IN THE DISTRICT COURT
AT NORTH SHORE

CRI-2014-044-002334

WORKSAFE NEW ZEALAND
Informant

v

GRABONE LIMITED
Defendant

Hearing: 6 October 2014

Appearances: S Symon for the Informant
P Wicks QC for the Defendant

Judgment: 06 October 2014

NOTES OF JUDGE E P PAUL ON SENTENCING

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[1] Grabone Limited appears today for sentence on one charge pursuant to s 163(c) Electricity Act 1992, the maximum penalty for a company is a fine not exceeding $500,000. The second charge is against reg 80 Electricity (Safety) Regulations 2010 in that they aided Kmall in committing an offence against that regulation. The maximum penalty there, a $50,000 fine. Grabone Limited is represented by Mr Wicks QC and Mr Symon appears for the informant.

[2] Guilty pleas were entered at the first appearance by the company and accordingly the full discount will be available to them at this sentencing. In terms of the facts of the offending, Grabone runs a website which promotes and offers various types of goods and services supplied by merchants for sale on a short term basis to its subscribers. It is to be noted that Grabone has had compliance issues in the past and on 22 June 2012 they were warned for selling bug scare machines in breach of

the regulations. On 29 October 2013, they were issued with an infringement notice and fee for selling led butterfly lights which were in breach of the regulations.

[3] In respect of the offending here, on 2 November 2013, Sheree Kennedy purchased a bubble machine from the Grabone website. On 16 – 27 December she contacted Kmall, the original supplier of the goods about the bubble machine. She advised that company she had received an electric shock from the bubble machine when it was plugged in but switched off.

[4] On 27 December 2013 to 5 January, she emailed Grabone explaining her complaint and raising her safety concerns. Grabone responded stating that she should send the machine back for testing. Frankly, this was woefully inadequate and that is acknowledged by the defendant. It was inadequate because Grabone did not take any steps to withdraw the product from sale, test other products or notify other customers of the risk, all matters, which they acknowledge, essentially should have been undertaken at the time.

[5] On 10 February Miles Bonniefield of the energy safety unit of the Ministry of Business, Innovation and Employment observed the bubble machines were again being advertised by Grabone. An inspection of Ms Kennedy's machine revealed a number of failures which I do not propose to repeat. On 10 February Mr Bonniefield contacted Grabone and Kmall to notify them of the safety concerns and Grabone informed, on an urgent basis, that they would take a number of steps to remedy the situation with no dispute that that is what occurred. Kmall, for their part, also responded on 11 February. There was also assistance provided by Grabone directly to the Energy Safety team in effect.

[6] In terms of submissions, I have had full written submissions from both the prosecutor and defendant. Mr Symon for the prosecutor is seeking a total starting fine in the order of $120,000. He refers to the purposes of sentencing, particularly deterrence both specific and in general for this company. He states that Energy Safety, who bring the prosecution, are concerned by the persistent sale of non-compliant and unsafe electrical products disclosed here. They say the offence under reg 80 is particularly serious given the potential harm and the fact that a

customer did suffer an electric shock from one of the machines, so reinforcing the potential for serious harm and Mr Symon has addressed me on that today.

[7] In their submissions, the prosecution say Grabone were aware of the company's requirements to comply with New Zealand Safety Standards and they cannot come to this sentencing attempting to display some level of ignorance, given their previous notices and infringements. They record there are 439 purchases of bubble machines potentially to the value of $15,000. Then he addressed me on the level of fine which is the particular issue in this sentencing today. In terms of justifying the fine, he referred to the aggravating features, the commercial gain here, where he says Grabone, a large scale operator which provides the public a wide variety of products and these particular goods fit into that regime. He reminds me of the actual harm to Ms Kennedy here and that cannot be ignored. Again he refers to previous warnings to the company in terms of aggravating features relating to them and in his submission, it says a starting fine in the order of $80,000 for the lead charge, $40,000 for the regulatory charge, leading to $120,000 is appropriate and discounts of 25 percent for plea and the remedial action taken by the company would leave something in the order of $80,000.

[8] For the defence, Mr Wicks in particular addressed the reliance by the prosecutor in the *Ministry of Business, Innovation & Employment v Zolo Limited and Dtown* decision identifying there were separate entities, the fines that were imposed in fact $40,000 imposed against each separate entity. He accepted, as highlighted by the prosecutor that this was moderately serious offending and that is so. He also accepted that there would be some small uplift for the prior notifications to the company. He explained the circumstances that occurred when the initial complaint came through from Ms Kennedy and really, human error and failure. Indeed that is an explanation but where public safety and particularly personal safety of consumers is concerned, that could in no way afford the company an excuse. He also identified the particular culpability here in terms of recklessness and obvious failure by Grabone to take steps when they had been notified of the obvious risk.

[9] In terms of an overall starting point he advised me to consider a fine in the order of $35,000 for both offences, applying totality he says something in the order

of $30,000 and then with the discount, which is not disputed, an end sentence somewhere in the order of $20,000. There is a real tension here between the prosecutor and the defendant. The tension is they are about $70,000 apart in terms of the final outcome of sentence and although they have attempted to assist me today, it has been something of a difficult exercise to determine the starting point.

[10] However, it seems to me, when applying the least restrictive outcome in terms of the level of fine, but providing for a sufficient level of deterrence, particularly where the goods were not only not fit but there was an accident to a user and notification did not result in sufficient immediate action, in my view, taking account of the moderate seriousness of this offending, I see the fine on the lead charge in the order of $50,000. I would uplift that by $20,000 for the regulation offence. I accept totality would be applied so a nominal total starting fine in the order of $60,000. When one applies the necessary discounts, full discount for guilty plea of 25 percent, 5 percent for the remedial action taken by the company and remorse demonstrated through the letter filed, it seems to me that a fine of $40,000 meets all those competing interests in terms of the purposes and principles of sentencing. Accordingly, against CRN ending 1037 the lead charge, I enter the conviction, the company is fined $40,000 Court costs $132. On the remaining charge, as indicated to counsel, a conviction and discharge will be entered.

E P Paul
District Court Judge