IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CRI-2018-090-002184
[2018] NZDC 22649

THE QUEEN

v

AOTEA FINANCE (WEST AUCKLAND) LTD

Hearing: 26 October 2018

Appearances: S Lowery for the Crown
J Land for the Defendant

Judgment: 26 October 2018

NOTES OF JUDGE J JELAS ON SENTENCING

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[1] Aotea Finance (West Auckland) Ltd ("Aotea West Auckland") has entered guilty pleas to five representative charges brought under ss 83ZN and 103 of the Credit Contracts and Consumer Finance Act 2003 ('the Act").

[2] Aotea West Auckland along with its associated companies, Aotea Finance Ltd, Aotea Finance (Manukau) Ltd and Aotea Finance (Panmure) Ltd, together form part of the Aotea Finance Group. The group has a single general manager and a sole director.

[3] The nature of the business of these companies is to provide personal loans to consumers. Aotea West Auckland provides loan services to the consumers in the West Auckland area.

[4] The business of the companies is in part governed by the provisions of the Act. The Act sets out strict requirements for creditors to adhere to as part of its primary purpose of consumer protection. The Supreme Court has previously stated that the purpose of the Act is to particularly protect vulnerable consumers who are more likely to use such services.[1]

[5] Section 83ZN of the Act prohibits lenders from taking a security interest over goods specified in that section. Section 83ZN came into force on 6 June 2015. Part of the purpose of bringing that provision into effect was to protect basic household goods from repossession where their monetary value, if on-sold by the creditor, was low but their innate value to the debtor was high. The prohibited goods, against which a security interest cannot be taken, includes goods used or required primarily for personal, domestic or household purposes and includes such things as beds, bedding, cooking equipment (including stoves), medical equipment, heaters, washing machines and refrigerators.

[6] The five representative charges reflect 19 lending contracts Aotea West Auckland entered with 19 debtors. In each of those contracts, prohibited goods were specifically listed as items that Aotea West Auckland would take security over for loans being granted.[2]

[7] There was a preparation period of twelve months between the introduction of the new s 83ZN provision and its coming into force on 6 June 2015. This year long lead in period gave time for money lending businesses to alter their practices and make the necessary changes. The Commerce Commission for its part took steps to educate lenders, which included Aotea Finance Ltd and the other companies in its group, to ensure they were aware of their new compliance obligations. There were face-to-face meetings with representatives of the defendant and the wider group, and seminars presented which Aotea Finance representatives attended.

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[1] *Sportzone Motorcycles Lid (in liq) v Commerce Commission* [2016] NZSC 53; [2016] 1 NZLR 1024 at [66].

[2] The defendant responsibly accepts that statutory damages should be paid to the 19 debtors effected. The Commerce Commission has calculated the level of statutory damages which is set out in schedule 3 to the Commission's submissions. I therefore make an order that statutory damages be paid to the 19 affected debtors in accordance with schedule 3. Schedule 3 is attached to these notes as appendix A.

[8] The defendant, in its submissions, has listed what it describes, and is in part accepted by the Commerce Commission, as its efforts to ensure Aotea West Auckland was ready and able to comply with the new legislation when it came into force. There were meetings with branch managers to ensure the need for compliance and senior company members attended Commerce Commission seminars.

[9] The general manager of the Aotea Finance Group notified all staff of the pending changes and sent out emails specifically listing items that could no longer be taken as security.

[10] Aotea West Auckland employed three individuals who were responsible for preparing the lending contracts with the debtors. Those three individuals held the job title of lenders. Assisting the lenders were two other employees who had the responsibility of valuing the chattels being advanced as security for the loan.

[11] The branch manager provided the three lending staff members with step-by-step guides as to how to identify and remove prohibited items from loan agreements. I am told there were also one-on-one meetings to ensure awareness of the pending legislative changes. Reminder letters and other correspondence was also sent to the lenders.

[12] The Commerce Commission accepts these steps were taken by Aotea Finance to ready itself for the change in the Act.

[13] In January 2016, the Commerce Commission received a complaint about a loan contract with Aotea West Auckland. It was that complaint which initiated the investigation. Approaches were made in the normal way by the Commerce Commission to the senior representatives of Aotea West Auckland. At a meeting on 26 May 2016, it was agreed that an audit would be undertaken to ascertain if other contracts provided security over prohibited goods. What was agreed, and what occurred, was a random selection of 52 contracts which were provided for examination to the Commission.

[14] In addition, senior members of Aotea West Auckland met in a voluntary interview with members of the Commerce Commission on 7 September 2016. During that meeting Aotea West Auckland representatives informed the Commission of the various steps they had taken prior to 6 June 2015 and the result of its own internal investigations. They included:

(a) Internal policies were in place from 6 June 2015 instructing employees not to take securities over prohibited consumer goods. Aotea West Auckland took steps to ensure that security could not be taken over "beds and bedding, cooking equipment, medical equipment, portable heaters, washing machines, refrigerators, travel documents, identification documents and bank cards". It was the case that two employees failed to follow those instructions and in doing so acted contrary to their authority:

(i) One employee did not view a microwave as being "cooking equipment"; and

(ii) The other employee "simply failed to follow clear directions from management in relation to the taking of security". Subsequently that employee was disciplined and has resigned.

(b) Some securities may have been taken over prohibited consumer goods as a result of refinancing of loans that were originally entered into before section 83ZN came into effect. The company stated that, "when a customer refinances a loan the previous security listing is carried over unless a specific change is made to the listing". The company accepted that this should not have occurred and that doing so was contrary to the express instructions given to Aotea West Auckland staff by responsible management of the Aotea Finance companies.

(c) An internal audit of all open contracts entered into either before or after 6 June 2015 had been undertaken. Following that audit, the company:

(i) Removed its security interest over any of the listed prohibited consumer goods, including where the company was entitled to take that interest pursuant to s 83ZN(2), and wrote to affected debtors advising them of this; and

(ii) No longer takes securities against any of the consumer goods listed in s 83ZN(1)(a), even where it is entitled to do so under s 83ZN.

(d) In accordance with its internal policies, no prohibited consumer good has been repossessed since 6 June 2015, even where Aotea West Auckland was entitled to do so because a PMSI was in place.

[15] The main focus of submissions today is what the appropriate starting point for sentence should be. The Commerce Commission submits a conservative starting point in the range of $70,000 to $80,000 is warranted. The defendant submits a lower starting point is warranted in light of the significant steps it took, and for other reasons I will come to. The defendant submits the range is in the vicinity of $30,000 to $40,000.

[16] Both counsel agree that discount for assistance with the Commission's investigation is warranted and that full credit of 25 percent is available for the guilty pleas entered early.

[17] Relevant factors for identifying the correct starting point have been the subject of various cases in the past including *Commerce Commission v L D Nathan and Company Limited*[3] and, subsequently, *Premium Alpaca Limited v Commerce Commission*.[4]

[18] I accept the objectives of the Act as identified by the Commerce Commission in its written submissions. As already noted, the primary purpose of the Act is to protect consumers, particularly vulnerable consumers.

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[3] *Commerce Commission v LD Nathan & Co Limited* [1990] 2 NZLR 160.
[4] *Premium Alpaca Limited v Commerce Commission* [2014] NZHC 1836.

[19] In terms of the numbers of the borrowers affected, of the 52 samples provided, 19 were identified and are the basis of the five representative charges. The Commerce Commission emphasises the point that of the 52 contracts sampled, 36.5 percent were found to be non-compliant with the legislation which is a high strike rate and is of relevance when setting the starting point. It is noted by the Commission that the defendant business is a substantial player in the lending business area over the charge period in that the defendant entered into at least 3892 contracts with a total payable value of over $15,500,000.

[20] The defendant has undertaken an analysis of the 19 contracts and set out a helpful table in its written submissions. During the first charge period of 6 June 2015 to 31 July 2015, seven of the 19 contracts were non-compliant. That was for a range of prohibited items being included as security. Those items included beds, cooking items, washing machines and refrigerators. It is emphasised by the defendant that over the charge period, the number of prohibited goods wrongly included in contracts significantly decreased. For the last two charges in the charge period, the predominant prohibited item wrongly listed in the loan agreements was microwaves. This is primarily attributed to one of the three lenders wrongly assuming that a microwave did not fall under the category of cooking equipment.[5]

[21] The defendant submits that a number of errors in the contracts decreased substantially during the charge period, reflecting the company's oversight and implementation of the new legislation. This is a point I will return to.

[22] A further relevant factor is the offending period; it was a period of nine months. It is clear from the evidence being provided that, despite the spot checks that were being undertaken by the then branch manager of Aotea West Auckland, the offending contracts were not identified. The branch manager referred to checking at least ten contracts per lender per month for at least the first six months following the implementation of the new legislation. It would appear that, sometime during that period, errors were noted in respect of one lender and a written formal warning issued. However, subsequent errors were not detected. This is somewhat surprising given

[5] Refer paragraph [14] above.

there were only three lenders for the branch manager to oversee. It is also somewhat surprising given that there were other agents who would have been reviewing the chattel items listed for security. Between the agents and the branch manager, it is difficult to appreciate how the offending could have occurred for so long.

[23] One explanation that has been provided for the initial offences immediately after the legislation came into force is that the majority of those contract related to re-financing situations. This occurs when a borrower has returned to Aotea West Auckland to re-finance an existing loan. Personal information has obviously been held by the defendant company which has been included in the new finance agreement that has been entered into. It was submitted that the security items listed in the earlier contracts was printed out and included in the new re-finance contract. However, Mr Land has acknowledged that a prudent Lender would have gone through a process of confirming with the borrower whether items previously listed as security remained in their possession. It could not be assumed that all earlier items listed were still within the ownership of the borrower. One would have thought that during that process, the changes to the legislation would have been noted and any prohibited items deleted. I do not place much weight on this explanation.

[24] A further aspect to consider is the degree of carelessness. The Commerce Commission submits there has been a high degree of carelessness. While acknowledging there were steps taken, the Commission submits they simply were not enough. The defence submits and emphasises that the defendant company is a responsible company who prides itself on compliance. The defence notes the significant steps taken[6] (which I have already referred to) and submits that it is unrealistic to expect absolute compliance in the period immediately after new legislation comes into force, particularly having regard to this legislation coming into force at a time a number of other pieces of significant legislation affected the industry.

[25] Relevant to the degree of carelessness, in my view, is the number of staff members who were carrying out and preparing the loan agreements. As I have already touched upon, there were three relevant lenders. It is submitted by the defendant that

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[6] Refer paragraphs [8]-[11] above.

the 19 contracts can be linked to two of those lenders, one who did not implement any of the legislation despite training and advice and the other being the member who assumed a microwave was not a prohibited good.

[26] In my view, having two thirds - or even one third - of a staff of that small number who have not complied is a relevant factor in assessing the degree of carelessness. It is difficult to imagine how one of three staff members could, for so long, simply not comply particularly given the level of oversight that has been suggested by the branch manager in her affidavit. This is legislation designed to protect the vulnerable and a high standard is required of those who operate within it. I consider that there has been a significant degree of carelessness. While it has not been by senior staff members they are responsible for the acts of the junior staff.

[27] Another factor all counsel sought to make submissions on is the level of harm. I accept the defence submission that there was no risk of repossession. Certainly, no prohibited items were repossessed. However, the process of entering into a lending agreement requires the borrower to specifically identify or, in the case of re-financing, acknowledge ownership of items that fall within the list of prohibited items. From the outset, the borrower is under the belief that, in the event they default under the credit contract that they are at risk of losing items of high personal value to them. The level of harm or stress that may cause the borrowers is difficult to quantify but I accept there is a level of harm in that process. This is not a situation of pre-printed forms but information being obtained directly from the borrower which is then recorded on the contract agreement.

[28] Finally, it is submitted by defence that the final penalty does not need to reflect the deterrence principle. The defence state that personal deterrence is not required for Aotea West Auckland as they did take reasonable steps when faced with the unfortunate situation of the two employees not complying. The Commerce Commission emphasised the need for general deterrence and pointed to the need to ensure that lenders in the industry, who do comply with the Act and bear the cost of doing so, are not placed at a competitive disadvantage against those who do not.

[29] All counsel have endeavoured to provide me with some cases to assist in identifying an appropriate starting point. This is the first sentencing case for charges under s 83ZN of the Act. The Commerce Commission has listed a number of cases but submits the most analogous and helpful is the case of *Commerce Commission v Best Buy Limited*.[7] The defendant submits this case is distinguishable on a number of factors and submits that the more helpful decision is *Commerce Commission v Betterlife Corporation Limited*.[8] I do not intend to consider the merits of each case. I have read counsels' submissions and the relevant cases.

[30] I consider the defendant company has a high responsibility to ensure compliance, particularly in the bedding-in period where they were most at risk of not complying with the new legislation. The standards have been raised by Parliament which is reflected by the implementation of the new provision and by the substantial increase in penalties if there were breaches. While there was oversight and some audits, it was not at the level that one would expect, particularly given the small number of lenders in this particular office of this finance group. The reality is that the level of non-compliance was only discovered after intervention by the Commerce Commission. This company is a relatively large player in the lending industry and the standards that can be expected of it should be high.

[31] Having regard to the various factors that I have already referred to, I consider that the appropriate starting point sentence is one of $70,000. Credit is due, as all agree, for the co-operation the company has provided to the Commission during the course of its investigation, which is to be encouraged. A discount of $5000 will be given for that co-operation. A further discount will be given for the guilty plea to the level all counsel agree which brings the end total sentence to $48,750. That amount can be divided then between the five charges.

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[7] *Commerce Commission v Best Buy Limited* [2017] NZDC 13575; [2017] DCR 213.
[8] *Commerce Commission v Betterlife Corporation Limited* [2016] NZDC 10579.

[32] On each charge there will be a fine of $9750.

[33] As I have already noted, statutory damages are also ordered to be paid as per Schedule 3 to the summary of facts.

[34] No prosecution costs are sought but court costs of $130 will also be imposed on each of the five charges.

Judge J Jelas
District Court Judge

Date of authentication: 05/03/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

ANNEXURE A

Schedule 3 – calculation of statutory damages

#	Date of contract	Contract #	Total advances made and agreed to be made under the contract [i.e. advances agreed to be made to the borrower]	Calculation of statutory damages
1	06/06/2015		$4,743.20	$237.16
2	06/06/2015		$3,777.15	$200.00
3	06/06/2015		$4,643.87	$232.19
4	06/06/2015		$5,674.37	$283.72
5	06/06/2015		$6,431.08	$321.55
6	01/07/2015		$5,971.47	$298.57
7	01/07/2015		$3,455.00	$200.00
8	01/09/2015		$1,979.13	$200.00
9	23/09/2015		$5,349.84	$267.49
10	01/10/2015		$2,369.44	$200.00
11	01/10/2015		$2,471.20	$200.00
12	01/12/2015		$2,774.05	$200.00
13	17/12/2015		$5,268.25	$263.41
14	05/01/2016		$4,383.12	$219.16
15	05/01/2016		$3,949.46	$200.00
16	02/02/2016		$1,578.12	$200.00
17	02/02/2016		$5,268.04	$263.40
18	02/02/2016		$4,724.20	$236.21
19	01/03/2016		$5,851.00	$292.55
Total				**$4,515.41**