IN THE DISTRICT COURT
AT AUCKLAND

CRI-2015-004-000415
[2016] NZDC 8714

THE COMMERCE COMMISSION
Prosecutor

v

BUDGET LOANS LIMITED
EVOLUTION FINANCE LIMITED
Defendant(s)

Hearing:	2,3,4,5,6 & 9 May 2016
Appearances:	Ms A McClintock & Ms C Paterson for the Prosecution Ms B Frowein & Ms G Im for the Defendants
Judgment:	1 July 2016

RESERVED DECISION OF JUDGE D J SHARP
[On s 147 Applications]

Introduction

[1] Both defendants make a number of applications under s 147 of the Criminal Procedure Act 2011, for dismissal of charges brought by the Commerce Commission. All charges relate to processes connected with enforcement of loan obligations to the defendant companies.

[2] The defendant companies purchased loans originally advanced by National Finance 2000 Limited (NFL) and Western Bay Finance Limited (Western Bay Finance).

[3] The purchases of the loan books from these companies were for sums well below the face value of the loans. This was because the likelihood of recovering the funds advanced was questionable as many of the loans were in serious default.

[4] The two defendant companies face 125 charges. Budget Loans Ltd faces 82 charges and Evolution Finance Ltd faces 43. All of the Evolution Finance charges relate to s 13(i) of the Fair Trading Act 1986 (the FTA). The allegations are of misleading representations of a number of different varieties. Budget Finance Ltd faces 79 charges of alleged misleading representations of a number of different varieties under s 13(i) of the FTA. It also faces 3 charges of falsely representing a benefit under s 13(e) of the FTA.

[5] Both defendant companies are separate legal entities and have each acquired different loan books but in practice there are no clear divisions in the functional aspects of their activities. The day to day operations of both defendant companies were carried out at the same time, using the same staff, records and computer systems. In assessing the cases against each company no practical distinctions may be drawn and either or both defendants may have been involved with the debtors files which are the subject of these proceedings.

[6] The defendant companies have acknowledged an extremely proactive approach to the collection of loan monies outstanding. The allegations made against the companies are that the approach which was taken was reprehensible to the extent that it constituted criminal offending.

The Applications

[7] Both defendants apply to dismiss all but 3 of the charges before the Court (the s 13(e) charges are not challenged) on the grounds that the conduct in question is not regulated by the FTA.

[8] The challenged representations are said not to be *"in trade"* or *"in connection with the supply or possible supply of services"*. Both defendant companies also apply in the alternative as follows:

(a) To dismiss 6 charges of representations of the defendant's right to require debtors to make payments in addition to the wage deduction ordered under District Court attachment orders.

(b) To dismiss 4 charges of representations about the defendant's right to add interest to unpaid judgement debts after District Court attachment orders had been imposed.

(c) To dismiss 19 charges for improperly adding costs and interest to debts after repossessions had been carried out. (This application as filed has been overtaken by changes to the charging documents but the basis of the application has been applied to the representations alleged in charging documents relating to post repossession interest and costs).

(d) To dismiss charges filed out of time.

The prosecution opposes each of the applications made. Submissions in writing have been filed by both defendants and the prosecutor. In a preliminary ruling I ordered these applications to follow the prosecution evidence.[1]

Issues

1. Were the defendants making the alleged representations *"in trade"* or *"in connection with the supply or possible supply of services"* or *"concerning the existence of rights"?*

2. Were the alleged representations internal communications not regulated by the FTA?

3. Were the alleged representations allowed or at least not disqualified by the District Courts Act 1947 and the Creditors (Repossession) Act 1997 (The CRA)?

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[1] *Commerce Commission v Budget Loans Ltd & Evolution Finance Ltd* [2016] NZDC 5579.

4. Was it permissible for the defendants to add interest to judgment debts after attachment orders were granted under the District Courts Rules?

5. Was it permissible for the defendants to add costs and interest to debts after repossessions had been carried out, where there was a continuing security interest? In the alternative is s 35 of the CRA ambiguous?

6. Were the charges filed out of time?

[9] The FTA contains the following definitions:[2]

> **Trade** means any trade, business, industry, profession, occupation, activity of commerce or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.
>
> **Business** means any undertaking—
>
> (a) that is carried on whether for gain or reward or not; or
>
> (b) in the course of which—
>
> (i) goods or services are acquired or supplied; or
>
> (ii) any interest in land is acquired or disposed of—
>
> whether free of charge or not
>
> **Services** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:
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> ...
>
> (d) any contract for, or in relation to, the lending of money or granting of credit, or the making of arrangements for the lending of money or granting of credit, or the buying or

[2] S 2(1)

discounting of a credit instrument, or the acceptance of deposits;—

[10] Words referred to above in the definition section to the FTA on their literal meaning convey an exceptionally broad range of circumstances within which the Act applies. The legislation largely followed the Australian Trade Practices Act.

[11] The leading Australian case on the meaning of the expression *"in trade or commerce"* is *Concrete Constructions (NSW) Pty Limited v Nelson*[3]. This case is considered in *Body Corporate 202254 v Taylor*[4] where the Court said *"The phrase "in trade" operates grammatically and is an adverb, directly applying to the verb "engage", but in practical terms [whether Taylor was considered to be in trade] comes down to whether the phrase in substance applies to the impugned conduct or rather to both the defendant and the conduct. The argument for the owners on a first question is that s 9 is not confined to the conduct of a person who is trading on his or her own account. We refer to this as "the broad approach". In contradistinction, counsel for Mr Taylor maintains that as Mr Taylor was not trading on his own account, he cannot have been engaged in trade. In this, he was espousing what we refer to as "the narrow approach".*

[12] The New Zealand approach can be seen in *Body Corporate 202254 v Taylor*[5] the Court said "*On the one hand, consumer protection considerations which are best served by a broad approach to liability: and on the other, the undesirability of imposing unexpected liabilities on employees (along with an associated weakening of the usual protection afforded by limited liability status). Although both the broad and narrow approaches are tenable, we see no reason why we should depart from the broad approach given its congruity with the words of the statute, the most recent and authorative Australian decision on similar legislation and most significantly, the pattern of New Zealand authority, including judgments of this Court".*

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[3] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.
[4] *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17 [68]
[5] Ibid [78]

[13] In the text "Fair Trading Misleading and Deceptive Conduct[6] it states *"what emerges from Concrete Constructions is that it is not enough that the defendant be engaged in trade. What must be in trade is the particular conduct complained of. Further, it is not sufficient for this conduct to be in the course of or for the overall purpose of a trading or commercial activity. Rather the conduct must be an aspect or element of the activities or transactions which, by their nature, bear a trading or commercial character. Put another way, conduct which is divorced from any relevant, actual or potential trading or commercial relationship in dealing will not suffice. Which activities or transactions bear a trading or commercial character will not always be clear. In "less clear" cases, it may be possible to import a trading or commercial character to an activity which is not, without more, of that character."*

The Defence Case

[14] The defence rely upon a distinction between the commercial arrangements between the defendant companies and NFL and Western Bay Finance when the defendant companies made the initial commercial arrangements, acquiring creditors rights under the existing credit contracts and the later enforcement of those contracts against the recipients of the loans.

[15] The defendants' position is that the alleged representations relate to assertions of rights obtained under District Court judgments and contractual rights obtained by the defendant companies and are separate from any activities in trade, regulated by the FTA.

[16] The defence point to *Desmone Limited v University of Auckland Senior Common Room Incorporated*[7] *"In this case, it may be that entering into the contract was an act in trade, as would be the pre-contractual negotiations of the parties. But the mere exercise of perceived contractual rights as between two parties to a contract is quite different. Those rights may be acquired by actions in trade, and the motivation behind their exercise may be commercial, but the assertion of the rights falls outside the purview of the Fair Trading regime".* Further, the defence note that

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[6] Fair Trading Misleading and Deceptive Conduct (2006) Authors C Trotman & D Wilson at 18-19.
[7] *Desmone Limited v University of Auckland Senior Common Room Incorporated* (2002) NZBLC 103 and Dicta of Rodney Hansen J is referred to.

this was said to be true even if the assertion of legal right *"turns out to be ill founded".*[8]

[17] The dicta of Rodney Hansen J in *Desmone* is consistent with the finding of Barker J in *Malayan Breweries Limited v Lion Corp Limited*[9] that the assertion of legal rights, such as the threat of legal action or the bringing of legal action, is not regulated by the Fair Trading Act. Further *Desmone* is also consistent with *Marcol Manufacturers Limited v Commerce Commission*[10] where Tipping J adopted Halsburys Laws of England definition: *"A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct."*

[18] The defence position is that a representation needs to be a communication of a statement of fact, not an assertion of legal or contractual rights. The defence says that the representations alleged here are not statements of fact made in trade. They are assertions made about the exercise of rights by the defendants, being either legal right to enforce District Court judgments or contractual rights to realise pre-existing securities.

Where the defendants "in trade"?

[19] The defendants maintain their actions were not *"in trade"*. The defendant companies purchased loan books from Western Bay Finance, NFL and others in 2006. The purchase of loan books was an activity of commerce relating to the acquisition *"of creditor rights"* under existing credit contracts. There was *"trade"* between the defendants and the insolvent finance companies. The defence submits to the limited extent the defendants negotiated and effected the original purchases of the loan books and later engaged in sales of repossessed goods, the defendants are *"in trade"*.

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[8] Ibid at para 19.
[9] *Malayan Breweries Limited v Lion Corp Limited* (1988) 4 NZCLC 64,344
[10] *Marcol Manufacturers Limited v Commerce Commission* [1991] 2 NZLR 502.

[20] The defence submission is the remainder of the companies' current activities, mainly the collection of debts, are not carried on *"in trade"*. The activity of collecting debts is said not to amount to a supply or acquisition of rights, it is on the defence submission an exercise of contractual rights.

[21] The defence further submits the alleged representations were not made in the course of *"trade"*.

[22] The defendants' submission is that it is insufficient that the company was at various times engaged *"in trade"*. The defence submits what must be *"in trade"* is the particular conduct complained of *Concrete Constructions (N.S.W.) Pty Ltd v Nelson*[11] the conduct must *"bear a trading or commercial character (at page 604)* and the Act was *"not intended to impose, by a side-wind, overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities"*.

[23] The defendant's say even if they are correct and the representations were not made *"in trade"* potentially liability could be asserted if the conduct was *"in connection with the supply of services"*.

[24] The defence say the *"supply of services"* here was completed over a decade prior when the lending was carried out by Western Bay Finance and NFL.

[25] The link with the supply of services is a factual question. The defence rely upon *Ducret v Chaudhury's Oriental Carpet Palace Pty Ltd*[12]. The defence submits that here the factual basis for a finding of a connection between the supply and the later representations by the defendants is so far removed in terms of time and causal connection that the factual question should not be determined against the defendant. The defence submits that there is other adequate consumer protection legislation such as the CRA so that the more general provisions of the FTA should not be used to impose criminal liability in respect of acts which bear a civil character.

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[11] *Concrete Constructions (N.S.W.) Pty Ltd v Nelson* 1990 HCA 17.
[12] *Ducret v Chaudhury's Oriental Carpet Palace Pty Ltd* [1987] FCA 323

[26] The third defence point is that what occurred here was not a representation of the existence, exclusion, or effect of a *"right"* under s 13(i).

[27] Section 13(i) provides:

> *"(i) Make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy including (to avoid doubt) in relation to any guarantee, right or remedy available under the Consumer Guarantees Act 1993."*

[28] The defence submit s 13(i) is directed towards representations as to the existence of consumers rights and remedies made in the course of contractual negotiations, rather than assertions of a creditor's contractual rights after a contract is made.

[29] The defence relies upon the Australian authority of *Australian Competition & Consumer Commission v McCaskey*[13] where it is stated at [53] *"I consider there is a difficulty with the third paragraph in relation to s 52. An agent who, on instructions, asserts that an alleged debtor is liable and seeks payment of the debt under threat of recovery action does not engage in misleading or deceptive conduct just because, on the true facts of the case, the alleged debtor is not liable. The assertion of liability if reasonably based on instructions, may be the statement of an opinion honestly held or a representation of the opinion of the creditor. A legal practitioner writing a letter of demand on instructions which there are no reasons to disbelieve, does not engage in misleading or deceptive conduct if a court subsequently finds there to be no liability. The declaration alleges simply that there was no legal liability on the part of the Campbells thereby falsifying the assertion to the contrary attributed to Ms McCaskey. It does not allege a statement by Ms McCaskey of an opinion which she did not hold or for which there could be no reasonable basis. On the face of it the third paragraph of the declaration does not identify a contravention of s 52 and I decline to make it. A fortiori it does not identify a contravention of s 53(g). This is not to say that such contraventions could not be found on the agreed facts. But here I am addressing the terms of the proposed declaration itself."*

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[13] *Australian Competition & Consumer Commission v McCaskey* [2000] FCR 1037.

[30] The Federal Court Judge in *McCaskey*[14] declined to make the orders sought by consent under s 53(g). He stated at [38] *"In my opinion, the construction necessary to support the claimed application of s 53(g) in this case is, at the very least, doubtful and should not be accepted particularly having regard to its penal character. It is inconsistent with its history and apparent purpose. I do not propose to make those declarations insofar as they relate to the [relevant] representations."*

[31] The defence maintain that these propositions from Australia have application in this case and point to *Taylor Bros Ltd v Taylors Group Ltd*[15] for authority that benefit can be obtained from the Australian Case Law.

[32] The defence submission is that s 13(i) does not capture representations of a debt collection company which amounts to an assertion of its own rights, but rather it is directed towards misrepresentations made about the existence of consumers rights and the course of contractual negotiations.

The subsidiary argument for the defence that internal communications are not regulated by the Fair Trading Act.

[33] The defence accepts s 45(c) of the Fair Trading Act provides liability for the acts of servants or agents. The defence relies upon *Concrete Constructions*[16] for the following proposition ... *"without more, a "misleading" statement by one of a building company's own employees to another employee in the course of their ordinary activities is not in trade or commerce".*

[34] The defence submit *"Concrete Constructions"* situation is analogous to what is alleged here as the defendant's employees are issuing instructions to their agents in the ordinary course of business and the agents are simply acting on the defendant's instructions. A statement authorising an agent to act on behalf of a principal amounts to an internal communication, rather than a statement bearing a *"trading or commercial character".*

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[14] Ibid
[15] *Taylor Bros Ltd v Taylors Group Ltd* [1988] 21 NZLR.
[16] Ibid.

Were the Defendants allowed to require payments in addition to wage deductions under attachment orders?

[35] Each of the relevant charging documents states the defendant did not have a right to require the debtor to increase the amount of his or her repayments unless the defendants obtained a variation of the attachment order from the District Court. The defendants submit under the District Courts Act 1947 that it is lawful to require payment of a judgment debt in addition to wage deductions ordered under an attachment order.

[36] The defence submits if a creditor elects to enforce a judgment debt s 79(6) of the District Courts Act 1947 applies. This provides

> *"It is hereby declared that 2 or more proceedings for the enforcement of a judgment or order may be taken concurrently but the Judgment creditor shall not be entitled to recover a greater sum than the amount owing under the judgment or order and the costs and fees of any proceedings for enforcement".*

[37] Accordingly it is submitted that it necessarily follows that it is lawful for a creditor to make demand for additional payments prior to issuing additional, concurrent enforcement proceedings. If the demand to the debtor is unsuccessful, the judgment creditor may then consider whether to issue a concurrent enforcement proceeding and may decide what that proceeding might be. Conversely, if the debtor makes payment there will be no need for an additional, concurrent enforcement proceeding to be filed in Court.

[38] The defendants point to significant periods of time being required for the debts that had been legitimately proven to be paid by reference to the attachment orders.

[39] The defence says s 84I of the District Courts Act 1947 does not specify that an attachment order under s 84G of the District Courts Act 1947 operates as a stay of other enforcement proceedings.

[40] The defence makes the further submission that if the effect of the provisions were to limit the power of the creditor to make further demands additional to the enforcement the provision is equivocal and the rules relating to strict construction of penal statutes apply. The defence relies on *Police v Smith.*[17] The submission is made that if District Courts Act 1947 is capable of an interpretation which permits the conduct of the defendants, criminal liability should not be imposed.

Is the right of a secured creditor to realise its security limited by an attachment order?

[41] The defence submission is that it was unnecessary for the defendants to apply for variation of attachment orders before making representations that an increase in the amount which was paid from the attachment order was required by the debtor.

[42] The defendants submit enforcement proceedings to recover a judgment debt under the District Courts Act 1947 do not limit a secured creditor's right to enforce its security interest in consumer goods. The defence submits s 36 of the CRA anticipates and provides for the realisation of securities after judgment. Further it provides the power for the Court to adjust the judgment sum in the light of any proceeds of sale. *Osborne Building Ltd v Duncan*[18] is submitted to be a authority for the proposition that a security may be enforced after judgment is obtained in order to recover the amounts secured plus any interest secured. A creditor's rights under a security are submitted not to merge when judgment is obtained under a credit contract. The defendants submit there is no authority stating it is unlawful to issue a demand letter prior to initiating a repossession process.

The defendant maintains interest may be added to judgment debts after an attachment order is granted.

[43] Section 65A of the District Courts Act 1947 sets out:

> ***"Interest on judgment debts***
>
> *(1) In this section—*

[17] *Police v Smith* [1974] 2 NZLR 32.
[18] *Osborne Building Ltd v Duncan* Doogue J HC Hamilton WSI/92, 2 December 1992.

...

(2) Every judgment debt of an amount exceeding $3,000, or such other amount as may be fixed from time to time for the purposes of this section by the Governor-General by Order in Council, shall carry interest from the date of the judgment or order on the amount for the time being remaining unpaid.

(3) Such interest shall be at the rate for the time being prescribed by or under section 62B, and shall accrue from month to month.

(4) No interest shall be payable on costs incurred after the date of the judgment or order.

(5) Notwithstanding subsection (2) or subsection (3), where any enforcement process is issued in respect of the judgment debt, no interest shall be payable in excess of the amount specified in the process unless a further such process is issued."

[44] If the creditor elects to enforce a judgment debt, s 79(6) of the District Courts Act 1947 applies.[19]

[45] The defence submits the combined effect of s 65A and s 79(6) is that a judgment creditor can only seek a fixed amount of interest in an attachment order, but may later issue a concurrent or subsequent enforcement process to recover additional interest which accrues on the judgment debt. Further that this additional interest will be payable as a matter of course. It necessarily follows that it is lawful for a creditor to represent a right to claim interest on a judgment debt even after an attachment order is made. If the further interest is not paid on demand, a judgment creditor can apply to the Court for a further attachment order to enforce this right.

[46] The defence submit s 84I of the District Courts Act: (*"Effect of attachment orders"*) does not specify that an attachment order under s 84G is to operate as a stay of other enforcement proceedings or as a bar to interest accruing on the unpaid portion of the judgment debt.

[47] The defendant makes the additional submission that should the interpretation which is urged by the prosecution be preferred then the rule for strict construction of

[19] As set out at paragraph [36] above.

penal statutes ought to be applied and *Police v Smith*[20] should apply. (mirroring submissions summarised at [39] and [40] of this judgment.

Are the defendant companies permitted to add costs and interests to debts after repossession where there is a continuing security interest?

[48] A number of the charges here relate to purported enforcement of security agreements which had clauses allowing the secured party to enforce against all present and after acquired personal property ("APAAP clauses"). The defendants submit where APAAP clauses are present the loan contracts did not crystallise under s 31 and s 35 of the CRA following repossession. The effect of this was for the defendants to remain secured for the full amount of the remainder of debts together with interest under the contracts.

[49] Section 35 provides the following:

> ***"Limit on creditor's right to recover from debtor***
>
> *If the net proceeds of sale are less than the amount required to settle the agreement under s 31 as at the date of the sale, the creditor is not entitled to recover more than a balance left after deducting those proceeds from that amount (whether under a judgment or otherwise)."*

[50] Section 31 defines *"Amount required to settle the agreement"* which *"means the balance of the advance outstanding together with any interest and charges payable under the agreement"*. The defence refers to the consideration given by Panckhurst J in *Expansionary Holdings Ltd v Cambridge Discounts Ltd.*[21] This was not a case involving an APAAP clause (and was determined before APAAP clauses came into popular usage). Panckhurst J considered the effect of the predecessor provision under s 34 of the Hire Purchase Act 1971 and found the intention of this section is to crystallise the debt as at the date of sale, end the accrual of interest at the contract rate and oust the jurisdiction of the District Court to award interest on any judgment for the debt. The defence submit this is comparable to the way in which a claim in *persona* under a debt contract becomes crystallised at the date of judgment, and the rights under the contract merge with the contract.

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[20] Ibid.

[21] *Expansionary Holdings Ltd v Cambridge Discounts Ltd* HC Christchurch, (2011) 7 NZBLL.

[51] The defence submit it has not yet been considered by the Courts how s 35 of the CRA is to operate if there are multiple items of security for one debt. The question is raised by the defence is, does the debt crystallise after the sale of the first item repossessed? Or should *"net proceeds of sale"* in s 35 refer to the *"net proceeds of sale of all of the collateral"*, once all items have been repossessed and sold? The defence suggest that where the opportunity is available for property to be included in the security as it is obtained by the debtor the limitation proposed by s 35 of the CRA could not come into effect until all security, or at least all significant security, is repossessed.

[52] The alternative submission on behalf of the defendant is that the position is at least ambiguous and the strict construction of penal statutes requires the Court to interpret the provision strictly and in favour of not imposing criminal liability.

Are the charges filed out of time?

[53] The defendant repeat the submissions made during the pre-trial hearing of 21 March 2015. The defendant suggest the charging documents can be very broadly divided into three categories:

(a) Allegations that the defendants misrepresented the benefits of refinancing of Budget Loans Limited (three charges) – s 13(e) FTA.

(b) Repossession-related offences (112 charges) – s 13(i) FTA.

(c) Offences from attempts to enforce District Court judgments against debtors (10 charges) – s 13(i) FTA.

[54] The defendants seek dismissal of all the repossession-related offences that are alleged to have happened more than two years before the charges were filed.

[55] The defendant submits the applicable time limit is contained in s 41 of the CRA. The defendant relies upon the time limitation provision which is set out in the Act.

[56] The defendant also relies on *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council.*[22] In that case, the High Court considered a claim under the FTA by the Invercargill City Council against engineers that had contracted to peer review the design of Stadium South land. The claim alleged misleading and deceptive statements were made in a structural and design review letter relating to the stadium. The statements were that the design of the stadium was sound, however, these came into question when it collapsed years later during a heavy snow storm.

[57] The defendant engineers raised by way of defence the time limits set by s 393 of the Building Act 2004, which provides that civil proceedings relating to building work must be filed within 10 years after the dates of the act or omissions which proceedings are based on (i.e. the 10-year long stop provision). The time limit under the Building Act was expressly related to the defence to the FTA claim.

[58] The High Court accepted the argument that the proceedings based on breaches of s 9 of the FTA where statute barred by s 393(ii) of the Building Act. On reaching this conclusion, the Court relied on s 50 of the FTA (*"Saving of other law"*). Mander J stated at para [66][23] "*Section 50 ensures that, notwithstanding the creation of a new statutory bases for liability, contractual, tortious and other existing sources of liability are not affected. Equally, the provision contemplates the potential application of other legislation to a case which may involve the FTA and that the legislation is not to limit or affect the operation of that other legislation*". The defendant submits that it should be entitled to an order that all charges for repossession in related offences which are alleged to have occurred more than two years before the charges were filed are dismissed on the basis that they are out of time.

[59] An alternative submission is made that if the Court holds that the CRA has no application to the charges then the time limit in s 40(b) of the FTA apply, which at all relevant times provided as follows: *"Despite s 14 of the Summary Proceedings Act 1957, proceedings under this section may be commenced at any time within three*

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[22] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2014] NZHC 1439.
[23] Ibid.

years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered".

[60] The meaning of *"discovered or ought reasonably to have been discovered"* was considered in the context of the time limit for bringing civil claims under the FTA in the case of *Commerce Commission v Carter Holt Harvey*[24]. The civil time limit runs from *"the date on which the loss or damage, or the likelihood of loss or damage, was discovered or reasonably to have been discovered"*. In that case, the Supreme Court stated[25] at para 29 *"For present purposes, the concept of discovery entails finding something out, in the sense of becoming aware of it. An applicant discovers the loss or damage when he or she acquires knowledge of it"*. In the Court of Appeal, there was discussion of the *"extent"* of knowledge required. *"Extent"* in this context is not concerned with the quality of the necessary knowledge. It is concerned with the *"subject matter of that knowledge"*. *"It is neither necessary nor desirable to attempt some qualitative description of the knowledge inherent in the concept of discovery. Put simply, an applicant either is or is not aware of the loss or damage. Furthermore, if there is any doubt about whether the applicant was actually aware of the loss or damage, the enquiry then moves to whether the applicant ought reasonably to have been aware of it. The Court will then have to consider whether a reasonable person, situated as the applicant was, ought to have known that loss had occurred. No further refinement is required on either of these aspects of the matter"*.

[61] The defendant submits that the evidence in relation to C[redacted] W[redacted], S[redacted] R[redacted] *and A*[redacted] M[redacted] shows the prosecution was or ought to have been aware that the material required to set the time limitation period running was present when the complaints were sent by Ms McCullum and so the proceedings filed are out of time.

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[24] *Commerce Commission v Carter Holt Harvey* [2010] NZCCLR 17.
[25] Ibid.

Submissions of the Prosecution

[62] The prosecution submits that the conduct is within the scope of s 13(i) of the FTA. The prosecution maintains there is no doubt that the defendants were *"in trade"*. The defendants are said to have been working to make money from the provision of credit to customers. That is submitted to be a service. The prosecution submits it is a service that is not provided at a single point in time but it is provided on an ongoing basis, until the creditor is repaid.

[63] The prosecution submits the defendant companies provided services to two categories of debtors: those whose debts they purchased, and those whose debts they refinanced. The core service they were providing was the same in all instances – the provision of credit on agreed terms. It is submitted that it is factually incorrect to suggest that the defendants made no supply of credit to the debtors under the purchased loans. That is what they were doing from the point at which they purchased the debt. They were not acting as debt collection agents for another company (and even if they were, that too would be an act in trade). They were collecting the debts owed under the Credit Contracts. That was the *"business"*, their *"activity of commerce"*. The defendant's themselves were also of this view as can be seen from their correspondence in which they repeatedly refer to themselves as the creditor.

[64] On the prosecution submission it follows that the defendants were making representations in trade, when they made statements, sent documents or took actions in relation to the debts they had purchased, as they were under the refinanced contracts. There is no basis to distinguish between the two, particularly not in the application of consumer protection legislation. The prosecution submits it is illogical to suggest the FTA should cover the refinancing situation and yet not attempts to recover debts from the same class of consumers.

[65] The Commission submits that each of the specific representations relied upon was made *"in trade"* and refers to *Concrete Constructions.*[26] In most cases the representations were made to the debtors directly referring to the purchased loans.

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[26] Ibid.

They related to action the defendants asserted they had a right to take in dealing with those loans. The representations either related to repossession action the defendants said they were entitled to take or their asserted rights to add interest and costs to the debt, all of which was *"in trade"*. In those circumstances it is submitted for the prosecution that there can be little argument about the close connection between the representations and the defendant's trading activity.

[66] The prosecution submits that because the representations often related to asserted contractual rights, this does not remove the defendants conduct from being in trade. The prosecution distinguish *Desmone*[27] on the basis that Hansen J's observations do not provide a blanket rule that representations as to rights under a contract will never amount to conduct *"in trade"*. Rather as noted in *McVicker v Vodafone,*[28] they "merely highlight ... *the need to assess the activity in question against the underlying purpose of consumer protection"*.

[67] In relation to *Malayan Breweries*[29] the prosecution says this related to actions between shareholders and directors. A shareholder asserting their statutory rights against a company or complaining about the company to a regulatory agency is not *"in trade"* as to come within the provisions of the FTA. The prosecution maintain the present case is far removed from *Malayan Breweries.*[30] These representations were made in the course of the defendant's core trading activity. They were statements of the defendant's rights, as to repossession and of rights in connection with judgments, made to the consumers they were seeking to recover money from.

The prosecutor submits the commission does not need to prove the representations were received by the debtors for the conduct to breach the Fair Trading Act 1986.

[68] The Commission submits that it need not prove that debtors were actually misled. Accordingly the act of representing is made out when it is irrevocably set

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[27] Ibid.
[28] *McVicker v Vodafone* (NZ) HC Auckland CIV-2005-404-180 3 April 2005.
[29] Ibid.
[30] Ibid.

forth or disseminated upon a course which is intended to lead to the representee, or the representees.

[69] The prosecutor relies on *Thompson v Riley McKay Pty Limited (No 2)*[31] and submits that it is not necessary for the representation to actually reach the representee. The authority of *Thompson v Riley*[32] was cited with approval by the Court in *Commerce Commission v Megavitamins*[33] where the Court said[34] *"in essence a representation is the making of a statement of fact intending it to be received by another"*.

[70] The prosecution also submits representations provided to agents are representations made *"in trade"*.

[71] The prosecutor submits that most of the representations in this case were contained in documents sent directly to debtors. However, in some cases the alleged representation relied on was contained in an authority to act document issued by either of the defendants to the repossession agents (authorising them to carry out repossessions). In some of those cases it cannot be established by the prosecution that those documents were shown to the relevant debtors. In those circumstances, the issue is whether a representation made to a repossessing agent is a representation *"in trade"*.

[72] It is also submitted that representations made *"in trade"* for the purposes of s 13 of the FTA need not be made to a consumer specifically.[35] The prosecution submits in every case the provision of a document affording to give authority to repossess – was an act sufficiently connected to the defendants trade activity to be covered by the FTA. The authority for this is *Concrete Constructions.*[36]

[73] The prosecutor submits the instruction to act was a key step by the defendants in the exercise of their asserted legal rights. The fact that the agents did indeed take

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[31] *Thompson v Riley McKay Pty Limited (No 2)* (1980) 29 ALR 267.
[32] Ibid.
[33] *Commerce Commission v Megavitamin Laboratories (NZ) Ltd* (1994) 6 TCLR 95.
[34] Ibid at page [100].
[35] *Concrete Constructions* (Ibid).
[36] Ibid.

the documents and/or repossess property or attempt to do so may be seen from the loan notes records and communications that have been provided in evidence. This the prosecution submits, is not a situation where conduct stays internal to the defendant companies.

[74] The prosecutor relies also on Mr Wayne Hawkins, in his first interview, stating that the defendants used independent contractors to undertake repossession.[37] It means that the authority to act documents contained a representation to an agent external to the defendant companies to carry out repossessions.

The representation must be in connection with the supply of services.

[75] The defendant's argument is that the *"supply of services"* covers only the initial granting of a loan to a debtor.

[76] The defendants' submit being the act of debt collecting does not amount to a supply or acquisition of a right, it is merely an exercise of rights.[38]

[77] The prosecutor submits this confuses the elements of the charge. The prosecutor maintains that the representations must be made in connection with the *"supply of services"* (here the provision of credit) concerning the *existence of a right"*. The representation does not have to be in connection with the supply of rights.

[78] The prosecution maintain that the definition of *"services"* include *"facilities that are or are to be provided under any contract"* including (at (d)) *"any contract for, or in relation to the lending of money or the granting of credit"*. Those words been said to clearly include the service the defendants provide – that is the provision of credit.

[79] The prosecutor's argument is that the service provided by the defendants in this case is ongoing provision of credit to debtors. The prosecutor submits there was a benefit to the debtors, from the continued provision of credit, and it is in the

[37] Mr Hawkins interview 30 September 2013, page 52.
[38] Paragraph 21 of the defendants submissions.

exchange for that benefit that the debtors agreed to pay interest to the defendant. That is both a service and a fundamental premise of the defendants' business.

[80] The prosecutor submits further, the specific requirement under 13(i) of the FTA is that the representation be *"in connection with the supply of services"*. The prosecutor submits this definition is wide enough to capture conduct that occurs before, or after, the loan sales had taken place.[39] The Commission says that although the defendants made some of the representations after judgment, does not alter the position under the FTA.

[81] With the issue of the existence of *"a right"* the defendants alternatively argue that representation does not concern the existence of *"a right."*[40] The prosecutor submits that this argument is answered on the plain wording of s 13(i) i.e. *"no person shall ... in trade .... Make a false or misleading representation concerning the existence of a right"*. The prosecutor submits that to suggest that the provision is only directed at representations targeting the rights of the consumer, and thereby excludes a trader who misrepresents their own rights, neither accords with the wording of the section or the purpose of the FTA. The section could easily have referred solely to the rights of the consumer, but it does not. The prosecutor submits both are included and a trader misrepresenting their own rights will be misrepresenting the rights of the consumer at the same time.

[82] The defendants argue their interpretation is supported by *Australian Competition & Consumer Commission v McCaskey.*[41]

[83] That case related to things a debt collector had said in endeavouring to collect sums on behalf of clients. The Court was concerned about the application of a consent declaration in some circumstances and refused to make the proposed consent declaration.

[84] The Court went on to say:[42]

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[39] *Foodtown Supermarkets Ltd v Commerce Commission* [1990] 3 TCLR 466.
[40] Paragraphs 49-60 of the defendants submissions.
[41] *Australian Competition & Consumer Commission v McCaskey* [2000] FCR 1037; (2000) 10 FRC 8.
[42] Ibid at paragraph 36.

"It may be possible to read this provision as covering the case in which a right or remedy is asserted by the supplier against the purchaser relating to the suppliers right to payment and remedies for that right. But this is a strained reading and a doubtful construction. In any event it is not the reading relied upon in the proposed declaration. Alternatively it might be argued that the representations are made in connection with the supplier of debt collecting services to clients of cash return, albeit the representations are made to third parties who on this analysis are neither supply nor purchasers. This is the application of the provision relied upon by the ACCC. This also, in my opinion, is a doubtful construction involving no representations to the consumer of the relevant services or any agent or other party who might convey a representation to a consumer. Rather it relies on a representation made to a suppliers customer by a person seeking to collect payment on behalf of the supplier."

[85] Given the absence of analysis or argument on the issues, the Judge was not prepared to make the declaration.[43]

[86] The prosecutor submits the issues that arose on the interpretation that most concerned the Court in *McCaskey*[44] do not arise in this case. The representations here are made to the debtors themselves (or the defendant companies agents). The Commission submits there is no cause for concern that s 13(i) should be restricted to an assertion as to the consumers rights. The purpose of the legislation in its plain wording clearly captures a misrepresentation of the suppliers rights against the consumer as well, particularly given that the statement of those rights necessarily involves the consumers rights in any event.

[87] The prosecutor submits the situation of an independent debt collector asserting rights against a customer of the person whom supplied consumer goods or services is a separate situation from that in which the representation of rights is directly related to the goods or services provided. Here the assertion of rights relates

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[43] Ibid at paragraph 40.
[44] Ibid.

to issues in respect of the loans that were outstanding and so is tied directly to the services that the defendant companies are said to have been supplying.

The presumption that penal statutes must be strictly construed.

[88] The defendants have relied on the presumption that penal statutes must be strictly construed to argue that if the provisions at issue are capable of permitting the conduct of the defendants the matter should be decided in their favour.

[89] The prosecution submits that the High Court has recently considered that principle in the FTA context. In *Progressive Enterprises v Commerce Commission*[45] Asher J in consideration of s 17 of the FTA said at [55]: *"In reaching this conclusion I observe that I do not apply any presumption of interpretation that penal statutes must be strictly construed. Nor do I assume that the mens rea imposed in s 17 is tantamount to fraud. I made such obiter observations in CC v Vero Insurance NZ Ltd,*[46] *a case concerning the application of s 13(e). With the benefit of full submissions on the interpretation of s 17 in this appeal, I consider those observations to have been unhelpful for the purpose of this interpretation exercise. The Fair Trading Act does not create truly criminal liability, indicated by the fact that no sentence of imprisonment can be imposed and because its purpose is regulatory. Presumptions of interpretation applicable to criminal statutes will not greatly assist, nor will analogies with civil law concepts.*

Requiring payments in addition to attachment orders breaches the District Courts Act.

[90] The prosecution refer to s 79(6) of the District Courts Act 1947. The prosecutor does not dispute that multiple enforcement processes are available under the District Courts Act and these may be taken by a creditor concurrently. Further, the adoption of one right under the District Courts Act 1947 does not *"stay"* the others. The prosecutor argues that the defence approach of separately and unilaterally (without recourse to the Court) attempting to enforce the original

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[45] *Progressive Enterprises Ltd v Commerce Commission* (2009).
[46] *Commerce Commission v Vero Insurance NZ Ltd* (2006) 11 TCLR 779 at 784.

contractual right of interest in addition to that authorised by the Court process is incorrect for three reasons.

(a) Contractual rights to interest merge in a judgment debt unless there are specific provisions to the contrary. *Economic Life Assurance Society v Usborne.*[47]

(b) The defendants interpretation – that they are entitled to both obtain attachment orders and to separately require the contractual right to interest – undermines the purpose of attachment orders.

(c) Section 79(6) makes it clear the ability to run concurrent enforcement processes relates to Court enforcement processes and is subject to the restrictions contained in that section.

[91] The prosecution submit that it is no answer for the defendants to say that they could have obtained a variation from the Court and so the conduct is justified. It is not possible, the prosecution argue, for the defendant companies to assert that a Court would have allowed the payments to be increased had they applied for a variation. No variation was applied for. The defendant companies representation was that they were entitled to a higher rate of repayment with repossession threatened where the debtor did not agree to pay sums greater than the attachment orders. To be in such a position required applications to the Court which were never made.

Adding interest to loan after attachment order is made is not permissible unless the court orders it by another attachment order.

[92] The defendants similarly submit that they are legally entitled to demand repayment of interest added to a debtors loan after an attachment order has been made by the Court.

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[47] *Economic Life Assurance Society v Usborne* [1902] AC 147 (HL).

[93] The defendants again rely on s 79(6) to assert that they can run an alternative enforcement process to that provided by the Court.

[94] The prosecution submits the defendants argument overlooks both the wording in s 65A(5) and the wording of the representations that they made. The prosecutor submits it is clear from the wording s 65A(5) that the only way the defendants can obtain further interest post attachment order is to issue an enforcement process with the Court to obtain it. Without such an application the defendant had no entitlement to assert a right to increased interest. The defendants had written to the debtors and outlined that they considered further interest was owed. This could only be done where the contract allowed for interest to continue post judgment – (the assertion of the Commission is that these contracts did not) and where on application to the Court for this additional interest, the Court allowed it. That would be permissible but this, on the prosecution argument, is not what occurred. The prosecution rely on the example of Ms M[redacted]'s case.[48]

[95] The Commission submits;

(a) Once an attachment order (or any other enforcement process) is issued, the defendants are not entitled to add any further interest to a debtor's loan without the Court ordering it following a further enforcement process.

(b) The starting point is s 65 of the District Courts Act 1947, which provides that a judgment of the Court, once granted, is final and conclusive (of the issues) between the parties and may only be altered on appeal or review. Consequently a judgment debt or an attachment order issued under s 84G of the District Courts Act 1947 is final as between the parties.

(c) More specifically, s 65A of the District Courts Act 1947 covers the imposition of interest on judgment debts. Section 65A(2) provides that every judgment debt of more than $3,000 shall carry interest from

[48] Prosecution Witness bundle no 2 at page 4.

the date of judgment until paid. However s 65A(5) qualifies that, stating that where an enforcement process has been issued (e.g. an attachment order) *"no interest shall be payable in excess of any amount specified in the process, unless a further such process [enforcement order]is obtained"*.

[96] The prosecutor submits the defendants' position is misconceived for two reasons:

(a) In the case of the three debtors falling under this category of conduct ([redacted], [redacted] and [redacted]), the defendants do not have a continuing contractual right to be paid interest on the judgment debt obtained, on which they could make demand. The only interest to which they were entitled is the interest that was included in the original debt. Subsequent statutory interest that accrued from the date of judgment was included in the attachment order made in each case.

(b) Even if that was not the position, the specific effect of s 65A(5) of the District Courts Act 1947 is that no interest (whether contractual or statutory) is payable once an enforcement process has been issued, unless a further enforcement process is issued that provides for it.

[97] The prosecutor submits that accordingly the defendants did not have a right to be paid additional interest accruing after the attachment orders had been made. The only opportunity for such right would be upon obtaining a further attachment order providing for it.

[98] The prosecutor submits in none of the four charges arising in this category did the relevant defendant obtain a further attachment order from the Court. For that reason the defendant did not have a right to be paid further interest by the debtor which was not included in the first attachment order. The representations to the contrary are submitted to constitute an offence under s 13(i) of the FTA.

Adding interest and costs after repossession and sale of goods, breaches s 35 of The Credit (Repossession) Act 1997.

[99] The prosecution submits that the presence of an all present and after acquired security provision does not allow subsequent enforcement and limits the amount a creditor may recover remain. Specifically it provides that if the net proceeds from the sale of goods is less than *"the amount required to settle the agreement"* as at the date of sale, then the creditor is not entitled to recover more than the balance left after deducting those proceeds from that amount (whether under a judgment or otherwise).

[100] Section 31(2) the CRA defines *"the amount required to settle the agreement"* as:

> (a) *...the balance of the advance outstanding, together with any interest and charges payable under the agreement; and*
>
> (b)... [repealed]
>
> (c) *Includes the reasonable costs and expenses of the credit of an incidental to taking possession, of holding, storing, repairing, maintaining, valuing and preparing the sale of, the consumer goods and returning them to the order of the debtor, and*
>
> (b) ...
>
> (c) *Includes the cost reasonably and actually incurred by the creditor in doing any act, matter, or thing necessary to remedy any default by the debtor.*

[101] The prosecution maintain that the policy of the Act and the intention of s 35 go to a limitation of the debt by crystallisation of the amount left owing once repossession has been carried out.

[102] In addition s 42 of the CRA contains a prohibition on contracting out of that Act. It follows that the defendants cannot point to the all present and after acquired security clause to support the argument that s 35 does not apply. The combined effect of s 35 and s 42 is submitted to be plain. There has been a repossession and sale accordingly the debtor is restricted to the sum left after the sale of repossessed goods.

Charges are all within the applicable time limitation period.

[103] The prosecution submits the appropriate consideration is under the FTA not the CRA. The reason for this on the prosecution submission is that the prosecution has been filed under the FTA and references to other legislation are inapplicable.

[104] The prosecution submit there is nothing in s 50 of the Fair Trading Act 1986 nor in *Southland Indoor Leisure Centre v Invercargill City Council*[49] which imposes time limitation on the facts present here.

[105] Consideration of the factual basis upon which the Commission could reasonably have discovered matters giving rise to the charges is relevant here. The prosecution submission, is the date on which the relevant debtor file was received by the Commission is when it could reasonably have discovered matters.

[106] The defence have relied upon *Commerce Commission v Carter Holt Harvey.*[50] The prosecution submit this is distinguishable. That case involved reasonable discoverability in the context of a civil claim requiring proof of loss under s 43 of the FTA. The Court held that *"what the applicant must ... know to set time running in respect of past loss, is that it is more probable than not that loss has occurred."*

[107] The prosecutor submits that in the context of criminal proceedings the commissioners are required to have a high level of knowledge that contravention has occurred before time starts running. In order to have discovered a contravention the Commission must have an opportunity to assess the information they have been

[49] *Southland Indoor Leisure Centre v Invercargill City Council* [2014] NZ HC 1439.
[50] *Commerce Commission v Carter Holt Harvey* [2009] NZS 120.

given. Here it was in the context of a complaint. The complaint could conceivably have been wrong. The Commission needed to have an opportunity to assess whether the conduct complained of had occurred. The prosecutor submits it is only in carrying out that exercise could it be said the commission actually discovered something.

[108] In the case of Ms W[redacted] the knowledge required to commence time to run to limitation occurred when Mr McIvor received her file from Ms McCullum on 23 March 2012 and carried out an assessment of it. The date of filing of the proceedings therefore was within the requisite period of time available under the FTA.

Consideration

Were the defendants making the alleged representations *"in trade"* or *"in connection with the supply or possible supply of services"* or *"concerning the existence of rights"?*

[109] The statutory definitions in the FTA are widely drafted. The case law suggests a broad approach to the definitions is required. In this case the distinction between conduct and representations is not material. In many respects the representations charged were followed by conduct reinforcing the stated position.

[110] The distinctions the defence attempts to draw are not real. These were companies which had as a core part of their business the recovery of money lent to debtors. The defendant companies would carry out collection functions relying on the loan contracts which they had purchased but what they were doing was providing credit to the debtors with a charge being made for that credit. Interest continued to accrue on the loans. Collection of that accruing interest and the principal advanced was the business of both defendant companies.

[111] *Desmone Limited*[51] related to an arm's length negotiation for premises and equipment that were required to support a business. In *McVicker v Vodafone*[52]

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[51] Ibid.

Associate Judge Abbott commented that *Desmone* was *"an illustration of the need to assess the activity in question against the underlying purpose of consumer protection"*. The original transaction did not have the characteristics of *"trade"* associated with it. Similarly *Malayan Breweries Limited*[53] related to an inter-company dispute between shareholders and the company's board of directors. This was not an *"in trade"* situation either.

[112] Here *"in trade"* representations about the defendant company's rights to the way money could be recovered from debtors was an intrical part of both defendant's company's businesses. The prosecution submissions are accepted on this issue.[54]

[113] The character of the businesses which were operated and which are demonstrated in the interview which were given by Mr Wayne Hawkins, show the matters which are the subject of the prosecution are *"in trade"* and also are *"in connection with the supply of services."*

[114] The application on the basis of those aspects were not present is dismissed.

Were the alleged representations internal communications not regulated by the FTA?

[115] The representations in this case have a factual character. They related to obligations said to exist on the part of the debtors. The defendant company said the debtors were obliged to do certain things. The obligations were expressed as continuing as was the provision of the credit in the form of loan balances.

[116] In addition the defendant companies represented that if the things they said were not done then the defendant companies would carry out processes including repossession. These communications were in a number of cases directly to the debtors and in others they were forwarded to agents for the repossessions to take place.

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[52] *McVicker v Vodafone* HC Auckland CIV-2005-404-180 3 April.
[53] Ibid.
[54] Paragraphs 61-66 (inclusive) above.

[117] The prosecution acknowledges the instructions to repossession agents were not always conveyed to the debtors. Once a representation in the form of an authority to repossess was formulated and disseminated it was known that these authorities would be acted upon. That is sufficient for the purposes of an actionable representation being present. The prosecution is not required to prove that any debtor was actually influenced by the representations. In some cases representations related to assertion of rights obtained under judgments but this does not remove from those representations the character of being in connection with services supplied by the defendant companies. They related to obligations the debtors were told existed or that were said to apply to debtors.

[118] The defendant companies rely upon *Concrete Constructions (N.S.W.) Pty Ltd.*[55] This case is readily distinguishable because the representations in that case related to activity separate from the provision of goods or services supplied by the company. In that case it related to an instruction to an employee and not an instruction to be disseminated outside the company's own structure. The conduct here is linked between the commercial activities of the defendant companies and the actions of their agents. See *Orison v Strategic Minerals.*[56]

[119] The provisions of the FTA expressly include representations to agents as being caught by the provisions of the Act.[57] Here it was acknowledged by Mr Wayne Hawkins in his interview that independent agents were used for the purposes of carrying out repossessions. The authorities which were provided to the agents were intended to be acted upon and constituted actionable representations. This basis for the defendants s 147 application also fails.

Was the representation of a *"right"*?

[120] The defendants rely upon *ACCC v McCaskey.*[58] In that case an independent debt collector was endeavouring to collect debts owed to third parties. The distinction from the present case is that the debt collectors there were entirely

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[55] Ibid.
[56] *Orison v Strategic Minerals* (1987) 77 ALR 141 [131] – [132].
[57] See s 45 FTA.
[58] Ibid.

independent of the suppliers of the goods and/or services. In this case the relationship between the debtors and the defendant companies was that of the supplier of a financial service namely credit and the recipient of that supply. The distinction is significant.

[121] The prosecution submission is that the incorrect assertion of a right by a supplier of credit directly compromises rights that are due to the consumer. If the lender could unilaterally place a debtor into default and repossess their goods that would significantly impair the value of the credit provided. The actions of the defendant company directly affected the debtor's rights in relation to the loans they had. The relationship *"in trade"* continued while the loan was in existence. The supply of the funds remained and the obligation to pay off the loans continued. They were continuing relationships.

[122] Accordingly the submissions made in the alternative on the part of the defendant companies that the proceedings could not succeed for failure to fit within the FTA are dismissed.

Were the alleged representations allowed or at least not disqualified by the District Courts Act 1947 and the Credit (Repossession) Act 1997?

[123] It is possible to issue multiple proceedings under the District Courts Act 1947.

[124] The selection of one form of process does not *"stay"* other potential processes. Notwithstanding the above s 79(6) of the District Courts Act 1947 only allows for other court processes.

[125] To represent a right to further interest post judgment (which may only lawfully relate to interest where there is a provision preserving it from merger on judgment)[59] is only possible by way of a further court process being undertaken.

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[59] *Economic Life Assurance Society v Usborne* [1902] AC 147 (HC).

[126] It is therefore a false representation to require extra payment during the currency of an attachment order unless the debtor is also informed that any payment greater than the existing attachment order may only be required if the court makes a further order allowing it.

[127] Making a request for interest under a contract at the contractual rate may not legitimately occur where an attachment order is present unless the court has provided for an additional interest payment. The representation by the defendant companies that the loan repayments which had been ordered under the attachment order were inadequate and further processes including repossessions would follow, was an incorrect statement of the position.

[128] In addition the facts, as provided in Mr Wayne Hawkins interview, were that it was never envisaged by the debtor companies that subsequent Court processes would be carried out because of the expense.

[129] Both on the basis of the legal argument and by reference to the evidence which I heard, I find that the representations in the form in which they were delivered to the debtors were false representations. No basis for suggesting such an approach was justified may be found in either the District Courts Act 1947 or the CRA.

Was it permissible for the defendants to add interest to judgment debts after an attachment order was granted under the District Courts Rules 2014?

[130] To have charged interest after judgment could only have been lawful if the right to charge interest post judgment was specifically recorded in the contract between the defendant company and the debtor. The usual rule is that the right to charge interest merges with the judgment. *Economic Life Assurance Society v Usborne*[60].

[60] Ibid.

[131] Where it is permitted for applications for additional interest after attachment orders to be made following judgment, the only basis upon which further interest could be claimed is upon the Courts consideration of a further application.

[132] To assert a right to claim additional interest while an attachment order was on foot without making it clear that this would be subject to the requirement that an application be made to and granted by the Court, was a misrepresentation of the facts.

Was it permissible for the defendants to add costs and interest to debts after a repossession had been carried out, where there was a continuing security interest? In the alternative is s 35 of the Credit (Repossession) Act 1997 ambiguous?

[133] Section 35 of the CRA provides the debt is crystallised after the sale of the repossessed good. The remaining balance is the maximum sum which the creditor may recover.

[134] Clearly if a repossession has taken place and additional sums are added to the debt that is in breach of the statutory provision and unlawful.

[135] In this case in a significant number of the charging documents the contract which was in force between the defendant companies and the debtors contains an all present and after acquired security clause.

[136] This theoretically could enable multiple repossessions on the part of the defendant companies.

[137] The law has been altered to capture the situation in which the potential security available for repossession may extend beyond that originally held by the debtor. The law as it stands now would prohibit the addition of charges and costs following repossession and sale of goods.[61] The impact of the legislation referred to

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[61] Credit contracts in Consumer Finance Act 2003 s 9(e), 9(g), 9(h) and schedule 1AA Credit Contracts And Consumer Finance Amendment Act 2014 s 4(2) and Credit (Repossession) Amendment Act 1999 (no 127), s 4 Credit (Repossession) Amendment Act Commencement Order 2002 (SR) 2002/61), clause 2.

clarifies the position in relation to the enforcement of after acquired securities and the code supports the standards required in relation to using the legitimate security enforcement provisions.

[138] Both the Law Commission[62] and *Fentons Law of Personal Property New Zealand*[63] acknowledge there was ambiguity as to how s 35 applied when loans were secured by multiple items of property by an all present and after acquired securities clause. The portion of s 35 which comes for consideration is how the net "*proceeds of sale*" should be determined when the potential for continuing repossessions and sale is at least arguably present.

[139] The provision in force at the time and which is relied upon by the prosecution is in a form which did not specifically address the potential for a creditor to repossess security on a continuing basis.

[140] The original application under s 147 referred to charging documents which have been amended and some new charges have emerged. There are instances in which s 35 of the CRA was in force and the addition of interest and/or costs after repossession could not be justified.[64]

[141] In respect of H [redacted] S [redacted] there was an all present and after acquired security clause but repossessions were attempted at least 10 times. By 14 February 2013 the loan notes[65] indicate little or nothing of security value remained. To suggest that the presence of the provision could allow the legitimate use of repossession offends justice. It is not arguable that potentially the right to rely on a security provision could potentially extend as far as the defendant company took it in this case. CRN's ending 982 and 213 are capable of being established to the required criminal standard.

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[62] Consumers & Repossession: a Review of the Credit (Repossession) Act 1997 Report 124, April 2012.

[63] 7th Edition, Lexus Nexus NZ Ltd 2010 at Vol 2 chapter 22.11.

[64] H [redacted] T [redacted] CRN's ending 0238, 0242, R [redacted] C [redacted] CRN's ending 0245, 0243, M [redacted] K [redacted] CRN's ending 0208, 0249 I [redacted] T [redacted] CRN's 201,203.

[65] Prosecution Exhibit bundle at page 1020 and 1022.

[142] While keeping in mind the decision in *Progressive Enterprises v Commerce Commission*[66] (that because these are regulatory provisions, an application of the strict rules for construction of penal statutes is disapproved), this is a situation of concern. The law in relation to potential multiple repossessions was uncertain, save for Mr S[redacted] where plainly the repossessions could not be saved by the right to repossess present or after acquired property. The application of s 35 the case of the other debtors is unclear.

[143] The consequence is that I cannot say the right to additional interest or further costs after repossession of part of the security was not present in the following CRNs: 0216, 0248, 0210, 0218, 0246, 0247, 0214, 1481, 0201, 0204, 0202, 0222, 1478, 0206, 0215, 0207, 0212, 0209[67] and 1480[68].

[144] Accordingly pursuant to s 147 of the Criminal Procedure Act 2011 the above nineteen charging documents are dismissed as the prosecution cannot establish the required elements of the offences or at least cannot exclude a reasonable doubt about them.

Charges filed out of time?

[145] The charges here relate to charges laid under the FTA. Other acts limiting proceedings need not be considered. Here the limitation period is prescribed by the act under which the proceedings have been brought.

[146] The distinction between the long stop ten year limitation period for Construction Contracts is unrelated to the circumstances here. In this case the application of the CRA is but one factor in the consideration of the matters before the Court.

[147] The limitation period in this case is three years, after the matter giving rise to the contravention was discovered or reasonably ought to have been discovered. Key words in the provision are *"the contravention"*. The contravention of a provision

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[66] *Progressive Enterprises v Commerce Commission* Ibid
[67] Prosecution exhibit list p 1343 (ALL PAAP present).
[68] As in 66.

necessarily involves an assessment of the factors present. Here complaints were received but the merit or otherwise of such would be uncertain until the details between the defendants and the complainants could be assessed. In many respects Ms McCullum did report matters that are legitimate complaints but until the files were examined the Commission did not know that.

[148] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*[69] is authority for the effectiveness of the ten year limitation provision in civil actions in constructions cases. There is no corresponding limitation in the CRA or the FTA.

[149] In *Commerce Commission v Carter Holt Harvey*[70] the issue of *"knowledge"* in the civil loss context was considered. In that case on the same facts as the civil issue the defendant company plead guilty in the District Court to s 13 charges. No issue of limitation in the criminal sense was pursued by the appellant company. The discussion of *"knowledge of loss or damage"* is restricted and is distinct from the situation here.

[150] The earliest opportunity the prosecution could reasonably have had to carry out the assessment which is required to contemplate criminal proceedings was 23 May 2011 when the debtor files in relation to the various complainants where available for consideration by the Commerce Commission. On the facts here time did not begin to run until those documents were in the hands of the Commerce Commission.

[151] On that basis all of the charges are filed within time.

[152] Accordingly the application under s 147 of the Criminal Procedure Act 2011 succeeds in respect of the nineteen charging documents referred to above. Otherwise the s 147 applications are dismissed and the charges must be considered on the assessment of the evidence provided by the prosecution, on the basis of proof beyond reasonable doubt.

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[69] Ibid.
[70] Ibid.

[153] Some subsidiary arguments have been raised with respect to consideration of the case on the basis of the ordinary criminal standard and that will be addressed in a substantive decision which will follow.

D J Sharp
District Court Judge