IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-002128
[2016] NZDC 19165

COMMERCE COMMISSION
Prosecutor

v

ACE MARKETING LIMITED
Defendant

Hearing: 1 July 2016

Appearances: J Barry for the Prosecutor
J Edwards for the Defendant

Judgment: 29 September 2016

JUDGMENT OF JUDGE R J COLLINS

Introduction

[1] Between 1 June 2013 and 23 November 2015, the defendant, Ace Marketing Limited, breached New Zealand consumer protection legislation on multiple occasions. The defendant is a mobile trader. Such businesses do not sell through conventional stores. They sell via websites, social media, telemarketing, door to door, and they utilise vehicles by parking in mobile truck stops and prominent locations.

[2] Mobile traders bear the allegation that they frequently target vulnerable communities and provide goods on credit at significantly higher prices than those for comparable goods at mainstream retail outlets. Indeed, the defendant's managing director, Mr Sandip Kumar, in an affidavit filed in this sentencing has deposed:

> [26] ... Mobile traders typically sell goods via weekly or fortnightly instalment payments. Many, including Ace Marketing, deliver the goods to the customer before the full payment has been made. They therefore appeal to customers who, for whatever reason (such as bad credit, lack of cash funds, and so on) are unable to purchase a product upfront in a single lump sum of cash or credit.
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> [27] The perception some members of the public have of mobile traders is that the prices of goods charged by mobile traders are high compared to retail outlets. In my view, this does not give the full picture, as the default rate in the mobile trading industry is particularly high and the cost of debt recovery makes it uneconomical to engage debt recovery agencies to pursue debts. Against this background, the significant business risk that Ace Marketing assumes in making delivery of goods prior to full payment arguably justifies charging a higher price.

[3] Ace Marketing was incorporated in February 2012. As indicated in the paragraph above, it targets customers, who ordinarily cannot get financing elsewhere, to buy furniture and electrical goods using uninvited direct sales techniques. It is based in Hamilton, but there is a large number of sales staff working around the North Island. As at January 2015, the defendant had 20 staff based in New Zealand and 15 further staff working in a dedicated call centre in Fiji.

[4] It is important to stress that mobile trading per se is not unlawful, however, as is apparent from what is set out above, it is very important that such traders comply with consumer protection legislation.

[5] Between 1 June 2013 and 23 November 2015, the defendant entered into approximately 8102 consumer credit contracts with debtors for the supply of consumer goods. The defendant insists that approximately 25-30 percent of its customers cancel within the cooling off period.

[6] As a result of its offending, the defendant faced and entered guilty pleas to 28 charges. Nineteen charges encompass the defendant involving itself in misleading conduct by making statements in its contracts that were false. They were false on account of being contrary to specific legislative provisions, and they thereby breached the Fair Trading Act 1986 ("FTA").

[7] Furthermore, with respect to the Credit Contracts and Consumer Finance Act 2004 ("CCCFA"), the defendant has admitted nine charges involving failures to provide information or provide information in a clear way.

Issues for this sentencing

[8] The prosecutor and the defendant differ significantly on the appropriate penalty for this offending. The issues that arise, therefore, in this sentencing are:

(i) A determination of the seriousness of the offending;

(ii) Identification of the appropriate starting point and consideration of where the offending sits in comparison to other cases;

(iii) Identification of mitigating factors and the level of discount to be applied for those mitigating factors; and

(iv) An assessment of the defendant's ability to pay the appropriate monetary penalty and what adjustment, if any, needs to be made for an inability to pay.

[9] Before setting out the facts on which the defendant is to be sentenced, I repeat the observations made in *Commerce Commission v Tiny Terms*[1] about how far other cases can assist in a sentencing such as this:

> [9] However, there are limits to which the previous cases can go in providing assistance to this sentencing. Those limits include: Firstly, there is not yet as far as I am aware, a decision of the High Court in terms of s 17 and s 32 of the CCCF Act. Secondly, some of the cases predate the sentencing methodology mandated by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372(CA) and *R v Clifford.* Third, some of the cases involve agreed starting points. Fourth, they involve various combinations of the Acts, sections and numbers of charges. Fifth, there is generally a pattern of deciding on global culpability and then apportioning that per information. Sixth, one case only appears to have been decided post the Supreme Court decision in *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607. Finally, as Mr Hamlin points out, the Commission has often got the difficult task of deciding just how to structure the charges, the number of charges, the extent

[1] *Commerce Commission v Tiny Terms Ltd*, DC, Auckland, CRI-2012-004-011709, 24 January 2014.

> to which they are representative in fairly but firmly prosecuting these matters.

[10] Other cases, however, do provide a general framework to assess the culpability of a defendant in terms of this legislation. Both Acts of Parliament were designed to deal with commercial offending when breaches are proved. That commercial offending must be met with commercial penalties to provide the necessary deterrence that Parliament requires.

[11] The purposes of this legislation are well-understood and repeatedly confirmed by references to *Senate Finance Limited*[2] where the Court observed:

> The purposes of both Acts of Parliament is self-evident. It is to protect the interests of consumers entering into credit contracts, provide for the disclosure of adequate information to those consumers and prevent misleading and deceptive conduct, false misrepresentations and unfair practices. Consumers must be adequately informed of their rights and responsibilities. Consumer rights to disclosure of information, developed over the last few decades prescribe that anything that is material in a contractual relationship between a vendor and a purchaser or a shopkeeper and a customer must be made clear and conspicuous in the interests of fairness and honest trading. Those concepts underpin both pieces of legislation.

[12] Since that observation, it is relevant to note for this case that in relation to the FTA charges the maximum penalty for such offences was increased from $200,000 per offence to $600,000 per offence on 16 June 2014. The legislative intent could not be clearer. The Courts must give effect to that legislative intent.

The charges

[13] The 28 charges the defendant has pleaded guilty to relate to the following conduct:

(i) Charges 1-5 are breaches of s 17 CCCFA, between 1 June 2013 and 23 November 2015, by failing to disclose to debtors under consumer credit contracts certain information required by Schedule 1 of the CCCFA. The Commission elected to charge one representative charge per six month period;

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[2] *R v Senate Finance Ltd*, DC, Auckland, CRN-2006-4502955, 14 November 2006.

(ii) Charges 6-8 relate to breaches of s 32(1)(c) CCCFA, between 1 June 2013 and 31 January 2015, by failing to express clearly to debtors information required to be conveyed in a clear and concise manner so as to bring the information to the attention of a reasonable person. Again, the Commission elected to bring one representative charge per each six month period;

(iii) Charge 9 is one representative charge of a breach of s 41 CCCFA in that between 1 June 2013 and 5 June 2015 the defendant provided for a credit fee in consumer credit contracts that was unreasonable; and

(iv) Charges 10-28 relate to breaches of s 13(i) FTA, between 1 June 2013 and 23 November 2015 by making misleading representations to consumers in relation to:

(a) the guarantee relating to the delivery of goods;

(b) the creditor's right of repossession;

(c) the amount recoverable by the creditor under the contract following repossession and the sale of the goods that are the subject of the contract;

(d) the debtor's right to apply for relief on grounds of unforeseen hardship;

(e) the guarantee relating to goods matching their description.

Again, the Commission elected to bring one representative charge per six month period.

The facts of the offending

[14] The defendant was registered on the Financial Service Providers Register to be a creditor under a credit contract. It registered under the name "Ace Marketing Limited" and was assigned its relevant registration number.

[15] In recent years leading up to these charges, the business practices of mobile traders have become more prominent in the complaints the Commerce Commission receive from consumers and their advocates. In August 2015, the Commission published a report setting out findings of its investigation into the mobile trader industry. The report identified systemic compliance issues within the industry with respect to traders' obligations under the CCCFA, in particular, the requirement to provide adequate disclosure to consumers prior to entering into consumer credit contracts.

[16] The Commission opened an investigation into the defendant as a result of consumer complaints, primarily about non-delivery of goods. This investigation ran in parallel with the Commission's investigation into the mobile trader industry as a whole.

[17] Between July 2014 and February 2016, the Commission corresponded and met with the defendant on a number of occasions. The defendant provided the Commission with information about its mobile trader business and the information provided by the defendant provided the basis for the charges it faces. It is common ground between the prosecutor and the defendant that the defendant cooperated fully with the Commission.

[18] Since June 2013, Ace Marketing Limited entered into over 8000 consumer credit contracts with customers known as "rent to own agreements". Customers entering consumer credit contracts with the defendant were provided with a number of different documents, including:

(i) A welcome letter;

(ii) The specific terms of the customer's contract (a pre-printed form that is filled out with the details of each customer's arrangement with Ace Marketing); and

(iii) The general terms and conditions that go with the contract (pre-printed standard form contract terms).

[19] Since June 2013, the defendant used four different versions of the rent to own agreement documents. The charges that the defendant faces relate to the quality of this documentation, the representations made therein and the reasonableness of the fees provided for under those contracts.

Breaches of s 17 CCCFA

[20] Up until 6 June 2015, s 17 CCCFA required creditors who entered consumer credit contracts to disclose certain key information to debtors under Schedule 1 of that Act either before the contract was made or within five working days of that contract being made.

[21] Since June 2015, s 17 CCCFA has required creditors who enter consumer credit contracts to disclose certain key information to debtors under Schedule 1 of that Act before that contract is entered into.

Charges 1-4: 1 June 2013-5 June 2015

[22] Between 1 June 2013 and 5 June 2015, the defendant entered into approximately 6554 consumer credit contracts.

[23] The rent to own agreement documents provided to those debtors failed to disclose certain key information applicable to the contract as set out in Schedule 1 of the CCCFA. Specifically, those documents failed to:

(i) Accurately state the initial unpaid balance payable under the contract. The contract discloses the "total sum", which is the purchase price of the goods (inclusive of GST and any delivery fee). However, it does

not include the application/booking fee ($45) or direct debit set-up fee ($5 or $10).

(ii) Accurately state the correct:

(a) amount of the first and last payments payable under the contract which differ from the regular payment amount. The first payment differs from the regular payments by dint of the first payment incorporating a fee to be paid to the relevant sales agent, while the final payment amount differs from the regular payments in order to cover the credit fees payable under the contract. These first and last payment figures are not set out in the rent to own agreement documentation. The amount of the first payment is set out in the "debit direct form", but that is not provided to customers;

(b) number of payments payable under the contract, as the number of payments does not account for the additional payments required to meet the fees not included in the initial unpaid balance, a PPSR registration fee of $20 or $25, and a weekly transaction fee of $1.75. The stated number of payments also does not account for the "Ace Rewards Programme", which reduces the total number of payments where the debtor does not default during the contract period (or defaults only once or twice), which came into use in version three of the rent to own agreement document;

(c) total amount of the payments payable under the contract, because the total sum payable does not include the application/booking fee ($45), direct debit set-up fee ($5 or $10), PPSR registration fee ($20 or $25), or the weekly transaction fee ($1.75).

(d) the time credit fees become payable under the contract. Specifically, the contract fails to identify when the application/booking fee, PPSR registration fee, direct debit set-up fee, and weekly transaction fee become payable.

Charge 5: 6 June 2015 to 23 November 2015

[24] Between 6 June 2015 and 23 November 2015, the defendant entered into approximately 1548 consumer credit contracts. The rent to own agreement documents provided to those debtors failed to disclose certain key information applicable to the contract identified above in terms of the contracts entered into between 1 June 2013 and 5 June 2015, but, in addition, the contract documentation failed to:

(i) State the frequency with which continuing disclosure statements would be provided to debtors; and

(ii) State the defendant's registration number under the Register of Financial Service Providers and the name under which it is registered on that register.

Breaches of s 32(1)(c) of CCCFA (charges 6-8: 1 June 2013- 31 January 2015)

[25] Section 32 CCCFA sets out mandatory standards for the style and form in which disclosure is to be provided to debtors under consumer credit contracts. In particular, under s 32(1)(c), disclosure must express the standard information clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person.

[26] Between 1 June 2013 and 31 January 2015, Ace Marketing Limited entered into approximately 6087 consumer credit contracts. The rent to own agreement documents provided to those customers failed to express the required information clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person by expressing many of the terms and conditions:

(i) In small size 5 font;

(ii) In two condensed columns on two sides of a single page; and

(iii) Providing no spaces between clauses,

with the effect that the information is difficult to read and required information is obscured. Such a method of printing is often referred to as "mouse print".

Breach of s 41 CCCFA (charge 9: 1 June 2013-5 June 2015)

[27] Section 41 CCCFA prohibits consumer credit contracts providing for a credit fee that is unreasonable.

[28] The rent to own agreement documents include either a $20 or a $25 PPSR registration fee to cover the cost of Ace Marketing Limited registering a financial statement on the Personal Property Securities Register. However, for 148 contracts entered into during that period where such a fee was charged to consumers, Ace Marketing did not, in fact, register a financing statement nor incur a cost in relation to the same. It was, however, the defendant that brought this fact to the Commission's attention.

Breaches of s 13(i) FTA (charges 10-28: 1 June 2013-23 November 2015)

[29] Section 13(i) FTA prohibits a person, in trade, in connection with the supply or possible supply of goods or services, from making a false or misleading representation concerning the existence, exclusion, or affect of any condition, warranty, guarantee, right or remedy.

[30] Between 1 June 2013 and 23 November 2015, Ace Marketing Limited in the 8102 consumer contracts entered into with debtors for the supply of consumer goods made false and/or misleading representations concerning the existence of a right as set out below.

Delay in delivery charges (charges 10-12)

[31] The defendant made a representation to debtors that it would not be liable for any delay in the delivery of the goods to be supplied under the contract and the debtor would not be entitled to cancel the contract as a result of any delay.

[32] That representation was false and/or misleading because (as from 17 June 2014) there is a guarantee under s 5A Consumer Guarantees Act 1993 that goods will be received by the consumer at a time, or within a period, agreed between the supplier and the consumer or if no time period has been agreed, within a reasonable time.

[33] Failure by the supplier to comply with the guarantee gives the consumer a right of redress against the supplier which includes the right to reject the goods (for a failure of a substantial character) and a right to damages.

Repossession without notice (charges 13-17)

[34] The defendant represented to debtors that if in an event of default (as defined under the contract) occurred:

(i) Ace Marketing may enter any place it reasonably believes the goods are located;

(ii) That such entry may be made by using force if necessary;

(iii) That such entry may be made by Ace Marketing at any time of the night or day without giving notice to the debtor; and

(iv) Ace Marketing may then repossess the goods that are the subject of the contract without notice to the debtor.

[35] Those representations were false and/or misleading because under the Credit (Repossession) Act 1997 ("CRA") up until 6 June 2015;

(i) A creditor must (unless the goods are at risk) serve a pre-possession notice on the debtor, and on every guarantor of the debtor, before taking possession of consumer goods (s 8 CRA);

(ii) That pre-possession notice must specify a period for remedying the default (s 9 CRA) during which time the creditor cannot take possession of the consumer goods (s 10 CRA); and

(iii) A creditor must not enter residential premises for the purposes of taking possession of consumer goods outside the hours of 6.00 am to 9.00 pm on Mondays to Saturdays and at any time on a Sunday or on a holiday (s 15 CRA).

[36] The CRA was repealed as from 6 June 2015, however, ss 8, 9, 10 and 15 now have materially similar provisions under ss 83G, 83N and 83S CCCFA. The representations, therefore, continue to be false and/or misleading.

Charging interest after sale of repossessed goods (charges 18-22)

[37] Under its consumer credit contracts, Ace Marketing asserted a right to repossess and sell goods that are the subject of the contract. In relation to that right to repossess and sell the defendant represented that:

(i) The proceeds of any such sale would be applied to the outstanding amount owing under the agreement; and

(ii) If the sale proceeds are less than the outstanding amount owing under the agreement, the debtor will remain liable to Ace Marketing for the outstanding amount owing under the agreement together with default interest charges on that balance, which accrue from the date the outstanding amount becomes owing until the date it is paid.

[38] That representation is false and/or misleading because under s 35 CRA, if the net proceeds of sale are less than the amount required to settle the agreement as at the date of the sale, the creditor is not entitled to recover more than the balance left

after deducting those proceeds from that amount. In other words, there is no ability to continue to charge interest post repossession and sale.

[39] Although s 35 CRA was repealed with effect from 6 June 2015, it has a materially similar replacement provision under s 83ZM CCCFA.

Statement of debtor's right to apply for relief for unseen hardship (charge 23)

[40] Section 55 CCCFA gives debtors the right to apply to the creditor for a change to the terms of their contract where, because of some unforeseen hardship such as illness, injury, or loss of employment, the debtor is unable to reasonably meet their obligations under their contract.

[41] The right to apply for relief under s 55 is one of the matters required to be disclosed to consumers under Schedule 1 of the CCCFA.

[42] The defendant represented to debtors that they had a right to apply for relief under s 55 CCCFA, but would not be entitled to exercise that right if they had defaulted in making a payment under the agreement. That representation was false and/or misleading because, from 6 June 2015, under s 57 CCCFA the debtor is only prevented from making an application under s 55 if:

(i) In the case of the debtor defaulting, the debtor has:

(a) been in default for two weeks or more after receiving a repossession warning notice or a notice under s 119 Property Law Act 2007;

(b) failed to make four or more consecutive periodic payments by or on the due dates; or

(c) been in default for two months or more; or

(d) it was reasonably foreseeable to the debtor at the time the contract was made that the debtor would be unlikely to be able

to meet his or her obligations under consumer credit contract because of the illness, injury, loss of employment, end of a relationship, or the other reasonable cause.

Goods matching the description (charges 24-28)

[43] Ace Marketing represented to debtors that if the products the subject of the agreement are not available at the time of delivery, Ace Marketing had, at its sole discretion, the ability to substitute similar products and not to have any liability to the debtor.

[44] That representation was false and/or misleading because under s 9 Consumer Guarantees Act where goods are supplied by description to a consumer, there is a guarantee that the goods correspond with the description. If the supplier fails to comply with that guarantee, the consumer has a right of redress against the supplier under part 2 Consumer Guarantees Act.

Aggravating and mitigating factors

[45] The prosecutor submitted that the offending is serious or aggravated by the following factors:

(i) The extent of the offending – in that there are three main facets to the overall offending which all fundamentally impact on a debtor's understanding of the contract and their rights and obligations. The Commission says that, firstly, the misleading and false representations in the defendant's contracts were numerous, five in all, covering statutory rights under three different pieces of legislation. The misrepresentations regarding the debtor's rights for a delay in delivery and the right of the creditor to substitute goods go to the heart of the contracts. I agree that these are particularly aggravating factors.

(ii) Secondly, the prosecutor submits that the failures to comply with the obligations provided by Schedule 1 of the CCCFA are widespread. There were five items under Schedule 1 which were either not disclosed, inaccurately disclosed or inadequately disclosed. These became seven after the amendment Act came into force on 6 June 2015. The prosecutor asserts that these failures were systemic and significant and have been held to be so when one examines other cases.

(iii) Thirdly, the prosecutor says that the failures under s 32(1)(c) CCCFA are highly aggravating in the context of the overall offending. The prosecutor attached an example of the defendant's terms and conditions. I concur with the prosecutor that the document is significantly incomprehensible and is barely legible. Some of the terms and conditions of the contract cannot be properly read and understood by debtors and the information might not as well have been disclosed at all.

(iv) The prosecutor accepts that the charge which relates to the breach of s 41 CCCFA does not significantly aggravate the defendant's culpability and notes the defendant's assertion that full refunds have been made to all customers.

[46] The second factor which the prosecutor says aggravates the offending is that it involved a high degree of negligence.

[47] Thirdly, the prosecutor points to the fact that 8102 contracts were entered into during the charge period is highly significant.

[48] Fourthly, the Commission points to the extended period of time over which the offending occurred, being two and a half years. Most of the offending extends across the entire offending period.

[49] The prosecutor also submits that the vulnerability of victims is a significant aggravating feature in this case. It is contended that it is a central feature of the mobile trader industry that traders target relatively unsophisticated consumers, with low incomes and poor credit histories and that it is these consumers who are most in need of protection provided by the CCCFA and FTA.

[50] The defendant says the offending is mitigated by the fact that it never intended to deliberately flout either Act. It is submitted for the defendant that, in its early years, it had limited capital and limited means to seek its own legal advice. The defendant, through its managing director, Mr Kumar, has deposed that it adopted contracts used by others which it considered must have been compliant because they were in widespread use. The defendant then points to the period in time where it had received its own legal advice and that was, in general terms, to the effect that its contracts were compliant. The fact that the defendant "borrowed" the contracts of others or those of its competitors is not a mitigating factor as far as I am concerned. Nor do I attach any particular weight to the fact that it acted on inadequate legal advice. There are aspects about that which do not convince me that I should give particular credit for it. Even if there were shortcomings in the advice that the defendant received, the FTA failures were fundamental. The representation that a debtor/consumer could not cancel for delay and the assertion of the right to substitute as well as the right to repossess without notice were all fundamental and blatant breaches of the Act. If the defendant knew its own contracts well, it should have been well aware of those errors within them yet it communicated those errors to customers over a lengthy period of time.

[51] The defendant claims that it never enforced any of the non-existent rights it purported to have and that there was limited loss or harm caused to consumers. The difficulty with that submission is that it will never be known, for example, how many consumers did not cancel for delay because they did not know they could cancel. In addition, it is unknown how many consumers accepted substituted goods because they did not know they did not have to. It is unknown whether there were consumers or debtors who decided on a course of action that they would otherwise not have adopted because of a fear that their home may be entered at any time and goods repossessed.

[52] The defendant also says that it has suffered as a result of negative publicity and publicity of the fact of the prosecution. It says it will further suffer when the sentencing decision enters the public domain. I accept that there is clear authority that such publicity can operate as a mitigating factor. However, it needs to be as a result of a balanced assessment and, in my view, must not be given undue weight. However, there will be allowance made for that in this case.

[53] It is common ground between the parties that the defendant fully cooperated with the Commerce Commission and meaningful credit will be given for this fact.

[54] The defendant also points to the remedial steps it has taken following the Commission's investigation. However, a number of the remedial steps it points to are nothing more than ensuring it now complies with the law. The remedial steps, though, do have significance in that it indicates a much lower likelihood of future offending.

[55] Assessed against the factors that have been long held to be applicable to the assessment of culpability,[3] I regard the offending here as particularly serious. Of all the cases that will be referred to later in this judgment, it is more serious than all of those cases with the exception of the combination of the *Love Springs* and *Tiny Terms* prosecutions. Therefore, bearing in mind the objectives of the legislation, the offending has the following features. There were a number of important untrue statements made. The offending involved negligence on an extremely high level because the offending occurred with such frequency and over such an extended period of time. Harm to individual consumers is difficult to identify, but the protective nature of the legislation must be given full effect.

[56] The important Sentencing Act purposes that apply are denunciation, accountability and deterrence.

[57] Factors which must operate in favour of the defendant are its full cooperation; to a very limited extent, negative publicity; its financial circumstances

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[3] *Commerce Commission v L D Nathan and Co* [1992] NZLR 160 and *Commerce Commission v Ticketek New Zealand Ltd* [2003] DC Christchurch CRN-2009031178.

and guilty pleas which came at the earliest opportunity.

Other cases

[58] In terms of comparative cases, I have considered all those referred to me. They are *Commerce Commission v Wenatex,*[4] *Commerce Commission v Flexi Buy Ltd,*[5] *R v Senate Finance Ltd,*[6] *Commerce Commission v Lelei Finance Ltd,*[7] *Commerce Commission v Tiny Terms Ltd,*[8] *R v Baker and Dolbel,*[9] *Commerce Commission v Galistair Enterprises Ltd*[10] and finally *Commerce Commission v Betterlife Corporation*[11]

[59] I record in this judgment a comment about the decision in *Tiny Terms*. The defendant in that case was closely associated with Love Springs Ltd. That is noted in the judgment. It was Love Springs that actually sold the water cooler units and effectively assigned the financing or lease to buy rights to Tiny Terms. Love Springs Ltd and Tiny Terms Ltd had the same effective beneficial ownership. Love Springs and its managing director had separately faced charges under the FTA for making very serious and false allegations about tap water. They did that so as to promote the sale of the water coolers. On a combined basis, fines of approximately $500,000 were imposed on Love Springs and its managing director. My error in delivering the *Tiny Terms* judgment was not to make it clear that the Tiny Terms' offending had to be viewed in the light of what had already gone before and had been imposed on the associated entities. Had Tiny Terms stood on its own, I would have unquestionably imposed higher penalties. *Tiny Terms* does not provide the level of assistance here

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[4] *Commerce Commission v Wenatex New Zealand Ltd*, Auckland District Court, CRI-2011-004-002567, 7 September 2011, Judge Gibson.
[5] *Commerce Commission v Flexi Buy Ltd*, Auckland District Court, CRI-2015-004-011372, 19 February 2016, Judge Field.
[6] *R v Senate Finance Ltd*, Auckland District Court, CRN-2006-4502955, 14 November 2006, Judge Callander.
[7] *Commerce Commission v Lelei Finance Ltd*, Manukau District Court, CRI-2007-092-13465, 19 March 2008, Judge Blackie.
[8] *Commerce Commission v Tiny Terms Ltd,* Auckland District Court, CRI-2012-004-011709, 24 January 2014, Judge Collins.
[9] *R v Baker and Dolbel*, Auckland District Court, CRI-2006-004-018554 and CRI-2006-004-018646, 21 May 2007, Judge Aitken.
[10] *Commerce Commission v Galistair Enterprises Ltd*, Auckland District Court, CRI-2007-004-004009, 6 December 2007, Judge Aitken.
[11] *Commerce Commission v Betterlife Corporation Ltd and Goodring Company Ltd*, Auckland District Court, CRI-2016-004-000650 and CRI-2016-004-001140, 10 June 2016, Judge M-E Sharp.

that counsel suggest, but the fault for that lies with me. What I have had to say in this judgment about Tiny Terms only reinforces the view that I have that because cases vary so much on their facts that earlier cases, unless they be those of the higher Courts, have their limitations in the setting of the appropriate starting point.

Starting point

[60] Therefore, in light of the seriousness with which I regard the offending, balancing the mitigating factors I have accepted and taking what limited guidance that can be taken from other cases, I have no difficulty accepting the Commerce Commission's submission that the starting point for the FTA offending is between $220,000-$255,000. In fact, I consider it must be set at no less than $255,000, given the increase in the maximum penalties to $600,000 for any one offence. This offending involved a very large number of contracts and fundamental failures over an extended period of time.

[61] Applying the same process to the CCCFA charges, I also have no difficulty accepting the Commission's submission that the starting point is between $100,000-$120,000 if this offending had stood on its own. There has to be a meaningful adjustment for totality as both counsel submit, before turning to mitigating factors and, finally, the issue of ability to pay. However, on a global totality basis, I end up with a start point of $290,000.

[62] From that starting point, I give the defendant a credit of 10 percent rounded to $30,000 for its full cooperation with the Commission's investigation. I also give another credit of five percent ($15,000) for the impact of negative publicity. I do that because I accept what Mr Kumar has deposed in that competitors have unfairly utilised the fact of this prosecution to advance their own position in an unfair way against this defendant. The combined credit, therefore, is of $45,000 and it reduces the starting point to $245,000. There can be no doubt that the defendant is entitled to the full credit of 25 percent for its guilty pleas which came at the earliest opportunity. It is a credit of $61,250 which reduces the starting point to one of $183,750.

Defendant's ability to pay

[63] A degree of financial information has been placed before me regarding the defendant's financial position and its ability to pay. The Sentencing Act 2002[12] instructs that I must take into account a defendant's ability to pay. The law is clear that that also applies to a corporation.[13] It is something that I have to take into account. It will be given effect in this case in what I consider to be a meaningful and pragmatic way. However, there must in an appropriate case come a point where a limited liability company flouting the law cannot avoid what would be the otherwise appropriate penalties by claiming an inability to pay or alternatively that the fine at the appropriate level would be such as to put it out of business. While I do not consider it comes about in this case, it is my view that for commercial offending which attracts the appropriate commercial penalty, if that means that the defendant can no longer trade, then that is the reality of the commercial decisions that such a defendant has made.

[64] At para 6 of the affidavit sworn by Mr Kumar in relation to the defendant's financial position, he stated:

> This information is confidential and commercially sensitive. I respectfully request that the specific financial information is not disclosed in any sentencing notes or via any application to access the court records.

Given the defendant's cooperation I am quite prepared to agree to that request.

[65] The defendant has provided information which shows its profit and loss position for the year ending 31 March 2014, 31 March 2015 and its draft position for the financial year ending 31 March 2016. I question the 2016 figure as it seems to me that there is an item which is very much of a capital nature included in the expenditure column. In any event, while the most recent balance sheet shows some net equity, I am satisfied that a fine in the vicinity of $183,750 to be paid within 30 days[14] is likely to place the defendant company in an untenable and unsustainable position. However, though, in line with the sentiments I have expressed above about

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[12] Sections 14 and 40.
[13] *East Bay Heli Services Ltd v R*, HC Rotorua, AP53/03, 13/11/2003, Baragwanath J.
[14] Sections 80 and 81, Summary Proceedings Act 1957.

commercial offending, there is a limit to which I am prepared to reduce the appropriate fine. In this case, I am prepared to reduce the global penalty to one of $150,000. That will be applied as a fine of $5500 on each of the 19 FTA charges and a fine of $5055 on each of the CCCFA charges. The cumulative addition of those fines does not quite equal $150,000, but it is very close to it, but those specific per charging document fines are the fines to be imposed. However, they can be paid over a two year period. Therefore, the defendant company can pay globally $75,000 per year in four instalments per year. The first instalment of $18,750 is to be paid no later than 31 October 2016.

Ancillary orders

[66] On 13 May 2016, the Commission filed an application for ancillary orders under the CCCFA. It refined its position at the time of the hearing of the application which occurred at the same time as sentencing submissions were heard on 1 July 2016. Ultimately, the Commission sought an order that the defendant refund the costs of borrowing incurred by debtors who entered into contracts with the defendant between 6 June 2015 and 23 November 2015.

[67] The Commission contends that the jurisdiction to oppose such orders follows in this way. Section 99(1A) CCCFA provides:

> Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22.

[68] The costs of borrowing are defined as including all credit fees, default fees and interest charges. However, they do not include fees or charges past on by third parties.

[69] The Commission states that s 93 CCCFA enables the Court to make certain orders where a defendant has breached any of the provisions of Part 2, Part 3 or Part 3A CCCFA. Sections 17 and 32 are therefore included. Section 94 provides for the orders that can be sought and include an order directing the creditor to refund or credit a payment in accordance with s 48.

[70] Section 48 directs that a creditor is to refund or credit any payment to a debtor that it is not entitled to receive as soon as practicable.

[71] The Commission contends that alternatively the order can be made pursuant to s 94(1)(ca). That provision enables the Court to order that no credit fee, default fee or other fee is payable to the creditor, and that if such a fee or fees have been paid by the debtor, that they be refunded.

[72] The Commission further contends that those provisions taken together provide that the creditor is required to refund the credit fees, default fees and interest charged to the debtor during the period that its documentation did not comply with the disclosure requirements. The Commission limits the order it is seeking to contracts entered into between 6 June and 23 November 2015.

[73] Ace Marketing's contracts provided for the following fees to be charged to debtors:

(i) Application fee of $45;

(ii) Direct debit fee of $10;

(iii) PPSR registration fee of $20 or $25;

(iv) Weekly transaction fee of $1.75.

[74] The direct debit fee and the PPSR registration fee can be regarded as fees passed on from third party, so are not part of the orders that the Commission seeks.

[75] The contracts also provided for default interest charges at 19.95 percent per annum and default fees of $10 per dishonoured or mispayment, and a $6 fee for sending a letter regarding the default.

[76] With those matters in mind, the Commission seeks an order that the defendant refunds, to all debtors who entered into contracts with Ace Marketing between 6 June and 23 November 2015, the application fee, weekly transaction fee

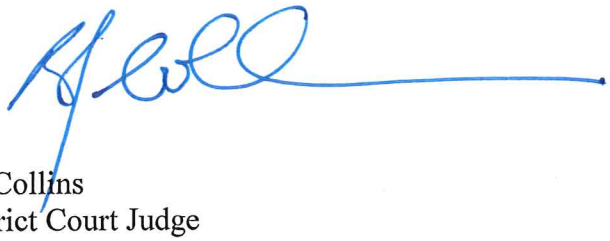
and any default fees or interest charges incurred by those debtors and not otherwise refunded. The Commission advises that the orders would affect 1548 contracts, although it is likely that it will be materially lower on account of cancellations.

[77] Pursuant to s 94(1)(cc), enables the Court to make any other order it thinks fit for the purpose of giving effect to an order under s 94(1)(ca). Pursuant to that section, the Commission seeks an additional order that the defendant provide proof to the Commission within 12 months that the refunds have been made to the affected customers.

[78] The defendant does not oppose the making of these ancillary orders. The defendant advises that it "does not envisage that will require anything close to the 12 months" that the Commission is seeking for the defendant to affect all relevant refunds. Once it has collated the relevant information, Ace Marketing will be contacting customers and making refunds, irrespective of any orders the Court makes. Act Marketing hopes to have all of the refunds paid by 30 September 2016.

[79] In light of the above, there will be orders that for all contracts entered into between 6 June and 23 November 2015 that the debtors be refunded any application fees, weekly transaction fees and any default fees or interest charges incurred by those debtors and not already refunded.

[80] In addition, the defendant is to provide to the Commission proof, within 12 months of the date of this judgment that refunds have been made as ordered.



R J Collins
District Court Judge