IN THE DISTRICT COURT
AT AUCKLAND

CRI-2012-004-016817
CRI-2012-004-016818
CRI-2012-004-016819

COMMERCE COMMISSION
Informant

v

ROBERT DANIEL ROWE
STEWEART NEPIA PORDER
RANGI WYATT STEPHEN SAVAGE
Defendants

Hearing:	29 May 2014
Appearances:	B Hamlin for the Informant A Kemp for the Defendant Rowe D Reece for the Defendant Porter K Bendall for the Defendant Savage
Judgment:	29 May 2014

NOTES OF JUDGE DAVID J HARVEY ON SENTENCING

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[1] This is a sentencing in respect of three defendants who face one charge each of breach of the Fair Trading Act 1986 relating to the prohibition against pyramid selling. It is the first sentencing since the introduction of the recent amendments to the Act and with significant penalties for this type of offending.

[2] I have been favoured with detailed submissions from the Crown for the Commerce Commission and from Mr Bendall, Mr Reece and Ms Kemp for each of the defendants. I would not want this case or these remarks to be thought of as prescriptive of the way in which sentencing for these types of offences should be approached, but it may well be that some of the matters raised in my remarks and

that have been addressed by counsel could be of some small assistance to others in the future.

[3] The charges that are faced, as I have said, involve the promotion of a pyramid selling scheme and, after some initial delay and skirmishing, pleas of guilty were entered by each of the defendants. A pyramid selling scheme is one that provides for the supply of goods or services to many participants in the scheme. It is primarily the chance to buy or sell an investment opportunity through an agent rather than to buy or supply goods or services. A pyramid scheme is by its nature unfair and under the Fair Trading Act it must be likely to be unfair to many participants because, firstly, getting a financial reward is dependent upon the recruitment of other participants and, secondly, the number of participants that must be recruited to produce a reasonable financial reward is not likely to be obtainable by any of the participants in the scheme.

[4] The reason for prohibiting pyramid selling schemes is that they are basically and intrinsically unfair. Unlike legitimate businesses the returns, as I have said, do not depend upon the provision of goods and services, but upon the constant supply of new people coming into the scheme and it is not long before new members become exhausted and only those who have got in early have a likelihood of making any money, because those who join later are going to lose.

[5] There are two arrangements (if I can put it this way) that surround these particular charges. One involves a global Internet-based scheme offering its members discounted accommodation and travel vouchers as well as income earning opportunities, known as TVI Express. The particular scheme in this case involved not only TVI Express but another system known as FT90, which had been created by the defendant, Mr Savage. Now as far as TVI Express was concerned the person had to apply through the TVI Express website or provide a completed application forwarded to an existing member and there was a membership fee of $USD250 to be paid through an intermediary called Liberty Reserve. The person who became a member of the system was allocated a position on a Traveller board and they received travel vouchers and the like. The scheme was designed to allow a member to earn income by recruiting new members, having access to a shopping pool, phone

deals, discounts, personal and business development and the like so that they moved up the Traveller board and then onto the Express board.

[6] It was found in 2011 by the Australia Federal Court that TVI Express was a pyramid scheme. What happened in this particular case was that the FT90 scheme promoted the TVI Express scheme and as Mr Hamlin put it, wrapped around the TVI Express scheme, and it purported to accelerate members through various cycles on the TVI Express boards.

[7] What happened was that the defendants in these particular matters started to promote both the FT90 scheme directly and indirectly the TVI Express scheme by holding seminars for presentation at conference locations, often in the South Auckland area, although it is to be acknowledged that there were members who did join up from other parts of New Zealand. Predominantly membership of those who signed up were from South Auckland.

[8] The majority of the presentations were conducted by the defendant Savage. Mr Rowe would sometimes conduct presentations with Mr Savage as a guest speaker. The presentations involved slide shows demonstrating the TVI system and how FT90 could accelerate progress through the system. Presentations were also done at the home addresses of members or prospective members. These were attended by friends and family and were run primarily by the defendant Porter, although subsequently Mr Savage started running business breakfast meetings to promote TVI Express and FT 90.

[9] These presentations would occur on an average of once a week but on occasions Mr Rowe and Mr Porter would conduct four hour interviews with those who expressed interest in signing up and assess their suitability for membership. Once a new member was proved they had to fill in and sign up a form, sign the terms and conditions and a confidentiality and non-disclosure agreement, then they received an induction pack, including a compendium and a number of documents, a presentation, a welcome letter, a shopping club catalogue, a USB flash drive, which contained a variety of presentations, including a video of Mr Savage talking about the benefits of TVI Express. Training web hours were held for members of

presentations that Mr Savage had created and members were given a chance at extra cost to purchase business cards, a marketing video and time at a business expo stand.

[10] Between March and October 2011 at least 30 people signed up as members of the FT 90 scheme. Each paid $12,500 to Fast Track 90. Some of the members had to organise personal loans to pay their membership fee. Licences were also sold permitting the licensee to hold their own public meetings and keep a percentage of the FT 90 membership fee. These licences cost even more, 20,000 to $60,000 and while six licences were offered for sale only one licensee had paid by the time FT 90 ceased operations.

[11] The summary of fact indicated that Fast Track 90 received income of $281,500 over the period of offending but has no assets presently. There was direct financial gain to the defendants, although at the moment their financial circumstances are dire, to say the least.

[12] It was during June of 2011 that the Commerce Commission had its attention drawn to this particular activity and there was an investigation carried out and early in September 2011 Mr Rowe was advised that TVI Express and FT 90 schemes may be pyramid selling schemes, but his response was that it was a multi-level marketing initiative, which is essentially a distinction without a difference.

[13] Around October 2011 Mr Savage and Mr Rowe advised through their solicitors that they would cease promoting TVI Express and develop a new business model and on 16 October 2011 Mr Savage wrote to all FT 90 members advising them to cease promoting their TVI business in its current form while the Commission's investigation was in progress.

[14] The seriousness of the offending is a matter which Mr Hamlin has addressed on behalf of the Commerce Commission and needs to be taken into account as part of the sentencing process. Pyramid schemes, he submits, are very close to fraud, although Ms Kemp took exemption to that particular description, but there can be no doubt that in the main pyramid selling schemes are a scam and they rely upon promises, which effectively are more promises of dreams than promises of reality.

As the summary of fact made clear pyramid selling schemes do not actually deal in hard product.

[15] From the outset most investors will not receive their investment back and of most investors even fewer will receive any of the promised returns. In this case the defendants promised a return of capital within 90 days and a potential income of $US160,000. This could not have been achieved. The Fast Track 90 fee of twelve and a half thousand dollars was significantly greater than any other case that has been referred to me under the Fair Trading Act and this has had a significant financial and emotional impact upon the victims and I will talk about that in a moment.

[16] There can be no doubt in having a look at the scheme and the way in which it operated that it was complex and it was sophisticated. It is difficult for me to fully understand how it operates and it took some time looking through the documents and the material that I have had to fully comprehend just what it was all about. There can be no doubt, also, that this worked to the disadvantage of the victims, they were not habitual investors, they were not business people, they were individuals and judging from the victim impact statements individuals with relatively limited means. Even so, advantage was taken of them and it must be a matter of some concern that the defendants were aware of this, and the reason that I say that is that they actually provided applications for finance in the Fast Track 90 induction packs, so it was well recognised that many of those that they were wanting to sign up would not have the means or the ready cash to buy in.

[17] The other thing is that the unwitting people who signed up became part of the whole pyramid selling scam and effectively became offenders and in addition family members and friends were recruited into the scheme and they did not understand their conduct was unlawful, and this caused additional emotional harm and significant embarrassment to those who had signed their friends up.

[18] I turn now to the impact on the victims and it is clear from reading the victim impact statements the single predominant characteristic of all of these folks are that

they were hard working, average New Zealanders who were unsophisticated, and more importantly, vulnerable.

[19] One of the victims lost a seven and a half thousand dollar inheritance that she paid to Fast Track 90, she has no other savings or assets and losing that money she attributes is one of the reasons for her marriage ending in 2011. One has to speculate about how dreadful it must have been for a windfall inheritance to be cynically appropriated by this particular scheme.

[20] Another victim states that she invested seven and a half thousand dollars; she was the sister of the person I have just mentioned and that caused a huge amount of friction within the family, embarrassment and loss of integrity. Another sister of the first person that I have mentioned invested an inheritance as well and every time she sees a picture of the person from whom she received that inheritance she is reminded not only of the inheritance but of the loss and her involvement in this particular scam. In addition, her husband had cancer and the stress of losing the money to this scheme made the final year together a lot worse.

[21] Another person was a beneficiary who borrowed money to invest Fast Track 90 from the ASB and she has been paying that back out of her benefit. Another victim, a part-time social worker nearing retirement also borrowed money from a family member and she has not been able to pay it all back. The stress of losing the money has been significant.

[22] These were all people who were vulnerable and who were unsophisticated and probably were unable to understand the intricacies of the arrangement that they were entering into. It has been suggested in submissions that they all had a choice and in some respects that is true, but the important thing about choice is that it must be informed choice and it must be a choice that is based upon an understanding and one of the precepts, if I understand it properly, of the ethical business model is that when a person does make a choice to put, as they might put it, "Skin in the game," they do so knowing of all of the risks as well as the potential rewards, and also understand that nothing comes for free and that with every investment there must be some level of risk. With this particular scheme I certainly assess the risk as a high

one. The risk not only of capital but a risk of being unable to achieve the promised gains or indeed any gains at all.

[23] Mr Hamlin has articulated a number of sentencing principles that should be applied and that have been developed in the cases that he cites. *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160; *Commerce Commission v Ticketek New Zealand Limited* [2007] DCR 910 (DC) and *Zenith Corporation v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008.

[24] Matters to be taken into account include the objectives of the Act, the degree of culpability, the extent to which statements of the defendants departed from the truth, the extent of dissemination of those statements, the extent of prejudice or harm, if any, to consumers, the attitude of the offenders in respect of remorse, cooperation with authorities and any remedial action. The important of deterrence both particular and general, the financial circumstances of the offender, guilty pleas and the offender's previous records.

[25] In addition, in looking at the penalties some modification is required in dealing with pyramid schemes because one has to take into account the extent to which the scheme was promoted to actual and potential participants. The number, type, circumstances and impact upon the victims of the schemes and the magnitude of the offending.

[26] I do not intend to go through in any great detail each of the factors, other than to observe that pyramid selling schemes are unfair and because of their unfairness they have been deemed to be unlawful. They involve misleading and deceptive conduct in some way, shape or form and certainly, as I have already suggested, offend against what could be deemed ethical business practices. They all require people to join up, and inevitably involve a level of complexity that people may have difficulty in understanding.

[27] The only way in which one could obtain returns would be to sign up as many people as possible and some of the representations that were made were false. The

returns and the promises of significant returns simply could not be sustained. The dollar figures probably are dazzling. In that respect, as far as unsophisticated investors would be concerned would mean that a careful examination of other factors might be overlooked. There has been some dispute as to the level or the number of people that would be necessary to even start to obtain a return but even at a lesser figure than that suggested by Ms Kemp of some 62 or 67 people, that is still a large number of folks to sign up before a dollar starts to appear upon the horizon.

[28] It is one of the consistent strands throughout the submissions that I have received in the arguments that have come from counsel for the defence that the defendants had attempted to minimise their offending, and I make no apology for saying that. they have offered all sorts of reasons to say how it is that they were duped, how they put skin in the game, how they did not realise just exactly what was going on or the extent of it, but they were active participants. They were all involved in the presentation scheme, they were all involved in signing people up, they knew, or must have known that there would be difficulties for most of the people they were signing up and the fact that they took advantage, and I say that again without any apology, took advantage of unsophisticated and vulnerable people seems to demonstrate to me the cynical approach that cannot be countenanced. It has been suggested that if they were not positively aware of what they were doing they were either wilfully blind or downright negligent. I think that they were aware of what was going on.

[29] There was a significant level of involvement on the part of Mr Savage, who was the primary force behind Fast Track 90. Mr Rowe was the managing director and was substantially involved and Mr Porter, although he had a lesser involvement, was also involved to a considerable degree and that involved contact with affected parties.

[30] Although there were only 30 members signed up and the number of paid members was not high the returns that were received from the sums that were required to buy in were nevertheless quite significant and that has had an impact upon the victims and I have already discussed that.

[31] I have already suggested that the scheme was complex and difficult to detect and that also aggravates the offending. Mr Hamlin suggests that it demonstrates an increased degree of planning, premeditation, knowledge and involvement in the offending that makes it difficult for victims to understand what they were signing up for and of course the fact that it was an Internet-based scheme means that the dissemination of this particular scheme, part the TVI scheme, was, as I have said, a global worldwide one, it was not restricted to a geographical location. By buying into that particular operation using the Fast Track 90 scheme the defendants were availing themselves of the advantages and benefits of doing business online.

[32] The defendants have expressed a certain degree of remorse but by the same token I have to temper those expressions with the excuses that they have offered and the various statements that they have made, both in submissions and otherwise, which would seem to be attempts on their part to minimise their offending.

[33] So the aggravating features, and these have been set out by Mr Hamlin, and I respectfully adopt them, involve frequent false promises of a significant return, a very sophisticated scheme, which was difficult to work out, the significant financial loss caused, even although there were not a large number of people who signed up, the impact upon the victims, which I have already discussed, and the culpability of the defendants.

[34] Tipping J in *Megavitamin Laboratories (NZ) Limited v Commerce Commission* (1995) 6T CLR 231 (HC) said, "That the Act had to have sharp teeth," and in some respects the earlier authorities that have been cited are helpful in determining issues such as culpability and the approach thereto. The legislative history of the amendments that increase the penalties demonstrate the concerns of the legislature of what are effectively rip-off schemes that are doomed to fail and must be stopped. Furthermore, concerns on the part of the legislature that the penalties that have been imposed in the past were inadequate.

[35] It was also observed that people are less likely to offend if they know in advance that the penalties are likely to render the offending activity profitless and in my view the deterrent in this particular case must be sufficiently stern to make

engaging in this conduct financially unviable. Anything other than a firm approach will simply place a fine within the category of the cost of doing business and that simply cannot be countenanced.

[36] This case, in my view, is particularly serious because of the financial impact upon the victims, which is greater than that in the previous schemes, given the higher entry level costs to join Fast Track 90 and certainly the entry level figure is quite a lot greater than in any of the cases that have been cited under the legislation before it was amended.

[37] In addition, the victim impact statements detail not only the financial consequences but also the embarrassment and emotional harm and damage that have been caused to each of the victims and that most be a considerable cause of concern.

[38] The normal approach to sentencing that is applied in criminal cases of course applies in this particular matter and it is necessary to set a starting point, noting that the maximum fine is $200,000, but this type of offending is fineable only. It is submitted by the Crown that the starting point should be comparatively close to the maximum and it must also be noted that maximums or near to maximums can only be available for the most serious cases.

[39] The Commerce Commission suggests that a scaled approach be developed as far as starting points are concerned, nothing that Mr Savage was the principal offender and the mastermind, as it were, behind the particular scheme. That Mr Rowe was involved in the offending but less so than Mr Savage and again Mr Porter's involvement was less than that of Mr Savage and Mr Rowe.

[40] By the same token it must also be observed that the defendants are entitled to a discount for their guilty plea. Two of them have previous convictions but not of any great significance as far as this particular offending is concerned so they should be entitled to some kind of benefits as far as that is concerned, but it must also be observed that as matters stand at the moment no offer of reparation has been made, and little assistance has been provided for the authorities.

[41] In terms of seriousness I take into account the fact that the victims were putting significant sums into the scheme and suffered significant losses as a result. There were false representations of the gains that could have been made as a result of all of this, there was an awareness that the representations were false or to put it at best, wilfully blind. That the defendants were aware of the financial circumstances and vulnerability of the victims, some were borrowing money and indeed facilitated that by putting loan applications in the packs. The scheme was complex, making it difficult to work out the true position and the impact on the victims was compounded by the recruitment of family and friends.

[42] It is necessary, of course, to take into account, and one must, the submissions that have been made on behalf of the defendants. In that regard Mr Bendall has argued strongly on behalf of his client that I should take into account not only the particular circumstances in which he found himself, but also the circumstances that he faces now. He concedes, of course, that this is a pyramid selling scheme and there is no question about that, although he does sort of quibble to a certain degree about the words, "Invest," and, "Investment," but there can be no doubt that this is what the operation was. The putting up of capital in the hope of a return.

[43] He also suggests, as I have already noted, that Mr Savage along with the co-defendants was an unwitting victim, but I would suggest with the greatest respect that that must be put aside and contrasted with the fact that Mr Savage enthusiastically promoted this particular operation.

[44] Mr Bendall characterises Mr Savage's mental element, if I can put it that way, as not being wilful blindness but a loss of objectivity. It seems as though he became a too enthusiastic endorser of the product, but also behind Mr Bendall's submissions, and it would seem that so far as Ms Kemp is also concerned, there is a suggestion that these people had faith in their product, but faith has little place in business transactions where the objective approach must be taken and in this particular case it was not. I reject the suggestion that these people became so involved and enthusiastic about their approach and about their product that they lost sight of what it was really all about. They wanted returns, they wanted them fast and they wanted to sign up people so that they could get them and there is no question of that.

[45] Unfortunately Mr Porter is bankrupt and that has caused problems in terms of his ability to pay a fine or reparation and Mr Reece has suggested that any fine that I would impose as far as he is concerned would have to take its place in the queue.

[46] Ms Kemp, in a very detailed and helpful submission, has analysed the particular approach and also been critical of some of the calculations that have been made in terms of the numbers required to get a return. She was concerned at the way in which Mr Hamlin had articulated the relationship between FT 90 and TVI in the sense that she characterised FT 90 as a coaching tool or system that did not in and of itself promise a return. The fact of the matter is that it was inextricably linked with the TVI system; it was part and parcel of a pyramid selling scheme. She was also highly critical of the suggestion that pyramid selling operations were analogous to a fraud, but I have already discussed that and she concedes, of course, that it is necessarily a strict liability offence. Like Mr Savage, Mr Rowe has financial difficulties and is very likely to go bankrupt.

[47] As far as the sentencing is concerned and fixing the penalties, I intend to adopt a three-stage process. I intend to articulate a base sentence for this offending, taking into account all of the circumstances that I have earlier outlined. This is the sentence that I would have imposed, all things being equal and the defendants being possessed of assets and employment and able to pay a fine. The fact of the matter is that they cannot, at least pay the type of fine that I think should be imposed, and the Sentencing Act 2002 says that I have to take into account their financial ability to pay both fine and reparation.

[48] I agree that Mr Savage was the prime mover of this operation. I do not agree that he should be looking at a starting point of $150,000 but his culpability is high. I believe that a fine of $125,000 reflects that culpability. Similarly, with Mr Rowe, who was an enthusiastic participant in this operation, I consider that the level of fine suggested by him again was rather high and I would fix his level of fine at $100,000. Mr Porter was perhaps the least culpable of the three but no less involved in the operation and I fix his level of penalty at $90,000.

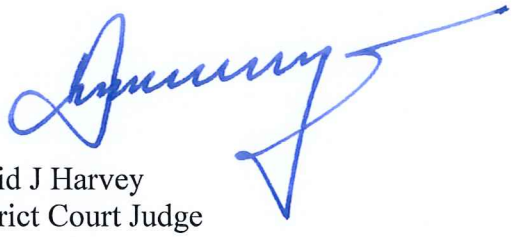
[49] Each of the defendants would be entitled to a 25 percent discount for guilty plea, although they are not entitled to the full 25 percent for that alone, but also for personal mitigating circumstances. For Mr Savage there would be a reduction of $31,250 to bring the fine down to $93,750. For Mr Rowe the reduction would of course be $25,000 bringing the fine down to $75,000. Mr Porter's reduction of 25 percent would amount to $22,500 bringing the fine down to $67,500.

[50] The second phase of fixing the penalty involves an adjustment for ability to pay. Mr Savage has an earning capacity, Mr Rowe as I have said is bankrupt, and Mr Porter is about to be so, but I do not think that that in and of itself means that they should avoid the consequences of their actions. The purposes of sentencing are to hold people accountable and in this regard there must be a penalty. They must also take responsibility for their unlawful actions and the harm and damage that they have caused. Therefore, taking into account the ability to pay I would reduce the figures to a certain degree. For Mr Savage, I would fine him $60,000, for Mr Rowe I would fine him $40,000 and likewise Mr Porter, $40,000.

[51] There now comes into the mix the question of reparation. Mr Hamlin said that if there were to be payment of reparation, reparation would be favoured over the payment of a fine. I have taken some time to consider what would be a proper figure in this regard. The total amount that is claimed by way of reparation is $168,000, which equates to some $56,000 per defendant. That clearly is beyond their means to pay. Each defendant, in my view, should pay reparation of $20,000 each at $65 a week, which would take six years to pay. Reparation payment, although not sufficient to completely reimburse the victims would be distributed pro rata between them. They would at least get something and in that respect I would adjust the fines in this way.

[52] Mr Savage, a finishing point fine which would take into account reparation, $40,000. Mr Rowe's finishing point fine would be $20,000, and Mr Porter's finishing point fine would be $20,000. Therefore, Mr Savage will be convicted and he will be fined $40,000, Court costs $130, he will pay reparation in the sum of $20,000 at $65 a week with the first payment 5 June 2014 to be divided pro rata between the victims.

[53] Mr Rowe will be convicted and fined $20,000, Court costs $130, reparation $20,000 at $65 a week, first payment 5 June 2014 divided pro rata between the victims and, similarly with Mr Porter, convicted and fined $20,000, Court costs $130, reparation $20,000 at $65 a week, the first payment 5 June 2014, again to be divided pro rata between the victims.



David J Harvey
District Court Judge