

**IN THE DISTRICT COURT  
AT CHRISTCHURCH**

**CRI-2011-009-005425**

**COMMERCE COMMISSION**  
Informant

v

**MORRISON CAR COMPANY LTD**  
Defendant

Hearing: 9 August 2011  
(Heard at Aoraki House)

Counsel: K Grau for the Informant  
P Norcross for the Defendant

Judgment: 9 August 2011

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**NOTES OF JUDGE J A FARISH ON SENTENCING**

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[1] The defendant company has pleaded guilty to 55 charges laid under the Fair Trading Act, 16 of those relate to breaches of s 28(1) of the Act in that it failed to display SIN or CIN notices at the time the cars were listed for sale on TradeMe and there are also 39 charges under s 13(g) of the Fair Trading Act which relate to the practice of shill bidding or ghost bidding.

[2] The defendant company is a car company operating a business here in Christchurch and it has a Principal Managing Director, Mr Morrison, and, at the time of this offending, there were two sales staff and a sales consultant. At the time of this offending it had two websites with TradeMe accounts, both of those were suspended and then disabled after this offending came to light and after warnings had been given to the defendant about its practice of shill bidding.

[3] By way of background the defendant company was trading in low value vehicles and there were two user accounts. Between December 2007 and August 2008 the defendant company had listed 190 vehicles with the TradeMe website and made 136 sales. The other account operated between September 2008 and 2009. It had listed 77 vehicles for sale and made 31 sales. None of these vehicles which were offered for sale on the TradeMe auction site are under either of those accounts supplied or had access to the Supplier Information Notice or the Consumer Information Notice as required by the 2003 and 2008 regulations. In effect the prospective buyers did not have access to that fundamental information.

[4] Shill bidding is the practice of selling goods on an auction website under one user name and placing bids using another user name. This is expressly banned by TradeMe and auction sites generally. The terms and conditions of trade clearly set this out. TradeMe warned the defendant company on at least two occasions prior to shutting down their accounts that they were not to use shilling or ghost bids in relation to their auctions. It was not only one person though at the company who was entering into this practice. There was Mr Morrison, himself, the wife of the sales manager and also the brother of the director, Mr Lance Morrison. As I said, they were warned on 28 August 2007 and again on 15 March 2008.

[5] Mr Morrison, when first asked about this by the informant, said that, firstly, he was not aware that he had to place the SIN notices on the cars traded and he was not trying to mislead anyone by not having done that. He admitted that he had been warned about shill bidding but he did not recall doing it himself or entering bids himself and that his employees had denied any knowledge.

[6] However, during the course of his interview with the informant, he was a little bit more forthcoming which is at odds with the explanation that he has now proffered through his counsel that he was aware and that there was a logical and justified reason for him and his staff members to be entering into this ghost bidding exercise and that, on the one hand, it could be seen as being dishonest but he was, and he had instructed his staff, not to be dishonest. I tend to agree with the informant that that is not plausible and I will come back to that shortly.

[7] The maximum penalty in relation to each information is in the sum of \$200,000. Both the informant and the defendant agree that I would be better off to set a fine in totality and perhaps in relation to one information from one class or group of offending, set the fine and then convict and discharge on the remaining informations.

[8] Here the principle purposes of sentencing are denunciation, both personally and generally, and also deterrence both individually and also generally. Here recognition has to be taken as to the seriousness of the offending and also the gravity of the offending and, in particular, the amount of time over which this company continued to trade in breach of its obligations under the Act but also in breach of its obligations to TradeMe.

[9] We simply do not know what effect this offending may have had on the auction site users. Some of the comments that were posted on the auction site were actually posted by the false bidders so it is very hard to recognise what, if any, detriment there was to the auction user, other than that they may have been more likely to have looked at the vehicles being sold by the company because of the apparent cheapness, that is the one dollar reserves.

[10] The very real victim here though, in relation to the shill bidding, is TradeMe. They have a significant reputation and they spend a lot of resources and money to enhance the security for users and to make sure that there is no fraudulent activity through their sites. As they said they have spent considerable time and money over the last decade into building a reputation as a safe place for buyers and sellers to conduct business on line. This company's offending undermines the core principles on which the business is based.

[11] Previous experience has shown that, following a Commerce Commission investigation into the actions of members on TradeMe, adverse publicity occurs which threatens the goodwill associated with our brand. As they have told me in the Victim Impact Report they had to spend considerable resources in collating and compiling evidence which was directly related to this offending. They have been unable to quantify the amount of hours but it has taken them over three years to be

able to put all of that information together for the informant. In addition they have had to have their own separate legal advice. So there is a very well recognised victim here.

[12] The sentencing also has to reflect the objectives of the Act, which is protection of the consumer and the safety of the consumer. It has to recognise the effect on competitors, the effects on the consumer and the effects on the offender.

[13] Here I need to approach the sentencing in accordance with the Court of Appeal approach in *R v Taueki* [2005] 3 NZLR 372 and that is to assess the defendant company's culpability, bearing in mind the aggravating and mitigating circumstances of the offending, and then look to adjust that starting point by any aggravating or mitigating features relevant to the company itself.

[14] Here, in my view, there are a number of aggravating features. I accept that in relation to the offending which relates to the SIN information that the company was careless in the extreme. I have been told today that they are a well recognised company having been in business for some time and are obviously very experienced. It is simply inappropriate and extremely careless for them not to be aware of the regulations that dictate their trade. I accept that as soon as issues in relation to the SIN information were pointed out they did rectify this.

[15] The more significant issue though is in relation to the ghost bidding. On the one hand the defendant company says that there was no deliberate deceit or dishonesty in relation to their offending and that they were reckless at the most. On the other hand the informant tells me that, in their view, they view them as being significantly dishonest.

[16] I find that their behaviour, or the offending itself, was deceitful and I agree with the informant that after they had been warned by TradeMe to desist that it then became dishonest. I agree with the informant that it is implausible that the defendant company would have continued this practice on behalf of customers after being warned by TradeMe. I also accept that if the staff did not win the auctions very often, as has been claimed, that it makes it inherently implausible that they were

placing bids on behalf of genuine customers, particularly after they had been warned by TradeMe to desist.

[17] Therefore, I see that culpability in relation to that offending as being quite high and I do not accept the explanations for that behaviour as set out in the submissions filed on behalf of the defendant. As I said it is implausible in the extreme.

[18] There is, though, no way to quantify whether or not there was any direct effect on consumers and I have already noted the effect in relation to TradeMe itself, which I consider to be reasonably significant.

[19] The informant suggests that I take a starting point in relation to the offending as being 30 to 35 percent off the maximum, the maximum being \$200,000. I take a starting point of 30 percent off the maximum, so it is a starting point of \$60,000. From that though I need to consider whether there are any aggravating features. Here there are no aggravating features, the company does not have any prior record. I have to recognise whether there are any significant mitigating features and the only significant mitigation feature here is the plea of guilty that was entered at a very early stage in the proceedings so the company is entitled to a 25 percent discount off that starting point. So that brings us down to \$45,000.

[20] I agree though that I also need to stand back and look in a globalised way as to whether or not that fine - \$45,000 – is one that the company can afford. Here I have been told that there is no financial information, however, Mr Norcross assures me that the company is still trading in difficult times here in Christchurch and the informant tells me that there are at least 200 cars listed at the moment with the company on their website.

[21] Therefore, I am satisfied today that the company is not in an impecunious state such that a fine of \$45,000 would be inappropriate given the exercise that I need to do.

[22] The fine in relation to information ending 04391 which is the breach under s 28(1) is in the sum of \$25,000. In relation to information ending 04324, which is a breach under s 13(g) I impose a fine of \$20,000, making a total of \$45,000. In relation to all other informations the company is convicted and discharged. I also award costs in terms of the prosecution in the sum of \$1000.



J A Farish  
District Court Judge