IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI 2018-085-000790
[2019] NZDC

FINANCIAL MARKETS AUTHORITY
Prosecutor

v

MORGAN DE VERE CORPORATE FINANCE LIMITED
Defendant

Date: Hearing 20 March and 23 April 2019

Appearances: D R LaHood for Prosecutor
J A Dean for Defendant

Judgment:

DECISION OF JUDGE C J THOMPSON

Introduction

[1] The defendant company, Morgan DeVere Corporate Finance Limited (MDV) faces two charges laid under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The two charges are identical in their allegations, each alleging that:

> ...knowing that it was not registered under the Act, did hold out that it was registered under the Act.

[2] The difference between the charges is that one alleges offending occurring between 7 March 2017 and 28 July 2017, and the second alleges offending between 7 December 2017 and 12 March 2018.

[3] The Act applies to persons (including of course companies) who are in the business of providing a *financial service* – see s 7. Section 6 of the Act defines the business of providing a *financial service* as:

... carrying on a business of providing or offering to provide a financial service (whether or not the business is the provider's only business or the provider's principal business).

[4] Section 2A of the Act provides that the purposes of the Act are –

(a) to promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and

(b) to promote and facilitate the development of fair, efficient, and transparent financial markets.

[5] Section 11 provides that a person conducting a business subject to the Act must be registered for that service and, if the requirements of s 48 are met, be a member of an approved Dispute Resolution Scheme. Section 11 goes on to provide: ...

(2) Every person who knowingly breaches subsection (1) commits an offence and is liable on conviction, - ...

(b) In the case of a person who is not an individual to a fine not exceeding $300,000.

[6] Further, s 12 prohibits a person to whom the Act applies holding out that the person is registered under the Act unless the person is registered under the Act and, if required, is a member of an approved Dispute Resolution Scheme. A breach of the requirements of s 12 also carries a fine, in the case of a Company, not exceeding $300,000.

The charges

[7] The first charge covers the period between 7 March 2017 and 28 July 2017. Reference to the chronology [see para [9]] will show that this is the period between the date on which MDV's directors were advised of its deregistration, and the date when the website was taken down for maintenance, and was therefore not available to public viewing.

[8] The second charge covers the period from when the website was again available - 7 December 2017 - and still showed the assertion that MDV was registered under the Act; to the date on which the website was finally taken down – 12 March 2018.

The background facts

[9] Throughout the periods covered by the charges, the Directors of the company were Mr Rene Anthony Moorby, a New Zealand resident, and Mr Kirk David Sharpe, who I understand is resident in Great Britain.

[10] It will be of assistance if I set out a chronology of relevant events which I have taken from the evidence advanced by the Financial Markets Authority (FMA). I do not understand there to be any dispute about the dates and events:

Morgan DeVere (MDV) registered as a Financial Services Provider (FSP)	19 April 2014
First warning to MDV of possible deregistration	6 January 2017
Formal notice of initiation of deregistration process	2 February 2017
MDV deregistered as FSP	7 March 2017
MDV advised that after review of all material, registration would not be reinstated	8 March 2017
MDV advised that its available course was to appeal deregistration to the High Court	9 March 2017
MDV specifically advised that its website should be modified to immediately remove references to being registered as an FSP	10 March 2017
MDV website noted as still showing it registered as an FSP	20 March 2017
MDV advised it must remove the reference to FSP registration from its website not later than 31 March 2017	24 March 2017
Sharpe advised that the FSP references would be removed by 14 April 2017	5 April 2017
MDV asked why the FSP references had not been removed from its website	20 April 2017
Sharpe advised that the FSP references would be removed after 1 May 2017	27 April 2017
MDV website noted as not having been relevantly changed	16 May 2017
Google cache version of MDV website showing no changes had been made	30 July 2017
MDV website showing as being *under maintenance* and not being accessible	2 August 2017
Website noted as again being accessible, and still showing that MDV was a registered FSP	7 December 2017
Notification to MDV and its Directors of the website's reinstatement with assertion of registration as an FSP – warned of possible prosecutions	8 March 2018
Sharpe's response	10 March 2018
Website *taken down*	12 March 2018

[11] It is common ground that the defendant company had been registered on the Financial Service Providers Register. That registration occurred on 19 April 2014. At

the time of registration, it was understood by the FMA, (which is the entity established to administer the Act) that the Company intended to carry on the business of providing financial services from a physical (as opposed to electronic or similar) office in New Zealand within three months of the date of registration.

[12] It is not is dispute that MDV had a website containing, in its *heading,* the words:

> Registered in New Zealand: FSPR 350206.

Further, in the body of the website page, was this statement:

> Morgan DeVere Corporate Finance Limited (UK) is the holding company responsible for the overall strategy and management. Morgan DeVere Corporate Finance Ltd (New Zealand) is the sales/administration office registered as an FSP (Financial Services provider[sic]) based in the Wellington CBD.

At least the heading, containing the statement: *Registered in New Zealand: FSPR 350206* remained as part of the website throughout the relevant periods (ie those about to be mentioned as being part of the charges) of time.

[13] There seems to have been no relevant activity from the time of registration until January 2017. On 6 January 2017, an email was sent from the FMA to MDV advising it that it appeared that the Company did not have a *physical presence* in New Zealand in the sense of a permanent and dedicated office address. MDV was advised that deregistration under s18(1)(c) of the Act was being considered, but invited its comments by 20 January 2017.

[14] As the chronology shows, there was then some correspondence between the company and the FMA, with the crucial points being the advice to MDV that the deregistration process was being initiated; the deregistration on 7 March 2017; the advice to MDV that reinstatement of registration would not happen (8 March 2017) and MDV being advised on 9 March 2017 that its only way forward was to appeal the deregistration to the High Court (which it did not do). On 10 March 2017, MDV was specifically advised that it should immediately remove from its website any reference to its being registered under the Act. That all of the FMA's concerns and directions were received by the company is clearly to be taken from Mr Sharpe's message of 5 April 2017 advising that the reference(s) would be removed by 14 April 2017 and, after that did not occur, that removal would be done *after* 1 May. Again, it was not removed. The reference remained on the website until the whole website was taken down on in March 2018.

Discussion

[15] Mr Moorby is a New Zealand resident and was an acquaintance of Mr Kevin Sharpe who is UK based and was the person who *set up* MDV in New Zealand. Mr Moorby, although he had little direct experience in the financial services world, agreed to be a Director of the new company. Unfortunately, soon after the company was established and its registration with the FMA was complete, Mr Moorby suffered very serious health issues. He has no recollection at all of the period of a month or thereabouts from early 2017, and even after that he says, he was not really functional in the sense of being decisive or analytical. In a practical sense he ceased to be an active participant in the company's affairs, although he remained on the record as a Director and accepted, by his plea of *Guilty* to the charges laid against him, that the company had failed in its responsibilities under the Act, and that he had a responsibility to have ensured that it did so.

[16] It was noted also that there was no evidence that the company had actually conducted business in New Zealand, and Mr Moorby said that to the best of his knowledge, it had not done so. Mr Dean also submitted that there was no evidence that the company had advertised overseas that it was a registered entity under the New Zealand legislation. That may be so, but there can be no doubt that, in terms of s12, the contents of its website plainly *held out* that it was registered under the Act, when it knew full well that it was not. If a company puts material up on its website, it must know (and indeed intend) that it will be readable by anyone in the world who has internet access. The fact that there is no evidence that other persons acted on that misrepresentation about registration is not the point.

[17] The issue of *mens rea* was raised, Mr Dean pointing out that the definition of the offence specifies the requirement that to be guilty of it, the breach must be committed *knowingly*, ie:

> s12(2) – Every person who knowingly breaches subsection (1) commits an offence …

with his point being that the section does not create a strict liability offence.

[18] It is clear, from the wording of s12(2) of the Act, that a person who breaches the prohibition on holding his/her/its self out as being registered under the Act, when he/she/it is not in fact registered, will commit an offence if the holding out is done knowingly. That is, the person must be shown to have known that he/she/it was not registered, but presented to the world that he/she/it was registered. In the case of an individual person, the attribution of that knowledge can be established by what the

person said, or wrote, or did. In the case of a corporate entity, the knowledge can be attributed to it by what its directors and management say, or write, or do in conducting the company's affairs and business. Judgments such as those in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) and *Linework Ltd v Department of Labour* [2001] 2NZLR 639 (CA) make the situation very clear.

[19] Here, there can be no doubt that Mr Sharpe and Mr Moorby were Directors of the company and knew what the position was: - that the registration of the company under the Financial Service Providers (Registration and Dispute Resolution) Act had been cancelled, as of 7 March 2017. Their respective acknowledgements of, and responses to, the FMA's various messages make that perfectly clear. Mr Moorby's ill-health can certainly explain his distance from the day-to-day issues about the company, but he did come to understand the position. He himself said in evidence that when he felt able to focus on the problem, he actively pressed his co-director to attend to what needed to be done to amend the contents of the website.

[20] Even independently of Mr Moorby's reminders, Mr Sharpe, as the chronology of events shows, was informed and active throughout the relevant periods in 2017 and 2018. What they, as Directors, both knew, and did or did not do, were what the company, as a matter of law, knew and did or did not do. They may not have set out, from the beginning, to misrepresent the company's position but they knowingly allowed that misrepresentation to continue when it was perfectly clear that the company was no longer registered as an FSP. In that sense, their knowledge is the company's knowledge, and their failure to act on that knowledge is the company's failure. That failure, with that knowledge, constitutes the offence.

[21] It was suggested, in the course of the defence case in cross-examination, and in submissions, that had the FMA been so concerned about the continued notice on the website that MDV was registered under the Act, it could have directly contacted the website provider (the name of which was appended to the website), and required that entity to remove the reference to registration. I am not sure that this was being seriously advanced as a defence, but it can have no merit. For instance, whether or not the website provider was based in New Zealand, the FMA's authority to require it to act on its instructions, in the face of whatever contractual arrangements it had with MDV was, at best, very dubious. More importantly, it was MDV's responsibility to comply with the law, and the FMA was not called upon to undertake its compliance duties for it.

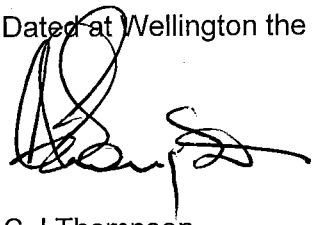
[22] The term *hold out* requires little elaboration – it means simply … *to represent (something) as true… or … to represent (oneself or another) as having a certain legal status.*[1] That is plainly what occurred here – from 7 March 2017 the company did not have the status of being registered as a Financial Services Provider, and knew that to be so. Notwithstanding that, it continued, through its website, to assert that it was so registered.

Result

[23] In short, I am satisfied that there can be no doubt that the company continued to hold itself out as being registered as a Financial Service Provider knowing full well that it was not. The company must be found *Guilty* of the charges.

[24] I will ask the Registrar to issue this decision to the parties. The charges have what is presently a nominal adjournment date of 10 May 2019. A date for sentencing is to be arranged, if counsel would kindly advise the Registrar of a date on which that could be dealt with.

Dated at Wellington the 1st day of May 2019



C J Thompson
District Court Judge

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1 See eg Black's Law Dictionary 10th ed.