

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-006922
[2018] NZDC 8471**

COMMERCE COMMISSION
Prosecutor

v

MOBILE SHOP LIMITED
Defendant

Hearing: 26 April 2018

Appearances: A McClintock for the Prosecutor
C Girven for the Defendant

Judgment: 26 April 2018

NOTES OF JUDGE P I TRESTON ON SENTENCING

[1] The defendant, Mobile Shop Limited, appears for sentence on 24 charges under the Credit Contracts and Consumer Finance Act 2003 and the Fair Trading Act 1986. The charges are representative. In between the periods 1 October 2015 and 30 September 2016. They are representative charges and relate to over 5000 consumer credit contracts which it is said that the Mobile Shop Limited entered into over a 12 month period. The submission was made that the contracts are likely to have exceeded a total value of \$1,000,000 and the charges relate to the inadequate disclosure of key information in the contracts, use of incomprehensible contractual terms and misrepresentation in the contracts about the creditor's and debtor's legal rights under the Consumer Guarantees Act 1993.

[2] There are six charges for breaches of s 17 Credit Contracts and Consumer Finance Act for failing to disclose to debtors certain key information required under schedule 1 of the Act for which the maximum penalty is \$30,000 per charge. Six

further charges for breaches of s 32(1)(c) Credit Contracts and Consumer Finance Act for failing to provide disclosure which was clear, concise and presented in a manner likely to bring the required information to the attention of a reasonable person for which the maximum penalty is \$600,000 per charge and finally 12 charges for breaches of s 13(1) Fair Trading Act 1986 by making false or misleading representations for which the maximum penalty is once more, as with the last bracket of charges, \$600,000 per charge. The misrepresentations were about debtor's rights under the Consumers Guarantees Act and two different rights were misrepresented. It is contended Mobile Shop's liability for foreseeable loss for damages in its liability for providing goods of an acceptable quality.

[3] Mobile Shop Limited is a mobile trader which initially operated in Auckland and Hamilton but from early-2016 has operated in Auckland only. It is still operating but the wind down that was referred to at an earlier stage is nearly complete. It sells consumer goods, mainly clothing, cooking, Manchester and electronics on credit at prices which are often significantly higher than what was charged in mainstream stores.

[4] The prosecution submits that the offending in this case is particularly serious and that an appropriate starting point would be between \$440,000 to \$500,000 adjusted to \$370,000 to \$420,000 on a totality basis. It submits that there ought to be an uplift of at least 10 percent to reflect the company's previous conduct, not necessarily convictions but correspondence and information that was given to it and a 10 percent discount for cooperation which should not exceed 10 percent. Those two aspects of course balance one against the other.

[5] It is accepted also that the company is entitled to the full 25 percent for its guilty pleas and the adjustments result in fines in the range of approximately \$277,000 to \$315,000.

[6] It is submitted on behalf of the prosecution that mobile traders frequently target vulnerable communities. The Credit Contracts and Consumer Finance Act sets out strict disclosure requirements for creditors which have been lacking in this case and the Fair Trading Act it is submitted has been a cornerstone of New Zealand's consumer

protection legislation for three decades. It is designed to contribute to a trading environment in which the interests of consumers are protected, businesses compete effectively and consumers and businesses participate confidently. So it is submitted that because of the breaches, the matter ought to be regarded seriously by the Courts.

[7] As far as breaches of s 17 are concerned, it is submitted that the documents provided to the debtors failed to properly disclose virtually all of the required information, that there were not regular payment amounts set out in some contracts, that contracts did not state when the first payment was due or the total amount payable under the contract and in 24 out of 54 contracts looked at, description of goods supplied and subject to security was inadequately described.

[8] Under s 32, contracts provided, it is submitted, to the company debtors failing to express the required information under schedule 1 and it is submitted that the extent of offending was significant. There were representative charges after all. The offending, it was submitted by the prosecution, was highly reckless, contrary to what the defence sees as being negligent. The number of victims was significant and the victims were, as has already been said, particularly vulnerable. So in conclusion the company deprived the number of customers that has been referred to from having full knowledge of their statutory rights and again the starting points potentially are set out with the appropriate uplifts and allowances.

[9] In addition, the 54 debtors whose contracts were reviewed by the Commissioner are entitled, it is submitted, to statutory damages in the sum of \$200 each which totals a further \$10,800 and the Commission seeks an order that those statutory damages are paid. On the other hand, the defence submits that the starting point for the matter in total ought to be between \$350,000 and \$400,000. That globally then, \$285,000 to \$336,000 with an end result of \$192,780 to \$226,000.

[10] Submissions have been made by the defence that the non-disclosure was “technical” in nature, that the particular people in the contracts did not suffer prejudice or loss, there was never any payment of interest sought, and the statutory damages, if awarded, ought to be deducted from the fines ultimately and as I have already said, that the actions were negligent rather than anything else and the details of that have

been set out and answered and referred to in the affidavits which have been filed, both by the prosecution and by the defence and which I have taken due account of.

[11] Of course, I must bear in mind the maximum potential sentences and it is clear that in sentencing the aspects that I must concentrate on appear under the Sentencing Act, the company must be held accountable for the potential harm to the victims, although not necessarily the case in all matters in this case, the company's responsibility must be underlined and its conduct in failing to apply its attention to the necessary requirements must be denounced and a sentence must be imposed that would deter similar offenders from the same sort of behaviour in order to protect the community and particularly the more vulnerable members of the community who might be tempted to enter into contracts with the company.

[12] The least restrictive outcome of course is the one that must be adopted by the Court and I also bear in mind and stress the factors that have been referred to by the prosecution, the extent of the offending, clearly these are representative charges over a 12-month period and clearly there were more aspects to it than are covered by these particular prosecutions and fundamentally, the debtors understanding of the contracts and their rights of obligation was prejudiced in general terms.

[13] I consider that although the offending was perhaps, as the defence have submitted, negligent rather than highly reckless as the prosecution would say, nevertheless the facts which I take into account and the number of victims also is significant and as I have said more than once, the victims were particularly vulnerable members of society.

[14] So bearing all those factors in mind and taking into account the submissions that have been made both by the prosecution and by the defence, it is my view that the overall starting point for sentencing in this matter, in relation to the 24 charges, is \$440,000. I take into account the matters that I have referred to by way of reduction of that figure, both in relation to the uplift for the company's failure to apply promptly to the concerns undertaken by the prosecution, I balance against that the 10 percent credit for its co-operation, so overall the starting point ought to be reduced, in my view, by the 25 percent for guilty pleas which leaves an end result of \$330,000.

[15] I am asked by the prosecution to apply significant fines in relation to the s 17 matters but I have got to say that I must take into account as a matter of common sense and principle that the maximum penalties in relation to the three charges must be referred to and the s 17 matter has a maximum potential sentence of \$30,000 in relation to sentencing. So what I have done in relation to those charges, and there are six of them, I bear in mind what the prosecution said but I have allocated for those matters a total fine of \$40,000. That must be divided of course among the six charging documents that I have referred to, so that there will be in relation to the s 17 matters, fines of \$6600 on each charge, together with \$130 Court costs in each case.

[16] In relation to the s 32 charges, there are six of those also. Bearing in mind the starting point that I have referred to, of \$330,000 some \$96,600 and I have rounded some of these figures off, which apply to those charges. So that in relation to each of the charges, the six of them under s 32, I impose a fine of \$16,100 and Court costs \$130 in each case.

[17] That remains the s 13 matters under the Fair Trading Act where again the maximum potential sentence is \$600,000. There are 12 of those and I allocate in the starting point \$145,000 totally to be divided among the 12 charges, which again comes to the figure by way of rounding of \$16,100 on each of the 12 charges, together with Court costs appropriately.

[18] So in summary, although I have noted on the individual charging documents the particular fines and Court costs, the overall fines which are today imposed total, as I have said, the end figure of \$330,000.

[19] That leaves the statutory damages figure of \$10,800 and I order that figure to be under the first charge as a matter of convenience, which will be charge number ending 2293. As I have said, I have ordered the \$130 Court costs on each of the charging documents. That is a total of \$720 for Court costs. Thank you.

P I Treston
District Court Judge