IN THE DISTRICT COURT
AT MANUKAU

CRI-2014-092-12492
CRI-2014-092-12606
[2016] NZDC 7242

COMMERCE COMMISSION
Prosecutor

v

TWENTY FIFTY CLUB LIMITED
AND
GAVIN MARSICH
Defendant(s)

Date:	26 April 2016
Appearances:	F Cuncannon & T Clark for Prosecutor No Appearance for Twenty Fifty Club Limited No Appearance for Gavin Marsich Amicus Curiae - Ms M Mason
Judgment:	3 June 2016

JUDGMENT OF JUDGE J C MOSES

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[1] On 27 April 2016 I presided over a trial of the two defendants, Twenty Fifty Club Limited ("Twenty Fifty") and its sole director and shareholder, Gavin John Marsich. There was no appearance on behalf of either Twenty Fifty, or Mr Marsich.

[2] The two defendants each face 17 charges arising from their pay-day lending practices. The charges were laid between October and December 2014 and had initial appearances on 14 January 2015. After several enlargements and/or adjournments, the Court entered not guilty pleas on behalf of the defendants on

15 May 2015 after Mr Marsich had appeared and indicated to the Court that he did not recognise the jurisdiction of the Court to hear the charges against him.

[3] After several further adjournments, the matter was set down for a trial for seven to eight days on 2 September 2015. Judge Blackie, in a memorandum of that date indicated that Mr Marsich had left the courtroom during the case management hearing after refusing to accept the jurisdiction of the Court and indicating that he did not wish to participate in the trial.

[4] I appointed Ms Melinda Mason, barrister, as *amicus curiae*. A month before the hearing the prosecutor supplied full disclosure of relevant material to Ms Mason.

[5] On 21 April 2016 I arranged for a case management conference. Mr Marsich appeared but did not wish to enter the body of the Court, and made it clear to me that he did not wish to have anything to do with Ms Mason, nor did he recognise the Court or the Commerce Commission.

[6] On the morning that the trial was due to commence, namely 26 April 2016, a Mr Wenzell was in court as "an executor" for Mr Marsich. Mr Marsich had provided the Court on that morning with some additional documents, copies of which are attached to this decision and annexed as **Appendix 1**. I advised Mr Wenzell that he had no standing before the Court as he was not counsel, but that he could be a "McKenzie friend" and offer advice to Mr Marsich if Mr Marsich wished him to do so. Mr Marsich did not enter into the body of the Court from the public gallery, however he did read a prepared statement to the Court. Mr Marsich then indicated his desire to speak with Ms Mason, the Court appointed amicus, and I provided him the opportunity to do so. When the matter was called again later in the morning, Ms Mason indicated that Mr Marsich sought an adjournment for a two week period so that he could engage with Ms Mason. I decided that bearing in mind the history of this case and the opportunity that Mr Marsich had before the trial to engage with Ms Mason, or to engage his own counsel, I was not prepared to grant that adjournment. However I did adjourn proceedings until 10 am on 27 April 2016 to allow Mr Marsich to discuss matters with Ms Mason.

[7] When proceedings were called on the morning of 27 April 2016, Mr Marsich did not appear. Ms Mason indicated that he was still insisting on there being an adjournment of his case and he also maintained that the Court had no jurisdiction to hear the proceedings because he had not entered into a contract with the Commerce Commission. I gave brief reasons confirming that I was not prepared to grant any further adjournment, and the hearing proceeded.

[8] For completeness I have attached as **Appendix 2**, a copy of the written materials filed by Mr Marsich in support of his claims that the Court has no jurisdiction to hear his case. I will deal very briefly with those submissions. I do note however that Mr Marsich was not being present to speak to these submissions, however for completeness I will deal with the issues raised.

[9] Courts have consistently held that New Zealand Courts have jurisdiction over people in New Zealand. In *R v Mitchell*, the Court of Appeal observed that the Courts have made it plain on a number of occasions, that arguments based on an assertion that the Parliament of New Zealand is not authorised to make law affecting some or all of the persons living in New Zealand, cannot succeed before it. [1] Our Courts are bound to accept the validity of acts of Parliament, and a litigant is not entitled to put himself outside of the law of New Zealand. Similarly, Andrews J in *R v Brooker* [2] stated that the Courts have consistently held that challenges to the sovereignty of Parliament, the validity of acts of Parliament (whether in a context of Maori sovereignty arguments, or any other challenge to the sovereignty of New Zealand parliament) cannot succeed. As can be seen in the material in **Appendix 2**, if there are further arguments raised, they are difficult to comprehend, and I am not dealing with the material further than to the extent to which I have dealt with them in this paragraph.

[10] On 18 May 2016, after the conclusion of the hearing but before the delivery of this decision, further written submissions were filed in Court, purportedly by Mr Marsich.

[1] R v Mitchell CA68-04, 23 August 2004, at [14]
[2] R v Brooker [2014] NZCA 436 at [4]

In those submissions Mr Marsich claims:

(a) Not to have received full disclosure prior to the hearing. I do not accept these submissions. I have received an affidavit of service of disclosure.[3] I have also received letters and courier receipts showing that additional material was provided to Mr Marsich.[4] Mr Marsich does not list the material he claims that he has not received.

(b) Mr Marsich claims not to have had sufficient time to contact a lawyer. As is self evident from the history of this case, Mr Marsich has been given ample time to consult a lawyer but chose not to do so.

(c) Mr Marsich submits that charges have been amended. I have not amended any of these charges and in any event, I find there has been no unfairness to Mr Marsich in the way the charges have been brought.

(d) Mr Marsich claims that he needs further time because the charges are serious and carry "five years jail time". This is factually incorrect. All of the charges the company and Mr Marsich face are fineable only.

(e) Mr Marsich seeks to comment on the evidence of Ms Bingham as it relates to the Commerce Commission investigation. Mr Marsich had the opportunity to ask questions of Ms Bingham but elected not to take part in the hearing. I make my decision on the basis of the evidence I have heard.

Mr Marsich filed a further document, entitled "In Asseveration of Marsich, John – Gavin of Manukau commencing in undesignated process of legislating an affirmation on 6 May 2016" (sic), along with several other documents namely "Commercial Asseveration of Truth and Auckland Registry and Asseveration – statement of the Truth".

[3] Exhibit 14
[4] Exhibit 15,16 and 17

I find that in essence, these documents repeat earlier arguments challenging the jurisdiction of the Court and to the extent that they do not, they are irrelevant to the matters I must decide.

Factual Background

[11] The evidence I have heard establishes that during the entire period covering all charges, Twenty Fifty was a lender providing pay-day loans from a small office at 605B Great South Road, Manukau.

[12] I am satisfied on the evidence presented at trial, that at all material times Mr Marsich was a director of Twenty Fifty, having been appointed a director on 8 August 2013. From 27 December 2013, Mr Marsich was the sole director and shareholder of the company. Furthermore, I am satisfied on the evidence given, and on the basis of the exhibits produced, that Mr Marsich was the person who had dealings with prospective customers, including each of those who gave evidence before me. He was the person who had dealings with the Commission and its investigation as the representative of the company. Each of the loan documents produced, whether they be described as promissory notes, members promissory notes, or membership and grant documents, each have Mr Marsich's name on the pre-printed forms as a witness to the documents. Those documents, the text messages sent and received from Mr Marsich's telephone which have been produced along with Mr Marsich's ASB bank records, all confirm that Mr Marsich was responsible for the day-to-day activities of Twenty Fifty, and that he was directly involved in receiving, processing and enforcing loans made by Twenty Fifty.

[13] I accept that Mr Marsich, as a director, may be guilty as a principal offender for acts and omissions carried out in that role, and as a secondary party to offences committed by Twenty Fifty under s 66 of the Crimes Act 1961.

Charges of failing to comply with statutory notices

CRN's 14092504871 and 14092504898

[14] These charges allege that the defendants without reasonable excuse, refused or failed to comply with a notice issued under section 98(a) and (c) of the Commerce Act, 1986. Mr Marsich is charged as a party to Twenty Fifty's offending and that he did or omitted an act or acts for the purpose of aiding the company to commit that offence.

CRN's 14092504870, 14092504897

[15] These charges allege that the defendants without reasonable excuse refused or failed to comply with a notice issued under section 47 G of the Fair Trading Act 1986 ("FTA"), and that Mr Marsich was a party to the Twenty Fifty's offending, in that he did or omitted an act, or acts for the purpose of aiding the company to commit the offence.

Elements of the charges

[16] I am satisfied that the elements in relation to these four charging documents are:

(a) That the Commission issued a statutory notice;

(b) The notice was served;

(c) The notice was not complied with; and

(d) There is no reasonable excuse for the failure to comply with the notice.

[17] I heard from Ms Susan Bingham who was employed by the Commerce Commission as a chief advisor from February 2008 to January 2016. Her evidence establishes that on 8 April 2014, the Commission issued statutory notices under section 98 of the Commerce Act for the company to provide information and documents relating to its costs in establishing and administrating loans, and its costs

associated with default. At the same time, the Commission issued a section 47G Fair Trading Act notice to Twenty Fifty, to the attention of Mr Marsich requiring Twenty Fifty to provide copies of documents or agreements relating to Twenty Fifty's security interests in debtors' property. Any such documents were to be sent to the Commission by 22 April 2014.

[18] I am satisfied that these notices were served by courier at Twenty Fifty's office at 605B Great South Road, Manukau. I am further satisfied that Twenty Fifty did not comply with either of the notices at any time. It is clear from Ms Bingham's evidence that she had corresponded with Mr Marsich after the notices were served and that he indicated that before he would disclose any information he required the Commerce Commission to sign a confidentiality agreement.[5] It is also clear that there was following correspondence where Mr Marsich required *inter alia* that the Commerce Commission pay $1,500 per Maori standard, in New Zealand dollars or Maori barter cash.[6] There was a further telephone attendance with the Companies Office on 23 April 2014.[7]

[19] I am satisfied that the company and its director Mr Marsich did not respond to the matters raised in those notices. Rather, he emailed the Commerce Commission alleging a breach of his rights, and a denial that the Commerce Commission had any authority.[8]

[20] I am further satisfied that Ms Bingham again wrote to Twenty Fifty reiterating that it was an offence to fail to comply with the notices and at the same time invited Mr Marsich to the offices to discuss compliance.[9] I am satisfied that Mr Marsich responded to that letter reiterating that he did not wish to respond to the Commerce Commission's request.[10] The evidence establishes that Mr Marsich was emailed again on 29 April 2014 with further statutory notices requesting that he attend the Commerce Commission's offices on 7 May 2014 to answer questions as part of their investigation into Twenty Fifty but that they were unable to be delivered

[5] BOD Vol 2, Tab 1, page 94
[6] BOD Vol 2, Tab 1, page 129
[7] BOD Vol 2, Tab 1, page 144
[8] BOD Vol 2, Tab 1, page 152
[9] BOD Vol 2, Tab 1, page 159
[10] BOD Vol 2, Tab 1, page 162

as no-one at the address was prepared to sign for them.[11] On 4 May 2014 Mr Marsich emailed Ms Bingham requesting that the Commerce Commission cease and desist all action against him and Twenty Fifty.[12] Despite yet a further email to Mr Marsich on 13 May 2014 requesting an explanation for its failure to comply with the notices and a reminder that it was an offence to fail to comply with a notice without reasonable excuse,[13] Mr Marsich simply replied in an email dated 20 May 2014 that he requested the Commerce Commission complete a confidentiality agreement[14] and he directed that the Commerce Commission cease and desist all actions against him and Twenty Fifty, and issued the Commerce Commission with an invoice for a sum of $112,794.59.[15] This evidence satisfies me beyond any reasonable doubt that each of the elements of these charging documents have been proven in respect to Twenty Fifty, and that through his actions, Mr Marsich as the sole director of the company, aided the company to commit the offences.

Failure to provide key information to debtors

<u>CRN's</u>:
14092505594, 14092505572; and
14092505595, 14092505573; and
14092505596, 14092505574; and
14092505597, 14092505575; and
14092505598, 14092505576; and
14092505599, and 14092505577.

[21] These series of charges relate to loan contracts of individual debtors, namely Sharon Henare and Bobby O'Connor and allege that;

(a) As a creditor under a consumer credit contract, Twenty Fifty failed to ensure that disclosure of the key information applicable to that contract was made to the debtor within five working days of the day on which the contract was made; and

[11] BOD Vol 2, Tab 1, page 165
[12] BOD Vol 2, Tab 1, page 198
[13] BOD Vol 2, Tab 1, page 201
[14] BOD Vol 2, Tab 1, page 202
[15] BOD Vol 2, Tab 1, page 204, page 222

(b) Mr Marsich was a party to this offending.

[22] For the relevant time period that covers the charging documents, the Credit Contracts and Consumer Finance Act 2003 ("CCCFA") required creditors to provide debtors under consumer credit contract key information about their loans. The information that must be disclosed to debtors under the Act is set out in Schedule 1 to the CCCFA. Schedule 1 of the CCCFA relevantly provides the details of the key information concerning consumer credit contracts that had to be disclosed.

[23] Section 103(1) of the CCCFA provides that it is an offence for any creditor to breach any of the provisions of sections 17 to 69, 71 to 74, and 76 to 82 of the Act.

[24] Section 17(1) of the CCCFA provided that:

> (1) Every creditor under a consumer credit contract must ensure that disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every debtor under the contract;
>
> (a) before the contract is made; or
>
> (b) within 5 working days of the day on which the contract is made.

[25] The elements of each of these charges are therefore:

(a) Twenty Fifty was a creditor;

(b) under a consumer credit contract;

(c) who failed to ensure the disclosure of key information (being the information set out in Schedule 1 of the CCCFA);

(d) Either:

(i) before the contract was made; or

(ii) within 5 working days of the contract being made.

Charges relating to Ms Henare

CRN's 14092505594, 14092505572

[26] These charges relate to a loan entered into between Twenty Fifty and Sharon Henare on 3 October 2013.[16]

[27] Ms Henare in her evidence confirmed that on 3 October 2013 she had been dealing with Gavin Marsich in relation to the loans that she took out with Twenty Fifty. It is clear from the documents produced that neither the loan contract document nor the promissory note referred to disclosed a description of the property subject to the security interest purportedly to be taken by Twenty Fifty. I find that the elements of both of these charges are proven beyond reasonable doubt both in relation to Twenty Fifty and in relation to Mr Marsich, who through his actions as sole director of the company, was a party to that offence.

CRN's 14092505595 and 14092505573

[28] Ms Henare gave evidence that she did not repay her loan of $75 by 9 October 2013 as required, but did repay it the following day. Twenty Fifty charged her a late payment fee of $50. Ms Henare said:

> "Gavin also charged me an extra payment of $50 as a late payment fee, and told me I had to pay that too".

Twenty Fifty issued that $50 as a new loan together with another on 11 October 2013 which included another 50% "marketing fee". The total repayable was $75.[17]

[29] That promissory note of 11 October 2013 does not:

(i) disclose the total amount of the advance made under the loan contract;

(ii) give a description of the credit fee payable;

[16] BOD Vol 1, Tab S, page 199, 200
[17] BOD Vol 1, Tab S, page 202

(iii) indicate the amount of the credit fee payable or the method of calculating that fee;

(iv) give a description of the property subject to the security interest purported to be taken by Twenty Fifty; or

(v) provide a statement of Ms Henare's rights under section 27 of the CCCFA to cancel the contract.

[30] I accept the evidence given by Ms Henare in relation to this loan and I am satisfied beyond reasonable doubt that the information required by law to have been provided was not provided by Twenty Fifty to Ms Henare. I am also satisfied to the requisite standard, that through his actions or inaction, Mr Marsich was a party to the offence.

Charges relating to Mr O'Connor

<u>CRN's 14092505596 and 14092505574</u>

[31] Mr Bobby O'Connor gave evidence as to his dealings with Twenty Fifty and Mr Marsich. On 3 October 2013 Mr O'Connor obtained a loan of $350. The amount to be repaid was $525, due a week later.

[32] Mr O'Connor testified that he paid this on time.

[33] On 25 October 2013 Mr O'Connor obtained a second loan from Twenty Fifty, this time for $300. A total of $450 was due to be repaid a week later.[18] Mr O'Connor confirmed that this amount had been repaid in two instalments, and although the second instalment was late, he was not charged any late fees.

<u>CRN's 14092505597 and 14092505575</u>

[34] These charges relate to a loan taken out by Mr O'Connor on 5 November 2013 for a sum of $400 with a total of $600 due to be repaid a week

[18] BOD Vol 1, Tab B, page 31

later.[19] The Promissory Note was witnessed by Mr Marsich. Mr O'Connor's evidence was that he repaid the loan on 13 November 2013 which was a day late. He said that Mr Marsich did not charge him a late fee for the late payment as they were on reasonably good terms at that stage.

<u>CRN's 14092505598 and 14092505576</u>

[35] These charges relate to a fourth loan that Mr O'Connor obtained on 16 November 2013 for $400. A total of $600 was due to be repaid.[20] The "Promissory Note" was witnessed by Mr Marsich. Mr O'Connor stated that that loan was repaid.

<u>CRN's 14092505599 and 14092505577</u>

[36] These charges relate to a fifth loan taken out by Mr O'Connor on 24 November 2013 for $1,500 from Twenty Fifty. A total of $2,250 was due to be repaid on this loan on 1 December 2013.[21] This "Promissory Note" was witnessed by Mr Marsich. I accept Mr O'Connor's evidence that the date of this contract was in fact 24 November 2013, rather than the date recorded on the promissory note, namely 24 December 2013. It would not make sense for the contract to be post-dated after the date the loan was required to be paid on the promissory note.

[37] I accept that in relation to each of those last four loans taken out by Mr O'Connor, none of those promissory notes discloses the following information:

(a) The total amount of the advance made under the contract;

(b) A description of the credit fee payable; or

(c) The amount of the credit fee payable, or the method of calculating that fee.

[19] BOD Vol 1, Tab B, page 32
[20] BOD Vol 1, Tab B, page 33
[21] BOD Vol 1, Tab B, page 34

[38] I am satisfied that this information was required to have been provided to Mr O'Connor and was not provided by Twenty Fifty to him. Mr Marsich through his actions and as the sole director of the company, was a party to that offending. I find all those charges relating to Mr O'Connor are proven beyond reasonable doubt.

Charging an unreasonable establishment fee

CRN's 14092505590 and 14092505579

[39] Twenty Fifty claims on its website that it does not charge "interest" on its loans.[22] It charges an establishment fee equivalent to 50% of the sum borrowed. That fee is variously described on its website and in other documentation as "marketing fee" or "marketing koha".[23] [24] [25] On each occasion, the sum borrowed and the marketing fee both fall due for repayment on the debtors next pay day, or within seven days, whichever is sooner [26] [27]. Ms Bingham in her evidence referred to a schedule she had prepared which is at the commencement of the Commerce Commission's bundle of documents Volume 1, which sets out under a column entitled "Marketing Fee" well over 100 examples of loan documents that provide for marketing fees of $50 or more. It was noted and accepted by Ms Bingham that there were three occasions where the column had incorrectly noted a marketing fee of $50 or more when that was not the case. However I find that error to be immaterial in terms of the matters I need to consider. These charges allege that Twenty Fifty, being a creditor under consumer credit contracts, breached section 41 of the CCCFA, by providing for an establishment fee in those contracts that was unreasonable. Mr Marsich is charged as a party to Twenty Fifty's offending in that he did or omitted to do an act or acts for the purpose of aiding the company to commit the offence.

[40] The Commission submits that the "marketing fee" or "marketing koha," exceeded Twenty Fifty's reasonable costs, or average reasonable costs in connection with the application for credit, processing in considering that application,

[22] BOD Vol 3, Tab 4, page 74
[23] BOD Vol 3, Tab 4, page 74
[24] BOD Vol 3, Tab 6, page 131
[25] BOD Vol 1, Tab A, page 23
[26] BOD Vol 1, Tab A, page 2
[27] BOD Vol 1, Tab A, page 23

documenting the consumer credit contract, and advancing the credit. They submit that Mr Marsich was responsible for setting the "marketing fee".

[41] Section 42 CCCFA sets out matters the Court must give regard to in determining whether an establishment fee is unreasonable. Those matters are:

(a) Whether the amount of the fee is equal to or less than the creditors reasonable costs in connection with the application for credit, processing and considering that application, documenting the Consumer Credit Contract, and advancing the credit; or

(b) Whether the amount of the fee is equal to or less than the creditors average reasonable costs of the matters referred to in paragraph (a) for the appropriate class of consumer credit contract.

[42] Whether a marketing fee is unreasonable has been discussed in the Court of Appeal and in a very recent decision, the Supreme Court in the decision of *Sportzone Motorcycles v Commerce Commission.*[28] The Court held in the *Sportzone* case that for a fee to be reasonable it must relate to costs incurred by the creditor in relation to the steps required to complete a specific transaction. The Court described this as a "transaction-specific approach".[29]

[43] This approach requires:

(a) That the Court assess whether costs relate to transactions concerning the individual debtor on whom the fee is levied.[30] The creditor must identify what steps were undertaken in relation to particular aspects of the provision of credit and calculate the costs of taking those steps.[31]

(b) Where the CCCFA allows for "average reasonable costs" to be levied (such as at s 42(b)), the "transaction-specific" approach still applies. Average reasonable costs must be calculated in relation to the total

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[28] Sportzone Motorcycles v Commerce Commission [2016] NZSC 53
[29] At para [51]
[30] At para [68]
[31] At para [73]

amount of anticipated transaction-specific costs for the anticipated number of transactions.[32]

(c) While the transaction-specific approach will generally only incorporate variable costs, some fixed costs may be included in the fee where they are relevant and closely connected to the activity for which the fee is charged.[33] General overheads are not recoverable.[34] The "closely connected" test, however, is merely shorthand for reasonableness as set out by the CCCFA, and is not a substitute for it.[35]

(d) Factors other than the cost of the transaction, such as fees charged by other providers, may be relevant. However, these factors will not "outweigh" cost in the determination of reasonable fees.[36] Furthermore, fees charged by other providers should not be assumed to be reasonable.[37]

[44] The Supreme Court's decision is notable for its emphasis on consumer protection as a central purpose of the CCCFA (citing s 3 [38]). Comparability between competing credit offerings was also considered to be an important purpose.[39] Efficiency and flexibility were found to be subservient to these "more important purposes".[40] The objective of consumer protection informed the Court's approach to statutory interpretation. The Court found that the transaction-specific approach promoted the objective of consumer protection, and considered the submission that it may lead to a corollary increase in interest rates as not "axiomatically correct".[41]

[45] I heard evidence from Ms Bingham that there was limited information about Twenty Fifty's costs located during the execution of the search warrant of Twenty

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[32] At [72]
[33] At [81]
[34] At [113]
[35] At [82]
[36] At [92]
[37] At [93]
[38] At [67]
[39] At [65]
[40] At [61]
[41] At [67]

Fifty's business premises. Twenty Fifty has failed to provide any information to the Commissioner which would seek to justify the 50% marketing fee to be paid at the next pay day or within seven days. The evidence from Ms Bingham is that the Commerce Commission has attempted to look at what costs could possibly be associated with start up marketing fees using the information they had before them. Ms Bingham was aware that Mr Marsich had other business interests. For example, he is apparently a registered motor vehicle dealer, and that there were some vehicles being sold in front of his property. He had another business Healthy Home Group Limited, which was related to insulation and insulation sales. The Commerce Commission also took into account that there may be some rental costs for Twenty Fifty, however noted that in fact Mr Marsich's partner Ms Paula Vero was the tenant of the property from which the business was run. The Commerce Commission also took into account that for a period of 22 to 23 days which covered the dates of almost all of the documents located in Twenty Fifty's office, there were some 230 contracts and the Commerce Commissions calculation was based on Mr Marsich issuing approximately 10 loans per day. The difficulty that the Commerce Commission had in assessing what reasonable costs might have been incurred, is that there was no assistance or information provided to them by the company or Mr Marsich as director. The evidence of Ms Bingham was that there was no evidence which would justify a fee of $50 or more for an establishment/marketing fee.

[46] I accept Ms Bingham's evidence. The defendant company and Mr Marsich have been given ample opportunity by the Commerce Commission to provide information which might justify any 50% establishment fee where that fee was $50 or more, and have failed to do so.

[47] In the circumstances, I find that the contracts which provided for establishment fees of $50 or more were unreasonable in the circumstances. I am satisfied on the evidence I heard that the charges have been proven to the required standard against Twenty Fifty. I also find beyond reasonable doubt, that Mr Marsich though his role as the sole director of the company and the role he played in the company as described in paragraph 12 of this decision, was responsible for setting the fee and as such he was a party to the company's offending.

CRN's 14092505591 and 14092505578

[48] These charges allege that Twenty Fifty, being a creditor under a consumer credit contract, breached section 41 of the CCCFA by providing for an establishment fee ("rollover fee") in those contracts which was unreasonable. It is also alleged that Mr Marsich was a party to Twenty Fifty's offending and that he did or committed to do an act or acts for the purpose of aiding the company to commit that offence. In particular, it is alleged that Mr Marsich was responsible for setting the rollover fee.

[49] The contracts stated that if a debtor failed to pay their loan on time:

(a) The outstanding balance would be refinanced by Twenty Fifty into a new loan (rollover loan); and

(b) Twenty Fifty would also add to the rollover loan a fee equivalent to 50% of the outstanding balance (rollover fee).

[50] The Commerce Commission submits that the rollover fee is either an establishment fee on the rollover loan or alternatively it is a default fee on the initial loan.

[51] There are five different variations of the rollover fee contained in the promissory notes which were located by the Commerce Commission during the search of the Twenty Fifty premises:

(a) An example of the first variation is set out in the promissory note issued to Akeina Kimiora on 31 January 2014:[42]

> 7.1 I/We do acknowledge that any remaining unpaid balances and fees will roll-over into a NEW Grant and a marketing fee of 50% of the Grant amount will be added to any remaining Grant balance...

(b) An example of the second variation is set out in the promissory note issued to Apaula Pone on 13 February 2014:[43]

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[42] BOD, Vol 1, Tab A, page 2
[43] BOD, Vol 1, Tab A, page 23

> 7.1 I/We do acknowledge that any remaining unpaid balances and fees will roll-over into a NEW Grant and a marketing fee of 50% of the Grant amount will be added to any remaining Grant balance. …

(c) An example of the third variation is set out in the promissory note issued to Bobby Sharn David O'Connor on 3 October 2013:[44]

> Failure to have available funds at the time of collection will result in accumulated costs being taken as a NEW Loan application plus 50% of the loan balance as payment due on the next PAY day. …

(d) An example of the fourth variation is set out in the promissory note issued to Bobby Sharn David O'Connor on 5 November 2013:[45]

> Failure to have available funds at the time of collection will result in accumulated costs being taken as a NEW Loan application plus up to a maximum of 4 weeks plus 50% of the loan balance as a fee with payment due on the next PAY day. …

(e) An example of the fifth variation is set out in the promissory note issued to Bobby Sharn David O'Connor on 24 November 2013 (I note that the promissory note says 24 December but I accept for the reasons given earlier that this is an error):[46]

> Failure to have available funds at the time of collection will result in accumulated costs being taken as a NEW Loan application plus up to a maximum of 4 weeks plus 50% of the loan balance as a fee with payment due on the next PAY day or within a 7-day maximum period. …

[52] Ms Bingham referred to the schedule which she had prepared which is located at the commencement of the Commerce Commission's bundle of documents, volume 1 under the column headed "Rollover Fee". There she has set out those loan documents which include provision for such a rollover fee, where that rollover establishment fee would amount to $50 or more. I am satisfied for the reasons set out in paragraphs 45-47, that the establishment fee (rollover fee) was unreasonable in the circumstances.

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[44] BOD, Vol 1, Tab B, page 30
[45] BOD, Vol 1, Tab B, page 32
[46] BOD, Vol 1, Tab B, page 34

[53] I am satisfied that there was a new separate contract agreed to by the parties, and that therefore the fee set in those circumstances is an establishment fee. I am therefore satisfied that each element of the charges had been established. I am satisfied beyond reasonable doubt that Mr Marsich, as the sole director of Twenty Fifty, was a party to the offending of Twenty Fifty and was responsible for setting this unreasonable fee.

Charging unreasonable default fees

CRN's 14092505593 and 14092505580

[54] These charges allege that Twenty Fifty being a creditor under Consumer Credit Contracts, breached section 41 of the CCCFA by providing for a late penalty or dishonour fee ("rollover fee") in those contracts which was unreasonable. Mr Marsich is charged as a party to that offending.

[55] These charges have been laid as an alternative to the charges referred to in paragraphs 48 to 53 on the basis that the fees being charged should more properly be considered as default fees rather than establishment fees. I have found that those charges alleging that the fees should be considered as establishment fees have been proven, and in those circumstances these charges are dismissed. If however I was wrong and the circumstances of the consumer credit contracts breaches should more properly be considered as default fees rather than establishment fees, then I would have found that the default fee charges were unreasonable.

CRN's: 14092505592 and 14092505581

[56] Default fees are defined under s 5A of the CCCFA as :

> Default fees means fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor: but does not include default interest charges.

[57] Ms Bingham gave evidence that she discovered during her investigation that:

6.27 In addition to the Rollover Fee, where a loan was not repaid on time, Twenty Fifty's loan contracts also provided for a further $20 or $25 default fee, along with a further $50 for recovery costs.

6.28 Examples of Twenty Fifty's further default fee are set out in:

(a) The promissory note issued to Akeina Kimiora dated 31 January 2014:[47]

> 6. I/We do acknowledge and accept there is a late dishonour fee of $25 that will be added to the grant balance on default payments. A further $50 may be charged for recovery costs.

(b) The promissory note issued to Bobby O'Connor on 3 October 2013:[48]

> I/We do acknowledge and understand there is a late penalty fee of $20 and a collection agents costs of $50 if payment is not received by 10 am the day of due payment.

(c) The promissory note issued to Mr O'Connor on 5 November 2013:

> I/We do acknowledge and understand there is a late penalty fee of $25 and a collection agents costs of $50 if payment is not received by 10 am the day of due payment that will be added to the loan balance.

Ms Bingham sets out in the 13th column in her schedule under the heading "Unreasonable default fee," 234 examples of loan documents that provided for a default fee.

I am satisfied that for the reasons set out in paragraphs 45-47, that any such "default fee" charges are unreasonable. There has been no evidence provided which would justify any default fees being charged. I am satisfied beyond reasonable doubt that the charges against Twenty Fifty have been proven and that Mr Marsich, as the sole

[47] BOD, Vol 1, Tab A page 2
[48] BOD, Vol 1, Tab B page 32

director of the company, was responsible for setting the default fees and as such was a party to this offending by the company.

Charges of purporting to contract out of the Credit (Repossession) Act 1996 (the CRA)

<u>CRN's: 14092505583 and 14092505570</u>

[58] These charges allege that Twenty Fifty, being in trade, in connection with the supply services, made a false or misleading representation concerning the existence of a right, namely its right to contract-out of the CRA. These charges relate to promissory notes issued by Twenty Fifty which provided that the company may seize additional security items. Mr Marsich is charged as a party to this offending.

<u>CRN's: 14092505584 and 14092505571</u>

[59] These charges relate to representations contained in the promissory note documents issued to debtors which provided that Twenty Fifty's collection agent "may require security worth four times the payment that is due and will remove a selected item for surety purposes only, and/or seize the above security item(s) listed above". Mr Marsich is charged as a party to this offending.

[60] I am satisfied that at the time the contracts were entered into the CRA governed the circumstances in which a creditor could repossess consumer goods under a loan agreement. That process was set out in s 7 of the CRA. A creditor was entitled to repossess consumer goods under a loan agreement only if:

> (i) the goods are subject to a security interest and the security agreement provides a right of repossession; and either
>
> (ii) the debtor is in default under the security agreement; or
>
> (iii) the goods are "at risk".

[61] If the debtor is in default, s 8 of the CRA requires the creditor to serve a pre-possession notice on the debtor in the prescribed form, and to give the debtor at least 15 days to remedy the default, before it can repossess the goods.

[62] Section 17 CRA also required the creditor to present the debtor with a copy of the pre-possession notice at the time it enters the debtors' premises to take possession of the goods.

[63] If the goods are "at risk" the requirements set out in paragraph 7.2 (b) do not apply and the creditor may immediately repossess goods without prior notice. The term "at risk" is defined under s 7(2) of the CRA and states that goods are only "at risk" if the creditor has reasonable grounds to believe that the consumer goods have been or will be destroyed, damaged, endangered, disassembled, removed, or concealed, contrary to the provisions of the agreement.

[64] Section 7(2) of the CRA places the onus on the creditor to prove that grounds exist to believe that consumer goods are "at risk".

[65] The CRA requirements for realising a security interest in consumer goods include s 25 which provides that a creditor must offer consumer goods for sale after the expiration of 15 days from the date of service of the post-possession notice.

[66] Contracting-out of the terms of the CRA is prohibited under s 42 CRA. That section provides that the provisions of the CRA have effect, despite any provision to the contrary, and any security agreements. Section 42(3) states that every creditor who purports to contract-out of the provision of the CRA commits an offence against s 13(1) of the Fair Trading Act 1986 ("FTA").

[67] I am satisfied on the evidence I have heard and produced as exhibits, that during the charging period, Twenty Fifty used several different variations of its promissory note document which were in breach s 7 and 42 of the CRA 1997, and s 13 (i) and 40 of the FTA 1986. These include the promissory note issued to Mr O'Connor dated 3 October 2013,[49] the promissory note issued to Mr O'Connor dated 25 October 2013,[50] the promissory note issued to Mr O'Connor dated

[49] BOD, Vol 1, Tab B, page 30
[50] BOD, Vol 1, Tab B, page 31

5 November 2013,[51] and the promissory note issued to Mr O'Connor dated 24 November 2013.[52]

[68] I am satisfied that each of those promissory notes contained clauses, which in turn contained two representations that were contrary to the regime set out in the CRA. The first was:

(a) That Twenty Fifty had the right to seize security items on non-payments. I find that that was contrary to the provisions of the CRA which require a repossession notice to be issued unless goods were at risk.

(b) That Twenty Fifty may hold items seized as surety. I find that representation was contrary to the provisions of the CRA which govern the treatment of seized goods, in particular s 25 which requires a creditor to offer for sale items have been seized after the expiration of 15 days from the date of service of the required post-possession notice.

[69] Ms Bingham referred to eight examples which were set out in the column of her schedule at the beginning of the bundle of documents, Volume 1, under the heading "Contracting-out of CRA # 1", which contained examples of loan documents containing representations where Twenty Fifty claimed they had the right to seize security items on non-payment, and eight examples of loan documents in the schedule under column heading "Contracting-out" of the CRA # 2" which included representations that Twenty Fifty could hold items seized as surety.

[70] I am satisfied that the elements of these four charges that each defendant is facing have been proven to the required standard. In particular I find that both Mr Marsich, though his actions and as sole director of the company, was a party to those charges.

[51] BOD, Vol 1, Tab B, page 32
[52] BOD, Vol 1, Tab B, page 34

Misrepresentations as to affiliation

CRN's: 14092505586 and 14092505568

[71] Twenty Fifty are charged that being in trade, in connection with the promotion by any means of the supply of services, made a false or misleading representation that Twenty Fifty had any approval endorsement or affiliation, namely that it was a member of the FSCL dispute resolution scheme. Mr Marsich is charged as being a party to that offence.

CRN's: 14092505587 and 14092505569

[72] Twenty Fifty is also charged that being in trade, in connection with the promotion by any means of the supply of services, made a false or misleading representation that it had any approval, endorsement or affiliation, namely that it was a registered financial services provider under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Mr Marsich is charged at being a party to that offence.

[73] Section 13(f) of the FTA provided at the time of these offences:[53]

> **Section 13 False or misleading representations.**
>
> No person shall, in trade, in connection with a supply or possible supply of goods or services, or with the promotion by any means of supply or use of goods or services; ....
>
> (f) Make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; ...

[74] Section 40 of the FTA makes it an offence to breach s 13 of the FTA. The elements which the Commerce Commission must establish to prove these charges are:

(a) Twenty Fifty was in trade; and

(b) Made a false or misleading representation as to being

(i) a registered financial services provider; and

[53] From 15 November 2000 to 16 June 2014

(ii) a member of FSCL'S dispute resolution scheme.

[75] Ms Bingham gave evidence that during the course of her investigation, she reviewed Twenty Fifty's website. It contained the following information under the heading "What if I have a complaint?"

> If you disagree with our findings, we have an independent disputes resolution service which you can use to take your complaint further. As a New Zealand government registered financial services provider, we have engaged Financial Services Complaints Limited to provide this service.[54]

[76] I heard evidence from Ms Rhonda Singleton whose evidence was unchallenged and whose evidence I accept. Ms Singleton is the enquiries and administration manager at FSCL, which provides dispute resolution services for financial services providers. Ms Singleton has a high level of knowledge about the members of their scheme. She had never heard of Twenty Fifty. She made further checks of the internal database of FSCL members and also checked the financial services provider register. She confirmed that neither Twenty Fifty nor Mr Marsich are current or past members of FSCL. She was instructed to contact Twenty Fifty to ask them to apply for membership of FSCL or to remove the FSCL's details from the Twenty Fifty website.

[77] Ms Singleton telephoned Twenty Fifty and spoke to Mr Marsich. She recalled having a long and "difficult" conversation with Mr Marsich who she found to be both aggressive and argumentative. Mr Marsich offered no explanation about why Twenty Fifty had FSCL details on its website. She provided Mr Marsich with a brief overview of his obligations as a financial service provider. Following that phone call she sent an email to Mr Marsich which included an application form for financial service provider membership and information as to how to apply to become as a member of FSCL. She requested Mr Marsich to return the completed application to her. She did not receive a completed application form from Mr Marsich or Twenty Fifty.

[78] I also heard from Ms Shirin Giffin who is a Senior Integrity Officer at the Ministry of Business, Innovation and Employment (MBIE). Her role is to review all

[54] BOD, Vol 3, Tab 4, page 81

entities on the financial service providers register. She is able to view all applications internally on the system before they are publically viewable. She advised that Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires financial service providers as defined to be registered. She has checked whether Twenty Fifty Limited and/or Mr Gavin John Marsich are on the financial service providers register. Neither are.

[79] I accept her evidence and accept that if they had been on the financial services provider register and had been de-registered they would also have shown up on her searches. I accept her evidence that neither Twenty Fifty Limited nor Mr Marsich are, or ever have been, registered financial service providers.

[80] On the basis of the evidence I have heard from Ms Bingham, Ms Singleton, and Ms Giffin, and also the documents produced, I am satisfied beyond reasonable doubt that Twenty Fifty was in trade and that Twenty Fifty made a false or misleading representation as to being both a registered financial services provider and a member of the FSCLS dispute resolution scheme. I am also satisfied beyond reasonable doubt on the evidence provided to the Court that Mr Marsich, by his actions and as the sole director of the company, was a party to both offences with which he is charged.

Misrepresentation as to the right to repossess

<u>CRN's 14092505585 and 14092505582</u>

[81] Twenty Fifty are charged that being in trade, in connection with the promotion by any means of the supply of services, made a false or misleading representation concerning the existence of the right, namely its right to repossess the van of Ms Seini Taulava. Mr Marsich is charged as being a party to that offence.

[82] As previously referred to in paragraphs [53-58], the CRA has a mandatory process for repossessing consumer goods and I am satisfied that it is a contravention of the FTA to represent otherwise.

[83] In relation to these charges the Commerce Commission must prove that:

(a) Twenty Fifty was in trade; and

(b) made a false or misleading representation as to its rights to repossess Ms Taulava's van.

[84] I heard evidence from Ms Taulava. Her evidence was unchallenged and I accept it. Ms Taulava referred to the dealings that she had with Mr Marsich and Twenty Fifty. She had taken out what she thought was three loans with Twenty Fifty. She had started going to Twenty Fifty to get loans in the middle of 2013. When she borrowed her third amount of $200, she was required to pay back $300. She said Mr Marsich required further evidence of her assets, and took a copy of her van registration sticker. She said she obtained a one page promissory note. She went to pay back the $300 but, her benefit was only $305, so it required payment of all her benefit money and she had to take out another loan right away. Again she said the only document she received was a one page promissory note.

[85] Ms Taulava was unable to repay that loan, but made a $100 payment towards it. She said Mr Marsich added to the amount that she owed, and the balance kept going up. Mr Marsich sent her texts about making payment and referred to a copy of some of the texts sent and received which are contained in the bundle of documents, Vol 3, Tab 2.

[86] Ms Taulava said her baby became unwell and she had to take her to the Intensive Care Unit and payments become even more difficult. Mr Marsich offered her the opportunity to work to pay off the amount owing by recruiting other people to a scheme where those recruited would in turn pay small amounts to Mr Marsich, but she was unable to recruit anyone.

[87] She gave evidence that Mr Marsich advised her that he knew a lot of people who would come and collect money from her, and he would also make veiled threats that someone would come and smash windows of houses if loans were not repaid. She said Mr Marsich told her that he hired gang members to smash people's houses if they didn't repay their loans.

[88] At the end of November or early December 2013 Ms Taulava's loan balance was over $600. She could not afford to repay it and went to see Mr Marsich about it.

She did not have sufficient money to pay back the loan in one lump sum. She said that she had her children with her and that Mr Marsich became aggressive and began swearing at her. She said Mr Marsich told her she had to hand over her van keys to him. She gave him the keys. Mr Marsich did not give her any paperwork or notices about the repossession. He simply took the keys and she left the van there. She advised Mr Marsich that the van was financed by another company but he said he did not care who owned the van. She was dropped home with her children by Mr Marsich's partner. Ms Taulava testified that the documentation given to her by Mr Marsich regarding the loans was in her van that was taken by Mr Marsich.

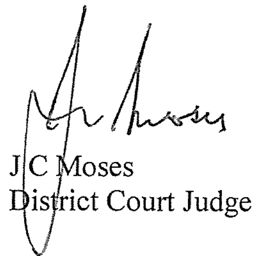
[89] I also heard evidence from Shanna Tofilau who is a collections manager at Auto Finance Direct, On Road Finance Limited. That company had financed Ms Taulava's purchase at of the van. She confirmed that On Road Finance Limited had repossessed Ms Taulava's car as it was "at risk" because it had been taken by a third party. The vehicle had an immobilizer/GPS unit in the vehicle, and they were able to locate it outside 49 Grande Vue Road, Manurewa, and arranged for it to be towed on 4 December 2013. Ms Tofilau referred to a number of documents that had been produced to the Court relating to Ms Taulava's account details on their finance system. She also referred to invoices that relate to the repossession and associated costs incurred by On Road Finance Limited.

[90] I accept the evidence given by Ms Taulava and Ms Tofilau. I am quite satisfied that on the date that Ms Taulava's vehicle was repossessed by Twenty Fifty, Twenty Fifty did not have any right to repossess the van because no valid repossession notice had been issued to Ms Taulava and the van was not "at risk" in terms of s 7(2) of the CRA.

[91] I am satisfied by the evidence that Twenty Fifty through the actions and statements of Mr Marsich, made a false or misleading representation to Ms Taulava that Twenty Fifty had the right to repossess her vehicle in the circumstances where it did not have that right.

[92] I find that the charges have been proven beyond reasonable doubt against Twenty Fifty and also against Mr Marsich, who by his actions described by

Ms Taulava and by his role as a director of the company, was a party to the offending by Twenty Fifty.



J C Moses
District Court Judge