IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2023-044-000830
[2024] NZDC 14374

COMMERCE COMMISSION
Prosecutor

v

SHELLEY ROSE CULLEN
Defendant

Hearing:	24 June 2024
Appearances:	J Barry for the Prosecutor No appearance by or for the Defendant
Judgment:	24 June 2024

NOTES OF JUDGE A-M SKELLERN ON SENTENCING

Background

[1] This is the sentencing for Shelley Rose Cullen. I found her guilty of five representative charges of promoting a pyramid selling scheme pursuant to s 24 of the Fair Trading Act 1986 on 12 April 2024 in a reserved decision. The Judge-Alone trial had proceeded on 27 March 2024 by way of formal proof, given that Ms Cullen chose not to take part in the trial.

[2] My decision of 12 April sets out my findings in respect of the offending. I do not propose to traverse the findings again, but I will return briefly to the summary of facts.

[3] Ms Cullen has not, to date, participated in the court proceedings. After being found guilty, Ms Cullen has posted comments on the internet regarding the guilty verdicts. Her view is that she is a good scammer and that "they", presumably the court, cannot do anything to her. Further, she says she is going to keep doing what she does, and I will refer again, to the message on Facebook video on 23 April 2024.

[4] Ms Cullen has been made aware of this sentencing both by the court and the prosecutor. She has been given notice of the direction to both parties to file any submissions for sentencing seven days prior. She has also been advised of the option to attend the sentencing by AVL but has neither filed submissions nor indicated any wish to be involved. Out of an abundance of caution, the prosecutor has also forwarded to Ms Cullen, on 19 June 2024, details of precisely what it is that the Commerce Commission is seeking today. That is specifically, that the court impose a fine of $600,000, which is the maximum available for one charge in relation to the five charges in respect of which I found her guilty.

[5] He is also very clear in his communication with Ms Cullen that the Commission has the ability to seek, and does so, under s 40A of the Fair Trading Act, an additional penalty. He clarifies that using the 18 June exchange rates, Ms Cullen's net profit of 514.82 Ether cryptocurrency and 12,549,837 Tron cryptocurrency equated in NZD terms, to $5,343,432. The prosecutor is asking the court to order that Ms Cullen also pay that additional amount in full. That is over and above the $600,000 that the Commission is seeking in fines for the charges themselves. The prosecutor made it clear to Ms Cullen that these are matters for the judge, not the Commission, but he wanted Ms Cullen to understand that is what the Commission was seeking. Ms Cullen has chosen to remain disengaged from the process and has taken no steps at all.

The Facts

[6] In terms of the basic facts as I found them, between 11 July 2020 and 8 November 2020 Ms Cullen and others promoted the Lion's Share scheme and that, in my finding, was a pyramid selling scheme. Each of the elements of the charges

were proven beyond a reasonable doubt and the reasons for those findings are set out clearly in my decision.

[7] In summary, between approximately 11 July 2020 and 28 November 2020 Ms Cullen promoted a pyramid selling scheme known as Lion's Share. The scheme was a cryptocurrency pyramid selling scheme that operated worldwide via a website. Ms Cullen was not the founder of the scheme but was the lead promoter in New Zealand. She promoted the scheme through multiple YouTube videos, Zoom videos, Facebook live videos, Facebook posts and at least one in-person event. One YouTube video was viewed over 50,000 times.

[8] In terms of the way the scheme worked, participants had to pay to unlock the opportunity to earn money from the scheme. Once in the scheme, the only way that participants could make money was to recruit a sufficient number of participants or obtain more money from existing participants. The scheme did not sell any products or services to its participants, aside from the service of membership and therefore, had no source of revenue other than the payments made by participants. The scheme did not provide for participants to profit by any means other than through recruitment.

Section 40A of the Fair Trading Act

[9] The scheme included an Ethereum platform Smart contract and a TRON platform Smart contract. Ms Cullen made net profits of 514.82 eth cryptocurrency and $12,549,837 TRON cryptocurrency respectively. This amounted to, in New Zealand conversion rates at the time, $759,732 in total profit and $3,521,862 in total profit calculated based on conversion rates as at the 8 August 2023. An analysis of the data relating to Ms Cullen's direct and indirect recruits showed that the overwhelming majority of them lost money. Specifically, of the 6,127 recruits on the Ethereum platform, 87.5 per cent of them lost money, totalling $1,824,333. Of the 37,942 recruits on the TRON platform, 89.7 per cent of them lost money, totalling $6,866,822 calculated at the time of the transaction.

[10] In addition to a fine at the highest level provided for under the Act, the prosecutor, as I have noted, also seeks for an additional penalty pursuant to s 40A of

the Act. Section 40A of the Act provides that if a person is convicted of an offence under s 40A, the court may, on the application of the Commission, in addition to any penalty that the court may impose under that sub-section, order that person to pay an amount not exceeding the value of any commercial gain resulting from the contravention if the court is satisfied that the contravention occurred in the course of producing a commercial gain. The value of any gain must be assessed by the court and any amount ordered to be paid is recoverable in the same manner as a fine. Further, the standard of proof in proceedings under this section is the standard of proof that applies in civil proceedings so that is, of course, on the balance of probabilities.

[11] The prosecutor has supplemented his written submissions today with brief oral submissions. He refers to Ms Cullen as the most prolific promoter in New Zealand in respect of this kind of offending. He says she is the most serious offender in the 40 years that the Act has been in force. He refers to her conduct as being relentless over a period of five months and he says she was right at the top of the scheme. He refers to a family fun day that Ms Cullen promoted where he says the conduct was, in fact, akin to theft. He refers to the huge amount of money lost by subscribers to the scheme and that particularly, Ms Cullen may not have had complete underlying expertise, as Mr Sanders has, but she really did not need to. He submits she had clearly turned her mind to the legality or otherwise of this scheme.

Principles and Purposes of the Sentencing Act

[12] The prosecutor notes that personal deterrence is a very important point in these proceedings and further, refers to what he calls upward pressure on dealing with these matters over the last 12 months.

[13] I note that in terms of previous convictions there is no uplift sought, but Ms Cullen has nine previous dishonesty convictions from 2011 to 2014. So, she cannot claim previous good character.

[14] As I have said this in the main, I accept the prosecution's submissions and adopt them. The prosecution submits that the sentencing principles of greatest importance in this case are denunciation and deterrence and to hold Ms Cullen to

account for the harm caused to victims of this scheme and her wider community. The prosecutor says the most important principle is the need for the court to impose the maximum penalty for offending, which is within the most serious for which the penalty is imposed. It elaborates on the great need for deterrence, particularly specific deterrence. It refers to Ms Cullen's public response to the investigation, her public response to the court's reserved decision and her continued promotion of schemes that may be placing the public at risk. It refers to Ms Cullen's nine convictions for dishonesty and says there is a real need to deter her from offending in this way.

[15] In terms of Ms Cullen's response to the investigation, it is noted she was partially compliant with the Commission's request as a result of investigation into the scheme. She however, demonstrated concerning attitudes about the prosecution in a video on 19 January 2021. The comments made by her in that video included, first: "I'm going to make history as one of the biggest scammers in New Zealand." Second: "Fuck the consequences I ain't scared." Third: "I jump scam to scam because I can, what's the consequences, $600,000 slap on the hand?" Fourth: "The biggest penalty I will get, I don't mind if I go to jail," and fifth: "I don't have a bank account and I'll say you aren't getting my password so you can lock me up." The prosecutor refers to those comments as displaying a frankly reprehensible attitude demonstrating that Ms Cullen actually took pride in her offending.

[16] In terms of her response to my reserved decision, the prosecutor notes that, the intervention of the court has had no impact on curtailing her attitude, indeed, the opposite is true, it says. I am going to repeat what is said in a post by Ms Cullen. I quote:

> They did this to me like back in 2020, the news put me all over social media, they put me on the TV, they put me in the newspapers as the biggest scammer, the biggest scammer out there, so I just thought, 'okay, I'll be the biggest scammer out there, I'm going to do exactly what the news wants me to do,' so I've been doing it, I am the biggest scammer out there, you know, but you can have hackers out there, you have the good hackers and you have the bad hackers, you have the good scammers and then you have the bad scammers. I am and I am proud to say it, I am a good scammer, they can do nothing to me, guys I am not even worried. They can't do anything to me, I am going to continue doing what I do.

[17] In terms of that attitude, it is clear that Ms Cullen takes no account whatsoever of the proceedings against her and neither is she concerned about any penalties likely to be imposed, because it is her view, that she is effectively, untouchable. This is presumably based on the fact that she is residing overseas and, as she tells the readers of her posts, she considers there is nothing that can be done to her.

[18] The next issue is her continued involvement in schemes of a similar nature and Mr Matthan's statements setting out the steps he has taken to capture her involvement in schemes of a similar nature. In summary, on 21 December 2020 the Commission issued Ms Cullen a "stop now" letter requesting her to cease promotion of the Lion's Share and other alleged pyramid schemes; to remove promotional material from social media accounts and to make a proposal for compensation. On 24 December 2020 Ms Cullen confirmed she had stopped promoting Lion's Share, but she did not address the rest of the Commission's stop now letter, particularly, in terms of making a proposal for compensation.

[19] At the time of the stop now letter Ms Cullen was promoting "SuperOne" and "D.A.I.S.Y" cryptocurrency-based schemes. Ms Cullen promoted these schemes by similar means to the Lion's Share. The schemes were not fully investigated by the Commission, but it appears they are no longer being promoted. There was a further scheme referred to in the submissions that was not investigated, and it is noted that Ms Cullen promoted and continues to promote the 'MaVie" cryptocurrency scheme from at least 31 July 2023.

[20] She continues to promote this scheme despite Facebook having blocked her accounts and that was following Ms Cullen's conviction. As a result, promotion of MaVie is now predominantly through Ms Cullen's associates and family. The prosecutor is clear that he is not seeking for the court to effectively convict Ms Cullen of promoting other pyramid schemes, this is simply information by way of background for the court's information.

[21] The current proceedings and the risk that MaVie may breach the Fair Trading Act has failed to deter not only Ms Cullen, but also other New Zealand based promoters of MaVie and supporters of Ms Cullen.

[22] The prosecutor also notes that in addition to specific deterrence there is a need for general deterrence and to denounce Ms Cullen's conduct in order to highlight the prominence of pyramid schemes in the community. As the prosecutor notes, they often target vulnerable communities who are lured in by the promise of large returns in a short amount of time for an initial one-off investment.

[23] There is a need to raise awareness about the illegality of non-sustainable, too good to be true, pyramid schemes and the harm they pose to dissuade others from establishing similar schemes in the future. The prosecutor also noted that s 40A applies only to pyramid schemes and that the background for that is to attempt to ensure that people do not profit in any way from pyramid schemes.

[24] In terms of the further submissions in relation to the court needing to impose a maximum penalty, s 8(c) of the Sentencing Act 2002 provides that the maximum penalty should be imposed for offending which is within the most serious cases for which that penalty is prescribed, unless the circumstances relating to the offender make that inappropriate. The breadth of Ms Cullen's promotion, her leadership and the extent of her profiteering, the prosecutor says, squarely places Ms Cullen's conduct within the worst class of cases.

[25] I accept the prosecutor's submission that the Commission has not seen such a prolific promoter of pyramid schemes in New Zealand to date. The magnitude and intensity of her promotion as well as the reach that she has had across New Zealand and Australia, is illustrated in the figures in terms of the way she has benefited. Further, Mr Sanders' evidence that Ms Cullen was the third top promoter on the Ethereum platform and second top promoter on the TRON platform, only behind the owner of the accounts, reiterates that her conduct falls within the worst class of cases of promotion encountered.

Matters relevant to setting the Starting Point

[26] In terms of the starting point, the prosecutor refers to *Commerce Commission v Steel and Tube Holdings* where the Court of Appeal affirmed sentencing should begin with the purposes and principles of the Act, that customary sentencing methodology

applies, namely the seriousness and culpability of the offending is to be assessed, followed by factors affecting the circumstances of the offender, which may aggravate the starting point.[1] The Court of Appeal also noted the defendant's financial resources may also justify increasing or decreasing the fine.

As with sentencing other offending the court has to take into account totality, treatment of any co-offenders and other relevant principles. The prosecutor also refers to Judge Harvey's comment in the *Commerce Commission v Rowe & Ors*[2] where he identified the following factors as relevant:

(a) the extent to which the scheme was promoted to actual and potential participants.

(b) the number, type, circumstances, and impact on the victims of the scheme; and

(c) the magnitude of the offending.

[27] In terms of the aggravating features set out in *Commerce Commission v Steel and Tube Holdings Ltd* and *Commerce Commission v Rowe* relevant to setting the starting point in this case the prosecutor notes that Ms Cullen's promotion of the scheme plainly undermine the objectives of the Act and the protections that s 24 of the Act, was designed to afford to members of the public. In terms of the extent of her role, she posted eight videos to Facebook and YouTube, made 73 posts on Facebook and between 28 July and 24 November 2020 claimed to be holding daily Zoom presentation and also held at least one in-person event, which I referred to earlier.

[28] While it is accepted that Ms Cullen is not the founder of the scheme, she was the lead promoter of the scheme in New Zealand. Her promotion of the scheme was carried out over a period of at least four and a half months and she, as the prosecutor submits, was largely responsible for the harm perpetrated in New Zealand. She had 286 direct recruits across both of the scheme's platforms and a total down line of

[1] *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549.
[2] Auckland DC, CRI 2012-004-016817, 29 May 2014

44,069 participants. It is noted that many in the scheme looked up to her as leader and mentor and it is submitted that the starting point imposed should reflect her culpability as the driving promoter of the scheme in New Zealand.

[29] In terms of her state of mind the Commission submits that if Ms Cullen did not have knowledge of the illegality of her conduct she was, at least, wilfully blind towards it. This is demonstrated by her conduct, her history and of statements she made before and following the Commission's investigation. Representations made by her, suggest she had turned her mind to the legality of the scheme, either of her own accord or through the concerns of potential recruits. Those included statements by her that the scheme was totally scam free and absolutely not illegal at all.

[30] Ms Cullen also had access to and did access the data on who won and who lost from the scheme. She, therefore, must have been abundantly clear about the inherent unfairness of the scheme. It was clear that if any member received a return of more than they invested, that return must have been funded by other participants receiving less money than they invested. It is really that simple. The only source of income was recruitment and for a recruit to make money another needed to lose money.

[31] I also accept the prosecutor's characterisation as to her being relentless in her promotion of the scheme further suggesting she was aware of the financial gains available to her by others buying in. She was encouraging recruits to: "Get out there, invite, invite, invite, don't come in here and join up on this business thinking you're just going to sit there, and oranges are going to fall out of the sky." Ms Cullen was also relatively sophisticated, in my finding, in terms of her ability to explain the scheme.

[32] I accept she did not have the same level of expertise as Mr Sanders, but she was certainly able to give a good account of the way in which things worked. She was able to explain concepts central to the operation of cryptocurrency and the block chain during her interview with the Commission. To be absolutely fair to Ms Cullen, I not only read the transcript of her interview, but I watched the footage of it. My purpose was to ensure that I was accurately grasping the manner in which Ms Cullen was dealing with these matters, rather than simply reading what she had said.

[33] Ms Cullen was plainly able to articulate and explain how each level of the scheme functioned to future recruits, as well as the similarities and differences between them and how she claimed they would make a profit. In that respect, it is also noted Lion's Share was not the first scheme of this kind Ms Cullen was involved in. She had previously been involved with Forsage, which she claimed functioned similarly to Lion's Share. Both schemes utilised cryptocurrency and Smart contract to facilitate payments and incentivise recruitment.

[34] In terms of a summary of Ms Cullen's approach the Commission submits it is, therefore, proper for the court to infer that Ms Cullen was aware how Lion's Share operated and of its inherent unfairness and I certainly infer both of those things.

[35] In terms of the extent of promotion to actual participants and the magnitude of offending, which has already been referred to in terms of the 44,069 participants and her regular promotion using a variety of methods. She significantly profited herself and caused significant loss to others.

[36] In terms of her earning of cryptocurrency at the time of offending, which was $759,732, equating to $5,343,432 at the date of the submission. Today, that equates to $5,328,849.05. I have already referred to the users who lost on Etherium and those who lost on the TRON platform. The offending was of a significant magnitude and certainly requires a denunciatory response.

[37] The scheme was highly sophisticated and the promotion that Ms Cullen focused on in New Zealand was those with no experience of cryptocurrency and, predominantly, in the Māori and Pasifika communities. Further, Ms Cullen actively encouraged recruitment of those with limited financial means, encouraging participants to invite other people out there who are struggling and might want extra income.

[38] There are no factors mitigating the offending at all.

[39] In terms of relevant authorities, the only case prosecuted of this kind since the maximum penalty increased to $600,000 was that of the *Commerce Commission v*

Halafihi Saimoni. [3] The Commission located one further case but that was decided when the maximum penalty was $200,000, a third of what it is now.

[40] In terms of the decisions against the background of significant development on the evolution of the Fair Trading Act in its sentencing practice in recent years, in particular, the last 12 months, those decisions must be considered against that background.

The Starting Point for the fines

[41] In terms of further case law the Commission refer to further cases, which I do not intend to traverse. It is sufficient for me to say that Ms Cullen's offending certainly sits at the very highest level of this form of offending. A starting point of the maximum penalty of $600,000 is entirely appropriate and proportionate in the circumstances. That $600,000 fine will, of course, be divided amongst the five representative charges. However, the starting point for the offending is $600,000, the maximum available to the court.

Disgorgement order

[42] Now turning to the issues relating to s 40A of the Fair Trading Act, the prosecutor submits that s 40A should be considered at the end of the sentencing exercise. That is appropriate in terms of the plain wording of the section. The provision refers to an additional penalty and, in terms of the analogous law on profit forfeiture orders under the Criminal Proceeds (Recovery) Act 2009, the Commission note the Court of Appeal in *Henderson v R* made the following comments distinguishing profit from instrument forfeiture orders, they said:

> The order forces the defendant to disgorge ill-gotten gains which logically renders it of little or no relevance to sentencing. It is not punitive, and the giving of a discount would mean a windfall. Instrument forfeiture orders are, however, punitive because they relate to the forfeiture of legitimate assets that had been used for an illegitimate purpose. This conceptual difference is further reflected in the fact that when it comes to the civil forfeiture orders the court has no residual discretion once the grounds for making an order are

[3] [2023] NZDC 26381

> established whereas it does under the Sentencing Act 2002 in relation to instrument forfeiture orders.[4]

[43] Having regard to all those factors the court said: "We conclude that as a general rule, civil forfeiture orders do not warrant a discount in sentencing." In terms of the need for an order under s 40A I agree the present case squarely engages the justification for the s 40A disgorgement provision. Ms Cullen's personal profit from promoting the scheme well exceeds the maximum penalty for the fine. There is a need to totally disgorge her of any profit earned from her promotion of the scheme over and above the fine imposed. To that end and as the prosecutor has advised Ms Cullen, the Commissioner sought an order that Ms Cullen be required to pay the equivalent in New Zealand dollars of $514.8 to Etherium and 12549837 TRON.

Quantum

[44] In terms of the quantum, the judgment of the court will need to be expressed in dollar terms. Cryptocurrency does present a unique problem for the court because of its fluctuating value over time and that is certainly the case here. In terms of some assistance in terms of cryptocurrency however, the prosecutor refers to the case of *Ruscoe v Cryptopia Ltd (in liq)*.[5] The starting point is that cryptocurrency is a form of intangible personal property. Gendall J held that cryptocurrencies are a species of intangible personal property and clearly, an identifiable thing of value. He noted that cryptocurrencies were property amenable to forfeiture and other orders like money and other forms of tangible property.

[45] The prosecutor then goes on to refer to cases brought under the Criminal Proceeds (Recovery) Act 2009 seeking orders for forfeiture of cryptocurrency assets. It is accepted that none of the cases discussed how to value cryptocurrency because those forfeiture orders were granted by consent and where a New Zealand dollar value was given, the current value of the cryptocurrency was implicitly adopted in the forfeiture order. There are examples of those cases, but the prosecutor's point is that they reflect an implicit acceptance of the appropriateness of valuing cryptocurrency at the current New Zealand dollar rates for the purposes of

[4] [2017] NZCA 605 at [40]-[42]
[5] *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728,2 NZLR 809; [2020] NZHC 728

forfeiture orders. They say an approach that completely disgorges a defendant of profits, even accounting for increases in value of those profits is consistent with the approach taken by the courts in equity for breaches of fiduciary duty and, in my view, also completely consistent with the plain wording of s 40A of the Act. The power under s 40A is punitive. It is an additional penalty and recoverable in the same way as a fine. Parliament also wanted the power, under s 40A, to provide deterrence value.

[46] In terms of the appropriate quantum here, Ms Cullen profited at the time the transactions were calculated by 759,732 however, the value of her cryptocurrency has increased significantly since the time of her offending and that is what brought the Commission to a figure of $5,343,432.

The decision

[47] I consider that in all the circumstances a s 40A order is entirely appropriate for the reasons that I have set out and, in terms of CRI-2003-044-000830 there will be a s 40A order in the sum of $5,328,849.05 in New Zealand dollars.

[48] In respect of the five representative charges, given that there was a starting point of $600,000, which was also the end point, given that there were no mitigating features, each of the charges will carry a $120,000 fine resulting in, a $600,000 penalty in all.

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Judge A Skellern
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 09/07/2024