

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2014-092-012606
[2016] NZDC 23919**

COMMERCE COMMISSION
Prosecutor

V

TWENTY FIFTY CLUB LIMITED
Defendant and
GAVIN JOHN MARSICH
Defendant

Hearing: 24 November 2016

Appearances: F J Cuncannon and T C Clark for the Prosecutor
No appearance by the Defendant M Marsich
M Mason as Amicus Curiae

Judgment: 24 November 2016

NOTES OF JUDGE J C MOSES ON SENTENCING

[1] The defendant Twenty Fifty Club Limited and Gavin Marsich are for sentence in relation to 16 charges that they each face which have been laid under the Credit Contracts Consumer Finance Act 2003, the Fair Trading Act 1986 and the Commerce Act 1986.

[2] Mr Marsich was charged as a party of the offending of the company and the charges I have found proven.

[3] I presided over a trial involving the two defendants on 27 April of this year and I delivered a written decision on 3 June this year in which both defendants were convicted of these charges.

[4] The very brief background to this offending is that the defendants were involved in payday lending, namely the provision of high cost, short term credit involving vulnerable customers, low income earners or beneficiaries and who required urgent loans and had no or little access to any other credit.

[5] After I found the charges proven, I had the matters put adjourned and I have received extensive and very helpful submissions from the Commerce Commission dated 22 July 2016 and 24 November 2016.

[6] Neither Mr Marsich nor anyone on his behalf, nor the company's behalf appear at sentence. Ms Mason appears as she has done throughout as Amicus who I had appointed to assist the Court in this case. I am grateful for her ongoing assistance.

[7] In essence, she has advised me today that Mr Marsich had instructed her not to file anything in response to the Commerce Commission's submissions and she has indicated that the defendant is out of town at the moment, and his partner or wife is present in Court and has some concerns as to his health and wellbeing. Her submissions from the bench are that the defendant has no income other than a sickness benefit.

[8] I have no confirmation of that nor is there any confirmation as to the current state of the company and I am proceeding without any such information.

[9] The Credit Contracts and Consumer Finance Act was established to protect consumers, particularly vulnerable consumers and to allow for comparability between competing credit offerings. That Act sets out strict disclosure requirements for lenders entering into credit contracts with debtors. The Act also prohibits creditors from providing unreasonable credit fees in consumer credit contracts.

[10] I note as set out in the Commission's submissions that the Supreme Court has indicated that these provisions are intended to place a real constraint on what creditors are entitled to charge by way of fees and to ensure that the annual interest rate is the main focus of the price competition between credit providers.

[11] The Fair Trading Act has been part of our legislation for nearly three decades and it is designed to ensure that the interests of consumers are protected, that businesses compete effectively and that consumers and businesses participate with confidence.

[12] The Commission is able to issue statutory notices in order that they can carry out their investigations into alleged contraventions of the Commerce Act as has been affirmed in the Supreme Court in a decision of *Astra Zenich Limited* [2009] NZSC 92, [2010] 1 NZLR 297, the Commission must have power to conduct investigations and to gather evidence of any anti-competitive activities in relation to those three acts and those three different types of offending for which the defendants have been convicted.

[13] In terms of Sentencing Act 2002, I must impose a sentence which holds the defendant accountable for the harm done to their victims and to the community by the offending. I also must impose a sentence which deters others from engaging in such activities and also impose a sentence which publically denounces the behaviour of which the defendants were engaged in.

[14] In terms of the offending under the Credit Contracts and Consumer Finance Act, I find the following aggravating features; the ones which were set out in the Commission's submissions:

- (a) The duration of the offending which covered a period of five months;
- (b) The extent of the offending; and
- (c) The harm caused by the offending I note that the promissory note issued by 2050 Club Limited did not include a statement of the

statutory right to cancel the contract. It also provided for unreasonable credit fees.

- (d) In terms of the number of victims, there were at least 82 debtors over some 234 loans, though, as has been pointed out to me today by Mr Cuncannon, as a result of the fact that the defendant did not cooperate or provide any proper records, it may well be that there was significantly greater number of victims than those identified.
- (e) The victims were vulnerable as I indicated at the outset. This offending targeted those who were vulnerable.

[15] Anyone such as the defendant company and Mr Marsich who seeks to gain at the expense of the poor and the most vulnerable in our society without regard for the laws' safeguarding such people cannot expect leniency from the Courts.

[16] The Commission submits that the conduct was at best highly reckless. In my view, that is a very generous interpretation of what took place. The conduct which was I found proven was, in my view, wilful rather than reckless. Neither defendants are prepared to engage with the Commission at any stage during its investigation nor is there any evidence that they took steps at any stage to address the Commission's concern.

[17] Both in his dealings with the Commerce Commission and in his dealings and or submissions made to the Court, it is clear that Mr Marsich believed or at least claims to believe that the law does not apply to him, and that he is above the law. As will be clear from my judgment and these sentencing comments, it does and he is not.

[18] In terms of the harm caused by the Fair Trading Act offending, I agree with the submissions filed by the Commission. The harm that was caused was that the misrepresentations about the company's rights to repossess and hold and sell security items were likely to cause harm to consumers. Those representations allowed the company and Mr Marsich to put pressure on borrowers to make payments by threatening to seize, and hold security in circumstances they were not entitled to do.

[19] The representations in respect of the repossession of one such person, [REDACTED] caused her significant harm. It deprived her and her children of the use of her vehicle. She was required to pay some \$3,409.20 to her finance company for the unlawful repossession of her vehicle.

[20] I note also that in the course of the evidence, it was clear that Mr Marsich would, on occasion, threaten verbally those owing money as a result of these illegal contracts, in order for him to gain financially.

[21] The misrepresentations that Twenty Fifty was a registered financial service provider and a member of the Dispute Resolution Scheme I accept also may have caused harm to consumers, given the false impression that the company was operating with a regulatory framework and that borrowers would have access to the dispute resolution for any issues that may arise.

[22] I find that the defendants conduct was not only a substantial departure from the truth in that they represented that the company had the right to hold and sell consumer goods without any regard to their obligations under the Credit Repossession Act 1997. The company represented that it was a registered financial service provider when it was not and I note the cases referred to by the Commission of the need to impose significant penalties for deliberate conduct.

[23] So far as the offending involving failure to comply with statutory notices, I also accept the features which the Commission have outlined as aggravating features, namely that the offending was deliberate. Mr Marsich acknowledged receipt of notices but failed to take any steps to comply despite numerous opportunities to do so. The effect of the offending was that the Commission was unable to fulfil its statutory function and increased the cost of their investigation, and as I have already pointed out, the Commission may not have located many documents it expected to find.

[24] I have been referred to a large number of cases by the Commission to look at the starting points for penalties. It is perhaps unfortunate that at this stage there is no assistance from the High Court in terms of the approach that could or should be

taken where a company and a director are charged together, and exactly how division of penalties should be rendered.

[25] It is fair to say that in the District Court there have been a variety of approaches depending on the particular circumstances. They vary from the approach taken in the decision of *the Commerce Commission v Home Finance Company Limited and Ashindon*, where Judge Moore took the approach of setting an overall penalty which he then allocated two thirds toward the director and one third to the company. His Honour Judge Thorburn in a decision *Commerce Commission v E Femick C the Finance Limited and Loots* took the approach of dividing the penalties equally between the company and the director. Other cases where there are significantly less charges and where it appears either larger corporations were involved or cases involving companies which have ongoing financial activities, are cases where the penalties have been awarded more significantly directed toward the company than to the director or directors.

[26] In terms of the approach that I intended to take, I think in terms of the Sentencing Act the more standard approach is to firstly, look at the charge or charges which relate to the particular type of offending, and set a starting point for those particular individual types of offending.

[27] There are nine charges which relate to the Credit Contracts and Consumer Finance Act ("CCCFA"). Each of the charges which the company faces is mirrored in a charge that Mr Marsich faces.

[28] I take the approach that the starting point, looking in totality for each charge the company faces which is mirrored by the offending of Mr Marsich, so that in relation to each pair of offences, in my view, the overall criminality or overall penalty should be that of \$6,500 per pair of offences which would amount to \$57,000 for the CCCFA offending.

[29] So far as the offences under the Fair Trading Act, there are five and I am of the view that an overall starting point of \$6,000 for each pair of offences is appropriate which would amount to \$30,000.

[30] In relation to the starting point for the statutory notices, I have taken into account the cases referred to by the Commission where the Courts have held that in cases such as *Crown v Love Springs Limited and Phillip John Smart* and *Commerce Commission and Coppers Arch Wood Protection Limited* that where companies and those associated with them deliberately withhold relevant documents. Fines toward the upper end are appropriate.

[31] For those two charges, in my view, each of them warrants a \$15,000 starting point which amounts to \$30,000; that takes the overall starting point to that of \$117,000. However, looking in totality at the charges, it is my view that the overall penalty should be somewhat less than that.

[32] I am going to take the approach of that looking in totality of an overall figure of some \$76,000 is appropriate to be divided by way of the nine CCCFA charges each with \$4,000, the five Fair Trading Act charges at \$4,000 and the two breaches of statutory notice and totality of \$10,000.

[33] In terms of how the fines should be divided, the Commission has urged on me to take the approach that Judge Moore did by awarding two thirds to the company and one third to Mr Marsich.

[34] There is nothing to suggest that the company is continuing its activities, however, there is nothing to suggest that it is not and I do not have any information as to whether the company has any assets. I do not know whether Mr Marsich has any assets. As I say, I am approaching the sentencing process in the absence of having any assistance from Mr Marsich or the company. I am, however, of the view that the approach taken by Judge Thorburn of dividing the penalties is a more appropriate approach to take in relation to this particular case.

[35] The end result is that in terms of the schedule of charges as set out to the Commerce Commission's sentencing submissions, for charges 1 and 2 where the maximum penalty for a body corporate is \$30,000 and for an individual \$10,000, the company and Mr Marsich are fined \$5,000 in relation to each of those first two charges.

[36] In relation to the remaining charges in the schedule, namely 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 17, the defendant company and Mr Marsich will each be fined the sum of \$2,000.

[37] There remains other aspects to the sentencing process which I consider are appropriate in this case: Firstly, I am of the view that [REDACTED] has incurred significant expenses as a direct result of the unlawful repossession of her vehicle. There is reference to interest that she has been charged, but I do not know what that amount is and I do not intend to add any interest to that original figure. I am of the view, however, that the offending has caused her and did cause her significant emotional harm caused by the stress and inconvenience of the loss of that vehicle, and I intend to award the sum of \$1,000 of emotional harm reparation.

[38] So, in relation to charge 17, that is the charging document ending 5582, the sum of \$4,409.20 is to be paid by way of reparation to [REDACTED]. I have attached that to a charge that Mr Marsich is facing rather than the company as I am of the view that there is more chance of it being recovered from him than the defendant company.

[39] In addition, the Commission seeks and I consider it is appropriate to make ancillary orders under s 94 CCCF Act confirming that:

- (a) A marketing fee or marketing koha however described, of \$50 or more could not be charged in relation to any contract set out in the schedule.
- (b) A rollover fee however described of \$50 or more could not be charged in relation to any contract in the schedule and;
- (c) That an additional late penalty or dishonour fee however described of \$20 or more could not be charged in relation to any contract in the schedule.

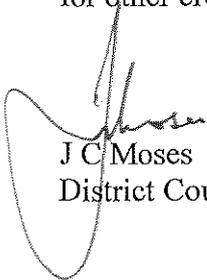
[40] I also note that the defendants are prohibited from enforcing any contract against any debtor that the company or Mr Marsich may have where there has not been proper disclosure.

[41] Finally, the Commission seeks a banning order under s 108(1) Credit Contracts and Consumer Finance Act 20/03/15. Under the Act, I may make an order prohibiting a person from doing any of the matters set out under s 108(2) where a person has been convicted of an offence against the Act, or has failed more than once to comply with any of the provisions of the Act, if in the opinion of the District Court the person is not a fit and proper person to enter into consume a credit contract as a creditor, or enter into consumer leases as a lessor or enter into buy back transactions as a transferee or act as a buy back promoter in connection with a buy back transaction.

[42] I agree entirely with the submissions made by the Commission that Mr Marsich's actions indicate a wholesale disregard for his statutory responsibilities and as such, I am of the view that this is an appropriate case for such an order to be made.

[43] Mr Marsich's conduct which gives me grounds for forming that view includes amongst other things, that he does not accept that the Credit Contracts, Fair Trading or Commerce Act or in fact any legislation enacted by Parliament applies to him. Secondly, he does not accept that the Commission has any authority to investigate his business practices. Thirdly, he failed to register as a financial services provider. I could add that he does not accept that this Court has any control over his actions.

[44] In these circumstances and in the circumstances of this case, I am of a view that a banning order is necessary to protect the public, and to deter and set a standard for other creditors, and that it is appropriate that the ban be for an indefinite duration.


J C Moses
District Court Judge

Addendum:

1. I note that the starting point of \$57,000 referred to in paragraph [28], should in fact be \$58,500, which is the correct total for nine pairs of charges, each with an overall starting point of \$6,500. This in turn means that the starting point of \$117,000 referred to in paragraph [31] should be \$118,500. I do not however alter the totality starting point of \$76,000 referred to in paragraph [32] of these Sentencing notes.

2. The banning order is to cover all matters set out in s 108(2), namely:
 - (2) The matters are—
 - (a) providing credit under consumer credit contracts, leasing goods under consumer leases, purchasing land under buy-back transactions, or acting as a buy-back promoter in connection with a buy-back transaction either alone or in partnership with any person and whether or not through agents:
 - (b) acting as a director or taking part directly or indirectly in the management or control of any company or business that provides credit under consumer credit contracts, leases goods under consumer leases, purchases land under buy-back transactions, or acts as a buy-back promoter in connection with a buy-back transaction:
 - (c) being in the employ, or acting as an agent, of a creditor, a lessor, a transferee, or a buy-back promoter in any capacity that allows the person to take any part in the negotiation of—
 - (i) consumer credit contracts involving the provision of credit by the creditor; or
 - (ii) consumer leases involving the leasing of goods by the lessor; or
 - (iii) buy-back transactions