IN THE DISTRICT COURT
AT AUCKLAND

CRI- 2012-004-011709

COMMERCE COMMISSION
Informant

v

TINY TERMS LIMITED
Defendant

Hearing: 24 January 2014

Appearances: B Hamlin for the Informant
I Rosic for the Defendant

Judgment: 24 January 2014

NOTES OF JUDGE R COLLINS ON SENTENCING

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[1] The defendant, Tiny Terms Limited, has pleaded guilty to 14 representative charges in breach of the Credit Contracts and Consumer Finance Act 2003. The charges relate to the standard form agreements that consumers entered into with Tiny Terms Limited between July 2009 and October 2010. The defendant has also pleaded guilty to six charges in breach of the Fair Trading Act 1986. These charges relate to representations made by the defendant in relation to the contracts that it entered into. There were three charges relating to representations that consumers could not cancel the contracts. There were another three charges where on account of the defendant's non-compliance with the CCCFA, representations made that the contracts could be enforced were false.

The Background to the Offending

[2] The defendant company was responsible for financing consumer leases in respect to water cooler units sold to consumers by Love Springs Limited. Consumers who agreed to purchase a Love Springs water cooler unit signed a two year agreement and were subsequently financed by Tiny Terms. The repayments were either weekly, fortnightly or monthly. Under these agreements consumers were to pay a total of $1589.95 per unit. The offending for which the defendant is for sentence is said to involve contracts totalling $10,229,000.00. All contracts failed to comply with the CCCFA. The commission says that one of the background factors against which this sentencing is to occur, therefore, is total revenue in the order of approximately $5.9 million.

[3] The offending has been broken down into three categories. The first, being category one is breaches of s 17 of the CCCFA. The defendant's credit contracts in that regard failed to comply with the s 17 obligation in two material respects. Firstly, the contracts failed to disclose how Tiny Terms Limited estimate of loss on full repayment was calculated, a matter that is required to be disclosed by Schedule 1 of the CCCFA.

[4] Secondly, the contracts contained information in a box headed, "Notice to customer; right to cancellation." That information did not comply with the form of the statement required by Schedule 1 of CCCFA. It is to be observed that that second failure is one that Ms Rosic, for the defendant, will describe as a failure of form over failure to advise.

[5] The second category of offences are under s 32 of the Act. Tiny Terms Limited's credit contracts failed to comply with that section in three material respects. Firstly, in respect of the rent to own agreements, the terms and conditions were printed in very small and hard to read font. Secondly, the rights of either party to terminate the agreement were not expressed clearly and concisely in cl 12 of either the rent to own or the consumer lease credit contracts. Thirdly, the automatic renewal of the agreement and how that could be avoided was not expressed in a manner likely to bring it to the attention of a reasonable person. This

meant debtors were not able to ascertain the term of the agreement and the total number of payments they would be required to make under the agreement. There have been submissions in discussion between myself and counsel regarding this failure. I observed to counsel that I regarded this as the most significant breach and I remain of that view. The extension provision, to give it that label, or the rollover provision, of the contract for another two years could be avoided by the consumer paying $1 by "money order". Failure to pay that $1 extended the term of the contract for another two years. That term can rightly be considered or viewed in my opinion as draconian and hidden away in small print does make this breach the most serious as far as I am concerned.

[6] The third category of offences that the defendant is for sentence are breaches of s 13(i) of the Fair Trading Act 1986. The defendant committed this breach in the following way; the defendant sent to some of its debtors a document entitled "Prepossession notice" though that may in fact have been a repossession notice which purported to enforce the credit contract. This notice amounted to representations by the defendant that it could enforce the credit contracts. In fact, because the defendant had not provided those debtors with the disclosure required by the CCCFA it was not legally entitled to enforce the terms of the contracts pursuant to s 99.

[7] Secondly, it is said that when some debtors called the defendant company and attempted to cancel their credit contracts, they were told by the defendant's call centre operators that they could not. This was a false representation about the debtor's rights as they in fact had a right to cancel the Tiny Terms credit contracts under s 27(1)(b) of the CCCFA as proper disclosure had not been provided to them. Before moving on, I should observe that the parties are agreed that the appropriate starting point for the Fair Trading Act offences is one of $1500 per information or a global penalty for that offending of $9000. I do not propose to depart, in those circumstances, from the level of agreement reached between the prosecution and the defendant.

[8] I turn to the purposes of the legislation and the purposes and principles of sentencing. Before doing that I observe there in fact have been six cases referred to

me to provide assistance in sentencing. The first sentencing decision in time, involving breaches of the CCCFA was a decision in *Senate Finance Limited.* In that case in discussing the purpose of the legislation, His Honour Judge Callander stated, "The purpose of both Acts of Parliament," (that was a reference to the Fair Trading Act and the CCCFA) "is self-evident. It is to protect the interests of consumers entering into credit contracts, provide for the disclosure of adequate information to those consumers and prevent misleading and deceptive conduct, false misrepresentations and unfair practices. Consumers must be adequately informed of their rights and responsibilities. Consumer rights to disclosure of information, developed over the last few decades prescribe that anything that is material in a contractual relationship between a vendor and a purchaser or a shopkeeper and a customer must be made clear and conspicuous in the interests of fairness and honest trading. Those concepts underpin both pieces of legislation."

[9] However, there are limits to which the previous cases can go in providing assistance to this sentencing. Those limits include: Firstly, there is not yet as far as I am aware, a decision of the High Court in terms of s 17 and s 32 of the CCCF Act. Secondly, some of the cases predate the sentencing methodology mandated by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372(CA) and *R v Clifford.* Third, some of the cases involve agreed starting points. Fourth, they involve various combinations of the Acts, sections and numbers of charges. Fifth, there is generally a pattern of deciding on global culpability and then apportioning that per information. Sixth, one case only appears to have been decided post the Supreme Court decision in *Hessel v R* [2010] NZSC 135, [2011] 1 NZLR 607. Finally, as Mr Hamlin points out, the Commission has often got the difficult task of deciding just how to structure the charges, the number of charges, the extent to which they are representative in fairly but firmly prosecuting these matters.

[10] However the authorities to which I have been referred nevertheless do provide a general framework to assess the culpability of a defendant in terms of this legislation. Both Acts of Parliament are designed to deal with commercial offending when breaches are proved. That commercial offending must be met with commercial penalties to provide the necessary deterrence that Parliament requires.

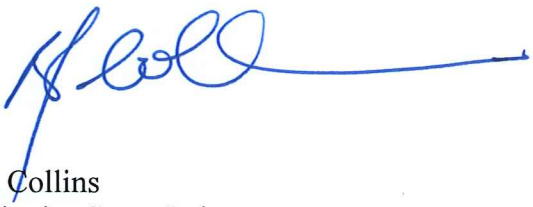
Clearly of all the purposes and principles of sentencing which are at play in this sentencing, the aspect of deterrence is to the forefront.

[11] In submissions today, Mr Hamlin has said that it is an error to categorise the offending as technical. He says the legislation, particularly the CCCFA, is inherently designed to attack technical offending. He says the legislation is about protection of consumers, some of whom may lack the necessary skills to appreciate just what they are committing themselves to unless those commitments are clearly brought to their attention. He says that an aggravating factor in this offending is the number of contracts that were entered in to. He said that the item being purchased was far from insignificant at $1600.00. He accepted that the defendant's offending was negligent or careless. That is something that Ms Rosic agreed with and I have no difficulty concluding that the offending was careless rather than a deliberate attempt to mislead. Mr Hamlin says that there were five ways in which the legislation was breached which he says underscores the lack of care taken by the defendant. He submitted that the mitigation that should be allowed to the defendant for its efforts to redress the wrong should be extremely limited. It is his view that the communication, by the defendant writing to its customers, coming at the time that it did in the form that it did, entitled it to only minimal mitigation or discount. He finally concluded by saying that this was significant commercial offending by reference to the gross sales revenue involved.

[12] Ms Rosic submitted that it is one thing to say that the Acts are designed, or the CCCFA in particular, is directed at technical offending but she rightly submits in my view that there are varying levels or varying culpability for technical breaches. She submits that the efforts that the company took entitle it to some meaningful discount. She stresses that while any guilty plea came late, that was the result of substantial negotiations between the parties and at the end of the day a significant amount of Court hearing time was avoided. She stresses that in some cases with respect to those which were cited, there was a complete failure to disclose and she says here that it was often the case that content was present but the legislation was breached by the way in which it was presented. In that regard she says the notice of cancellation, the termination rights and the extension clause were breaches of form rather than omissions of material information.

[13] In response to that Mr Hamlin does submit that provisions hidden away, (my words) can be just as culpable as complete omission. At the end of the day this is a sentencing exercise and as has often been said, sentencing simply involves the exercise of the best judgement the Judge can bring to bear and is not a scientific process.

[14] Separating the offending under the CCCFA charges from the Fair Trading Act charges, I have decided to settle upon a global starting point. While that will be then apportioned per information, what I am about to say will demonstrate the limitations in future for that being used as a helpful comparator by doing it on a per information basis. In my view the aggravating factor or the most serious factor which sees me reach the global starting point that I do, is the extension clause which I consider the most aggravating of all the aspects, or the most grave of the breaches. So therefore, having taken into account all the facts of the offending, having referenced it the best I can in relation to the six authorities that have been provided to me, for the CCCFA charges I have concluded the appropriate starting point is one of a fine of $90,000.00. Against that I would apply a total discount of 20 percent to involve discount for all mitigating factors including the worth of the guilty plea. That takes matters to $74,000 which I have further reduced to $70,000 to make the arithmetic process one that is far simpler because that brings about a fine of $5000 exactly per charge or per each of the 14 informations. In respect to the Fair Trading Act charges I take the agreed starting point of $9000.00, apply the 20 percent discount to that to get to a figure of $7200 and divided by six that works out as $1200 per information.



R Collins
District Court Judge