**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE DEBTORS IDENTIFIED IN THIS JUDGMENT PURSUANT TO S 202 OF THE THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CRI-2016-404-000237**
**[2017] NZHC 695**

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| BETWEEN | BUDGET LOANS LIMITED AND EVOLUTION FINANCE LIMITED<br>Appellants |
| AND | COMMERCE COMMISSION<br>Respondent |

**CRI-2016-404-000233**

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| BETWEEN | COMMERCE COMMISSION<br>Appellant |
| AND | BUDGET LOANS LIMITED AND EVOLUTION FINANCE LIMITED<br>Respondents |

Hearing: 21 and 22 November 2016

Counsel: B G Frowein and M J Whale for Budget Loans Limited and Evolution Finance Limited
A M McClintock and C P Paterson for Commerce Commission

Judgment: 11 April 2017

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**JUDGMENT OF EDWARDS J**

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This judgment was delivered by Justice Edwards
on 11 April 2017 at 12.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date: 11/04/2017

Zoe Athfield
Deputy Registrar
High Court Auckland

Solicitors: Lowndes, Auckland
Meredith Connell, Auckland

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## Introduction

[1] Budget Loans Ltd and Evolution Finance Ltd (referred to collectively as "Budget") are finance companies. Their business involves the enforcement of loans purchased from other finance companies.

[2] Between 2009 and 2014, Budget made a number of representations to debtors in the course of enforcing their loan agreements. Those representations concerned Budget's right to recover additional interest and costs from debtors, its right to repossess secured property, and the benefits of refinancing.

[3] The Commerce Commission laid 125 charges against Budget under s 13 of the Fair Trading Act 1986 (FTA) alleging that these representations were false and misleading. The trial of those charges took place before a Judge alone in the District Court.

[4] By decision dated 1 July 2016, Judge Sharp granted Budget's application under s 147 of the Criminal Procedure Act 2011 to dismiss 19 of those charges (s 147 decision).[1] Those charges concerned representations about the right to charge interest and costs following a repossession of secured property in circumstances where Budget held multiple security interests. Whether those representations were false and misleading turned on the application of s 35 of the Credit (Repossession) Act 1997 (CRA) (now repealed). Relying on the penal statutes presumption, the Judge found that s 35 was unclear and dismissed the charges accordingly. The Commission appeals the s 147 decision.

[5] The Judge entered convictions on the remaining 106 charges in a decision dated 4 July 2016 (substantive decision).[2] Budget appeals the substantive decision. The appeal grounds raise wide-ranging issues about whether Budget was acting "in trade", whether the representations were made "in trade", whether "representations" were made at all, whether the representations were false and misleading, and whether the charges were brought within time.

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1 *The Commerce Commission v Budget Loans Limited* [2016] NZDC 8714 ("s147 decision").

2 *The Commerce Commission v Budget Loans Limited* [2016] NZDC 9294 ("substantive decision").

**Background**

[6] Budget Loans Ltd and Evolution Finance Ltd were incorporated in 2004 and 2006 respectively. The directors of both companies at the time of the offending were Mr Alan Hawkins and his son, Mr Wayne Hawkins.

[7] Budget Loans Ltd was once a lender in its own right but its loan originating business wound down between 2006 and 2008. During that period both finance companies focused on the purchase of loan books of other smaller loan companies at a discounted rate, and the enforcement of those loans to obtain a return on their investment.

[8] In practice, there was no clear division between the two companies in respect of the functional aspects of their debt collection activities. The day-to-day operations were carried out with the same staff, same records, and same computer system. Although one company was technically the creditor on any particular loan, the correspondence sent to debtors and other steps taken to enforce the loans was in the name of the other company at various times.

[9] Budget Loans Ltd had previously been investigated by the Commission in 2007. It pleaded guilty to 34 charges in 2010, 25 of which related to the charging of interest post repossession and sale of goods contrary to s 35 of the CRA.

[10] In December 2011, the Commission received a complaint from a budget advisor about Budget Loan Ltd's debt recovery practices. As a result of that complaint, the Commission opened an investigation into both companies.

[11] The 2011 investigation focused on a sample of 21 debtors. The Commission has commenced a High Court compensation proceeding in relation to the balance of the loans purchased by both companies which is currently on hold following the disposition of this criminal proceeding.

[12] At the conclusion of the investigation, the Commission laid 125 charges under s 13 of the FTA. The trial took place before Judge Sharp in the District Court over six days. The prosecution called evidence from Mr McIvor, the investigator for

the Commerce Commission and 13 other witnesses. An interview with Mr Wayne Hawkins was also adduced in evidence. The defence did not call evidence.

[13] After the conclusion of the prosecution's evidence, Judge Sharp heard argument in relation to Budget's application to dismiss 122 of the 125 charges pursuant to s 147 of the Criminal Procedure Act 2011. The Judge granted the s 147 application in relation to 19 of those charges.

[14] The substantive decision was delivered on 4 July 2016. The Judge found each of the 106 charges proven beyond reasonable doubt and entered convictions accordingly.

[15] The Judge's specific findings in relation to each issue raised on appeal are addressed in the course of this judgment.

**Charges**

[16] The 125 charges were all laid under s 13 of the FTA. Of the 106 convictions entered, 103 relate to charges under s 13(i), and three of them relate to charges under s 13(e) of the FTA. The maximum penalty for an offence under s 13(e) and (i) of the FTA is a fine of $200,000.

[17] The charges were laid in relation to a sample of 21 debtors. Not all of these debtors were interviewed by the Commission and many of the charges were based on documents extracted from Budget's files.

[18] In most cases the original loan agreement was entered into between 2001 and 2004 by either National Finance 2000 Ltd or Western Bay Finance Ltd. In many cases judgment had been obtained against the debtor and an attachment order had also been made in relation to the debt.

[19] Each charge relates to a separate representation. For all but one of the debtors there are multiple charges laid against Budget. The various categories of representations were summarised by Judge Sharp as follows:[3]

> (a) Representing a right to repossess goods when they did not have that right;
>
> (b) Representing a right to repossess goods when a valid pre-possession notice had not been issued;
>
> (c) Representing a right to repossess goods because goods were "at risk" when the goods did not meet that definition;
>
> (d) Representing a right to add interest to loans after repossession and sale of secured goods;
>
> (e) Representing a right to add costs to loans after repossession and sale of secured goods;
>
> (f) Representing a right to add interest to loans beyond the amount approved in an attachment order;
>
> (g) Representing a right to require debtors to make loan payments at a higher rate than specified in an attachment order;
>
> (h) Representing benefits to debtors refinancing their loans.

**Section 13 Fair Trading Act: elements of the offence**

[20] Section 13(e) and (i) of the FTA provide as follows:

> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—
>
> (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
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> ...
>
> (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or
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> ...

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3 Substantive decision, above n 2, at [1].

[21] Judge Sharp listed the elements of the offence under s 13 as follows:[4]

(a) the defendant is a person (within the meaning of the FTA); and

(b) was "in trade" and;

(c) being in trade made a representation and;

(d) … in connection with the supply of services and;

(e) … concerning the existence of a right; and

(f) that representation was false or misleading.

[22] There is no challenge to that part of his judgment.

**Commerce Commission appeal**

[23] The 19 charges dismissed by Judge Sharp relate to representations that Budget had the right to add interest and/or costs to debtors' loan balances after repossession and sale of secured property.

[24] All of the loan contracts at issue in the 19 charges have a clause giving a security interest in "all present and after-acquired property" (APAAP clause). This clause affords Budget repossession rights over multiple items of property.

[25] The Commission alleged that Budget's representations were false and misleading because s 35 of the CRA precluded any right to add interest/and or costs to debtors' loan balances after the first repossession had been made, even where there were multiple security interests.

[26] Section 35 of the CRA provided as follows:

> **35 Limit on creditor's right to recover from debtor**
>
> If the net proceeds of sale are less than the amount required to settle the agreement under section 31 as at the date of sale, the creditor is not entitled to recover more than the balance left after deducting those proceeds from that amount (whether under a judgment or otherwise).

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4 Substantive decision, above n 2, at [4].

[27] Section 31 of the CRA provided for a debtor's right to settle the agreement either by paying the balance of the advance outstanding, together with any interest and charges, or by performing an obligation under the agreement.

[28] The CRA was repealed by the Credit Contracts Consumer Finance Amendment Act 2014. Section 83ZM of that statute expressly prohibits the addition of charges and costs following repossession and sale of goods even where there are multiple security rights. In other words, s 83ZM makes clear that the crystallisation of the debt occurs on the first repossession and sale of a secured item.

[29] In the District Court, Budget argued that there was an ambiguity in the application of s 35 where the loan contracts contained an APAAP clause. Specifically, it submitted that it was not clear whether "net proceeds of sale" in s 35 referred to the realisation of some or all of the security, or only to the first repossession and sale of secured property. Budget argued that the penal statutes rule applied so that it should receive the benefit of any doubt about the application of s 35.

[30] Judge Sharp found that the effect of s 35 of the CRA was to crystallise the debt after the sale of repossessed goods, and the remaining balance left after repossession was the maximum sum which the creditor may recover against the debtor. However, he agreed with Budget that, in all but one case, the application of s 35 was unclear where loans were secured by an APAAP clause.[5] He accordingly dismissed all charges, except for those involving Mr S[redacted].

[31] In Mr S[redacted]'s case there had been in excess of 10 repossessions exercised pursuant to the APAAP clause. The Judge found that reliance on the APAAP clause to undertake this number of repossessions offended justice and those charges were therefore capable of being established to the required criminal standard. Convictions on those charges were subsequently entered.[6]

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5 s 147 decision, above n 1, at [142]–[143].

6 s 147 decision, above n 1, at [141].

**Approach on Appeal**

[32] The Commerce Commission brings its appeal of the decision pursuant to s 296(2) of the Criminal Procedure Act 2011 (CPA). Leave is required. Both the leave and substantive appeal were argued at the same time and are accordingly considered and determined together.

[33] The Commission submits that the Judge erred in law in the following ways:

(a) By failing to rule on the correct interpretation of s 35 of the CRA;

(b) By finding that s 35 is only contravened when repossessions have occurred such that they "offend justice". (That finding is said to arise by way of implication from the finding on Mr S[redacted]'s loan).

(c) By failing to rule that s 35 prohibits addition of interest and/or costs after repossession and sale of security notwithstanding the presence of an APAAP clause.

**Analysis**

*The approach to interpretation*

[34] The key issue on appeal concerns the meaning and effect of s 35 CRA in circumstances where there are multiple security interests.

[35] Judge Sharp relied on the penal statute rule in construing s 35. That "rule" is an interpretive presumption which provides for the strict construction of penal statutes in favour of a defendant.

[36] The Commission submits that the penal statute rule has no application in this case because the FTA is not a penal statute. It relies on this Court's decision in *Progressive Enterprises v Commerce Commission*.[7] In that case Asher J declined to apply the presumption on the basis that the FTA "does not create truly criminal

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7 *Progressive Enterprises v Commerce Commission* (2009) 10 TCLR 116 (HC).

liability, indicated by the fact that no sentence of imprisonment can be imposed and because its purpose is regulatory".[8]

[37] I agree that the presumption has less relevance to the interpretation of a regulatory statute, than it does to a statute involving truly criminal liability. But that does not mean that the presumption, or the policy reasons underpinning it, will have no part to play in the interpretation of a statute which attracts criminal liability. As noted in *Statute Law in New Zealand*, where there is genuine doubt as to the meaning and purpose of a provision, a defendant is still likely to get the benefit of that doubt.[9]

[38] Although the presumption may still have a residual role to play, it is clear that the purposive approach embedded in s 5(1) of the Interpretation Act 1999 has watered down its effect.[10] In *R v Karpavicius*, the Privy Council accorded primacy to a purposive interpretation of a provision of the Misuse of Drugs Act 1975. Lord Steyn said:[11]

> [15] Their Lordships are content to assume that linguistically the arguments are finely balanced. It may be right to conclude that on a purely textual view the words "in any other case" are capable of bearing either the interpretation put forward by counsel for the appellant or the interpretation adopted by the Court of Appeal, which before the Privy Council was supported by the prosecution. In a more literalist age *it may have been said that the words of s 6(2A)(c) are capable of bearing either a wide or narrow meaning and that the fact that a criminal statute is involved requires the narrower interpretation to be adopted. Nowadays an approach concentrating on the purpose of the statutory provision is generally to be preferred ... This is reinforced by s 5(1) of the Interpretation Act 1999 (New Zealand) which provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.*
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> (emphasis added)

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8 At [55].

9 JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 236.

10 At 233.

11 *R v Karpavicius* [2004] 1 NZLR 156 at [15]–[16]. See also *R v Konsaijan* [2012] NZHC 2293 at [33].

[39] In *Kirby v Police*, Kós J (as he then was) outlined a statutory interpretation approach which reconciles the purposive approach with the somewhat "faded" penal statute presumption. His Honour said:[12]

> [12] The first point to be made is that the former presumption in favour of strict construction of a penal statute has faded somewhat. But it remains right to say that where non-compliance with a provision can have substantial penal consequences (and here the prescribed penalty is a fine not exceeding $10,000), a Court should not take an unnecessarily expansive view of the purpose and scope of that provision. It is not a question of taking a "strict" or "narrow" view. *Rather the Court determines where across a range of potential compliance requirements the purpose of the statute is most appropriately met, having regard to the consequences for an individual of non-compliance and the reasonable needs, on the other hand, of the state. ...*
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> (emphasis added)

[40] I respectfully follow that approach in this case. The task is to locate where, across a range of potential compliance requirements, the purpose of s 35 of the CRA is most appropriately met, having regard to the consequences of non-compliance for Budget, and the reasonable needs of the state.

*Meaning of s 35 of the CRA*

[41] Section 35 was the successor to s 34 of the Hire Purchase Act 1971 and was in substantially the same terms. In two High Court cases the Court found that the purpose of s 34 of the Hire Purchase Act 1971 was to freeze the financial obligations of a hirer under a hire purchase agreement upon sale of a repossessed item.[13]

[42] There is no real dispute between the parties that this was the underlying purpose of s 35 also. That is, the purpose of s 35 was to crystallise the debt as at the date of sale of the repossessed property, so that interest and costs did not continue to accrue on the outstanding balance.

[43] What is in dispute is the point at which crystallisation occurs where there are multiple security interests. There are three competing interpretations:

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12 *Kirby v Police* [2012] NZHC 2397, [2012] NZAR 975 at [12].

13 *Marac Finance v McKee* (1988) 2 NZBLC 102,867 at 8; *Expansionary Holdings Ltd v Cambridge Discounts Ltd* (2001) 10 TCLR 116 (HC) at [41].

(a) First, s 35 applies so that the debt is crystallised after the *first* repossession and sale of a secured item. On this interpretation the phrase "net proceeds of sale" refers to the proceeds of sale of the first item of property repossessed.

(b) Second, the section applies once *all* property secured by the APAAP clause has been repossessed and sold. On this construction, the phrase "net proceeds of sale" refers to the proceeds of sale from all secured property.

(c) Third, the section applies once all *substantial* security has been repossessed and sold. This application of the section was suggested by the authors of *Garrow and Fenton Law of Personal Property in New Zealand*.[14] On that application of the section, it would be a question of fact in any particular case as to when the debt crystallised. It is implicit in the findings regarding Mr L[redacted] that this is the interpretation favoured by the Judge.

[44] The plain meaning of the text gives little in the way of clues as to the preferred interpretation. But when a purposive interpretation of the section is adopted, there can be little doubt that crystallisation of the debt occurs after the first repossession and sale of secured property. That is, the first interpretation is the only one which gives effect to the underlying purpose of the section and the policy of the CRA.

[45] The effect of s 35 was to draw a line in the sand as to when interest and costs would continue to accrue on an outstanding balance. That provided certainty for both debtors and creditors alike as to their respective rights. One consequence of fixing the date of crystallisation by statute was that the creditor was faced with what the Law Commission described as a "partial election between suing for the debt and

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[14] Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) vol 2 at [22.11], footnote [8].

repossessing the property".[15] The first of the three possible constructions of the section is the only one which meets those underlying objectives.

[46] In contrast, the second interpretation would effectively render s 35 redundant. A creditor could defer and delay the date of crystallisation by exercising its security rights sequentially. That would lead to the underlying debt ballooning as interest and costs continued to accrue on the outstanding balance. The growth of that debt would be at the creditor's sole discretion, and would depend solely on if and when it chose to exercise its repossession rights. The debtor would have no certainty at all as to crystallisation, and the creditor would not be confronted with any form of election between repossession and suing for the debt.

[47] The third interpretation is also inconsistent with the underlying purpose of s 35. Determining a date of crystallisation on a case by case basis does not provide any certainty for either creditors or debtors as to when that date might be reached. Debate about what may be considered "substantial" security would erode the very purpose of fixing that point by statute. It would also afford a route by which creditors might avoid, or at least postpone, the election between repossession and pursuit of the debtor through the courts.

[48] For these reasons, I agree with Judge Sharp's conclusions in respect of Mr S[redacted], but respectfully take a different view on the route by which that result should be reached. In my view, s 35 precluded the charging of interest and costs on the outstanding balance after the first repossession and sale of secured property. Although I agree that the number of repossessions in Mr S[redacted]'s case "offends justice", I do not agree that this is the threshold for contravention of s 35 in those circumstances.

[49] Budget submits that the first interpretation renders a multiple security interest of little practical value. I do not accept that submission. An APAAP clause may still be used to realise multiple items of collateral in relation to the outstanding balance of the loan. In other words, if the creditor exercises its rights over one item of property,

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15 Law Commission *Consumers and Repossession: A Review of the Credit (Repossession) Act 1997* (NZLC R124, 2012) at [3.83].

and the net proceeds of sale are insufficient to clear the loan, further repossessions and sales may be undertaken in relation to the outstanding balance. That is consistent with the purpose of an APAAP clause which is to give a creditor greater security in relation to a debt.

[50] But even if the practical value of the APAAP clause is rendered nugatory, that would not provide a reason to construe s 35 differently. Contractual terms are negotiated under the shadow of the law. The commerciality of those terms does not dictate the proper meaning of a statutory provision.

[51] I accept that the first and preferred interpretation of s 35 means that a creditor cannot recover the costs of repossession for the second and subsequent repossessions. But that does not provide grounds for construing s 35 any differently in my view. For creditors with multiple rights of repossession, the fact that the costs of subsequent repossessions cannot be recovered simply sharpens the focus of the election between suing the debtor, or exercising their rights of repossession.

[52] Finally, I do not accept Budget's submission that the first interpretation would result in the imposition of retrospective criminal liability in breach of the New Zealand Bill of Rights Act 1990. There has been no case concerning the application of s 35 where there is an APAAP clause or something similar, and so there is no previous inconsistent decision on this point. In *Y v R*, the Supreme Court said "if there has been uncertainty in relation to the scope of ss 132 and 134 [of the Crimes Act 1961], the resolution of the question of interpretation in this decision does not impose retrospective liability on the appellant".[16] That position applies equally to this case.

[53] As the Law Commission acknowledges, s 35 could have been expressed more clearly.[17] But I do not consider the infelicitous drafting necessarily translates into a real ambiguity or a genuine doubt about how the section applies where there are multiple security interests. Of the range of potential compliance requirements, I consider the purpose of s 35 of the CRA is most appropriately met by an

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16 *Y v R* [2014] NZSC 34, [2014] 1 NZLR 724 at [27].
17 Law Commission, above n 15, at [3.81], [3.83].

interpretation which precludes the charging of interest and costs on the outstanding balance after a repossession and sale of secured property.

**Result**

[54] It follows that I take a different view to Judge Sharp on this issue. There was a case for Budget to answer in relation to these charges and they should not have been dismissed pursuant to s 147 of the Criminal Procedure Act 2011.

[55] Those findings also dispose of Budget's argument that other charges should also have been dismissed on the same basis.

[56] Leave is granted to the Commission under s 296 of the Criminal Procedure Act 2011, and the appeal is allowed. Judge Sharp heard the evidence in relation to the 19 charges dismissed. It is therefore appropriate to remit these charges to Judge Sharp for determination in light of this judgment.

**Budget's appeal**

[57] Budget appeals all 106 convictions entered by Judge Sharp. All but three of the convictions concerned representations made under s 13(i) of the FTA. Budget appeals on numerous overlapping grounds which are marshalled under the following headings: the application of the FTA; false and misleading conduct; charges filed out of time. Each of these grounds is considered below.

**Approach on appeal**

[58] Section 229 of the Criminal Procedure Act 2011 provides a right of appeal against conviction.

[59] Section 232 provides that the appeal court must allow the appeal if satisfied that, in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or a miscarriage of justice has occurred for any reason.

[60] A miscarriage of justice means any error, irregularity or occurrence in relation to or affecting the trial that created a real risk that the outcome of the trial was affected or resulted in an unfair trial or a trial that was a nullity.[18] A "real risk" is a reasonable possibility that a not guilty or more favourable verdict would have been delivered if nothing had gone wrong.[19]

**Application of Fair Trading Act**

[61] Budget appeals all 106 convictions under s 13 of the FTA. The majority of those convictions concerned conduct falling within s 13(i). Nearly every element of that section is challenged, and the section is accordingly set out again below:

> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—
>
> ...
>
> (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or
>
> ...

[62] Budget submits that the Judge erred in finding that it was acting "in trade"; that the representations were made "in trade"; and that the representations were also made "in connection with the supply ... of services".

[63] Budget also challenges the Judge's finding that the Commission had proved the existence of a "representation", and that the representations were about a "right" within the meaning of s 13(i).

[64] These grounds of appeal are considered below.

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18 Criminal Procedure Act 2011, s 232(4).

19 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730, at [110].

*Budget's trade*

[65] Judge Sharp found that the representations were "in trade" and "in connection with the supply of services". He held:

> [109] The statutory definitions in the FTA are widely drafted. The case law suggests a broad approach to the definitions is required. In this case the distinction between conduct and representations is not material. In many respects the representations charged were followed by conduct reinforcing the stated position.
>
> [110] The distinctions the defence attempts to draw are not real. These were companies which had as a core part of their business the recovery of money lent to debtors. The defendant companies would carry out collection functions relying on the loan contracts which they had purchased but what they were doing was providing credit to the debtors with a charge being made for that credit. Interest continued to accrue on the loans. Collection of that accruing interest and the principal advanced was the business of both defendant companies.

[66] He further held that representations about the way money could be recovered from debtors were an integral part of Budget's business.[20]

[67] The starting point in considering this issue is the meaning of "trade", which the FTA defines as follows:

> *trade* means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

[68] The definition encompasses the "supply" of "services", and those words are repeated in s 13(i). The term "supply" in relation to services is defined to mean "provide, grant, confer". The term "services" is defined as follows:

> *services* includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:
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> ...
>
> (d) any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or

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[20] s 147 decision, above n 1, at [112].

> granting of credit, or the buying or discounting of a credit instrument, or the acceptance of deposits;—
>
> but does not include rights or benefits in the form of the supply of goods or the performance of work under a contract of service.

[69] On the plain meaning of these terms, Budget was clearly engaged in "trade", "business" and in an "activity of commerce". That trade involved the recovery of principal and interest advanced under the original loan contract.

[70] However, as Budget submits, simply being in business is not enough to fall within the FTA. The conduct in issue must be "in trade" to be captured by s 13. Whether an activity is "in trade" involves assessing the conduct in issue in light of the purpose of the FTA and in particular the consumer protection purpose set out in s 1A(1)(a).

[71] In *Concrete Constructions (NSW) Pty Ltd v Nelson*, a majority of the High Court of Australia held that it was only conduct which had a trading or commercial character that fell within the Trade Practices Act 1974 (Cth).[21] In that case, a building site foreman made certain health and safety representations to a builder which were alleged to be false and misleading. Those communications were held to fall outside the ambit of the Trade Practices Act 1974 (Cth) as they lacked the necessary trading or commercial character.

[72] A trading or commercial character was also absent from the representations at issue in *Desmone Ltd v University of Auckland Senior Common Room Incorporated.*[22] In that case the defendant issued a notice terminating a catering services contract with the plaintiff. The plaintiff alleged that the representations made in the notice were false and misleading within the meaning of the FTA. Rodney Hansen J found that the mere exercise or assertion of perceived contractual rights fell outside the Fair Trading regime. Budget places great weight on these observations which they say apply equally in this case. However, when the judgment is read in its entirety it is clear that the representations in issue were not made in the course of providing catering services, and in that respect did not have

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21 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17.

22 *Desmone Ltd v University of Auckland Senior Common Room Inc* (2002) 7 NZBLC 103,580.

the necessary trading or commercial character to bring them within the purview of the FTA.

[73] Budget also relies on *Malayan Breweries Limited v Lion Corp Limited.*[23] In that case, Barker J held that the threat of legal action or the bringing of legal action by shareholders against the company and their directors was not conduct regulated by the FTA. Again, the representations in that case were not made in the course of the defendant's core trading activity and were not therefore representations "in trade".

[74] The key distinguishing feature of this case is that the enforcement of the loan contracts, and the representations made for that purpose, formed the very backbone of Budget's trade. Budget's business involved the recovery of monies due and owing under a loan contract. Recovery was to be effected by enforcing the terms of the loan, writing to debtors demanding increased payments, and taking enforcement action under security agreements in the event of default.

[75] Although the representations may have concerned the exercise of contractual or statutory rights, they were nevertheless impressed with the necessary trading and commercial character to bring them within the ambit of the FTA. Unlike the position in *Desmone* or *Malayan*, the representations made by Budget were the tools of their trade and the direct means by which they sought to achieve their commercial objectives.

[76] Furthermore, the representations at issue were also directed at, and intended for, consumers. Indeed, many of the representations at issue were made in Authority to Act documents. Those documents authorised the repossession of debtors' property and, pursuant to s 17 of the CRA, had to be shown to a debtor upon entry to their premises. Regarding such representations as having been made "in trade" is consistent with the consumer protection focus of the FTA and further distinguishes this case from the authorities relied on by Budget.

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23 *Malayan Breweries Ltd v Lion Corp Ltd* (1988) 4 NZCLC 64,344.

[77] A finding that the representations were made "in trade" goes some way to answering another of Budget's challenges to the Authority to Act representations. Budget contends that these representations were "internal communications" because the Authorities were issued by Budget to their employees and as such fell outside the ambit of the Act.

[78] But the fact that the Authorities were issued to employees (if, indeed, that was proved as a matter of fact), assumes little significance in the overall analysis. It is the commercial purpose of such representations, and the fact that they were ultimately intended for a consumer audience, that is determinative in this case. I agree with Judge Sharp that these representations were made "in trade".

[79] I also consider the Judge was correct to find that Budget's conduct was "in connection with the supply … of services" within the meaning of s 13(i). On the plain meaning of those terms as defined, the enforcement action taken by Budget was clearly "in connection" with the grant of rights under a contract for the lending of money.

[80] Budget argues that the "supply of services" only related to the original advance of credit. It submits that the representations had no proximity to the original advance in terms of time (having been made many years later), and subject matter (being concerned with the enforcement of judgment debts and not the loan contracts). On that basis, they submit that the "connection" between the lending of credit and the alleged representations is insufficient for the purposes of s 13.

[81] The temporal and causal distinction alleged by Budget is strained in my view. The original supply of credit was not an isolated event which can be hived off from the terms and conditions upon which that supply was made. The advance of the principal sum, the collection of interest and fees on that sum, and the enforcement of the loan agreement (and subsequent judgment debt) were interlinked activities which existed on a continuum. The provision of credit was always subject to the terms and conditions upon which the advance was made, and in that sense was ongoing. Similarly, the enforcement of a judgment debt is directly connected to the underlying loan agreement which is the subject of that judgment and the terms and conditions

upon which the credit was provided. Clearly the enforcement of the terms upon which the advance of credit was made was in "connection" with the supply of that credit.

[82] The Judge did not err in finding that Budget was acting "in trade", that the representations were made "in trade", and that they were "in connection with supply … of services". This ground of appeal is dismissed.

*The nature of a representation*

[83] Budget also challenges the application of s 13(i) of the FTA on the grounds that the Commission could not prove a "representation" had been made in a number of the charges. They argue that the Commission is required to prove actual dissemination of the representation and actual receipt of the representation by the debtors.

[84] Judge Sharp found that the representations made were of fact and the actions described in the representation were actually taken.[24] He further found that "actual dissemination" of the representation was unnecessary, but that by reference to Mr McIvor's evidence, the prosecution had proved beyond reasonable doubt that representations were made.[25]

[85] In relation to the representations made in the Authority to Act documents, Judge Sharp found that once a representation in the form of an authority to repossess was formulated and disseminated it was known that the authorities would be acted upon. He considered that was sufficient for an actionable representation to be made, observing that there was a link between the conduct in issue and the commercial activities of Budget and their agents.[26]

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24 Substantive decision, above n 2, at [41].

25 Substantive decision, above n 2, at [43].

26 s 147 decision, above n 1, at [117]. Judge Sharp also referred to s 45 of the FTA as including representations to agents as being caught by the provisions of the Act. The Commerce Commission accepts that that was in error. Section 45 captures representations by agents to third parties and not representations to an entity's own agents.

[86] Budget does not dispute the fact that s 13(i) does not include an express requirement that a representation be made to another person. Rather, Budget submits that receipt is implicit in the very nature of a "representation".

[87] The leading authority on the nature of a representation remains *Marcol Manufacturers Ltd v Commerce Commission.* In that case, Tipping J held that the essence of a representation is that the "representor must be saying something to the representee either by words (whether spoken or written) or other means".[27]

[88] Contrary to Budget's submissions, Tipping J did not find that receipt by a representee was an essential ingredient of a representation. *Marcol* itself concerned representations made on a jacket label. There was no evidence that anyone had actually bought the jacket or read the label, but the statements were nevertheless found to be representations for the purposes of the FTA.

[89] In *Thompson v Riley McKay Pty Ltd,* the Federal Court of Australia expressly held that receipt by a debtor is not an ingredient of a representation.[28] The representations in that case were advertisements published in journals. The issue was whether the prosecutor had to prove that they had in fact been read in order to find an offence under s 53 of the Trade Practices Act 1974 (Cth). Deane J described what was required to prove a representation as follows:[29]

> It is implicit in the ordinary use of the word "represent" that there be an intended representee, to whom the relevant representation is directed. That intended representee may be an identified person, as in the case of a representation made to a particular person in a letter, or unidentified, as is commonly the case with a representation made in an advertisement to be disseminated by the mass media. *There is not, however, implicit in the word "represent" any requirement that the representation actually reach, or be understood by, the intended representee. The act of representing is complete once the subject matter is irrevocably set forth or disseminated upon the course which is intended to lead to the intended representee or representees.*
>
> (emphasis added)

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27 *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC).
28 *Thompson v Riley McKay Pty Ltd* (1980) 29 ALR 267 (FCA).
29 At 276.

[90] These cases provide a complete answer to this ground of appeal. Proof of receipt by another person is not required to prove that a representation has been made.

[91] However, proof of a "representation" does require proof that the representation has been disseminated or set forth upon its intended course. Those are questions of fact to be determined on the evidence adduced at trial. Whether a representation has been made is likely to turn on the nature of the representation and the means by which it has been disseminated. Publication of an advertisement in either print or electronic media may well be sufficient to prove that a representation has been made. Similarly, the sale of goods containing labels which are alleged to contain misleading representations is likely to be sufficient.

[92] Where the representation is made in a letter or other document addressed to a specific representee, there must be proof that those representations have been set forth on their intended course. Statements in documents which lie latent on a file and are not published, sent, disseminated, or otherwise "set forth" are unlikely to meet the definition of "representation". Proof of receipt by the identified representee will be good evidence that the representation has been made. But a representation may still be proved by other means, and the absence of evidence proving receipt is not necessarily fatal to the charge.

[93] In this case, the Judge considered that the evidence of Mr McIvor and the fact that the representations had been actually acted upon was sufficient proof that a representation had been made. For example, the loan notes for many of the debtors recorded that an Authority to Act document was issued, and that repossession of the goods took place, either on the same day or shortly thereafter. That is compelling evidence that the Authority to Act document was issued to a repossession agent, and in my view, is sufficient to prove beyond reasonable doubt that the representations in the Authority to Act document were made.

[94] The Judge did not err in finding that the "representations" the subject of the charges had been made. This ground of appeal is also dismissed.

*Existence of a "right"*

[95] Judge Sharp found that the s 13(i) representations concerned the existence of a right".[30] Budget submits that "rights" in s 13(i) means consumer rights. They say that the representations at issue in this case concern representations about *its* legal rights as opposed to representations about the debtor's rights, and accordingly fall outside s 13(i).

[96] Budget relies on *Australian Competition and Consumer Commission v McCaskey*.[31] That case concerned a number of orders sought by consent pursuant to the Trade Practices Act 1974 (Cth). Declaratory relief was sought pursuant to s 53(g) of that Act, which is in substantially the same terms as s 13(i). In the course of considering whether to grant a declaration in agreed terms, the Judge noted that the application of s 53(g) to representations by the supplier against a purchaser, as opposed to the purchaser against the supplier, was "a strained reading and a doubtful construction".[32]

[97] The Judge's comments must be read in context. The declaratory relief was sought by consent. A range of difficulties with the terms of that relief had been identified by the Judge. Those difficulties related to the nature of the representations, and the fact that they were being made by a debt collector, rather than the supplier/defendant itself. It is not entirely clear from the judgment that the Judge's observations formed part of his reasons as to why the declaratory relief was ultimately declined.

[98] In any event, whatever the position in *McCaskey*, s 13(i) is clear as to its terms. There is no basis to read the reference to "rights" in that section as only referring to consumer rights. A key purpose of the FTA is consumer protection, but that does not mean that the rights in s 13(i) must only refer to consumer rights. In any event, as the Commission submits, a misstatement of a supplier's rights necessarily involves a misstatement of consumer's rights. They are two sides of the same coin. It would deprive s 13(i) of any meaning and effect if it could be avoided

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30 s 147 decision, above n 1, at [120]–[122]; substantive decision, above n 2, at [57].

31 *Australian Competition and Consumer Commission v McCaskey* [2000] FCA 1037, (2000) 104 FCR 8.

32 At 23.

by simply framing the representation as one which related to the rights of a creditor (or supplier) rather than those of the debtor (or consumer). Such an interpretation is inconsistent with the plain meaning and purpose of s 13(i). I do not consider the Judge erred in dismissing this argument.

**False and misleading**

*Representations as to payments in addition to attachment orders*

[99] Budget made representations to six debtors that they were required to increase their repayment rate beyond the sum that had been ordered by the Court under an attachment order.

[100] Judge Sharp found the representation to be false because an extra payment cannot be required while an attachment order is current unless the Court makes a further order allowing it.[33]

[101] Budget challenges this finding on a number of fronts, each of which are addressed below.

[102] The first ground of attack challenges the characterisation of the representations the subject of the charges. Budget argues that the representations are analogous to "pre-action letters" sent prior to a concurrent enforcement proceeding being issued pursuant to s 79(6) of the District Court Act 1947. In other words, they say the letters put the debtor on notice that if a payment plan cannot be arranged on the debtor's own terms, the creditor will issue enforcement proceedings in the District Court.[34] Further, in relation to three of the six debtors they contend that the representations made do not assert a right to require additional payments to be made.

[103] To address these arguments it is necessary to consider the terms of the representations the subject of each of the charges. In each case, the representations

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33 s 147 decision, above n 1, at [126].

34 Section 79(6) provides as follows: "It is hereby declared that 2 or more proceedings for the enforcement of a judgment or order may be taken concurrently, but the judgment creditor shall not be entitled to recover a greater sum than the amount owing under the judgment or order and the costs and fees of any proceedings for enforcement".

were made in letters sent to the debtors. The letter to Ms T[redacted] provides a good example. It reads as follows:

> Dear Miss T[redacted]
>
> Re: Loan Contract 505825 with Evolution Finance Ltd
>
> **FINANCIAL CIRCUMSTANCES REVIEW**
>
> Please find attached a Statement of Income and Expenditure.
>
> As part of our annual process, we are currently reviewing all loans. After reviewing your account it has come to our attention that your current repayment amount of $10.00 is not adequate to support the remaining balance. At this rate this debt will take over 10 years to pay off.
>
> As this loan is now over 7 years past its maturity date and at a high balance, we now require you to increase your payments to the contracted amount of $28.93 per week, which will make this account payable in less than 4 years. If you are unable to afford this amount, please contact me ASAP. We are more than happy to discuss a more suitable arrangement based on your current financial situation, and may also be able to offer you a refinance deal based on your affordability.
>
> If you are unable to increase at this time, please fill out and return the attached document in the provided pre-paid envelope. Should you fail to increase your payments or contact me by the 22nd February; your file will be forwarded onto our legal department for further review.

[104] Similar representations were made to Mr and Mrs L[redacted], and Mr C[redacted]. Reference was made to the current payments, the balance, interest rate, and the length of time required to pay off the loan. The letters stated that the debtors were required to increase payments to cover the loan and the minimum payment required was stated in the letter.

[105] The letter to Mr F[redacted] responded to a request by him for a settlement balance on the loan. The history of the loan from December 2001 to 3 April 2013 was canvassed. That included the fact that payments were being made under an attachment order at $25 per week. The letter notes that the interest charged is that allowed by the Court, post-judgment, of 7.5 per cent. However, the letter goes on to state that:

> Unfortunately because of the long period where loan payments were not made, interest even at the 7.5 per cent rate is adding $34 per week so the loan is going backwards.

> The major problems were due to your not making payments on the loan for that period of six years between 2002 and 2008. As you can see, the results are not of our making, this was the cause to making the balance higher due to interest changes during that time.
>
> Payments have to increase to the contract rate of $400.90 per month or $93.25 per week.
>
> If you the client can make payments at this or close to this level on a consistent basis then we would be prepared to modify the loan so that the interest being charged is materially reduced.

[106] Properly construed, I do not consider the letters amount to "pre-action letters" as Budget submits. There is no reference to concurrent enforcement action being taken in the District Court, nor is there any reference to any application to vary the attachment order. The fact that concurrent proceedings *could* have been subsequently issued under s 79(6) is beside the point. What is implicit in the representations made is the fact that Budget had a right to require payments other than what the Court had ordered and without first initiating those further proceedings.

[107] Budget argued that there was insufficient evidence that they "required" additional payments in three of the six charges because their assertion was tempered or mitigated by qualification to the effect that it was only if the debtor could afford to make an increase that such would be sought.

[108] This argument was not advanced in the District Court. In any respect, I am satisfied that it has no merit. The letters state that the debtor is "required" to pay the higher amount, or that he or she "must" now pay. That is the language of obligation. The qualifying words relied on by Budget are expressed as matters of discretion, for example, "more than happy to discuss", and "may" be able to discuss a refinance deal. Read as a whole, the representations clearly imply that Budget has a right to demand or require the additional payments, and a discretion as to what will happen next. Budget did not have such a right and accordingly the representations are false and misleading.

[109] Finally, I do not accept Budget's alternative submission that the provisions of s 79(6) are ambiguous so as to require the application of the penal statutes rule. The

wording of s 79(6) is clear as to its terms. The penal statutes rule provides no answer to the charge.

[110] Budget makes a further alternative argument in relation to Mr L[redacted] Budget submits that the representation made was not false and misleading because its letter was addressed to both Mr L[redacted] and his wife, and only Mr L[redacted] was making payments pursuant to an attachment order.

[111] The representations at issue were set out in a letter as follows:

> Dear Mr and Mrs L[redacted]
>
> Thank you for the payments you are making on your account. We are now at a point where your account must be reviewed.
>
> You are currently making payments of $50 fortnightly on your loan. Your current balance is $6,064.13 at an interest rate of 20 per cent. At this rate your loan will be repaid in approximately 14 years.
>
> As a result of this we now require you to increase your payments to cover the loan within a minimum of four years. This means we will need to see a minimum payment of $100 per fortnight.
>
> Failure to do this may result in the repossession of your consumer goods and/or new Court proceedings being filed against you with all added expenses being at your cost.
>
> To prevent this action being taken against you, you must contact us with seven days of the date of this letter (sic). Our bank account details are as follows:
>
> [bank details follow]
>
> If you require any assistants (sic) please don't hesitate to call us on our free phone number [phone number set out].

[112] Budget accepts that Mrs L[redacted] was not paying money pursuant to an attachment order. There was nothing in this correspondence that identifies Mrs L[redacted] or subjects her to further enforcement action. I therefore agree with the Commission's submission that the requirement to increase the fortnightly payments is plainly a reference to the attachment order which was being paid by Mr L[redacted]. It is difficult to construe the letter any other way. There was no right to require that attachment order payment to be increased. The Judge was right to find this representation false and misleading.

[113] Finally, Budget makes an alternative argument in relation to two debtors (Ms W[redacted] and Mr L[redacted]) who have general security agreements. Budget contends that a right to seek additional payments continues under the general security agreement despite the attachment order being repaid. The same argument is raised by way of challenge to nine convictions for representations in relation to Ms M[redacted] and Mr L[redacted] relating to the right to repossess goods where the attachment order had been repaid. Budget argues that the right to repossess under the security agreement survived the discharge of the attachment order.

[114] Budget's arguments under this head are difficult to follow. To the extent the arguments are premised on the right to continue to charge interest and costs following a first repossession where the general security agreement contains an APAAP clause, then my findings on s 35 dispose of this ground of appeal. Budget was not entitled to charge interest and costs after the first repossession of the debtor's chattels.

[115] To the extent that the arguments turn on the security agreement not merging with the judgment obtained in the District Court, then Budget's submissions are premised on an erroneous construction of those agreements. The provisions relied on by Budget arise out of the loan agreement, and not the general security agreement. Budget does not point to any provisions of the latter agreement which would give rise to an independent right to continue to charge interest (or any other fee). On my review of those documents they do not include such a right. The obligation to repay the loan, interest, and costs arose under the loan agreement and not the security agreement.

[116] That distinguishes the position from *Osborne Building Ltd v Duncan* (relied upon by Budget) where an independent right to charge interest in a mortgage was found to have survived summary judgment on the underlying loan agreement.[35]

[117] On the proper construction of the agreements in issue, once the judgment debt was discharged through the discharge of the attachment order, the security

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35 *Osborne Building Ltd v Duncan* HC Hamilton WS1/92, 2 December 1992, Doogue J.

interest was also discharged. Budget had no right to seek additional payments, or to repossess goods, once the attachment order was repaid.

*Representations requiring interest in excess of sum ordered in an attachment order*

[118] Four of the charges allege that Budget required debtors to pay interest in excess of the amount ordered by the Court in an attachment order. The Commission alleges that this was misleading because Budget had no right to do so. Judge Sharp ruled as follows:[36]

> [130] To have charged interest after judgment could only have been lawful if the right to charge interest post judgment was specifically recorded in the contract between the defendant company and the debtor. The usual rule is that the right to charge interest merges with the judgment. *Economic Life Assurance Society v Usborne*.
>
> [131] Where it is permitted for applications for additional interest after attachment orders to be made following judgment, the only basis upon which further interest could be claimed is upon the Courts consideration of a further application.
>
> [132] To assert a right to claim additional interest while an attachment order was on foot without making it clear that this would be subject to the requirement that an application be made to and granted by the Court, was a misrepresentation of the facts.
>
> (footnote omitted)

[119] Budget submits that it is lawful and appropriate for a creditor to represent a right to claim interest on a judgment debt even after an attachment order is made. If the further interest is not paid on demand, a judgment creditor may then apply to court for a further attachment order to enforce this right.

[120] Section 65A(5) of the District Courts Act 1947 provides that where any enforcement process is issued in respect of a judgment debt, no interest shall be payable in excess of the amount specified in the process unless a further such process is issued.

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[36] s 147 decision, above n 1, at [130]–[132].

[121] Representations which amount to a demand for further interest, without indicating that such a right would only arise if Budget applied for and was granted a further enforcement process, were misleading in my view.

[122] Furthermore, for three of the four relevant debtors, there was no contractual right to demand interest on the judgment debt at all. In those circumstances, the only interest to which Budget was entitled was the interest that was included in the original judgment debt and any subsequent statutory interest that accrued from the date of judgment which was included in the attachment order made in each case.

[123] For the fourth debtor, Ms M[redacted], the applicants only had a right to demand further interest if they applied and were granted a further attachment order providing for it. Without that qualification, I agree with Judge Sharp that the representations as to further interest were misleading.

*Right to repossess goods "at risk"*

[124] Budget challenges Judge Sharp's findings in relation to representations that the repossession of goods were on the basis that such goods were "at risk". The representations were made in the Authority to Act documents by way of a large watermark stating "AT RISK", in a heading which stated "Security At Risk", and at the foot of the document which stated "Security at Risk pursuant to section 109(2) of the Personal Property Security Act 1999 and also pursuant to section 7 (2) of the Credit (Repossession) Act 1997".

[125] Section 7 of the CRA provided that a creditor must not take possession of consumer goods unless the debtor is in default under a security agreement, or the consumer goods are "at risk". Under s 8 a creditor is obliged to serve a pre-possession notice on the debtor and on every guarantor of the debtor before taking possession of consumer goods. But that requirement does not apply if the consumer goods are "at risk".[37]

[126] The term "at risk" is defined under s 7(2) of the CRA as follows:

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[37] CRA, s 8.

> ... the creditor has reasonable grounds to believe that the consumer goods have been or will be destroyed damaged endangered disassembled removed or concealed contrary to the provisions of the agreement.

[127] As is evident from this section, the creditor must have reasonable grounds for believing that the goods are "at risk" in order to fall within the definition.

[128] Judge Sharp observed that Budget's practice "appears to have been to use an "at risk" template on a default basis and, based on the evidence of Mr McIvor, there was no basis upon which it could be said that the goods were "at risk".[38] Mr McIvor's evidence was largely unchallenged by Budget at trial having only been cross-examined on these charges in relation to two of the debtors.

[129] Budget now challenges the Judge's findings on the basis that he reversed the onus of proof, and erred in relying on Mr McIvor's evidence without independent review of the documentary evidence on file. It submits that there were valid pre-possession notices on file in many cases and accordingly the Commission could not discharge the burden of proving beyond reasonable doubt that the goods were not "at risk" at the time the representations were made.

[130] It is not necessary for me to determine the onus of proof issue in order to resolve the appeal. That is because even if Judge Sharp erred in the application of the onus of proof, it was not an error that vitiated the Judge's decision for the reasons set out below.

[131] I consider the Judge was entitled to rely on the evidence of Mr McIvor in finding the charges proved. Budget was obliged to cross-examine Mr McIvor on significant matters which contradicted his evidence.[39] In the absence of such questions, Mr McIvor's evidence was left unchallenged. Nevertheless, I do not consider the evidence which Budget now seeks to rely on impugns Mr McIvor's evidence such that it can be said a miscarriage of justice has occurred.[40] Budget's arguments in relation to each of the debtors are considered below.

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38 Substantive decision, above n 2, at [48].
39 Evidence Act 2006, s 92.
40 Section 92(2)(c).

Ms T[redacted] and Ms R[redacted]

[132] Both charges were based on representations made in an Authority to Act document which suggested the goods to be repossessed were "at risk". Budget now relies on references in the loan notes to pre-possession notices being sent prior to the repossessions taking place.

[133] Even if those pre-possession notices were considered to still be valid at the time the repossessions took place (and there are serious doubts about that in both cases), it does not alter the fact that the representations made in the Authority to Act document as to the goods being "at risk" were false and misleading. This evidence would not have altered the position in respect of these charges.

Ms M[redacted] and Ms C[redacted]

[134] Mr McIvor's evidence in relation to both these debtors was that there were no grounds for believing that the goods were "at risk". In any respect, he noted that, given that both debtors had paid off the attachment order at the time of the representations, there could not be any items considered to be "at risk".

[135] Budget submits that the loans may not have been paid off in full, as there was a right to continue to charge interest and costs after the first repossession pursuant to s 35 of the CRA. They point to other evidence which they say forms a foundation for a finding that the goods were "at risk".

[136] My findings regarding s 35 dispose of that argument. There was no right to continue to charge costs and interest after the first repossession, and accordingly the loan was paid off at the time Budget represented they had a right to repossess the goods.

[137] Furthermore, I am not persuaded that any of the matters raised by Budget suggests a reasonable basis for the creditor believing that the goods were "at risk". As such, the representation that there was a right to repossess goods which were "at risk" was false and misleading in the circumstances.

[138] Finally, I do not accept that the charges for these debtors were duplicitous. Although the charges concerned the same Authority to Act document, they were nevertheless concerned with different representations – the right to repossess, and the right to repossess on the basis that the goods were "at risk". The charges were not contingent on each other and could stand or fall on their own terms. For example, if a right to repossess had somehow survived repayment of the attachment order, then the first representation would not be false or misleading. But the second charge could nevertheless still be proved if the goods were not "at risk" and accordingly there was no right to repossess them on that basis.

[139] Mr McIvor's evidence addressed both requirements separately. There was no right to repossess the goods because the attachment order had been repaid. Furthermore, he could not find any evidence that the goods were "at risk". The Judge was entitled to rely on that evidence in finding those charges proved.

Ms N[redacted]

[140] Budget now suggests that there is evidence on Ms N[redacted]'s file that goods had been removed and/or concealed in breach of Ms N[redacted]'s security agreement. Much of the evidence relied on by Budget is remote from the time that the representations were actually made. The evidence of Mr McIvor and the loan notes suggest that whatever the position was in the past, it is clear that Budget were in constant contact with Ms N[redacted] at the time the "at risk" representations were made. There is nothing arising out of those conversations or events which would suggest that the goods were "at risk" at the time the representations were made.

Mr S[redacted]

[141] Budget suggests that the loan notes indicate a pattern of Mr S[redacted] concealing his whereabouts and engaging in deception when he received notice of legal action. That forms a basis for suggesting that the goods were in fact "at risk" as represented in the Authority to Act documents.

[142] But, such an allegation is not sustainable when the events, as detailed in the loan notes at the time the representations were made, are considered as a whole. The loan notes evidence successive repossessions of goods from Mr S[redacted] within a very short period of time. On each occasion items were located and repossessed at the same address. There is no suggestion in the loan notes that Mr S[redacted] was concealing any of the property at this time. To the contrary, the loan notes record that nearly all his property had been taken as a result of these successive repossessions. The notes also evidence that Budget was in contact with Mr S[redacted] throughout this period. I do not consider that this evidence contradicts Mr McIvor's findings that there was no basis for considering the goods were "at risk". Accordingly the representations were false and misleading.

**Charges filed out of time**

[143] Budget submits that the charges relating to representations regarding repossession have been filed out of time. They submit that the time limit under s 41 of the CRA applies to those charges.[41]

[144] Judge Sharp found that the applicable limitation provision was prescribed by the FTA. Accordingly, the charges had to be brought three years after the matter giving rise to the contravention was discovered or reasonably ought to have been discovered.[42]

[145] I agree. The charges related to representations under the FTA. The charges specifically alleged that the representations were false and misleading and in contravention of s 13(i) of the FTA. The relevant limitation period is prescribed by the FTA.

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41 Section 41 of the CRA was replaced as from 1 July 2013 by s 413 of the Criminal Procedure Act 2011. For charges pre-dating 30 June 2013, the time limit for laying an information was "at any time within 2 years after the time when the matter of the information arose". After 30 June 2013, the time limit was "2 years after the date on which the offence was committed". The CRA was repealed as from 6 June 2015 by s 82 of the Credit Contracts and Consumer Finance Amendment Act 2014.

42 Section 40(3) of the FTA was replaced as from 8 July 2003 by s 8 of the Fair Trading Amendment Act 2003. Prior to that date s 40(3) provided that proceedings under the section may be commenced "at any time within 3 years after the matter giving rise to the contravention arose". After 8 July 2003, the section provided that proceedings could be commenced "at any time within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered".

[146] Budget relies on *Southland Indoor Leisure Centre v Invercargill City Council* to support its position.[43] But the issues in that case were very different to those in this case. That case concerned the application of the limitation period in s 393 of the Building Act 2004 to a cause of action in a civil proceeding brought under the FTA. Section 393 of the Building Act 2004 specifically provided that the Limitation Act 2010 applied to civil proceedings arising from building work associated with the design, construction, alteration, demolition or removal of any building. Mander J found that the FTA cause of action met this definition and accordingly the limitation period applied.

[147] None of those issues arise in this case. The case does not stand for a general proposition that where there are other limitation periods prescribed by statute which are generally concerned with the same subject matter as the FTA cause of action, then those limitation periods will apply instead of the limitation period under the FTA.

[148] In the alternative, Budget argues that if s 40(3) of the FTA applies, then two charges relating to the debtor Ms W[redacted] should be dismissed as the likelihood of loss or damage "ought reasonably to have been discovered" earlier than it was.

[149] Judge Sharp made a finding of fact that the earliest opportunity the prosecution could reasonably have had to carry out the assessment was 23 May 2011 when the debtor files in relation to the various complainants were available for consideration by the Commerce Commission.[44] There is no basis to disturb that factual finding. I am satisfied that all the charges were filed within time.

**Result**

[150] Leave is granted to the Commerce Commission to appeal from the 19 charges dismissed pursuant to s 147 of the Criminal Procedure Act 2011, and the appeal is allowed. The 19 charges are remitted back to Judge Sharp in the District Court for determination in light of this judgment.

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43 *Southland Indoor Leisure Centre v Invercargill City Council* [2014] NZHC 1439.

44 s 147 decision, above n 1, at [150].

[151] Budget's appeal is dismissed.

Edwards J