

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-004-002469
[2017] NZDC 14223**

COMMERCE COMMISSION
Prosecutor

v

BUDGET WAREHOUSE LIMITED
Defendant

Hearing: 30 June 2017

Appearances: A McClintock and A Watt for the Prosecutor
E Ho for the Defendant

Judgment: 30 June 2017

NOTES OF JUDGE J C DOWN ON SENTENCING

[1] Budget Warehouse Limited have pleaded guilty to 18 charges under Fair Trading Act 1986 and Credit Contracts and Consumer Finance Act 2003. I will refer to the Financial Trading Act as FTA and the Credit Contracts and Consumer Finance Act 2003 as CCCFA hereafter.

[2] Each of the charges are representative. In other words, each charge represents a period of time and I think one month of trading. Therefore, it is important to understand that these are not just 18 examples of transactions which have been contrary to law, they are representative charges of a much wider period of conduct.

[3] The charges relate to contracts used in the defendant's truck shop business operated in the Auckland and Hamilton area selling, the prosecution say, high price

consumer goods on a credit basis door to door. The contracts in question misrepresented the defendant's liability for and the consumer's right to cancel due to delivery delay as well as the defendant's liability for consequential loss and damage. In addition, the contracts either omitted or incorrectly disclosed a substantial portion of the mandatory disclosure required by the CCCFA.

[4] The Commission, represented by Ms McClintock and Ms Watt, today submit that the offending was serious due to the large number of disclosure failures and the importance of the information that was misrepresented or left out, together with a large number of contracts.

[5] In summary, the circumstances are as follows. The defendant entered into a total of 817 consumer credit contracts between 6 June 2015 and 23 May 2016, so a period of about 11 months. In fact, each of the representative charges covers a period of approximately two months.

[6] Each of the consumers were provided with a standard form contract with terms and conditions on the reverse side. Those terms and conditions on the contracts contained false or misleading representations as to firstly, the defendant's liability for and the consumers right to cancel the contract due to delayed delivery, and secondly, the defendant's liability for consequential loss or damages.

[7] The defendant represented that it would not be liable for any delay in delivery of the goods to be supplied and that the consumer would not be entitled to cancel as a result of those delays. That representation was contrary to the guarantees under s 5A of the CGA, which provides that goods must either be received by the consumer within the agreed timeframe or within a reasonable time and creditors who do not meet that guarantee are liable to have the goods rejected or for damages.

[8] The defendant also represented that if goods caused any loss or damage it was liable only for the repair or replacement of the goods and not for any consequential losses. The defendant further purported to limit its liability for any defect or non-compliance of the goods. That was contrary to s 18(4) CGA, which provides that

consumers may obtain damages resulting from the failure of goods which were reasonably foreseeable as liable to result from such a failure.

[9] The credit contracts in question provided to 817 and also failed to disclose significant proportions of mandatory information applicable under the contracts subject to schedule 1 CCCFA. There were, in total, nine types of key information that were not disclosed, some of which had sub categories, and therefore 13 pieces of key information, and the majority of the failures result from pre printed terms and conditions on the back of those documents. The remainder occurred because details that were specific to individual consumers were not inserted into available spaces in the contract or the details inserted were incorrect.

[10] The CCCFA and FTA are consumer protection legislation directed at ensuring the consumers receive full and honest disclosure so that they can understand their rights and make decisions based on proper information.

[11] It is important to note that Credit Contracts and Consumer Finance Amendment Act 2014 made some important changes and, of course, those changes were in place at the time of this offending. A number of members of Parliament throughout the passage of that Amendment Act noted that poorer communities were being targeted by predatory practices of truck shops and so it is not surprising that the Commission seeks to send out a strong message, through this sentencing exercise, to other would be traders of this type, and I accept that one of the primary purposes of sentencing today is that of deterrence and that needs to be firm. It should not be forgotten, of course, that these are offences which carry only fines rather than imprisonment and that the defendant company is therefore liable to fines, rather than any greater penalty against any individual in that company.

[12] There are a number of aggravating features which are accepted by the defendant. Firstly, the misrepresentations have the effect of minimising or avoiding all together specific consumer protections, and in this case those failures were so extensive that it is said by the Commission that the consumers involved cannot possibly have properly understood their rights and obligations under the contract.

[13] The extent of the offending is said to be significant in this case. The number of failures is very significant and the Commission say that, in fact, in this case the number of failures is one of the highest that they have seen.

[14] Thirdly, the offending involved a high degree of negligence. It is pointed out by the prosecutor that most of the requirements that were breached had been mandatory since 1 April 2005. There is also a 12 month lead in time between the 2015 Amendment Act being passed and coming into force, which allowed creditors time to become familiar with the new requirements. So there was plenty of time provided to the defendant to be able to be compliant in those more recent obligations. During that period of time there was significant publicity over the Commission's report setting out the findings and putting everyone on notice that there were stricter rules due to come in.

[15] In particular in this case the Commission says that the negligence is significant or great on the part of this defendant, because although legal advice has been sought that was right at the end of the period that forms these charges and at a time when the Commission had already alerted them to the deficiencies, or some of them.

[16] Fourthly, the number of victims is significant, 817 debtors. Fifth, the victims were particularly vulnerable. I am told that it is a feature of this case, as well as other such cases, that the mobile trader industry does tend to focus upon unsophisticated consumers in areas where there are people with low incomes and poor credit histories, and it is those very people that need the protection of the law.

[17] The most serious of the two sets of charges carry a maximum penalty of up to \$600,000, the less serious charges up to \$30,000. One of the changes that has come into effect as a result of the updating of the law is an increase in the maximum penalties, and it is clear from that the Parliament intended that a much stronger signal be sent out to offenders in order to deter them and others from similar offending.

[18] The Commission submits that by reference to other similar cases the starting point on the s 17 charges should be in the region of 90 to \$100,000. As for the FTA offending, by reference to other sentencing authorities, prosecution submits that the

appropriate start point also should be between 90 and \$100,000. If one simply aggregated those two start points the resultant overall start point would be nearly \$200,000 fine. However, the Court must have regard to the totality of the sentence imposed today. So the submission by the prosecutor is that that start point reflecting totality for all 18 offences should be in the region of 150 to \$170,000.

[19] The Commission accepts that the defendant has fully cooperated with the Commission, and I note from my reading of the file that that has been very significant; there has been no holding back of co-operation, and once the Commission started the investigation the defendant was forthcoming in every regard. Neither does the defendant company have any previous history of similar offending. In those circumstances a discount of perhaps 10 percent is justified for those mitigating features, and to reflect the guilty pleas the maximum of 25 percent should apply. That, the prosecutor says, should result in a final sentence of between 100 and \$110,000.

[20] The defendant's counsel, no doubt on clear instructions from their clients, has largely accepted those submissions and does not to any significant extent differ from those submissions, but does ask the Court to conclude that the lower of those two final sentences or fines, in other words \$100,000, should apply in this case.

[21] There are other obligations that arise out of these convictions, and that is that fees charged when the paperwork was inadequate is by function of law required to be returned to the debtors. That is certainly the case here and amounts to a sum of just over \$30,000. It is proposed that the defendant be given a period of 12 months in which to make the appropriate refunds under the law and that they provide the Commission at the conclusion of that 12 month period with a schedule of repayments made and efforts that have been made to find debtors who can no longer be traced. I am certainly going to support that order.

[22] The defendant does ask me to take account of the reality that business has been hit hard. There was a period of time whilst they became compliant that the defendant company was unable to trade in the normal way and subsequently, because of losses, the fleet has been reduced and the business has contracted somewhat. Because of the

impecunious state of the company they seek time over which to pay the fine and to repay the charges that they are required to do under the law.

[23] The Commission are happy to consent to time being granted for fine to be paid and I will impose such an order. So I have come to the conclusion that the appropriate overall start point is in the region of \$150,000. I have come to that conclusion having reviewed other similar cases that have been provided to me and, giving credit for those matters of personal mitigation and the guilty pleas, I am prepared to impose what I deem to be the least sentence that is appropriate in this case, which is a fine of \$100,000. I am also going to order that that be paid.

[24] This counsel, is an oral judgment so I reserve the right to correct it as to form but not substance.

J C Down
District Court Judge