IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-009128
[2017] NZDC 3427

COMMERCE COMMISSION
Prosecutor

v

BESTDEALS 4 YOU LIMITED
Defendant

Hearing: 21 February 2017

Appearances: M McClintock for the Prosecutor
Defendant appears in Person

Judgment: 21 February 2017

NOTES OF JUDGE E M AITKEN ON SENTENCING

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[1] The defendant, Bestdeals 4 You Limited faces a total of 19 charges, 11 for breaches of s 17 Credit Contracts and Consumer Finance Act 2003, the CCCFA, for failing to disclose to debtors under consumer credit contracts information required under Schedule 1 of that Act. It also faces seven charges relating to breaches of s 36 Fair Trading Act 1986, the FTA, for failing to ensure that disclosure of key information applicable to layby sale agreements was made to the consumer before the agreement was entered into.

[2] This is offending over an 11 month period from 6 June 2015 to 26 April 2016 where it relates to the CCCFA offences and to a period of seven months from 5 September 2015 to April 2016 where it relates to the FTA charges.

[3] Bestdeals operates as a mobile trader under the trading name Easylayby. It operates its mobile trading business in Auckland, Whangarei and Hastings via three

sales agents. At the time of this offending each agent had a car and sold door to door using a catalogue.

[4] Mobile traders, often referred to as truck shops, are businesses that generally do not have fixed retail premises in the traditional sense. Some of these traders operate mobile shops, usually from trucks, while others employ sales staff who sell goods door to door using catalogues and brochures. The 11 CCCFA offences occurred in this context.

[5] Mobile traders use a variety of sales techniques including uninvited direct sales through door to door telemarketing sales, parking mobile truck shops in prominent locations and using websites and Facebook. They sell predominantly or exclusively on credit, layby or other deferred terms and often to those who have low incomes or poor credit histories. The price of the goods is often significantly higher than would be charged for comparable goods by main stream retail traders, largely because of the credit that is, in effect, said to be extended to the purchaser.

[6] Unusually for a mobile trader Bestdeals also operates from a store as well, trading as Super Mobile in Flat Bush, south Auckland. The seven FTA charges relating to the layby sales agreements arise from agreements entered into at the Super Mobile store.

[7] So, the contracts in question here sold goods under two different contractual arrangements. Goods sold through the mobile trading business were sold on credit through consumer credit contracts known as the Easylayby contract. Goods sold through the Super Mobile store were sold through layby agreements known as the Super Mobile layby agreements.

[8] It is relevant in assessing the culpability of the defendant to set out the context in which this offending took place and I am grateful to the prosecution for their comprehensive submissions in this regard.

[9] In recent years the business practices of mobile traders have become more prominent in the complaints the Commerce Commission has received from

consumers and their advocates. In 2014 the Commission opened an investigation into the mobile trader industry. The Commission identified 32 mobile traders during the project. They operated throughout New Zealand, although the majority were based in the north island with a particular concentration in Auckland. It was a very dynamic industry with traders frequently entering and exiting the market. The defendant company was not identified in this initial project.

[10] Following that investigation in August 2015 the Commission published its report setting out its findings. The report identified systemic compliance issues within the industry with respect to trader's obligations under the CCCFA, in particular the requirement to provide adequate disclosure to consumers before entering into consumer credit contracts. There was significant media publicity over the report and its findings and, in addition, the Commission made mobile traders aware of the report.

[11] Most mobile traders investigated were also issued with compliance advice by the Commission in order to change the industry behaviour. As noted, the defendant company, Bestdeals 4 You, did not form part of the Commission's initial inquiry but its conduct came to the attention of the Commission after a complaint was made, an anonymous complaint, in April 2016.

[12] Looking then at the specific behaviours that form the substance of the charges I deal first with the Easylayby contracts, in other words the breaches of s 17 CCCFA.

[13] When entering into consumer credit contracts with debtors during this period Bestdeals provided debtors with a standard form of contract containing product and payment details. During the period Bestdeals entered into 1307 Easylayby contracts with debtors with a total value of $1,108,522. Under s 17 CCCFA creditors who enter consumer credit contracts are required to disclose certain key information to debtors before the contract is entered into and that information was set out in the summary of facts. These contracts provided to debtors over the charging period failed to disclose the following key information:

- Firstly, the full address of Bestdeals.

- Secondly, a description of the security interests that is taken in connection with the Easylayby contract. Specifically, the terms and conditions did not disclose whether if Bestdeals right under the security were to be exercised, (1) whether the debtor would or may remain indebted to Bestdeals if there was a shortfall on sale and (2) what the consequences would be if the debtor gave a security interest over the property to a person other than Bestdeals.

- Thirdly, an accurate statement of the debtor's right to cancel the contract as the statement provided does not include a time period for cancellation.

- Fourthly, the right of the debtor to apply to Bestdeals for relief on grounds of unforeseen hardship and how an application can be made.

- Fifthly, the frequency with which continuing disclosure statements would be provided.

- Sixth, an accurate description of when default fees would become available.

- Finally, Bestdeals registration number (under the Register of Financial Service Providers) and the name under which the creditor is registered on that register.

[14] Further, in April of 2016, 11 of the 94 contracts also did not include an accurate statement of the total number of payments required and/or the amounts of those payments, although it is fair to observe that in four out of 11 of those contracts the payment amounts were only over or understated by a very small margin.

[15] The 11 charges under the CCCFA Act are representative charges, one for each of the months of the charging period.

[16] In terms of the Super Mobile layby sales agreements Bestdeals provided the consumer with a tax invoice that contains some of the terms of the agreement between Bestdeals and the consumer and most had the words on it, "Layby as per store policy." Additional terms and conditions of the layby sale agreement were displayed at the counter of the Super Mobile store but the consumer was not provided with a copy of the terms and conditions when they entered into the agreement.

[17] During the charge period Bestdeals entered into 127 Super Mobile layby agreements with a total value of just under $46,000. There is no dispute that Super Mobile contracts were layby sales agreements and under s 36 FTA the suppliers of these agreements must ensure that the following criteria are met: the agreement must be in writing, expressed in plain language, legible, presented clearly, meet the disclosure requirements in s 36C(2) and be given to the consumer at the time of entering into the agreement.

[18] The agreements at issue here failed to meet the disclosure requirements under s 36C(1) over the charge period because the agreement was not provided to the consumer in writing. The only information they received was contained in the tax invoice. Further, the defendant company failed to disclose the following information as it was required to do so on the front page of the agreement here (the tax invoice) and that information was:

- a summary of the consumer's right to cancel the agreement;
- whether or not a cancellation fee would be charged;
- if a cancellation charge was to be imposed either the amount of the charge or a clear description of how it would be calculated; and
- the supplier's name, street address, telephone number and email address.

[19] I do accept that on the back page of the agreement some disclosure was made, but the legal requirement is for it to be on the front page. And it was not

accurate as to the right to cancel nor how the company will determine whether to charge a cancellation fee and what it would be or how calculated. Instead, the agreement referred to "any reasonable expenses being incurred in relation to the sale and cancellation" and there is a reference to the sales person commission. That disclosure, in my view, fails to meet the company's obligation.

[20] Seven charges under the FTA are representative charges each covering a one month time period between September 2015 and April 2016.

[21] In terms of the defendant's history Bestdeals has not been prosecuted before by the Commerce Commission for any breaches.

[22] Finally, the Commerce Commission seeks convictions; they will be entered. It also asks the Court to make an ancillary order to the effect that Bestdeals refund the cancellation fee costs as set out in tab 11 of the bundle. The defendant opposes that application.

[23] Turning then to approach the sentencing of the defendant company I will deal with each of the groups of charges separately but I observe that both CCCFA and the FTA are, inter alia, consumer protection legislation directed at ensuring consumers receive full and honest disclosure of information so that they can understand their rights and make an informed decision before or at the time they enter into any agreement. Disclosure is fundamental to both the protection and the exercise of those rights.

[24] The defendant's business in both aspects targeted, arguably, the most vulnerable members of our society: those for whom the items they wanted could not be paid for outright and to whom credit facilities were otherwise not being extended. It is not an overstatement, in my view, to observe that the defendant's business, like most mobile traders, likely provided the only opportunity to this client base to acquire goods and it is likely often that these agreements were entered into or contemplated with unreal expectations as to their own ability to pay.

[25] It may be that this particular group of society can best be described as the precariat: that group who live in our society in precariously balanced circumstances, circumstances in which a single event, for example a loss of a tenancy or a loss of job, can tip the individual and their family into poverty or at the very least can create significant stress both financially and socially. That said, mobile trading is lawful, it is also clearly lucrative, that is clear from the facts of this case and the authorities to which I have been referred.

[26] The defendant claims that it is not such a lucrative business but, as I have said, from the information gleamed from authorities to which I have been referred I do not necessarily accept that. In any event those who seek to engage in this business should be and will be expected to comply scrupulously with all of the various consumer protection legislation and disclosure, especially the type that was not made here. That is not only a legal requirement but it ensures a consumer can inform him or herself accurately before they enter into an agreement as to the real cost of the agreement: in other words the cost over and above the normal retail price and, in particular, can inform themselves accurately, for example, as to costs if they must subsequently make a decision that involves missing a payment, cancelling the agreement or returning the goods.

[27] It is clear from the facts that the defendant company committed two separate offences under two distinct regimes and I will deal now with the CCCFA offending. In 2014 an amendment was made to the CCCFA to extend the definition of "Business premises" to include truck shops. The Commerce Committee report, on the amendment, stated that the disclosure provisions were "crucial to increasing consumer protection". Truck shops therefore, fall to be treated no differently from ordinary lenders. The aggravating factors that I identify here are at least six. Firstly, there was substantial non disclosure. Seven items in particular were not disclosed, the number and type that were omitted make the situation serious as there was either no, inaccurate or inadequate disclosure of those seven items.

[28] Secondly, there was widespread failure to comply in numerous events, 1307 in total. Thirdly, the period was one of 12 months. Fourthly, many of the disclosure requirements had, in fact, been in place since 2005 and there was a long lead in time

for the amendment to take effect when the further criteria were added. The defendant company could therefore be said to have had ample time to familiarise itself with its legal requirements.

[29] Fifthly, I deal with the defendant's claim that it was unaware of any of these requirements. The defendant submits that the company simply used the same contracts that others in the business were using. It took no legal advice and made no enquiries with, for example, the Commerce Commission. It claims to have been unaware of the publicity surrounding the Commerce Commission investigation into other mobile traders.

[30] For myself I find that attitude and approach to signal not a matter of mitigation but, on the contrary, a high degree of negligence. The CCCFA contracts at the heart of this prosecution were worth in excess of $1,000,000. This is potentially a very lucrative business trading on the most vulnerable sections of our population.

[31] To enter into this business without seeking any advice at all, to rely solely on documents from others in the business without even a basic enquiry to ensure that those other businesses complied with the law, strikes this Court on verging on grossly negligent. It is certainly not a matter of mitigation as the defendant submitted.

[32] Sixthly, I accept that the prosecution case does not include complaints from the defendant's customers other than an anonymous complaint, which may have come from anyone, including a rival trader. But in effect every debtor was a victim of the offending. For these reasons deterrence must be the key purpose of sentencing.

[33] In respect of the Fair Trading Act offending the importance of the disclosure regime is highlighted in the legislation itself as one of its key purposes. The 2013 amendment repealed the Layby Sales Act 1971 and according to the Minister of Consumer Affairs at the time the aim of the legislation was to offer better protection to both consumers and businesses, and to bring consumer laws in line

with the business practices of our time. Proper disclosure, again as I have said, is fundamental to consumer protection.

[34] Here the consumer was not provided with the copy of the terms and conditions in full and as required, only with a tax invoice and, again, there was a significant failure to disclose, as set out in the summary of facts. There was a six month lead in time before the amendment was passed into law, so sufficient time for a diligent business to ensure compliance.

[35] One hundred and twenty seven contracts were entered into over the eight month period where the defendant company failed to make adequate disclosure. There was a notice attached to the shop fitting and some of the disclosure requirements were included in that notice but it was not accurate nor was it complete and even if it was that was not compliance. The requirement is for proper notice, in writing, in advance of each contract being entered into.

[36] Both the informant and the defendant have referred me to the case law citing and relying, essentially, on the same decisions. I turn briefly to address some of the decisions to which I have been referred but remarking before I do that both s 17 CCCFA and s 36C of the FTA carry a maximum penalty of $30,000. I am aware that this is the first prosecution of its type under s 36C FTA, and I have been referred to an authority where there was a prosecution under 36U which governs the disclosure regime for extended warranty agreements which is, in my view, appropriately regarded as almost identical to the layby sales disclosure regime such that the Court's comments and approach in that decision are certainly relevant and worthy of consideration in reaching a decision under this prosecution for offending under 36C.

[37] Dealing firstly with the mobile trader cases and the decision in the *Commerce Commission v Flexi Buy Ltd*[1] 10 charges were brought under s 17 and s 32 CCCFA. The offending took place over the course of a year, 300 to 360 contracts were involved and the breaches involved a breach of disclosure and illegible handwritten contracts. The defendant company was unable to produce the contracts for the

[1] *Commerce Commission v Flexi Buy Ltd* CRI-2015-004-011372 [NZDC 3028]

Commerce Commission when asked to and the Judge described the disclosure as having manifest deficiencies and the company as being entirely reckless when dealing with members of the public. A starting point of $50,000 was fixed.

[38] *R v Smart Shop Ltd*[2] dealt with a prosecution under s 17 CCCFA and s 36U Fair Trading Act. On this occasion there were 2415 credit contracts entered into over an eight-month period with non-disclosure over six different areas. About 700 to 800 extended warranty agreements were entered into over five months. The non-disclosure in respect of those agreements was absolute. The starting point for the CCCFA offending was $70,000, many contracts and multiple breaches being key to that assessment and the starting point under s 36U was $40,000.

[39] I have had regard to the decisions in *Ace Marketing, Better Life and Goodring Company*. I find those three decisions, in these particular circumstances, to be of limited assistance. The companies there were charged with s 17 CCCFA offending but they were also charged with other offending under both that and the FTA where maximum penalties of $100,000 were involved. Certainly, the defendant relies on the decisions in *Better Life* and *Goodring* where the starting point for the s 17 offending was $20,000 and $25,000 respectively. The prosecution's submission is that is not helpful because it is considered in the context where the other offending attracted such a high maximum penalty and, in any event, the prosecution's submission is that that would be insufficient here.

[40] I have considered other decisions to which I have been referred. They are helpful in a general way but certainly where they are District Court decisions they do not carry any precedential value. I have looked, for example, with interest at the *Tiny Terms* decision, 20,000 contracts, 14 representative charges over 15 months with significant aggravating factors and a starting point of $90,000. The point subsequently made by my colleague, Judge Collins, really emphasises the difficulty in these cases. His point was that that starting point was fixed in the context of substantial sentences on entities associated with the broader business in which the *Tiny Terms* offending took place – in other words, it should not necessarily be taken out of that context and that, in my view, simply emphasises that whilst consideration

[2] *R v Smart Shop Limited* [2016] NZDC 1937

of other decisions is helpful and important, ultimately, each case falls to be determined on its own facts. And I adopt, as a summary of those facts, the points set out in the prosecution submissions, certainly for the CCCFA offending at 6.38 of the submissions.

[41] I have given careful consideration to the defendant's submissions. Mr Singh, the director of Bestdeals 4 You Limited has represented himself and filed detailed and comprehensive submissions. He has read all of the relevant authorities and made submissions on them and I heard also his oral submissions last week. He accepts the summary of facts; he adds, however, that the company only ever received a cancellation fee, that it never took enforcement action against his customers who stopped paying, and that it never received any interest or credit fees. He accepts that the contracts did not include an accurate statement of the total number of payments but that they have a reliable computer system that ensures payments were made accurately and he was at pains, both orally and in his written submissions, to emphasise to the Court that Bestdeals 4 You strives to be a good creditor and to treat each of its customers with care and respect.

[42] In terms of the Super Mobile contracts he reminds the Court that there was further disclosure made in the store, displayed prominently, but accepts that it was not necessarily accurate and it was not in writing on the front of the contracts, as required. He has invited the Court to approach sentencing in this way – in particular, to have regard, firstly, to the average number of daily contracts entered into between his company and the various defendants in the other cases to which I have been referred. He invites the Court to factor in the fact that the defendant did not receive any other fees – for example, like the defendants in *Smart Shop*. He stresses that they have never taken action against any of their customers for any reason. He notes that Bestdeals did not charge four and a half times the retail price to customers as, for example, *Smart Shop* did in respect of one item, noting that the Bestdeals 4 You item was priced about twice as high as the normal retail price but a significant difference, he submits, between his company and, in that case, *Smart Shop.*

[43] To that, I would add that this is offending by omission. It was a failure to disclose, it is not an affirmative misrepresentation and I do accept that there was no

compliance advice given by the Commerce Commission in the past, nor had he been warned, and that is another point of distinction between him and *Smart Shops.* He submits that a starting point for the CCCFA offending of $18,000 would be appropriate and a starting point of $5000 for the FTA offending. It is obvious that there is a substantial difference there between the parties with the Commerce Commission submitting a starting point of $50,000 to $60,000 for the CCCFA offending and $20,000 to $25,000 for the FTA offending.

[44] I must emphasise that I strenuously reject the notion that Bestdeals 4 You is less culpable because they failed to take legal advice – a point to which the defendant refers in both his written and oral submissions.

[45] In determining the starting point, as I have already inferred, I take the view that deterrence both in respect of *Bestdeals* but to the wider trading community must be a, if not the, primary purpose of sentence. As the Commerce Commission investigation demonstrated, the mobile trading industry is rife with non-compliance; it targets a vulnerable population and is potentially lucrative. If deterrence is not a primary purpose of sentencing the risk is that continuing to behave in this way might be seen as financially worthwhile – that cannot be the approach.

[46] Having carefully had regard to the decisions and whilst I am not persuaded that Bestdeals was entirely reckless, such as Flexi Buy, although I observe there were three times as many contracts; while I accept that there were fewer contracts here than there were in *Smart Shop* I am nevertheless of the view that this was grossly negligent conduct on behalf of Bestdeals and that a starting point for the CCCFA offending of $50,000 is appropriate.

[47] In terms of the Fair Trading Act the *Smart Shop* starting point under s 36U was $40,000. Here I am dealing with 127 contracts as opposed to 700 to 800. No fee was charged here and there is some disclosure in the store and some effort to comply. This was not reckless but the breaches were significant and for those reasons, in my view, a starting point of $20,000 would be appropriate.

[48] That takes the total starting point to $70,000. In my view it would be singularly inappropriate for that to be reduced on the basis of totality. These were two separate offences, two distinct failures under two disclosure regimes. It cannot be that the greater the number and type of offence the lesser the penalty. It is a starting point therefore for both offences of $70,000.

[49] As to matters of mitigation, I have already dealt with the defendant's submission that he was unaware of his requirements. I accept that he was co-operative with the Commerce Commission, and credit for that compliance I fix at 10 percent. The fact that he has now complied I do not regard as a matter of mitigation. I concur with my colleague in *Smart Shop* that corrective action cannot be said to be a matter of mitigation. It is simply doing what the law already required the defendant company to do. Nor so I regard lack of complaint from consumers as a matter of mitigation. It can be said in this case that the defendant company consumers did not know what they did not know – disclosure was not made, they did not know what their rights were and, frankly, it makes no logical nor legal sense to suggest that a lack of complaint in this particular context should be a matter of mitigation.

[50] As to lack of previous, in my view this must be a neutral factor. Whilst often in the Criminal Courts a lack of prior convictions will attract a reduction in penalty, the stark reality here is that Bestdeals 4 You has never complied with the disclosure requirements under either piece of legislation. It would be inappropriate therefore for credit to attach to the fact that they have never been prosecuted. They have not complied – in other words, they were committing these offences from the outset. The lack of previous convictions, in my view, is neutral.

[51] Certainly, credit must be given for a guilty plea and I fix that at 25 percent. In the circumstances, therefore, the starting point of $50,000 is reduced by $5000 for compliance and $11,250 for a guilty plea, reaching an end point fine of $33,750. The Fair Trading Act offending, a starting point of $20,000, $2000 credit for compliance and $4500 credit for guilty plea, an end point fine of $13,500. The total amount is $47,250 and that is imposed in respect of all of the offending.

[52] I turn then to the issue of ancillary orders. The defence argue that it would be inappropriate to order Bestdeals in effect to repay the cancellation fees that have been paid over the 11-month period. They say it will involve the company in some considerable difficulty in trying to locate its customers and that there is no precedent and, at one point, the defendant, director Mr Singh, argued that the Court had no jurisdiction. I am satisfied I have the power to make ancillary orders under the CCCFA Act and I am also satisfied that ancillary orders have been made in the past.

[53] The short point here is that Bestdeals 4 You was not entitled, not permitted to charge a fee for anything because it has failed to make disclosure. It has charged a total of $10,875 in cancellation fees – fees that it was not entitled to. And, consistent with my approach that deterrence is the primary purpose of sentencing here, in my view the Court must and should order repayment. To fail to do so would run the risk of the industry and the defendant company perceiving and receiving some benefit from non-compliance. The defendant is therefore ordered to refund the cancellation fees and this to the total value of $10,875.

[54] However, I accept that given the nature of his customer base it may ultimately be difficult to locate each and every customer. I therefore direct that in six months, which will be 21 August 2017, the defendant company serve on the Commerce Commission a schedule setting out the steps it has taken and the amounts of fees it has been able to refund and the reasons why any amounts not refunded have not been refunded. The Commerce Commission and the defendant company must then file a joint memorandum to be drawn to my attention and any submissions can be made as to how take the matter further.

[55] I conclude by suggesting this: that Bestdeals 4 You draft a standard letter, perhaps with the assistance of the Commerce Commission; that in that letter it advises its past clients that they should not have been charged a cancellation fee as they were entitled to receive a full disclosure and explaining why therefore the cancellation fee is being returned. That way, not only will monies be refunded to which the defendant company was not entitled but so, too, might this vulnerable group of consumers be better informed as to their rights and there is, therefore, a two-pronged rationale for that order.

[56] I am indebted to counsel for the Commerce Commission for their very thorough and comprehensive submissions and to you, Mr Singh, for your very thorough and detailed submissions in reply.

E M Aitken
District Court Judge