IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2023-485-51
[2023] NZHC 3035

BETWEEN	BRENT IAN ANDREWS Appellant
AND	COMMERCE COMISSION Respondent

Hearing: 26 October 2023

Appearances: Appellant self-represented
J B Hamlin and C A Richardson for Respondent

Judgment: 30 October 2023

JUDGMENT OF GRICE J
(Appeal against conviction and sentence)

Introduction

[1] On 31 May 2023, in a reserved judgment following a Judge-alone trial before Judge Harrop, the appellant was convicted on two charges:[1]

(a) failing, without reasonable excuse, to provide information and documents in accordance with a notice issued under ss 98(1)(a) and (b) of the Commerce Act 1986 contrary to s 103(1)(a) of the Act;[2] and

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1 *Commerce Commission v Andrews* [2023] NZDC 9206 [conviction decision].
2 Maximum penalty $100,000 fine.

(b) failing, without reasonable excuse, to attend an interview in accordance with a notice under s 98(1)(c) of the Commerce Act contrary to s 103(3)(a) of the Act.[3]

[2] On 7 July 2023, the appellant was sentenced to pay a fine of $3,000, to be paid at the rate of $10 per week.[4] The Judge would have imposed a fine of $30,000, but lowered the fine to $3,000 on the basis this would be the most the appellant would realistically be able to pay, considering his financial situation.

[3] The appellant appeals against both conviction and sentence under many heads of appeal. Leave was granted to Ms Carla Jerram to sit next to Mr Andrews and assist him.

[4] The respondent submits the appeal should be dismissed. The respondent says that although the appellant has raised a significant number of grounds of appeal, none of the grounds raised by the appellant demonstrate any error by the Judge in his assessment of the evidence or law, let alone one sufficient to give rise to a miscarriage of justice. The respondent says the evidence produced by the Commission was sufficient to prove the charges beyond reasonable doubt. In terms of the sentence, the respondent says that while the Judge erred in describing the appellant's benefit entitlements, he did not err in imposing a fine of $3,000.

Background

[5] The appellant was a director of Premodealz Ltd (Premodealz), a mobile trader undertaking consumer lending.

Statutory framework

[6] Consumer lending is regulated under the Credit Contracts and Consumer Finance Act 2003 (the CCCFA). A "mobile trader" is defined under the CCCFA, but in essence involves the sale of consumer goods to natural persons on credit.[5] The

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3 Maximum penalty $100,000 fine.
4 *Commerce Commission v Andrews* [2023] NZDC 14576 [sentencing decision].
5 Credit Contracts and Consumer Finance Act 2003, s 5.

CCCFA provides that sales by a mobile trader are to be treated as a consumer credit contract.[6]

[7] The Commission has a role to promote compliance with the CCCFA, and to this end has a number of functions under s 111, including taking prosecutions in relation to breaches of the Act.[7] Section 113 of the CCCFA applies a number of provisions from the Commerce Act to the Commission's functions under the CCCFA, including information gathering powers under ss 98 and 103.

[8] Section 98 of the Commerce Act, the Commission's primary power of gathering information by compulsion, provides:

> **98 Commission may require person to supply information or documents or give evidence**
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> (1) Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—
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> (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
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> (b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or
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> (c) to appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.
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> (2) For the purposes of subsection (1), the Commission's powers under this Act include the power to investigate whether an exception or exemption from this Act (whether under this Act or any other enactment) applies to a person or to a person's conduct.

[9] The "necessary or desirable" test in s 98(1) is a low threshold, but must be approached objectively. The Supreme Court has stated that a notice under s 98 must be used to obtain evidence, information, or documents relevant to the Commission's

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6 Section 16A.
7 Section 111(2)(b).

exercise of its powers and functions.[8] While the onus falls on the Commission to show that documents or information are relevant, it is a "very easy" onus to discharge.[9]

[10] Section 103 of the Commerce Act provides:

> **103 Offences**
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> (1) No person shall—
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> (a) without reasonable excuse, refuse or fail to comply with a notice under sections 53B(1)(c), 53N, 53ZD, and 98; or
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> …
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> (2) No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.
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> (3) No person, having been required to appear before the Commission pursuant to section 98(c), shall—
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> (a) without reasonable excuse, refuse or fail to appear before the Commission to give evidence; or
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> …
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> (4) A person who contravenes subsection (1), (2), or (3) commits an offence and is liable on conviction to,—
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> (a) in the case of an individual, a fine not exceeding $100,000:
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> …
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> (5) Proceedings for an offence against subsection (4) may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.

[11] Sections 103(1)(a) and 103(3)(a), the provisions under which the appellant was convicted, are strict liability offences, but apply only where the refusal or failure to comply with the relevant notice occurred without a reasonable excuse.

[12] Winkelmann J held in *Streeton v Police* that a reasonable excuse requires there to be a subjectively held belief that the person was excused, which is reasonable in light of the particular circumstances.[10] It is accepted, however, that the approach in *Grey v Police* applies, whereby it is for a defendant to raise an evidentiary basis for

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8 *Astrazeneca v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [29].
9 *Telecom Corp of New Zealand Ltd v Commerce Commission* [1991] NZAR 155 (HC) at 163.
10 *Streeton v Police* HC Auckland CRI-2006-404-147, 8 December 2006 at [9].

any defence, but it is the prosecution which ultimately has the burden of proof.[11] In other words, as the Court there stated, the Crown must displace a defence of this character if it is appropriately raised.[12]

Evidential basis for the convictions

[13] As noted, the appellant was a director of Premodealz, a mobile trader undertaking consumer lending.

[14] In October 2020 the Commission opened a project to monitor the practices of "mobile traders" to ensure they were complying with the CCCFA, particularly in respect of those traders' disclosure and responsible lending obligations, as well as providing guidance to promote compliance with that Act.

[15] The Commission had concerns about whether Premodealz was complying with the Act, after considering Premodealz's website and Facebook page, and a complaint about Premodealz.

[16] On 23 February 2021, Ms Jeanne-Marie Grobler, a senior investigator at the Commission who had a leading role in the project, spoke with the appellant and requested he attend a voluntary meeting and provide five redacted customer contracts and a copy of Premodealz's terms and conditions.

[17] On 25 February 2021, Ms Grobler emailed the appellant, saying he had not responded to the Commission's meeting or information requests. The appellant responded by email and advised he was preparing the documents and would send them as soon as they were completed. Later that day, the appellant via email sent the Commission:

(a) five redacted copies of Premodealz's customer invoices (rather than customer contracts);

(b) a blank copy of Premodealz's new customer sign-up form;

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11 *Grey v Police* HC Hamilton, AP 65/01, 31 October 2001 at [20].
12 At [20].

(c) a copy of Premodealz's credit contract disclosure form; and

(d) a copy of Premodealz's terms and conditions.

[18] Ms Grobler responded and asked the appellant if he could attend a voluntary meeting. Although the appellant initially agreed, on 27 February 2021 he emailed Ms Grobler and advised that he would endeavour to forward the remaining information to the Commission by 5 March 2021, but that he was not willing to meet with the Commission voluntarily at that stage. No further documents were received.

[19] As noted, the Commission had concerns about Premodealz's compliance with the CCCFA. On 21 July 2021, the Commission issued a statutory notice to Premodealz under s 98(1)(a) and (b) of the Commerce Act (the first notice). The first notice required that Premodealz provide to the Commission by 5.00pm on 4 August 2021 various information, including:

(a) a copy of a sample of customer files,

(b) Premodealz's policies and training material in relation to affordability assessments;

(c) initial, variation and continuing disclosure documents; and

(d) all versions of the terms and conditions used by Premodealz.

[20] On 22 July 2021, Ms Grobler called the appellant to confirm he had received the first notice. The appellant confirmed he had received it but advised he did not intend to comply as he was closing down Premodealz. Ms Grobler explained that Premodealz was required to comply with the first notice even if he was closing down the company.

[21] However, Premodealz provided no further documents in compliance with the first notice.

[22] Between September 2021 and May 2022, the Commission sought information relating to Premodealz from ASB Bank Ltd and Flo2Cash Payment Solutions Ltd (Flo2Cash). Flo2Cash advised that Premodealz had been paid $260,000 by borrowers, and 37 of them were continuing to pay money to Premodealz (via Flo2Cash).

[23] The Commission remained concerned, as it appeared a number of borrowers were continuing to make payments to Premodealz. On 18 May 2022, the Commission issued a statutory notice to the appellant under s 98(1)(c) of the Commerce Act (the second notice). The second notice required the appellant to:

(a) appear before the Commission for a compulsory interview on 9 June 2022 at the Commission's Wellington office (the compulsory interview); and

(b) bring to the compulsory interview and provide to the Commission:

(i) the documents requested in the first notice; and

(ii) the full customer file for each of the 37 active customer plans which were then with Flo2Cash and where Flo2Cash was collecting payments on behalf of Premodealz.

[24] On 18 May 2022 the second notice was served on the appellant in person by Mr Mervyn Theobald. When the appellant was served a copy of the second notice, he stated the Commission had no jurisdiction over him on the basis of a "Wakaminenga-Ki-Marangatuhetaua Sea Pass" card he produced, and that Mr Theobald was wasting his time.

[25] On 20 May 2022, Ms Grobler emailed the appellant to confirm the second notice had been served on him both by way of email and in person and that the defendant was required to comply with this notice. The email noted that the Commission did not share his view that it did not have jurisdiction over him.

[26] On 7 June 2022, the appellant responded to Ms Grobler's email saying he would not attend the compulsory interview and repeating his assertions that the Commission did not have jurisdiction to compel him to comply.

[27] The appellant did not attend the compulsory interview.

[28] At trial, the appellant did not give or call evidence.

District Court decision

[29] The Judge was satisfied that the Commission had proven beyond reasonable doubt that the requisite elements of each charge were met and the appellant was guilty on each charge.

[30] The Judge found that it was at least desirable, and arguably also necessary, for the Commission to issue each of the notices. As the Judge said, the first notice followed what the Commission saw as an incomplete response to a request for voluntary disclosure, and the second followed an apparent failure by the appellant to comply with the first.[13] The Judge accepted therefore there was clearly jurisdiction to issue the notices.[14]

[31] In respect of the first notice, the Judge found that it was appropriately sent. The Judge found that the small number of documents supplied by the appellant earlier on 25 February 2021 was "clearly insufficient" to meet the requirements of the notice.[15] The Judge noted the Commission then received no documents from Premodealz or the appellant in response to the notice.[16] Based on this evidence, the Judge had "no hesitation" in concluding that the appellant, in his capacity as a director of a mobile trader company, refused or failed to comply with the notice lawfully issued under s 98(1)(a) and (b) to that company.[17] The Judge was also satisfied "(beyond reasonable doubt if need be)" that the appellant had no reasonable excuse for not

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13 Conviction decision, above n 1, at [30].
14 At [31].
15 At [44].
16 At [49].
17 At [50].

supplying the requested documents.[18] The Judge considered it was not reasonable for the appellant to refuse to comply with the notice to supply information, and was in any case obliged to tell the Commission if any documents sought did not exist or were no longer in his possession or control.[19] As the Judge noted, "[t]his was not a case of partial compliance with the notice, but of complete non-compliance with it."[20]

[32] In respect of the second notice, given the failure of the appellant to comply with the first notice, and the other information available to the Commission by the time the second notice was issued, the Judge had "no hesitation" in concluding that there was justification for the issue of the second notice.[21] The Judge was satisfied beyond reasonable doubt that the notice was properly served on the appellant and the appellant failed or refused to comply with it.[22] As the Judge said, he did not attend the Commission's premises as required. The Judge also found that the Commission had proved beyond reasonable doubt that the appellant did not honestly believe that he did not have to attend and that the appellant did not have an objectively reasonable basis for not attending.[23] As the Judge stated, "[w]hatever the state of the company, [the appellant] had no good reason for not attending the Commission to say what he could … and to supply the evidence they were seeking for justifiable statutory purposes."[24] As the Judge said, "[e]ven if [the appellant] had come along and said everything he wanted to say about the pointlessness of the meeting, that would have avoided the charge he currently faces."[25]

[33] At sentencing, the Judge "readily" dismissed the appellant's application for discharge without conviction, as there was no basis put forward by the appellant as to why the gravity of his offending would be outweighed by the consequences of entering convictions.[26] In terms of the appropriate fine, the Judge noted there were several aggravating factors, including that it was deliberate and involved complete

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18 At [51].
19 At [52].
20 At [52].
21 At [56].
22 At [59].
23 At [60].
24 At [61].
25 At [62].
26 Sentencing decision, above n 4, at [11].

non-compliance with both notices and resulted in not only delaying the Commission's ability to pursue its investigation, but ultimately frustrating its investigation entirely.[27]

[34] The Judge noted that this case was the first sentencing since the penalties under the Act increased tenfold.[28] The Judge rejected a submission that the Court should apply the same multiplier to penalties imposed prior to the amendment and considered that the approach to be taken to the sentencing was for the Court to look at the apparent gravity of the offending in the case before it, having regard to the applicable maximum penalty.[29]

[35] The Judge noted there was an imperfect balance to be struck between the deliberate and complete non-compliance with the notices and the fact that the appellant's company appeared to be operating at a fairly low level.[30]

[36] The Judge considered an appropriate fine in respect of both charges on a totality basis would be $30,000.[31] However, the Judge noted he had information before him demonstrating that the appellant had no savings, no house, no investments, no vehicle, and no other assets, and as such could not pay a fine other than from his very limited income from his benefit.[32] The Judge said:

> [33] So the upshot of all this is that there is a substantial disconnect between the fine I think you deserve, or should be ordered to pay, and the fine you can realistically pay. It is the latter, and no more than the latter, that I must impose.

[37] Noting that the guiding principle for instalments was that the fine should be able to be paid off within five years, the Judge was satisfied that an overall fine of $3,000 ($1,000 in respect of the first notice and $2,000 in respect of the second notice) was the most he could "reasonably impose".[33] That was "obviously substantially less" than the fine he would otherwise have imposed on the appellant were it not for the appellant's inability to pay.[34]

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27 At [20].
28 At [22].
29 At [24].
30 At [25].
31 At [30].
32 At [31].
33 At [35].
34 At [35].

Submissions

Appellant's submissions

[38] The appellant seeks that the conviction and sentence be set aside on a number of grounds. In particular, the appellant brings his appeal on the basis that he has committed no offence and there is a flaw contained in the offence provision of the Commerce Act. The appellant says that as a former director of the company, he was required to fulfil his duties as a former director pursuant to the Companies Act 1993. The appellant says that although the Commission expected him to present documentation it required for its investigation processes, that expectation was in direct contradiction to the duties required of him as a former director of the company. Mr Andrews also emphasised that he could not produce the requested documentation and he had told the investigator that. In the case of the training material, Mr Andrews said it did not exist due to the fact that he was the only person dealing with the customers. In addition, he been employed by other finance companies and had completed their documentation for them and that had not created difficulties with the Commission. He submitted that it was pointless attending the interview as he could not produce the material that the investigator had sought from him.

Respondent's submissions

[39] As noted earlier, the respondent submits the appeal should be dismissed. The respondent says that although the appellant has raised a significant number of grounds of appeal, none of the grounds raised by the appellant demonstrate any error by the Judge in his assessment of the evidence or law, let alone one sufficient to give rise to a miscarriage of justice. The respondent says the evidence produced by the Commission was sufficient to prove the charges beyond reasonable doubt. In terms of the sentence, the respondent says that while the Judge erred in describing the appellant's benefit entitlements, he did not err in imposing a fine of $3,000.

Appeal against conviction

[40] I first address the appellant's appeal against his convictions.

Approach to appeal

[41] The Court must allow an appeal against a decision of a judge in a judge-alone trial if the Court is satisfied that the judge erred in their assessment of the evidence to such an extent that a miscarriage of justice has occurred, or a miscarriage of justice has occurred for any reason.[35] The Court must dismiss the appeal in any other case.

[42] A miscarriage of justice is any error, irregularity, or occurrence in relation to or affecting the trial that has created a real risk the outcome of the trial was affected or has resulted in an unfair trial or a trial that was a nullity.[36] A miscarriage of justice is "more than an inconsequential or immaterial mistake or irregularity".[37] A trial will be unfair if an error or irregularity departs from good practice in a manner that is "so gross, or so persistent, or so prejudicial, or so irremediable" that an appellate Court must condemn the trial as unfair and quash the decision..[38]

[43] A "real risk" that the outcome was affected exists when "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong".[39] The appellant does not have to establish that the verdict was "actually unsafe" but rather that there is a real possibility the verdict would be unsafe.[40] To establish a "real risk" that the outcome was affected, "something more" than a simple disagreement with a judge's factual assessment is required.[41]

Grounds of appeal

[44] There are nine stated points on appeal:

(a) Did the Court have jurisdiction to hear the matter?

(b) Did Mr Andrews enter any type of plea himself?

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35 Criminal Procedure Act 2011, s 232(2)(b)–(c).
36 Section 232(4).
37 *Matenga v R* [2009] NZSC 18 at [30].
38 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78], citing with approval *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].
39 *R v Sungsuwan* [2006] 1 NZLR 730 (SC) at [110].
40 At [110].
41 *Gotty v R* [2017] NZCA 528 at [15].

(c) Did Mr Andrews comply with the first request of Ms Grobler?

(d) Did Mr Andrews refuse to comply, when in fact as a director he was unable to comply pursuant to the Companies Act 1993?

(e) Was Mr Andrews able to supply Ms Grobler with the material requested between the dates of January 2020 and April 2021?

(f) Was there any jurisdiction for the District Court to hear the matter, pursuant to s 2 of the Commerce Act?

(g) Was Mr Andrews of the understanding he had supplied the Commission with all relevant information, therefore not frustrating the Commission's ability to carry out its investigation?

(h) Did the Commission prove each element of each charge beyond reasonable doubt?

(i) Does s 2 of the Commerce Act allow for District Court jurisdiction as defined in the interpretation section, namely as to what the word "court" means as provided under s 2 of the Act, which states "**court** means the High Court of New Zealand"?

[45] A number of these overlap and I now turn to address each in their groupings.

Jurisdiction

[46] The first, sixth and ninth grounds of appeal object to the jurisdiction of the District Court to deal with the charges because s 2 of the Commerce Act defines "court" as the High Court of New Zealand.

[47] Section 76 of the Commerce Act is a complete answer to this ground of appeal. It provides that "the District Court must hear and determine proceedings for offences against sections 86B, 87B, 100, and 103."

[48] Even if it did not, the interpretation provision on which the appellant relies commences with the words "In this Act, unless the context otherwise requires". Sections 9 and 71 of the Criminal Procedure Act 2011 give the District Court jurisdiction over category 1 offences. Section 103 of the Commerce Act is a category 1 offence. I am therefore satisfied that in these circumstances, the context would "otherwise require" "court" to mean the District Court.

[49] I am satisfied that the District Court had jurisdiction to deal with the charges.

Deemed not guilty plea

[50] The second ground of appeal relates to whether the appellant entered a plea to the charges.

[51] The proceedings were first called in the District Court on 24 November 2022. The proceedings were called again on 5 December 2022 but had been listed before a community magistrate who did not have jurisdiction to deal with the proceeding. No plea was entered at these appearances.

[52] At the second appearance on 20 December 2022 the proceedings were called in a list before Judge Mika in the Hutt Valley District Court. Judge Mika required the appellant enter a plea under s 39 of the Criminal Procedure Act.

[53] The appellant refused to enter a plea. In accordance with s 41 of the Criminal Procedure Act, the appellant was deemed to have pleaded not guilty. Judge Mika noted this on the file and adjourned the proceeding to a case review hearing.

[54] Sections 39 and 41 are a complete answer to this ground of appeal. I am satisfied there was no error in relation to the deemed not guilty plea.

Compliance

[55] The third, fifth and seventh grounds of appeal relate to the appellant's provision of information voluntarily prior to the issue of the first notice. The appellant says he had a reasonable excuse as the documents and information requested by the

Commission either did not exist, in the case of the customer files, or had already been provided to the Commission voluntarily, in the case of the remaining requested documents.

[56] However, there is no evidential basis for the alleged excuse. In February 2021, the appellant indicated to the Commission that further documents would be forthcoming. In July 2021, he indicated to the Commission that the documents would not be forthcoming, but not because they did not exist but because he intended to close the business. In June 2022, the appellant indicated that he would not comply with the second notice because the Commission did not have jurisdiction over him. Ms Grobler also rejected in cross-examination any submission that the appellant had advised her that the documents the Commission sought did not exist.

[57] Moreover, even if the appellant had genuinely believed he did not need to comply with the first and second notices, I am satisfied this would not be a reasonable excuse. The first and second notices provided an extensive explanation of the appellant's obligations, and the staff of the Commission made extensive efforts to encourage compliance with the notices.

[58] Even if the documents did not exist or were not in the appellant's control, the first notice required that the appellant confirm this, and he did not do so.

[59] The fact that some documents had already been provided did not excuse compliance with the first notice, as the Commission was entitled to formally seek provision of the documents, and in any case the documents provided in February 2021 did not include some of the categories of documents covered by the first notice.

[60] Finally, nothing raised by the appellant addresses at all his failure to comply with the second notice and attend the compulsory interview. That he did not consider he should attend because it would be pointless is not an acceptable excuse.

[61] Accordingly, these grounds of appeal cannot succeed.

Directors' obligations

[62] The appellant submits that ss 136 and 137 of the Companies Act provide a reasonable excuse to not comply with the notices. Under s 136, a director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so. Under s 137, a director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances.

[63] However, there is nothing in the duties owed by a director of a company under these sections — or, for that matter, under any other — that prevents a director from supplying information to the Commission, either voluntarily or under a s 98 notice.

[64] It is no answer for Mr Andrews to say, as he did in his oral submissions, that he could not comply so it was not in the interests of the company for him as a director to agree to do something the director "cannot fulfil". His duties as director in fact require compliance with a duly issued notice, as it will be in the best interests of the company to comply and co-operate with the Commission, particularly during an investigation. Moreover, a director acting to comply with a notice under s 98(1) of the Commerce Act will be acting reasonably and for a proper purpose, and any disclosure will be one that is "required by law", for the purposes of the director's duty under s 145(1)(b) of the Companies Act.

Proof beyond reasonable doubt

[65] The eighth ground of appeal is that the Commission did not prove the charges beyond reasonable doubt.

[66] There is no legal or factual basis on which any reasonable doubt that the charges were proved arises. The Commission properly exercised its powers under s 98, and the Judge was correct to find that it was necessary and desirable to seek the information and documents sought by the Commission, and to seek to interview the appellant. The notices were properly served on the appellant, were accompanied by sufficient explanatory material, and were explained to him. The evidence of his

responses shows the appellant clearly understood them. The appellant's non-compliance was deliberate and there was no reasonable excuse for his total non-compliance.

Other arguments

[67] The appellant raises a number of additional arguments.

[68] The first which Mr Andrews emphasised in his oral submissions was that there was a defect in the legislation which excused his compliance. First, the appellant is correct that s 103(3) refers to s 98(c), and at the relevant time there was no s 98(c). However, the legislative history clearly demonstrates that s 103(3) was intended to refer to s 98(1)(c), and by mistake the cross-reference was not updated when the Act was amended by the Commerce (Cartels and Other Matters) Amendment Act 2017 (the Amendment Act). There was an apparent and obvious minor technical error in the legislation but not one which would excuse compliance. There is therefore no merit in this submission.

[69] The appellant also submits that the Judge's comment at sentencing that "in reality it was your company" means the Judge was unable to make an "impartial and non-bias decision". There is nothing in this assertion. This comment did not indicate bias or a lack of impartiality on the part of the Judge.

[70] The appellant has also raised a number of spurious legal arguments, including referring to the Imperial Laws Application Act 1988 and Secret Commissions Act 1910, alleging that counsel for the respondent has made misrepresentations to the Court as to his name (as he is known by his middle name rather than his first name), and stating that he has repudiated and/or cancelled any contract with the respondent, in reliance on the Contract and Commercial Law Act 2017. These types of arguments are commonly referred to as pseudo law challenges and simply have no merit.

Conclusion as to appeal against convictions

[71] For the above reasons, I am satisfied there has been no miscarriage of justice in this case. The appeal against convictions is dismissed.

Sentence appeal

[72] I turn now to the appeal against sentence. The District Court sentencing was the first sentencing for offending under s 103 since penalties for such offending were increased tenfold by the Amendment Act. This appeal is the first occasion on which the High Court has considered a sentence under s 103 of the Commerce Act.

Approach to appeal

[73] An appeal against sentence is an appeal against a discretion and must only be allowed if the Court is satisfied that, for any reason, there was an error in the sentence imposed and a different sentence should have been imposed.[42] The Court must dismiss the appeal in any other case.[43]

[74] In an appeal against sentence, an appellate Court will not intervene unless a sentence was outside the range available to the sentencing Judge.[44] The focus is on the final sentence and whether that was in the available range, rather than the exact process by which it was reached.[45] An appellate Court must therefore exercise an appropriate degree of restraint and will intervene only where the sentence imposed is "manifestly excessive" on the basis of some material error so that a different sentence should be imposed.[46]

Analysis

[75] The respondent accepts that the sentencing notes appear to contain a material error, and the High Court may consider it necessary to resentence the appellant.

[76] The error relates to the description of the appellant's financial position. [redacted]

42 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [26]–[27].
43 Criminal Procedure Act 2011, s 250(3).
44 *Tutakangahau*, above n 42, at [36].
45 *Ripia v R* [2011] NZCA 101 at [15]; and *Tutakangahau*, above n 42, at [36].
46 *Kumar v R* [2015] NZCA 460 at [81]; and *Tutakangahau*, above n 42, at [32].

[77] The respondent submits that the Judge erred in describing the appellant's benefit entitlements but did not err in his assessment of the appellant's ability to pay. Therefore, the respondent submits the fine of $3,000 was appropriate.

[78] I agree. The fine of $3,000 was at the lowest for offending at this type and lowered from $30,000 to take into account the appellant's dire financial position.

[79] The fine was to be paid off in instalments of $10 per week. Mr Andrews says that he can only pay 50 cents per week. He says that his partner's income cannot be considered. Mr Andrews says that just because he has elected to pay the full accommodation rental and his partner pays other expenses, to take the partner's income into account in assessing the appropriate level of instalments is not permitted. As Mr Hamlin pointed out, the amount of 50 cents per week is meagre, but in any event it is Mr Andrews' choice to use his benefits and supplements to pay the household rental for the benefit of others. He cannot then complain that he does not have sufficient means to pay the assessed modest contribution of $10 per week.

[80] I do not consider the fine of $3,000 could be regarded as manifestly excessive, even having regard to the true financial position of the appellant. The instalment figure is reasonable.

Conclusion

[81] I am satisfied there has been no miscarriage of justice in this case, nor any error in the fine imposed at sentencing.

[82] The appeal against conviction and sentence is accordingly dismissed.

Grice J

Solicitors:
Commerce Commission, Wellington