IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2015-009-009950
[2016] NZDC 11109

COMMERCE COMMISSION
Prosecutor

v

GERARD JAMES THOMSON
Defendant

Hearing: 17 June 2016

Appearances: S Lowery for the Prosecutor
J Brandts-Giesen for the Defendant

Judgment: 17 June 2016

NOTES OF JUDGE B P CALLAGHAN ON SENTENCING

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[1] I am going to deliver now my sentence and sentencing remarks but because it is an oral decision there may be some inaccuracies grammatically and I will reserve the right to correct the decision in respect of any mistakes and I just want it known that I have taken into account all the information that is in front of me, including the written submissions, victim impact statements, summary of facts, testimonials, pre-sentence or the reparation report and if I do not mention some things it is not because I have not taken them into account. It is neither desirable nor necessary.

[2] Here Mr Thomson, who was the director of Flaxmill Limited, has pleaded guilty to three charges under the Fair Trading Act 1986 of making a false or misleading representation concerning the existence of a guarantee and the three offences relate to three building contracts led to or entered into between

Flaxmill and Ms Davidson who is present, a Mr and Mrs Goodship and Lorna Stewart.

[3] The summary of facts sets out the background and essentially it is this, that the building contracts were entered into containing a specific provision in the standard form building contract that, "The builder shall apply for a Homefirst Guarantee prior to commencement of the work." This was not done.

[4] There is an allegation in the summary of facts and in the material before me that over and above that, the defendant Mr Thomson had assured the various complainants in one form or another that their work would be guaranteed. There is a dispute as to what he meant by that. Some of the complainants say that they believed and understood from him that it was the guarantee for the Homefirst Guarantee. He maintains it was to do with his personal guarantee in respect of work which his company and he being the alter ego would stand by.

[5] In any event I think it matters not, given that there was the specific matter is not what the oral representations were because one does not really need to go much further than what is in the building contract that the complainants each signed to see that clearly there was this representation.

[6] The defence say that the defendant's submission here to apply for the Homefirst Guarantee has resulted from carelessness. That with respect understates the situation as I see it. Even putting to one side the oral representations that I have discussed, the building contract used a standard form and specifically stated that the builder shall apply for the guarantee prior to the commencement of the works.

[7] So as I have accentuated the contract, therefore, specifically provided for this and both the defendant and the company have to be taken to have known this. Therefore, I cannot accept in light of that provision in the contract that it can be said to be careless. At best it is gross carelessness or gross recklessness.

[8] The defendant himself, while accepting his liability in the material before me, although the position may have changed slightly in counsel submissions this

morning, does not seem to have realised the impact that this failure has had on particularly two of the complainants, Ms Davidson and the Goodships. Until all was explained to me by counsel, as counsel this morning, the reparation report tended to suggest that he felt he had been hard done by and there was really no basis to these charges. It has been explained to me that this was taken out of context, the comments that he did not agree and to quote the probation officer, "These are drummed up charges." It is hard to see how, even if that is taken out of context, what it could mean other than he does not seem to have accepted, as I have said, the full implication of what has occurred.

[9] As Judge Farish, I think, intonated in or said in the *Balmoral Homes*[1] decision which I have been referred to, most home buyers, particularly first home buyers, rely on the builders and rely on the confidence that they can expect from a guarantee such as this which despite the nomenclature are quite common throughout the building industry.

[10] Now I have to remember that the breach of the building contract and the fundamental basis for this charge was that the defendant company did not apply for the guarantee of, on behalf of these three building owners. The contract itself was not a guarantee that there would be a guarantee but it said that one would be applied for but on an overview of the evidence and the material before me it is very likely that each would have qualified had the application been made.

[11] The issue of reparation is not straightforward, particularly as Ms Davidson's case where there has already been an adjudication for an amount of the building deficits and there was an adjudicated award of $14,356.90 leaving a shortfall in the actual cost to her of $17,941.12, a difference of $3584.22.

[12] I do not consider any answer to the reparation now that the defendant or the company was able to or still is able to carry out remedial works of which a limited amount does seem to be acknowledged. The trust and relationship between the defendant and by that I include his company and the complainants Ms Davidson and

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[1] *Commerce Commission v Day and Anor*, CRI-2010-009-004417, Christchurch District Court, 1 September 2010, Judge Farish.

the Goodships has broken down completely and any suggestion of a working relationship would be untenable and I note in respect of the Goodships there is the suggestion that the company could still carry out what they claim is remedial works which is not accepted by the defendant.

[13] So in looking at the issue of sentencing I am going to consider first the issue of reparation, secondly the calculation of a fine including an adjustment of course for reparation if ordered which I intend to order and then a third matter to take an overall view and stand back and look at the totality of the financial penalties.

[14] Reparation under s 32 Sentencing Act 2002 is a provision where the Court can order some monetary recompense to a person who has suffered through offending if the loss or damage, including emotional harm, has occurred through or by means of an offence and as I mentioned in submissions this morning, and I refer to *Hall's Sentencing* text at s a 32.7:

> The keywords in s 32(1) are, "through or by means of the offence." It is a wide expression and is to be approached in a commonsense way. Resort to refined causation arguments is not to be encouraged.

[15] In *R v Donaldson* and *R v Chapman* [2006] NZCA 279 (2 October 2006) at [36] the Court of Appeal said this:

> The statutory phrase, "through or by means of an offence," is of wide expression and its outer limits are not immediately obvious. It may, therefore, prove helpful to have resort to the concepts of remoteness, materiality and intervening act (novus actus interveniens), at least in analysing more difficult factual situations. However, we endorse the viewpoint that reparation is to be approached in a broad commonsense way and resort to refined causation arguments is not to be encouraged.

[16] Just going from what the Court of Appeal stated in that decision, each case of course will depend on its own factual scenario and the difficulties or otherwise must be considered in a factual matrix of the particular case the Court is dealing with.

[17] In respect of reparation, the issue of a Homefirst Guarantee not being applied for has left Ms Davidson and the Goodships bereft of the comfort of the sanctity of a guarantee. There may well have been other building defects that are not covered by the guarantee. I cannot say with any definitive view that Ms Davidson's and the

Goodships' losses would have been entirely covered. The likelihood is that there would have been some items covered. I say that because of the very intrinsic nature of a building dispute.

[18] I indicated at the outset of submissions this morning that I did not consider that I could award a sum for diminution in value of Ms Davidson's property. The reason is that in the context of a damages award, such a sum is a speculative exercise and in my assessment too remote to come within the provisions of s 32. This does not mean it can be otherwise explored but issues as I have indicated of remoteness of damage are particularly relevant here.

[19] Ms Davidson's complaint and that of the Goodships relates to a building dispute. There are issues in the case of Ms Davidson as suggested by the defence as to design faults and a general breakdown in relationships with Flaxmill personnel. Defence also point to the fact that this was a part build to an existing building and there were inherent building difficulties. That is not accepted by Ms Davidson.

[20] As to the Goodships, the argument is that the defects there are of a type to be expected due to the environmental and climatic conditions. I do not have any expert evidence one way or the other.

[21] As I have indicated, some of the losses that Ms Davidson and the Goodships claim may well be covered by the guarantee and some may not and I need to approach this in a commonsense and broad way. I note that the defendant withdrew from the submission that I could not award Ms Davidson the difference between what the adjudicator awarded and what she actually spent, including in that the disbursements for building surveys, consents, et cetera.

[22] I am not going to repeat what I have said about the difficulties in assessing what would be covered and what would not but otherwise and to say had there been a guarantee, it seems to me that a number of the items would well have been covered and I intend to approach this on the basis that at least 50 percent of the losses would be covered.

[23] In respect of emotional harm reparation, I note the effects that this has had on Ms Davidson, a successful career woman who has been emotionally devastated by this. The suggestion by the prosecutor is that I award $5000 as emotional harm reparation and the defence say a lesser sum.

[24] I noted this morning the personal effect that this issue has had on Ms Davidson when she read her victim impact statement and as I pointed out during submissions that an offender has to take a victim as he or she finds the victim and everybody reacts differently to the effects of offending and is illustrated in this case because Mrs Stewart, or the Stewarts more correctly, do not appear to have been emotionally affected although the same is not said about the Goodships and indeed obviously Ms Davidson.

[25] I consider, when I stand back and look overall and bearing in mind that I just have to make a calculation, that a sum of $6000 is not an unreasonable amount for emotional harm reparation for Ms Davidson, bearing in mind what I have said that the building guarantee if it had been done may not have covered everything. Added to that, I believe it is a reasonable approach in respect of the shortfall for the remedial work, to award the difference between the adjudication and what she in fact was she spent at one half of that which in round figures is $1792 together with one half of the amount for the disbursements based on the same reasoning, which is $1900. So that added to the $6000 emotional harm reparation would make an award of just over $9600 and I round that off at the sum of $9500 including in that $6000 for emotional harm.

[26] In respect of the Goodships, to me it appears that they have not been affected as greatly and I do not minimise the effect on them and it is always a matter of degree and I assess their reparation claim as to one half of the amount they say have received a quote for as to repairing the deficits and that comes to $3729 plus an emotional harm reparation award to them of $3500. When I stand back and look at it overall, while they have been affected I assess that it is to a lesser degree than Ms Davidson so I would assess the total reparation to the Goodships at $7200 based on emotional harm reparation of $3500 and the balance for in round figures to go towards costs of the rectification work.

[27] I do not consider that it is appropriate to make any award for the insurance premium not paid because it seems to me quite clear that on ordinary commercial basis of that would have been a cost to the building owner because the contract merely says it is going to be applied for on their behalf and at the end of the day in my assessment the owners would have had to pay this amount.

[28] In respect of the level of fine and of course in accordance with the *R v Taueki* [2005] 3 NZLR 372 (CA) principles, I have to assess the aggravating and mitigating aspects of the offending generally and then I have to make allowance for any aggravating and mitigating personal matters in relation to the defendant. I have to also bear in mind the provisions of the Fair Trading Act which is the governing legislation in respect of this offending and it is appropriately summarised in Mr Lowery's first submissions at page 3 where he has referred to the objectives of the Act being designed to facilitate fair competition and consumer welfare through accurate disclosures and fair trade practices. It is a consumer focused piece of legislation and gives force to the notion that traders who conduct business fairly and lawfully should not be disadvantaged by those who do not.

[29] In addition, of course s 9 Sentencing Act is relevant in assessing aggravating and mitigating aspects of offending and aggravating and mitigating aspects of the personal position of a defendant, including the Court must take into account the means of an offender; the status of an offender, whether or not that offender is a first offender or not, which here is the case; any attempts at reparation which have been made, in which this case there has not in a sense of actual payment or amounts. The Court has to also take into account any loss that may have been suffered as a result of the offending.

[30] In respect of the aggravating features of this offending as I have said and in my view, it cannot be described as being simply careless. It is more than that. It is gross carelessness or gross recklessness because of the very nature of the contract which provided that these guarantees would be applied for. I have to take into account the effects on the victim and in particular the victims here, Ms Davidson and the Goodships and I have already commented on the effect on them. I have to take into account in respect of them the harm that has been suffered. I have taken into

account the submissions made by Mr Lowery as to the aggravating features and the submissions made by Mr Brandts-Giesen but I think the aggravating features are as I have mentioned, together with the need of the Court to make an offender accountable, to denounce this type of behaviour in a commercial setting and I am also to take into account deterrence for others who might be involved.

[31] In respect of any mitigating features of the offending, clearly there are none.

[32] In this case the prosecution have suggested a starting point on a global basis of between $24,000 to $30,000. In respect of fines before adjustments are made, Mr Brandts-Giesen on behalf of the defendant suggested I could pitch it at a lower level of between $10,000 to $15,000. Reference has been made to a number of cases including the *Balmoral Homes*[2] decision, *Commerce Commission v Sutherland* (CRI-2013-009-010152, Judge P R Kellar, 6 December 2013) and *Commerce Commission v Ticketek NZ Ltd* [2007]DCR 910.

[33] The maximum fine is $60,000 for each offence. Although I am invited to approach this on a global basis I need to look at the offences in respect of each of the individuals including the repercussions for them and in my assessment I take a starting point in respect of the offence relating to Ms Davidson's absence of a guarantee at $10,000, in respect of the Goodships $7500 and in respect of the Stewarts $6000, being a total of $23,500.

[34] Mr Brandts-Giesen has made submissions both orally and in writing about the effect that adverse publicity has had on the defendant's business, including an earlier TV news bulletin, which I was unaware of, and a retraction after that and has mentioned in submissions that effectively the defendant's otherwise lucrative building business (when I say defendant, I mean the company) that has dried up and the defendant has now as a result of these offences having been made public is working as a subcontractor.

[35] Of course publicity is always considered as part of the penalty but of course if it gets to a stage where it has significantly adverse effects then the Court can

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[2] Supra

rightly take into account in the form of a penalty already suffered and I think there is a reasonable basis for making a moderate allowance and I would do that of $2500 which would reduce the sum to $21,000.

[36] The defendant is a first offender, I have noted the testimonials filed. There are no aggravating features and it is accepted in sentencing decisions that a first offender qualifies for an allowance for a previous good record. I am bearing in mind here that there were the three offences but they were committed over a reasonably short period of time. I would make an allowance of $2000, reducing the global starting point of the fines to $19,000.

[37] I am asked to consider the means of the defendant. It has been stated in many cases that the Court must take a broad view and while I accept there have been repercussions for the defendant, the defendant is in a position in my opinion to be able to meet a financial penalty and I do not see his position as noted in the accounts as being such that I should make any further adjustment downwards in respect of his financial position. I have already made an allowance in respect of the adverse effect the publicity has had.

[38] It is appropriate to make an allowance in respect of an award of reparation and I adopt the *Department of Labour v Hanham & Philp Contractors Ltd* (HC Christchurch CRI-2008-409-000002, 17 December 2008) approach where a full bench of the High Court thought in respect of reparation the Court would be justified of making an allowance in the region of 15 percent for the payment of reparation, and rounding that off, that would reduce the global starting point of the fine to $16,000.

[39] I am satisfied in the circumstances here that an allowance for a guilty plea of one fifth, 20 percent, should be allowed. Whilst the Supreme Court in *R v Hessell* [2010] NZSC 135; [2011] 1 NZLR; (2010) 24 CRNZ 966 said that the Court could allow up to 25 percent that is not the hard and fast rule. In this case I am not convinced entirely, at least up until today, that there has been any real significant remorse shown by the defendant which would allow me to go to a 25 percent

allowance but 20 percent given is what I consider reasonable and that would reduce the financial penalty by a fifth in round figures to $12,800.

[40] When I stand back and look at the overall fine and the reparation, that is $12,800 plus $9500 to Ms Davidson and $7200 to the Goodships which comes to $29,500, I do not think that is disproportionate to the offending here. The defendant says that he will need to pay off the fines and offers $200 per week. Whilst I am satisfied that part of the fine can be paid that way, in my view this case does require him to make some readjustments to his financial situation and the sum of at least $10,000 should be paid within 28 days and the balance can be paid at that rate suggested with a review by the registrar in three months.

[41] So Mr Thomson, if you will stand I will impose the penalties that I have indicated to be imposed. In respect of the charge relating to the absence of a guarantee for Ms Davidson, you will be convicted and fined $6000 plus Court costs plus reparation for emotional harm reparation of $6000 and $3500 in respect of actual losses.

[42] In respect of the Goodships' charge, you will be convicted and fined $4000 and ordered to pay Court costs plus reparation of emotional harm of $3500 plus reparation of actual losses as per my decision of $3700. In respect of the charges for Ms Stewart, a conviction and fine of $2800 and Court costs on all. The rate of payment of the fine reparation and costs, noting that the Sentencing Act provides for reparation to be paid to first and paid by the Court to complainants first, they are to be paid at by the sum of $10,000 within 28 days and after that of no less than $200 per week with the first payment to be within seven days for the three months following, and then to be reviewed by the registrar following that as to the amount of weekly payments.

B P Callaghan
District Court Judge