IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-008321
[2016] NZDC 25857

COMMERCE COMMISSION
Prosecutor

v

YOUI INSURANCE GROUP LIMITED
Defendant

Hearing: 15 December 2016

Appearances: A McClintock and S Lowery for the Prosecutor
O Meech and J Parker for the Defendant

Judgment: 15 December 2016

ORAL NOTES OF JUDGE P RECORDON ON SENTENCING

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[1] The Commerce Commission has a role established by s 8 Commerce Act 1986 and it is an important role under the Fair Trading Act 1986. The Fair Trading Act 1986 came into force in March 1987. It has a long title, "An Act to prohibit certain conduct and practices of trade, provide for the disclosure of consumer information relating to the supply of goods and services, and promote product safety." This fits with the Commerce Act 1986, which seeks to promote competition and economic efficiency in New Zealand markets.

[2] The Commission has brought prosecutions before and no doubt they will bring them again. They are essentially a watchdog, to make sure that the public, which requires respect and honesty in business, people perhaps who are not used to dealing with important business matters, have a body which monitors and makes

sure that if things are not going well, complaints are investigated and something is done about concerns the members of the public have.

[3] In this case there are 15 representative charges against Youi NZ Pty Limited. There has been a huge amount of work carried out by the Commissioner and by the lawyers for the Commissioner and for Youi Insurance Company Ltd ("Youi") before we have all come together in the Court today. There are individual victims, who I will discuss in more detail later in this decision.

[4] For some reason, which I still have not got to the bottom of, this sentencing file was only given to me yesterday and put into a Judge alone trial date. It is a difficult time of the year for the Court and the mechanics of the system have difficulty at times keeping up with the volume of work. Thankfully we have had time to deal with the case in some depth and, as I have said, much of the work has been essentially done prior to coming in to Court by the parties and their lawyers.

[5] Today we have heard from one of the victims who has another role which is investigative journalism and it seems that that was the reason she initially became involved. However, nonetheless, she feels like a victim and she, is in terms of the prosecution, a victim.

[6] Section 20 of the Victims' Rights Act 2002 makes it clear that, unless there is a pretty good reason otherwise, she is entitled to present her views to the Court. How she does this, is a matter for the Court's discretion to an extent. She was given the opportunity to speak today, with the option of speaking on an anonymous or not anonymous basis. She chose the latter and gave us her views.

[7] An "agreement" has been arrived at between the Commission and Youi. The Court's role is not simply to rubberstamp. At the same time, an approach to "agreements" has developed following the decision of Rodney Hansen J in *Commerce Commission v Alstom Holdings SA & Ors* which discusses the general approach to fixing penalty and the appropriate response from the Court where a penalty has been agreed upon between the parties.[1]

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[1] *Commerce Commission v Alstom Holdings* SA & ORS [2009] NZCCLR 22.

[8] Hansen J held that the task of the Court, where a penalty has been agreed, was not to embark on its own enquiry of what would be an appropriate figure, but to consider whether the proposed penalty is within the proper range. His Honour refers to the Full Federal Court's decision in *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission*, where the reasoning for such an approach is discussed:[2]

> There is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[9] So my task really has been to listen carefully to everything that has been said and to read carefully the submissions and the affidavit from Mr Overs, the company secretary and head of compliance at Youi and to work out if the settlement which has been proposed is a good one. I have had the benefit of reading a number of cases, all of which are District Court cases and, while I am not bound by those, there is a theme throughout the cases which is certainly persuasive.

[10] The facts are different in all cases, and that point has been made clearly by both counsel. I am very grateful to both Ms McClintock, Mr Meech and to their juniors Mr Lowery and Ms Parker, not only for the written submissions, but for carefully providing me with the background to how they reached the figure that they and their client consider to be a fair result.

[11] It seems there is no obvious pattern in the cases where people are directly affected, such as Ms Clement, as to how they become involved in cases on a restorative justice basis or as victims with right to be heard. This may be something the Commerce Commission could look at in the future. However, I think it is important to emphasise that it is the public who are directly affected and there may be, as has been noted in some of the earlier cases, an argument for emotional harm payments in addition to reparation which in this case preceded the hearing today.

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[2] *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285, (1996) 141 ALR 640, (1997) ATPR 41-546.

[12] From the beginning, Youi has accepted full responsibility and accountability. They have acknowledged that some of their processes were not as stringent as they might have been to ensure that some of their representatives who were going against what the public accessing the website were seeking, an avoidance of direct spoken or email contact with Youi people were held to account and required firmer guidance and monitoring. Their prospective clients wanted to do everything on the web and to receive quotes before deciding if they wanted to go ahead with insuring houses or vehicles. When salespeople insisted on phone numbers, bank accounts and other personal details and insisted on phoning prospective clients/customers up, this was not what the prospective customers wanted. It seems this was what the Youi practice was and is now. The practice certainly was to automatically phone up it seems but the difference between then and now was that then, the phoning practice was not spelt out whereas now, it is. Phone calls are made as a matter of course now and on a basis which is transparent and obvious to the public.

[13] I am not going to go into the facts of this case in detail. They have been canvassed clearly and in detail by counsel and they are acknowledged in the summary of facts which is annexed to the Commission's papers. There is a useful table which sets out the eight different areas where the company failed at one point or another, to deliver properly. These include:

(a) The website gave the customer the impression a quote was available online.

(b) A salesperson represented that Youi required payment details to generate a quote or other documents.

(c) A salesperson represented that the customer would not be charged.

(d) A salesperson represented that the customer could cancel by email.

(e) Youi sent invoices that did not specify that the customer was under no obligation to pay.

(f) Cancellation was a problem.

(g) The company failed to action cancellation requests.

(h) The company charged or attempted to charge customers for unsolicited policy.

[14] Not every point was relevant for every complaint. Some were relevant for two or three of the complainants. For two of the complainants, all of these points were relevant. For some complainants, the Commission found that there was fault in relation to only one of these areas, for example, the salesperson requesting that Youi required payment details to generate a quote or other documents. For a number of the complainants that was the only problem.

[15] The prosecutions are important. They are, as I said earlier on, brought by a body with a number of different functions one of which is to consider and bring criminal prosecutions where an individual, or an entity has breached the provisions of the Fair Trading Act. The charges in Youi's case are representative. They were, to an extent, agreed upon between the Commission and Youi.

[16] It is clear from the Commerce Commission's submissions, mirrored in many respects by the defendant's submissions, that there has been collaboration to reach what is seen by both parties as a fair penalty for what has happened and a foundation for Youi's future practices and procedures which will very much reduce the chances of a repetition of what led to this case today.

[17] The company, through Mr Meech, has submitted that what happened was not planned, deliberate or intentional, and that there has been media reporting which has attributed poor motives to Youi NZ. This seems to be accepted by the Commerce Commission. From what I have read and heard such criticism appear to be inaccurate.

[18] While making that statement, Mr Meech is not taking away from what has happened. He has said, "Yes we stuffed up but we are going to make sure that we

will take all sorts of steps in the future to reduce the chances of that happening again and we are sorry." The affidavit from Mr Overs sets out the compliance processes that the company had in place prior to the investigation and the various and extensive remedial steps which the company has taken to address concerns of the conduct that forms the basis of the charges. Apologies have been given to each complainant individually.

[19] It is accepted that the remorse on behalf of Youi is genuine and extends to the public as well as those individuals affected. The affidavit from Mr Overs says at para 3.2(a):

> Youi NZ does not and has never condoned pressure sales. Youi NZ regards it as abhorrent as the general public does that Youi NZ sales advisors asked for customer credit card details in order to provide a "quote" and initiated, without consent, policies customers would be charged for. Youi is deeply disappointed that customers experienced the difficulties they did in cancelling policies and obtaining refunds. These things should never have happened.

[20] Youi says, through Mr Overs, that they take full responsibility. They are not trying to make excuses at all for what has happened. They cancelled policies, they refunded premiums, they repaid bank dishonour charges, they have issued apologies, they have fronted the media it seems and they have had what Mr Meech regards as perhaps more than their fair share of adverse publicity.

[21] It is clear from Ms McClintock's submissions, that they co-operated fully, they have been open and transparent and they have provided all the documentation that they were asked for. They have acknowledged that as far as cancellation was concerned, this was contrary to their process and just should not have happened. The charges were filed in August 2016, the summary agreed upon and guilty pleas were entered at the first possible chance on 3 October.

[22] I will not go into the previously decided cases which have been given to me. I have read them and noted that much of what has been said is relevant here. As I have said, despite many similarities, the facts in all those other cases are different. As to whether there was one rogue salesperson, as it seems Ms Clement suggested she was told, (and I am probably misquoting her a little), it is accepted by the

company that while conduct varied amongst the sales staff, there was more than one salesperson who fell short of the standards that the company expected of them.

[23] As far as penalty is concerned, it is not in dispute that a totality approach is the way to approach the charges, the penalties and what has happened. The website created the opportunity, and the opportunity was taken by some of the agents to hard sell. Financial incentives will always be part of who we are. The Kiwi is basically a decent person but especially when times are tough, people are looking for deals and are vulnerable and open to exploitation.

[24] In my view, the conduct of employees was generally pretty good but there were these people amongst the sales staff. I am told New Zealand has about 350 employees, with Australia having a slightly larger number and South Africa fewer. When calls are made they could go to representatives in any of the three countries, it seems. The details I am not clear on but that seems to be the picture I have been given.

[25] These charges carry a maximum penalty of $600,000 for each. The way that the matter has been approached on this totality basis is a starting point in the range of $650,000 to $750,000. Discounts were then applied in the range of 40 percent. 25 percent discount was given to reflect the early guilty plea, on the basis of *Hessell v R*,[3] with a further 15 percent discount for co-operation, remorse and remedial steps. A discount of $100,000 was also applied, as the insurance disciplinary body got in first and fined Youi $100,000. The Commerce Commission, through Ms McClintock has said that it would be appropriate to "deduct" that amount from the total, which results in something between $290,000 and $350,000, with a mid point range of $320,000.

[26] What is essentially a restorative justice process has taken place between the Commission and the company and that is largely due to the attitudes of both parties. It certainly makes the job of the Court much easier and less time consuming for a Judge who does not know the facts or the background anywhere near as well as those

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[3] *Hessell v R* [2010] NZSC 135.

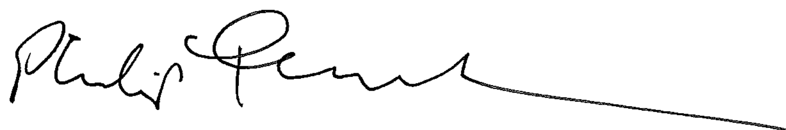
directly involved, such as the company secretary and compliance boss, who is here today from Australia, and the Commerce Commission and lawyers on both sides.

[27] The figure of $320,000 is in the range. It is a figure which has been agreed upon. It would be wrong in my view for the Court to consider tinkering with something which has been agreed to. It would presuppose that a Court had more idea of what happened and also an interpretation of the law which was somehow superior to what has been put before the Court. That is not the case. The approach taken by the parties has been consistent with the law, with what happened and with everything that the company has done to remedy the situation.

[28] I have decided not to divide the amount up between each of the charges, which on Mr Meech's method, would have given us a 33 cent "ending" on each charge. At the same time I agree with Mr Meech that emphasising the website charge with $40,000 as opposed to the other, $20,000, which Ms McClintock suggested, is perhaps also not really reflective of what happened. The better way in my view, and it is not a unique way, is simply to put the whole amount on one of the charges with the remaining charges being convicted and discharged.

[29] In that respect, I will take the first charge which is ending 3769. A conviction is entered and there is a $320,000 fine. On the other 14 charges, I convict and discharge.

[30] I reserve the right to review this decision as to form but not as to substance. This decision is delivered orally after a fairly intensive couple of hours of hearing. To reserve the decision or to give the decision with reasons given later, with the Christmas break around the corner would have been helpful to no one. Thanks again to the parties and to counsel for their professionalism and helpful assistance.



P Recordon
District Court Judge