

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-004-010600
[2017] NZDC 13575**

Credit Contracts and Consumer Finance
Act 2003

BETWEEN

COMMERCE COMMISSION
Informant

AND

BEST BUY LIMITED
Defendant

Hearing: 23 June 2016

Appearances: A McClintock and A Watt for the Informant
P Moodley for the Defendant

Decision: 6 July 2017

RESERVED DECISION OF JUDGE B A GIBSON

[1] The defendant, Best Buy Limited, pleaded guilty by notice pursuant to the procedure in s 38 Criminal Procedure Act 2011 shortly after the charging documents in this matter, which concerned 16 charges relating to disclosure failures in its consumer credit contracts, were laid.

[2] All of the charges are laid as representative charges and span the period 1 June 2015 to 28 April 2016.

[3] Eleven of the charges concern breaches of s 17 of the Act which requires creditors under consumer credit contracts to ensure that initial disclosure of as much of the key information set out in Schedule 1 of the Act and is applicable to the contract, is made to every debtor under the contract before the contract is entered into. Those charges carry a maximum penalty of \$30,000 each.

[4] The remaining five charges are, again representative charges, laid under s 32 of the Act which concerns disclosure standards and which requires the information disclosed to the debtor not to be likely to deceive or mislead a reasonable person with regard to any particular material to the consumer credit contract. The maximum penalty for those breaches is \$600,000 per charge.

[5] At the material times, the defendant company operated a mobile trader business in Auckland and in smaller North Island towns. It sold a range of household products, including kitchen appliances, audio visual, computers, furniture and outdoor equipment, cellphones and similar items. The company produced a catalogue from which purchasers could select items and also advertised its goods for sale on its website. The goods were priced significantly higher than similar items available from conventional retailers. The target market for the defendant's activities, as with other similar traders, were poor communities living in suburbs or towns where many of the goods were not available and who were unable to accumulate cash or obtain credit to be able to lawfully acquire these items in a more conventional way.

[6] The group targeted by the defendant, as with other traders operating in the same industry, are often described as vulnerable members of society, and were described by Judge Aitken in her decision in *Commerce Commission v Best Deals 4 You Ltd*¹ as being “the precariat”, a compound word coined by sociologists in the 1980s using the words ‘precarious proletariat’. She described them as being:

The target group can be described as “the precariat”, the group who live in precariously balanced circumstances and for whom a single event can tip their family into poverty and create significant stress.

[7] Mobile traders target this part of the community by uninvited direct sales or by parking lorries with goods for sale, or “truck shops” in prominent locations. They sell predominately or exclusively on credit, lay buy or other deferred terms. There is a significant risk to the trader from defaults and losses which are usually not recoverable, no doubt part of the reason why prices are significantly higher than those charged in mainstream stores. An example of this is given in the caption

¹ *Commerce Commission v Best Deals 4 You Ltd* [2017] NZDC 3427

summary in relation to an iPhone 6 Plus sold by the defendant on 6 December 2015 to a customer for a total price of \$2,079 when an identical model was available from Noel Leeming for \$1,199, as at 25 January 2016. Recognition of the vulnerable position of the poorer segment of the community is found in various consumer protection legislation of which the Credit Contracts and Consumer Finance Act 2003 (“the Act” or “CCCFA”) is one. The primary purpose of the Act is set out in s 3(1) as being:

... to protect the interests of consumers in connection with credit contracts ...

[8] Section 3 of the Act also emphasises the significance of the disclosure provisions by providing for disclosure of adequate information to consumers under consumer credit contracts, both before entry into the agreement and subsequently in the event of variation. Section 3(3)(b) provides that disclosure of adequate information to consumers under such credit contracts is

...

- (i) to enable consumers to distinguish between competing credit or lease arrangements; and
- (ii) to enable consumers to be informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them; and
- (iii) to enable consumers to monitor the performance of consumer credit contracts; and
- (iv) ...

[9] The Credit Contracts and Consumer Finance Amendment Act 2014 both extended the disclosure requirements and allowed creditors a year between the royal assent and the coming into force of this provision, thereby enabling creditors to amend their documentation. The Act also significantly increased the penalties for breaches of s 32 to \$600,000 for body corporates from a previous maximum penalty of \$30,000. That was a clear indication from the legislature as to the seriousness with which breaches were to be viewed and the need for sentencing that amounts to deterrence.

Mobile trader industry

[10] Ms McClintock, for the informant, submitted that the context of the case was significant as this was the 12th prosecution of a mobile trader as part of a series of prosecutions under the CCCFA and/or the Fair Trading Act for disclosure failures and misleading representations in consumer contracts used in the mobile trader industry. The caption summary noted that in recent years the business practices of mobile traders have become a more prominent part of the complaints received from consumers and their advocates by the Commerce Commission. The industry background of systemic non-compliance issues is relevant to the defendant's sentencing as is the Commission's attempts to bring the attention of mobile traders to its investigation. The caption summary, accepted by the defendant, noted, in this context, that:

2.2 *In 2014, the Commission opened an investigation into the mobile trader industry. The Commission identified 32 mobile traders during the project. They operated throughout New Zealand, although the majority were based in the North Island, with a particular concentration in Auckland. It was a very dynamic industry, with traders frequently entering and exiting the market.*

2.3 *In August 2015, the Commission published its report setting out its findings from the investigation into the mobile trader industry. The report identified systemic compliance issues within the industry with respect to traders' obligations under the CCCFA, in particular the requirement to provide adequate disclosure to consumers before entering into consumer credit contracts. There was significant media publicity over the report and its findings. In addition, the Commission made mobile traders aware of the report. More mobile traders were also issued with compliance advice by the Commission in order to change industry behaviour.*

The Charges

[11] The Commission's investigation in the defendant began in December 2014. It was accepted by the informant that the defendant co-operated with the Commission and supplied a number of its consumer credit contracts entered into between 6 June 2015 and 28 April 2016, as requested. Two versions of its customer contract were used during the charge period. The first version was used between 6 June 2015 and 31 October 2015, and a second version between 1 November 2015 and 28 April 2016. During the charge period, the defendant entered into 1,161

contracts with debtors with a total value of \$1,741,500. 497 of the contracts were entered into on the first version of the defendant's customer contract and 664 on the second version.

[12] The breaches of s 17, in relation to version one of the contract, were as follows. There was a failure to provide applicable key information as required by Schedule 1 of the CCCFA, namely:

- (a) An accurate statement of the amount of the payments or the method of calculating that amount; and/or
- (b) An accurate statement of the number of the payments; and
- (c) An accurate statement of when the first payment was due;
- (d) An adequate description of the debtor's right to cancel the contract; and
- (e) The right of the debtor to apply to Best Buy for relief on grounds of unforeseen hardship; and
- (f) The frequency with which continuing disclosure statements would be provided; and
- (g) Best Buy's registration number under the Register of Financial Service Providers and a name under which Best Buy is registered on that register.

[13] A number of version one contracts also failed to disclose the correct payment start date.

[14] Faults were also found with the second version of the defendant's consumer contract, the faults being more or less identical to those in the first version.

[15] Five charging documents were laid under s 32(1)(d) of the CCCFA.

[16] The failures were similar to those for the s 17 charges with s 32(1)(d) requiring that disclosure must not be likely to deceive or mislead a reasonable person with regard to any particular material to the consumer contract and it was accepted the defendant's forms did so.

Approach to sentencing

[17] I accept the Commission's submission, that the relevant factors for sentencing in terms of the principles and purposes set out in the Sentencing Act 2002, are to hold the defendant accountable to the harm done to the victims and the community by the offending, denounce the defendant's conduct and to impose fines that might deter other persons or the defendant from committing the same or similar offences, a particularly relevant purpose given the systemic breaches identified by the Commerce Commission that are rife in the industry.

[18] I also accept the aggravating features of the offending are the extent of the failures which were widespread and systemic, a high degree of negligence, a large number of victims in the form of 1,161 debtors affected by the offending and the fact that the debtors were persons on low incomes with little opportunity of obtaining credit from conventional sources.

[19] Ms Moodley argued that although the defendant was negligent, it could not be said to be high or grossly negligent in the way contended for by the informant, referring to an affidavit sworn by Mr Ajaypal Singh, a director and shareholder of the defendant company, in which he ascribed the breaches to a failure to obtain proper legal advice, inadequate training by a senior employee, relying on his own drafting of the agreements and that of EC Credit Control Limited, a company that supposedly monitored changes to the legislation and updated agreements as and when necessary. Those matters seem to me to be simply excuses and emphasise the degree of negligence on the part of the defendant which I accept was high. The defendant made a choice, for financial reasons, not to seek legal advice. In the context of forms dealing with numerous requirements imposed by the relevant legislation which was complex, that was a fault that very clearly was negligent and contributed significantly to the offending.

[20] There are no mitigating features relating to the offending but insofar as the defendant itself is concerned it co-operated with the Commerce Commission. Although it has no previous convictions, given the defendant for most of the period since it commenced trading regularly and systemically offended against the

legislation I do not propose to give any credit in the form of a discount on the starting point.

Starting point

[21] For the s 17 offending the informant submitted that the offending in *Commerce Commissioner v Betterlife Corporation Ltd and Goodring Company Ltd*² was more serious given the number of contracts involved and the duration of the charge period, but not as serious as *Commerce Commission v Smart Shop Ltd*³ where \$70,000 was selected as the starting point for offending over an eight-month period where there was a high volume of contracts.

[22] Both counsel referred to the decision of Judge R J Collins in *Commerce Commission v Ace Marketing Ltd*⁴ where there were five prosecutions under s 17 CCCFA and where the failures were widespread, systemic and significant. In that case, the starting point accepted by Judge Collins for the CCCFA charges would have been \$100,000-\$120,000 “if this offending had stood on its own”: see para [61]. Both counsel accepted that the offending was less serious than *Commerce Commission v Tiny Terms Limited*⁵ with the defendant contending for a starting point for the charges under s 17 of the Act as being \$30,000-\$40,000 and the informant \$50,000-\$60,000. In relation to the s 32 offending, the defendant sought a starting point of \$70,000-\$80,000, with a global starting point for all charges of \$100,000-\$120,000. The informant contended for a starting point of \$80,000-\$100,000 for the s 32 offending, noting that it had a similar degree of seriousness to the offending in the *Ace Marketing* decision and the *Tiny Terms* decision, but on a lesser scale. Consequently, the informant’s global starting point was \$130,000-\$170,000.

² *Commerce Commissioner v Debtor Life Corporation Ltd & Goodring Company Ltd* [2016] NZDC 10579.

³ *Commerce Commission v Smart Shop Ltd* [2016] NZDC 19377

⁴ *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.

⁵ *Commerce Commission v Tiny Terms Limited*, Auckland District Court, CRI-2012-004-0011709

[23] Overall, and considering the authorities cited, I determine that an appropriate starting point for the s 17 offending is \$50,000 and for the s 32 offending \$90,000 leading to an end starting point of \$140,000. However, I accept that the totality principle applies and adjust the collective starting point to \$130,000 to reflect that. In terms of discounts, the informant accepted the defendant was entitled to a discount for co-operation with the prosecuting authority. I accept that was a benefit to the informant in lowering the cost and amount of time that necessarily had to be applied to the prosecution and allow the defendant a discount of ten percent for that, resulting in a figure of \$117,000 before any further mitigating factors are quantified.

[24] The defendant sought a discount, in modest terms, for the impact of negative publicity. I accept there has been publication of the prosecution and publicity has affected the defendant's business, but that seems to me to be a consequence of the criminal offending and to allow the defendant a discount for the normal consequences of its offending would seem illogical. Further, if a discount were granted for the defendant's inability or reduced ability to pay it would, in effect, be double counting.

[25] The defendant sought a discount on the basis of ability to pay. Mr Singh exhibited copies of the company accounts for the financial year ended 31 March 2016 and the draft accounts for the year ended 31 March, 2017, and I accept those accounts show a deterioration in the volume of sales and in profit. However, the company has continued to trade, now under a different name, and the immediate position is not known. I do accept some discount should be given, but it should not be significant. The discount I ascribe is five percent. I am aware that discounts as high as 20 percent have been applied under this head in other cases, but in the circumstances of this case and on the information I have available to me, that seems to be too high. However, I will allow the fine to be paid by instalment. Consequently, the end sentence, before the discount for entering a guilty plea at an early stage is applied, is reduced to \$111,150.

[26] The informant concedes that a discount of 25 percent for the entry of guilty pleas is appropriate notwithstanding that the charges, because of the documentary evidence available, would not have been difficult to prove. Nevertheless, the guilty

pleas coming at an early point in the process represented a significant saving in trial time and so I allow a 25 percent discount under this head, leading to an end sentence of \$83,362.50 to be apportioned over the 16 charges in the sum of \$5,210.15 each. I will not direct payment of Court costs, having regard the overall loss of sales volume in the accounts made available to me.

[27] The fine can be paid over 24 months by quarterly instalments of \$10,420.31, with the first instalment due for payment on 23 July 2017 and quarterly thereafter.

[28] The informant also sought ancillary orders under s 93 and s 94 CCCFA, that the defendant refund all costs of borrowings that were paid by debtors over the charge period. Section 48 of the Act allows recovery of payment to a creditor which it is not entitled to receive and requires a creditor, as soon as practicable, to refund the payment to the debtor. Ms Moodley accepted that the funds ought to be made, but submitted that the net amount only after payment of taxation should be paid and that a refund should not be allowed for cancellation fees, for which \$7,110 was sought, as it could not be established that any cancellation had occurred as a result of the breach of the Act.

[29] The refund sought pursuant to ss 93 and 94 is not a penalty. It is simply a refund of monies wrongly collected from debtors. If taxation has been paid on the sums presumably the defendant can obtain a refund from the Inland Revenue Department. In any event, the policy of the Act is clear and full refunds are envisaged, not net amounts. Accordingly, the defendant is ordered to pay \$37,180 to debtors from whom the monies have been wrongfully obtained, the sum comprising:

- (a) \$22,140 establishment fees;
- (b) \$4,200 credit check fees;
- (c) \$7,110 cancellation fees; and
- (d) \$3,730 default fees.

[30] I also make an order under s 94(1)(cc) that the defendant provide proof to the informant within 12 months that the refunds have been made to the affected customers. In the event that the customers are unable to be located, then the

defendant is to provide evidence, to the satisfaction of the Commerce Commission, that all necessary steps have been taken to identify and locate the relevant debtors.

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B A Gibson
District Court Judge