IN THE DISTRICT COURT
AT NAPIER

CRI-2016-041-000726
[2017] NZDC 10534

COMMERCE COMMISSION
Prosecutor

v

CASH TO YOU LOANS LIMITED
Defendant

Hearing:	19 May 2017
Appearances:	A McConachy for the Prosecutor S J Jefferson for the Defendant
Judgment:	19 May 2017

NOTES OF JUDGE G A REA ON SENTENCING

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[1] The company Cash To You Loans Limited has pleaded guilty to eight separate charges laid under the Credit Contracts and Consumer Finance Act 2003.

[2] The matter has had a lengthy history to get to this final sentencing day. Originally on 23 September last year there was a request for a sentence indication which could not be given because of inadequate overall information. Subsequently, there was a reduction in the number of charges, the company pleaded guilty and I have had comprehensive submissions from both counsel as to what the outcome should be and I have asked a number of questions of both counsel about matters arising as well.

[3] Each of the charges has a maximum penalty of $30,000 and it is submitted by Ms McConachy on behalf of the informant that fines in excess of $100,000 should be imposed upon the company to reflect the seriousness of the offending.

[4] The charges divide up into four separate categories:

(a) Charge 1 is proven that between 1 April 2013 and 23 June 2014, by failing to disclose debtors under a Consumer Credit Contract, there was an advantage to the company.

(b) Charge 2 deals with a breach by failing to express to debtors under Consumer Debt Contracts the required information clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person and not likely to deceive or mislead them.

(c) Charges 3 to 5 deal with an interest charge in excess of the maximum amount permitted in the contract. What has happened there is that the default interest provision in the contract was set at zero percent. It is likely that that was a mistake, but as Ms McConachy says that is what was in the contract and that is what those who were borrowing the money were entitled to expect because that was what they had agreed to.

(d) Charges 6 to 8 deal with the defendant company getting a credit fee that they were not entitled to.

[5] Overall, in the ways that I have outlined, it is alleged that this defendant company received in excess of $28,000 that it was not entitled to. Since the matter has come before the Court, the company has ordered its affairs to enable all but $3149.80 to be re-credited to persons who should not have been charged the particular amounts in the first place. Ms McConachy expresses concern about what has happened in relation to the $3149.80 because it seems to have been credited in a place that it should not have gone to. It could not be paid back to those who were due it because those people cannot be identified or are no longer available to have it

repaid to them. So overall, the loss is around the $3100 and something like $25,000 has, in its own way, been repaid.

[6] Ms McConachy makes the point, which is a valid one, that but for the prosecution not only would that money not have been repaid, this company would have continued on in the way that it was going and further persons would have suffered financially as a result of it. It is also accepted that this conduct went on for some time and was simply part of the business operation of this company.

[7] A significant feature of this case and where it departs from many others is that the director of the company here has not been charged. Ms McConachy advises that that was a deliberate decision because there was no suggestion of dishonesty and it was the Commission's view that unless the Commission could prove that the director deliberately assisted the company in, essentially, "ripping off" its clients, then it would be unsuccessful in a prosecution. That in itself gives rise to the obvious collateral that there is no allegation here at all of dishonesty; that has been made clear right from the very start. It is gross negligence that is alleged and it is gross negligence in the face of a prior warning.

[8] I have also received financial details from the accountant for the company. Those details are as at the end of the financial year, 31 March 2015 and it does not paint a happy picture for the defendant company. Ms McConachy questions the overall validity of some of the material in the financial disclosure; however, for the purpose of this sentencing I need to factor in that the company is impecunious and that does have an effect on the fines that are imposed.

[9] It is necessary, to start with, to go back to the purpose of this legislation. It is to protect those that in our community desperately need protecting in a financial sense. Much of this legislation deals with the regulation of lenders who are operating at the third or fourth tier. They are providing funds generally at very high interest rates for people in our community who either cannot access loans through other means or, for some other reason, are driven to pay higher interest rates to operations such as this to enable them to fund their own lives.

[10] It is educational to look at the material provided here and the persons who have borrowed the money and the amounts that they have borrowed; they are all in small amounts with the largest loan, I believe, being $3500. It is absolute vital when dealing with the vulnerable people in our community who go to loan operations such as this that they should be protected and that there should be a significant response in the event that the procedures are not properly followed and there is a loss to people as a result.

[11] It has to be said that this is not one of those cases where it is alleged that by chicanery or dishonest conduct a commercial operation is taking advantage of people who can ill-afford to be taken advantage of. It is submitted here for the Commission that we are dealing with negligence – "gross negligence" as Ms McConachy has termed it – but this is not deliberate conduct aimed by this company or its director to dishonestly enrich itself at the expense of those it is lending money to. That has to be spelt out very clearly because in cases such as this there can be a merger between what is sometimes perceived as "loan sharking" and this particular case. It is not suggested, as I understand it, that this is a case of what is commonly known as loan sharking.

[12] This has not been an easy case to determine what the overall penalty should be. There is no decision of the higher Courts that provides any guidance or tariff. There are a number of District Court cases that have been referred to me, but as Mr Jefferson says, they must be treated on their own facts and they do not necessarily provide a great deal of assistance in circumstances such as this.

[13] As I have probably already made it clear in the comments to Ms McConachy, I see it as entirely disproportionate that fines anywhere near the vicinity of $100,000 would be imposed here for what is negligent rather than dishonest conduct. I accept the criticism that Ms McConachy made of the analogy that I drew with other prosecutions, but it is significant the level of fines that are being asked for in this sort of prosecution. Undoubtedly, in some cases, fines at that level and higher are warranted to ensure that those lending money in this market know full well that there is more than just a cost of operation involved if they get caught and that there will be a significant sanction. I do not consider fines at the level that have been suggested in

this case need to be imposed to bring that message home to this company, this director or others who are not dishonest but can be bumbling in the way they deal with their affairs.

[14] Having no overall guidance as to what the level of fine really should be in a case such as this and taking into account the fact that the company may not be in a sound position to meet a fine of any sort, I have considered that the appropriate approach is to reflect in the fines about the same amount that the company got away with before the prosecution was commenced, namely in the vicinity of $28,000.

[15] On that basis, I intend to convict and fine the company a total of $3500 on each charge and it will also be ordered to pay Court costs in the sum of $130 on each charge.

[16] Once again, I stress that I do not regard this case as a precedent for anything other than the sentencing in this particular case. There is no allegation of dishonesty, the company is in financial difficulty and I consider that this response is a reasonable one bearing in mind the culpability and bearing in mind that the vast majority of the amount taken has been re-credited to those that it has been taken from.

[17] There is provision under the legislation to ban a company such as this defendant from continuing in this line of work. I do not intend to go over the circumstances of the section in any detail, other than to say that in this case I am satisfied that they have been met and I have had no argument from Mr Jefferson to the contrary.

[18] Accordingly, there will be an indefinite ban on this company Cash To You Loans Limited from continuing on in this line of work. There was originally an application that the director be banned as well; however, that application has been abandoned today by the informant.

[19] I am advised that in the event that the company wishes to commence business again, there are provisions where it can apply to be re-licensed (if that is the correct terminology) but that will be a matter for it in due course.

G A Rea
District Court Judge