IN THE DISTRICT COURT
AT AUCKLAND

CRI-2006-004-018554
CRI-2006-004-018646

THE QUEEN

v

ANTHONY CHRISTOPHER BAKER
AND

DAVID JOHN DOLBEL
Defendants

Appearances: D Hauer for the Informant
K Gould for the Defendants

Judgment: 21 May 2007

DECISION OF JUDGE E M AITKEN ON SENTENCING

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[1] David Dolbel and Anthony Baker have pleaded guilty to 21 charges under the Credit Contracts and Consumer Finance Act 2003 and one charge contrary to the Fair Trading Act.

[2] They are charged in their capacity as partners of Dolbec Finance. As the only two partners of the company they are jointly and severally liable for offending by the company pursuant to s 12 of the Partnership Act 1908.

[3] In short Dolbec Finance provides finance services to consumers who wish to buy a motor vehicle (in almost all cases) and who require the finance to do it. As a

provider of credit in this way and in turn a credit contract with those who enter into agreements with you, you are required to comply with the relevant provisions of the Credit Contracts and Consumer Finance Act 2003.

[4] As noted you have both pleaded guilty to 22 charges. This represents offending spanning a period 1 April 2005 to 30 June 2006. I concur with both counsel that the representative charges to which you have pleaded guilty adequately reflect your offending and it is for that reason that all other charges against you were withdrawn with leave.

[5] The facts in this matter are not in dispute, the summary of facts having been agreed by both the informant and defendant's counsel, on your behalf. I will deal with the facts briefly and under the four heads of the offending.

[6] Firstly you have both pleaded guilty to 10 representative charges against s 17 of the Act by failing to disclose all key information as you are required to do so, that information being the information set out in schedule 1 of the Act.

[7] From 1 May to 11 November 2005 you continued to use your credit contracts that had been drafted under the old Act. Following correspondence from the Commerce Commission your template was amended but it still failed to comply. You are charged with breaches up to and including 30 June 2006.

[8] Those contracts failed to comply in as much as they:

(i) Did not set out how interest charges would be calculated and debited to the debtor's accounts.

(ii) Did not provide a description on the credit fees and charges that may become payable under your contracts.

(iii) Failed to include a clause as to full repayment, and

(iv) Failed to include default interest charges or fees.

[9] There are matters of mitigation. I will refer to those later but quite simply at this point the mitigation advanced is that you took steps to get it right, in other words you took steps to comply and those steps included legal advice and discussions with the Commerce Commission.

[10] The second group of offences reflected by your guilty pleas to the 10 representative charges contrary to s 25 of the Act are that from 1 April 2005 to 30 June 2006 you failed to ensure that every guarantor under the contracts to provide credit finance received a copy of the terms of the guarantee.

[11] Again there is mitigation that has been advanced on your behalf, specifically, that in this case whilst you failed to comply you did take verbal steps to ensure that the guarantors were aware of their rights and obligations. I will refer to those matters shortly.

[12] In respect of the charges under s17 and s 25 I concur with counsel for the informant that these should be the lead charges for the purposes of sentencing.

[13] Thirdly you have both pleaded guilty to one representative charge contrary to s 38 of the Act in that you debited interest charges payable before the day on which the interest charges became payable. I note briefly here that it is agreed by the informant and I certainly find that this offence was much more technical in its nature than the others.

[14] Fourthly you have pleaded guilty to one representative charge contrary to s 13 of this Act and s 40 of the Fair Trading Act, in that between 2 December 2005 and 1 February 2006 you sought to enforce a number of credit contracts through issuing letters of authority to act (repossession seizure authority letters) when, because you had failed to make the proper disclosure in accordance with schedule 1 of the Credit Contracts and Consumer Finance Act 2003, you were prohibited by the Fair Trading Act from enforcing those contracts.

[15] The maximum penalties for breaches of s 17, 25 and 38 of the Credit Contracts and Consumer Finance Act in respect of each charge is $30,000. The maximum penalty for the Fair Trading Act offending is $60,000.

[16] I turn now to have regard to the sentencing principles and purposes as I am required to do under the Sentencing Act 2002. The starting point in my view in having regard to the purpose of imposing sentence today must be the purpose of the legislation itself: that is the Credit Contracts and Consumer Finance Act.

[17] This is discussed in the only case that has been brought to date under this new legislation and that is the matter of ***R v Senate Finance Ltd***. Section 3 of the Act itself however also clearly articulates the purposes of the legislation and they are, inter alia:

> (i) To protect the interests of consumers entering into credit contracts,
>
> (ii) To provide for full disclosure of information to consumers, in this case both debtors and guarantors, before they become irrevocably committed to the contract, and
>
> (iii) To prevent misleading and deceptive conduct, false representations and unfair practices.

[18] In terms of the Sentencing Act the relevant purposes in this particular case, in my view, include the need to hold you both accountable for the offending, to provide for the interests of the victim and to deter both yourselves and others from committing the same or similar offences.

[19] In assessing the appropriate penalty regard must be had to these purposes and in particular, in this case, to the gravity of the offending, having regard to both aggravating and mitigating factors and your own personal circumstances.

[20] The Court, in many cases, in imposing penalties, particularly for serious offending, looks to determine an appropriate starting point. This, in my view is an

important first step for a number of reasons, including the need for the decision to be transparent and to achieve some consistency between decisions.

[21] In this particular case the parties have effectively agreed as to the appropriate starting point for the offending and I echo the sentiment expressed by my fellow Judge, Judge Callander, in the ***Senate Finance*** decision that this is both sensible and helpful to the Court, particularly given the lack of precedent under this relatively new legislation and I am grateful to both counsel for the obvious efforts that they have taken to reach the sort of agreement that is now put before me.

[22] As to that starting point, it has been arrived at, again very sensibly in my view, by looking at the totality of the offending and I do not disagree with this approach in the circumstances. When it is linked back to the individual offences it is in effect a fine of $4500 per charge.

[23] For the following reasons I concur with that amount: firstly having regard to the nature of the offending. This offending took place over a 12 month period. It came about because you both took inadequate steps to inform yourselves as to your obligations under the Act. However I accept, by way of mitigation, that to a very large extent you relied on the advice you received from Falcon Advances Ltd who themselves had taken legal advice. So to some considerable extent your reasons for relying on that advice were very understandable in the circumstances.

[24] I accept Mr Gould's submission that this offending arose at least initially because of what he describes as sloppy administration and your over-reliance on your lead financer Falcon Advances and their solicitors.

[25] I take into account the fact that when the Commerce Commission intervened you were concerned (if I can put it that way) that they failed to specify to you exactly what steps you should take. I have had regard to the correspondence referred to me by Mr Gould. In my view the letter of 13 December is general in its terms although I believe the letter of 8 March is more specific and on its face at least could be seen to be, for that reason, more helpful.

[26] However, while I accept that the earlier letter was not very specific and I accept, through your counsel, your assertion that you found the Commerce Commission unhelpful in that regard, in my view a balance must be struck between the role of the Commerce Commission in educating and enforcing the Act and the responsibilities that the Act places on individual traders.

[27] You as individual traders are required to comply and the onus at the end of the day falls on you to inform yourselves. You cannot, in my view, therefore rely on the Commerce Commission to point out each and every breach, although I would always encourage the Commerce Commission to be as helpful as it can in the circumstances particularly where, as here, they were dealing with two people who were wanting to comply and who had made that clear.

[28] I accept that you took steps to ascertain the extent of your obligations. I accept that you were fully cooperative. You were voluntarily interviewed, you have entered guilty pleas and you have reached agreement as to the appropriate penalties. This is not therefore a case where you have blatantly disregarded your obligation either before or after the informant intervened. I also accept, and this too is important, that your documentation now fully complies.

[29] The second factor that I have had regard to is the interests of the victims and clearly the Credit Contracts and Consumer Finance Act aims primarily to protect victims.

[30] I am advised, and I accept, that over the last seven years you have had up to 600 customers. I accept that none of those customers have lost money as a consequence of this offending. In particular I accept that once the overcharging of four customers was brought to your attention by the Commerce Commission they were all repaid and this was done after the interview and certainly before any of these informations were laid.

[31] Counsel has put before the Court evidence relating to your client base. It is, in his words, a small niche market providing finance to what both parties have described as an unsophisticated client group, many of the people in that group being

those who would not normally be able to obtain finance elsewhere. I accept that you have a close relationship with your customers, that many are related to each other, that there have been very few repossessions because of the extended family member support and the efforts you have gone to in contacting them when they appear to be getting into difficulties.

[32] I also accept that many of your clients do not have English as a first language and I accept therefore that it was unlikely that many, but not I would say all, would have been able to read the documentation or even be interested in keeping it. Importantly, as I have already alluded to, I accept that you were at pains to explain their obligations to them. I commend you both for this. It is in my view in the spirit of the Credit Contracts and Consumer Finance Act in that the key part of the Act is to ensure that information is imparted to consumers before they enter into binding contracts. However, verbal communication cannot replace the obligations that you have under the Act to provide written material and you yourselves accept that.

[33] Thirdly I take into account that s 38 is a somewhat technical offence in as much as you relied on your computer software package and I think the acceptance by the prosecution of that is reflected in the one representative charge that you both face.

[34] Fourthly I have had regard, in looking at the overall penalties that should be imposed, to the only other decision under this new legislation and that is the matter that I have already referred to, ***R v Senate Finance Ltd***. The defendants there were convicted of charges under s 17. The actual conduct differs from the conduct before me in as much as in that case it involved faxing through agreements to meet their disclosure obligation but those fax copies being illegible. To some extent therefore that was a more technical offence and I note that those defendants were fined the sum of $3000 per charge. It is offending of a slightly different nature from the offending that you two face and that is reflected, in my view, in the penalty of $4500 that will be imposed in respect of each information.

[35] Having therefore reached a global starting point both counsel have suggested a reduction 40% in light of your guilty pleas. The Court always has regard for guilty

pleas and those who appear before it and plead guilty are entitled to a reduction in what would otherwise be the penalty.

[36] The normal range, if I can put it that way, tends to be in the region of 15 to 30% and therefore a reduction of 40% is very much at the upper end of the scale but I am satisfied that that is appropriate. That in this case reflects your guilty pleas, it reflects your cooperation and it is also appropriate (and this in my view is highly relevant) having regard to the statutory damages regime.

[37] Turning now to that regime. Again there has been agreement reached between the parties that statutory damages should be paid and for the following reasons I concur.

[38] To a considerable extent, in my view, the payment of statutory damages meets the sentencing obligation to protect the interests of the victims. In the particular circumstances of this case it seems appropriate to me to order statutory damages and I will do so. They are to be paid in accordance with Annexure C as attached to the Informant's sentencing submissions.

[39] It is not only appropriate that the victim's needs are met in my view but it is also appropriate to order statutory damages in that they require you to pay to each and every person affected by your conduct a sum of money. Those sums of money, taken separately, are relatively small but in my view they appropriately sheet home to you and to others (and I remind myself here of the need for general deterrence in sentencing of this type by individual payments of statutory damages) the importance of compliance at that individual contract level. It is a reminder that it is individuals whose interests are being protected by this legislation.

[40] I am also satisfied that the discount of 40% is appropriate having regard to your personal circumstances. You are both first offenders, you run a modest business with a profit in the last financial year in the vicinity of $90,000. As I have noted you have cooperated fully throughout and I accept you are not a company which deliberately runs roughshod over the interests of your consumers. I accept you took advice at different stages of the proceedings and therefore made an effort to

comply and I accept, importantly, that you took real steps to inform your customers verbally as to their rights and obligations. This is not therefore a case where you have deliberately attempted to mislead them.

[41] I accept, finally, that you were lending in a moderate to high risk environment to a specific group of people who would not otherwise necessarily have been able to obtain credit but that was a vulnerable group in society for whom the consequences of a breach of contract can be severe and who may be otherwise unaware of the protections available to them. There is a need therefore for real diligence in my view in meeting your legal obligations, both in word and in spirit.

[42] In all the circumstances therefore, as I have outlined, I am satisfied that the statutory damages and the fines as agreed between the parties appropriately reflect the offending in this case.

[43] Specifically therefore, Mr Dolbel, in respect of the s 17 charges to which you have pleaded guilty you are convicted and fined the sum of $45,000, that is $4500 per charge.

[44] Mr Baker, in respect of those charges you are convicted and discharged. Mr Baker you are convicted and fined $45,000 in respect of the 10 charges contrary to s 25 of the Act, that is $4500 per charge. Mr Dolbel you are convicted and discharged in respect of those charges.

[45] Mr Dolbel you are convicted and fined $4500 in respect of the one charge contrary to s 38. Mr Baker you are convicted and discharged in respect of that matter. Finally Mr Baker you are convicted and fined $5500 for the s 13 charges. Mr Dolbel in respect of that matter is convicted and discharged.

[46] Those fines are to be paid as per any agreement which you subsequently reach with the registrar. I will impose no conditions on that in this Court at this time.

[47] Both defendants are also ordered to pay statutory damages in the sum of $23,300 each. Those are to be paid to the individuals in the name and amounts as set

out in Annexure C as attached to the Informant's sentencing submissions. Those amounts can be paid by the defendants at the rate of $4000 per month.

[48] As to costs, I have had regard to both Court costs and solicitor's costs. In my view, in regards to both, it is appropriate and I can duly have regard to the matters that I have already referred to, and in particular your personal circumstances.

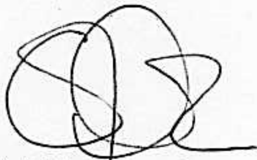
[49] It is not appropriate in my view to impose the standard Court costs in respect of each and every information to which you have pleaded guilty. You have acted responsibly throughout in pleading guilty and through your counsel in reaching agreement in respect of the charges. That has been of considerable benefit to the Court and to the public and the Court costs can in my view reflect this.

[50] In the circumstances therefore each of you shall pay Court costs of $130 in respect of four charges. They are to reflect the four different types of offending for which you have been charged and which you have pleaded guilty.

[51] Finally, I turn to the mater of solicitor's costs. I note in the ***Senate Finance*** case that the Court declined to make any orders as to solicitor's fees but no reasons are given there and I can place therefore no weight on that.

[52] In the circumstances I record that the Crown seeks $5000 in costs from each defendant or $250 per charge. In my view the solicitor's costs in this case can and should be kept to a minimum. As already noted, both defendant's took real steps to comply with their obligations, they were fully cooperative throughout and through their guilty pleas and that cooperation have saved the Commerce Commisson, the Court and the public a considerable amount of money and in my view it is appropriate to reflect that in the order for costs. In the circumstances each defendant will pay solicitor's costs in the sum of $1000.

[53] My thanks again to counsel for their extremely helpful submissions and the agreements that they were able to reach in respect of this matter.



E M Aitken
District Court Judge