IN THE COURT OF APPEAL OF NEW ZEALAND

CA333/2009
[2010] NZCA 374

BETWEEN	COMMERCE COMMISSION Appellant
AND	PROGRESSIVE ENTERPRISES LIMITED Respondent

Hearing: 29 April 2010

Court: Chambers, Arnold and Ellen France JJ

Counsel: J B M Smith and J B Orpin for Appellant
D J Goddard QC and J R E Keenan for Respondents

Judgment: 16 August 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] The Commerce Commission (the Commission) laid 18 informations under ss 17(a) and 40 of the Fair Trading Act 1986 (FTA) against Progressive Enterprises

Ltd (Progressive) arising out of the supply of cereals whose packets carried offers of prizes which were no longer available as the relevant competition had closed. In the District Court, Judge Barry Morris convicted Progressive.[1] On appeal, Asher J quashed the convictions, on the ground that the offence required a particular mental element and that the Commission had not proved that Progressive offered the prizes with that intention.[2]

[2] The Commission then sought leave to appeal to this Court. Asher J granted leave on the following two questions:[3]

> (a) What is the mens rea requirement in s 17(a) of the Fair Trading Act 1986?
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> (b) If s 17(a) of the Fair Trading Act 1986 imposes a mens rea requirement, is it possible under ss 17 and 45 of the Fair Trading Act 1986 to aggregate the mental states of knowledge and intention of different servants or agents of a company in order to create a requisite composite mens rea?

Background

[3] The case was determined by the Courts below on the basis of an agreed summary of facts. The factual summary which follows is drawn largely from Asher J's substantive judgment.

[4] Progressive owns 148 Foodtown, Countdown and Woolworths supermarkets across New Zealand. It addition, it has an interest as franchisor in other chains. It markets various in-house products in all its supermarkets under the "Signature Range" brand, including breakfast cereals. Progressive contracted Daymon Associates (Daymon) to handle the development, sourcing, promotion and advertising of its in-house brands, including the Signature Range line of products. Daymon is a worldwide sales and marketing company which specialises in the development and promotion of in-house brands. The events which form the basis of the charges occurred while Daymon was still managing the Signature Range line of

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1 *Commerce Commission v Progressive Enterprises Ltd* DC Manukau CRI-2007-092-6035, 14 April 2008.

2 *Progressive Enterprises Ltd v Commerce Commission* (2008) 12 TCLR 284 (HC).

3 *Progressive Enterprises Ltd v Commerce Commission* HC Auckland CRI-2008-404-165, 14 May 2009 at [16].

products, although partway through Progressive gave Daymon formal notice that it would be terminating the arrangement in the following year and doing the work itself.

[5] In mid-2006 Daymon proposed to Progressive that it launch a new "Lighten Up" sub-brand of the Signature Range cereals by means of a promotion that offered purchasers of the new cereals the opportunity to enter a draw for one of five trips to the Hunter Valley in Australia (the promotion). A round printed sticker (a roundel) offering purchasers the opportunity to enter the draw was fixed to the front of all the cereal packs involved in the promotion. The roundels did not identify the dates on which the competition began or closed.

[6] During the course of the promotion each cereal pack bearing the roundel contained a pamphlet setting out the details of the competition, including its closing date. Accordingly this information would only become apparent after the cereal had been purchased and the packet opened. To enter the competition a purchaser was required to fill in part of the pamphlet with his or her name and address, which would then be placed in a box for the ultimate draw.

[7] In addition, to assist in drawing attention to the promotion, wobblers (pieces of printed plastic) were hung from the relevant shelves in the supermarket. The wobblers described the offer, but did not state the closing date for the competition. Nor was there any other advertising material at the point of sale that disclosed it. Accordingly, the closing date could only be discovered after the cereal was purchased, the packet opened and the pamphlet read. Progressive did not review or approve the design of the roundel, the wobbler or the entry forms.

[8] The cereals involved in the promotion were produced by two New Zealand manufacturers, Hubbard Food Ltd (Hubbard) and Smart Foods Ltd (Smart Foods). Daymon arranged for Hubbard and Smart Foods to prepare the promotional material for the cereal packets, which were to be delivered with the cereal packs when they were delivered to Progressive supermarkets.

[9] The cereal packs bearing the promotional roundel and containing the competition pamphlet first began appearing on supermarket shelves in the week beginning 2 July 2006. More of these cereal packs appeared on supermarket shelves in the week of 16 July 2006. Advertising materials in the supermarkets promoted the competition. The cereal packs bearing the roundel and containing the competition pamphlet continued to be delivered in the weeks that followed.

[10] The closing date for entry into the competition was 31 August 2006. On 23 August 2006 Hubbard contacted Daymon about what it should do in respect of promotional material on the cereal packs that it would be delivering after 31 August 2006. Daymon instructed Hubbard to destroy the promotional material. On 22 September 2006 one of Progressive's employees approved a payment to Hubbard for the cost of destroying the promotional packaging.

[11] The draw was duly held on 31 August 2006 and the five winners were notified. On 28 September 2006 Progressive approved a poster to be displayed in stores announcing who had won the prizes in the competition. The winners' names were also posted on Progressive's website.

[12] However, neither Daymon nor Progressive gave instructions to the supermarkets as to what to do with the remaining cereal packs bearing the promotional roundels. Further, both Hubbard and Smart Foods continued to produce cereal packs bearing the roundels. Smart Foods continued to deliver cereal packs bearing the roundels to Progressive's distribution centres until mid-October 2006 and Hubbard continued to do so until 12 December 2006. Progressive's management was not aware of this.

[13] On 6 October 2006 a customer complained to Progressive that he had purchased a pack of "Light and Fruity" cereal which bore the promotional roundel but did not contain details of the competition. This complaint was passed to Progressive's customer complaint free-phone number but it was not passed on to the person responsible for in-house brands, Ms Sally Inkster. Ms Inkster had joined Progressive on 20 September 2006, as part of Progressive's move to take over responsibility for its in-house brands from Daymon.

[14] On 11 October 2006 Ms Inkster noticed a promotional wobbler that did not identify the competition closing date while visiting a supermarket. The next morning she put a message in the daily bulletin sent to supermarket store managers, reminding them that the competition had closed on 31 August 2006 and instructing them to remove all point-of-sale promotional material immediately. At that stage Ms Inkster thought that the promotion only involved advertising such as wobblers. She was not aware that cereal packs bearing promotional roundels had continued to be produced or that some such cereal packs might still be in the supply chain.

[15] Another customer, Mr Hollis, made a complaint to Progressive by letter dated 17 October 2006, advising that cereal packs bearing the promotional roundel had been on display since the competition had closed. It is not known when that letter was received by Progressive.

[16] On 25 October 2006 Ms Inkster sent a message to all stores asking them to display the winners' poster prominently so that customers were aware that the competition had closed. She again reminded them to remove any advertising, as follows: "PLEASE REMOVE all point of sale which advertises the promotion". Ms Inkster was still unaware of the continued production of cereal packs bearing promotional roundels, or their presence in the supply chain. Nor had she been informed at this point of the 17 October 2006 complaint from Mr Hollis.

[17] Ms Inkster learnt of Mr Hollis' complaint on 31 October 2006. Daymon proposed as a solution to the problem of the unsold cereal packs that a sticker be placed over the roundels. Progressive agreed to this. Stickers along with a memorandum of explanation were sent to supermarket managers on 3 November 2006.

[18] On 10 November 2006 Progressive responded to Mr Hollis' complaint and apologised for its lapse in "quality care". Progressive stated that it had spoken to the relevant store manager, had since produced stickers to cover the promotional roundel and had issued a "winners' poster" to all stores. It gave Mr Hollis a voucher for $10.00.

[19] The same day the Commerce Commission advised Progressive that it had received a formal complaint from Mr Hollis. Progressive responded, saying it had addressed the Commission's concerns by way of stickers and reminders. On 22 November, Mr Hollis wrote again to Progressive saying that he had observed that the competition was still being promoted in three supermarkets, and copied his letter to the Commission.

[20] On 5 December 2006 Progressive again told store managers to re-check their stock and to ensure that all references to the competition had been removed. On 6 December 2006, after being contacted again by Commerce Commission staff, the instruction was repeated. As at 6 December 2006 approximately 70 Progressive stores nationwide were still displaying the cereal packs bearing the promotional roundel.

[21] On 11 December 2006 Progressive received fresh deliveries of cereal packs bearing the promotional roundels at its distribution centres. Progressive again instructed the distribution centres to isolate those stocks until further notice. On 12 December 2006 Progressive banned on-pack promotions of Signature Range products where the competition had a final closing date.

The charges

[22] The Commission had no concerns about the running of the competition itself. Its concern was with Progressive's continued display of promotional packs of cereal in some of its stores after the competition had ended. As is apparent from the preceding outline of the facts, promotional roundels advertising the competition were displayed on cereal packets in a large number of stores after 31 August 2006. Clearly the instructions given by Progressive to cover the roundels and not to continue to promote the competition were not implemented by all of Progressive's stores.

[23] The Commission laid 18 informations against Progressive alleging breaches of ss 17(a) and 40 of the FTA. These informations covered only the period from

16 November to 13 December 2006. The Commission chose not to take action in respect of the periods before 16 November or after 13 December.

The offence

[24] Section 17 of the FTA provides:

> **17 Offering gifts and prizes**
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> No person shall,–
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> (a) In connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services; or
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> (b) In connection with the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,–
>
> offer gifts, prizes, or other free items with the intention of not providing them or of not providing them as offered.

[25] The informations as originally laid followed a uniform wording, as follows:

> [Progressive] in connection with the promotion of the supply of goods, namely [a cereal], offered a prize or other free item, namely the chance to win one of five free trips to the Hunter Valley Australia, *when in fact, it did not intend to provide a chance to win that trip as offered*.
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> (Emphasis added.)

However, Judge Morris allowed the Commission to amend the charges at the outset of the hearing by replacing the italicised words with the words "with the intention of not providing the chance to win that trip as offered". As Asher J noted that the original and the amended wording in the informations reflected an important distinction, between an absence of intention to offer a prize and a positive intention not to offer a prize.[4]

[26] There was no dispute that Progressive had committed the physical element of the offence. It was also clear that "no Progressive staff member knew of the offer of prizes while also intending that the prizes not be provided."[5] At issue was the nature

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4 At [30].
5 At [31].

of the necessary mental element and whether the Commission had proved that Progressive had whatever mental element was required.

The High Court decision

[27] Asher J considered the matter under two headings: whether s 17 created an offence of strict liability and, if not, whether the mental states of several Progressive employees could be combined and attributed to Progressive.

[28] As to the first point, Asher J concluded that s 17 did not create an offence of strict liability but, rather, a mental element was required. The Judge identified that mental element as "a positive intention not to provide prizes knowing that they were being offered, the two mental states being knowledge of the offer of the prizes and the concurrent intention not to provide the prizes".[6] In reaching this conclusion, the Judge considered the statutory language and context, the FTA's purpose and previous authority.

[29] As to the second point, Asher J held that it was not permissible to aggregate the mental elements of several Progressive employees so as to create a composite mental element attributable to Progressive.[7] The Judge considered in particular s 45 of the FTA, which deals with conduct by servants or agents, and previous authority.[8]

Discussion

[30] We will deal with the two questions on which Asher J granted leave in turn.

(a) What is the mens rea requirement in s 17(a) of the FTA?

[31] Mr Smith for the Commission (who did not appear in the Courts below) argued that Asher J had erred in his finding that s 17(a) required knowledge that prizes were being offered and the concurrent intention not to provide the prizes.

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6 At [54].
7 At [87].
8 At [66].

This, he submitted, was to interpret s 17 as a full mens rea offence involving dishonesty, as in the case of the various dishonesty offences in the Crimes Act 1961.

[32] Rather, Mr Smith argued, all that was required in the present instance was that:

(a) Progressive had made an offer of a prize;

(b) the offer was made in connection with the supply of goods; and

(c) at the time the offer was made, Progressive did not intend to provide the prize.

In relation to (c), all that had to be shown was that, objectively, there was no intention to provide the prize. There was no need to prove a positive intention not to provide; rather, it was sufficient to prove that there was no intention to provide either by pointing to an absence of intention or to an intention not to provide. Accordingly, an inadvertent or careless offer would be an offence if the offeror had no intention of providing the prize when the offer was made. Mr Smith acknowledged that this was to some extent a "reformulation" of the approach which the Commission had adopted in the High Court, where it had accepted (at least initially) that element (c) could be characterised as requiring mens rea (although its closing position seems to have been that the offence was one of strict liability).[9]

[33] In support of his submission, Mr Smith argued that the particular form of words in s 17 was not determinative and the interpretation which the Commission was advancing gave proper effect to the consumer protection purpose of the section.

[34] We consider that Asher J was right in the conclusion that he reached. In using the language "with the intention of not providing [the prize]", Parliament has identified the particular intention that must be proved. This is often described as a

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9 See [32].

specific intention.[10] It would be unusual, not to say misleading, if Parliament were to use that form of language but intend that it be interpreted in a different sense.

[35] Further, the language of s 17 is to be contrasted with the language of the surrounding sections:

(a) Some sections do not mention any mental element:

- Section 9 does not require a mental element.[11] A breach of it gives rise to civil, but not to criminal, liability.

- Sections 10 – 14(1) do not require any mental element, although a breach will give rise to both civil and criminal liability.

(b) Other sections do address the question of mental element:

- Section 19(1) prohibits a person in trade from advertising for supply at a specified price goods or services which he or she "[d]oes not intend to offer for supply" or "[d]oes not have reasonable grounds for believing can be supplied".

- Section 21 prohibits a person from demanding or accepting payment for goods or services if at the time he or she "[d]oes not intend to supply the goods or services" or "[i]ntends to supply goods or services materially different from [those paid for]" or "[d]oes not have reasonable grounds to believe" he or she will be able to supply.

The language used in these sections differs from that found in s 17. The sections prohibit conduct unless a particular mental state or set of circumstances is present (that is, unless there is an intention to offer

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10 See, for example, *Commerce Commission v Colony Resorts Ltd* HC Wellington AP153/90, 19 September 1990 at 5.

11 *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1 (HC) at 27 and 30.

the goods or services for supply or there are reasonable grounds for believing they can be supplied). Section 17 differs in that it requires that an offer of a prize be made *with* a *specific* intention, namely that of not providing the prize. We do not see the different mental element formulations as being interchangeable, as submitted by Mr Smith.

[36] In our view, the statutory language is decisive. We acknowledge our obligation to ascertain the meaning of an enactment "from its text and in the light of its purpose".[12] However, we do not consider that we can properly ignore or adjust the plain language of s 17 on the ground that the Commission's preferred interpretation will better serve the FTA's purpose of consumer protection. The proper scope of the FTA is primarily for Parliament's determination, and its assessment is recorded in the plain language it has used. Placed in the context of the statutory scheme, this language reflects Parliament's view of the appropriate balance between the competing interests involved. Had Parliament wanted to achieve the result contended for by the Commission, it could easily have used language apt to achieve that, as it has in other sections.

[37] Accordingly, we do not accept that an offence against s 17 can be committed inadvertently or carelessly. There must be first, an offer of a prize in connection with the supply of goods and second, a co-existing intention of not providing the prize. As Asher J found,[13] this view is consistent with earlier New Zealand authorities[14] and with Australian authorities under the similarly worded Australian provision.[15]

(b) Can the mens rea requirement be met by aggregating the mental states of several of Progressive's employees or agents to create a composite mens rea?

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12 Interpretation Act 1999, s 5(1).

13 At [48]–[53].

14 *Commerce Commission v Colony Resorts Ltd* at 5; *Adair v Commerce Commission* (1994) 6 TCLR 126 (HC) at 136–137 (this case went on appeal, but this point was not disturbed: *Commerce Commission v Adair* (1995) 6 TCLR 655).

15 Trade Practices Act 1974 (Cth), s 54. See *Australian Consumer and Competition Commission v Nationwide News Pty Ltd* (1996) ATPR 41-519 at 42,496. See John Heydon *Trade Practices Law: Restrictive Trade Practices, Deceptive Conduct, and Consumer Protection* (looseleaf ed, Lawbook Co) at [13.60].

[38] Mr Smith accepted that, if the mental element required under s 17(a) is as Asher J found it to be, no question of aggregation can arise. This is because, in relation to an offence requiring a dishonest intention, it is contrary to principle to combine the mental states of different actors, each on its own innocent, in order to create a guilty mind. As Devlin J put it, "you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind".[16] Given our finding on the first question, this is sufficient to deal with the second question.

Decision

[39] We answer the questions as follows:

Question:

What is the mens rea requirement in s 17(a) of the Fair Trading Act 1986?

Our answer:

Section 17(a) requires proof of a specific intention, that is, an intention of not providing the gifts, prizes or other free items or of not providing them as offered, which must be present at the time the offer is made in connection with the supply or possible supply of goods or services.

Question:

If s 17(a) of the Fair Trading Act 1986 imposes a mens rea requirement, is it possible under ss 17 and 45 of the Fair Trading Act 1986 to aggregate the mental states of knowledge and intention of different servants or agents of a company in order to create a requisite composite mens rea?

Our answer:

No.

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[16] *Armstrong v Strain* [1952] 1 KB 232 (CA) at 246 per Birkett LJ quoting from the judgment of

[40] Accordingly, we dismiss the appeal. The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for two counsel.

Solicitors:
Commerce Commision, Wellington for Appellant
Gilbert Walker, Auckland for Respondent

Devlin J under appeal.