IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2016-009-004647
[2017] NZDC 13866

COMMERCE COMMISSION
Prosecutor

v

ACUTE FINANCE LIMITED
Defendant

Hearing: 23 June 2017

Appearances: S Lowery for the Prosecutor
P Shamy for the Defendant

Judgment: 23 June 2017

NOTES OF JUDGE T J GILBERT ON SENTENCING

---

[1] Acute Finance Limited is a Christchurch-based finance company specialising in small personal loans of between $300 and $5,000 with terms of up to three years. It is a closely held company, and Suzanne Harper is the individual primarily behind it. Most of Acute's customers are low-income individuals.

[2] This prosecution focuses on Acute's activities in the 2014 financial year. During that year, Acute generated revenue of $316,000 with a pre-tax operating surplus of $166,000. It entered into 430 loan contracts with debtors, and this prosecution covers a sample of 67 of those loans. For reasons of expediency, the remaining 84 percent of the loans from 2014 were not investigated. Whilst it seems likely that they were no different to the 67 that were reviewed, I need to focus on the contracts which are captured by the charges.

[3] The four representative charges each cover a period of three months and are laid under s 41 Credit Contracts and Consumer Finance Act 2003. They relate to what is known as a repayment waiver fee. Essentially, under the loan contracts Acute agreed to meet debtors' obligations under their loans if that debtor died, became disabled, or was made redundant. In order to meet the potential cost, Acute charged a repayment waiver fee. Every contract required that fee to be paid, and it varied between contracts.

[4] There is nothing wrong in principle with charging such a fee. However, the Act requires that such ancillary fees are reasonable, bearing in mind the actual costs associated with the repayment waiver. The purpose of this is to ensure creditors cannot charge lower interest rates by bolstering their profits from other areas. That type of practice inhibits potential borrowers' abilities to compare apples with apples when looking at interest rates in the lending market. That is particularly undesirable at the end of the market that Acute operated at, which primarily consisted of low-income families and individuals who are often vulnerable.

[5] In relation to the 67 loans that were reviewed, Acute charged repayment waiver fees totalling $16,600. Its actual costs closely associated with the repayment waiver were only a third of that, approximately $5,600. Accordingly, it was charging about three times more than it was legitimately entitled to, and was therefore generating profit in a way that was prohibited by the Act.

[6] The most relevant purposes and principles of sentencing in this case, in my view, are denunciation, deterrence, and holding Acute to account, although of course all of the purposes and principles of sentencing have to be taken into account, and I have borne them in mind.

[7] Investigations and prosecutions under s 41 are, by their very nature, complex and time-consuming. Detecting this type of offending is not easy. It is important that lenders, in this case Acute but also more generally others operating within a similar market, realise that the potential costs of breaching the Act are significant. Fines must not simply be licence fees, but need to bite in order to promote the underlying purposes of the legislation, which include the protection of many very

vulnerable borrowers and their families. It is that sentiment which undoubtedly contributed to Parliament significantly increasing the maximum penalties in June 2014 from $30,000 to $600,000 in the case of corporate entities. This prosecution, of course, pre-dates that increase, but I am alive to the drivers which sit behind the Act and which, no doubt, contributed to the recent increase in penalties.

[8] There are a number of factors which the prosecution characterise as aggravating. First, there is the extent of the overcharging and the number of consumers affected. Acute was levying a fee that was approximately three times what was reasonable. The $10,000 total that was overcharged, spread among the 67 loans, averages out to around about $150 per loan. Whilst to many in the community that may be insignificant, to Acute's predominant customer base, low-income and often vulnerable borrowers, that sum is very material. The offending continued over the course of the year covered by the charges, and resulted in at least a moderately significant profit.

[9] There is some dispute about whether the offending was inadvertent or reckless. Acute says this was a mistake and that it was astonished to find that it was in breach of the law. Various references have been filed to suggest that Acute, and Ms Harper in particular, are in fact responsible lenders and do not fall into the category that some might describe as loan sharks. The Commission says that the offending was more insidious than simple inadvertence.

[10] I accept on the basis of what has been put before me that this was certainly not deliberate offending, and I am not sure that it can properly be characterised as reckless either, in the sense that Acute realised a risk of breach and elected to run that risk nonetheless. In my view, though, it certainly was careless offending. Lenders like Acute operate in what is a highly regulated industry, and are expected to be on top of their obligations under the Act. They should properly analyse any ancillary fees to ensure they are legitimate, and a failure to do so is, in my view, not an adequate explanation for offending. Whilst the Act is complex in some respects, it certainly is not a new piece of law, and the responsibility is on those looking to lend funds to ensure that they are doing it lawfully.

[11] In setting a starting point, I bear in mind that the maximum fine for one charge is $30,000. In this case, there are four representative charges in total, capturing 67 different contracts. The theoretical maximum penalty is, therefore, a fine of $120,000.

[12] There is no tariff for offending in this area. There have been a number of previous cases decided under the Act, and I have been provided with several of them. They vary in usefulness, though, because they are frequently different in terms of the factors and circumstances at play, and there are also different charging combinations that are preferred by the Commission.

[13] The Commission submits that a starting point, when looking at the offending globally, should be in the region of $30,000 to $50,000. It qualifies that by saying a figure at the top of that range is justified, given the factors in this case. An end point is suggested by Mr Lowery of between $27,000 and $42,000. Mr Shamy takes a different view. He has characterised the offending as an unintentional mistake by a company which is indeed socially responsible. He says that the culpability is at the lower end and submits that an end fine should be in the order of $10,000 to $12,000, extrapolated, I expect, from a starting point if one was to be identified, of somewhere approaching $20,000 in totality.

[14] When I consider Acute's circumstances and the representative nature of the charges, I think a starting point of $7000 per charge is justified. That is 23 percent of the maximum for each charge, and aggregated comes to $28,000. I consider that to be sufficient to meet the purposes and principles of sentencing, to fit reasonably comfortably alongside the cases that have been referred to me, such as they are relevant, and to recognise that this was careless rather than reckless or deliberate offending.

[15] In setting a starting point, I need to bear in mind and emphasise that lenders have to realise that the obligations under the Act are theirs to fulfil proactively. I consider that any lower starting point would not have the requisite deterrent effect and would simply be viewed as a licence fee. Had the offending been reckless or deliberate, I would have adopted a higher starting point, much more in line with Mr

Lowery's submissions in the case of recklessness and, indeed, significantly higher than that had it been deliberate.

[16] There are several mitigating features which I need to consider. It is apparent that Acute co-operated with the Commission during this investigation by providing information. Ms Harper attended a voluntary interview. Acute has no prior convictions and Ms Harper, from the reference I have read, is a decent person. Further, Acute has agreed to refund the amounts overcharged on the 67 sample loans. In my view, all of that justifies a discount of approximately 15 percent, which is about $4,000. That brings me back to $24,000.

[17] Finally, a discount is due for Acute's guilty plea. That was entered very late in the piece, only one working day prior to the trial. I certainly acknowledge that there is some complexity to these matters, and in this case the actuaries were working through things. The reality is, though, on any analysis it is a very late plea. I allow a further discount of $2,000 which is eight percent.

[18] The end fine is $22,000 in total which will be spread $5,500 per charge. In addition, there will be Court costs of $130 per charge.

[19] I have to consider whether or not to make orders under the Act, effectively reimbursing the individuals who were harmed by this offending. I have been assured by Mr Shamy that Acute has taken steps to repay the 67 borrowers affected by this, and on that basis I am not going to make any formal orders. But, in the event that that turns out not to be the case, leave is reserved for the Commission to bring the matter back before me.

T J Gilbert
District Court Judge