IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-000650
CRI-2016-004-001140
[2016] NZDC 10579

THE COMMERCE COMMISSION
Prosecutor

v

BETTERLIFE CORPORATION LIMITED
GOODRING COMPANY LIMITED
Defendants

Hearing:	10 June 2016
Appearances:	A McClintock and J Barry for the Prosecutor G H J Brant for the Defendant Betterlife A Murray for the Defendant Goodring
Judgment:	10 June 2016

NOTES OF JUDGE M-E SHARP ON SENTENCING

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[1] Two disassociated companies, Goodring Company Limited and Betterlife Corporation Limited, appear for sentencing, having pleaded guilty to a number of charges brought variously under the Credit Contracts and Consumer Finance Act 2003, the Financial Service Providers Registration and Dispute Resolution Act 2008.

[2] Even though the companies are not associated in any way, given that I understand these to be the first such prosecutions, and given that the Commerce Commission's submissions were made in tandem for both companies, it seemed sensible to adopt the recommendation of counsel and hear all submissions in one hearing and sentence both defendants at the end, as I now do.

[3] Dealing firstly with Goodring Company Limited. it pleaded guilty to 28 charges under the Credit Contracts and Consumer Finance Act and two charges under the Financial Service Providers Registration and Dispute Resolution Act. Of those, 21 charges were for failing to provide adequate disclosure under s 17 Credit Contracts and Consumer Finance Act, maximum penalty $30,000 per charge.

[4] Seven charges of failing to comply with s 32(1)(c) Credit Contracts and Consumer Finance Act, by not providing clear concise disclosure presented in a manner likely to bring the required information to the attention of a reasonable person. Maximum penalty $600,000 per charge, except for one charge which pre-dated the increase in maximum penalty and therefore attracts a lower maximum of $30,000.

[5] One charge under s 11(1)(a) of the Financial Service Providers Registration and Dispute Resolution Act for having knowingly failed to be registered on the Financial Service Providers Register, a maximum penalty of $300,000 per charge. And one charge under s 11(1)(b) of the Financial Service Providers Registration and Dispute Resolution Act for having knowingly failed to be a member of an approved dispute resolution scheme, maximum penalty $300,000 per charge.

[6] In respect to Betterlife Corporation Limited, it faces sentence on three charges of failing to provide adequate disclosure under s 17 Credit Contracts and Consumer Finance Act, maximum penalty $30,000 per charge. And three charges of failing to comply with s 32(1)(c) Credit Contracts and Consumer Finance Act, by not providing clear concise disclosure and presenting it in a manner likely to bring the required information to the attention of a reasonable person, for which the maximum penalty is $600,000 per charge.

[7] Both defendants operate mobile trader businesses selling high priced consumer goods on credit, using a variety of sales techniques and often to those who have low incomes and poor credit histories. Mobile traders are often referred to as "truck shops" these are businesses that do not have fixed retail premises in the traditional sense. Some operate mobile shops usually from trucks, whilst others employ sales staff who sell goods door to door, using catalogues and brochures.

[8] They sell predominantly or exclusively on credit, lay-by or other deferred terms and often to those, as I have said, with 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.

[9] Goodring is based in Auckland and operates in suburbs such as Mangere, Henderson, Glen Innes and Otahuhu. It sells consumer goods such as clothes, shoes, towels and blankets.

[10] Betterlife Corporation, equally runs a mobile trader business using truck shops and a variety of sales techniques. It is based in Auckland and operates in suburbs such as Mangere, Ranui, Glen Innes and Manurewa. It sells consumer goods, principally clothes on credit at higher prices than what is charged in mainstream stores. One only needs to drive through those suburbs at any given time to see such trucks.

[11] The background to the Commerce Commission investigation into the two defendant companies. The summary of facts upon which I sentence, has this to say:

> In recent years the business practices of mobile traders have become more prominent in complaints that the Commerce Commission has received from consumers and their advocates. Thus in 2014 the Commission opened an investigation into the mobile trader industry. It identified 32 mobile traders during the project. They operated throughout New Zealand but the majority were based in the North Island, with a particular concentration in Auckland.

[12] In the summary of facts, this type of business was stated to be very dynamic, with traders frequently entering and exiting the market.

[13] In August 2015 the Commission published its report setting out its findings from the investigation into the mobile trader industry. That identified systemic compliance issues within the industry with respect to traders' obligations under the Credit Contracts and Consumer Finance Act. 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, as entities which can act as creditors under credit contracts or be members of approved dispute resolution schemes.

[14] The summary of facts also records that 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.

[15] The investigation into Goodring formed part of the Commission's initial mobile trader investigation. Between July 2014 and December 2015, the Commission corresponded with Goodring on a number of occasions and provided the Commission with information about its mobile trader business. The information provided by Goodring has provided the basis for the charges it faces.

[16] Betterlife did not form part of the Commission's initial mobile trader investigation. It is a new entity, I believe it only started up in business in 2014 and came to the attention of the Commission in the latter part of its investigation. But the Commission had previously dealt with Betterlife's sole director and shareholder Harvey Lau, also known as Hong Ding Lau, as part of another mobile trader business with which he was previously involved, that was known as Good Value Group.

[17] Between 3 August and 30 November, the Commission corresponded with Betterlife on a number of occasions. It provided the Commission with information about its mobile trader business and that information provides the basis for the charges that it faces. Once the Commission notified Betterlife of its failings on 16 October 2015, Betterlife improved its compliance with s 17 Credit Contracts and Consumer Finance Act.

[18] Goodring, breaches of s 17 Credit Contracts and Consumer Finance Act, 14 May to 18 December 2015. Prior to 6 June 2015 under s 17 Credit Contracts and Consumer Finance Act, 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 it being made. On 6 June 2015 and subsequently, pursuant to s 17 Credit Contracts and Consumer Finance Act, creditors who enter consumer credit contracts are required to disclose

certain key information to debtors under schedule 1 of that Act before the debtors enter into the contract.

[19] The first group of charges for Goodring are representative charges. Between 14 May and 16 October 2015, the defendant entered into consumer credit contracts with 758 debtors. The documents provided to those debtors when entering the contracts failed to disclose certain key information applicable to them, as set out in schedule 1 to the Credit Contracts and Consumer Finance Act. Specifically, the documentation failed to:

(a) State the unpaid balance as at the date of the disclosure statement.

(b) State the total amount of number of payments required to be made by the debtor under the contract.

(c) State when the first payment is due.

(d) Adequately describe the security interest taken under the contract.

(e) Provide a statement of the debtors' right to apply for relief on grounds of unforeseen hardship.

(f) Provide an accurate statement of the debtors' cancellation rights.

(g) State the frequency with which continuing disclosure statements would be provided.

[20] A small proportion of those contracts were entered into prior to legislative amendment taking effect on 6 June 2015. For those contracts the schedule 1 failures are limited to items (a) to (c) and (g) that is, failure to state the unpaid balance as at the date of the disclosure statement. Failure to state the total amount of number of payments required to be made by the debtor under the contract. Failure to state when the first payment is due and failure to state the frequency with which continuing disclosure statements would be provided.

[21] The breaches of s 17 were broken down by the Commission on a representative basis to one month periods between 14 May and 16 October 2015, resulting in six charges.

Section 17 Specific Charges

[22] As part of its investigation the Commission also received copies of 15 individual consumer credit contracts entered into by Goodring between 20 October and 10 December 2015. The debtors for those contracts are set out at schedule A of the agreed summary of facts, which I append to this sentencing judgment. For those contracts Goodring failed to disclose the matters set out at (b) to (g) as I have referred to supra. There is a separate charge for each such contract, resulting in 15 charges.

Section 32 Representative Charges

[23] The disclosure provided to all of those debtors also breached s 32(1)(c) as the information provided in the terms and conditions page was expressed in a small font size in two dense columns on a single page and provided no space between the terms and conditions, with the ultimate effect that the information was difficult to read because of the obscuring of key information.

[24] Again, the Commission has broken down, on a representative basis, to approximately one month periods between 14 May and 18 December 2015, the breaches of s 32(1)(c), thus there are seven charges.

Goodring

[25] Registered as a financial service provider on 3 December 2015 but did not register for the correct financial service. On 16 May 2016, Goodring registered for the correct Financial Dispute Resolution Scheme, approved under the Financial Service Providers Registration and Dispute Resolution Act.

Betterlife

[26] Breaches of s 17 Credit Contracts and Consumer Finance Act, charges 1 to 3. Under s 17 Credit Contracts and Consumer Finance Act, creditors who enter consumer credit contracts are required to disclose certain key information to debtors under schedule 1 of that Act before entering into the contract. Between 29 July and 16 October 2015, Betterlife entered into consumer credit contracts with no fewer than 428 debtors. Betterlife provided them with a document titled "Betterlife Purchase Agreement" and a document setting out key information concerning the consumer credit contract. Those documents failed to disclose certain key information applicable to the contracts, as set out in schedule 1 to the Credit Contracts and Consumer Finance Act/

[27] Specifically, those documents failed to state the total number of payments required to be made by the debtor under the contract, adequately describe the security interests taken under the contract, provide a statement of the debtors' right to apply for relief on grounds of unforeseen hardship, provide an accurate statement of the debtors' cancellation rights. State the frequency with which continuing disclosure statements would be provided, state the name and contact details of the dispute resolution scheme of which Betterlife is a member. State Betterlife's registration number on the register of the financial service providers and the name under which Betterlife is registered on that register.

[28] Between 17 October and 28 October 2015, Betterlife entered into consumer credit contracts with no fewer than 11 debtors. The disclosure documentation provided to them, with the contract, failed to adequately describe the security interests taken by Betterlife over goods, securing the debtors' obligations under the contract.

[29] Charges 1 to 3 representative charges covering contracts entered into during three periods:

(a) Charge 1, 29 July to 31 August 2015

(b) Charge 2, 1 September to 30 September 2015.

(c) Charge 3, 1 October to 28 October 2015.

[30] Breaches of s 32(1)(c) Credit Contracts and Consumer Finance Act, charges 4 to 6. Section 32 Credit Contracts and Consumer Finance Act 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) disclosure must express the required information fairly concisely and in a manner likely to bring the information to the attention of a reasonable person.

[31] The contracts entered into with the debtors between 29 July and 28 October 2015, failed to express the required information 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. In a small font size in two condensed columns on a single page, providing no spaces between terms and conditions. The information therefore is difficult to read and key information is obscured. This would be particularly so for somebody who is of that ilk of customer, which both Goodring and Betterlife would normally deal, that is a low income person, often with varying low degrees of education.

[32] Charges 4 to 6 are representative charges covering the contracts entered into during these periods:

(a) Charge 4, 29 July to 31 August 2015.

(b) Charge 5, 1 September to 30 September 2015.

(c) Charge 6, 1 October to 28 October 2015.

The Statutory Context Against Which These Prosecutions Commenced

[33] The Credit Contracts and Consumer Finance Act, came into force on 1 April 2005, but it effected major changes to the information that creditors must disclose. The importance of the disclosures provisions is highlighted by the purposes of the

Credit Contracts and Consumer Finance Act, set out in s 3, including providing for the disclosure of adequate information to consumers under consumer credit contracts and consumer leases, both before entry into and before variation of such agreements:

(a) To enable consumers to distinguish between competing credit or lease arrangements.

(b) To enable consumers to be informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them.

(c) To enable consumers to monitor the performance of consumer credit contracts.

(d) In the case of consumer leases to make clear to consumers that consumer leases are not consumer credit contracts.

[34] Recent amendments via the Credit Contracts and Consumer Finance Amendment Act 2014, extended the disclosure requirements. There was a year between the Amendment Act receiving Royal assent and coming into force on 6 June 2015. This gave creditors a long lead-in time to amend their documentation as necessary.

[35] The significance of the Amendment Act is as to the increases in the maximum penalties for a number of offences under the Credit Contracts and Consumer Finance Act. Breaches of s 32 now attract a maximum penalty of $600,000 for Body Corporates from a previous maximum penalty of $30,000. Maximum penalty for breaches of s 17 by Body Corporates, has however remained at $30,000.

[36] Thus, there was a 20 fold increase in the maximum penalty for offending under s 32. The Commerce Commission's stance is that this signals that Parliament intended a dramatic increase in the sentencing level for s 32 breaches in order to appropriately denounce such conduct.

[37] Mr Brant who appears for Betterlife, takes issue with this approach, saying that Parliament only intended to align the penalty provisions under s 32 with those that are analogous in their trading act, ie the misleading and deceptive conduct provisions. And that Hansard and the different select committee reports, do not indicate any more than that, so that this Court in sentencing on other breaches for s 32, than misleading and deceptive conduct type of breaches, should be extremely cautious about increasing what would have been the relevant starting point prior to the Amendment Act for other types of s 32 breaches.

[38] In the end, whilst of academic interest, I do not find at all attractive, the notion that Parliament only intended to effect the s 32 breaches which are analogous to the Fair Trading Act 1986 breaches, because I take the view that had it so intended, it would have clearly spelt that out and it did not. It increased the maximum penalty for all s 32 offending.

[39] In any event, as the Commerce Commission says, and I accept, underlying the reforms was a demonstrated need to further reduce the asymmetric information problems between creditors and consumers.

[40] The Commerce Commission cites the Minister introducing the Bill in the first reading, where he said regarding disclosure:

> One of the explanation for poor consumer decisions on creditors, is that the current disclosure requirements and rules are not providing sufficient protection, especially for the more vulnerable consumers at the lower end of the consumer credit market. There is evidence that consumers tend to be overly optimistic about their ability to repay a loan or that lending decisions are made based on poor use of the information that consumers do possess. The true cost of credit, including costs such as bank fees, default fees and default interest, tends not to factor in the decision-making processes for many consumers. Another issue is that these fees are not disclosed in a way that enables ready comparisons between different loan products by consumers before they enter into the credit contract. To address this, the Bill improves disclosure requirements and increases the value of information available, so that consumers can better compare credit contracts and make more fully informed decision.

[41] That passage taken from the Minister's address to the House on the first reading of the Bill amending the s 32 maximum penalty provisions, says everything about the reasons for doing so. And also pithily encapsulates the difficulties in this

particular market, where you have consumers who are at the lowest of income levels, living in the most straightened of circumstances of earners in our society. And even those who are not earners in our society, who are usually ill-educated, many of whom cannot even read because they are not literate, entering into consumer contracts that they can ill afford, in circumstances where, if things were adequately explained to them, they probably would not do.

[42] It has been thought, and this has been discussed in Parliament, that poorer communities were thought to be targeted by the predatory practices of truck shops and that those practices needed resolving. So the definition of "business premises" was extended at the select committee stage to ensure that truck shops were covered by the legislation, thus removing any doubt about this.

[43] So I agree with the Commission. In combination, Parliament clearly signalled its intent that truck shops be treated no differently than ordinary lenders, their customers are equally as vulnerable and equally in need of protection and there can be no doubt that when companies such as Goodring engage in conduct that breaches the Credit Contracts and Consumer Finance Act and companies like Betterlife, such conduct does require substantial denouncement.

Financial Service Providers Registration and Dispute Resolution Act

[44] The purposes of this Act are to promote the confident and informed participation of businesses, investors and consumers in the financial markets and to promote and facilitate the development of fair, efficient and transparent financial markets.

[45] Once again, consumer protection is a clear focus of the legislation. Transparency on the financial services market was a key driver in enacting that legislation. And the Commission submits that a separate deterrent response is required for breaching that Act, over and above the Credit Contracts and Consumer Finance Act breaches in the Goodring case. Of course this does not apply to Betterlife.

[46] I am in the unenviable position of sentencing both companies as the subjects of the first prosecutions brought by the Commission or the Financial Markets Authority for offending under the new penalty provisions and under s 11 Financial Service Providers Registration and Dispute Resolution Act.

Purposes and Principles of Sentencing

[47] I do not believe that there is any particular issue between the parties as to the need to hold both the defendants accountable for the harm done to the victims and the community by such offending. Although, I hasten to add, that in this case there is no specific harm done to the victims, there is certainly no evidence of that before the Court. So whilst ill breaches, there is no evidence that the particular debtors were in fact impacted.

[48] I accept however, the Commission's case that each and every debtor is a victim of this offending and that Parliament plainly intended that disclosure of the key information in a comprehensible way is critical to enabling debtors to understand their rights and obligations under the contract.

[49] I have looked at the particular contracts or versions of them, which both the defendants were using and can certainly accept that they would have been extremely difficult, if not almost impossible for the debtors to properly read or understand. Having said that, it strikes me that Betterlife corporation Limited's contract was a little easier to read than was Goodrings, but both obviously suffered from significant and serious deficiencies.

[50] I am told by counsel for both defendants, that their clients are either closing down their respective businesses or certainly, in the case of one of them, tailing down the operation. And so it may well be that the necessity of holding each of these individual defendants accountable for the harm done to the community by this offending, does not rank quite as greatly as it might otherwise.

[51] However, it is an extremely important principle and indeed purpose of these sentencings, to denounce the defendants' conduct and to deter other people in this

industry or others who would enter this industry, from committing this type of offence. I am told, and have no reason whatsoever to doubt, that there have been systemic breaches identified within the mobile trader industry and thus it is especially important that a deterrent message is sent to the industry. I accept that.

Aggravating and Mitigating Features of the Offending: Goodring – Credit Contracts and Consumer Finance Act Offending:

(a) The extent of the offending is relevant and important. I agree with the Commission that the schedule 1 failures are widespread, there were seven items under schedule 1 which were either not disclosed, inaccurately disclosed or inadequately disclosed. That does indicate systemic and significant failures.

(b) The s 32(1)(c) failures are aggravating in context of the overall offending because the disclosure suffers from significant comprehensibility and legibility issues.

(c) The offending involved considerable negligence.

[52] In the case of both defendants I acknowledge that the Commission does not say that the defendants were reckless or indeed set out to breach the Credit Contracts and Consumer Finance Act. But there was an obligation on them to ensure that they complied with the Act and became familiar with the new disclosure obligations between the passing of the Amendment Act and its coming into force. Both companies were given advance notice of the changes and told about the specific concerns that the Commission had with mobile traders and their practices.

[53] The number of victims were significant. In Goodring's case, at least 753 debtors were affected by offending spanning approximately seven months.

[54] And lastly, the victims were vulnerable. As the Commission said, it is a central feature of the mobile trader industry that traders target relatively unsophisticated consumers with low incomes and poor credit histories.

[55] Conversely, I believe it only fair to acknowledge that the credit industry is vital to New Zealanders. There is a place for it and many of the people that deal with these mobile traders would otherwise be unable to obtain credit. I do take into account that there is a place for mobile traders. However, in order to ensure that the debtors of mobile traders are not completely exploited, documentation and disclosure needs to be completely consistent with the legal requirements.

[56] For Betterlife, once again the extent of the offending, the schedule 1 failures were widespread, seven items under schedule 1, which were either not disclosed, inaccurately disclosed or inadequately disclosed. Thereto, the failures were systemic and significant. As to the s 32(1)(c) failures, they too were aggravating the context of the overall offending. The disclosure suffered from significant comprehensibility and legibility issues.

[57] Secondly, the offending involved considerable negligence. I have already said in connection with Goodring, that the Commission acknowledges that the defendant Betterlife, did not set out to flout the Credit Contracts and Consumer Finance Act. But it was incumbent in Betterlife, as it was with Goodring to become aware of and comply with its legal obligations. It had time to become cognisant of the changes and it failed to do so. People operating in the consumer credit market, that is creditors, must be educated and familiar with the Credit Contracts and Consumer Finance Act legal requirements.

[58] Three, the number of victims was significant in total 439 debtors spanning approximately three months.

[59] The victims were vulnerable.

Mitigating Features of the Offending

[60] I do not see any for either defendant company.

Starting Point of Offending

[61] Apart from the intellectual and academic issues taken by Mr Brant for Betterlife, as to the intention of Parliament for breaches other than those consistent with breaches of the Fair Trading Act, I do not believe that there is any real digression between or among the parties about anything in this prosecution except the approach, what the starting point should be and what the discount should be.

[62] When I talk of "approach" I mean whether or not the Court should adopt a starting point for the lead offending and uplift it for the other offending and on a totality basis, set a fine which could be levied against the defendant on one of each of the main groups of charges. And then convict and discharge on the others. Or whether there should be per charge fines levied, fines or course being the only permissible penalties to be imposed. Or whether, as the Commission said in reply:

> Adopt a starting point for the different types of offending under the different sections and Acts and impose fines on each of them in those three categories for Goodring, for Betterlife two categories.

[63] As to discounts, there is some skirmishing between the parties over whether the discounts should amount to 40 percent approximately or 30 percent. But in general there is not much between the parties.

Starting Point Authorities

[64] The Commission has discussed the following cases, all of which I have read. *Commerce Commission v Flexi Buy Limited*, DC Manukau, [2016] NZDC 3028, *R v v Senate Finance Limited*, DC Auckland, CRN 2006-450-2955, 14 November 2006, *Commerce Commission v Lelei Finance Limited*, DC Manukau CRI 2007-092-13965, 19 March 2008, *Commerce Commission v Tiny Terms Limited*, DC Auckland CRI 2012-004-11709, 24 January 2014 and *R v Baker*, DC Auckland, CRI 2006-004-018554, May 21 2007, submitting in the end, for Goodring, that the most useful comparative to the defendant's conduct in terms of the number of contracts and

debtors affected, are the *Lelei* and *Flexi Buy* decisions (616 and 360 contracts variously).

[65] For the s 32 offending, the Commission says there are similarities with *Tiny Terms, Senate* and *Flexi Buy*. But taken together, the Commission submits that the overall culpability of Goodring sits between the *Lelei*, *Flexi Buy* and *Tiny Terms* offending:

> The high volume of contracts coupled with the significant number of schedule 1 breaches and the presence of s 32 breaches indicates that the starting point, were this offending solely addressed under the previous maximum penalties, would be (for all charges) one in the range of $70,000 to $80,000.

[66] From there, the Commission discusses the application of the new maximum penalty for s 32 breaches. I hasten to add that both defendants' counsel, disagree with the starting point that the Commission suggests would have been adopted, were this offending solely addressed under the previous maximum penalties.

[67] On behalf of Goodring, Ms Murray submitted that had the conduct occurred prior to 6 June 2015, the appropriate starting point would have been $55,000 to $65,000. And applying what she says is the same multiplier used by the Commission in recognition of the increased penalties; she suggests a starting point of $120,000 to $140,000.

[68] Mr Brant too, for Betterlife suggests that the starting point for pre-amendment increased provisions would have been significantly lower than that suggested by the Commission.

Application of the New Maximum Penalty for s 32 Breaches

[69] The Commission says that this signals a clear Parliamentary intent that the sentencing levels for such conduct must lift significantly. I accept this.

[70] Whilst the expected penalty under the previous maximum should not be reached by simply multiplying by 20, which was the increase and I agree with the Commission that would be regarded as an overly mathematical and excessive

approach. That the Court should, in a principled way take the likely penalty under the previous regime as a guide, then identify a starting point, giving effect to Parliament's intent to substantially increase the sentencing levels for this type of offending and balance that against the need to impose the least restrictive outcome appropriate in the circumstances. In other words, a sentencing in the round.

[71] And so taking into account the comparison with the authorities that I have previously referred to and the need to give effect to Parliament's intent in raising the maximum penalty under s 32 as well as recognising the extent of the schedule 1 breaches, recognising the significant legibility issues and reflecting the large number of contracts involved, the Commission suggests for Goodring, a starting point in the range of $130,000 to $170,000. And then talks of adjustment to the starting point.

[72] There are no aggravating features of Goodring, personal aggravating features that is. There are however, mitigating features. These are, in respect to both Goodring and Betterlife, first and foremost those companies respective guilty pleas. It is accepted by the Commission that both are entitled to the full 25 percent guilty plea discount under *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[73] Both companies co-operated with the Commission's investigation, they voluntarily provided documents when requested. The Commission suggests that modest credit can be afforded for their co-operation and suggests a discount of five percent to recognise this factor.

[74] Whilst the defendants themselves suggest that they could be given a further moderate discount for lack of previous convictions, in Betterlife case since it was only incorporated in April 2014, the Commission suggests that would be inappropriate.

[75] The Commission says that the authorities indicate that some credit may be afforded where the offender takes immediate steps to improve their compliance with the legislation. And that following the Commission's letter on 16 October 2015, setting out its concerns with Betterlife's Credit Contracts and Consumer Finance Act compliance, the defendant improved its documentation to better comply with s 17.

But the Commission makes the point that the documentation was still deficient in its description of the security interest taken under the contract and failed to remedy the problems related to the s 32 conduct, which it submits is the most aggravating conduct. Therefore, the Commission submits that no credit should be afforded Betterlife for this factor.

[76] In the end, the Commission submits a starting point in the vicinity of $130,000 to $170,000 for Betterlife is one that balances both Parliament's intent to markedly increase the penalties for s 32 conduct and the need to impose the least restrictive outcome in the circumstances, from which credit can be afforded for mitigating factors up to $30,000, resulting in a fine in the range of $91,000 to $119,000.

[77] For Betterlife, as I have already said, Mr Brant suggests that the approach is misconceived in many ways, most of which, if not all I have already traversed. But in particular, says that:

> Offences under s 17 should attract a range for a first offender, such as Betterlife between $2000 and $4500 per charge and on a principled basis, that the sentencing of Betterlife, should take place by a per charge, on the basis of a per charge levy, so to speak.

[78] Mr Brant also says that:

> When there are two different offences with two different maxima and one with a significantly higher maximum, when culpability is different, means that to amalgamate them, would be in principle incorrect and would place a greater weight on the offences having a higher maximum penalty but may be disproportionate to the conduct, which is the subject of the charge.

[79] I accept in principle what he is getting at, but really feel that it comes down to a proper balancing of all of the factors in determining first of all the basis upon which I should sentence, that is a per charge basis, a per category basis or a fine on the lead type of offence with a conviction and discharge for the defendant on all others.

[80] Sentencing is not a completely mathematical exercise. It is not an exercise in arithmetical accuracy. It is an exercise is competing considerations, it is a balancing exercise. In this case, I have determined, as I have with Goodring, to adopt the basis,

of the alternative basis suggested by the Crown for sentencing, that is to divide the offending into the different categories, adopt a starting point for each of those categories and then apply the discounts.

[81] In Betterlife's case, the Commission suggests that would mean a $100,000 to $140,000 fine for s 32 offending and a $30,000 start point fine for s 17 offending. I have not done the maths to ascertain what the amalgam of all of the per charge fines, suggested by Mr Brant would be. But note that he suggests that the starting point range for the s 32 breaches, that is conduct relating to font size, condensed columns on a single page and no spaces between terms and conditions, should only be between $1000 and $2000 per charge.

Starting Point Betterlife

[82] I agree with the Commission that this type of offending needs to be dealt with in a strict, though principled way. A very clear message needs to be sent to the creditor community to ensure that the people who are the most vulnerable and the subjects of this industry, are not preyed upon in the way that history has reflected thus far.

[83] In saying that, I am not suggesting that either of the present two defendants have in fact preyed on any of these debtors and I make it clear again that there is no evidence before the Court of actual harm to the debtors. That would seem to be either because there is no harm or because the Commission has failed to investigate each of the particular credit contracts in question to ascertain the harm, I know not which.

[84] I also accept the Commission's view that the extent of the s 17 breaches for Betterlife sit within the highest end of the relevant authorities, there being seven schedule 1 failures, but only four in *Lelei* and *R v* Baker and two in *Tiny Terms.*

[85] For the s 32 offending, I accept the similarities with *Tiny Terms, Senate* and *Flexi Buy.* I however, do not consider that the s 32 offending is as significant as the s 17 offending.

[86] I agree with the Commission that taken overall, the overall culpability of the defendant Betterlife, sits between *Lelei*, *Flexi Buy* and *Tiny Terms*.

Starting Point for s 17 Offending, Betterlife

[87] Were I sentencing now, under the previous maximum penalties, I consider that the available range would have been somewhere between $50,000 and $60,000 not the $60,000 to $70,000 the Commission contends for.

Application of the New Maximum Penalty for s 32 Breaches

[88] The Commission suggests that the least restrictive outcome in the circumstances is a starting point in the range of $130,000 to $170,000, without attempting to apply a multiplier or to relate this in any way to the very significant uplift of penalty by Parliament.

[89] And so in the most principled way possible, the Commission has really plucked a figure out of the air, has juggled it, held it, massaged it and decided that is what sounds good. Unfortunately the sentencing exercise in the end will often come down to that sort of exercise, what feels right and proper. And this is without the benefit of any other precedents for increased penalties, that is what I must do here.

[90] For Betterlife, I believe that I should divide the offending into the two different categories. Starting with the s 32 offending, I consider that the range that I start with should be somewhere between $80,000 and $120,000. And for the s 17 offending, a start point of approximately $20,000. From that of course there will be the discounts, the first being the guilty plea, 25 percent. The second being the discount of five percent for co-operation.

[91] Whilst the Commission suggests that there should be no further discounts, particularly for steps to improve compliance with the legislation, I do accept the submissions that have been made by Mr Brant on behalf of his client. As to reasons, not only for the offending but his client's attempts to comply and the genuineness of

its conduct. So I am prepared to give a further five percent, which means that the discounts available are 30 percent for Betterlife.

[92] I note that Betterlife suggests it was unaware of the amendments which came into force on 6 June 2015 and that Betterlife was investigated along with others in the industry, without complaint. That the disclosure breaches for Betterlife are a result of a standard form document being utilised and in other words, one wrong action being the use of a precedent used on numerous occasions. Whilst I understand that obviously both the industry, its victims, Parliament and the public, expect much better than this.

[93] In the end, I have come to the conclusion that the fines to be imposed on Betterlife for the s 32 offending are $56,000, which I will impose on one only of those charges and on the others the defendant will be convicted and discharged. And for the s 17 offending, fines of $17,500 to be imposed on one only with conviction and discharge on the others.

[94] Turning now to **Goodring**. The Commission submits that the appropriate starting point is $150,000 to $190,000. Goodring submits the appropriate starting point is $120,000 to $140,000. And Ms Murray who acts for Goodring, suggests that the factors relevant to the offending supporting that starting point range, are that loans to customers were generally small and seldom totalled more than $300. None of the terms of the credit contract were oppressive. Goodring's loan business was not large, the overall revenue from all its credit contracts for the period 14 May 2015 to 18 December 2015 was only $301,550. There have been no repossessions and no fees or interest charged on credit contracts during the period covered by the charges, the legibility issues do not reflect the readability of the original contracts provided to customers as opposed to copies, such as those attached as tab 2 to the Commission's submissions. An original copy of the contract has been attached as exhibit A to the affidavit of Feng Wang, which was filed in support of Ms Murray's submissions and which I have read.

[95] Ms Murray also submits that Goodring's conduct is more analogous to the offending conduct in *Flexi Buy* and *Lelei* than it is to the offending conduct in *Tiny*

Terms, that it was negligent not reckless. I interpolate here that the Commission accepts in respect to this company as well as the other defendant, that the behaviour was or the conduct was negligent and not reckless.

[96] In Goodring's case it obtained legal advice on its legal obligations after receiving letters from the Commerce Commission and sought to follow this advice by amending its terms and conditions. Goodring's offending like the offending in *Lelei* involved small loans. None of the terms in Goodring's credit contracts were particularly oppressive as opposed to the draconian extension provision in *Tiny Terms* contracts, and that a starting point substantially above that imposed in *Flexi Buy* cannot be justified.

[97] In relation to the overall starting point for all of the Credit Contracts and Consumer Finance Act charges, Goodring submits that had the conduct occurred prior to 6 June 2015 the appropriate starting point would have been $55,000 to $65,000. A fine what Ms Murray refers to as the same multiplier as used by the Commission in recognition of the increased penalties would mean a starting point of $120,000 to $140,000.

[98] She notes, quite rightly, that only seven of the 28 Credit Contracts and Consumer Finance Act charges have been laid under s 32 and one of these was before the increase in maximum penalty and therefore counsel for Goodring submits that no uplift as a result of the increase in maximum penalties applies in respect of the 21 charges under s 17 Credit Contracts and Consumer Finance Act, maximum penalty $30,000 and the one charge under s 32 Credit Contracts and Consumer Finance Act relating to conduct prior to 6 June 2015.

[99] On the Commission's submission, the appropriate starting point for these charges would be $55,000 to $63,000 but Ms Murray submits that the starting point that she proposes should be broken down per charge and therefore for these 22 charges, it should be $43,000 to $51,000. She does, unlike Mr Brant who appeared for Betterlife, however accept that the appropriate starting point post the Amendment Act increasing the maximum penalty for the six charges under s 32

Credit Contracts and Consumer Finance Act should be correspondingly higher and as she quite rightly says, the question is by how much?

[100] It is Goodring's submission that increasing the proposed starting point from $12,000 to $14,000 if under the previous maximum penalty, to $77,000 to $89,000 is sufficient to reflect the seriousness of the charges and recognise the significant increase in penalties.

[101] Turning to the Financial Service Providers Registration and Dispute Resolution Act, the maximum penalty for offences under s 11 is a fine not exceeding $300,000. The Commission submits that an uplift to the starting point of $25,000 should be imposed for this Financial Service Providers Registration and Dispute Resolution Act offending. But Goodring submits that it's more appropriate to apply an uplift of $15,000 to $20,000 taking the total proposed starting point to $135,000 to $160,000. She also cites a number of mitigating factors applying to Goodring. I deal with those now.

[102] First and foremost, Goodring is entitled to the full 25 percent discount under *Hessell* for its guilty plea at the first opportunity. Secondly, it is entitled to a five percent discount for its full co-operation with the Commission's investigation. I do not consider that it's entitled to a discount for amending its credit contracts to be consistent with the Credit Contracts and Consumer Finance Act, that is and was its legal obligation. Goodring no longer seeks to rely on previous legal advice and it is acting on that previous legal advice as a mitigating factor, which is just as well in my view.

[103] The defendant Goodring did register as a financial service provider and become a member of an approved dispute resolution scheme, but mistakenly registered for the wrong service between 3 December 2015 and 16 May 1016. So I do not believe that is a matter that should really be taken account of either.

[104] It is submitted by Ms Murray that there have been no repossessions, no fees or interest charged during the period covered by the charges and that the amount of revenue received from the contract would be disproportionate to the imposition of

the penalties sought by the Commission and would have a significant impact on the financial position of the company. I have never seen, as a principled basis for the adopting or the giving of a discount as a mitigating feature, a disproportion that is related to the penalty, vis-á-vis the amount of revenue received from the contracts, and I do not propose to start now.

[105] Lastly Goodring Company is apparently winding down its operations and it is their intention to slowly wind down the business. That is as maybe, but that cannot be considered to be a mitigating feature of this sentencing in my respectful view. That means that I am only prepared to give the same discounts to Goodring as to Betterlife, that is 30 percent.

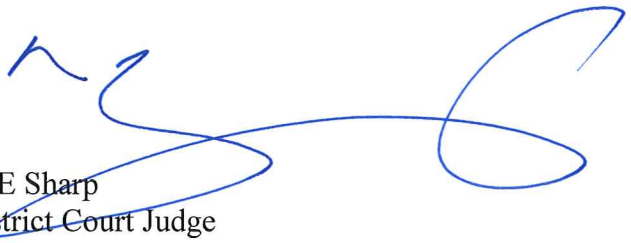
[106] The alternative suggestion of the Commission as a basis for sentencing by dividing the offending of Goodring into s 32 offending which would be the lead offending. Section 17 offending and Financial Service Providers Registration and Dispute Resolution Act offending is a good one, which I already adopted for Betterlife and I will do again for Goodring. It seems a more principled basis for sentencing.

[107] Taking all matters into account, including the various authorities, the various circumstances of this offending and the, often, and this can be said about both defendants practices, the often blatant omissions and failures in their credit contract practices, I consider that the starting point for the s 32 offending should be a fine of $100,000 to then be discounted by 30 percent.

[108] For the s 17 offending, $25,000 to be discounted by 30 percent. And for the Financial Service Providers Registration and Dispute Resolution Act offending, a starting point of $15,000, to which the 30 percent discount is to be applied.

[109] That brings me to an end fine on one only of the s 32 charges for Goodring, of $70,000. For the s 17 offending a fine on one only of $17,500. And for the Financial Service Providers Registration and Dispute Resolution Act offending on one only charge, a fine of $10,500.

[110] On all other charges, there will be convictions and discharges.



M-E Sharp
District Court Judge