IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2022-096-002628
[2023] NZDC 14576

COMMERCE COMMISSION
Prosecutor

v

BRENT IAN ANDREWS
Defendant

Hearing:	7 July 2023
Appearances:	B Hamlin and A Prestidge on behalf of the Prosecutor Defendant appears in Person
Judgment:	7 July 2023

NOTES OF JUDGE S M HARROP ON SENTENCING

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[1] Mr Andrews, you appear for sentence today having been found guilty by me in my reserved judgment of 31 May of two charges laid under the Commerce Act 1986. Although they were Hutt Valley charges, and that is where the hearing occurred, the sentencing is taking place here in Wellington for convenience to me and to counsel for the Commission. I acknowledge that you have had to come further than any of us to be here today, from Taita.

[2] The two charges are failing, without reasonable excuse, to provide information and documents to the Commerce Commission in accordance with a notice issued to your company Premodealz under s 98, and failing without reasonable excuse to attend an interview with the Commission in accordance with a notice issued requiring you to do that.

[3] These charges are each serious. They carry a maximum penalty of a fine of up to $100,000. That penalty was increased tenfold in 2017. The fine used to be $10,000 for a charge of this kind.

[4] In terms of the sentencing today, the first issue is that you have applied for a discharge without conviction, as you are entitled to do. I have read the documents that you have filed in support. There is the brief application, there is the affidavit you swore on 30 June, there are a number of attachments, you have filed written submissions, and there are some legislative extracts and references that you have supplied.

[5] The law says I must not discharge a defendant without conviction unless I am satisfied that the direct and indirect consequences of entering a conviction would be out of all proportion to the gravity of the offending. It is well established that that means I have to go through a four-stage process. The first stage is to decide the gravity of your offending, then I have to take into account all of the aggravating and mitigating factors of the offending itself in doing that task, but also I have got to take into account matters relating to your personally such as would be relevant on any sentencing occasion. Having done that, I have then to decide what are or appear to be the likely consequences of entering a conviction on each charge. It is important to say that you do not need to point to definite or certain consequences, it is enough if there is a real and appreciable risk of adverse consequences. Then I need to stand back and apply that statutory test, and decide whether the significant level of disproportion that it involves is met on this particular occasion. If it is met, I retain a discretion, nevertheless, not to discharge without conviction but that is rarely done where the test is met; it sometimes happens when a person has previously been discharged without conviction, especially on similar matters, but that is not relevant today.

[6] I have read your papers in support, and heard from you again today. As I understand your application you contend you should not have been found guilty on either of the charges, and you say that responsibility rested with the company of which you were at the time one of the directors, not with you personally. You add that at the time that charges were laid, you were no longer a director and the company was not on the company register any more. You point out that you repeatedly told Ms Grobler,

the Commission's investigator, that you were not able to comply more than you already had with the obligations that they sought to enforce.

[7] You have also then gone on to make a number of submissions about the assignment of what you say are the applicable fiduciary obligations, and the transfer of the charges, to counsel for the Commerce Commission.

[8] Well, today is a sentencing hearing to determine the appropriate sentence based on the findings that I made in my judgment. It is not an opportunity to relitigate those findings or to make submissions about why they are wrong. You do have a right of appeal against the verdicts I reached if you wish to pursue that, and you have already told me today that that is indeed what you intend to do. But today I must, and do, proceed on the basis that my judgment was correct to find you guilty of both charges.

[9] So, except to a limited extent, I am not going to make any comment on the submissions that you have made about why my decision was wrong, and why you should be discharged without conviction. Section 98 of the Commerce Act says that the Commission may serve a written notice on any person, and it expressly contemplates that in the case of the body corporate a director or competent servant and agent of the body corporate must respond to it. That is simply common sense because a company is not a natural person, and it can only operate through one or more human beings. Also, you were expressly charged as a party to your company's failure to respond to the first notice under s 66 of the Crimes Act 1961 in respect of the company's failure. I did not find it necessary to discuss that in my judgment because I found that in your capacity as a director of the company you failed to comply with the notice that the company received, and although I know there was another director, who I understand is your partner, you were realistically the only person who could properly respond. You were the human embodiment of your company.

[10] The second notice requiring you to attend the interview was directed to you personally, but again, of course, you were being asked to do that in your capacity as a director of the company. I might add that, in principle, if you consider that your actions were taken entirely on behalf of the company, and in your capacity as a director, you can ask for reimbursement from the company for any fine that you have imposed on

you, but I realise that that is an academic point because the company is not only no longer trading, it is not now on the company register I understand from the information I was given.

[11] So, because there is no basis put forward by you as to why the gravity of your offending would be outweighed by the consequences of entering convictions, indeed there are no particular adverse consequences of entering convictions which are identified, I readily dismiss your application for a discharge without conviction. However, as you have heard today during the hearing, one aspect of the information that you have provided as part of your material is very important for sentencing today, and that is the information about your personal financial position which I will discuss later. That, in the end, is going to dominate the level of fine that I impose.

[12] During the hearing today I directed under s 41 of the Sentencing Act 2002 that you complete a declaration of means, and you have done that. I note it is done under the duress of the jurisdiction of the Court, to use your words, but that is very helpful because it tells me about your financial position as at today.

[13] Now in terms of setting an appropriate fine, the process I have to follow is to assess an appropriate starting point fine based on the details of your offending. That includes any aggravating features of it, and having regard to the maximum penalties that Parliament has put in the legislation. Then I have got to look at whether there are any aggravating or mitigating factors relating to you personally and decide on how they impact on the starting point, and in that way I will reach an end fine. Because the two charges are closely related, I will endeavour to establish one overall end fine, but ultimately it will be imposed on the two charges. I need to, as the Commission's submissions properly acknowledge, apply what we call the totality principle, given that these two offences are closely related and really part of the same process that you went through, or did not go through with the Commission.

[14] The details of your offending are set out in my detailed judgment, and it is not necessary that I go through everything again today, but I do gratefully adopt, although I will shorten it somewhat, the summary that has been included in the Commission's submissions. I begin with the context in which this offending arose. As part of its

obligation to promote compliance with the CCCF Act, as it is known, the purpose of which is to protect the interests of credit consumers, the Commerce Commission in October 2020 began a project to monitor the practices of mobile traders, especially in relation to their disclosure and responsible lending obligations. The Commission was not, as Ms Grobler made clear at the hearing, in the first instance seeking to take a punitive approach but rather an educative one. Your company, Premodealz Limited, was a mobile trader and, as I have said, you were one of the two directors and a shareholder; in reality it was your company.

[15] The Commission made various efforts to contact you to request a meeting and to obtain information and documents. Ms Grobler explained the Commission's purpose to you on 23 February 2021 and she asked you to attend a voluntary meeting and to provide as a sample five redacted customer contracts and a copy of your company's terms and conditions. Two days later on 25 February you did send some information which led to Ms Grobler again requesting the meeting. You initially agreed to that and promised to forward some further information by 5 March. But ultimately you said you were not willing to meet with the Commission voluntarily, at least at that stage, and no further documents were received by the Commission from you.

[16] That led, on 21 July 2021, to the Commission issuing the first statutory notice to your company requiring information. It was served on you, but you said you were not going to comply because you were closing the company down. Ms Grobler explained that you were required to comply even if you were closing the company down. Because you did not comply with that notice you were later charged with failing to do so. That is the first charge that I dealt with.

[17] As a director of Premodealz, and the person to whom the first notice was addressed, you were a party under s 66 of the Crimes Act to the company's failure to comply with that notice, and as I have mentioned, in any event you had an obligation to respond in your capacity as a director and as the human embodiment of your company.

[18] Following your non-compliance with that first notice the Commission opened an investigation into your company. So at that point it was no longer just part of the mobile trader project, but an investigation into your company. Between September 2021 and May 2022 it sought information from independent sources. These gave rise to concerns. So on 18 May 2022 the Commission issued an statutory notice to you personally to attend a compulsory interview on 9 June 2022 at the Commission's Wellington office. I interpolate that that sort of notice cannot be realistically issued to a company, it has to be a person who runs the company, and that was you. You were directed to bring the documents that had been requested in the first notice, and the full customer file for each of the 37 active customer plans, which the Commission's inquiries indicated were ongoing. Despite what you said about the state of the company, there was money being collected by a company called Flo2Cash on behalf of your company. You refused to attend the interview, you did not attend, and you claimed that the Commission did not have jurisdiction over you. That led to you facing the second charge which I also found proved.

[19] I accept the Commission's submission that the rationale for significant penalties for this offending is clear. It undertakes a wide range of enforcement and regulatory functions in relation to competition and consumer law. In order to do its job it must be able to gather information. Non-compliance with notices, as the Commission submits, strikes at the heart of its ability to carry out its statutory functions. I accept that penalties imposed should, in principle, be significant and operate as a real deterrent because otherwise people, especially those people with something to hide, would be encouraged not to comply. Here your conduct on behalf of the company and personally had the effect of preventing the Commission from progressing its investigation. As a result it is not known whether there were, in fact, breaches of the company's various obligations as a mobile trader. There are indications of real concern, but ultimately no proof. The company has not ultimately been prosecuted for one or more breaches of the CCCF Act so there is no information about that.

[20] I do accept the Commission's submission, however, about the aggravating features of your offending. First of all, it was deliberate. You chose, after an initial apparent intention to co-operate, not to do so. You were given plenty of opportunity.

Indeed, even after being charged you could have chosen to co-operate but instead you denied doing anything wrong by defending the charges. Now of course that was absolutely your right but the non-co-operation was over a significant period of nearly a year. This was a case of complete non-compliance with both notices rather than partial compliance, although I acknowledge again here that prior to the first notice there was voluntarily some information provided. As I have noted, as a result of your offending the Commission's ability to pursue its investigation was not only delayed but ultimately frustrated entirely.

[21] I observe here that this situation of offending to prevent, or which has the effect of preventing, the true picture being found out is not unknown in sentencing. In cases of suspected drunk-drivers who refuse to provide a blood specimen, the Court's sentencing approach is to proceed on the basis that there was a high level of blood alcohol underlying that because if the Court took a lenient approach and assumed that it probably was not too high, drivers who do have a high level of blood alcohol would be encouraged to refuse to co-operate and refuse to be tested. So that is why a stern approach is appropriate. A favourable inference is not able to be safely drawn, even though, I repeat, we do not have information about what, if any, breach of the Act by your company may have occurred.

[22] The Commission has helpfully referred me to some other cases but pointed out that they think, and I am sure they will be right, this is the first sentencing since the penalties increased tenfold. I do not propose to discuss the cases apart from one called *Commerce Commission v Marsich* which was a judgment of Judge Moses in 2016.[1] Mr Marsich was charged, together with his company of which he was sole director, with failing to comply with a notice issued under s 98, and also a failure to comply with a notice issued under s 47 of the Fair Trading Act 1986. That company was engaged in payday lending, namely providing high-cost short-term finance to vulnerable low income consumers. Mr Marsich failed, or refused to comply with the Commission's notices because he claimed to believe the law did not apply to him. So not very different to what you have done here. There was a formal proof hearing, that is the defendant did not take part in it, and Judge Moses adopted a starting point of

[1] *Commerce Commission v Twenty Fifty Club Ltd* [2016] NZDC 7242

$5,000 fine per charge, which at the time was 50 per cent of the maximum for an individual. The penalty was ultimately split between Mr Marsich and his company, who were each fined $5,000.

[23] Now as the Commission acknowledges, that case was arguably a little more serious than yours because you, at least, did supply some information initially and I think significantly in the *Marsich* case there were clear indications of the number of potential victims. There were 82 debtors and some 234 loans. Judge Moses said that the offending had targeted those who were vulnerable. Here, as I have explained, I am not in a position to make such an adverse finding simply because of the absence of information. Now, of course, that is down to your non-compliance but an absence of information is an absence of information, however that is caused.

[24] The Commission submits that having regards to the 10 times increase in penalty I should apply the same multiplier to the penalty which Judge Moses imposed. I do not agree that is the correct approach. When Parliament increases the maximum penalty for an offence, of course the Courts must pay careful regard to that, but suggesting there needs to be a multiplier automatically applied to what would have been the appropriate fine prior to the amendment is, in my view, not a proper sentencing approach. Rather, the Court has to look at, having regard to the applicable maximum penalty, the apparent gravity of the offending in the case before it.

[25] Although I am hampered by the lack of information my impression is, and I say this fairly tentatively, that your company was operating at a relatively low-level as a mobile trader. The maximum penalty may well have been increased to allow the Courts to deal with high-end offending of this kind, but it is not clear at all that that is what I am dealing with here. So there is an imperfect balance to be struck here. On the one hand I have deliberate and complete non-compliance with the notices leading to the absence of information which would otherwise allow the Court and the Commission to understand the risk to the public, how many breaches of the obligations of the mobile trader obligations there may have been, how serious they were, and how many victims were involved. But on the other hand your company appears to have been operating at a fairly low-level and there is, albeit as a result of your

non-compliance, almost no information allowing me to assess what risk to the public your company may have presented.

[26] Given your company is no longer trading at least it can be said that there appears to be no longer any risk, at least from that company, of any harm to the public. I also have no information about the extent of the income or other benefit which you personally may have received from the operations of your company. Given your circumstances as they now are, I think I can probably safely infer you did not make much money out of it. However, as I say, I do not know the true position.

[27] So despite what I have said about that drink-driving analogy, and the significant penalties available here, I consider I have to be careful not to impose a fine which purports to reflect non-compliance with the Act beyond that inherent in the charges. My assessment, taking everything into account is that an appropriate starting point of around $20,000 for each of the charges would be appropriate, arguably the second was more serious than the first, and on a totality approach I would adopt a starting point of a fine of $30,000.

[28] Now I come to personal factors. Although you have got quite a number of previous convictions, 47, I accept the Commission's point that these are largely historical low-level offending that are not of any particular relevance to the present offending, and so I do not apply any uplift in your sentence by reference to them. Of course, by the same token you are not in a position to say that you should receive a reduced sentence because you have previously been of good character. I think you are 52 now.

[29] Aside from your financial position, which I will come to, there are no other mitigating factors I can see here. There is no personal information about you and your current and previous circumstances which would warrant a reduction in sentence, and importantly you did not plead guilty. Of course that is not something which can ever increase a sentence because you are absolutely entitled to plead not guilty. But not pleading guilty, not accepting responsibility for your offending, and not co-operating with the Commission once charged as you could have done, represents the absence of

a significant mitigating factor which would otherwise have reduced the fine in a material way.

[30] If money were no object for you, and clearly it is, I would therefore impose a fine covering both charges of $30,000 but that is, as I say, certainly not the position.

[31] You have supplied information that you receive the Jobseeker benefit, and that is your only income. [redacted] So it is not a case where you can pay a fine other than from your very limited income from the benefit. There is, for example, no asset you could sell to provide money to pay a fine.

[32] I do not know what your prospects of future employment and income are, beyond continued receipt of the benefit, but I think I can infer from the medical exemption, and I do not know the details nor do I need to, that the prospects of your regaining employment and increasing your income from what it is, do not appear to be good. Under our law, s 40 of the Sentencing Act, I must take into account, in determining the amount of your fine, your financial capacity, your ability to pay one. I am entitled, as I have done today, to require you to complete a declaration under s 41, and that has been helpful.

[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.

[34] Instalments can be imposed where payment within 28 days is not possible, and that certainly will be the case here. Under the Summary Proceedings Act 1957 arrangements with the Registrar for payment by instalment are expected to be such as

to allow the total fine to be paid within five years. So that, while I am not bound by that, it is a guiding principle.

[35] Having reflected on all of these points I am satisfied that an overall fine totalling **$3,000** is the most I can reasonably impose on you. That is obviously substantially less than the fine I would otherwise have imposed were it not for your inability to pay.

[36] On the charge relating to the first notice, you are convicted and fined $1,000, and on the charge relating to the second notice you are convicted and fined $2,000. Those fines are to be paid at the rate of $10 per week, with the first payment by 21 July.

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Judge S M Harrop
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 18/07/2023