IN THE DISTRICT COURT
AT WHANGAREI

CRI-2014-088-000686
[2015] NZDC 8845

WORKSAFE NEW ZEALAND
Prosecutor

v

A & J BRASTING LIMITED
Defendant

Hearing: 4 February 2015

Appearances: S Symon for the Prosecutor
P Hoskins for the Defendant

Judgment: 4 February 2015

NOTES OF JUDGE K B DE RIDDER ON SENTENCING

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[1] The defendant, A and J Brasting Limited, faces one charge laid under the Hazardous Substances and New Organisms Act 1996 in that it failed to comply with a compliance order served on it on 12 September 2013 under s 107 of the Act.

[2] The facts upon which this charge are based are that the defendant company operates a retail surplus shop based in Whangarei. It is a family business and has been in business for over 30 years now. It also has a loose association, through friendship, with four other stores all of which are called emporiums, located throughout New Zealand and particularly Wellington, Rotorua, Tauranga and also Manukau I believe.

[3] In early 2013 representatives of the various emporium shops, including the defendant in this case, travelled to China to purchase stock for sale in their respective

shops back in New Zealand. One of the items they purchased was paint from a large complex in China, each of the stores involved purchasing quantities. The total number of cans of paint they purchased totalled 504 but of that only 168 were destined for the shop operated by the defendant in Whangarei.

[4] The cans were sent back to New Zealand, to use a neutral expression at this stage as there is some issue about how they got here and who is responsible for that, and subsequently a customer purchased one of these cans of paint from a shop in Wellington known as Pete's Emporium Limited. The customer applied it to the internal walls of his home.

[5] Apparently, because of the effects of the paint on the residents of the house, a complaint was made and a health and safety inspector began an investigation into the paint and paint was seized. Also on the day that a can of paint was seized from the Wellington shop the person operating that shop provided the inspector with a document relating to the paint which was a translation of the Chinese instruction. That translated instruction indicated that the flashpoint of the paint was 36 degrees celsius which meets the definition of a flammable substance under schedule 2 Hazardous Substances Minimum Degrees of Hazard Regulations 2001.

[6] Compliance orders were served on the defendant requiring it to provide evidence of Environmental Protection Authority approval and documentation relating to the importation of the paint. That was not provided because, shortly put, there was no such Environmental Protection Authority approval and thus it is in this way that the prosecution is brought because of the peculiar wording of the Act rather than simply charging the company with bringing into the country a hazardous substance, rather the prosecution have to rely upon this somewhat tortuous provision of not complying with the compliance order. However, essentially the charge relates to the importation of a hazardous substance in breach of the appropriate legislation.

[7] The tins carried the word, "flamile" and a flame icon on the side of the tins of paint. This appears to be a misspelling of the word flammable when placed alongside the flame icon.

[8] There has been no application to the Environmental Protection Authority for an individual substance approval and therefore, as I have said, that is why this prosecution has been brought.

[9] An issue has arisen in the course of this matter proceeding to Court today for sentence around the issue of whether or not the defendant is the importer of all 504 cans or only the 168 cans that were destined for its shop here in Whangarei.

[10] The first starting point is the definition of importation and import contained in the s 2 of the Act. In relation to hazardous substances importation has the same meaning as in s 47 Customs Act 1966 which provides that for the purposes of this Act goods shall be deemed to be imported into New Zealand if and so soon as in any manner whatever whether lawfully or unlawfully they are brought or come within the territorial limits of New Zealand from any country outside those limits.

[11] There has been some focus on ss 25 and 115 of the Act as to whether or not it could be said the defendant imported all 504 cans. In my view it is not necessary to embark on a detailed analysis of that. The short point is the only way in which the other cans over and above the 168 that the defendant required could get into the country was through the appropriate Customs documentation used by the defendant. In my view, in terms of the definition of importing the defendant was clearly the importer of all 504 cans.

[12] I add two further comments to that. Firstly there is no such thing in the interpretation section as a nominal importer. Goods are imported or they are not. Secondly, in the event that I am wrong in the view I have reached about that in any event on any view on the evidence which is not in dispute about how these cans were distributed amongst the separate companies if there was some merit in the argument that the defendant was only acting as an agent for the other purchasers then in any event it would still be liable under s 66 Crimes Act 1961 as a party to the importation by those other companies and therefore the argument in short, in my view, does not assist it at all.

[13] Finally, in any event the difference between 168 cans and 504 cans, in my view, is not so great to play a significant part in assessing the seriousness of the offending. Even at 169 cans the potential for harm was sufficiently high.

[14] The first task of course is to assess the offending itself. It has been agreed by counsel in their respective submissions that it seems the approach to be followed is to follow the steps set out for assessing culpability referred to in the case of *Department of Labour v Hanham & Philp Contractors* (2009) 9 NZELC 93,095. It seems that that approach has been followed in a recent case out of the District Court at New Plymouth where a similar charge was dealt with.

[15] The first task then is to identify the operative acts or omissions at issue. In this case really it amounts to omissions in the sense that there was clearly a lack of care in assessing what type of paint the defendant was purchasing. It did have a flammable sign but there were no other markings on the tin by way of instructions whatsoever. Rather it appears that the representative of the defendant company making the transaction in China asked the interpreter to ask the person selling the paint whether it was water-based rather than oil-based or spirit-based and on being told that it was water-based simply accepted that at face value and took no further steps.

[16] One step which has been suggested is that a smell test would have soon indicated that the contents were so powerful it would call into question the assertion that it was water-based. In response to that the defendant says that he could not be expected to open all cans. That overlooks the obvious point that simply opening one can would have been more than sufficient to perhaps put the company on the alert. Rather it seems, as I have said, the interpretation from the vendor was taken at face value. Also, it seems from the material before me there was no attempt made to have instructions provided in English as to what exactly was in the paint and what its nature was. They seem to be the relevant omissions which led to this incident.

[17] The next issue is to assess the nature and seriousness of the risk of harm occurring noting of course that in ss 4 and 6 of the Act there was a very clear primary focus on health and safety of people. My initial concern was that the

summary of facts agreed for the purposes of sentencing clearly identified flammability as one of the properties specified in s 2 of the Act under the definition of hazardous substance but also it was clear from the informant's submissions that the informant also relied upon toxicity which is another factor specified under the definition of hazardous substance.

[18] After a brief adjournment to enable counsel to address the issue I was informed that I can accept the comments in the written submissions for the informant on this issue at paragraph 5.9. The toxicity of the paint is such that fumes of the paint can cause severe health issues for humans, including headaches, burning throats, watering and swollen eyes, itching and dizziness and these symptoms can present sufficient severity to require hospitalisation. If the paint is used inside a building the fumes are strong enough that even airing the room would not cause the fumes to dissipate and the fumes can also contaminate furnishing and belongings inside a house. As I understand the agreed approach on this issue of toxicity that assessment of the risk of harm to people in fact is taken from what happened to the customer who purchased the paint in Wellington which led to the investigation and which led to this charge.

[19] As to flammability, although I am told, and it is accepted by the defendant, the paint meets the definition of a hazardous substance by virtue of its low flashpoint. I am not told anything more about what that actually means in terms of harm or risk of harm to the public.

[20] There has been some comment about the fact that the can of paint that led to the investigation and charge was sold from the Wellington shop and not from the defendant's Whangarei shop. In my view that is totally irrelevant to the sentencing exercise. There is no need in fact for any harm to be actually caused to justify prosecution if the product is hazardous.

[21] Also, reference was made to the prosecution effectively punishing the defendant for the harm caused to the person in Wellington who purchased the can there. Again that is not relevant. The issue is whether or not this product was hazardous and if so what risk it presented to the public at large.

[22] As to the next issue which is listed under para 54 of *Department of Labour v Hanhan* an assessment is required as to the degree of departure from standards prevailing in the relevant industry. Although there is an assertion in the written submissions for the informant at paragraph 5.4 that there was a substantial departure from standards prevailing, again I am not given any concrete evidence as to what the standards are that prevailed.

[23] The other matters listed in para 54 are already in effect covered by the assessment I have made to date. The obviousness of the hazard the informant would rely upon the flame symbol on the can plus another symbol with the word "harmful" on it. The availability, cost and effectiveness to avoid the hazard the informant would say that there were easy steps not requiring considerable expenditure to ensure that the appropriate detail was ascertained as to avoiding importing hazardous products. Those then are the matters that seem to determine the seriousness of the offending in this case. In my view, taking all those matters together it could be said that the culpability of the defendant here is at a medium level.

[24] In submissions for the defendant the counsel for the defendant, Mr Hoskins, has advanced an application under s 106 that the company be discharged without conviction and therefore I am now required to deal with that submission.

[25] The discretion in s 106 to grant such a discharge without conviction is of course constrained by s 107 of the Act which has been described as a gateway or pathway to justifying the Court considering whether to exercise its discretion under s 106 and of course s 107 contains the mandatory direction that the Court must not discharge an offender without conviction unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[26] The appellate authority on these provisions have made it clear that this involves a three stage process. Firstly assessing the gravity of the offence. In my view the relevant factor here is the purpose and principles of the Act as I have already referred to, namely to ensure the protection of the health and safety of people. The control of hazardous substances coming across the border is obviously a

primary factor behind the legislation designed to enhance and promote and ensure the health of the public, and products which come across the border which are hazardous and which have not been subject to appropriate controls and checks to enable their release into the community can give significant rise to difficulty and of course in this case the effects of the toxicity of the paint are sufficiently serious for me to assess the gravity of the offending in this case as being relatively serious. In effect there was a casual approach to checking this paint which was totally reliant on the seller's assurances that it was water-based.

[27] Having reached the view that this was a relatively serious incident I am then required to examine the direct and indirect consequences of a conviction for the company and I stress that the conviction is for the company and not for any of its directors or staff.

[28] There are three general grounds advanced. Firstly, that a conviction would mean that the company was faced with the stigma of a conviction and in this regard the defendant points particularly to its long involvement with charitable work in the community and its concern that this may have some effect on that work.

[29] In my view this ground advanced is advanced in terms which are highly general and speculative and there is no evidence put before the Court that any of those groups mentioned would not continue their association with the company and its charitable work. As an observation, in my view there is not so much charitable money available in Northland that these people would effectively cut off their nose to spite their face and in any event if any charity took the view that they would not want to be associated with the defendant after being convicted then that is a consequence for the charity and not a consequence for the defendant of the conviction.

[30] The next ground advanced is the ability of the managing director of the company to hold a business travel card, which he currently holds. The first point in response to that submission is that simply he is not the defendant, he is not being convicted and so there are no consequences to the defendant company at all in this regard if there were to be some restriction on the director. So it is not a consequence

faced by the company as the defendant arising out of a conviction if it were to be entered.

[31] In any event, again it is generalised, it just is referred to as a possibility without any clear indication one way or the other. Also, in my view, it is a minor effect in that the company's directors would not be prevented from travel and therefore the consequence, if any, to any member of the company would be minor. However, as I have said, I am required to assess the consequence of a conviction on the defendant.

[32] The third ground advanced is that if there is a conviction entered the company might face increased scrutiny from Customs and this may increase costs which would be then passed on to the public. If I have understood that submission correctly that would be a consequence for the customers and not a consequence for the defendant. Again, in any event, there is no detail as to the extent to which Customs may or may not choose to exercise closer scrutiny.

[33] Overall, in my view, the consequences that I have just referred to are nothing more than what could be expected from a conviction being entered. They are relatively minor and could be categorised as matters of convenience rather than substantial punitive effect on the company and to some degree effects on other people other than the defendant.

[34] That then leads me to the third part of the test and that is to balance the effects on the seriousness of the offending and make an assessment whether the consequences, direct or indirect, are out of all proportion to the gravity of the offending. Shortly put, I am not able to reach that position at all. Such consequences as they are could not be said to be out of all proportion to what is, as I have said, a relatively serious breach of the Act and nothing more by and large than the normal consequences that flow from the conviction.

[35] Accordingly therefore, in my view the defendant company cannot get itself through the gateway or threshold test of s 107 of the Act and therefore I decline to discharge the company without conviction.

[36] That then requires me to return to assess the appropriate level of fine that should be imposed. In that regard I am required to have regard to the purposes and principles of sentencing and of course in this case also the focus on the Act of public health safety.

[37] In my view, as I have already indicated and for the reasons outlined, this is moderately serious offending and therefore applying the bands in *Department of Labour v Hanham* and making the appropriate adjustments something in the vicinity of a starting point of $10,000 to $20,000 is appropriate. Taking the view that this is moderate offending within the mid range I then fix a start point of a fine of $15,000.

[38] It is accepted by the informant that the guilty plea was entered early and therefore in accordance with the Supreme Court case of *Hessell v R* [2010] NZSC 135 the company is entitled to a full one-quarter reduction from that start point, of $3750. That then leaves an end fine of $11,250.

[39] The issue then is whether that should be further reduced. In my view the company is perfectly entitled to claim that it has been a good corporate citizen, it has no previous convictions of any sort. The one incident referred to about some paint spilled as I understand it is nothing to do as such with the company at all rather on goods unloaders at the wharf. As I have said there is no previous convictions for any matter whatsoever. That justifies a further reduction of something a bit more than 10 percent which would be $1250. The end result is that on this charge the company is convicted and fined the sum of $10,000.

K B de Ridder
District Court Judge