IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-000283
[2018] NZHC 3442

BETWEEN	BUDGET LOANS LIMITED First Appellant	
	EVOLUTION FINANCE LIMITED Second Appellant	
AND	COMMERCE COMMISSION Respondent	

Hearing: 26 November 2018

Appearances: Jacque Lethbridge for the Appellants
Alysha McClintock and Danielle Houghton for the Respondent

Judgment: 20 December 2018

JUDGMENT OF MOORE J

RE-CALLED AND RE-ISSUED ON 8 FEBRUARY 2019 AT 11:00 AM

This judgment was delivered by me on 20 December 2018 at 4:00 pm
pursuant to Rule 11.5 of the High Court Rules.

~~Registrar~~/ Deputy Registrar

Date: 8-2-2019

J. A Wells
Deputy Registrar
High Court

Introduction

[1] Budget Loans Ltd ("Budget Loans") and Evolution Finance Ltd ("Evolution Finance", collectively "the companies") are in the business of acquiring distressed loan books and enforcing the loans purchased for profit.

[2] The companies were convicted in the District Court at Auckland of 125 charges laid under the Fair Trading Act 1986 ("the FTA"). The charges alleged the making of false representations in the course of enforcing credit contracts. It was claimed the companies misrepresented their rights as lenders. Many, if not all, of their victims were vulnerable. Their property was unlawfully repossessed and they paid more than they should have. The companies were sentenced to a fine totalling $720,000.[1] Reparation orders were also made totalling $109,000.

[3] The companies appeal the imposition of the fine on the grounds that it is manifestly excessive. No appeal is brought in respect of the reparation orders.

Approach to appeal

[4] Section 250 of the Criminal Procedure Act 2011 ("the CPA") applies. Pursuant to that provision the Court must allow the appeal if it is satisfied that:

(a) for any reason there was an error in the sentence imposed on conviction; and

(b) a different sentence should be imposed.

[5] In any other case the Court must dismiss the appeal.[2] In determining whether a different sentence should be imposed, the touchstone is whether the sentence imposed is manifestly excessive.[3] The focus is on the sentence imposed, rather than the process by which it was reached.[4]

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1 *Commerce Commission v Budget Loans Ltd* [2018] NZDC 11202 [Sentencing decision].
2 Criminal Procedure Act 2011, s 250(3).
3 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32].
4 At [36].

Grounds of appeal

[6] The companies allege five material errors in the sentencing decision which they submit resulted in the imposition of a manifestly excessive sentence. These are:

(a) the Judge erred in his assessment of their overall culpability by treating the offending as effectively being the subject of representative, rather than individual, charges;

(b) despite recognising wide dissemination across victims was a factor distinguishing this case from others, the Judge effectively still sentenced as if the prosecution had proved widespread offending outside the charges for which the companies were being sentenced;

(c) the Judge erred in his treatment of Budget Loans' prior conviction;

(d) the Judge erred in his treatment of Evolution Finance's lack of prior convictions; and

(e) the Judge erred in failing to give proper credit for the companies' co-operation.

Background

[7] The procedural and factual background to this matter is not straightforward. Because it bears on how the sentencing proceeded it requires some explanation.

Procedural steps

[8] In 2011 the Commerce Commission ("the Commission") commenced an investigation into the loan practices of the companies. It focused on a series of apparent misrepresentations they had made in the course of recovering or attempting to recover money from debtors of loans they had purchased or refinanced. The representations concerned the companies' right to recover additional interest and costs, its right to repossess secured property and representations concerning the claimed benefits of refinancing.

[9] Charges were laid under s 13 of the FTA in 2014; initially 70.[5] Following argument in respect of the representative and specific charges, the final number of charges faced by the companies totalled 125.[6] As Judge D J Sharp noted in his sentencing remarks the companies operated together despite their separate corporate identities. Thus in practice, for the purposes of trial and for this appeal, no practical distinction is made between the activities of either company, their debt collection practices or their common management.

[10] All charges related to misrepresentations made to 21 debtors spanning a four and a half year period. These may be categorised into four general types:

(a) *Repossession charges:* 83 charges laid under s 13(i) of the FTA, relating to misrepresentations regarding the companies' right to repossess debtors' property;

(b) *Interest and cost charges:* 29 charges laid under s 13(i), relating to the companies' misrepresentations regarding the right to add and/or cost to the debtors' loans after the repossession and sale of goods;

(c) *Attachment order charges:* 10 charges laid under s 13(i), relating to misrepresentations made by the companies regarding the amount debtors were required to pay after attachment orders had been made by the District Court; and

(d) *Refinancing charges:* three charges laid under s 13(e), relating to representations made by Budget Loans, regarding the benefits of refinancing.

The trial, convictions and appeals

[11] The trial started in the Auckland District Court on 2 May 2016. It occupied six consecutive hearing days. The Commission's principal witness was its investigator, Mr McIvor. He read his 100 page statement and took the Judge to each of the 1392

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5 The maximum penalty during the offending period was $200,000.

6 83 charges related to Budget Loans; 42 charges related to Evolution Finance.

pages of loan notes. The Judge viewed eight hours of interview with one of the companies' directors, Mr Wayne Hawkins. The limited cross-examination of Mr McIvor focused on aspects of the individual debtors and challenged the conclusions Mr McIvor had drawn.

[12] On 1 July 2016 the Judge granted the companies' application to dismiss 19 of the 125 charges.[7]

[13] On 4 July 2016 he entered convictions on the remaining 106 charges.[8]

[14] The parties cross-appealed. The Commission sought to have the dismissed charges reinstated. The companies appealed the convictions. Edwards J dismissed the companies' appeal but allowed the Commission's appeal against the decision to dismiss the 19 charges. These were remitted back to the District Court for reconsideration.[9] Leave to appeal this Court's decision was refused by the Court of Appeal.[10]

[15] On reconsideration in the District Court, the Judge convicted the companies of the 19 charges which had been remitted.

[16] I now turn to consider each of the grounds advanced on appeal.

Were the Judge's factual findings available to him?

[17] This question incorporates both the first and second grounds of appeal. That is because both relate to factual findings made by the Judge which the companies submit were not available to him on the evidence. For these reasons it is both sensible and convenient that the first and second grounds are addressed together.

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7 *Commerce Commission v Budget Loans Ltd* [2016] NZDC 8714 [s 147 decision].
8 *Commerce Commission v Budget Loans Ltd* [2016] NZDC 9294 [Substantive decision].
9 *Budget Loans Ltd v Commerce Commission* [2017] NZHC 695, [2017] NZCCLR 22.
10 *Budget Loans Ltd v Commerce Commission* [2017] NZCA 539.

Judge's factual findings

[18] The Judge's factual findings in respect of the companies' business were as follows:

(a) Budget Loans and Evolution Finance were incorporated in 2004 and 2006 respectively. The directors of both companies during the relevant period were Allan Hawkins and his son, Wayne Hawkins.[11]

(b) The companies were providers of credit. Budget Loans was initially a lender in its own right but that business was wound down from around 2006 onwards. Following this, both companies focused on the enforcement of loans which they purchased from smaller finance companies. These loans were predominantly subprime loans with a high rate of default. Their purchase price was discounted accordingly.[12]

(c) Having purchased bad debt, the companies' business model was to create cashflow by getting debtors to pay as much as possible for as long as possible. The Judge expressly accepted that it was established at trial that the companies employed a number of unlawful tactics to achieve that end, including:[13]

(i) repossession and/or threatened repossession in circumstances where there was no right to repossess; including falsely stating that the debtors' property was "at risk" in order to provide the ostensible authority to repossess without notice;

(ii) requiring debtors to pay sums (both interest and costs) that were prohibited from being added to the loans;

(iii) requiring debtors to increase payments over and above those ordered by the Courts under attachment orders; and

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11 *Sentencing decision*, above n 1, at [7].
12 At [7]-[8].
13 At [10].

(iv) offering to refinance loans with a "discount" when the stated balance owing did not reflect the correct amount of money owed by the debtors.

[19] The Judge noted the prosecution proceeded on the basis of a randomly selected sample of 21 debtors but that he had evidence before him in the form of an affidavit from the Commission's investigator, Mr McIvor, that the issues found in respect of the 21 debtor sample were replicated in almost all the loans he assessed.[14]

[20] Furthermore, in assessing the starting point, the Judge considered whether widespread dissemination was a factor relevant to the companies' culpability. He held:[15]

> "The defence says that this needs to be restricted to the charges that are present and that the dissemination is significantly less than other cases which are relied on by the prosecution. I do accept that sentencing must relate only to the charges upon which the defendant has been convicted. However, the type of conduct and the nature of the approach of the defendant, can I believe be taken into account. The defence cannot point to these being isolated incidents or incidents that have been aberrational. They appear to be part of a corporate approach undertaken by the defendant companies."

[21] The Judge was satisfied that the companies had a "deliberate policy of engaging [in] a strategy which involved untrue representations", which he stated could be seen in all of the charges.[16] For the purposes of sentencing he found this was the principal factor which made the companies' offending comparable to offending in a number of cases cited to him, despite the fact that many of those cases involved much wider dissemination.

Appellants' submission

[22] In summary, Ms Lethbridge[17] for the companies submitted that in agreeing to replace a number of representative charges with individual charges, the Commission represented that the scope of the previously alleged offending was thereby limited to the particular debtors referred to and identified in the specific charges. She submitted

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14 At [11].
15 At [67].
16 At [55]-[56].
17 Ms Lethbridge was not trial counsel. She appeared at sentence and on this appeal.

that although the Judge approached the question of liability by analysing the elements of each offence he departed from this approach at sentencing in two material respects:

(a) first, by finding the companies' business model was to create cashflow by getting debtors to pay as much as possible for as long as possible; and

(b) secondly, by treating that as evidence of "wide dissemination" which was a factor aggravating the companies' culpability.

[23] Ms Lethbridge submitted the business model theory was "a new invention" formulated by the Commission for the purposes of sentencing. It had not been part of the prosecution case advanced at trial nor did it form part of the Judge's factual findings in his liability decision. She submitted that at sentencing the Judge adopted this reasoning with the consequence that the facts the companies were sentenced on "... had morphed into an entirely different set of facts than were presented at trial and the subject of the earlier substantive fact decisions resulting in the companies being convicted." Thus, instead of the companies being sentenced for offending established in respect of 21 debtors, they were sentenced for offending which was much wider and included a generalised group of unnamed complainants.

[24] Ms Lethbridge submitted that the primary source of error was the introduction of Mr McIvor's affidavit. This document was filed for the sentencing and in support of the Commission's banning order. Ms Lethbridge's criticism is the admission of Mr McIvor's affidavit resulted in a conflation of the evidence for both the banning order and the sentencing. At sentencing Ms Lethbridge objected to its admission on the grounds that the evidence in respect of the banning order application was irrelevant and prejudicial to the sentencing process and that, in any event, the Judge's assessment of culpability was required to be confined to the facts he found proved at trial.

[25] Ms Lethbridge's submission on appeal is that if the Judge was prepared to admit Mr McIvor's evidence and the evidence of the business model theory he should have convened a disputed facts hearing under s 24 of the Sentencing Act 2002. This

would have afforded the companies an appropriate opportunity to challenge that aspect of the evidence which had not been proved at trial.

[26] Ms Lethbridge submitted it is clear from aspects of the sentencing decision the Judge took into account this additional material for the purpose of fixing sentence:[18]

> "The prosecution proceeded on the basis of a sample of 21 debtors. Mr McIvor's affidavit makes clear that the issues that he found within the files for the 21 debtors were issues that repeated themselves in almost all of the loans he assessed."

The Judge's factual findings – analysis

[27] The Judge's statement reproduced above must be read in context. It is plain the Judge was discussing the Commission's submission that Mr McIvor's affidavit supported its claim that the conduct complained of characterised the business practices of the companies. These paragraphs immediately followed the quote above:[19]

> "The defendants take issue with the wider dissemination of criminal behaviour. While it may be said that these proceedings report on the basis of only 21 debtors, the fact that investigation of the defendant showed that the conduct which was reflected in the charges was not limited to those charges and was a factor that could be found in the business method that was applied by the defendants affects the defendants' overall culpability.
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> Obviously, the defendants could not be sentenced for things that were not subject to proof, but the evidence of the prosecution was accepted in relation to matters of credibility and where Mr McIvor is suggesting criminal behaviour was something that could be seen to reflect the method that was applied, I accept that evidence.
>
> The submission is that the defendants routinely engaged in each category of representation across its loan book. Further, the prosecution received some 78 further complaints about loans held by the defendant following the investigation."

[28] I agree with Ms McClintock, for the Commission, that the Judge's reference to a business model did not introduce a wider basis of culpability than had been proved at trial. This is not the case of a Judge accepting a new and hitherto unheralded aggravating factor. Instead, it was a conclusion patently available to him from the facts proved at the trial. He heard extensive evidence regarding the companies'

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18 *Sentencing decision*, above n 1, at [11].
19 At [12]-[14].

business practices, including evidence relating to each of the 21 debtors to whom the 125 specific charges related. He did not need to look beyond that evidence to come to the conclusion that unlawful representations were a central feature of the companies' operating business model. Given the findings of guilt on all 125 charges it was well within the Judge's legitimate function to find the companies' conduct was neither isolated nor aberrational. Instead, his conclusion that the conduct involved a deliberate course of practice over four and a half years was plainly open to him on the evidence. Indeed, a contrary conclusion might well be described as perverse having regard to the number of victims, the nature of the charges and the repeated and consistent conduct across the whole victim cohort.

[29] Neither do I accept that conviction on a representative charge is a pre-requisite to a finding that an individual's offending reveals a "course of conduct". Such a submission misunderstands the nature and purpose of representative charges. Representative charges are appropriately laid in cases where it is neither possible nor practical to prefer specific charges because of the frequency, similarity and the length of time during which multiple instances of like offending took place. It was perfectly open to the Judge to find a pattern or course of conduct was revealed from the factual matrix supporting the specific charges.

[30] Furthermore, in my view, the provenance of Mr McIvor's affidavit needs to be considered. It was filed some six months before the sentencing. At no stage was notice given to cross-examine Mr McIvor. In any event, and in my view importantly, the nature of the business practices adopted by the companies was not contested during the trial. The defence was not that the defendants denied the practices but, rather, they contended they were permitted to do so. The Judge found otherwise.

[31] In any event, in coming to these factual findings the Judge was not "punish[ing] the companies for offending not the subject of charges before the court or proved to the required criminal standard", as the companies submit. He was exercising his judicial function in finding facts he considered relevant to the sentencing exercise. This was plainly a matter which touched on the seriousness of the offending actually proved. I thus agree with Ms McClintock that it was available to the Judge to determine that the offending was "part of a corporate approach undertaken" by the

companies.[20] I also agree it is apparent from the sentencing notes that the Judge went no further than that.

[32] In this context criticism is also made of the Judge that by adopting this approach he was able to conclude that there was no wider dissemination than that applicable to the 21 debtors. The Judge dealt with the question of dissemination in his sentencing remarks. He made specific reference to Ms Lethbridge's submission that consideration of dissemination needed to be confined to the particular charges which had been proved. On this point, under the heading of "Dissemination of the Misrepresentations", the Judge observed:[21]

> "The defence says that this needs to be restricted to the charges that are present and that the dissemination is significantly less than other cases which are relied on by the prosecution. I do accept that sentencing must relate only to the charges upon which the defendant is being convicted. However, the type of conduct and the nature of the approach of the defendant, can I believe be taken into account. The defence cannot point to these being isolated incidents or incidents that have been aberrational. They appear to be part of a corporate approach undertaken by the defendant companies."

[33] The Commission's case was not presented on the basis there was a wide dissemination across the whole loan book in order to elevate the penalty. The submission was focused on the fact that there had been repeated conduct within the randomly selected debtor sample. This is apparent when the Commission's written sentencing submissions are examined. This is how it was put:

> "4.6 The prosecution proceeded on the basis of a sample of 21 debtors. However, Mr McIvor's affidavit makes clear that the issues he found within the files of the 21 debtors were issues that repeated themselves in almost all loans he assessed.
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> 4.7 In addition, that conclusion is further supported by the fact that the 21 debtors were selected at random by the Commission, and yet the same types of conduct were found to have occurred repeatedly throughout the files of those 21 debtors.
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> 4.8 It is submitted that overall the evidence is clear that the conduct the subject of these proceedings was not confined; rather these were business practices that the defendants adopted. While the extent of the different representations across the whole loan book cannot be quantified numerically, it is submitted it can be safely concluded for

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20 At [67].
21 At [67].

> sentencing purposes that the defendants routinely engaged in each category of representations across its loan book."

[34] I add that quantifying each category of conduct numerically would have required each of the 7,500 loans to have been individually assessed.

[35] Additionally, the Judge in fact accepted that the other cases cited to him at sentencing involved greater levels of dissemination, involved representative charges and related to larger amounts of revenue. And the Judge discussed those cases.[22] He was entitled to compare the companies' offending against the offending in those cases, and conclude that while the companies' misrepresentations were not disseminated as widely, their deliberate nature was serious, and, when coupled with the greater disregard for the victims, the greater harm caused and the extent of offending, a starting point of $800,000 was appropriate. This is discussed more fully later in this decision.

[36] For the foregoing reasons, I have found there was no error in the factual findings made by the Judge or his conclusion as to the companies' culpability.

Did the Judge err in his treatment of Budget Loans' previous convictions and Evolution Finance's lack of previous convictions?

[37] This question incorporates the third and fourth grounds of appeal. It deals with the Judge's treatment of the companies' prior conduct.

[38] The Judge refused to apply a discount for Evolution Finance's lack of previous convictions. His reasoning follows:[23]

> "The defendant companies operated together, notwithstanding their separate corporate identities. Accordingly, for the most part the sentencing notes are relevant to each of the defendants. Where this is not the case the appropriate defendant is identified. Also for this reason I cannot give effective credit to [Evolution Finance] for an absence of prior convictions."

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22 *Commerce Commission v Love Springs Ltd* DC Auckland CRI-2012-004-011695, 11 December 2013; *Commerce Commission v Westpac Banking Corporation* DC Auckland CRI-2005-004-004062, 29 September 2006; *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd* [2017] NZDC 1956; *Commerce Commission v Bike Retail Group Ltd* [2017] NZDC 2670.

23 *Sentencing decision*, above n 1, at [9].

And:[24]

> "When viewed as a whole, the interviews provided show attempts to justify the position of the defendant companies. The interviews provide different explanations from those which ultimately found their way into the defence case. Evolution Finance has no previous convictions, this is correct. The two companies were effectively run together with the same managing minds and with the same knowledge. To offend in the way that has occurred here, given the previous convictions for similar acts, removes any credit that should be given for a lack of previous history on the basis of Evolution Finance."

[39] There is no flaw in that reasoning. Evolution Finance started trading in 2006. By 2009 it had started to offend in the way alleged. There could be no entitlement to a discount for lack of previous convictions because within a relatively short time of commencing operations it was offending through the same directorship "brains" as that of Budget Loans. In those circumstances I cannot see how the Judge could have given a discount. Indeed to have done so would have been wrong for sound policy reasons. It would allow a newly incorporated company to obtain a sentencing advantage when its unlawful practices are perpetuated through the same corporate brains which have previously offended in the same way albeit through different corporate identities.

[40] The second challenge under this heading is that the Judge erred in his treatment of Budget Loans' convictions in 2010. The 34 charges in that case concerned conduct similar to that underpinning 29 of the present charges (the interest and cost charges). At sentencing, the companies submitted nothing could be made of these charges. They also submitted an uplift was inappropriate because the 2010 offending occurred as part of the same continuum or course of conduct.

[41] The prior convictions did not form the basis of an uplift. The Judge treated them as factors relevant to his assessment of culpability, noting:[25]

> "The defence submit that the 2010 guilty plea is separate and distinct. This offending and sentence for it should be seen on its own, I should not doubly penalise the defendants for previous matters for which the defendants have already been [punished]. This is a fair submission as far as that goes, but the warnings which were given and the assurances which were given by the defendant companies are factors that I do consider impact upon culpability. I cannot completely put the 2010 offending to one side. The similarity to it, and

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24 At [79].
25 At [62].

> indeed in the absence of the safeguards which were promised, is a factor that I consider increases culpability."

[42] The Judge directly dealt with the submission when he observed:[26]

> "The submission, which must be an alternative submission, is that this was a continuing conduct and so as to sentence it in a significant way would be to punish the defendants for actions that effectively have been ongoing. The differing nature of the categories of the charge and the types of conduct and the impacts which can be seen [on] the victims, makes this an unconvincing submission."

[43] In my view the Judge's reasoning cannot be faulted. Furthermore, the index offending was more varied, sophisticated, and caused greater harm to the victims than the earlier offending. Thus, in my view, the Judge correctly treated Budget Loans' prior offending both as relevant context in assessing the "corporate" nature of the offending before him and also in determining it demonstrated a flagrant disregard for the warnings previously given.

Did the Judge err in failing to give proper credit for the companies' co-operation?

[44] This final ground may also be dealt with in relatively short order. The Judge declined to allow a significant discount for co-operation for the following reasons:[27]

> "The level of co-operation in this case does not appear to justify a significant reduction in penalty. The co-operation involved voluntary provision of interviews and compliance with stop now notices. But as observed by the prosecution, the stop now notices merely meant that the defendant did not continue with illegal acts."

[45] He also found the interviews revealed attempts to justify the position of the companies.[28] Nevertheless, he accepted some credit for the companies' co-operation was justified, and provided a 10 per cent reduction for both co-operation and the reparation ordered by the Court.

[46] I agree that a substantial discount was not warranted. Compliance with "stop now" notices merely constituted ceasing to continue to perform illegal acts, rather than an act of co-operation. Moreover, the Judge was entitled to conclude that the voluntary

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26 At [63].
27 At [78].
28 At [79].

interviews constituted attempts to justify the companies' position rather than acts indicative of genuine co-operation. Against that background, the 10 per cent discount provided must be regarded as generous, and at the high end indicated in cases of this sort.[29]

[47] Finally, and as something of a post script, I was advised by Ms McClintock that the reparation orders made by the Judge have not been complied with. As previously noted those orders are not subject to appeal. No reason was given to explain why the reparation ordered has not been paid to the victims. On its face, given the parlous circumstances of most, if not all of the victims, this circumstance sits uncomfortably with any suggestion on the part of the companies that they have co-operated.

[48] For these reasons this ground, too, must fail.

In any event should a different sentence be imposed?

[49] For the reasons discussed above I have rejected each of the grounds of appeal. As a consequence I am satisfied that the appeal should be dismissed. However, given the amount of time this proceeding has already spent before the Courts, I intend to analyse the starting point adopted comprehensively by considering it afresh. This review fortifies my conclusion that the sentence imposed was appropriate.

How the starting point was set

[50] The Judge set a total starting point of $535,000 for Budget Loans and $265,000 for Evolution Finance, totalling a global starting point of $800,000. He then reduced the fine by $50,000 and $30,000 respectively in recognition of the companies' co-operation with the authorities and the reparation orders he had made.

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29 *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836.

[51] He arrived at this starting point by setting discrete starting points for each of the four general categories (repossession, interest and cost, attachment order and refinancing) the charges fell into:[30]

(a) a starting point of $500,000 for the repossession charges;

(b) a starting point of $170,000 for the interest and cost charges;

(c) a starting point of $100,000 for the attachment order charges; and

(d) a starting point of $30,000 for the refinancing charges.

[52] The Judge also indicated starting points for each company in each category. While the sum of individual starting points in each category did not match the total indicated for each category, the overall starting point of $800,000 was maintained. The reason for inconsistencies in the starting points indicated in respect of each category may be that the Judge was seeking to avoid adopting a starting point in respect of any individual charge category greater than the maximum penalty of $200,000. Whatever the reason, I do not regard this as material. Because of the companies' essentially shared corporate identities, sentencing was always going to be approached globally.

[53] I turn now to consider the facts in respect of reach of the four categories.

Category 1: The 83 repossession charges

[54] The Judge described these charges in the following way:[31]

> "As regards to the repossession charges, 83 of them, the defendants represented a right to repossess goods and did repossess goods regularly from the 21 debtors. In doing so they misrepresented the repossession rights in three different ways:
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> (a) Firstly by representing they had a right to repossess where there was no valid security to repossess or no outstanding loan balance to be repaid.

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30 *Sentencing decision*, above n 1, at [81]-[85].
31 At [18].

(b) Secondly, by characterising property at risk and therefore not needing to serve a pre-repossession notice on the debtor. There was no basis in evidence to categorise the debtors' property as being at risk.

(c) Thirdly, by issuing invalid pre-repossession notices."

He added:[32]

> "As regards to the repossession charges, the repossessions were embarrassing for the people involved. They involved the taking of the most basic property, this was for the collateral purpose of punishing the debtors and creating an atmosphere in which the debtors would pay far more than they were required or risk having their most basic property taken away from them. Items repossessed were cars, refrigerators, washing machines and even beds."

[55] He then went on to give examples. Further examples were referred to me in argument. File notes obtained from the companies referred to business practices condoning illegal and illicit repossession practices for the purposes of encouraging payment. One example, in relation to the victim Ms T, recorded:

> "Someone's great idea to undertake an illegal repo of a vehicle on a loan that was paying."

[56] And to Mrs K, where this instruction was issued:

> "Tell her I'll send the boys to repo when I get back, debtor isn't to know we can't repo."

[57] Ms M was the subject of two forced and almost certainly unlawful entries to her home when she was not present. The instructions to the agents exhorted them to "take as much as you can".

[58] An example of how far the companies were prepared to go to extract funds from debtors using repossession as an incentive is revealed in relation to Mr C. The companies' records in relation to his affairs reveal the following instruction:

> "Continue with the repo as he needs incentive to make sure the AP will start for another $20pw, once we see this increase then the client can collect his stuff ..."

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32 At [29].

The agents were instructed to take his washing machine, bed and TV despite the fact that Mr C had told them he could not afford to increase his payments. The companies responded by specifically targeting low value essential items; this despite the fact that Mr C was paying $20 a week under an attachment order.

[59] Mrs R had goods repossessed on a number of occasions, including twice between November 2012 and February 2013. On each occasion she had actually overpaid what she owed. Following repossession the records note:

> "The client is now living in quite poor conditions."

Despite that knowledge a further repossession was undertaken.

[60] The cynical and extortive nature of the instructions is vividly revealed in an intra-company communication regarding Ms N:

> "Have told agents to send a message to the client advising they're going to do a repo at the house and give it 10 minutes to see if she responds. And if, they can do a break in. Idea would be to have the client come home and see if she has a car, also to find out if she's working. No response from the client so we have advised the agents they can proceed with a break down."

[61] Mr and Mrs L were subject to the activities of an agent who was ordered by the companies to fully clear out his house out despite the fact that the victims had overpaid their loan by almost $2,500. Two vehicles were repossessed even after they had repaid their loan.

[62] The use of repossession as a device to maximise its coercive influence is revealed in the next two examples. In respect of Ms M, the instruction was:

> "Proceed and make sure the trailer is full and the van loaded FULL, so they must take as much as they can. With the washing machine, microwave, fridge, bed as first priority."

And with Mr S, father of five, his home was all but emptied. He was left with virtually nothing when his goods were repossessed without notice on seven occasions. The companies' loan notes record:

> "Confirmed ... to issue a repo for the ESSENTIALS, advised we want a full repo and to take the fridge. ... We have been to this address so many times

> and emptied it also have sold his goods ... taking tools, mower, waster blaster from the shed. He [s]aid there's next to nothing in the house. Basically just a mattress he is sitting on. Told him to clear everything out including beds, needs to be a complete repo, as too many repos in the past."

[63] The Commission filed victim impact statements from 11 victims. They reveal the level of deprivation the unlawful repossessions caused. They confirm that on occasions the companies' agents removed items of little or no worth including clothing. It is hard to avoid the inference from this and the other examples cited above, that at least one of the purposes of repossession was to exert such coercive power over the victims that they would comply with all future demands. This is a theme which permeates the victim impact statements which make for very disturbing reading.

[64] Accompanying these actions were the companies' assertions that they had a lawful right to repossess despite cases where the victim had not given any security or not given security over items repossessed, or where the item was the sole security (usually a vehicle) which had been repossessed and sold and even after the loan balance had been paid off.

[65] Additionally, there were misrepresentations in cases where no repossession notice or valid repossession notice had been issued.

Category 2: The 29 interest and cost charges

[66] The Judge described these representations as important because they locked the debtors into a debt cycle. He concluded the conduct was deliberate because Budget Loans had been convicted of similar misrepresentations in 2010. The Judge described the dissemination as "significant"; representations were made to 12 of the debtors relative to interest and 14 relative to cost. He noted that the effect of the representations was both financial and emotional. In the case of one victim she had overpaid her loan by $3,500 and another was told she owed more than $10,000 above her correct balance.

[67] In the case of Ms N the unlawful addition of costs and interest meant that 10 years after she originally entered the loan, Budget Loans was claiming an outstanding balance of more than $3,500. In the case of Ms V, the companies claimed an

outstanding balance of almost $57,000 in relation to a loan of $8,965 borrowed 10 years earlier and upon which the Court had ordered judgment of $15,000 in 2005. As a consequence, Ms V declared herself bankrupt.

Category 3: The 10 attachment order charges

[68] The Judge's summary of this category is economical. However, in his liability decision he gave examples. One victim had judgment entered against her as a guarantor and an attachment order was made for the sum of $8,574.55. The victim made regular payments. No interest should have accrued but despite that, Budget Loans represented that the outstanding balance was $9,026.75 and later, advised her that it had recalculated "her loan" and the balance was $55,774.84. At no stage could the outstanding balance have ever been higher than that ordered by the Court. There were other, similar, examples.

[69] In interview, Wayne Hawkins said that the reason for not seeking variations to the Court orders was because it would have cost the companies more money. He said that the companies knew the debtors probably would not pay but the companies used it as a means to get in contact with them.

Category 4: The three refinancing charges

[70] This offending involved only Budget Loans. The company made representations to three of the debtors concerning the benefits of refinancing their existing loans. It did so by overstating the existing loan balance and so, in turn, exaggerated the benefit the debtor would receive by refinancing.

The applicable sentencing principles

[71] I agree with Ms McClintock that the following principles are relevant when considering the appropriate sentence in cases involving consumer misrepresentations:

(a) deliberate conduct by smaller companies,[33] as well as highly careless conduct by larger companies involving greater dissemination,[34] will attract heavy penalties up to the maximum;

(b) deliberate or highly reckless representations to vulnerable consumers is deserving of a particularly punitive penalty;[35]

(c) there is a need for deterrence when vulnerable consumers are involved;[36]

(d) commercial strategies involving misleading consumers are deserving of commercial penalties;[37]

(e) misleading claims which are difficult or impossible for consumers to test the accuracy of are a more serious form of misrepresentation;[38] and

(f) misrepresentations which lead to or facilitate personally intrusive conduct affecting consumers, such as the entry into homes and/or the removal of personal property is a particularly serious aggravating factor.

[72] Each of the aggravating factors listed above has application in the present case. In the instances of repossession the companies' representations claiming a right to repossess personal property was particularly serious. These representations facilitated the entry into consumers' homes and ostensibly authorised the removal of a wide range of personal belongings. In several instances, as the Judge rightly observed, this

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33 *Commerce Commission v Love Springs Ltd*, above n 22; *Commerce Commission v Auckland Academy of Learning Ltd* [2017] NZDC 27148.

34 *Commerce Commission v Westpac Banking Corporation*, above n 22; *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 22.

35 *R v Mehta* [2017] NZCA 491; *Commerce Commission v Auckland Academy of Learning Ltd*, above n 33.

36 *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165; *R v Mehta*, above n 35.

37 *Commerce Commission v Bike Barn Retail Group Ltd* [2017] NZDC 2670; *Commerce Commission v Love Springs Ltd*, above n 22; *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 22; *R v Mehta*, above n 35; and *Commerce Commission v Auckland Academy of Learning Ltd*, above n 33.

38 *Commerce Commission v Reckitt Benckiser (New Zealand) Ltd*, above n 22; *Commerce Commission v Love Springs Ltd*, above n 22; and *Commerce Commission v Auckland Academy of Learning Ltd*, above n 33.

conduct may well have been criminal in nature involving, as it did, the breaking and entering of private homes to remove property which the perpetrators knew they had no lawful right to take.

[73] Additionally, the nature of subprime financing means that consumers will often not fully understand their legal rights. Thus the need to be accurate and transparent in asserting enforcement rights is particularly important. The failure to observe that need is an aggravating feature. Furthermore, the items repossessed were important, if not essential, in the lives of the victims and their families. They included cars, washing machines, fridges, beds and, as previously noted, even clothing.

[74] The representations in Categories 2, 3 and 4 exploited the victims' naivety and lack of business and commercial acumen. These were vulnerable and mostly unsophisticated consumers who believed the untruths they were fed by the companies and their agents. As the Judge put it:[39]

> "This is a situation in which it was hard for consumers to tell themselves as to the accuracy of misrepresentation. In situations where people cannot judge as to whether or not information that they are given from a seemingly responsible body is true is always going to make forms of misrepresentation serious."

[75] It is also plain that the representations were deliberate and exploitative. Repossession was used as a means of securing co-operation and coercion as the examples cited above reveal.

[76] Furthermore, the misrepresentations were broadly disseminated within the sample group of 21 debtors. Ms Lethbridge correctly submitted that this feature distinguishes the present case from others where the dissemination was much wider. However, the Judge acknowledged this difference. What is plain from his findings is that the submission these were isolated or aberrational incidents was unsustainable. For the reasons already discussed, he determined, rightly in my view, that this was part of the defendants' business model.

[77] Finally, I accept that the representations were harmful. Examples of that harm have been given. The 11 victim impact statements provide ample insight into the

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39 At [61].

extent of the harm which affected not only the victims themselves but also their wider families and whānau.

[78] Given these aggravating factors, the Judge correctly characterised the offending as being amongst the most serious of its kind. There is no comparable case involving such damaging, prolonged, focused, cynical, personal and economic commercial conduct. For those reasons only limited assistance may be obtained by reference to previous cases.

[79] In my view only two of those cited in argument provide some, albeit limited, assistance. These are *Love Springs Ltd* and *Auckland Academy of Learning*.

[80] In *Love Springs* the offending involved the marketing and sale of water filters. The company promoted its filters by encouraging its sales people to tell potential customers that unfiltered tap water causes serious health problems. In that way the company exploited the naivety and vulnerability of customers. The representations were consistent with company training and sales instructions.

[81] The company pleaded guilty to 11 charges under s 10 of the FTA for engaging in conduct liable to mislead the public as to the nature, characteristics or suitability for purpose of goods. The company's director was found guilty as a party to seven of the charges. The misrepresentations spanned a six month period.

[82] The global starting point set for *Love Springs* and its director was $600,000, following a totality adjustment downward from a $700,000 starting point. The Judge noted that had *Love Springs* been sentenced alone the appropriate starting point would have been one of $500,000.

[83] The present offending is, in my view, considerably more serious than *Love Springs* for two reasons. First, the duration of the offending in the present case was more than four years. Secondly, the nature of the representations and the consequential harm to consumers is considerably greater.

[84] In *Auckland Academy of Learning* a mathematics product was sold to the parents of school-aged children. Using cold calls, sales representatives would offer parents an "educational assessment" in order to gain entry into their homes without disclosing they were, in fact, selling a product. They would then undertake an assessment using a maths test which was too difficult given the child's age. Inevitably the child failed or performed poorly. The sales representative would tell the parent that the assessment revealed "knowledge gaps" which could be remedied if they purchased the product. It was expensive. It cost between $6,000 and $11,000. The offending continued for four and a half years during which approximately 2,400 consumers were potentially misled into purchasing the programme. The Court adopted a starting point of $520,000.

[85] On the topic of deterrence, the sentencing Judge said:[40]

> "In considering the sentencing principles that apply, I consider that, as well as they can apply to a company, the one that has the greatest weight in a sentencing of this nature is deterrence. That is both deterrence to the particular company and general deterrence.
>
> A company does not have a conscience. Insofar as it is able to act, it does so through its officers. ... the company exists as a device to make profit. There is nothing wrong with that. But the main lever for deterrence is a financial penalty that will deter the current defendant and others like it from breaching their obligations. That approach is reflected in the high maximums that are provided for breaches of the Fair Trading Act and as is seen in cases that have addressed breaches of those sections."

[86] As with *Love Springs*, I do not regard the offending in *Academy of Learning* as anywhere nearly as serious or harmful to consumers as the offending in the present case. While I accept the dissemination in *Academy of Learning* was greater and the intrusion into private homes where the misrepresentations were made was deplorable, there is no real comparability in terms of the harm caused to the victims by the misrepresentations. The harm in *Academy of Learning* was that the representations led the consumers to purchase a product which they might not have otherwise. The harm in the present case is much more intrusive, damaging and enduring.

[87] In my view a more comparable case to the present is that of *Mehta*. Mr Mehta was the sole director and shareholder of Flexi Buy Ltd, a mobile trader or "truck stop"

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40 *Commerce Commission v Auckland Academy of Learning Ltd*, above n 33, at [54]-[55].

business selling electronics and other household items door to door. The offending spanned a period of some 13 months. Mr Mehta directed his sales people to advise customers that their goods would be delivered after they had made a specified number of payments. The goods were not delivered despite customers making payments. Mr Mehta applied the funds he received to his own purposes. Contracts were entered into with between 300 and 360 customers. The total amount received was nearly $160,000. Just nine customers ultimately received their goods and only after they complained or threatened to complain to the Police, Fair Go or the Commerce Commission.

[88] Mr Mehta was convicted as a party to Flexi Buy Ltd's offending. He was the one who created the business model, operated the company's accounts and decided which geographical areas the business would target. Mr Mehta was sentenced to two years' imprisonment.

[89] In dismissing the appeal, the Court of Appeal observed:[41]

> "Although the total amount of loss as weighed by the Judge ($24,000) may not have been great, the harm was considerable. Mr Mehta's victims were people who could not afford to lose $1,000. It is clear that Judge Cunningham addressed herself to s 16 of the Sentencing Act. Although she accepted that home detention can be a deterrent sentence she said:
>
> > 'In my view because of the seriousness of what occurred here I am not minded to impose home detention. In my view it needs to be a sentence at the top of the hierarchy of sentences to send a message to Mr Mehta and to any other person who seeks to, in my words, rip off vulnerable people. That such behaviour that breaches the criminal law will be met with the full force of the criminal law. That sentence will be on both charges, a sentence of two years' imprisonment.'"

[90] For reasons which are not entirely clear neither Mr Hawkins nor his son faced charges themselves. Had they been and if convictions had followed, it is not inconceivable that terms of imprisonment may have been imposed. That observation is made only for the purpose of emphasising how seriously the Courts view offending of this sort.

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41 *R v Mehta,* above n 35, at [20] (footnotes omitted).

Conclusion

[91] On any analysis the conduct in this case elevates it to the most serious category which justifies a starting point at or about the maximum available.

[92] The starting points of $600,000 and $520,000 fixed in *Love Springs* and *Academy of Learning* respectively reveal that the global starting points the Judge fixed here; $535,000 for Budget Loans and $265,000 for Evolution Finance (totalling $800,000) were well within range.

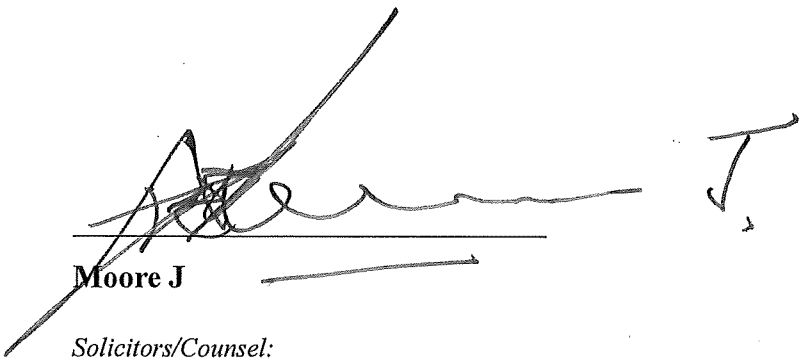
[93] Some sense of proportion and relativity can be gained when the $800,000 starting point is arbitrarily apportioned across the 21 debtors over a period of four and a half years. As Ms McClintock pointed out, a straight division leads to a figure a little under $40,000 for each victim, a figure which in her submission puts the starting point in context if the offending is viewed in the individualistic way Ms Lethbridge presses for.

[94] I am easily satisfied that the starting point, and therefore the final sentence, was well within the sentencing discretion of the Judge. Indeed, given the maximum penalty, the offending viewed as a whole might well have attracted a considerably sterner starting point.

[95] For these reasons I am satisfied that the appeal should be dismissed.

Result

[96] The appeal is dismissed.



Moore J

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