

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2014-004-011175
[2015] NZDC 9803**

COMMERCE COMMISSION

v

ANDREW MARQUET TAYLOR

Hearing: 28 May 2015
Appearances: C Paterson for the Prosecutor
B Donald for the Defendant
Judgment: 28 May 2015

NOTES OF JUDGE A E KIERNAN ON SENTENCING

[1] Andrew Taylor, you are here for sentence having pleaded ultimately guilty to offending committed between January 2013 and January 2014.

[2] The offending which is encapsulated now in four charging documents, the prosecution is brought by the Commerce Commission, relates to the operation of an online retail store purporting to sell musical instruments for components. The charges that you have accepted are in relation to charging document ending 4561, obtaining by deception; that is an offence under Crimes Act 1961.

[3] The particulars of that offence are set out in the charge and I am not going to read them out now, but essentially, what is alleged and you have accepted is between 20 July 2013 and 16 January 2014, you, Mr Taylor, trading as Global Sound Trade by deception and without claim of right obtained a pecuniary advantage or caused loss to any other person exceeding \$1000. The maximum penalty the law provides

for that offence is seven years' imprisonment. Then there are two offences of essentially in shorthand, misleading conduct. They are under the Fair Trading Act 1986 and they are charged also under s 66 Crimes Act because you are charged as a party to the company you were running, and those offences occurred between 1 January 2013 and in relation to charging document ending 4458, 14 June 2013 and in respect of charging document 4560, 19 July 2013 and the misleading conduct included, and I will refer to the summary in a moment, advertising goods for sale on the website for parties which did not reflect genuine recommended retail prices in respect of one of them, and various representations to do with stocking the goods, providing a refund, the terms of purchase and delivery in the case of the other charging document.

[4] Each of those carries a maximum penalty of a \$60,000 fine, and the fourth charging document ending 4566 is an offence under again the Fair Trading Act and that is failing to comply with a notice issued under the Act on 8 November 2013 requiring information and documents to be supplied by 29 November 2013. You have accepted you did not comply with that notice. The maximum penalty for that one is a \$10,000 fine.

[5] There is a lengthy summary of facts which you have agreed. I am not going to repeat all of that now, but I will summarise it and it should be attached to the written notes of this sentencing hearing.

[6] As the summary says in the introduction, the charges relate to various representations made on two websites for your online store regarding price stock and supply of products advertised for sale as well as I have said representations regarding delivery times and refunds.

[7] You were the sole director and shareholder of Global Sound Trade Limited from the time it was incorporated in September 2009 until 19 July 2013 when it was struck off the Companies register. Global Sound Trade was an online store offering for sale, a large range of musical instruments and componentry via two websites, one in New Zealand and one in Australia.

[8] During the period of the incorporation of the company, you were the only person responsible for maintaining and operating the business and the websites you were in effect a one man band. You also had sole access to the bank accounts into which customers' payments were made. After the company was struck off the register in July 2013, you continued to operate the business and the websites as a sole trader trading under the name Global Sound Trade. The New Zealand website was deactivated by the domain named Commission on December 2013 and the Australian website deactivated shortly after on 17 January 2014.

[9] There is in the summary a detail of the content of the websites, misrepresentations regarding prices of goods, stock of goods, delivery times and refunds, and also supply of goods. The charges that you have accepted fall into two time periods, January to July 2013 and then July 2013 to January 2014.

[10] Throughout the period you held a number of different bank accounts in New Zealand and one in Australia and you received payments from customers by direct deposit into those bank accounts. There was an analysis of those bank accounts to track those deposits. Only a small number of payments that could correspond to purchases from suppliers were made and those are detailed in the summary. The bank accounts have now been closed by the banks for breach of their terms and conditions and so on.

[11] As a result of the misrepresentations, members of the public were induced into placing orders on the websites and making payments to Global Sound Trade and essentially to you. The Commission as you know received complaints from 94 customers in New Zealand and Australia who had placed orders during the period and attached to the summary of facts is an appendix setting out the details of all of those people.

[12] You received a notice on 8 November 2013 requiring you to provide information and documents to the Commission. By 29 November, you did not provide a response and that is one of the charges you face which I have referred to. You did voluntarily attend though with the Commission for a, what must have been a lengthy interview in January 2013, and set out in the summary are passages of the

explanations that you gave in that interview. In relation to the notice you said you had received it, but did not realise you had to respond. So I have summarised what is in the summary of facts Mr Taylor rather than read it all out, but I have, of course, read it all and I know that you accept it through your pleas.

[13] You do have some criminal convictions; they are some years old. They are all for dishonesty and there are none for these specific offences for which you have now pleaded guilty; a theft back in 2003, then in 2004, two shopliftings and a receiving. You received fines and a short period of community work for those years ago in the Dunedin District Court.

[14] A restorative justice referral was made as is required after your guilty pleas. Conferences were not able to be held obviously as has been pointed out with the large number of victims logistically that would have been difficult, but the restorative justice provider has advised the Court that restorative justice could not be accessed. I know that you were willing to participate in that process, it was not possible to organise, so what that means is I do not have a report of a conference if one had been able to be held, but I will give you credit for your willingness, in principle, to undergo that process, and there are no specific victim impact statements put before the Court today, but the details of the financial losses suffered by the victims are obviously set out in the material that I have seen, and there is an application for reparation in the total sum of \$89,696.00 and I know that you offered to pay reparation.

[15] There is a probation report and I have been assisted in Court by a probation officer today because there was an additional memorandum which had not quite made it to my file when I was preparing the sentencing. The probation report notes you have previous convictions; well that is an error as you know. There was an amount of stress in your life over this period of offending, alcohol, drugs and gambling I read. The assessment of risk is at medium risk of re-offending and the recommendation in the report dated 15 May was community detention and community work.

[16] Your parents' address and I note they are in your support at Court today is suitable for electronic monitoring, but as at the time of this report, neither you nor your parents wished to consent to home detention, rather only to the lesser sentence of community detention which is essentially a night time curfew. Your reasons for that and perhaps your parents, also Ms Donald has explained to me, were really to spare your family the further stress of a monitored sentence when already, of course, as at May 2015 where we are now, there has been an amount, of course, of family upheaval because of your behaviour, but I am told today and indeed that is confirmed in a memorandum dated Monday which has now been given to me that you have all signed a consent for home detention as well as community detention, and you have heard the probation officer in Court today suggesting some conditions.

[17] I have read in the report some question mark over your remorse and an attempt perhaps at justification. Ms Donald says I need to put that in context. You were answering questions posed by the probation officer and what is recorded as a high sense of self-entitlement and a lack of insight into the impact your actions had on others Ms Donald says is not an accurate reflection of your view of this offending. You do take full responsibility and offer full reparation and indeed, of course, have pleaded guilty. You have not been using alcohol or drugs and the report says since the end of 2013. Ms Donald says her instructions from you are since the end of 2013 which is a significant difference, I must say, in the information put before the Court and gambling also.

[18] The Commission and your lawyer, Ms Donald have both filed extensive written submissions which have been helpful. The Commission points out that this was persistent and widespread offending. There were identified losses to 94 victims and the total reparation as you know is \$89,696.00. What the Commission suggests is a starting point for the fraud offence is a term of three years' imprisonment, for the misrepresentation offendings, a range between 35 and \$50,000 fine, and for the failure to comply with the notice a starting point of an \$8000 fine.

[19] From those starting points, the Commission accepts that you would be entitled to a 25 percent or a quarter reduction for your pleas which I accepted as being at an early stage, and also perhaps a further reduction for remorse.

[20] So I have read the submissions from both parties. Counsel for the Commission helpfully sets out details of the misrepresentations and the fraud offending, and sets out for the Court the approach to sentencing and proved in *R v Clifford* and also reminds the Court of the decisions in *R v Varjan* CA97/03, 26 June 2003 and *R v Hayes*, also *Commerce Commission and L D Nathan*. Again I am not going to repeat all of those submissions, but they are helpful.

[21] Also referred to by the Commission are some cases which are roughly equivalent to your offending, the case of *R v Raffiee* where TradeMe accounts and Sella accounts were used and there were, I think, over the period of that offending, 56 complaints and a total fraud of approaching \$50,000, a high of premeditation I have read the sentencing notes of Judge Harvey who adopted a three year starting point. There was in that case a \$14,500 reparation payment and \$100 per week thereafter and a discount given for that. I have also read the cases of *Silcock v Police* and *Claire v Commerce Commission*.

[22] Reparation is sought as is made clear and the mitigating factor of a guilty plea accepted.

[23] The Commission also ask the Court to consider making an order as in the *R v Raffey* that you are not to have access to the internet for the period of a home detention sentence if I impose home detention.

[24] There has been some delay in the sentencing today because of an inquiry into the reparation that your counsel submitted has already taken place through deductions from WINZ payments to you. In her submission, Ms Donald suggested that may be an amount of perhaps \$1000 and she brought to Court some documentation in support of that.

[25] Counsel are agreed that today unfortunately not able to be completely verified and, therefore, both counsel invite me in making a reparation order to make it for the full amount, and if there needs to be any adjustment for reparation already made that can be done at a later stage.

[26] The Crown accepts that reparation is a priority in cases such as this, and invites the Court to make reparation orders and to take into account in imposing a fine for those offences that attract fines only the amount of reparation.

[27] Ms Paterson has mentioned some issues to do with dates as to websites and so on and suggest that your co-operation with the Commission was less than full, and a discount for restorative justice may really be part of a remorse consideration, but overall, counsel for the Commission urges the Court to consider those who have lost as a result of your offending primarily, as well as imposing a sentence which punishes and deters you and others from this sort of offending.

[28] Ms Donald on your behalf in her submissions has pointed out there is really no tariff for the fraud offending. She has also noted as some of the cases that I have already mentioned the *R v Raffey* case she distinguishes and says that that offender planned the offending in a more sophisticated way than you. Your business set up in 2009 was not set up to defraud people; it was as a result of your decline into drug addiction and heavy alcohol consumption, and gambling that it deteriorated into offending. You have been successfully in business as she points out for a number of years before this offending occurred.

[29] She also points out that in *R v Raffey* the offending involved the use of such internet sites as TradeMe and Sella and therefore affected their credibility in the market which is not something that has happened in your case because they were sites that were only operated by you. She suggests the starting point for the fraud offending of two years. In relation to the misrepresentation, she has addressed the issue of refunds and then repayment and she has made some comments about the other decisions that I have read. As to the dates, the websites were stopped or discontinued, I have read her submissions.

[30] In relation to the notice offending, it is accepted, of course, that you did receive the notice and failed to comply with it. It is a strict liability offence as she points out and you have pleaded guilty, again there is no tariff. You did co-operate she submits in that lengthy interview and you did not in fact as she says, withhold any documents at that time. The starting point she suggests of \$5000 with a

25 percent discount and I just omitted to mention for the misrepresentation offending she suggests a starting point of \$25,000.

[31] Ms Donald addresses the reparation which I have already mentioned. She tells me that you have come to Court today with a banked cheque of \$5000 ready to offer that as reparation and you would also be able to commit at present to \$125 a week. She points out that obviously you are intelligent and talented and once you are able to work again in the area in which you are most skilled, you would wish to increase those reparation payments, and if you remain in the community, you will be actively looking for employment.

[32] Ms Donald has gone into some detail about the addiction to methamphetamine and alcohol and also gambling, and she makes clear that this is not to excuse your offending in any way, but to explain how things progressed over that period. She points out that when you took a break as she puts it from the company from October 2013 until January 2014, that was when things really broke down and after sometime really at rock bottom, you went back to your parents at the end of 2013.

[33] Obviously now Mr Taylor, you are going to be starting again to rebuild your life. On the positive side, you do not drink or take drugs anymore. You have not gambled either since the end of the year for last I am told and she talks about the relevant discounts, and the contents of the pre-sentence report.

[34] So I have summarised what the lawyers have said and I am now going to turn to the imposition of sentence.

[35] The principles and purposing of sentencing that are most important in this case are to hold you accountable for this offending, to denounce or punish your behaviour and to deter or put off you and other people who may seek to offend in this way in the future. I hope that the personal deterrence of putting you off from this sort of behaviour has well and truly hit home now already, even before I sentence you because it has clearly taken a toll on your life, and those of the people who are close to you, as well as those that you deceived through this period of time.

[36] I have to take into account the extent of the harm or the effect on the victims and it is a financial harm, and the quantity I have already stated. There is a need for consistency with sentences in other cases and that is why the lawyers have given me all those other cases to look at, and overall I must impose the least restrictive outcome.

[37] The matters that also need to be taken into account under the Fair Trading Act are well known and they include the objectives of the Act which is to protect consumers and to prohibit unfair trade practises, and there must be an assessment of culpability in each case. So I have taken account of those principles and purposes and the particular factors to be taken into account when imposing penalties under the Fair Trading Act.

[38] This was repeated and deliberate offending Mr Taylor. It was sophisticated. You used your developed skills to keep these sites running. There is a significant amount of loss to the 94 victims. It was a breach of trust because you offered to supply things that either you did not supply or you could not supply, or you did not have in stock, you could not deliver and so on for the details set out in the facts. There was clearly an effect on all of those people as a result, so those are the principal aggravating features.

[39] In your favour as mitigation obviously, I am going to give you credit for your guilty pleas, so that is 25 percent or a quarter off the starting point that I am going to mention in a moment. I will give you a further credit for your offer to pay reparation and some of that is going to be paid upfront today, and your willingness to participate in restorative justice. It seems to me that a total discount of 35 percent is warranted in your case.

[40] In relation to the fraud offending and that is the offending punishable by seven years' imprisonment, having carefully considered the submissions and the cases that have been put before me, I am going to take a starting point of two years and six months' imprisonment.

[41] In the case of the misrepresentation charges, in my view, an appropriate starting point would be \$10,000 on each of those charges so that will be 20 altogether, and in respect of the failure to comply with the notice, a fine of \$4000 in respect of that charge.

[42] From those starting points in respect of each of those categories of offending from two and a half years for the fraud, I am giving you a credit of 35 percent would I think equate to 10 and a half months' imprisonment of two and a half, so the total would be a total of 19 and a half months' imprisonment, that is one year, seven and a half months.

[43] In relation to the misrepresentation and the failure to comply with the notice, I propose to deal overall with matters by imposing a reparation order rather than the level of fine that I have mentioned. So I am going to impose levels of fine which represent a very small percentage of those starting points that I have mentioned, so far less than 35 percent off.

[44] So if I start with the fraud offending Mr Taylor, a term of one year seven and a half months' imprisonment could be, in my view, imposed today. Because it is less than two years, it means that I can consider a monitored sentence. In your case as I have already told you in the information before me, I have decided that a term of home detention is appropriate and meets the principles and purposes of sentencing.

[45] The term that I am going to impose is a term of nine months' home detention. The conditions of the sentence will be as you have heard them already discussed in Court that you serve that sentence at 23 Kowhatu Road, One Tree Hill. That you travel there directly from Court now and wait for the probation officer and the security company. You are not to leave the address without the written approval of the probation officer.

[46] The other conditions will be that if you are assessed as suitable, you attend and complete any counselling or treatment or programme as directed by the probation officer. You will not consume any alcohol or non-prescription drugs over the period of the home detention sentence. You will not partake in any gambling on

the internet or otherwise during the period of the home detention sentence and I am going to impose also post detention conditions for six months beyond the nine, no alcohol and non-prescription drugs, no gambling and to attend any counselling or treatment if directed by the probation officer.

[47] So overall Mr Taylor, as I expect you understand, is one year and three months from today, this sentence in fact operates nine months will be at the address. It does not mean, if I just explain this to you that you may not be able to work because it maybe depending what sort of work you might be offered that the probation officer, may in due course, approve absences for work.

[48] The other part of the punitive sentence that I am going to impose which will get you out of the house for sometime apart from potentially the programmes is community work and I am going to impose 150 hours' community work.

[49] In relation to reparation which I will deal with next, I am going to make a reparation order for the total of \$89,696.00. \$5000 is to be paid at Court today and the balance currently at the rate of \$120 per week. If there is documentation which is accepted in relation to payments that already may have been made as a deduction from your WINZ payments, then that total payment can be adjusted and I am mentioning this now so it will be in the sentencing notes for the Court to see.

[50] In relation to the misrepresentation charges, I told you that I would take a starting point of \$10,000 on each charge and then give you reductions. Because of the large amount of reparation that I have ordered, I am going to order fines of \$1000 on each of those misrepresentation charges and that is because I view the reparation as the most important payment for you to make, so \$1000 on each of those.

[51] In relation to the failure to comply with the notice, I told you \$4000 starting point and deductions from that. Given the reparation order, I am going to impose a fine of \$400 on that. So the financial penalties I have got them like that are the reparation \$89,696.00 and fines which total \$2400. The reparation will be paid first, so when someone has to pay fines and reparation and a rate is ordered for the reparation, that will be the amount that is taken by the Court first.

[52] Now finally Mr Taylor, you have had some discussion about access to the internet. I appreciate that you have skills in that area which you have used for a number of years and some of them, of course, for the offending for which you have now accepted responsibility. I accept as other Judges have that the internet is part of modern life. You have not had a very restrictive bail condition because all that has been imposed so far is that you are not to be involved in the operation of any online retail store. I do think it is appropriate to make an order for some period not the whole period of home detention in line with the application that has been made to me.

[53] So although I am sure at your parents' house others have access to the internet and use it and indeed that is possible, of course, when only telephone these days, I am going to impose a condition on your sentence of home detention that you are not to have access to the internet or any internet based protocol nor use under your own name or the name of any other person any internet account for the first three months of your home detention sentence, and that is really to reflect the fact that this offending has literally took place on the internet, and a period of three months in the light of the nine month home detention sentence is not to a lengthy period, so if you have a mobile telephone on which you can access the internet, you will not be able to do that from today for a period of three months.

[54] If your parents have a PC on which they can access internet, you will not be able to access the internet for three months. Obviously, the policing of that condition will to some extent be something that you will have to impose on yourself because the probation officer will not be there every day making sure that you are not logging on under your parents' password. So I mention that to you frankly now that that is the order that I make for a period of three months.

A handwritten signature in black ink, appearing to read 'A E Kiernan', written in a cursive style.

A E Kiernan
District Court Judge