

**IN THE DISTRICT COURT
AT MANUKAU**

CRI 2007-092-6035

**COMMERCE COMMISSION
Wellington
Informant**

v

**PROGRESSIVE ENTERPRISES LIMITED
80 Favona Road, Manukau City
Defendant**

Hearing: 14 April 2008

Appearances: JCL Dixon and A M McLintock for the Informant
Campbell Walker and Matthew Harris for the Defendant

Judgment: 29 April 2008

DECISION OF JUDGE B N MORRIS

Background

[1] By informations laid summarily, Mervyn Anthony Theobald, Snr Investigator of the Commerce Commission, filed 18 charges in this court against the defendant company (the defendant) in April 2007. All are laid under ss 40 and 17(a) of the Fair Trading Act of 1986 and each alleges that in connection with the promotion of the supply of good, namely Signature Range "Lighten Up" cereal, the defendant offered a prize or other free item in these cases one of five free trips to the Hunter Valley, Australia when, in fact, it did not intend to provide the chance to win that trip as

offered. At the commencement of the hearing, the informant gave formal notice of its application under s 43(1) of the Summary Proceedings Act 1957 to amend the informations to read “with the intention of not providing the chance to win that trip as offered”. Counsel for the defendant opposed the amendment. We had a hearing and I determined that issue by pre-trial determination and granted the application to amend, so that each information was amended in accordance with the application. The period of the charges covers the period 16 November 2006 to 13 December 2006. An agreed summary of facts was tendered to me, each counsel then provided written submissions with case authorities and made oral submissions in support of the written material.

The Section

[2] Section 17 of the Act, under a sub-heading of “Unfair Practices”, 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 not providing them as offered.

[3] The informant accepts the position that it must prove beyond reasonable doubt that the defendant, in connection with the supply or possible supply of goods, or the promotion by any means of the supply of goods, offered a prize with the intention of not providing the prize.

[4] Therefore, the informant alleges:

- (a) That the defendant offered the cereal for sale with the prize draw the roundell displayed after the competition closed on 31 August 2006 and the competition roundell was still displayed on goods for sale between 16 November 2006 and 13 December 2006.
- (b) At the time the offer was made, the defendant possessed an intention not to provide the prize draw. I attach a copy of the roundell as Appendix A.

[5] The Commission's case is that the facts set out in the agreed summary of facts are sufficient to establish liability under s 17 of the Fair Trading Act of 1986. Specifically, it is contended that the facts established that:

- (a) The defendant offered the prize, in that it sold the product containing the prize draw offer and
- (b) It did so with an intent not to honour that offer.

[6] It is the Commission's position that although the situation in which the defendant finds itself arose due, in part, to a series of errors, they were not such as to afford it a defence of reasonable mistake under s 44(1) of the Act. In making this decision in my determination, I have read the summary of facts as set out and as agreed to by the defendant. Of that eight page summary, I accept that the key facts are those distilled into s A 6.3 A – F of the informant's submissions at page 8. Those particular items mentioned there are the key, in my view, to the consideration of the issues.

[7] In addition, it is clear to me that the defendant sold the product containing the prize draw offer in each of the instances for which it is charged. It is accepted the defendant intended to make a prize draw offer based upon the terms and conditions contained within the product packaging. One of those terms and conditions was that the prize draw was available to entries received by 31 August. For all intents and purposes, the informant says the objective offer made to customers after 31 August was identical to that made prior to that date. The Commission says that while during

the period of the charges, senior management may not have intended that the offer continue to be made. The offer was still being made and the action of staff in stocking shelves and selling the product are the actions of the company.

The Defendant's Case

[8] The defendant says that s 17(a) of the Fair Trading Act of 1986 requires proof that at the time the defendant offered the prize, the defendant intended not to provide it or not to provide it as offered. It is the submission for the defendant that it is insufficient that the defendant lacks an intention to provide the prize. Mr Walker contends that the requirement for the informant is to prove that the intention is clear on the face of the Section and it is the defendant's position that this is confirmed by the authorities. He relies, firstly, on *Commerce Commission v Vero Insurance New Zealand Ltd and Others* (2006) 11 TCLR 779, Asher J, and he quotes His Honour at para 19:

“The test for liability under s 17 is much higher than in relation to the general misleading and deceptive conduct and false representation section. An intention not to provide the service at all or, as offered, is required. The threshold is tantamount to that required for the tort of deceit”.

Again, he refers to *Commerce Commission v Colony Resorts Ltd*, High Court, Wellington, AP 153/90, 19 September 1990, Jefferies J. His Honour, in that case, said of s 17(b) which shares the same requirement of proof of an intention of not providing the gift or prize or other free item:

“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”.

The third decision that Mr Walker refers to is *Adair and Another v Commerce Commission* (High Court, Christchurch), AP 107/94, 20 September 1994, Holland J. His Honour in that case distinguished s 17(a) from the strict liability provision in s 13(g):

“The prosecution under S 17(a) is in a different category. No previous decision has been produced to me indicating that strict liability applies to this offence and it is significant that the intention of the offender is included in the definition of the offences. I shall deal with this further when considering the offences under s 17(a) but I merely record at this stage that men’s rea is not an integral part of offences under s 13(g)”.

“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”.

Mr Walker then moves to quote from Gault on Commercial Law at FT 17.05:

“The essential element of an offence under this Section is the intention of the offeror not to supply at the time the offer was made. If gifts are offered in good faith but not subsequently supplied, the offeror would not be in breach of this section.

“The requirement of intention will make it difficult to prove”.

Mr Walker submits that the informant has acknowledged that proof of an intention not to provide, as opposed to the absence of an intention to provide is critical to the offence by seeking to amend its informations accordingly and, further, he says there is no dispute:

“That PEL displayed promotional packs after the close of the competition date and the drawing of the competition. There was also no dispute that there was to be no further draw. However, this does not, in itself, constitute an offence. The informant has to go further and show that PEL offered the prize with the intention of not providing it”.

Mr Walker then, in his written material, very carefully goes through the agreed summary of facts and highlights within the fabric of the facts summary the various things that happened during the course of the whole situation, whereby the product was continued to be offered. He says at s 12:

“The informant acknowledges that its investigation did not establish that any one person within PEL intentionally restocked the shelves with the offending product whilst at the same time having knowledge that the competition had closed”.

He continues:

“No-one at PEL put or kept promotional packs on shelves knowing that the competition they were advertising had already closed. The court must proceed on the basis that those engaged in making the offer were acting in good faith and lacked an intention not to provide the prize”.

Again he submits that the informant has not identified anyone within PEL who, at the time the prize was offered, intended not to provide it. Those who knew that the competition had ended were unaware that the prize was being offered. They could not and did not have the conscious intention not to provide the prize being offered. They had no relevant intention at all because they had no reason to advert to the question of whether the prize would be provided or not.

Finally, he says that s 45 of the Fair Trading Act does not save the informant. He contends that s 45 does not separate the requisite state of mind from the act. He contends that it is not enough that one servant of the body corporate offered a prize and another servant intended not to provide it. The act and state of mind must be linked, for example by knowledge on the part of the person with a state of mind that the prize was being offered.

My Determination of the Issues

[9] 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 of 1986:

“Any conduct engaged in or on behalf of a body corporate 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 *C V Holland (Holdings) PTY Ltd (1977)*, 29 FLR 212; 15 ALR 445, Franki, J. I find that the company offered the prize. In so far as intention is concerned, I have carefully considered the authorities in the light of each side's submission and in particular the High Court decision in the *Adair* case. 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 a distinction in penalty in respect of each charge.



B N Morris
District Court Judge

Solicitors:

Crown Solicitor, Auckland, PO Box 2213, Auckland, for the Informant

Gilbert Walker, Solicitors, PO Box 1595, Shortland Street, Auckland, for the Defendant