

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA705/2023  
[2024] NZCA 213**

BETWEEN                      BRENT IAN ANDREWS  
   Applicant  
  
AND                                COMMERCE COMMISSION  
   Respondent

Court:                          French, Muir and Campbell JJ  
  
Counsel:                        Applicant in person  
   B Hamlin and C A Richardson for Respondent  
  
Judgment:                      5 June 2024 at 11.45 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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**The application for leave to bring a second appeal is declined.**

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**REASONS OF THE COURT**

(Given by Muir J)

**Introduction**

[1] Mr Brent Andrews applies to bring a second appeal against conviction and sentence in respect of two charges which initially came before Judge Harrop in the District Court:<sup>1</sup>

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<sup>1</sup> *Commerce Commission v Andrews* [2023] NZDC 9206 [verdict judgment]; and *Commerce Commission v Andrews* [2023] NZDC 14576 [sentencing notes].

- (a) Failing, without reasonable excuse, to provide information and documents in accordance with a notice issued under s 98(1)(a) and (b) of the Commerce Act 1986 contrary to s 103(1)(a) of that Act.
- (b) Failing, without reasonable excuse, to attend an interview in accordance with a notice under s 98(1)(c) of the Commerce Act contrary to s 103(3)(a).

[2] On 30 October 2023 his subsequent appeal to the High Court was dismissed.<sup>2</sup>

[3] His application for leave to bring a further appeal focuses exclusively on the second of these two convictions. He says he cannot be convicted under s 103(3) because the section cross-references to a non-existent section—s 98(c)—when the correct reference should be s 98(1)(c).

### **Background**

[4] The applicant was a director of Premodealz Ltd (Premodealz), a mobile trader undertaking consumer lending. The convictions relate to the applicant's conduct during an investigation of Premodealz by the Commerce Commission (the Commission).

[5] The Commission had concerns about Premodealz's compliance with the Credit Contracts and Consumer Finance Act 2003. On 21 July 2021 it issued a statutory notice to the company under s 98(1)(a) and (b) of the Commerce Act to produce information and documents to the Commission. Premodealz did not comply with that notice. It had earlier provided some documents, but its response did not comply with the request and was considered inadequate by the Commission.

[6] Because Mr Andrews did not comply with the notice, the Commission undertook further inquiries which indicated that, despite Mr Andrews' advice that Premodealz was no longer trading, a number of borrowers were continuing to make payments to it. On 18 May 2022 it therefore issued a statutory notice to the applicant

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<sup>2</sup> *Andrews v Commerce Commission* [2023] NZHC 3035 [first appeal judgment].

under s 98(1)(c) of the Commerce Act requiring attendance at an interview held at the Commission's office. Mr Andrews advised the Commission by email that he would not attend the interview and he did not do so.

[7] The Commission then brought the two charges previously referred to. In relation to the first of these, Mr Andrews was alleged to have been a party pursuant to s 66 of the Crimes Act 1961 to Premodealz's failure to comply with the notice.

[8] Following conviction and sentence Mr Andrews appealed to the High Court where he raised multiple arguments which are no longer pursued. As to the point on which he now relies, the High Court said:

[68] The first which Mr Andrews emphasised in his oral submissions was that there was a defect in the legislation which excused his compliance. First, the appellant is correct that s 103(3) refers to s 98(c), and at the relevant time there was no s 98(c). However, the legislative history clearly demonstrates that s 103(3) was intended to refer to s 98(1)(c), and by mistake the cross-reference was not updated when the Act was amended by the Commerce (Cartels and Other Matters) Amendment Act 2017 (the Amendment Act). There was an apparent and obvious minor technical error in the legislation but not one which would excuse compliance. There is therefore no merit in this submission.

[9] Mr Andrews submits that the public can have no confidence in the application of the criminal law if courts effectively ignore errors in legislative provisions. He says that the proposed appeal therefore involves a matter of general and public importance and the correction of a miscarriage of justice within the terms of s 237(2) of the Criminal Procedure Act 2011, and that leave should accordingly be given for a second appeal.

## **Discussion**

[10] We approach the application under s 237 on the well-recognised principles discussed in *McCallister v R*.<sup>3</sup> Underpinning any inquiry into whether a proposed second appeal raises either an issue of general public importance or a matter giving rise to a real risk of miscarriage of justice, will be the often related concepts of whether the decision from which the further appeal is sought simply applied well-established

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<sup>3</sup> *McCallister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

principles to a particular fact situation and/or whether there is an argument reasonably available that the court was in error.<sup>4</sup>

[11] We are unpersuaded that the proposed appeal has sufficient merit to warrant a grant of leave. We do not consider there to be any reasonably arguable basis for such appeal.

[12] It is not in dispute that s 103(3) of the Commerce Act contains a typographical error. It says:

- (3) No person, having been required to appear before the Commission pursuant to s 98(c), shall—
  - (a) without reasonable excuse, refuse or fail to appear before the Commission to give evidence; or
  - ...

[13] As the High Court acknowledged, there is no s 98(c). The relevant provision is s 98(1)(c) which provides:

- 98 Commission may require person to supply information or documents or give evidence**
- (1) Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—
    - ...
    - (c) to appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

[14] The legislative history establishes that this error occurred in the following way:

- (a) Between 1990 and 2017, s 98(c) existed in substantially the same form as s 98(1)(c).

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<sup>4</sup> At [36]–[38].

- (b) Section 98 was amended by the Commerce (Cartels and Other Matters) Amendment Act 2017 (the Amendment Act) to insert s 98(2).<sup>5</sup> That subsection clarified that the Commission’s powers “include the power to investigate whether an exception or exemption from this Act (whether under this Act or any other enactment) applies to a person or to a person’s conduct”.
- (c) The existing s 98 was then renumbered s 98(1), and s 98(c) became s 98(1)(c).
- (d) The Amendment Act also amended s 103(4) of the Act to increase the maximum fine available for contraventions of s 103(1), 103(2) and 103(3) from \$10,000 for an individual and \$30,000 for a body corporate to \$100,000 for an individual and \$300,000 in any other case.<sup>6</sup>
- (e) Although s 103 was amended by the Amendment Act, the cross-reference to s 98(c) was not updated.

[15] As *Burrows and Carter Statute Law in New Zealand* notes, New Zealand courts will correct drafting errors both by adding and substituting words to achieve the purpose of an Act.<sup>7</sup> In that context the courts have adopted the approach set out by the House of Lords in *Inco Europe Ltd v First Choice Distribution* where Lord Nicholls said the court must be satisfied about three things when seeking to correct a drafting error:<sup>8</sup>

(1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

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<sup>5</sup> Commerce (Cartels and Other Matters) Amendment Act 2017, s 29.

<sup>6</sup> Section 30.

<sup>7</sup> Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th Ed, LexisNexis, Wellington, 2021) at 409.

<sup>8</sup> *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 (HL) at 592. See for example *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 at [96]–[98] per Tipping J; *Ulrich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [62]; and *Maangi v R* [2017] NZCA 534 at [47].

[16] As to the first of these, we accept the Commission's submission that s 103(3) has a clear purpose. It was intended to create an offence that applies where a person has been required to appear before the Commission but fail to do so. The only power under the Commerce Act to require a person to appear before the Commission is under s 98(1)(c).

[17] As to the second, we accept that the legislative history establishes inadvertence on the part of the draftsman and Parliament in aligning the purpose identified with the provision in question.

[18] As to the third, we have no doubt that had the error been noticed by Parliament, it would have amended s 103(3) to refer to s 98(1)(c). We have come to that conclusion mindful of the fact that if s 103(3) did not engage s 98(1)(c) then:

- (a) The only compulsory interview power in the Commerce Act would be unenforceable.
- (b) Parliament would have effectively decriminalised contraventions of s 103(3) at the same time as it increased the penalty for such contraventions by tenfold.

[19] We accept that outcome cannot have been intended, and that, as a result, the Court can and should read s 103(3) as referring to s 98(1)(c).

[20] Accordingly, the application for leave does not raise any arguable issue in respect of Mr Andrews' convictions.

## **Result**

[21] The application for leave to bring a second appeal is declined.

Solicitors: