ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF VICTIMS.

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2017-004-002886
[2019] NZDC 23790

BETWEEN	COMMERCE COMMISSION Applicant
AND	ALLAN ROBERT HAWKINS First Respondent
AND	WAYNE ROBERT HAWKINS Second Respondent

Hearing:	13-15 November 2019
Appearances:	A McClintock and V Fowler for the Plaintiff First Respondent appears in Person No appearance by or for the Second Respondent
	Written Submissions: 3 December 2019 (Commerce Commission) 4 December 2019 (A R Hawkins)
Judgment:	18 February 2020

JUDGMENT OF JUDGE B A GIBSON

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[1] The applicant seeks management banning orders against the respondents pursuant to s 46C of the Fair Trading Act 1986 ("the FTA") for the maximum period available of 10 years. The respondents were directors of a company, Budget Loans Limited ("Budget") which at the relevant time for the application of the section was found to have committed offences against s 40(1) of the FTA, both also being closely involved in the management of the company at the time the offending conduct arose.

[2] Section 46C(1) of the FTA provides:

> (1) The District Court may make a management banning order against an individual who—
>
> (a) …
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> (b) is, or was at the time of the commission of the offence, a director of, or concerned in the management of, an incorporated or unincorporated body that has, on at least 2 separate occasions within a 10-year period (whether before or after this section comes into force), committed an offence against section 40(1) …

[3] The grounds for making the order are set out in s 46C(2) of the FTA which provides that the Court may make the order:

> …only if it is satisfied that the order is necessary to protect the public from a risk that the person, or any incorporated or unincorporated body of which the person is a director, or the management of which the person is concerned in, will commit further offences against section 40(1) or (1A).

Section 40(1) creates offences where there has been contravention of various provisions of Part 1 of the FTA (the unfair conduct provision), and s (1A) concerns breaches of s 24 of the FTA, the section concerned with pyramid selling schemes.

[4] Section 46 itself was inserted in the FTA as from 18 December 2013, three years after Budget was first convicted of offences against s 40(1) of the Act, but s 46C(1) is retrospective in effect.

[5] In 2010 Budget was charged and subsequently convicted of 34 breaches of s 13(1) of the FTA, a provision caught by s 40(1), for misrepresenting to debtors to whom it provided financial services that it had the right to charge a "welcome letter" fee, effectively an establishment fee, when it acquired a group of debtors from another company, and two further charges of misrepresenting the extent of the security granted under a particular clause in the debtor's contract with it.

[6] Budget had been a third tier lender of money, principally to borrowers with low incomes who found it difficult to acquire finance elsewhere. It essentially became a debt collecting company after it acquired a loan ledger, much of which was in default, from National Finance 2000 Limited (in receivership) ("NFL") and thereafter its principal business group was managing those debtors, together with another group of

debtors acquired from Western Finance by a company related to Budget, Evolution Finance Limited ("Evolution") which shared directors with Budget. There was no clear division between the two companies in respect of the functional aspects of their debt collection activities or in its management which involved both respondents.

[7] The conduct which led to Budget being prosecuted and convicted occurred between 2006 and 2009. The company entered guilty pleas in respect of that prosecution and a settlement agreement between Budget and the Commerce Commission was signed whereby the company undertook to refund, repay or reduce debtors' accounts by the amount of any unauthorised interest paid.

[8] Subsequently Budget committed further offences under the FTA when it was prosecuted and convicted in 2016 of 83 charges pursuant to s 40(1) of the FTA. Evolution was also prosecuted at that time and convicted of 42 charges under the FTA. The trial Judge, Sharp DCJ, dismissed 19 charges, the dismissals being subsequently successfully appealed by the Commerce Commission. Convictions in respect of those charges were entered against Budget after they had been remitted back to the District Court by the High Court for determination.

[9] Budget had faced, in that prosecution, 125 charges under s 13 of the FTA, concerning false and misleading representations made to debtors in the course of enforcing loan agreements, principally ones assigned to it by NFL. The representations, made between 2009 and 2014, concerned Budget's right to recover additional interest and costs from debtors, often in excess of attachment orders made by the court, the right to repossess property it believed to be secured, and representations concerning the supposed benefits for debtors refinancing their loans with Budget.

[10] Consequently, qualifying conduct by Budget under s 46(1) of the FTA was met by the convictions in 2010 and 2016 and, as the respondents were directors of Budget at the time of the offending, banning orders were sought by the Commerce Commission against them.

[11] Both respondents filed notices of opposition and supporting affidavits in opposition to the application. Mr Wayne Hawkins accepted he met the prerequisite requirement for a banning order but opposed the granting of one on the basis that it was not necessary for him to be banned in order to protect the public within the meaning of s 46C(2). Mr Allan Hawkins, in his notice of opposition, seemed to contest the prerequisite requirement for a banning order, although at the hearing accepted the requirement was met but also opposed the order on similar grounds to his son, Mr Wayne Hawkins.

[12] Both respondents were required for cross-examination. On the morning of the hearing the Court received an email from the second respondent's solicitors advising Mr Wayne Hawkins would not be attending the hearing but would abide the decision of the Court. No appearance was made on behalf of the second respondent notwithstanding his solicitors remain solicitors on the record.

[13] Given Mr Wayne Hawkins failure to attend and submit to cross-examination on his affidavit rule 9.64(3) of the District Court Rules 2014 applies which provides that the affidavit must not be used as evidence unless the evidence is routine or there are exceptional circumstances, and then only with the leave of the Court.

Budget's 2010 convictions

[14] In July 2010 Budget pleaded guilty to 34 charges pursuant to s 13(1) of the FTA, the maximum penalty, at that time, being $200,000 for each charge. Both respondents were directors of Budget at the time. The company was a wholly owned subsidiary of Cynotech Finance Group Limited, itself owned by Cynotech Holdings Limited ("Cynotech") which, at that time, was a publicly listed company owning a number of subsidiaries involved in finance, food manufacturing and corporate advisory services. Mr Allan Hawkins was appointed a director of Cynotech on 14 June 2004 and subsequently Mr Wayne Hawkins became a director on 1 April 2010.

[15] The prosecution of Budget under the FTA was based on representations made to debtors under consumer credit contracts of which it was the creditor, or became the creditor through the purchase of the loan ledger of the failed finance company, NFL.

The loan ledger was purchased for $7.7 million with the loans having a face value of $23 million, however many were in default.

[16] Broadly the charges concerned representations made by Budget to debtors that pursuant to the credit contracts it held or came to hold after the acquisition of NFL's loan ledger, meant it had a right to add interest and fees after Budget had repossessed and sold items of security, contrary to s 35 of the Credit (Repossession) Act 1993 ("CRA"), a right to charge an undisclosed fee of $15 for a "welcome letter" when it advised debtors of its acquisition of NFL's loan ledger, and two charges of misrepresenting the extent of the security interest it had over debtors' property. The misrepresentations regarding the extent of the security interest concerned statements made by Budget to debtors who had "*all present and after acquired property*" clauses in their contracts, and that this entitled it to take all their property regardless of when it was acquired, if repossession was effected. Pursuant to s 44 of the Personal Property Securities Act 1999 Budget could only repossess property specifically appropriated to the contract.

[17] On 23 July 2010, three days prior to sentencing, Budget entered into a deed of settlement with the Commission to provide compensation to borrowers as a result of the matters which were the subject of the prosecution. The deed of settlement was signed by both respondents in their capacity as directors of Budget. The agreement acknowledged that as at the date of the deed Budget had made refunds in the amount of $107,200.66 to affected debtors and that Budget would refund to each affected debtor the amount of any undisclosed letter fee and/or unauthorised interest and fees paid by that affected debtor.

[18] Judge Wilson QC sentenced Budget on 26 July 2010. He said at paragraph [2]:

> The work that Budget Loans Limited does is in subprime lending. What happens is it lends to people who do not have access to money through first tier lenders, banks and the like. This means that the people with whom it deals are generally less sophisticated, less aware and less able to protect themselves. The factor in the case, therefore, is victim vulnerability.

[19] Mr Wayne Hawkins swore an affidavit in support of the company for the sentencing hearing. He deposed that Budget had reversed the interest charges that

were charged on loans following the sale of secured goods and that debtors who had since paid off their loans in full would receive refunds from Budget for the amount of the charges. He also deposed that Budget had changed its repossession practice by altering the format of its notices so that they no longer referred to "all present and after acquired property" and would specifically list the assets subject to repossession. He deposed that Budget did not seize consumer goods which it is not permitted to repossess under the Credit (Repossession) Act 1997. He also accepted that Budget never intended to misled its customers and the company was simply following sound legal advice.

[20] Judge Wilson QC accepted the defendant, Budget, had taken advice from an experienced solicitor with respect to the pre-imposed possession notices and the "all present and after acquired property" clauses. Because of that His Honour considered the conduct of the defendant could not be characterised as "grossly reckless", that it had taken a responsible approach by seeking specialist legal advice and the company had made cash refunds totalling $86,513.42 although the actual amount overpaid was over $500,000. He concluded that the company had taken a significant number of genuine steps to put right what had been done that was wrong and accordingly reduced the fine from $61,500 to $30,750, a reduction for mitigating factors of 50%.

Compliance with the 2010 Deed of Settlement

[21] The "genuine steps" referred to by Judge Wilson QC in his sentencing decision in terms of putting right the matters that were the subject of the initial prosecution were reflected in the Deed of Settlement entered into between Budget and the Commerce Commission. Budget undertook to refund debtors incorrectly charged fees or interest by crediting the same to their account within 20 working days from the date of the deed, 23 July 2010. It undertook to repay debtors who had repaid their loans in full and who paid incorrectly charged fees or interest, and who did not have a current loan account, within 10 working days of the Deed by payment into a debtor's nominated bank account. Debtors who did not respond to notification of the overpaid fees or interest would have their monies treated as refunds owed to them pursuant to s 5 of the Unclaimed Money Act 1971.

[22] I accept, as the Commerce Commission submitted, that the steps included in the Deed, also referred to in Mr Wayne Hawkins affidavit and in the preceding paragraph, were not implemented at the time the assurances were given, nor were they properly implemented after, or within a reasonable period, of that time. Mr J R McIvor, an investigator for the applicant, interviewed Mr Wayne Hawkins and discussed progress in implementing the 2010 settlement with him, said in his evidence that "*by the time of the first interview, in September 2013, Wayne Hawkins estimated only 53% of the loans had been assessed*". The balance of loans not assessed still had their balances enforced. Further, loans that were the subject of reviews in terms of the 2010 undertakings had, on some occasions, interest added to the loan following the repossession and sale of the security. One debtor had $1,303.47 added, nett of adjustments, another, Ms N, had $5,876.80 added, nett of adjustments. There were also other examples. There were also other breaches including Budget continuing to make representations regarding the right to repossess goods, and in fact repossessing those goods, where there was no actual right to repossess.

[23] The process of reversing interest charges which had been improperly added to debtors' loans, undisclosed letter fees and other fees Budget was not entitled to charge, were not reversed at the time of sentencing before Judge Wilson QC or within a reasonable time thereafter. Mr Wayne Hawkins affidavit filed before sentencing of Budget in 2010 was therefore misleading.

[24] Mr Allan Hawkins said in his evidence he initiated a "AAA" review" of the loans to try and establish the correct balance but the process was not conducted across all loans where a repossession and sale had already taken place, as it ought to have been, and by 2013, as noted above, it was only 53% complete.

[25] I accept the submission of the Commerce Commission, supported as it is by the evidence, that the reviews were dealt with in an *ad hoc* way and without any real urgency, and usually when the debtors themselves made contact with the company. Further, Budget continued to make representations concerning the right to repossess goods under an all present and after acquired property clause in the agreement when it knew it had no right to repossess as it had pleaded guilty in 2010 to two convictions

for misrepresenting that right. By law only goods specifically appropriated to the contract were able to be repossessed.

[26] Debtors who were to be refunded incorrectly charged fees or interest under the terms of the agreement between Budget and the Commerce Commission in some cases were treated as if the Deed had never been entered into. For example, Mr N entered into a contract with NFL in 2004 listing Ms C as a guarantor. The total principal advanced was $4,575. The vehicle the subject of the agreement was repossessed in 2005 by NFL. Notwithstanding the agreement reached in 2010 accepting there was a prohibition on the charging of interest following repossession and sale of the security, interest was not refunded but, to the contrary, penalty interest was added to the loan after the sale of the car between 2005 and 2011 and there was no adjustment in terms of the 2010 agreement. In 2011 Mr Wayne Hawkins approved a "third party adjustment" (an increase) to her loan in the sum of $1,331.30 which increased the loan to $5,079.74. There was a further adjustment in the debtor's favour of $1,945.64 on 6 May 2011 reducing the loan to $3,828.44 which Ms C was told she had to pay. At the time the loan adjustment sum was added the balance on the loan was, according to Mr McIvor, $368.11. Judge Sharp found Ms C ultimately overpaid the loan by more than $3,500 and an order was made that she be refunded $4,796.49 and $4,000 as emotional harm reparation, neither of which sums have been paid.

[27] Another instance, referred to by Mr McIvor in his evidence and also referred to in the decision of Judge D J Sharp in the 2016 prosecution of Budget by the Commerce Commission, concerned Ms T who had her Honda Integra motor vehicle repossessed when the security agreement was over a Nissan Laurel motor vehicle, which itself had been repossessed. At the time of the repossession of the Honda Integra, Budget's diary note for debtors stated, with reference to Ms T "*someone's great idea to undertake a legal repo of a vehicle on a loan that is paying. Lawyer emailed to make complaint. I replied that I would arrange for the return of the car to the debtor*". The car was returned but the repossession costs were added to Ms T's loan. In the following month Budget's diary note refers to an attempt to get Ms T to increase her payments, including seeking a distress warrant for the car on Mr Wayne Hawkins instructions. This was done solely on the basis the debtor would not pay the higher sum Budget was now demanding. At the hearing before Judge Sharp it was

found that she was entitled to $5,000 emotional harm reparation, her home having been broken into by agents of Budget.

[28] Emotional harm reparation payments to several debtors including Ms T was ordered to be paid. While appealing the fines of $720,000 the company did not appeal the reparation ordered of $190,000 or the emotional harm payments of $53,000, yet neither the fines nor the other payments have been paid.

[29] There were other debtors subjected to further disreputable and callous conduct. Ms M, had an attachment order made against her for monies owed to Budget. She paid off the amount of the attachment order. On 31 May 2010 she received a letter from Budget thanking her for having paid off the judgment balance reflected in the attachment order but seeking payment of a further balance allegedly due of $4,068.01. The right to repossess her goods was asserted. It was alleged in the course of her dealings with Budget that they had a right to repossess consumer goods from her on the basis those goods were "*at risk*" in terms of s 7 of the CRA. That meant no pre-possession notice was required to be served in advance of repossession. Judge D J Sharp, in his decision given in *Commerce Commission v Budget Loans Limited*[1] said at paragraph [83] of the decision, that as Ms M had already paid off the judgment debt and attachment order, the loan was accordingly at an end, and any security interest Budget might have had had been extinguished so that there were no goods "*at risk*". Her property was repossessed on three different occasions after she had already paid the judgment debt in full.

[30] Other examples of Budget's high-handed and intimidatory tactics in dealing with debtors at a time when both defendants were directors and were managing the company can be found in Budget's dealings with Mr L when a loan secured over a vehicle was settled by NFL with insurers following the destruction of the vehicle. Budget asserted a right to repossess goods alleging, on 4 September 2013, a balance of $10,174.21 was owed. An attachment order had been made by the Court on 21 April 2010 requiring payments of $50 per fortnight. Those payments were made by regular deductions from Mr L's income but by letter dated 7 November 2012 Budget

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[1] [2016] NZDC 9294

represented to Mr L that it had a right to require him to increase his loan repayments over the amount obtained under the attachment order, to the sum of $100 per week. Repossession, without notice on the basis that the goods were "at risk", with no evidence supporting the same, was made on 5 September 2013 when agents of Budget's seized a 2001 Toyota Estima and a number of other household items including a fridge/freezer, computer hard drive, mouse, keyboard and monitor, and a queen size mattress. At that time Mr L had already made payments in excess of the amount Budget was entitled to recover under the attachment order.

[31] There were numerous other examples detailed in Judge Sharp's decision of 4 July 2016 and in his sentencing notes of 30 May 2018[2] in the prosecution of both Budget and Evolution. The prosecution followed from further complaints to the Commission about Budget's practices from December 2011 onwards. The Commission was initially asked by a budget advisor to investigate a complaint about the company. From the commencement of that investigation the Commission received a further 88 complaints about loans held by the defendants, usually made on behalf of debtors by budget agencies, community law centres, and also by Budget and Evolution's financial disputes resolution service provider. The subsequent prosecution led to 125 charges being laid against Budget and Evolution with groups of charges brought for representing a right to repossess goods when Budget/Evolution did not have that right, representing Budget/Evolution had a right to repossess goods when a valid pre-possession notice had not been issued, asserting a right to repossess goods supposedly "at risk" when the goods did not meet the definition of the same under the CRA, representing a right to add interest to loans after repossession and the sale of goods, the same being prohibited by s 35 of the CRA, representing a right to add costs to loans after repossession and sale of goods, representing a right to add interest to loans beyond the amount approved in an attachment order, representing a right to require debtors to make loan payments at a higher rate than specified in an attachment order, and misrepresenting the benefits to debtors of refinancing loans through Budget/Evolution.

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[2] [2018] NZDC 11202

[32] The ruthlessness with which Budget and Evolution conducted its operations, the respondents both being directors and working in the business, is illustrated by remarks made by Judge D J Sharp at sentencing on 30 May 2018 when he said:

> [40] Mr S had goods repossessed without notice on seven occasions between September 2011 and September 2013. The defendants' loan notes from repossessions on 23 September record, "confirm to issue a repo for the essentials. Advise we want a full repo and to take the fridge". As regards Mr S, the loan notes from his repossession two months later on 11 December 2012 recorded, "we have been to this address so many times and emptied it, taking tools, mower, water blaster from the shed. He said there's next to nothing in the house, basically just the mattress he is sitting on. Told him to clear everything out including beds, needs to be a complete repo, as too many repos in the past". Mr S had five children. The impact of this form of repossession must have been very difficult for his family to have endured.
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> [41] The victim impact statements speak of the strain of repossession, the shame of the agents calling repeatedly at their address and the aggressive manner of the defendants and their agents in dealing with them. The impact and distress caused by their criminal act should not be understated. Property repossessed often had little or no value, it was just disposed of. The indication is, that repossession was used as a direct means of coercion.

[33] At sentencing Judge D J Sharp described the actions of the companies, in effect the actions of the defendants, as "*lacking in compassion, humanity, and they were illegal*".[3] Mr S's experience was commonplace. The companies, and the defendants as directors, were well aware that many of the repossessions were illegal, as for instance the diary note for 20 October 2011, referred to by Judge Sharp in his sentencing decision, in relation to a debtor, Ms K, which states "*tell her I'll send the boys to repo when I get back, debtor not to know we can't repo*".[4] Homes were broken into, locksmiths were engaged to change locks when debtors were not present, goods that were essential for day to day living were taken.

[34] Budget and Evolution appealed the fines totalling $720,000 imposed on them by Judge Sharp for the 125 charges on which they were convicted. The charges concerned the various types of misrepresentation already described and were made to 21 debtors over a four year period. Moore J in the High Court dismissed the appeals, emphasising the seriousness of the offending by the company and saying, at para [90]:

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[3] ibid at para [87]
[4] ibid at para [32]

> For reasons which are not entirely clear neither Mr Hawkins nor his son faced charges themselves. Had they been, and if convictions had followed, it is not inconceivable that terms of imprisonment may have been imposed. That observation is made only for the purpose of emphasising how seriously the courts view offending of this sort.[5]

[35] The decision and sentencing notes and the subsequent decision arising from the appeal in relation to the activities of the two companies of which the respondents were directors show a cynical disregard of consumer credit law designed to protect vulnerable people with few options in accessing finance and whose possessions are in many instances of such little value that they were disposed of rather than being sold when powers of repossession were exercised, illustrate how devastating the actions of the companies under the control of the respondents must have been. Both directors were actively involved in authorising the day to day decisions made on loan accounts and on repossessions by both companies. Both men, from at least the time of the 2010 prosecutions, were well aware of what the law allowed. Many debtors resorted to challenging repossessions through community law centres and court staff at times pointed out to the respondents, as for instance in the example of Ms M who paid off the sum owed to Budget under an attachment order, that further interest could not be claimed. The company's records itself showed the loan balance had reached nil. Ms M was told she had to pay $4,068 at $75 per week. When the matter was referred to Mr Wayne Hawkins he authorised a claim being filed against her for the additional interest he had decided that she owed.

[36] No legal advice was produced in the course of the hearing to justify the position taken by the two companies. There is little doubt the companies' actions in attempting to force debtors to pay monies as interest after attachment orders had been paid off was, as the Commission submitted, simply a ruse to justify the seeking of further monies from debtors. Repossession was used to coerce debtors, as was the taking of items not subject to the security under the finance agreements and which were necessary for ordinary day to day living. Examples of Mr Allan Hawkins' blatant disregard for what he would clearly have known was prohibited conduct was the Ms F loan where Budget's diary notes show that a repossession could not occur in respect of a loan the subject of an attachment order for $13,888.93 and where Budget

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[5] [2018] NZHC 3442

subsequently represented to the debtor that she owed, in 2014, over $24,000, and for which Budget held no security. Mr Hawkins who, after being asked by a budget consultant as to what the security was, was approached by a staff member of Budget about the matter with the consequent loan record entry being:

> REPO EVERYTHING – starting with BED. Must clear them out, they obviously never got the message last week.

[37] Another example is the B loan which was initially for $4,494, and which in fact was paid, but the debtor failed to stop her automatic payments so that an overpayment of $747.15 arose. The loan note dated 15 April 2014 recorded:

> Will just keep her paying and if payment stops then we will not chase up the client and close and leave it be. **BUT WfAIT UNTIL IT DOES.**

[38] Mr Allan Hawkins was asked to approve a write off of $706.32, which by then was a credit in the debtor's favour, and on 29 October 2014 made a note in Budget's diary log authorising that notwithstanding the money ought to have been refunded to the debtor rather than appropriated by the company. Mr Allan Hawkins, under cross-examination, accepted that "it appeared the company had kept the money on his authority, but did not know why it did so on that occasion".

[39] The two companies were companies controlled by the respondents. I accept there were times when Mr Wayne Hawkins was not always present because of ill health but both he and his father, the respondent Allan Hawkins, were closely involved in the day to day operation of both companies, authorizing activity on the loan accounts including repossessions where, as a result of the prosecutions of 2010, they knew repossessions, particularly those purported to be undertaken under the all present and after acquired property clause in various contracts, were prohibited by the CRA. Questions were raised at various stages by persons acting on behalf of the debtors, specifically community law centres, but both respondents were plainly unconcerned and dismissive. Although no written advice to the company was produced by Mr Allan Hawkins at the hearing he said that he had advice from a former solicitor, Mr Liddell, that if there was an all present and after acquired property clause in the loan agreement and the creditor company had a power of attorney then it could apply and add items to the loan security list and then repossess those items. No evidence was

given as to when that advice was actually obtained but as the Law Commission noted, in its 2012 review of the Credit (Repossession) Act there was a divergence of views about the legality of enforcing all present and after acquired property clauses ("APAAP"). At paragraph 2.14 of the report the Commission noted:

> The Commerce Commission takes the stance that the Personal Property Securities Act requires that the debtor must specifically identify which after-acquired property is to be subject to the security interest and that a creditor may only repossess the identified property. We received submissions that expressed a different view as to the correct legal position.

[40] As is apparent from Judge Sharp's decision in the prosecution of the two companies, and the subsequent unsuccessful appeal to the High Court, the offending is far wider than any dispute over the legal effect of after acquired property clauses. The respondents were "hands on" directors with Mr Allan Hawkins accepting, at the hearing, that he was responsible, and by implication his son also, for the actions of the company employees. It is not difficult to reach the conclusion urged on me by the Commerce Commission, that the two respondents were unconcerned with the legality of their companies' actions, and the impact on debtors. The respondents erroneous view of the sums owed by debtors was at the very least grossly reckless, if not deliberate, in the face of the information available from the loan documents. These matters are directly relevant to the issue as to whether either defendant should be involved in the management of any incorporated or unincorporated body carrying on business in New Zealand in the foreseeable future because of the risk of further offences being committed against s 40 of the FTA.

First respondent's submissions

[41] Mr Allan Hawkins commented on the width of s 46C noting that any director of an incorporated or unincorporated body, even if not concerned with the management of the company, is potentially liable under this section. That is as may be, but the jurisdiction is still founded on breaches on at least two separate occasions within a 10 year period against the unfair conduct and consumer information provisions contained in parts 1 and 2 of the Act. The potential reach of the section is plainly what parliament intended.

[42] Secondly, insofar as his own personal position is concerned, although he accepted he was both a director of the companies during the relevant periods and involved in their management and so is liable for a management banning order in terms of s 46C, he submitted that given he is no longer a director or manager of any company currently undertaking consumer lending, an order ought not to be made against him as he no longer constitutes a risk of committing further offences against ss 1 or 1A of the FTA. The lending activities of Budget, of which he remained a director, ceased around 2006.

[43] Mr Allan Hawkins submitted that at 78 he no longer has any active business management role and had intended to retire in December 2011, when he reached the age of 70, but continued working as his son, Mr Wayne Hawkins, was suffering from ill health. Both Budget and Evolution at that time was owned as a subsidiary of Cynotech Holdings Limited, then a publicly listed company which was listed on the New Zealand stock exchange between 2005 and 2013.

[44] When questioned as to why Budget and Evolution had not paid the various fines and other monies ordered by the Court following sentencing by Judge D J Sharp, he accepted none of the $485,000 ordered to be paid by Budget had been or would be paid and of the $285,000 ordered to be paid by Evolution only $139.74 had been paid, and that because the balance of the company's bank account with ASB had been seized through an enforcement process. He said no further monies would be forthcoming as neither company had any assets.

[45] The loan ledger from NFL had been purchased by Budget. Evolution had purchased the loan ledger of Western Finance. Monies were advanced to Budget by the Wairahi Trust ("Wairahi"), a trust established by deed on 16 March 2000, the beneficiaries being Mr M W Daniel, a former director of Evolution, and his wife and children. Budget and Evolution entered into a general security agreement on 8 February 2012 with the two companies guaranteeing the principal and interest owed to Wairahi by reason of the advance to enable Budget to acquire the NFL loan book, although the loan book had been acquired well before, as many of the loans were at issue in the prosecution of Budget in the matter before Judge Wilson QC in 2010.

Consequently as at the date of hearing of the substantive matters before Judge D J Sharp the majority of assets of the two companies were charged to Wairahi.

[46] Shortly after the conclusion of the substantive hearing before Judge Sharp between the Commerce Commission and Budget and Evolution in May 2016 Wairahi moved to crystallize its security, serving a demand for payment on Budget for $2,477,121.03 and on Evolution for $2,629,151.50 on 30 June 2016. Judge Sharp's judgment was released on 4 July 2016. On 8 July 2016, the monies claimed to be owing not having been paid, Wairahi exercised its powers under the general security agreement and transferred the loan book for the two companies to itself.

[47] None of this was known by Judge Sharp at sentencing. He had required the two companies, Budget and Evolution, to provide affidavit evidence in advance of sentencing on 30 May 2018 if the companies intended to argue they were not able to meet all or any part of the fines and reparation orders that might be imposed. Plainly the two companies, at sentencing, did not have the ability to pay the monies ordered, and made that submission to Judge Sharp, but no supporting affidavit evidence affirming that was filed.

[48] Mr Allan Hawkins was the director of the two companies at that time. The failure to comply with the direction was plainly deliberate and the responsibility for it lies with him, he being, at that time, the sole director and, as he accepted, the chief officer of Budget and Evolution. Mr Hawkins said he informed an investigator of the Commerce Commission in August 2013 of the general security given to Wairahi. That may have been so, but the general security was not registered on the personal properties security register until 15 February 2017 with Mr Wayne Hawkins acting on behalf of Budget and Evolution for the debtor companies. Consequently any search of the register prior to that date would not have revealed to the Commerce Commission the existence of the general security agreement. Further, it appears that a number of loans belonging to Evolution and Budget were transferred to a company owned and controlled by Mr Wayne Hawkins, ABC Loans Limited ("ABC"), a company Mr Allan Hawkins said was set up by his son. Mr Wayne Hawkins became a director of ABC on 21 December 2015. Mr Hawkins suggested his son purchased the loans at valuation but could not say whether he paid the full amount for them.

[49] As for the balance of the loan ledger, Wairahi contracted with Jade Financial Property Pty Limited and Jade Financial Services Limited ('Jade') for collection. After deduction of agreed costs and commission the balance collected is forwarded by Jade to Wairahi. In correspondence with the Commerce Commission Jade noted, with reference to these arrangements, by letter dated 28 May 2019, the following:

> When loading the loans into our system, it soon became apparent that many of the loan accounts were paid in full – given that the customers had repaid the judgment debts in full – but the defendants were still trying to collect balances that included third party costs and interest. We refused to load or collect those debts as they were not legally recoverable.
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> We have about 342 accounts loaded, which indicates about 80 of the accounts were not loaded as we deem them paid in full or unrecoverable.

[50] Consequently, as at July 2016, when Jade entered into an arrangement with Wairahi to collect the loan ledger of Budget and Evolution, the arrangements notified to Judge Wilson QC at sentencing in 2010 in a separate prosecution by the Commerce Commission had still not been kept as both Budget and Evolution were still trying to collect monies including third party costs and interest that were simply not payable.

[51] Evolution and Budget's debtors were advised by Mr Wayne Hawkins by notice given on 8 July 2016 in writing that pursuant to an agreement dated 14 March 2014 their debts had been assigned to Jade. In fact it seems the debts may not have been assigned to Jade, but rather fell to Wairahi under the terms of the general security agreement and that trust had contracted Jade to collect the debts on its behalf by way of assignment. Jade makes payment to Wairahi each month of the balance of monies collected after deduction of agreed commission and collection costs. Nevertheless Mr Wayne Hawkins signed the notice as a director notwithstanding that he had resigned as a director of both Budget and Evolution on 10 February 2016 and had no further authority to continue to represent himself as a director of the two companies.

Exercise of the discretion under s 46C of the FTA

[52] Other legislation involving the exercise of a discretion to ban directors, or persons concerned with or taking part in the management of a company have been considered by the Courts. In *First City Corporation Limited v Downsview Nominees*

Limited (No 2)[6] Gault J dealt with a claim in civil proceedings for an order under s 189 of the Companies Act 1955 which enabled the Court to direct a director or person concerned in the management of a company to not act as such for such period as the Court thinks fit in the event there had been persistent failure to comply with the Act or the Securities Act 1978, fraud or recklessness or incompetence in the performance of duties as an officer of the company.

[53] Gault J held that although the civil standard of proof applied, given the nature of the relief sought and the gravity of the allegations and consequences a higher degree of probability is required than otherwise would be the case. He also observed that although penal in nature "... the disqualification should be approached with protection of the public in mind rather than punitively"[7] and that protection of the public and commercial community from the risk of a repetition of reckless and incompetent conduct was required.

[54] In *Davidson v Registrar of Companies*[8] Miller J, in dealing with an appeal from an order of the Registrar of Companies prohibiting the appellant, pursuant to s 385 of the Companies Act 1993 from managing companies for a period of two and a half years, observed, at p 563, as did Gault J in *First City Corporation Limited v Downsview,* that the prohibition of directors should not be classified as either protective or punitive but was both, saying, at paragraph [97] the section was "aimed at those who through some want of integrity, skill, judgment or industry are not suitable directors or managers", and at paragraph [137] "However, prohibition serves several purposes. Protection of the public from an individual director is one of them. The others are standard setting and general deterrence."

[55] Earlier, at paragraph [91] of the judgment Miller J also observed prohibition was aimed at protecting the public "... from unscrupulous or incompetent direction in future" an observation, the prosecutor submitted, particularly apposite in describing the unscrupulous conduct of the respondents in this matter.

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[6] [1989] 3 NZLR 710
[7] at 766
[8] [2011] 1 NZLR 543

[56] Similarly also, the District Court has power to make banning orders under s 108 of the Credit Contracts and Consumer Finance Act 2003 ('CCCFA') and in *Commerce Commission v Takarunga Management Limited & Trevor Allen Ludlow*[9] did so, where Judge L I Hinton at para [29] expressed his view that Mr Ludlow did not exhibit the requisite integrity and level of fair dealing appropriate in respect of lending transactions. In *Commerce Commission v Yuan Rong Yang*[10], another prosecution under the CCCFA involving a lending business, a prohibition order was made against the defendant indefinitely from involving himself in any capacity in the provision of consumer credit, with Judge M-B Sharp saying, at paragraph [43] of her sentencing notes:

> I say now that you are not a fit and proper person to be a creditor in a consumer credit contract and I doubt that you will ever be. You have preyed on less able and more possibly ignorant, but certainly more vulnerable citizens, and members of your own community. Your conduct was the sort of conduct which is exactly the type of conduct that this Act was passed in order to prevent or at least regulate.

[57] In Australia a helpful list of principles in relation to banning orders or disqualification orders of directors or managers of companies and the appropriate length of an order was distilled into a number of propositions by Santow J in *Australian Securities and Investments Commission v Adler*[11]. As was noted by Mansfield J in *ACCC v Excite Mobile Pty Limited (No. 2)*[12] they are generally followed but are seen as guidelines only. The propositions in relation to s 206C of the Corporations Act 2001 (Aus.) which enables an order to be made where a person had at least twice been an officer of a body corporate that has contravened the Act were repeated, and set out by Brereton J in *ASIC v Maxwell*[13] where, at p 411 he said:

> [150] Santow J identified the guiding principles and relevant factors which can be derived from the cases as follows [I have omitted his Honour's extensive references to the authorities]:
>
> [56] The cases on disqualification gave orders ranging from life disqualification to 3 years. The propositions that may be derived from these cases include:
>
> (i) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards.

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[9] CRI-2009-090-007407, 1 December 2011
[10] [2015] NZDC 20403
[11] (2002) 42 ACSR 80
[12] [2013] ATPR 42-454
[13] [2006] NSWSC 1052

(ii) The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.

(iii) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors.

(iv) The banning order is protective against present and future misuse of the corporate structure.

(v) The order has a motive of personal deterrence, though it is not punitive.

(vi) The objects of general deterrence are also sought to be achieved.

(vii) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company.

(viii) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty.

(ix) In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public.

(x) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.

(xi) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.

(xii) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA)* v *Ekamper*(1987) 12 ACLR 519 have been influential. It was held that in making such an order it is necessary to assess:

- character of the offenders;
- nature of the breaches;
- structure of the companies and the nature of their business;
- interests of shareholders, creditors and employees;
- risks to others from the continuation of offenders as company directors;
- honesty and competence of offenders;
- hardship to offenders and their personal and commercial interests; and
- offenders' appreciation that future breaches could result in future proceedings.

(xiii) Factors which lead to the imposition of the longest periods of disqualification (that is disqualifications of 25 years or more) were:

- large financial losses;
- high propensity that defendants may engage in similar activities or conduct;

- activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;
- lack of contrition or remorse;
- disregard for law and compliance with corporate regulations;
- dishonesty and intent to defraud;
- previous convictions and contraventions for similar activities.

(xiv) In cases in which the period of disqualification ranged from 7-12 years, the factors evident and which lead to the conclusion that these cases were serious though not "worst cases", included:

- serious incompetence and irresponsibility;
- substantial loss;
- defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty;
- continued, knowing and wilful contraventions of the law and disregard for legal obligations;
- lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform;

(xv) The factors leading to the shortest disqualifications, that is disqualifications for up to 3 years were:

- although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated;
- the defendants had no immediate or discernible future intention to hold a position as manager of a company;
- in *Donovan's* case, the respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings."

[58] Accepting that the periods of disqualification under the Australian legislation are far longer than those able to be imposed under s 46D of the FTA, which provides for orders for no more than 10 years, and that the ground for making an order is specifically stated in s 46C(2) of the Act, namely protection of the public from the risk the person will commit further offences against particular provisions of the Act, the list of relevant factors set out in *Adler*, particularly in considering the appropriate period for a banning order, is a helpful guide.

Analysis – Allan Hawkins

[59] An order can only be made if there is a risk that Mr Allan Hawkins, or any incorporated or unincorporated body of which he is a director or involved in the management in, will commit further offences against the unfair conduct provisions of

the FTA and the section concerned with pyramid selling schemes. Mr Hawkins in his submission, while accepting he was liable for a management banning order in terms of s 46C, submitted he no longer presented a risk as he was no longer a director or manager of any company currently undertaking consumer lending. However, Mr Hawkins has a long history of involvement in commercial activity including involvement in third tier lending companies such as Budget and Evolution. Even although gaoled for six years in 1993, having been found guilty on seven fraud and conspiracy charges in relation to the management of the former public company Equiticorp, he returned to a career in commerce and was at one point a director of approximately 20 registered companies including a listed company, Cynotech. He remains the director of seven companies including Budget of which he is the sole director and which is still accepting money by way of attachment orders and has an active website inviting loan applications. Further, in the Court of Appeal decision in *R v Gunthorp*[14] Casey J, when giving the judgment on sentence appeals by Mr Hawkins and other directors, noted that Mr Hawkins paid himself about double his annual salary and allowances when chairman of directors and chief executive officer of the Equiticorp Group, and observed that the Judge's conclusion that Hawkins simply stole the money was inevitable and that "Hawkins must be held primarily responsible for this dishonesty". Although obviously not on the same scale, there was clear dishonesty and unscrupulous behavior in dealing with debtors of Budget in the way already outlined such as the keeping of overpayments and the attempt to have debtors pay monies as interest after attachment orders had been paid off which shows very little changed in Mr Hawkins' character in the years since the failings of Equiticorp were detected.

[60] Mr Hawkins' son, the second respondent, Mr Wayne Hawkins, is currently a director of another third-tier lending company, ABC, in which he holds 50% of the shares and his wife the other 50%. The company appears to operate in the same third-tier market as did Budget and Evolution, and deals with vulnerable persons who have limited access to finance and who have only a limited range of goods to offer as security. There is, to my mind, notwithstanding his age, a very real risk that Mr Allan Hawkins would certainly, if the need arose, involve himself in the affairs of another

[14] CA 46/93, 6 September 1993

closely held family company having continued with Budget longer than he had anticipated to assist his son, the second respondent, when his son began to suffer periods of ill health. This raises the further risk of Mr Hawkins committing offences against the unfair conduct provisions of the FTA. I accept there seems little risk of him or for that matter his son, the second respondent, committing offences against s 1A of the Act, the pyramid selling scheme provisions.

[61] I am satisfied the criteria for the making of an order in respect of both respondents is met. No evidence of hardship that any order might cause was put before me and the risk to others from the defendants' predatory practices through the companies they have been directors of and managed is considerable. The breaches of the FTA for which Budget was convicted in 2010 and 2016 were significant. Both companies were managed by the respondents who were also directors at various times. In my view they both represent a significant hazard to anyone dealing with any company they manage or control or are directors of. The public in general and borrowers in particular utilising the services of companies such as Budget and Evolution are entitled to be protected from the respondents.

[62] Accordingly a management banning order preventing the respondents, without the leave of the District Court, from being a director or being in any way, whether directly or indirectly, concerned in or taking part in the management of an incorporated or unincorporated body carrying on business in New Zealand is made against both respondents.

Length of the order

[63] Under s 46D of the Act the order cannot be for more than 10 years. Utilising the criteria imposed by Santow J in *Australian Securities and Investments Commission v Adler* as set out in paragraph [57] of this judgment, it is clear that the 2016 convictions in particular demonstrate that significant financial losses were caused to borrowers from Budget and Evolution from the respondents' practices.

[64] Given the attitude of the respondents, particularly after the offending the subject of the 2010 convictions against Budget was detected, there has to be a high

propensity that, unless restrained, the respondents will engage in similar activities or conduct should they be involved in the management of both incorporated and unincorporated bodies in the future. The risk is equally high if the respondents are able to act as directors of an incorporated body.

[65] There is a complete absence of contrition or remorse. Mr Allan Hawkins, who participated in the hearing by conducting his own defence to the application, certainly did not express contrition or remorse. He accepted responsibility on the basis that he was in charge but, as is apparent from the decision of Judge D J Sharp on the 2016 prosecution and in the evidence presented by the Commission before me and referred to in this judgment, he was very much involved in the way the company operated. He was unapologetic for the same.

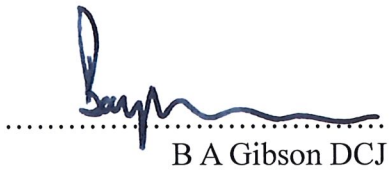
[66] I am also satisfied there was a blatant disregard for the law. Judge Sharp in his sentencing remarks noted the illegality of the activities carried out by the two companies under the aegis of the respondents' management directions. Moore J commented on the possible criminality in some of the offending when he dismissed subsequent appeals in the High Court.

[67] As for previous convictions and contraventions for similar activities, Mr Allan Hawkins achieved notoriety in the early 1990s in relation to fraud and conspiracy convictions through his management of Equiticorp. While Mr Wayne Hawkins does not have any similar convictions he was, together with his father, a director and managed Budget at the time the activities the subject of the 2010 and 2016 convictions for offences under the Act were suffered.

[68] For Mr Wayne Hawkins the risk through currently being a director of another third tier lending company, ABC, which seems to have acquired part of the loan book of Evolution and Budget, is considerable and accordingly, having regard to the seriousness of the breaches committed by Budget, the appropriate length of the ban for him is 10 years.

[69] Mr Allan Hawkins' conduct is equally justifying of a long banning order. The applicant seeks an order for 10 years. I accept his age may, to some degree, mitigate

the risk. The order is not to be imposed for reasons of punishment for past conduct but rather as one protecting the public from the risk identified in s 46C(2) of the Act. Solely because of his age I accept Mr Allan Hawkins presents less of a risk than his son of a repetition of the type of behaviour identified in this judgment. For that reason, and solely for that reason, the length of the order against Mr Allan Hawkins will be eight years.



B A Gibson DCJ