases from the parent company, NZME Ltd, relating to this prosecution, where NZME Ltd stated:

> The proceedings are not expected to have a material effect on the financial position or profitability of the NZME.

[60] There may be merit to that submission. However, there is insufficient evidence before the Court for me to reach a conclusion on this issue, namely whether the Judge was in error in failing to make any material reference to GrabOne being part of the NZME Group. More direct and detailed evidence would be required to determine whether there was a basis for concluding that the "economic realities of the organisation" ought to have been taken into account, or that there was some "special factor" justifying consideration of the financial resources of the broader

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51 *R v Bupa Care Homes (BNH Ltd)* [2019] EWCA Crim 1691.
52 At [84].

NZME Group. Insufficient evidence was provided, and it is of course for the appellant to prove such matters.

[61] Having said that, I accept in principle the Commission's submission that even in cases where the offending was not wilful or deliberate, deterrence remains necessary to incentivise investment into systems and processes that ensure compliance.[53] That investment is expensive. In the context of competitive markets like retail, especially retail of goods that ultimately find their way into the hands of children, it is important that companies are incentivised to invest in compliance with the law.

[62] I also agree that a defendant's resources do have a direct bearing on the corresponding expectations for having in place a robust compliance system.

[63] In any event, GrabOne, in its own right, was not a small business with only a handful of employees. It was well resourced and that is of relevance to the failure of its compliance system, which I address below. The financial resources of GrabOne were an important and mandatory element in the sentencing process. Those factors reinforce my view that the error made by Judge Maude as to the turnover levels was of a material kind and that this resulted in insufficient weight being given to GrabOne's size.

Ground three – characterisation of NZME's conduct

[64] The Commission submits that the District Court Judge erred in finding that NZME was merely careless and rejecting the contention that it was highly careless. It submits that the Judge's conclusion on this point was based on his erroneous conclusion about NZME's compliance system; that differentiated it from earlier cases where little or no compliance regime was in place. It refers to the following excerpts from the sentencing notes:

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[53] Peter Cartwright *Credible deterrence and consumer protection through the imposition of financial penalties: lessons for the Financial Conduct Authority in fighting financial crime in the global economic crisis* (Routledge, London, 2014) at 22.

> [39] NZME did have a process to detect unsafe product being sold through its platform. Its process in this case failed. It failed because, in my view, it was not robust enough to cope with human error …
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> …
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> [41] Injury, and serious injury, was an entirely foreseeable consequence of system failure.
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> [42] The *Greenstar* classification of high careless, where it relied simply on a warning label on product, however, is not, in my view, met in this case. That said, there was carelessness, with high consequence flowing from the carelessness, in a situation where the screening system adopted was not fit for purpose.

[65] The Commission contends that the Judge categorised NZME's conduct as a failure of the compliance process as a result of human error. In the Commission's submission, this misstates the fundamental flaw in NZME's system. It says that its compliance system completely failed to account for unsafe goods notices, and therefore unless the Magnet Sets were inadvertently caught by some other part of its compliance system, they would never have been screened out as they should have been. The Commission says, therefore, that the Judge overstated the relevance of NZME's compliance processes.

[66] In its written submissions (and as recorded in the summary of facts) the respondent sets out the compliance process for selling products via the GrabOne website, which I summarise as follows. Firstly, upon receipt of a submission form from a merchant, outlining the details of the product, sales representatives were trained to consider whether compliance checks were necessary according to NZME's compliance program. Certain products were categorised as "high-risk" goods, including children's toys, and sales representatives were trained to identify such goods. Any high-risk good was required to undergo additional steps before being accepted as a deal on the GrabOne website, typically involving:

(a) The completion of a compliance document by a sales representative (known as an "L2 Onboarding Form") which required them to scrutinise the products against the legislative requirements (e.g. any applicable product safety standard) to identify any requirement which

might mean further compliance documentation was required from the merchant.

(b) The L2 Onboarding Form was then submitted to the GrabOne Operations and Content Manager for review. The manager would check the "high-risk" product against the L2 Onboarding Form and assess any relevant testing assurances supplied by the merchant. The manager "might also" have checked any guidance published by a relevant regulatory body (e.g. the NZCC, WorkSafe or Energy Safety) to assess the standards a product was required to meet for sale in New Zealand.

[67] The respondent accepts that two separate errors led to the Magnet Sets being sold on the GrabOne website:

(a) The sales representative who received the submission form did not treat the Magnet Sets as a children's toy due to the merchant stating that they were suitable for an age range over 14 years. This meant that the product was not escalated to a manager, which the respondent submits was "an isolated incident of human error".

(b) NZME's compliance materials did not expressly refer to any unsafe goods notices, despite NZME having engaged a specialist third party risk compliance consultant to design its compliance program. The information available suggests that unsafe goods notices were simply never considered by the third-party consultant when NZME's compliance program was developed by that person.

[68] It may be that the term "highly careless" overstates the degree of NZME's culpability. However, I find that Judge Maude has overstated the relevance of NZME's compliance processes and failed to acknowledge the nature and degree of carelessness in this case. It was significant. A product safety compliance process that in no way accounts for UGNs is not much of a compliance process at all in the context

of a case like this. It fails to provide a mechanism to stop the supply of per se dangerous goods.

[69] Where serious injury is an entirely foreseeable consequence of a system failure, as Judge Maude recognised, that factor is highly relevant to determining whether the compliance process/system was adequate or robust enough.

[70] The context is obviously all important. The following factors are relevant:

(a) Between November 2012 and December 2019, GrabOne received eight compliance advice letters from the Commission concerning obligations under the FTA, one of which contained advice about compliance with product safety standards.

(b) Unsafe goods notices are not novel or difficult to locate. Information about unsafe goods notices are on the "product safety standards" page of the Commerce Commission website. They are among the most important regulations in the product safety arena. However, NZME, operating in the market by supplying goods to consumers on one of New Zealand's largest e-commerce websites (GrabOne), did not take any account of them.

(c) Product safety compliance is not a once and done exercise; compliance requires ongoing assessment for updates on the applicable regulatory regime.

(d) As the summary of facts notes, the listing of the Magnet Sets on the GrabOne website stated that they could "be used as an educational tool for children". The vulnerable nature of the target market reinforces the need for vigilance and care.

[71] The Commission notes that GrabOne Ltd was convicted and sentenced in 2014 on charges of breaching the Electricity Act 1992 and Electricity (Safety) Regulations 2010. That case involved advertising and supplying a bubble machine

which gave consumers an electric shock. In that sentencing decision, the Court noted that GrabOne Ltd had compliance issues in the past and described its response to the consumer complaint as "woefully inadequate".[54]

[72] I agree with the submission of Mr Wicks that it is wrong to characterise NZME as a "repeat offender": it has not previously been charged under the FTA. I also note that the conviction under the Electricity Act is now somewhat historic. However, having said that, some regard can be had to that earlier conviction in determining the degree to which NZME (through GrabOne) was on notice of the importance of regulatory compliance and ensuring their systems were robust and adequate enough to meet their obligations.

[73] I conclude that the learned District Court Judge was in error in his characterisation of the conduct and degree of carelessness by NZME. The degree of carelessness was understated.

Conclusion – starting point

[74] As a result of the three errors I have identified above, I find there should be a material increase to the starting point imposed. The starting point of $135,000 adopted by Judge Maude was manifestly inadequate.

[75] Had the District Court Judge correctly analysed the seriousness of the actual harm suffered and the financial resources of GrabOne, and not understated the degree of carelessness by NZME, he would clearly have imposed a higher starting point.

[76] This is the first product safety prosecution in New Zealand where the offending has caused actual harm. It is also the first product safety prosecution to come before this Court since 1990. I agree with the submission of the Commission that there should be a substantial departure from the existing sentencing levels in the District Court. The unique and serious conduct that I have identified, together with the need to take into account inflation, supports this approach.

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[54] *Worksafe New Zealand v GrabOne Ltd* DC North Shore CRI-2014-044-002334, 6 October 2014 at [4].

[77] I find that a starting point of at least $300,000 best reflects the true culpability of the offending in this case. That represents 50 per cent of the available maximum penalty prescribed by Parliament.

[78] I agree with the Commission's submission that a significantly higher starting point is required to send a deterrent message to traders in the product safety context.[55] Deterrence must be a primary objective when sentencing corporate offenders.

[79] I acknowledge that the Commission contended for a lower starting point than $300,000 in its submission to the District Court (i.e. a starting point between $200,000 and $240,000). However, in the circumstances of this case that is not material; on a prosecution appeal, as I have said, the prosecutor is not ultimately bound by the position it took at first instance.

[80] It is not necessary for me to address the alternative ground of appeal in detail, namely an express uplift to reflect financial resources. This is because the company's financial resources have been sufficiently taken into account in setting the starting point. In any event, given the increased starting point I have arrived at and after stepping back and assessing whether it is correct in all the circumstances (in accordance with the Court of Appeal's guidance in *Steel & Tube Holdings Ltd*),[56] I do not consider that any further adjustment is required in order to serve the relevant sentencing purposes. The fine I now impose is significant, and adequately accounts for the company's financial means.

Result

[81] I grant the Commission's appeal against sentence.

[82] The end sentence imposed by the District Court Judge, namely a fine of $87,750, was manifestly inadequate.

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55 See, in the Australian context, *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49 and *Australian Competition and Consumer Commission v Leahy Petroleum (No 3)* [2005] FCA 265.

56 *Commerce Commission v Steel & Tube Holdings Ltd,* above n 5, at [105] and [148].

[83] The sentence is replaced with a fine of $195,000 (i.e., a starting point of $300,000 with a 35 per cent discount for mitigating factors).

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Andrew J

APPENDIX 'A'

Case	Judgment date	Starting point	Starting point as % of max. (of single offence)	Plea	Other	End penalty	Defendant size
Commerce Commission v PKD Group Ltd (in liq) 2023] NZDC 11923	9 June 2023	$85,000	14%	25%	0%	$63,750	Small: turnover $42,000
Commerce Commission v Paramount Merchandise Co Ltd [2021] NZDC 17008	23 August 2021	$110,000	18%	25%	10%	$104,000	Medium to large: $7m turnover, 12 employees, 4 sales staff
Commerce Commission v 1st Mart [2022] NZDC 13480	5 July 2022	$65,000	11%	25%	0%	$55,250	Small to medium: $1m in early years, but more modest results
Commerce Commission v ND Import & Export Ltd [2021] NZDC 16449	16 August 2021	$55,000 - $60,000	9-10%	25%	10%	$36,000	Described as "moderate"
Commerce Commission v Quick Dollar Ltd [2021] NZDC 10894	1 June 2021	$10,000	18%	25%	10%	$60,500	Two full-time employees with annual turnover between $90,000 and $1.1 million
Commerce Commission v Y & Y Century Ltd [2021] NZDC 2804	16 February 2021	$60,000	10%	25%	10%	$39,000	Small company that operated three retail shops
Commerce Commission v New Hub Furniture Warehouse Ltd [2021] NZDC 2041	4 February 2021	$90,000	15%	25%	10% for cooperation and good character 5% for remorse. 10% for precarious financial circumstances	$48,600	Turnover of $1.65m across two financial years
Commerce Commission v SDL Trading Ltd [2021] NZDC 17530	28 August 2020	$80,000	13%	25%	15% uplift for previous offending. 5% discount for cooperation	$64,000	15 staff with a $5 million annual turnover
Commerce Commission v Feel So Good Ltd [2020] NZDC 19909	5 June 2020	$115,000	19%	25%	10%	$60,000	Small: company with one director, family-owned and trading at a loss
Commerce Commissioner v Espoir Ltd [2020] NZDC 10670	5 June 2020	$90,000	15%	25%	10%	$60,750	Turnover approximately $900,000 to $1m in 2017 and 2018. Referred to as "small to moderate sized"
Commerce Commission v Greenstar Holding Ltd [2020] NZDC 6407	22 April 2020	$80,000	13%	25%	10%	$54,000	Six employees. Gross profit of $670,000, net profit $36,000

Commerce Commission v Cinevan International Ltd [2020] NZDC 2893	19 February 2020	$120,000	20%	25%	10%	$81,000	$3.5m turnover across three years
Commerce Commission v Container Door Ltd [2020] NZDC 895	20 January 2020	$80,000	13%	25%	10%	$54,000	Judgment silent
Commerce Commission v Torpedo 7 Ltd [2019] NZDC 23398	19 November 2019	$125,000	21%	25%	10%	$80,000	Large, although specific figures redacted. Wholly owned subsidiary of The Warehouse Group
Commerce Commission v ACQ Development Ltd [2019] NZDC 19267	10 October 2019	$120,000	20%	25%	10%	$81,000	Little information on size given
Commerce Commission v 2 Boys Trading Ltd [2019] NZDC 22557	20 June 2019	$110,000	18%	25%	10%	$74,250	Little information on size given
Commerce Commission v Goodview Trading NZ Ltd [2019] NZDC 3795 (Goodview)	19 March 2019 (reissued 18 April 2019 – amended calculations for Goodview)	$35,000	18%	25%	15%	$22,312.50	Little information on size given, albeit imports 1,000 product lines
Commerce Commission v Goodview Trading NZ Ltd [2019] NZDC 3795 (joint future)	19 March 2019	$130,000	Some offending at $200,000 maximum – some offending at $600,000 maximum.	25%	10%	$87,750	Employs 5-6 staff in addition to directors. Carries 2,000-4,000 product lines
Commerce Commission v Goodview Trading NZ Ltd [2019] NZDC 3795 (Ebenezer)	19 March 2019	$60,000	Some offending at $200,000 maximum – Some offending at $600,000 maximum	25%	7.5%	$41,625	Little information on size given, albeit carries 10,000 product lines
Commerce Commission v Goodwear Ltd [2018] NZDC 25014	23 November 2018	Product safety: $80,000 Information $20,000	13%	25%	10% for cooperation and lack of prior convictions	$67,500	Described as "a relatively small-time operator" but "a profitable company"
R v NZ Sale Ltd [2018] NZDC 20513	25 September 2018	$110,000	One charge at $200,000 maximum penalty, three charges at $600,000 penalty	25%	10% cooperation and lack of previous convictions	$74,000	Large: 30 employees and annual turnover of $32m
Commerce Commission v Manufacturers-Marketing Ltd [2018] NZDC 7913	23 April 2018	$75,000	13%	25%	10%	$35,000	Small family company

Commerce Commission v SDL Trading Ltd [2018] NZDC 6626	26 March 2018	$120,000	One charge at $200,000 maximum penalty, five charges at $600,000 penalty	25%	10%	$81,100	"Modest sized company – about 10, sometimes 10 plus employees and an annual turnover of $4m"
Commerce Commission v AHL Co Ltd [2018] NZDC 27400	23 February 2018	$30,000	One charge at $200,000 maximum penalty, one charge at $600,000 penalty	25%	10%	$20,000	Annual turnover of $1m
Commerce Commission v The 123 Mart Ltd (in liq) [2017] NZDC 23286	13 October 2017	$280,000	46%	5%	10%	$252,000	Sizeable: 120-150 employees and annual turnover of $22m
Commerce Commission v Baby City Retail Investments Ltd [2017] NZDC 885	19 January 2017	$60,000	10%	25%	10%	$39,000	Operated 15 stores, described as a "significant company"
Commerce Commission v Brand Developers Ltd [2015] NZDC 21374	23 October 2015	UGN: $185,000 Misrepresentations $120,000	UGN: 92% Misrep: 60%		$50,000 And a further $40%	UGN: $100,000 Misrep: $17,666	Little information on size given