IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2008-404-0165

PROGRESSIVE ENTERPRISES LIMITED
Appellant

v

COMMERCE COMMISSION
Respondent

Hearing: 17 November 2008

Appearances: D Goddard QC and M Harris for Appellant
J Dixon for Respondent

Judgment: 23 December 2008 at 5:00 pm

JUDGMENT OF ASHER J

This judgment was delivered by me on 23 December 2008 at 5:00 pm pursuant to Rule 540(4) of the High Court Rules

…………………………………………..
Registrar/Deputy Registrar

…………………………………………..
Date

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Introduction

[1] Progressive Enterprises Limited ("Progressive") appeals its conviction in the District Court at Manukau on 17 charges laid under ss 17(a) and 40 of the Fair Trading Act 1986. The charges arise from Progressive's supply of goods bearing an offer of prizes when, as Progressive accepts, the prizes were in fact no longer on offer and would not be provided. The central issues are whether mens rea is required to establish an offence under s 17, and if so, what is required to prove that mens rea.

Background

[2] An agreed summary of facts was presented to the District Court. No evidence was adduced.

[3] Progressive owns 148 Foodtown, Countdown and Woolworths supermarkets nationwide, as well as an interest as franchisor in other chains. Progressive markets certain in-house products in all its supermarkets under its "Signature Range" brand. The conception, development, sourcing, promotion and advertising of its in-house brands, including the Signature Range line of products, was contracted to a third party, Daymon Associates ("Daymon"). The events in question took place while Daymon was still managing the Signature Range line of products, although during the course of the promotion Progressive gave Daymon informal notice that it would be terminating the arrangement in the following year.

[4] The in-house products marketed under the Signature Range brand included various cereals. In mid-2006 Daymon proposed to Progressive that it launch the Signature Range cereals by a promotion that offered trips to the Hunter Valley in Australia as prizes ("the promotion"). A roundel (a round printed sticker) offering the opportunity to enter a draw for "one of 5 uplifting trips to Hunter Valley, Australia" was affixed to the front of all the cereal packs involved in the promotion ("the cereal packs bearing promotional roundels"). Thus customers would be informed by the roundels that they could win one of five trips to the Hunter Valley. The roundels did not identify the dates on which the competition began or closed.

[5] During the course of the promotion each cereal pack bearing a promotional roundel contained a pamphlet setting out the details of the competition, including the closing date. Details of the competition would thus only be seen once the cereal pack was purchased and opened. To enter the competition a purchaser was required to fill in part of the pamphlet with his or her name and address, which would then be placed in a box for the ultimate draw.

[6] A piece of printed plastic known as a "wobbler", which gave details of the prizes offered, would hang from the relevant shelves in the supermarket.

[7] Neither the roundel, the wobbler nor indeed any of the point of sale advertising for the promotion stated the closing date for the competition. The closing date could only be discovered after the cereal was purchased, the package opened and the pamphlet read.

[8] The cereals involved in the promotion were produced by two New Zealand cereal manufacturers, Hubbard Food Limited ("Hubbard") and Smart Foods Limited ("Smart Foods"). Daymon arranged for Hubbard and Smart Foods to prepare the promotional material for the cereal packs, which were to be delivered with the cereal packs when they were delivered to Progressive supermarkets.

[9] The cereal packs bearing the promotional roundel and containing the competition pamphlet first began appearing on supermarket shelves in the week commencing 2 July 2006. More of these cereal packs appeared on supermarket shelves in the week commencing 16 July 2006. Advertising materials in the supermarkets promoted the competition. The cereal packs bearing the promotional roundel and containing the competition pamphlet continued to be delivered in the weeks that followed.

[10] The closing date for entry into the competition was 31 August 2006. On 23 August 2006 Hubbard contacted Daymon about what it should do in respect of promotional material on the cereal packs that it would be delivering after 31 August 2006. Daymon instructed Hubbard to destroy the promotional material.

On 22 September 2006 an employee of Progressive approved a payment to Hubbard for the cost of destroying the promotional packaging.

[11] The draw was duly held on 31 August 2006 and five winners were notified. Neither Daymon nor Progressive gave instructions to the supermarkets as to what to do with the remaining cereal packs bearing the promotional roundels. Further, both Hubbard and Smart Foods continued to produce cereal packs bearing the promotional roundels. Smart Foods continued to deliver cereal packs bearing the promotional roundels to Progressive distribution centres until mid-October 2006 and Hubbard continued to do so until 12 December 2006. Progressive's management staff were not aware that deliveries of the cereal packs bearing the promotional roundels were continuing.

[12] On 28 September 2006 Progressive approved a poster to be displayed in stores announcing who had won the prizes in the competition. The winners' names were posted on Progressive's website.

[13] On 6 October 2006 Progressive received a complaint from a customer that he had purchased a pack of "Light and Fruity" cereal bearing the promotional roundel but which did not contain details of the competition. This complaint was passed to Progressive's customer complaint free-phone number but it was not passed on to the person responsible for in-house brands, Ms Sally Inkster. Ms Inkster had joined Progressive on 20 September 2006.

[14] On 11 October 2006 Ms Inkster noticed a promotional wobbler that did not identify the competition closing date while visiting a supermarket. The next morning she put a message in the daily bulletin sent to supermarket store managers, reminding them that the competition had closed on 31 August 2006 and instructing them to remove all point of sale promotional material immediately. At that stage Ms Inkster thought that the promotion only involved advertising such as the wobbler. She was not aware that cereal packs bearing promotional roundels had been produced, and was not aware that some such cereal packs might still be in the supply chain.

[15] Another customer, a Mr James Hollis, made a complaint on 17 October 2006, advising that cereal packs bearing the promotional roundel had been on display since the competition had closed. It is not known when that letter was received by Progressive.

[16] On 25 October 2006 Ms Inkster sent a message to all stores asking them to display the winners' poster prominently so that customers were aware that the competition had closed. She reminded them again to "PLEASE REMOVE all point of sale which advertises the promotion". Ms Inkster was at that time still unaware that cereal packs bearing promotional roundels had been produced, and that some such cereal packs might still be in the supply chain. Ms Inkster had also not at this point been informed by Progressive staff of the 17 October 2006 complaint from Mr Hollis.

[17] Ms Inkster was informed of Mr Hollis' complaint on 31 October 2006. Daymon proposed as a solution that a sticker be placed over the roundels. Progressive agreed to this. Stickers along with a memorandum of explanation were sent to supermarket managers on 3 November 2006.

[18] On 10 November 2006 Progressive responded to Mr Hollis' complaint and apologised for its lapse in "quality care". Progressive stated that it had spoken to the relevant store manager, had since produced stickers to cover the promotional roundel and had issued a "winners' poster" to all stores. It gave Mr Hollis a voucher for $10.00.

[19] The same day the Commerce Commission advised Progressive that it had received a formal complaint from Mr Hollis. Progressive responded, saying it had addressed the Commission's concerns by way of stickers and reminders.

[20] On 5 December 2006 Progressive again told store managers to re-check their stock and to ensure that all references to the competition had been removed. On 6 December 2006, after being contacted again by Commerce Commission staff, the instruction was repeated. As at 6 December 2006 approximately 70 Progressive

stores nationwide were still displaying the cereal packs bearing the promotional roundel.

[21] On 11 December 2006 Progressive received fresh deliveries of cereal packs bearing the promotional roundels at its distribution centres. Progressive again instructed the distribution centres to isolate those stocks until further notice. On 12 December 2006 Progressive banned on-pack promotions of Signature Range products where the competition had a final closing date.

[22] Progressive accepts that promotional roundels advertising the competition were displayed on cereal packs in at least 12 stores at various times in the three months following the closing date for the competition of 31 August 2006. Clearly the instructions given by Progressive to cover the roundels and not to promote the competition were not all implemented at the level of individual stores.

The charges

[23] Progressive was charged with offering prizes in connection with the supply of goods with the intention of not providing them, contrary to s 17(a) of the Fair Trading Act 1986 ("the Act").

[24] The charges relate only to the period between 16 November 2006 and 13 December 2006. Mr Dixon for the Commerce Commission explained that the Commerce Commission did not charge Progressive in relation to events prior to 16 November 2006. This was because the promotional cereal packs had been manufactured before the competition had begun and Progressive had paid the manufacturers and suppliers to destroy all promotional material. The Commerce Commission took the view that for the period up to 16 November 2006 Progressive might have been able to avail itself of the defence of reasonable mistake under s 44(1) and concluded that it would be unfair to charge Progressive for events during that time. Progressive is not charged in relation to events after 12 December 2006, when Progressive banned on-pack promotions of Signature Range products where the competition had a final closing date.

The District Court decision

[25] The Court summarised the background and the submissions of the parties, and then set out its reasons for determination of the charges in [9] of the decision. That paragraph stated:

> I begin by considering s 45. In this regard I do not agree with Mr Walker's submission. Rather, I see merit in the informant's submission that under s 45(2) of the Fair Trading Act 1986:
>
> > "Any conduct engaged in or on behalf of account by a director, servant or agent of the body corporate acting within the scope of that person's actual or apparent authority shall be deemed for the purposes of the Fair Trading Act to be engaged in also by the body corporate."
>
> Mr Dixon submits:
>
> > "It does not matter that those were the actions of relatively junior staff".
>
> His authority for this proposition is the Australian decision on their s 84(2), the equivalent of our s 45(2) and its given the *CV Holland (Holdings) Pty Ltd* (1977) 29 FLR 212; 15 ALR, 445, Franki J. I find that the company offered the prize. Insofar as intention is concerned, I have carefully considered the authorities in the light of each side's submission and in particular a High Court decision in [*Adair & Anor v Commerce Commission* HC CHCH AP107/94 20 September 1994, Holland J]. I find the informations proven because the defendant had the intention not to provide the items offered. In addition, I make no distinction among the informations, finding them all proven but subject to what I finally hear there may well be distinction in penalty in respect of each charge.

The issue

[26] To identify the issue it is necessary to set out s 17(a) of the Act. It provides:

> **17 Offering gifts and prizes**
>
> No person shall,—
>
> (a) In connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services; or
>
> (b) In connection with the sale or grant or the possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,—

> offer gifts, prizes, or other free items *with the intention of not providing them or of not providing them as offered.*
>
> [emphasis added]

[27] Section 17(a) clearly imposes the actus reus requirement of making an offer. Progressive satisfied that requirement by its display of the promotional cereal packs. The question that arises is whether in terms of s 17(a) Progressive offered prizes to customers "with the intention of not providing them or not providing them as offered". In other words, does s 17(a) by these words impose a mens rea requirement in the form of a specific intention, and if so, precisely what form does that mens rea requirement take and how can it be satisfied.

[28] As the informations were originally framed, it was stated that Progressive committed an offence which varied according to the product, date and place but followed this form of wording:

> In that it, contrary to s 17(1) of the Act, in connection with the promotion of the supply of goods, namely [a cereal], offered a prize or other free item, namely the chance to win one of five free trips to the Hunter Valley Australia, *when in fact, it did not intend to provide a chance to win that trip as offered*.
>
> [emphasis added]

[29] At the commencement of the hearing the Commerce Commission sought to amend the informations under s 43(1) of the Summary Proceedings Act 1957 to read in substitution for the emphasised part the words "with the intention of not providing the chance to win that trip as offered". Despite opposition from Progressive, the amendment was permitted. There has been no challenge on appeal to the decision granting the amendment.

[30] The difference in the original and amended wording of the charge reflects an important distinction. The first wording denotes an absence of intention to offer a prize. The second wording, reflecting exactly the words of s 17, appears to denote a positive intention not to provide a prize to customers knowing that it was being offered to them.

Submissions

[31] A crucial matter of fact in the appeal is that no Progressive staff member knew of the offer of prizes while also intending that the prizes not be provided. That position is reflected at paragraph 55 of the consent summary of facts, where it is stated:

> The investigation did not establish that any one person with [Progressive] intentionally restocked the shelves with the offending product, whilst at the same time having knowledge that the competition had closed.

[32] In the light of this accepted fact, Mr Dixon for the Commerce Commission in this appeal initially accepted that for the Commerce Commission to establish the requisite mens rea, it was necessary to aggregate the mental states of different persons in the Progressive company. He apparently accepted that only then could it be said that Progressive offered the prizes with the intention of not providing them. However, in his most recent submissions he has submitted that s 17(a) creates an offence of strict liability in that no mens rea need be established. In other words, he submitted, the offence required no more than the offer of the prizes being made and the prizes not in fact being available. Thus, he submitted that there was no need to aggregate the mental states of different persons in Progressive in order to meet a mens rea requirement.

[33] Mr Goddard QC for Progressive submitted that s 17(a) requires the Commerce Commission to demonstrate a specific mens rea on the part of Progressive, namely a positive intention not to provide the prizes knowing that they were being offered. Moreover, he submitted that the mens rea must repose in a single person. In other words, a single servant or agent of Progressive must have intended not to provide the prizes knowing that they were being offered. Mr Goddard submitted that there was no evidence that there was such a person, and, further, that there was no evidence that any Progressive employee ever knew that the offers of prizes to which the charges relate were being made. Thus, Progressive disputed the Judge's finding that it had an intention not to provide the prizes knowing that the prizes were being offered.

[34] Two key issues therefore arise. The first is whether s 17(a) imposes a mens rea requirement or whether it creates an offence of "strict liability", where the circumstances of an offer of a prize being made and no prize in fact being provided are sufficient to establish liability. The second is the related question of whether, if s 17(a) imposes a mens rea requirement, it is possible to aggregate the mental states of knowledge and intention of different servants or agents in order to create the requisite composite mens rea, or whether the knowledge of the offer with the contemporaneous intention not to provide must repose in a single servant or agent. The District Court Judge appears to have concluded that there was a mens rea requirement, but that it was fulfilled.

Does s 17 create a strict liability offence?

The words of s 17

[35] On its face, s 17 requires a specific state of mind, namely an "intention of not providing" the prize offered. The reference to a specific intention indicates that a particular state of mind is a prerequisite to liability. Thus, on the face of the words in s 17, the offence consists of a single actus reus (the offer) and a mens rea that comprises two parts. The first is a knowledge that an offer is being made, which is indicated by the word "with". The second is the contemporaneous intention not to provide the prize as offered.

[36] It is necessary to ascertain whether the context of the Act supports that conclusion.

The statutory framework

[37] Part 1 of the Act (which includes s 17) contains provisions prohibiting certain misleading and deceptive conduct, false representations and unfair practices.

[38] Section 9 prohibits any person engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. There is no reference to a specific

mental state. On its face, this section would capture Progressive's conduct. This section does not create an offence: s 40(1).

[39] Sections 10 to 14 and 16 set out prohibitions on specific types of misleading conduct. Contravention of these sections is an offence: s 40(1). They are all expressed as an absolute prohibition without reference to a specific mental state such that a mens rea requirement would readily be inferred. For example, s 10 reads:

> **10 Misleading conduct in relation to goods**
>
> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

Contravention of these sections is an offence: s 40(1).

[40] The pattern in Part 1 is therefore to create prohibitions with no specified mental state. However, the pattern is broken at s 17 in the section of Part 1 marked "Unfair Practices", where there is express reference to a specific intention. Sections 19 and 21 of the Act also both refer to intention. Section 19, for example, uses the more specific wording of advertising for supply at prices which that person does "not intend to offer for supply." The "not intending to offer" better lends itself to being seen as part of the actus reus. This form of words could have been used by the Legislature in s 17 but it was not. The s 19 form of words follows the form of used in the original charges, which were later amended to reflect the s 17 wording.

[41] The stark contrast between the reference to intention in s 17, the lack of such a reference in other sections and the different wording in s 19 indicate that the imposition of a mens rea requirement was intended and entirely deliberate. It would not have been difficult to have drafted the section to create an offence without reference to mental states so that liability was contingent on proof of the actus reus only, as was done in other sections of the Act. This was not done.

[42] Section 44 records that it is a defence to a prosecution if the defendant proves that the contravention was due to a reasonable mistake, or reasonable reliance on information supplied by another person, or that certain specified acts or defaults by other persons caused the contravention and reasonable precautions were taken to

avoid it. This defence is akin to the defendant's affirmative defence of absence of fault in strict liability offences, referred to in *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA). In offences of strict liability the prosecution does not have to prove a mens rea, but the defendant will have a defence if he proves absence of fault.

[43] Mr Dixon argued that the application of the defences in s 44 to all offences referred to in s 40 including s 17 was an indication that there was no need to prove a mens rea under s 17. However, it is perfectly possible to provide for a specific defence, for instance of reasonable reliance on information supplied by another, to an offence with a mens rea requirement. A defendant might be able to claim as a defence reasonable reliance on erroneous third party advice as to what an offer of a prize meant, which was reasonably relied on. While accepting that the creation of such defences is more consistent with strict liability offences, I do not accept that as a matter of logic the availability of defences under s 44 is inconsistent with a mens rea requirement in s 17. Indeed, it is easy to see that a general defence of general application was convenient in terms of drafting.

The purpose of the Act

[44] The Act does not contain a purpose section and the long title does not allude to the Act's purpose. However, it is widely accepted that the Fair Trading Act is economic and social legislation, and its goal is consumer protection: *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 403-404. It is necessary for the meaning of words in the Act to be cross-checked against the purpose of the legislation: *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22]-[24].

[45] It was observed by Lord Scarman in *Wings Ltd v Ellis* [1984] 3 All ER 577 (HL) that the Trade Descriptions Act 1968 (UK), which covered similar ground to the Fair Trading Act 1986 (NZ), was not a truly criminal statute. Its purpose was "not the enforcement of the criminal law but the maintenance of trading standards": at 589-590.

[46] Mr Dixon for the Commerce Commission submitted that to interpret s 17 as including a mens rea requirement might not be consistent with the protection of consumers, which is the purpose of the Act.

[47] Such an interpretation might indeed be less consistent with the purposes of the Act, but the clear and unambiguous wording of a statute is of importance, in accordance with the ordinary canons of construction. This approach is reflected in s 5(1) of the Interpretation Act 1999, where text and purpose are accorded apparently equal importance for the purpose of ascertaining meaning. Violence cannot be done to the plain meaning of the words of the statute simply to better achieve the general purpose of the Act, especially where the plain meaning does not actually frustrate the purpose of the Act. The cross-check required by *Commerce Commission v Fonterra* cannot remove a mens rea element clearly present from the words and context of the Act.

The case law

[48] The conclusion that this is not a strict liability offence is supported by New Zealand and Australian case law. In *Commerce Commission v Colony Resorts Ltd* HC WN AP153/90 19 September 1990, Jeffries J stated at p 5:

> It is by definition an offence *of specific intent* in that the section refers to intent to do some further act or achieve some additional consequence other than a particular act without reference to intent. In the latter case that is an offence of general criminal intent. *The prosecution must prove the offer of gifts or prizes with the intent of not providing them or not providing as offered*. Intent, in the usual way for the criminal standard which applies here, must be proved by the circumstances as revealed by the evidence.
>
> [emphasis added]

[49] The equivalent provision in Australia is s 54 of the Trade Practices Act 1974 (Cth). In *Australian Competition and Consumer Commission v Nationwide News Pty Ltd* (1996) 18 ATPR 41-519 (FCA), Heerey J was of the view that a mens rea had to be proved. He said at [50]:

> … one of the elements of the offence created by s 54 is the intention on the part of the defendant of not providing the gifts, prizes or other free items in question, or not providing them as offered. These words “necessarily import a mental element”: *He Kaw Teh* at 539 per Gibbs CJ. What has to be proved

> is the actual intention of the defendant, just as "purpose" in s 45D means "the *subjective purpose* of those engaging in the relevant conduct": *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 42 FLR 331 at 349 per Deane J.
>
> [emphasis added]

[50] Both counsel placed considerable weight on the decision of *Adair v Commerce Commission* (1994) 6 TCLR 126 (HC). The High Court decision dealt with charges under s 17 as well as s 13(g) of the Act. The decision of the Court of Appeal on appeal in (1995) 5 TCLR 655 did not deal with s 17 but rather s 13(g) and the appeal was allowed as to the Court's conclusions in relation to that s 13(g). I will focus on the High Court decision which was not overturned in relation to the s 17 issues.

[51] In *Adair* the defendant advertised mountain bikes using the representation: "buy one mountain bike, get another one free". However, the Commerce Commission proved that the defendant intended only that a customer purchasing a certain "Ridge Hopper" bike for $599 would receive a cheaper "Street Hopper" bike free, the latter bike being worth about $300. Evidence was adduced to show that many prospective customers thought that if they purchased any type of mountain bike they would be able to get a free mountain bike of the same type.

[52] Holland J considered that charges laid under s 13(g) of the Act were strict liability offences, and that s 17 was in a different category: at 128. In relation to the issue of proof under s 17 he stated:

> Although I have agreed that offences under s 13(g) are offences of strict liability, an offence under s 17 requires proof of the offender's intention … [the appellant's counsel] did submit that the mens rea of the appellant had to be applied to the expression "as offered". He submitted that the company did intend to offer a free bike in the case of every sale of a mountain bike for $599 or more and that that was all it intended to offer. The offer must, in my view, be read objectively. That was to offer a free bike for every bike purchased. The intention of the appellant that was relevant was whether it was intended to carry out that offer according to its term.

[53] I interpret the decision as accepting that there is a mens rea requirement in s 17. I will return to the nature of that requirement in the next section of the judgment.

Conclusion as to mens rea

[54] These cases firmly indicate that the Crown must prove a specific mens rea, namely an intention not to provide a prize knowing it was being offered. The context of the Act supports this interpretation. I therefore conclude that s 17 imposes a mens rea requirement which the Commerce Commission must prove according to the criminal standard of beyond reasonable doubt. That mens rea element is a positive intention not to provide prizes knowing they were being offered, the two mental states being the knowledge of the offer of the prizes and the concurrent intention not to provide the prizes. This is to be distinguished from the passive absence of intention to provide a prize knowing it had been offered. If that were the wording of s 17 it would support a submission that the offence was of strict liability. It is not necessary to finally determine that issue for the purposes of this decision, as the wording of s 17 expressly contemplates a mens rea requirement.

[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 *Commerce Commission v Vero Insurance NZ Ltd* (2006) 11 TCLR 779 at 784, a case concerning the application of s 13(e). With the benefit of the 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.

[56] Having concluded that s 17(a) imposes a mens rea requirement of intention not to provide prizes knowing that they were being offered, it is necessary to examine what has been proved in this case and whether it meets what is required by s 17(a). In particular, the question arises as to how the mens rea of a company is to be made up in the circumstances where no single employee had the requisite mens rea.

Can the mental states of employees be combined and attributed to the company under s 17?

[57] The state of mind of a natural person can be ascertained as a matter of fact in the way described by Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 in relation to a misrepresentation of intent or opinion:

> There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

[58] The mens rea of a natural person can be attributed to a company in certain circumstances. The complication in this case, however, is that there appears to be no natural person with the requisite complete mens rea to attribute to Progressive. The staff members who put the cereal packs bearing the promotional roundels on the shelves were not aware that the promotion had closed. In other words, the staff members who were aware that an offer of prizes was being made were not aware that the prizes would not be provided and cannot be said to have intended that the prizes not be provided. Those staff members cannot therefore be said to have the requisite complete mens rea. Similarly, although Ms Inkster and presumably other senior staff were aware that the promotion had closed, they were not aware that cereal packs bearing the promotional roundel were still being placed on the shelves. Indeed, they had expressly required that the promotional material be removed. In other words, Ms Inkster intended not to provide the prizes but did not know that the prizes were being offered. She, too, cannot be said to have the requisite complete mens rea.

[59] Therefore, the next question in ascertaining whether the required mens rea is established is to determine whether s 17 permits the combination of aggregation of the mental states of more than one employee so that the requisite mens rea is achieved in composite and can then be attributed to the company.

The state of mind of a company

[60] A "person" is defined in s 2 of the Act as including any association of persons whether incorporated or not. There is no doubt that an incorporated company is a person capable of committing an offence under s 17. As a legal person

it exists independently of its constituent elements, such as its directors and servants. However, it can only act and think through those natural persons who are its servants or agents. In the often quoted words of Viscount Haldane LC in *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705 (HL) at 713:

> … a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the corporation.

[61] Thus, a distinction has traditionally been made between directors and senior officers of the company, whose acts and mental states are viewed for certain legal purposes as being those of the company itself, and those servants who are of a lesser status, whose acts and mental states are not: *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170.

[62] Section 45 does away with this distinction in the Fair Trading Act context. By its express provisions it establishes that a state of mind can be attributed to a company if it is held by a servant or agent, whatever their status.

The words of s 17

[63] The words of s 17 give no indication as to how the requisite mens rea arises in the company context, and in particular whether the mental states of more than one employee can be combined and attributed to the company as a complete mens rea. I observe that the specific state of mind in s 17, namely "with the intention of not providing them," is naturally most easily associated with the mind of a single individual.

The statutory framework

[64] Section 45 specifically deals with conduct by servants or agents. Section 45(1) provides:

> **45 Conduct by servants or agents**
>
> (1) Where, in proceedings under this Part of this Act in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.
>
> …

[65] This section provides that where a state of mind has to be proved in relation to a body corporate such as a company, it is sufficient to show that a director, servant or agent acting within the scope of that person's actual or apparent authority, had that state of mind. Thus there is no doubt that if, for example, Ms Inkster had been aware that the promotion was still being advertised after it had closed, the requisite mens rea would have been satisfied and Progressive would have been in breach of s 17.

[66] Section 45 does not, however, state that it is sufficient to combine the mental state of one employee with the mental state of another for the purposes of establishing the body corporate's mens rea and consequently liability. Indeed, the section provides that to establish the state of mind of a body corporate, it is sufficient to show that "a" director servant or agent had the state of mind. It is specific in its use of the singular. While accepting that words in the singular include the plural under s 33 of the Interpretation Act 1999, the wording of s 17 does not immediately lend itself to permitting the aggregation of mental states into a complete mens rea.

The purpose of the Act

[67] It would be consistent with the Act's goal of consumer protection to place the onus on traders to ensure that no offer of a prize was made that could or would not be fulfilled. It is in the interest of consumers that a stringent duty be placed on traders, many of whom will be corporate entities, to ensure that offers of gifts and prizes are honoured. This must be recognised in any interpretation exercise.

[68] However, as already discussed, the Legislature may have sought to achieve this goal by wording s 17 in the same way as s 19. It did not do so; the wording used required a very specific state of mind.

The case law

[69] I have not been referred to any New Zealand authority that casts light on the question of attributing the states of mind of multiple agents or servants in establishing corporate mens rea.

[70] The Commerce Commission relied on *Adair v Commerce Commission* as being on all fours with the present case. It submitted that the defendant in that case had no actual intention to deceive and indeed the learned Judge determined that the offer of a free bike for every bike purchased did not objectively reflect the subjective intention of Mr Adair.

[71] *Adair* may indicate that it is possible for a defendant to contravene s 17 yet not have an actual intent to defraud. It is not entirely clear whether Holland J considered that Mr Adair actually intended to offer a "free bike" knowing that this was misleading, or rather whether he innocently thought that the offer meant something different from what it said. In any event, Holland J was clearly not concerned with whether an intention to defraud had been proved, and made no mention of it.

[72] It is perhaps possible that a person might innocently offer a prize with an intention of not providing the prize yet without an intention to deceive, perhaps because the defendant misunderstood the meaning of the offer in an objective sense. That may have been the case in relation to Mr Adair. However, the Commerce Commission must go one step further in this case. The factor which distinguishes *Adair* was that the defendant who made the offer of a free bike with every purchase (and so obviously knew of the offer) was the same person who had the intention of not providing such a bike. In Progressive's case, no one person had both the knowledge of the offer and the intention not to provide.

[73] In the English decision of *Wings Ltd v Ellis* [1984] 3 All ER 577 (HL) the defendant company was convicted of making a statement which "he knows to be false". The defendant company, a holiday tour operator, had published a brochure mistakenly indicating that a certain hotel had air-conditioning. The mistake was discovered and instructions were given to all staff to amend the brochures advertising the air-conditioning, and a letter was sent to customers who had already booked holidays. However, the complainant booked the holiday relying on the brochure and was not informed that the hotel was not air-conditioned. The complainant booked the holiday through a travel agent who it was found "might well have known" of the lack of air-conditioning, but this was not found as a fact: at 587. In other words, it was not proved in that case that a single servant or agent made a statement as to the air-conditioning knowing that it was not correct.

[74] Nevertheless, the House of Lords decided that the company was guilty even though it had not acted fraudulently: at 583. Lord Scarman emphasised the consumer protection nature of the legislation, and having examined the words of s 14 concluded that the offence was a strict liability offence which could be committed unknowingly: at 589-590. As Lord Hailsham LC stated specifically at 584:

> The 1968 Act says nothing about fraud. It says nothing about intent. It says nothing to the effect that the defendant must at least know at the moment at which the false statement was made that it was being made in a form which was different from that which was then intended. It simply says that at the moment at which the statement is made the defendant must know the statement was false.

[75] Thus, the House of Lords did not need to consider the aggregation of the mental states of various servants or agents in order to establish a composite mens rea and did not do so.

[76] The relevant section of the Trade Descriptions Act 1968 (UK) was different from the present. Section 14 so far as it was material provided:

> (1) It shall be an offence for any person in the course of any trade or business -
>
> to make a statement which he knows to be false; or
>
> recklessly to make a statement which is false;

> as to any of the following matters …

[77] The position is different in relation to s 17. Section 17 states something very specific about intent and cannot, unlike the provision in *Wings*, be a strict liability provision.

[78] Moreover, on the facts of this case, unlike the position of the defendant in *Wings,* there was no opportunity for Head Office of Progressive to correct an error that should have been apparent. Lord Templeman noted that the complainant's booking form, which confirmed that he had read the conditions in the brochure, was sent back to the defendant company. However, the company (which would accordingly have been aware of the risk that the complainant was misled) gave no advice to him of the change of position in relation to the air conditioning: at 592.

[79] While *Wings* indicates that the courts will adopt an interpretative approach sympathetic to the goal of fair trading legislation, which is to protect the public and impose high standards on those who make representations in trade to the public, it is not determinative of the particular issue that arises under s 17 in this case.

[80] The aggregation of the mental state of one agent of a company with another agent of the company was considered by the New Zealand Court of Appeal in *The Mayor, Councillors and Burgesses of the Borough of Stratford v JH Ashman (NP) Limited* [1960] NZLR 503. In an action against a builder, the issue was whether a final certificate by the architect was obtained by the fraud of the builder. The Court of Appeal considered at 521 that fraud was not proved and referred to the decision of *Armstrong v Strain* [1952] 1 KB 232 (CA):

> We think it is clear from this decision that before a company can be made liable in fraud on a representation made by one agent of the company on information supplied by another agent, guilty knowledge on the part of one or other of the agents must be established.

[81] In *Armstrong v Strain* the issue was whether an innocent owner could be liable when his real estate agent made a misrepresentation. The Court found that there was "no way of combining an innocent principal and agent so as to produce dishonesty". The Court quoted Devlin J in the lower court at 246:

> There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge or … state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind.

[82] These statements were made in the context of allegations of civil fraud. The cases referred to and others were considered in DF Dugdale "Dishonesty by Aggregation?" (2006) 12 NZBLQ 3, where the author concluded at 7 that to make out dishonesty in a civil context there needs to be a natural person with fraudulent intent and that the aggregation of innocent mind with innocent mind is not enough. I have already noted that references to civil fraud are unhelpful in interpreting s 17. It is unwise to apply the notion of actual deceit to a regulatory offence that does not on its words require it. However, given the need to prove a very specific intent in s 17, the reluctance of the courts in a civil context to aggregate mental states when attributing a mens rea to a corporate body has relevance.

[83] The decision of the Federal Court of Australia in *Australian Competition and Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292 was not decided in the civil context. It concerned allegations that Radio Rentals was guilty of unconscionable conduct for the purposes of ss 51AA and 51AB of the Trade Practices Act. The case turned on the aggregation of the mental states of various servants or agents of the company and their composite knowledge of the intellectual disability of the complainant, who had had dealings with those various employees. The decision was thus made in the same context of consumer protection legislation, although there is no direct New Zealand counterpart to the unconscionable conduct provisions.

[84] The Australian Competition and Consumer Commission (ACCC) argued that the knowledge of multiple employees of a company as discerned from the company's records could be aggregated to establish the requisite mens rea element on the part of the company. Finn J described this proposition as "somewhat startling": at [177]. He observed that if the submission were correct it would have potentially alarming consequences for large multi-function corporations: at [181]. He relied on the decisions relating to civil causes of action: at [179]. He observed that there could be circumstances where dissaggregated knowledge could be

aggregated, at least where the knowledge was held by an employee who had the duty and opportunity to communicate it to a more senior employee. No such duty was owed by the supermarket employees in this matter. Finn J therefore refused to aggregate the knowledge of various employees to make out a composite mens rea and the complaints were rejected.

[85] The English Court of Appeal also rejected an approach involving aggregation of mental states in relation to contempt of court in *Z Ltd v A-Z* [1982] QB 558. Eveleigh LJ stated at 581:

> I do not think that it should be possible to add together the innocent state of mind of two or more servants of the corporation in order to produce guilty knowledge on the part of the corporation.

It must be observed that the context of contempt of court, which carries the risk of imprisonment, is very different from the context of legislation aimed at consumer protection.

[86] Nevertheless, it is clear that there is no principle specifically recognised in any decision cited whereby the mental state of one servant of the company can be combined with the mental state of another for the purposes of establishing a composite mens rea. No such principle has been accepted even in the context of regulatory offences.

[87] An aggregation of mental states would impose an even greater duty on companies to ensure that no misrepresentation as to prizes were made, and this would benefit consumers consistently with the purpose of the statute. However, the Legislature has stopped short of imposing strict liability in relation to s 17, and has not specifically permitted aggregation of mental states of company servants and agents when it had the opportunity to do so in s 45. Given that aggregation of mental states has not been shown to be a generally established principle or practice, one might expect the Legislature to say so explicitly if it intended to depart from practice and authorise the aggregation of mental states. To hold that a company had a specific mens rea when no servant or agent had that mens rea could be seen as unfairly tarnishing the reputation of a company. That was the view expressed by Lord Hailsham in *Wings* at 585. The very specific words as to intent in s 17 and 45

and the general reluctance of courts to permit aggregation persuade me that for the purposes of s 17 the mental state of one servant of the company cannot be combined with the mental state of another for the purposes of demonstrating a single composite mens rea.

[88] Given that there was no evidence that a single servant or agent had the requisite mens rea, it follows that no offence was proved and that Progressive was wrongly convicted.

Conclusion

[89] For these reasons I conclude that s 17 is not a strict liability offence, and that the Commerce Commission has not proved that Progressive offered the prize of trips to the Hunter Valley with the intention of not providing them. The convictions cannot stand.

[90] I do not determine Mr Goddard's alternative argument that there was no proof that any staff member, even on the supermarket floor, knew of the offer being made or was even aware of the roundels. That argument only featured clearly in written submissions in reply after the hearing. It has not been fully argued before me, and may not have been put in the District Court. Given my conclusion that the charges were not proved because the necessary mens rea was not established, there is no need to determine the submission.

Result

[91] The appeal is allowed and the conviction quashed.

Costs

[92] If costs are to be pursued, memoranda should be filed. If a timetable is required, a telephone conference should be arranged.

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Asher J