IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-007332
[2017] NZDC 18181

COMMERCE COMMISSION
Prosecutor

v

ZEE SHOP LIMITED
Defendant

Hearing:	11 August 2017
Appearances:	A Luck for the Prosecutor G Foley for the Defendant
Judgment:	11 August 2017

AMENDED NOTES OF JUDGE D M WILSON QC ON SENTENCING

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[1] Zee Shop Limited has pleaded guilty to seven charges laid under the Credit Contracts and Consumer Finance Act 2003. Three of the breaches relate to breaches of s 32 of the Act, failing to express required information clearly. The maximum penalty for these offences is a $600,000 fine. Four of the charges are infringement offences relating to breaches of s 17 of the Act, failing to provide adequate disclosure. The maximum penalty for the section is $30,000. All of them fall in a six month period between 6 June 2015, when the effective legislation came into force, and 10 December 2015.

[2] Zee Shop Limited is a retailer which sells through a host of mobile retailers and while it appears that they have not charged fees or interest it is clear from the contracts that high unit prices are charged. The Commission carried out an

investigation into mobile trader industry and during that initial period Zee Shop was not investigated. A mobile trader report was published in August 2015. In November 2015 members of the Commerce Commission visited Zee Shop's premises and subsequently sent a compliance advice letter identifying a number of perceived inadequacies and asking for further information.

[3] Defence counsel says that in contrast with other organisations that were investigated Zee Shop took its responsibilities seriously. It closed down and instead of relying on their own draft documents without legal advice briefed its solicitors to bring the company's standard terms, conditions and disclosure requirements into compliance with the Act. This is of course no more than what it should have done but at least it did take that step.

[4] By January 2016 the sales and credit contract documents had been re-drafted and the sales moratorium was lifted in late January 2016 after the legal advice had cleared the documents and they had been provided to the Commission. Further information was required and in due course the compliance was achieved.

[5] The principles and purposes of sentencing here are the usual ones in ss 7 and 8 Sentencing Act 2002. Here the defendant emphasises the need for consistency and the need to impose the least restrictive outcome. Counsel agree that there is no tariff decision but there is agreement between counsel that the s 32 charges are the lead charges.

[6] Despite the fact that two of the cases that were cited to me demonstrated that Judges of this Court, as it turns out, have chosen to set figures for the two different categories of offending separately add them together and then make a deduction for totality, Mr Foley said they are all much the same matter and adding them together produced an incorrect approach and an incorrect result.

[7] I prefer to follow the proposition that they were distinct types of offending and that those types of offending were such as should be marked separately. Certainly they were the sort of cases where the people they are dealing with are what Judge Aitken

(in *Commerce Commission v Best Deals For You Limited)* described as the most vulnerable member of our society. She also said:

> It may be that this particular group of society can best be described as precariat: that group live in our society in precarious balance circumstances, circumstances in which a single event can tip the individual and their family into poverty or at least can create significant stress both financially and socially.

[8] So, the contracts are consumer contracts covered by the Act. Strict disclosure requirements are imposed by that Act and at all times relevant to this case were the strict responsibility of the defendant company.

[9] The s 17 matters requires creditors to disclose certain key information before the credit contract is entered into. It is set out clearly in schedule 1 such as initial unpaid balance and the total number of payments to be made under the contract. Section 32 sets out mandatory standards for style and form of those documents to ensure that the disclosure of key information is expressed clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person

[10] The factual background is set out in the agreed summary of facts. Over the six month period Zee Shop entered into 2540 consumer contracts with a total value of $761,801. Were 251 defaulted without any payment being made, 81 were cancelled by consumers in accordance with their statutory rights. As far as those particular individuals it can be accepted that they knew what those rights were or at least obtained advice about them. The standard form contracts that had been adopted had the terms and conditions on the reverse side. How people managed to navigate through those remains mysterious, in the original form.

[11] The prosecutor has picked out a number of key information requirements that have been breached including:

(a) The residential shop of Zee Shop which was not disclosed;

(b) The number of payments to be made;

(c) The accurate statement of a debtors right to cancel the contract. In fact the contract says that the existing right given in the contract requires the consent of Zee Shop which is inconsistent with s 27 of the Act itself.

[12] There are then issues about the security interest and that this provided that ownership did not pass until all payments had been made. Then the right of the debtor to apply to Zee Shop for relief on the grounds of unforeseen hardship and the frequency with which continuing disclosure statements would be provided.

[13] The Commission has set out an analysis of individual contracts. I looked at 70 which were entered during the charge period, this was a sample; 23 of them failed to state the amount of each payment, 62 failed to state when the first payment was due and 25 failed to state the frequency with which debtors would be required to make payments. It is reasonable, says the Commission, to assume these were common shortcomings.

[14] The s 32 breaches disclose grammar and syntax which made some of the clauses incomprehensible. An example is set out in paragraph 3.10 of the informant's submissions. Mr Foley did not attempt to excuse these, he just characterised it as a genuine attempt by lay people to meet the requirements which without their fault fell short of the legal necessities.

[15] This is consumer protection legislation. As Judge Calendar noted in *Commerce Commission v Senate Finance Limited*, one of the conceptual bases for the credit contracts legislation is consumer right to prescribe that anything that is material to a contractual relationship must be made clear and conspicuous in the interests of fairness and honest trading. The Commission also refers to over time, the increases in the maximum penalties, reflecting Parliament's intention to denounce conduct which falls short of those statutory requirements.

[16] Mr Luck submitted that the defendant must be held accountable for the harm done and submitted that the failures deprived 2514 people of the opportunity to fully consider the obligations they were taking on. There may be room for saying that some

of those people would have managed anyway, but that is not the test. Secondly, to denounce and deter the conduct for these and other people.

[17] I would say though that in this case, from the steps that have been taken by Zee Shop Limited, it seems to me that they have responded responsibly to the breaches, re-drafted all their papers, closed their shop while those amendments were made and that these show an attempt to make amends. Of course, as Mr Luck submitted, they were required to do that anyway because they had a strict responsibility to meet the requirements of the Act so it was sound on their part to do it but it did show an acceptance by the company that there was error in their ways.

[18] The aggravating features relied on by the Commission are the extent of the deficiencies, the poor expression, lacking in conciseness and clarity. The maximum penalties reflect the strong signal Parliament wanted to give showing that those disclosure standards were to be scrupulously observed. The breaches are described as systematic and significant and six of the requirements were either inaccurately disclosed, partly disclosed, or not disclosed at all.

[19] A high proportion of those contracts suffered from other deficiencies as well, 62 of them did not even state when the first payment was due. That might possibly raise issues about the enforceability of them.

[20] Then there is what Mr Luck describes as a high degree of negligence. In saying negligence he is really submitting that these were not open-eyed breaches, they were just an inadequate attention to detail, a decision to go ahead without legal advice, so at least it is not a deliberate offending over a period of time. There is the large number of victims, which I have mentioned, and the offending over a period of six months. I have mentioned the vulnerability of those victims because of the market place in which they operate and their need to get access to consumer goods when perhaps their credit histories were poor.

[21] Mr Luck goes on to submit, by reference to previous decisions, *Goodring* and *Better Life* drawing distinction between those cases and this one. In the end his submission comes down to a proposition that the starting point for the s 32 offending,

which is the lead offending here, should be in the range of $140,000 to $160,000. He says those starting points should be markedly higher than the starting points in *Better Life*, which was $80,000 and *Goodring* was $100,000.

[22] In relation to the s 17 offending where the maximum penalty is considerably less of course, he refers to *Smart Shop* which adopted a starting point of $70,000. Mr Foley points out that at that time the maximum for each was $30,000 but that had been accumulated over a number of charges and perhaps does not provide a particularly helpful guide. In any event the Commission submits that a range of $75,000 to $90,000 is appropriate but that a global starting point of $215,000 to $250,000 gives effect to Parliament's intention in raising the maximum penalty, recognises the extent of the schedule 1 breaches, the significant illegibility issues and the large number of contracts involved. It then acknowledges that an adjustment should be made on totality grounds so that the figure is $200,000 to $230,000 once totality considerations are taken into account.

[23] Turning then to the mitigating factors, the degree of co-operation should be reflected, says Mr Luck, in about 10 percent and a discount for plea of 20 percent leaving a range of $144,000 to $166,000 is the overall figure which the Commissioner says is the appropriate figure.

[24] Mr Foley draws a distinction between other operators who might have used sharp practice and his client. He points to the degree of co-operation that was forthcoming once the matter came to light and the remedial steps that were taken which he describes as reasonable steps in the circumstances. He submits that the starting point for the s 32 offending should be $120,000 to $130,000 with an uplift of $12,000 that takes into account s 17 offending so that the final point would be $130,000 to $142,000, a 25 percent credit for a plea of guilty and further credit for the compliance.

[25] In regard to the steps taken to become a compliant entity I accept Mr Luck's point that in fact that was their statutory obligation anyway so a further deduction for that is, in my view, not called for.

[26] Starting point, says the defendant is $132,000 to $142,000 less an overall 40 percent for those mitigating factors, leading to an end sentence of a fine of $79,200 to $85,200. In my view the submissions made by Mr Foley do not give adequate weight to the degree of shortfall in compliance with the statutory obligations. I accept the general approach although not the figures adopted by the Commission in regard to those matters.

[27] I set a starting point for the s 32 offending as a figure of $100,000 with $60,000 for the s 17 offending, leading to a total of $160,000. On a totality basis a modest allowance is made to reduce this to $150,000 because the start points have been modest in the first place. There should be a credit for the degree of co-operation and the plea and those together should be in the figure of 30 percent. The overall result is a $100,000 fine which in my view is appropriate to this offending.

D M Wilson QC
District Court Judge