

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2016-092-004750
[2017] NZDC 18615**

COMMERCE COMMISSION
Prosecutor

v

MACFUL INTERNATIONAL LIMITED
Defendant

Hearing: 17 August 2017
Appearances: A McConachy for the Prosecutor
D Wilson for the Defendant
Judgment: 17 August 2017

NOTES OF JUDGE N SAINSBURY ON SENTENCING

Introduction

[1] This sentencing is in relation to 16 charges brought against Macful International Limited (Macful). The 16 charges relate to the operation of the defendant's business between April and November 2015. They consist of breaches of Section 17 of the Credit Contracts and Consumer Finance Act (CCCFA) being Charges 1-7 14 April to 16 October 2015, breaches of s 32(1)(c) of the CCCFA being Charges 8-11: 14 April to 12 November 2015, being breaches of s 32(1)(d) of the CCCFA being Charges 12 – 14: 6 June to 12 November 2015 and breaches of s 11 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act) being Charges 15 and 16: 15 April to 13 November 2015.

[2] I have received written and oral submissions from both defence and the prosecution. I acknowledge the assistance of both counsel for that.

[3] The following facts on which sentencing is based are taken from the summary of facts before the Court.

[4] Macful operates a mobile trader business, using the trading name “Ezi Truck”. Mobile traders, often referred to as truck shops, are businesses that do not have fixed retail premises in the traditional sense. Some of these traders operate mobile shops, usually from trucks, while others employ sales staff who sell goods door-to-door, using catalogues and brochures.

[5] Mobile traders use a variety of sales techniques, including uninvited direct sales (through door-to-door or telemarketing sales), parking mobile truck shops in prominent locations and using websites and Facebook. They sell predominantly or exclusively on credit, layby or other deferred terms and often to those who have low incomes and poor credit histories. The price of the goods is often significantly higher than would be charged for comparable goods by mainstream retail traders.

[6] Macful is based in Auckland and operates in suburbs such as Mangere, Manurewa, Otara and Takanini. It sells consumer goods (such as clothes, shoes and electrical goods) on credit, at prices significantly higher than what is charged in mainstream stores.

Commerce Commission’s Mobile Trader Investigation

[7] In recent years, the business practices of mobile traders have become more prominent in the complaints the Commerce Commission (Commission) has received from consumers and their advocates.

[8] In 2014, the Commission opened an investigation into the mobile trader industry. The Commission identified 32 mobile traders during the project. They operated throughout New Zealand, although the majority were based in the North Island, with a particular concentration in Auckland. It was a very dynamic industry, with traders frequently entering and exiting the market.

[9] In August 2015, the Commission published its report, setting out its findings from the investigation into the mobile trader industry. The report identified systemic compliance issues within the industry with respect to traders' obligations under the Credit Contracts and Consumer Finance Act (CCCFA). In particular, the requirement to provide adequate disclosure to consumers prior to entering into consumer credit contracts and a failure to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act) as entities who can act as creditors under credit contracts, or be members of approved dispute resolution schemes.

[10] There was significant media publicity over the report and its findings. In addition, the Commission made mobile traders aware of the report. Most mobile traders were also issued with compliance advice by the Commission in order to change industry behaviour.

Investigation into Macful

[11] Macful formed part of the Commission's initial mobile trader investigation. In 2015, the Commission corresponded with Macful on a number of occasions. The information obtained by the Commission during that correspondence provides the basis for the charges Macful faces.

Macful's Contracts

[12] When entering into consumer credit contracts with debtors, Macful provides those debtors with a standard form contract which contains product and payment details with the terms and conditions of sale on the reverse side (the disclosure document).

[13] Between 14 April and 12 November 2015, Macful entered into no fewer than 3,091 consumer credit contracts with debtors.¹

¹ The number of contracts is made up of 3,081 contracts entered into between 14 April and 16 October 2015. Macful has also provided 10 contracts that were executed between 10 and 12 November 2015. It follows that Macful has likely entered more contracts than the stated figure of 3,091, to account for the contracts entered between 17 October and 9 November 2015.

Breaches of Section 17 of the CCCFA (Charges 1-7 14 April to 16 October 2015)

[14] Prior to 6 June 2015, under s 17 of the CCCFA, creditors who entered consumer credit contracts were required to disclose certain key information to debtors under Schedule 1 of that Act *either* before that contract was made or within five working days of that contract being made.

[15] On 6 June 2015 and subsequently, under s 17 of the CCCFA, creditors who enter consumer credit contracts are required to disclose certain key information to debtors under Schedule 1 of that Act *before* that contract is entered into.

Charges 1 – 2 (14 April – 5 June 2015)

[16] Charges 1 - 2 are representative charges covering the following time periods:

- (a) Charge 1: 14 April – 13 May 2015
- (b) Charge 2: 14 May – 5 June 2015

[17] Between 14 April and 5 June 2015, the disclosure document Macful provided to debtors failed to disclose certain key information applicable to the contract as set out in Schedule 1 to the CCCFA:

- An accurate statement of the initial unpaid balance as at the date of the disclosure document because the balance fails to include the total amount payable under the new contract.
- Accurately state the total number of payments and the total amount of the payments required to be made by the debtor under the contract.
- Adequately describe the security interest taken in connection with the contract.
- Provide a statement of the debtor's right to apply for relief on grounds of unforeseen hardship.
- State the frequency with which continuing disclosure statements would be provided.
- Provide the company's physical address.
- Clearly state the credit fees charged.

Charges 3 - 4: 6 June – 14 August (Representative)

[18] Charges 3-4 are representative charges, covering the following time periods:

- (a) Charge 3: 6 June – 5 July 2015
- (b) Charge 4: 6 July – 14 August 2015

[19] Between 6 June and 14 August 2015, the disclosure document Macful provided to debtors failed to disclose certain key information applicable to the contract as set out in Schedule 1 to the CCCFA.

- An accurate statement of the initial unpaid balance as at the date of the disclosure document because the balance fails to include the total amount payable under the new contract.
- Accurately state the total number of payments and the total amount of the payments required to be made by the debtor under the contract.
- Adequately describe the security interest taken in connection with the contract.
- Provide a statement of the debtor's right to apply for relief on grounds of unforeseen hardship.
- State the frequency with which continuing disclosure statements would be provided.
- Provide the company's physical address.
- Clearly state the credit fees charged.

[20] From 15 August 2015, the defendant commenced using a new form of contract. This contract was also non-compliant with the provisions of the CCCFA.

Charges 5 - 7: 15 August – 12 November 2015 (Representative)

[21] Charges 5 - 7 are representative charges, covering the following time periods:

- (c) Charge 5: 15 August – 5 September 2015
- (d) Charge 6: 6 September – 16 October 2015

(e) Charge 7: 17 October – 12 November 2015

[22] Between 15 August and 12 November 2015, the disclosure document Macful provided to debtors failed to disclose certain key information applicable to the contract as set out in Schedule 1 to the CCCFA.

- An accurate statement of the initial unpaid balance as at the date of the disclosure document because the balance fails to include the total amount payable under the new contract.
- An accurate statement of the total number of payments and the total amount of the payments required to be made by the debtor under the contract.
- A description of the security interest that is taken in connection with the contract, including a clear explanation of the nature of the security interest, the property that is subject to the security interest, the extent to which the debtor's obligations to Macful are secured by the security interest, and what the consequences would be if the debtor were to give a security interest over the same goods to a third party.
- A statement of the debtor's right to apply for relief on grounds of unforeseen hardship.
- The frequency with which continuing disclosure statements would be provided.

Breaches of s 32(1)(c) of the CCCFA (Charges 8-11: 14 April to 12 November 2015)

[23] Charges 8 - 9 are representative charges covering the following time periods:

(a) Charge 8: 14 April – 5 June 2015

(b) Charge 9: 6 June - 14 August 2015

[24] Section 32 of the CCCFA sets out mandatory standards for the style and form in which disclosure is to be provided to debtors under consumer credit contracts. In particular, under s 32(1)(c) disclosures must express the required information clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person.

[25] From 14 April – 14 August 2015, the disclosure document provided to debtors failed to express the required information under Schedule 1 of the CCCFA clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person by expressing many of the terms and conditions:

- (a) With grammar which makes some of the clauses incomprehensible;
- (b) In two condensed columns on a single page; and
- (c) Providing few headings

with effect that the information is difficult to read and key information is obscured.

[26] From 15 August 2015, the defendant commenced using a new form of contract. This contract was also non-compliant with the provisions of the CCCFA.

[27] Charges 10 - 11 are representative charges covering the following time periods:

- (c) Charge 10: 15 August – 16 October 2015;
- (d) Charge 11: 17 October – 12 November 2015.

[28] From 15 August 2015 – 12 November 2015, the disclosure document provided to debtors failed to express the required information under Schedule 1 of the CCCFA clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person by expressing many of the terms and conditions:

- (d) In a small font size;
- (e) In two condensed columns on a single page; and
- (f) providing no spaces or clear division between terms and conditions;

with the effect that the information is difficult to read and key information is obscured.

Breaches of s 32(1)(d) of the CCCFA (Charges 12 – 14: 6 June to 12 November 2015)

[29] Charge 12 is a representative charge covering the following time period:

(a) Charge 12: 6 June – 14 August 2015.

[30] Under s 32(1)(d) of the CCCFA, disclosure must not be likely to deceive or mislead a reasonable person with regard to any particular that is material to the consumer credit contract.

[31] Between 6 June and 14 August 2015, the disclosure document Macful provided to debtors Macful contained standard terms and conditions on the reverse side. The terms and conditions included a statement of the debtor's right to cancel but stated that the debtor could only cancel in circumstances when Macful agreed to the cancellation.

[32] Under s 27 of the CCCFA Act, the debtor has a right to cancel a consumer credit contract in certain circumstances regardless of whether or not the creditor agrees to the cancellation. The right to cancel is a material particular of the contract. Stating that a creditor must agree to a cancellation is likely to mislead or deceive a reasonable person as to a material particular in the contract.

[33] From 15 August 2015, the defendant commenced using a new form of contract. This contract was also non-compliant with the provisions of the CCCFA.

[34] Charges 13 – 14 are representative charges covering the following time periods:

(a) Charge 13: 15 August – 16 October 2015

(b) Charge 14: 17 October – 12 November 2015

[35] Under s 32(1)(d) of the CCCFA, disclosure must not be likely to deceive or mislead a reasonable person with regard to any particular that is material to the consumer credit contract.

[36] The disclosure document correctly stated on the front page that the period for cancellation was five working days from the date of entry into the contract. However, the terms and conditions on the reverse side of the disclosure document state that the statutory cancellation period of the contract is within three working days of receiving the contract documentation. As a result, the disclosure document was likely to mislead or deceive debtors with regard to the time period within which they were able to cancel the contract as of right.

Breaches of s 11 of the FSP Act (Charges 15 and 16: 15 April to 13 November 2015)

[37] Section 11 of the FSP Act requires any person who is in the business of providing a financial service to be registered as a provider of that service and to be a member of an approved dispute resolution scheme. Acting as a creditor under a credit contract is a financial service as defined under the FSP Act. It is an offence to knowingly breach one or both of the s 11 requirements.

[38] Macful was made aware of the requirements under s 11 of the FSP Act through written correspondence from the Commission to Macful, sent on 14 April 2015 and 16 October 2015. Those letters were reviewed by Macful and legal advice was sought in relation to them, as noted in a letter to the Commission from Macful's counsel on 17 November 2015.

[39] Macful did not become registered on the financial service providers register or become a member of an approved dispute resolution scheme until 14 November 2015.

Defendant's History

[40] Macful has not previously been prosecuted or breached of the CCCFA, FSP Act, Commerce Act 1986 or the Fair Trading Act 1986.

Statutory context of sentencing

[41] For a sentencing of this nature, the statutory context is important. As is set out in the prosecution submissions, the Credit Contracts and Consumer Finance Act

2003 is consumer protection legislation and together with the Fair Trading Act 1986 is directed as ensuring the consumers receive full and honest disclosure of information so they can understand their rights and make decisions based on proper information.

[42] The statutory purpose of these provisions is a factor that has been referred to in the cases that dealt with the earlier versions of this legislation but also in the more recent cases that have dealt with this legislation since Parliament increased the penalties.

[43] It is important to note, as other Judges have, that this legislation is there to protect consumers. It is of the utmost importance for the good commercial management of business in this country and that breaches of these terms are to be considered serious. That is reflected in the high financial penalties that can now be imposed.

Assessment of culpability

[44] Turning to the approach to be taken on sentencing. The first step is assessing the level of culpability of this offending. The factors that the prosecution rely upon as top the assessment of culpability necessarily inform the issue of a starting point. In terms of the Sentencing Act 2002 there is the need to hold defendants accountable, to denounce conduct and to deter. In a sentencing of this nature, I consider deterrence is a significant factor.

[45] In terms of the offending itself, the prosecution refers to the extent of the offending. Reference is made to what is seen in the summary set out above. The s 17 failures had important information missing, similarly the s 32 failures are considered to be systematic. The prosecution describes the offending as having a high degree of carelessness. The point is made that the requirements of this legislation have been in place for a long time now regardless of the recent amendments. The prosecution takes the view that there is no excuse for a defendant not being familiar with these obligations.

[46] The number of victims the prosecution argue is significant. There were 3091 debtors affected by the faulty documents that caused this offending. This occurred over a period of seven months. What the prosecution say is that indicates the volume of business. I am invited to infer that that indicates a substantial amount of money was being made with documentation that failed to meet the standards imposed by this legislation. The prosecution also argue that the victims were vulnerable. The nature of this type of business, the mobile trader, targets relatively unsophisticated consumers with low incomes and poor credit histories. It is argued that these are the people most in need of the sort of protection that this legislation is designed to provide.

[47] In terms of the defence, one of the main issues on culpability raised by Mr Wilson is the fact that Macful Limited has endeavoured and did get legal advice about the construction of these documents and that the operators of the business genuinely relied on that advice. Accordingly, that has a bearing on the level of fault. That is a legitimate argument, however it can be overstated.

[48] I regard it in this way, for this type of offending there will be a continuum of culpability. At one end at the worst of cases, there is a situation of wilful, deliberate, misrepresentation. There, a person in order to deprive consumers of their rights in order to maximise profits, provides documentation that does not meet the requirements of the legislation. This then moves those who through lack of any due care or who are cavalier in the way they go about framing their business documents fall foul of the law. There are then those who are ineffective, albeit trying to do the right thing. This may be a case that is nearer to that end of the continuum. So Mr Wilson is right to point out that that is a factor to be taken into account on culpability. However, what does not change is this: that the responsibility remains with the company to get it right and if it turns out not to be right, it bears the consequences.

[49] In terms of the culpability factors outlined by the prosecution, I consider the extent of the offending must have a bearing on where matters sit. That has assisted me particularly in comparing it to the case that I find that is factually closest. I think that the description of the offending is being at the careless end rather than the

deliberate is correct. I do accept that the issue of vulnerability is important because it underpins the very purpose of the legislation. It is accepted in other cases involving mobile traders that this is an area of the market where those protections matter.

Starting point

[50] I now turn to the starting the starting point. Of the cases I have had referred to me, the one that is the best comparison is in my view, *Commerce Commission v Betterlife Corporation Limited & Goodring Company Limited*². That case has similarities in terms of the time period of the offending and the nature of the breaches. That said, it is notable that in this case the number of contracts at issue is higher.

[51] In the *Betterlife Corporation Limited & Goodring Company Limited* case, the *Goodring Company Limited* aspect of the decision involved 758 contracts, here we have 3091. But in terms of the type of breach there are very real similarities. In that case, the Judge Sharp approached the matter in this way. The lead offence was taken to be the s 32 offending, for which she imposed a starting point of \$100,000. She then applied an uplift of \$25,000 for the s 17 offending and a further uplift of \$15,000 for the FSPA offending. There were then discounts applied of 30 percent, 5 percent for co-operation and 25 percent for the guilty plea.

[52] In terms of the approach, I note that the prosecution have urged me in their submissions to take a slightly different approach than that was used in *Goodring Company Limited*. That is, in essence to take the three types of offending as stand-alone matters rather than select lead offending and apply an uplift. There would then be a final adjustment for the totality. I do not intend to take that approach. I consider that what was done in *Betterlife Corporation Limited & Goodring Company Limited* is both the better approach and has also provides the value of consistency.

² *Commerce Commission v Betterlife Corporation Limited & Goodring Company Limited* [2016] NZDC 10579.

[53] The offending, although categorised into the three sets of charges for the different legislative provisions, in reality covers one overall narrative relating to the operation of these mobile shops. Accordingly, I consider taking a lead offence with an uplift is the better approach. If I am wrong about that, it may well be that guidance from another Court better able to review those sorts of issues will sort that out.

[54] So noting the approach taken by Judge Sharp in *Goodring & Company Limited v Betterlife Corporation Limited*, which I agree with, I intend to follow a similar pattern but the sentence will reflect the fact that the greater number of consumers puts this, in my view, at a slightly higher level of seriousness.

[55] For the s 32 offending, I set a starting point of \$120,000. That would be apportioned over the various charges, but that would be the total result.

[56] In terms of the s 17 offending, in *Betterlife Corporation Limited & Goodring Company Limited* the Court applied an uplift of \$25,000. However, in this case the prosecution argue that there are significantly larger number of creditors and that there is a comparison to be made with the offending in *Best Deals*³ where a starting point of \$50,000 was imposed. In *Best Deals* it was noted that the offending period was shorter than in this case and the number of contracts far lower. I do consider that this is more serious offending but I have difficulty using that figure given the approach I am taking of adopting s 32 as the lead offence. The uplift that is designed to fit within the totality principle. That means that a fine in excess of \$50,000 is inappropriate. I assess this fine as \$40,000 as a starting point then.

[57] I now turn to s 11 SCPA. The approach that was taken in *Betterlife Corporation Limited & Goodring Company Limited* was an uplift of \$15,000. I do consider that a higher uplift is required here, which I put as \$20,000.


[58] From each of those three figures, I consider that it is appropriate for there to be a discount of five percent for co-operation. Indeed I applaud both counsel for the way they have worked through issues that have come up even at the sentencing

³ *Commerce Commission v Best Deals 4 You Ltd* [2017] NZDC 3427.

aspect of this case. That also reflects well on the client behind Mr Wilson's representation. I apply a discount of 25 percent for the guilty pleas. Technically that should be done by taking the five percent off and then the 25 percent but I am simply going to deduct 30 percent, which will give a small advantage to the defendant. So from the \$120,000, there is a discount of \$36,000 leaving an end result of \$84,000. From the \$40,000 there is a discount of \$12,000 leaving a figure of \$28,000. From the \$20,000, there is a discount of \$6,000 leaving a figure of \$14,000.

[59] The final matter to be dealt with relates to orders that can be made where fees or costs have been recovered by a defendant from those who have entered into contracts in the circumstances where those contracts are defective, as is the case here. I am able to make orders that that be rectified. Counsel have discussed a form of those orders and they are agreed that they can be made in the following terms.

- (a) An order under s 94(1)(ca) Credit Contracts and Consumer Finance Act 2003 that the defendant refund any costs of borrowing paid by debtors who entered into contracts with the defendant between 6 June 2015 and 13 November 2015 inclusive.
- (b) An order under s 94(1)(ca) Credit Contracts and Consumer Finance Act 2003 that the defendant cannot receive any further credit, default or dishonour fees on contracts entered into between 6 June 2015 and 12 November 2015 inclusive.
- (c) An order under s 94(1)(cc) requiring the defendant to provide proof to the Commission within 12 months that the refunds have been made to the affected customers.



N Sainsbury
District Court Judge