IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2017-009-006303
[2019] NZDC 5076

COMMERCE COMMISSION
Prosecutor

v

ALTERNATE FINANCE LIMITED
CRESTER CREDIT COMPANY LIMITED
Defendants

Hearing:	13 March 2019
Appearances:	S Lowery for the Prosecutor J Katz QC for the Defendants
Judgment:	13 March 2019

NOTES OF JUDGE A-M J BOUCHIER ON SENTENCING

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[1] The Court has two companies as defendants before it, Crester Credit Company Limited and Alternate Finance Limited. Both companies are charged under the legislative reference Credit Contracts and Consumer Finance Act 2003, ss 83ZN and 103.

[2] Each company faces four charges, relating to the defendant companies' failures to ensure their credit contracts did not contravene s 83ZN Credit Contracts and Consumer Finance Act by providing for security interests over certain consumer goods, in these cases beds, cooking equipment, washing machines, refrigerators and heaters. It is stated in the submissions of the Commission that the defendant companies

regularly entered into credit contracts with consumers that listed prohibited consumer goods as collateral the defendants could repossess or sell if the debtors defaulted.

[3] The conduct occurred for about 12 months in the case of Alternate Finance and 11 months in the case of Crester Credit. The maximum penalty for each charge is a fine not exceeding $600,000 which clearly indicates that Parliament intended charges of this nature to be taken seriously.

[4] The Commerce Commission's sentencing submissions, are firstly, in a bundle dated 24 October, then there are supplementary submissions dated 27 February. The defence have supplied the Court with submissions for the date of today and also the affidavit of Mr Diggs on behalf of the defendants in relation to the hearing.

[5] I have also been supplied today by a letter from Mr Diggs who states that he is the director of Crester Credit Company Limited and Alternate Finance Limited and he wishes to unequivocally apologise to their existing customers and any new customers for any statements made that may have misled them in the company's advertising or documentation. He then goes on to say, "Those existing customers, I thank you for your support and we undertake as always to listen to you compassionately." He says, "This is a personal apology and not suggested by my lawyer."

[6] I said at the start that the companies are spoken about by the Commission as third-tier lending companies and it has been, in the defence submissions, at pains to point out that the companies here are not the sort of companies such as companies who sell goods of any sort. They submit to the Court that the term third-tier lender has acquired a negative connotation due to activities of some such lenders, with less than satisfactory practices and policies, including their lending and finance arrangements. They submitted these two defendant companies are not in that category.

[7] I say at the outset that in calling them third-tier lenders that does not, in my view, place them into some sort of category with a negative connotation. They are simply not banks or large finance companies. That is the categorisation which I accept, and it is, in simple terms, third-tier lenders.

[8] So to go to the submissions, in the original submissions of the Commission, they say the defendant companies' offending was as a result of a high degree of carelessness, over a substantial period, despite the companies' specific knowledge that it was unlawful to take security interests over prohibited consumer goods. They point out that there was a lengthy lead-in to s 83ZN being enacted, one year in all, and that, therefore, the companies had time to train their staff and refine their procedures accordingly.

[9] The Commission submits that the purpose of this section is consumer protection and the likely vulnerability of borrowers using such third-tier lenders warrants special attention, thus it was enacted as a crucial consumer protection. The start point they then submit for, falls within a range of 100,000 to 120,000 in the case of Alternate Finance and a start point within the range of 85,000 to 105,000 in respect of Crester Credit.

[10] Then there are discussions as to reductions, 25 percent for early guilty plea and all of us, both the Commission, the defence and myself, are in agreement that 25 percent is appropriate. So we need take that one no further.

[11] Looking at the statutory obligations, they set out the types of loans issued, which are typically smaller loans to individuals. The Commission submit are typically at higher interest rates, and that there is some vulnerability in the possible customers of companies such as the defendants.

[12] They set out what the prohibited consumer goods are. Which are goods used or acquired for use primarily for personal, domestic or household purposes, beds and bedding, cooking equipment including cooking stoves, medical equipment, portable heaters, washing machines and refrigerators beds and bedding. The particular amendment is quoted. The Law Commission's summary of the issues is mentioned, and also the signalling of Parliament that it intends to substantially denounce any conduct which breaches the amendment.

[13] The key facts, the Commission submit, are under the standard terms of the defendant companies' credit contracts, debtors granted security interests over their

goods to the defendants and gave them the right to repossess and sell collateral listed in the contract if the debtor failed to meet their obligations. In respect of the charging period first of all, Alternate Finance, the charge period is approximately 12 months from 6 June 2015 to 26 May 2016. It is submitted that 56 of the 68 sample contracts received included listed prohibited consumer goods as collateral, and that Alternate entered into around 342 contracts during the charge period.

[14] For Crester, the relevant charge period is approximately 11 months from 1 July 2015 to 26 May 2016. 43 of the 51 sample contracts received, listed the same thing. Crester entered into around 200 contracts between that period.

[15] The companies have, however, now pleaded guilty to the charges before the Court. The purposes and principles of sentence are then referred to and it is submitted that factors of prime relevance for the Court to consider under ss 7 and 8 Sentencing Act 2002 are denunciation and deterrence, both specific and general and deterrent penalties are required for breaches.

[16] Submissions then go on to appropriate start points and look at aggravating factors. The aggravating factors are noted as follows, the objectives of the Act have been undermined, the defendants indicate they knew of the prohibition but failed to implement practices to ensure the provision was consistently being adhered to. Second aggravating feature, number of affected contracts. There has been much in the way of submission regarding this, but the precise number of affected contracts is not known, however, it is likely to be substantial, therefore, this is not an isolated piece of conduct.

[17] Number three, duration of offending. 12 months in the case of Alternate and 11 months in the case of Crester and ceasing only due to the Commission's investigation.

[18] Fourth, the Commission submits that the offending is at best viewed as highly careless. There was the one-year lead in, the defendants were plainly aware of the change, and despite that, in the submission of the Commission, did not update their staff, training and procedures.

[19] Fifth, more than one prohibited item was often listed, and some contracts, in the submission of the Commission, included numerous prohibited items.

[20] Sixth, the victims were vulnerable, and it is submitted that cases have recognised that persons who borrow from third-tier lenders are likely to be financially vulnerable individuals who may have low incomes and poor credit histories. Therefore, they need the greatest protection to understand rights and obligations under the contract.

[21] Seventh, likely harm. It is submitted that the offending was liable to mislead debtors as to the consequences of defaulting on their loans, it is likely, they submit, that few or none of the affected customers would have known that the defendants were unable to repossess their essential household items, leading possibly to considerable anxiety. The Commission acknowledges that no prohibited consumer goods were repossessed but they said that that is an absence of an aggravating factor.

[22] Looking at any mitigating factors of the offending, the Commission submits that there are none. They have then referred the Court to a number of cases which are pursuant to the previous legislation. When the submissions were first filed, the decision in *Aotea Finance (West Auckland) Limited* which was given in the District Court at Waitakere on 26 October, was not available. It took everybody a while to obtain the notes which have now been provided to the Court. The Aotea case is the first case under the particular amendment and, therefore, it is submitted by both parties to be the best comparator.

[23] In terms of the other cases which have been supplied, whilst I have certainly gone through them and read them, however the Aotea Finance case is really the most relevant one, and so I am not going to traverse the other cases.

[24] In terms then of the appropriate start points, the original submissions have already mentioned what the start point is, which I quoted at the outset. The adjustments are, 25 percent less for guilty plea. As far as cooperation, it is submitted that whilst there was cooperation, the level of cooperation was said to be, in the submission of the Commission, far from exemplary due to delay and there was a

compulsory notice under s 98 Commerce Act 1986 to Crester only so, therefore, the maximum appropriate discount for cooperation, the Commission submits, would be in the order of five percent.

[25] The absence of previous convictions, they submit, is neutral and further, any compliance with the law, in the submission of the Commission, does not warrant any additional discount. We then go on to the ancillary orders which are statutory damages, and it is submitted that the purpose of such damages is essentially punitive rather than compensatory, which is a quote from Gault on Commercial Law according to the submissions and, therefore, it should be neutral in calculating the quantum of any loss, so the mathematics of that have not been challenged by the defence. The statutory damages which have been calculated by the Commission in respect of Alternate are $12,315.89 and against Crester, $8921.93. So, therefore, the fines have been set out in the last paragraph of the original submissions under paragraph 9.

[26] Looking at the supplementary submissions, the Commission goes into certain issues mentioned in, first of all, the affidavit from Mr Diggs Three matters are addressed. They are, the number of contracts, the legal advice and contact with the defendants by the Commission. The number of contracts, the Commission refers to the agreed summary of facts being the start point for the Court to consider, in respect of both parties and they set out at 2.4 and 2.5 the agreed summary of facts calculations as far as that is concerned.

[27] As to legal advice taken by the companies, no privilege has been waived, therefore, the scope of that advice is not known, it is submitted. So, in terms of principles relevant to obtaining advice, it is submitted that according to Commerce Commission v Bayley Corporation Limited, taking of such legal advice is not a mitigating factor which attracts a discount, but an aggravating feature absence. They then refer to contact with the Commission between 2009 and 2016, they set out what the contact was between the Commission and the defendant companies.[1]

[28] The *Aotea* case is referred to, and in that case, there were five representative charges under s 83ZN relating to a nine-month period, the number of contracts were,

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[1] *Commerce Commission v Bayley Corporation Ltd* [2016] NZHC 1493.

3892 contracts. 52 were viewed as samples, 30 of those ultimately identified as having prohibited consumer goods in the list of collateral. Aotea Finance told the Commission, that it had internal policies in place to comply which were not followed.

[29] In that case, a start point was adopted of a fine of $70,000 with Judge Jelas taking a view that there was a significant degree of carelessness not by senior members of staff but by junior members of staff, and also in that case, a high level of deterrence was accepted to be required. There was a $5000 discount for cooperation and then a 25 percent for guilty plea.

[30] So, the Commission submits that the start point adopted in the Aotea case supports its position on the appropriate start point range here, because the defendant companies had no policies in place at all to ensure that security was not taken over prohibited items. Instead it assumed compliance, in their submission, and the compliance officer who was appointed by the company overlooked the issue as well. So, a higher level of carelessness here supports a higher start point being adopted.

[31] In oral submissions today, five points were made by the Commission. First of all, they submit that some of the defendant's submissions on the start points are in fact privileged pursuant to the Evidence Act 2006 and protected from disclosure. As to the degree of wilfulness, the Commerce Commission submits that it is highly careless here. Yes, they took legal advice, but it is not the standard form contract, it is what is put into the contract, in the collateral portion of the contract, right under the part which excludes such items. So, the company knew of the restriction but did not put it in place. So, therefore, the Commissioner submits that this is high carelessness.

[32] Consumer harm is the next point. There is no repossession of any goods but that does not equal, in their submission, no harm to the consumer and that might be the worry and concern of a consumer, and the borrowers would have known of the fact that the items were included in the contract because they were the ones who had to give the list.

[33] Next point being statutory damages, the company has accepted that it can pay the fines. The Commission submits that there should be no reduction of the fine due

to the statutory damages, as it submits that they are conservative, from a sample of contracts, and that the Commission is not seeking statutory damages for the entire loan book, only the sample.

[34] The next point is, in the submission of the Commission, there are a greater number of non-compliant cases here. The strike rate is important in the submission of the Commission, and also the steps to comply which were taken by *Aotea.*

[35] So, the Commission has given a comparison of salient sentencing factors in *Aotea Finance* as against Crester and Alternate. They have set those out, plus also the parties' positions as compared with the position adopted in *Aotea Finance.* Those have been supplied by the Commission to the Court today. So they submit in particular, there is no evidence of steps taken by the two companies here, yes there was legal advice taken but nothing else, while in the *Aotea Finance* case, two out of three staff who were dealing with these contracts got it wrong, but here it is unknown how many of the staff of these companies got it wrong, as it were.

[36] So then going to the defence submissions to the Court and the affidavit of Mr Diggs, first of all, looking at what Mr Diggs has had to say. He sets out his position. He is a director and shareholder of the two defendant companies and has been so for many years. The first one incorporated was back in 1988 which was Crester and in 1999, Alternate. So Crester has been in business for just a bit over 30 years.

[37] They are essentially family companies and they lend as relatively small amounts of finance to assist borrowers on a short-term basis. He sets out what the typical loans are and again, as I have already accepted that the companies do not target lower socio-economic groups but generally the nature of the business is that the clients or borrowers are not as well off, than those who go to banks. They do not sell goods or services which they then finance.

[38] He then sets out why he set up the two companies and how they operate, he then deals with the charges and notes that some of the contracts arose within a day or two of the new provisions coming into force. He says that it certainly has not occurred

due to any deliberate act on the companies' part or by himself, nor did it involve disregard for statutory obligations, due to the legal advice which they took. He emphasises again that they have never repossessed any of the prohibited goods and he believes that the issues arose because staff did a cut and paste of the pre-June 2015 form of the loan document and he thought that they had set matters up so that the forms complied.

[39] He then sets out that his company and himself had issues which were consuming much time when this occurred. He sets out how loan applications are usually made, and then looks at some of the submissions of the Commission. He did not agree that the companies were not fully cooperative with the Commission, he says he takes a responsible attitude to his and his company's obligations and always endeavours to cooperate with authorities.

[40] In terms of any fines that the companies will be levied, he says that both are able to afford fines in a reasonable and appropriate sum. Both of the company's trade, they will be obliged to pay any fines imposed and repay to clients the statutory damages but those represent a real loss to the company and it is effectively the profit component of the contract. He has then made some calculations and refers to counsel's submissions as to the suggested penalties.

[41] The personal mitigating factors are then set out. He has annexed to his affidavit references from a number of organisations and charities which he has contributed to. He says he has set up a number of community-based and charitable initiatives and has done so because he accepts that clients of the two companies are often people in need and he, therefore, tries to give back something to that same community. The references from all of those institutions or trusts or companies have been annexed to his affidavit.

[42] In terms of then the penalty submissions to the Court, it is submitted that the companies operated without any significant issues down to 2014, and the only time they came to the attention of the Commerce Commission is as disclosed in the summary of facts in 2009, and the Court would be invited to disregard that because no charges occurred as a result of the Commission's involvement. Then the submissions set out that as a result of the changes in the law, the companies sought legal advice.

The contracts are then referred to, and looking at the sample contracts, it is submitted the nature of the offending is rather odd, as it is set out at paragraph 20 of the contract what could happen if you failed to meet your commitments, followed by the description of the security interest.

[43] They point out that the primary contract document states at the outset that the customer is to read a certain paragraph, plus each following paragraph. It is set out under the heading of Background what the background to the contract is, the obligations, and then the description of security interest and the personal property collateral which excludes the various items that are referred to in paragraph 26 of the submissions. Then it lists the collateral security, and the list clearly excludes the prohibited goods such as fridge/freezer, double bed base and other goods which are non-prohibited goods.

[44] So, there is an additional explanation for the disclosure statement, what could happen if you fail to meet obligations and so on. It notes, however, the second page the disclosure statement purports to exclude prohibited goods, only then to include them within the specification of the collateral security. It is submitted that the documents of the two companies largely follow the model disclosure of the Commerce Commission.

[45] The defence submissions highlight again, that some of the offending came just days after the amendments came into force on 6 June 2015. They then set out, as far as cooperation is concerned, that the companies did respond in a timely manner in mid-2016 to the request of voluntary provision of information, because the request stated the compliance was voluntary. The statutory notice under s 98 was only issued because the Commission was not fully satisfied with what was provided, and that was complied with promptly, and further, that the companies acted responsibly on being served with the charging documents. They entered guilty pleas at the earliest possible time.

[46] Looking then at the approach to sentencing, and the factors which have been addressed in the Commission's submissions, the purposes and principles of sentencing are not disputed, but there is a dispute as to the application of the individual points in

the circumstances of this particular case. It is acknowledged that whilst denunciation and deterrence are relevant factors they must not override other specific factors, they are just two factors to be taken into account in the overall assessment.

[47] The defendant companies contend their conduct was not callous, overbearing, flagrant, or in deliberate disregard of the rights of borrowers, and of course that the Court must take into account the principles laid down in the case of *Hessell v R* which is of course very well-known, plus the case *Solicitor General v Hutchinson.*[2] So the aggravating factors relevant to the particular offending here are no more than carelessness on the part of the two companies in failing to ensure their contracts did not breach the section.

[48] Then responding to the list of aggravating factors set out in the Commission's submission, as to the first one, undermining the objectives, it is submitted that without more, that cannot be an aggravating factor because the defendant companies submit that their clients were not exploited nor preyed upon by the defendants, as often the case with other companies, they do not target people.

[49] Second factor, number of contracts. It is submitted here that, as the Commission accepts, the number of contracts is not completely known. The defendant companies accept as far as Alternate is concerned, that in the four charges, a total of 56 contracts which offend against s 83ZN, but they submit it is a leap of faith to say it is 82.4 percent of the total 68 contracts entered into and, therefore, it must be 82.4 percent of the total 342 contracts entered into. Further, it is on the Commission to establish a proper evidentiary basis in their submissions. As far as Crester, the Commission suggests that it is 81.1 percent and the defence submit in each case these estimates are not the best or most reliable figures.

[50] So in terms then of what the Commission sought, first of all, from Alternate, it required them to advise the actual number of contracts entered into, where security was taken, went on to see if that information could be collated by the Commission. The Commission must have been satisfied with information supplied because it did

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[2] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

not issue Alternate with a s 98 notice. They acknowledged that Crester received a s 98 notice and it complied with that notice.

[51] The duration of the offending, the time period, is accepted. As to the application of statutory damages, it is submitted that there is little in the way of authority and considerable research has not produced anything much, but there is an Australian case of *ACCC v Chubb Security Australia Pty Limited.*[3]

[52] As to the carelessness involved here, it is submitted in the written submissions carelessness is accepted, but it is important that the conduct was not deliberate nor flagrant and the defendants did and continue to have procedures in place to train staff who entered into these contracts, unfortunately clearly they were inadequate at the relevant time. But they have now been improved and enhanced so that the situation will not occur again. As to the number of prohibited items included, clearly in the sample contracts there was more than one item of prohibited goods included, but the submission is that that does not add anything much to the carelessness mentioned before.

[53] The vulnerability of victims. It is submitted this is a contentious and tendentious point. Whilst the companies accept that their borrowers are generally in a lower socioeconomic group, the submissions refer to Mr Diggs' affidavit which deposes as to the procedures and the explanations given to borrowers at the time plus the Notice to read the documents, advice to take time in doing so, and take legal advice if they wished to.

[54] The likely harm to have resulted. It is submitted that it is, in any event, based on pure speculation. There is no evidentiary basis for the submissions relied upon by the Commission and the simple point is that no borrower has suffered any loss whatsoever. In fact, with any award of statutory damages they will be advantaged.

[55] Looking then at mitigating factors. Whilst the Commission submits there are no mitigating factors relating to the offending, the defendants disagree because they submit they provide a necessary and important service to the community, but they do

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[3] *ACCC v Chubb Security Australia Pty Ltd* [2004] FCA 1750.

concede that the nature of their business, the largest number of their borrowers, will be in a lower socioeconomic group, however they provide a socially useful purpose in what they do.

[56] Further, then it is submitted that the breaches are technical. It is not a callous or deliberate attempt to fool or dupe borrowers but there is carelessness. Then as far as comparators, the *Aotea* case is the case which is the most available comparator here, although Mr Katz says it is often said that comparisons are odious.

[57] The decision of Judge Jelas was not available when preparing these submissions. However, taking a start point, the submission of the defence is that, first of all, there was an email on a without prejudice basis. The defence have submitted in their oral submissions, that is not something which should be excluded under the Evidence Act. Further, as there are now fewer charges before the Court than there originally were, when the submission was first penned, the start point should be a lesser one. The start point the defendants contend for the end of phase one of assessing a start point is for Crester, between 50 to $60,000, say $55,000 and for Alternate, $60 to $70,000, say $65,000. Looking at the circumstances relating to the defendants, the adjustment required for aggravating and mitigating factors relating to the offender, they essentially say there are no aggravating factors in relation to the offenders.

[58] The mitigating factors, whilst the Commission has listed two mitigating factors, the simple fact is, the companies have no previous history and they also rely on their social contract with their community as well and the charitable work that the family who owns the companies is involved in. Then as far as cooperation, the submission is that they did cooperate, and then the entry of guilty pleas. As far as the cooperation with the Commission, the defence submit a 10 percent reduction is appropriate. They then look at other considerations and submit that a further factor justifying some overall reduction of the fines is, the two defendant companies are in practical terms the same. Whilst obviously they are discrete legal entities, they are both family companies and both companies are in a position to pay fines. There is the jurisdiction to reduce statutory damages if the Court considers it just and equitable to do so. The guidelines for so doing are these set out under s 92 of the Act, and so,

therefore, it is submitted that the Court has the jurisdiction to attenuate the total financial impact by reducing either or both, the fines and the damages.

[59] In terms of the s 92 factors, the role of statutory damages are an incentive. The real penalty for the companies is the measure of damages. Both companies are truly incentivised, it is submitted. Compliance programmes, they have an appropriate compliance programme. The extent and reason of the breaches, the breaches are technical and as a result of carelessness, it is submitted. Prejudice to any person, it is submitted there is no evidence of prejudice to borrowers. Agreement to pay compensation, they accept that statutory damages are to be ordered and lastly, any other matter, the companies rely on the mitigating factors set out in the affidavit of Mr Diggs.

[60] Whilst the companies can afford to pay a fine it is submitted it must be commensurate with the offending, appropriate in all the circumstances and in accordance with the provisions of the Sentencing Act. Then the effect of publicity in terms of Mr Diggs and family is set out. He is the principal and sole director. He has already deposed the charitable organisations. References are then referred to which I have mentioned before and of course the companies have no criminal history. The references to the community works are again referred to.

[61] The end results are then set out in paragraphs 192 through to 196 of the written submissions. Going to the defence oral submissions today, responding to the five points raised by the Commission, the defence have pointed out that s 57 Evidence Act refers to specific privilege in civil proceedings only, and that the communications which were involved here are not to be ignored. The second point in terms of the documentation, it is submitted that there is nothing in the contract which is shown to the Court which suggests wilfulness on behalf of the companies. The third point as to harm to any persons, the lack of repossessions, the submissions of the Commission are easy to make, in the defence's submission, but very difficult to respond to and the harm can only be in the perception of the borrowers and is speculative.

[62] The fourth point regarding statutory damages, they only came in when the amendments to the statute were made. Further, no authority has been found as to

whether statutory damages are part of a penalty. There is of course the jurisdiction, which has been referred to in their written submissions, to reduce any statutory damages. They are a real financial cost to the companies. It is essentially the profit elements of the lending. Therefore, they earn nothing out of the contracts. The actual mathematical calculations are accepted.

[63] The fifth point as to the best comparator, being the *Aotea* case, the defence set out their submission, in comparison with *Aotea* the number of contracts involved overall there was six times the number of the contracts in the defendants' case. The book value of the contracts in the *Aotea* case was some 15 and a half million dollars, so the book value of the two companies here pales into insignificance. The figures have been set out by defence counsel in his oral submissions to the Court. Further, he submits that the *Aotea* company was clearly in a sizeable way, in contrast to the two defendant companies here.

[64] Then referring to the table supplied by the Commission today. In terms of the comparators, as far as the first factors, they submit that there is not much between the two defendant companies here and *Aotea*. They highlight that the companies Crester and Alternate did employ a compliance officer. So due to the comparisons suggested by defence, they go back to the start points referred to in the written submissions, a start point of say $55,000 fine for Crester, $65,000 for Alternate. The primary mitigating factor being the companies' engagement with the community, that they did cooperate, that that should receive a 10 percent discount. No uplifts are required. In terms of the statutory damages, the totality principle in sentencing should be taken into account.

[65] In terms of the response, even if one looks at matters on a revenue basis, it is submitted still that the defendants' culpability, the Commission submits, is above that of Aotea.

[66] So having considered all of the factors and considered the sentences that the Court should give and taking into account what the Court needs to set out, as far as the purposes and principles of sentence is concerned under the Sentencing Act, under ss 7 and 8, denunciation and deterrence, both specific and general, are certainly important

factors but of course they are only two factors that the Court needs to consider. Accountability of the defendants, the circumstances of the defendants, the gravity of the offending, also consistency with other sentencing cases, which of course is always difficult due to often significantly differing facts. However, everybody agrees that the *Aotea* case is the best comparator here and of course the Court needs to take into account the least restrictive outcome.

[67] As to the aggravating features of the offending, I do accept, firstly, that the objectives of the Act were undermined because the enactment was for the protection of vulnerable consumers. Secondly, as far as the number of contracts, the number of contracts is reasonably significant. The period over which the offending took place, it is one year for Alternate and 11 months for Crester. In terms of carelessness, looking at the carelessness involved, it is in my view reasonably significant carelessness. There was a one-year lead-in for this particular section, there was education by the Commerce Commission and so, therefore, there was the time for the companies to find out what they needed to do before the Act came into force.

[68] The next point is that the contracts did include numerous items which were prohibited by the section. The next point is, there were borrowers who could be in precarious financial positions, that such borrowers have been deemed by Parliament to need protection and such borrowers were the customers of the companies. The next point is harm. That is of course difficult to quantify, if not extremely difficult to quantify in these circumstances. It could possibly, however, have led to considerable anxiety amongst the borrowers and none of us here in this Court are in the position of those in the circumstances of living with the loss possibility of such necessary basics and one needs to comprehend that that could lead to anxiety by the customers. I agree that there of course was no repossession of any of the items.

[69] Mitigating factors. As far as the offending is concerned, the fact that the companies do not target vulnerable lenders, I do not see as a mitigating factor. The company is providing a service, of course, to people who need it, but they must comply with the statute. I do not accept that the breaches are specifically technical.

[70] Comparisons. Comparisons are always difficult, and it is the principles which underlie the decisions which are the most important features of any comparisons rather than necessarily the comparative facts which are important. So although *Aotea* is important here, it is not something in my view that can inform the Court on the basis of numbers alone. The whole circumstances of the case need to be taken into account.

[71] As far as any aggravating features of the offending companies, there are nil.

[72] As far as mitigating features, firstly, there are no previous convictions and I disregard the previous interactions with the Commission but juxtaposed to that, has to be considered the length of time that the offending took place.

[73] Cooperation. Yes, there was cooperation. However, there was in one case a s 98 notice required. It does, however, need a discount, and I accept that the company was not targeted specifically but the enquiry by the Commission was industry-wide. I am of the view that an eight percent discount should be given as far as cooperation is concerned.

[74] Next point is the guilty plea. We all agree that is 25 percent.

[75] In terms of any mitigating features further, the companies are two separate legal entities, so I do not accept that they are the same in practical terms. Because they are separate legal entities they must be treated as such.

[76] Next, they have agreed that they are in a position to pay fines. I am of the view that the statutory damages should not be regarded as a penalty because they are seen as statutory damages. That of course is a view that another and higher Court may disagree with, but because there are no other cases of assistance to the Court, I take the view that I have just expressed. I am of the view that there should not be a reduction of those statutory damages figures, and everyone has agreed, 12,315.89 for Alternate and $8921.93 for Crester. As far as the next issue, legal advice is not a mitigating factor in my view, it is the absence of an aggravating feature.

[77] Looking then at the overall start point and as to the gravity. In terms of Alternate and Crester, the gravity in respect of both of them is reasonably significant. I see little need to significantly differentiate between the two given there is only one-month difference in the length of the timeframe of the offending. So the gravity of the offending, I assess as being a little higher than *Aotea* case due to the slightly longer timeframe involved but one also must take into account the numerical factors that have been put before the Court as far as that is concerned ,and the significantly greater, if you look at it overall, book value of the loans of that company as compared with the two companies here.

[78] So, therefore, I consider that in respect of both companies, a start point should be $75,000 in respect of each of them less an eight percent discount which is $6000 for cooperation and other factors, less 25 percent for a guilty plea which is $17,250 and the total of $51,750. Then divided between each charge, say rounding it out a bit, $12,930 per charge plus Court costs of $130 on each charge, plus in respect of each of the two defendants the statutory damages for Alternate in the figures already given and for Crester in the figures already given.

[79] Those are the fines which I assess.

A-M J Bouchier
District Court Judge