IN THE DISTRICT COURT
AT NORTH SHORE

CRI-2009-090-007407

COMMERCE COMMISSION

v

TAKARUNGA MANAGEMENT LIMITED

AND

TREVOR ALLAN LUDLOW

Hearing: 1 December 2011

Appearances: J Donkin for the Crown
G Collecutt for the Defendant Ludlow
No appearance by or for the Defendant Takarunga Management Limited

Judgment: 1 December 2011

NOTES OF JUDGE L I HINTON ON SENTENCING

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[1] The Commerce Commission charged Takarunga Management Limited, which I refer to now as "TML", and Mr Ludlow with breaches of the Fair Trading Act 1986 and of the Credit Contracts and Consumer Finance Act 2003, in relation to two lending transactions of a total of four undertaken by TML during its short history.

[2] These charges involved two groups of borrowers, the Mataias and the Ofanoas. The matter proceeded as a defended hearing before me and I found the charges proven against TML and three of them proven against Mr Ludlow personally.

[3] Today is the sentencing hearing in relation to both TML and Mr Ludlow who is present in Court represented by Mr Collecutt. TML is not represented. Mr Ludlow appeared at the defended hearing for himself and for TML.

[4] Mr Donkin, who appeared at the defended hearing, has appeared for the Commission here at this sentencing hearing today. He has filed some submissions which are extensive in relation to sentencing. Those submissions have been helpful. They are careful and balanced in my view.

[5] The submissions address questions of the appropriate fine for each defendant, reparation, and also the issue of a banning order which is sought under s 108 Credit Contracts and Consumer Finance Act 2003 (CCCF Act). This relates to Mr Ludlow's being prohibited from, broadly, involvement in the credit industry.

[6] Mr Collecutt has also filed submissions which I have considered. I have heard from both counsel this morning in relation to sentence.

[7] As I said, the charges brought by the Commission involved two borrowers, the Mataias and the Ofanoas. In relation to the Mataias, loan documentation was entered into on 6 December 2007 following an initial meeting with the borrowers on 22 November 2007. The Mataias reviewed the loan documentation following the meeting and cancelled the credit contract the next day.

[8] On 13 December 2007 TML's solicitors sent a letter of demand to the Mataias claiming, amongst other things, legal fees of $1500 and what was described as a Mortgage Rescue fee of $5000.

[9] The Commission's case was that the legal fees of $1500 exceeded the actual amount payable and was not claimable, and the Mortgage Rescue fee of $5000 was not for reasonable expenses necessarily incurred in connection with the contract and its cancellation, and was also not claimable from the Mataias.

[10] It was obvious that the legal fees claimed exceeded what had been paid or was payable by TML and that the legal fees should never have been claimed. The

defendants accepted at the hearing that that claim was not justified, but that there was an issue in relation to the involvement of TML's solicitor. I found that charge proven against TML but not against Mr Ludlow personally in the circumstances.

[11] The second charge in relation to the Mataias involved the claim for the payment of the Mortgage Rescue fee of $5000. I found that fee distinctly not claimable by TML and not payable by the Mataias. Mr Ludlow attempted at the defended hearing to justify the fee in evidence when repeated requests from the Commission earlier could not unearth any detail like what was put before me at the defended hearing. I found the evidence unsatisfactory and, in any event, to not align with the purported contractual documentation which the Mataias had entered into with TML. Both TML and Mr Ludlow were found guilty of that charge.

[12] I said in my decision in relation to the Mortgage Rescue fee:

> Self-evidently Mr Ludlow devised and understood the Mortgage Rescue fee concept, failed to explain its components to the Commission and produced the sub-optimal fee invoices three years later, including claims for attendances evidently not the subject of the documentation.

[13] Turning briefly to the Ofanoas, Mr and Mrs Ofanoa entered into relevant loan documentation dated 10 December 2007 on the basis of which a default notice eventually was to issue under the Property Law Act 2007 dated 20 May 2008 for a total of $54,065.38. The Commission's case here was that pursuant to the default notice:

(a) the Services Fee of $7762.50 was not payable and it was false or misleading for the defendants to represent they had a right to claim it;

(b) that in any event the total amount sought under the notice of $54,065.38 was not payable because variations to the loan amount were not rightly claimed; and

(c) that any amount claimed was not then due, as the earliest that the loan advance could have been due according to the documents was a later date, namely 10 September 2008.

[14] The first charge relating to the Services Fee claim of $7762.50 was clearly proven. The amount according to the documentation of TML was only ever payable for what was (I could broadly describe as) a successful refinancing. That did not occur and there was no dispute about it. Therefore the Services Fee could not be payable on any view. The charge was clearly proven against TML and Mr Ludlow.

[15] The next charge involved the non-disclosure of terms of a loan variation with respect to renovation costs. Again I found that proven against TML but not, in the circumstances, against Mr Ludlow.

[16] The remaining charge concerned the demand for repayment under the demand notice of 20 May 2008. Mr Ludlow accepted in evidence that a demand could not be made because it was not then due. I said this in my decision:

> The company and Mr Ludlow accepted that they were, in effect, short circuiting the termination date or final repayment date by the earlier demand, and exercising self-help to repayment, simply because of the view Mr Ludlow took of possible conduct of the Ofanoas.

[17] The maximum penalty for each of the breaches of the CCCF Act is $30,000. In respect of the Fair Trading Act charges the maximum penalty is $200,000 per charge for a body corporate and $60,000 for an individual. Mr Donkin in his submissions has referred to principles and purposes of the Sentencing Act which are relevant here. No issue is taken with those propositions by Mr Collecutt and rightly so.

[18] The first matter the Commission points to is that the defendants must be held accountable for the harm done to these unsophisticated victims and the community by this offending. Mr Donkin refers to the purposes of the CCCF Act. Amongst those purposes, according to s 3 of the Act, are the protection of the interests of consumers in connection with credit contracts; to provide for the disclosure of adequate information to consumers; to enable consumers to become informed of the terms of consumer credit contracts; and at the conclusion of s 3 to prevent oppressive credit contracts and oppressive conduct by creditors under credit contracts.

[19] This is a piece of detailed consumer legislation which is designed to protect all consumers but I suggest, in particular, the consumers with whom TML was dealing at this time. That proposition underscores the Commission's submissions in relation to the Sentencing Act purposes and principles. There must, as the Commission rightly points out, be a substantial deterrence factor here that the Court must take into account.

[20] The Commission regards the conduct of these defendants as a complete failure to adhere to the requisite standard required of them by both statutes and representing a particularly cynical approach to their dealings with these unsophisticated debtors. No argument can be taken with those propositions.

[21] There are also aggravating features of the offending. Quite obviously the harm caused here was significant. These borrowers were in a precarious financial situation and most deserving of the protection of the law. The Commission points to various authorities which I have considered including *R v Senate Finance Limited* (DC Auckland CRN-2006-450-002955 14 November 2006, Callander J) and the *Glaister Enterprises Limited* decision.

[22] Of particular relevance here I have found some comments of Judge Thorburn in the *Femcee Finance Limited v Loots* decision. At, for example, paragraphs 9 and 13 of that decision, the Judge with reference to the CCCF Act and the purposes of that Act that I have referred to earlier states as follows:

> [9] These provisions are to do with the importance of protecting the particularly vulnerable section of the community for whom borrowing might be difficult through orthodox institutions, and invariably the ability of people whose financial situation is fragile and thus not able to meet the criteria of regular lending institutions who will come to an alternative money lending organisation...There is huge potential for such people to be exploited and end up paying unconscionably if they are not protected.
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> [13] The importance of the law protecting such people cannot be understated. The importance of a person operating to make loans available in this way to be familiar with the regulations governing the business cannot be understated.

[23] The Crown has suggested starting points ranging from $10,000 through $3500 for the offending, recognising the different maximum penalties for an individual and a body corporate. No particular issue is taken with that by Mr Collecutt. In total, the Crown submits, starting points for TML of $34,000 and Mr Ludlow $17,000 are appropriate. Mr Donkin's calculations are careful and principled, in my view. There is no doubt in my mind that fines at the suggested level proposed are appropriate. Of course the financial position of Mr Ludlow must be taken into account. I have no information concerning the financial position of TML.

[24] Mr Ludlow has filed an affidavit in connection with his present financial position. He is clearly in a parlous financial position without immediate prospects for improvement. He is currently imprisoned and I understand from Mr Collecutt may not be released from prison before 18 months to three years from the present time. Mr Ludlow accepts, however, that he should and he wishes to pay reparation to the Ofanoas and the Mataias at the level which has been sought on a reasonable timeframe and basis for repayment that I have just discussed with Mr Donkin and with Mr Collecutt. Clearly Mr Collecutt's submissions in relation to the payment of fine or reparation are relevant.

[25] Orders have been sought by the Commerce Commission in relation to the losses suffered by the Mataias and the Ofanoas. There may be the possibility recovery under ss 93 and 94 CCCF Act is precluded. There is no bar, however, to my awarding reparation under the Sentencing Act 2002 which is what, following discussion with counsel, I propose to do. I do believe, however, that an additional amount should be payable in relation to emotional harm. It is quite apparent that there has been considerable unnecessary suffering as a by-product of the situation both borrowers were put into by the conduct of TML and Mr Ludlow.

[26] Finally, the Crown seeks a banning order in relation to Mr Ludlow's future involvement in the credit industry. Section 108 CCCF Act provides that the Court may make an order prohibiting or restricting a person doing all or any of the matters set out in s 108(2) if that person has been convicted of an offence against the Act or of a crime involving dishonesty and in the opinion of the District Court the person is

not a fit and proper person to enter into consumer contracts as a creditor. There is no opposition to that order being made.

[27] The jurisdiction exists here because Mr Ludlow has been convicted, obviously, of an offence under the CCCF Act. He has been recently, in any event, convicted of a crime involving dishonesty at the Auckland District Court on 26 July 2011. He is, moreover, the principal officer for the purposes of s 108(1)(a)(vii) of the body corporate TML which has been convicted by me also of offences under the CCCF Act.

[28] Under s 109 of the Act the order, if made, can be for a specified period of time or without any time limit. An order can be, as it is put in *Gault on Commercial Law*, quite dramatic in its terms, because it involves exclusion from the credit industry and dealing in goods financed by credit or leased. The question for me is whether Mr Ludlow is not a fit and proper person to enter into consumer contracts as a creditor.

[29] My view is that Mr Ludlow is not a fit and proper person to so enter into consumer contracts and that it is appropriate that the banning order should be made. I have a view that Mr Ludlow lacked the skills to be in the industry and conduct the sort of transactions he had in mind or were required with the requisite documentation. He did not have sufficient familiarity with the industry and the legislation. He did not, in my view, exhibit the requisite integrity and level of fair dealing that is appropriate.

[30] I thought there was insufficient clarity in or surrounding Mr Ludlow's vision or execution here. For example, the early documentation for the business which I saw in evidence was not focussed. It was not consistent; it barely reflected what was happening or intended; it did not align with what happened. It was, I thought, a reasonably ill thought through concept. The documentation was sloppy in part, at the very least.

[31] I had the view that TML and Mr Ludlow wanted to be lender, renovator, financer and arranger, and possibly get involved as real estate agent. That mishmash

was not, in the event, to pan out well for the Mataias or the Ofanoas and it never had any prospect of doing so. But I also had the impression that Mr Ludlow may have found client concerns, which were legitimate concerns, to be unreasonable as well as discomforting. Mr Ludlow was piqued when a right of cancellation available to the Mataias was exercised by them, and piqued when there was some disagreement from the Ofanoas. The responses in relation to the demand of the Mataias for the Mortgage Rescue fee and the demand of the Ofanoas for early repayment (each of which I referred to earlier in the extracts from my decision) were clearly unlawful, and in the circumstances, outrageous responses. It is worrying to consider how possibly a creditor could consider such an entitlement to arise. That sort of exercise of self help is unsatisfactory.

[32] I confirm I have considered the materials which Mr Donkin has supplied in support of the Commission's application under s 108. They include the Deputy Registrar of Companies' minutes or notice in relation to the current banning order of Mr Ludlow as a director, which I understand is for a period of four years and six months from October 2008. I have considered also the sentencing notes of Judge Bouchier in relation to the recent sentencing of Mr Ludlow.

[33] I have reached the conclusion that in terms of s 108 it is appropriate that a banning order be made.

[34] The result of the sentencing is, in relation to TML:

(a) Concerning the Mataias and the legal fees which is CRN1755, TML is convicted and fined $4000.

(b) In relation to the Mortgage Rescue fee, TML is convicted and fined $10,000.

(c) In relation to the Ofanoas, CRN2591, TML is convicted and fined $5000.

(d) In relation to CRN2590, which is the Services Fee, TML is convicted and fined $5000.

(e) In relation to CRN2592, TML is convicted and fined $5000.

In addition:

(f) TML must pay reparation of $15,224.75 to the Mataias within one month, that is to say by 1 January 2012.

(g) TML must pay reparation of $8698 to the Ofanoas within one month by 1 January 2012.

[35] Turning to Mr Ludlow:

(a) In relation to CRN1754, which is the Mortgage Rescue $5000, the Mataias, Mr Ludlow is convicted and fined $500. He must pay reparation of $15,224.75 to the Mataias.

(b) In relation to CRN2540 he is convicted and fined $500.

(c) In relation to CRN2538 he is convicted and fined $500, but he must pay reparation of $8698 to the Ofanoas.

(d) The payments of reparation by Mr Ludlow are to commence two months following his release from imprisonment at the rate of $100 per month payable on the 1st of the month for 15 months, with the balance then outstanding of the reparation being payable in one sum, one month later, which is to say 18 months from the date of his release from prison.

[36] There will be a banning order to issue under s 108 Credit Contracts and Consumer Finance Act 2003. Under s 109 of that Act an order may be for a specified period of time, or without any time limit. The Commission has sought the order for an indefinite period of time and that is not opposed by Mr Ludlow. The

order that I make under s 108, which prohibits Mr Ludlow from activities under s 108(2), is without any time limit.

L I Hinton
District Court Judge