IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-003181
[2015] NZHC 1168

UNDER	the Fair Trading Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	ANZ BANK NEW ZEEALAND LIMITED Defendant

Hearing: 28 May 2015

Appearances: J C L Dixon and L C A Farmer for Plaintiff
A S Ross and M C Sumpter for Defendant

Judgment: 28 May 2015

ORAL JUDGMENT OF VENNING J

Solicitors: Meredith Connell, Auckland
Chapman Tripp, Auckland
Copy to: J C L Dixon, Auckland

[1] The Commerce Commission seeks a declaration that the ANZ Bank New Zealand Limited (ANZ) breached s 9 of the Fair Trading Act 1986 (the Act) by engaging in conduct that was misleading or likely to mislead certain affected customers by understating the risks and/or overstating the benefits of interest rate swap agreements. Interest rate swap arrangements are financial derivatives that can be used to manage and hedge interest rate risks. A key aspect of such a swap is it involves two contracts, an interest rate swap and a floating rate loan. Swaps fix the interest rate but not the margin.

[2] The Commission also sought an inquiry as to the loss or damages suffered by affected customers. The Commission and the ANZ have, however, reached a negotiated settlement. Pursuant to the settlement the Bank has agreed to pay affected customers as defined in the claim $18.5 million and does not oppose the Commission's application for the declaratory order sought. The issues for the Court are whether it is appropriate for a declaration to be made in these circumstances and if so, whether a declaration should be made in the terms sought and in the circumstances of the present case overall.

Background

[3] In August 2012 the Commission commenced an investigation into allegations the ANZ had breached the Act in its marketing of the interest rate swaps to its rural customers in particular. In December 2013 following its investigation the Commission advised ANZ it considered there was a sufficient foundation for it to commence proceedings alleging breaches of the Act between 2005 and 2009.

[4] Subsequently the Commission and ANZ engaged in discussions concerning the issue. The discussions culminated in a negotiated settlement pursuant to which ANZ agreed in summary:

(a) to make certain admissions in the statement of defence to the Commission's claim that it engaged in certain conduct that was misleading in relation to some affected customers;

(b) not to oppose the Court making a declaration that its conduct as admitted breached s 9 of the Act;

(c) to establish a payment fund of $18.5 million:

(i) to pay affected customers from the fund in accordance with the methodology approved by the Commission; and

(ii) to pay the remainder, if any, to rural support trusts;

(d) finally, to pay a contribution of $500,000 towards the Commission's costs in relation to the investigation.

[5] Given the admissions in the ANZ's statement of defence r 15.15 of the High Court Rules is engaged. The Commission is able to apply to the Court for any order it may be entitled to and the Court may in its discretion make any order it thinks just.

[6] In addition to the pleading (and particularly the admissions), the Commission's case is supported by the affidavit of Ms Butterworth, Chief Adviser of the Competition Branch of the Commission.

[7] The pleading and Ms Butterworth's affidavit disclose ANZ is New Zealand's largest rural banker, having a market share of just under 40 per cent. ANZ began selling the interest rate swaps to existing and potential rural banking customers in July 2005. It did so by introducing the concept through its rural banking managers. If the customer expressed interest the rural manager would typically arrange for them to meet with an ANZ market dealer from ANZ's Interest Rate Risk Management team.

[8] In essence the Commission alleges that the ANZ marketed and sold interest rate swaps to affected customers as being a good substitute for fixed rate term loans with less down side and more advantages. In so doing the Commission alleges ANZ's conduct was misleading as to some of the risks and some of the benefits of swaps to affected customers.

[9] Importantly I record at this stage that counsel for the Commission has confirmed that there is no suggestion that the allegations of misleading conduct for the purposes of the Act were intentional.

[10] I turn to the relevant pleading in particular. Underlying the general declaration sought are paragraphs 32 to 34 of the claim:

	Statement of Claim	Statement of Defence
32	Between on or about July 2005, and 31 March 2009, ANZ, by a combination of its Marketing Documents and Sales Presentations (including, in particular, individual and private discussions between ANZ managers and the Affected Customers), engaged in conduct in relation to Affected Customers that was misleading, or likely to mislead, by understating the risks and/or overstating the benefits of the Swap Arrangements.	It admits that it engaged in certain conduct that was misleading in relation to some Affected Customers, but otherwise denies paragraph 32.
33	The conduct referred to at paragraph 32 above was an operating and/or effective cause of the Affected Customers deciding to enter into Swaps.	It admits that certain of its conduct was a cause of some Affected Customers deciding to enter Swaps, but further says that its conduct referred to at paragraph 32 was not the sole cause of those Affected Customers deciding to enter Swaps, and that a number of the Affected Customers took legal, accounting and/or financial advice before entering into Swaps.
34	As a result of the conduct referred to at paragraph 32 above, the Affected Customers have suffered losses.	It admits that some Affected Customers may have suffered loss from entering swap arrangements as a result, in part, of certain of its conduct referred to at paragraph 32, but otherwise denies paragraph 34 and says further that the Fair Trading Act has a three year limitation period for affected persons to bring a claim for compensation. Every Affected Customer that entered into an interest rate swap is time-barred from pursuing ANZ for compensation under that Act.[1]

[11] As Mr Dixon acknowledged, the declaration sought goes somewhat further in terms of its particularity than the general admissions noted above. The basis for the further aspect of the declaration sought is to be found in the preceding paragraphs of the statement of claim and defence.

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[1] In its Reply, the Commission denied that the customers were time-barred from pursuing ANZ for compensation.

[12] The Commission has identified four representations that it alleges were misleading, namely:

(a) the margin representation – that margins on the swaps or the underlying funding would not change for the terms of the original swaps and for any restructure extension or shortening of the swaps;

(b) the ETA representation (break costs representation) – that any ETA (or break costs) payable by the affected customer would be the same, or virtually the same, as the cost of terminating a fixed rate term loan of equivalent amount, interest rate, and duration;

(c) the monitoring representation – that the Bank could and would monitor or would manage swaps to ensure the customer was able to take best advantage of the swaps; and

(d) the suitability representation – that swaps were a suitable alternative and good substitute for a fixed rate term loan for the circumstances of the affected customer.

[13] In particular paragraphs 22 and 23 of the claim plead:

	Statement of Claim	Statement of Defence
22	Between 2005 and April 2009, in its Marketing Documents and Sales Presentations, ANZ made representations to the Affected Customers to the effect that: (a) Swap Arrangements operated like a fixed rate term loan, except with greater flexibility and benefits, including the ability to easily restructure with low cost, and as such: (i) The Swap Arrangement fixed the all-up cost of the borrowing for the Affected Customer; (ii) Margins on the Swap or the Funding would not change for the term of the original Swap and for any restructure, extension, or shortening of the term of the Swap (the **Margin Representation**); and/or	It admits that it made representations to some Affected Customers to some (but not all) of the effect alleged, but otherwise denies the allegations as set out in paragraph 22 and says further that: 22.1 the representations made to each Affected Customer varied depending upon their different circumstances; … 22.3 it was clear from the Marketing Documents that the margin was not part of the Swap Arrangement. 22.4 ANZ managers believed any representations were true at the time they were made, …

	(iii) Any ETA payable by the Affected Customer on a Swap would be the same, or virtually the same, as the cost of terminating a fixed rate term loan of equivalent amount, interest rate, and duration (the **ETA Representation**).	
23	The Margin Representation was false and/or misleading, as the Swap Arrangements did not fix the all-up cost of borrowing, because ANZ retained the right under the terms of the underlying floating rate loan to increase margins.	It admits that the terms of the relevant loan agreements allowed ANZ to change margins. Save as is admitted, it denies paragraph 23 and says further that: 23.1 ANZ's managers expected at the time that any representation was made that margins would not increase, as margins on rural floating rate loans had been decreasing for over 20 years; 23.3 Many Rural Swap Customers had used these terms to negotiate lower margins through the period prior to the Global Financial Crisis (GFC).

[14] I note the pleading goes on to allege the monitoring and suitability representations as noted above but the Bank denies the alleged monitoring and suitability representations as pleaded so that they cannot form part of the misleading conduct that the ANZ accepts it engaged in.

[15] Against that factual and pleading background the first issue for the Court is whether the Court can make a declaration as to a breach of the Act notwithstanding the Act does not contain an express power for the Court to do so.

[16] In *Commerce Commission v Fletcher Challenge Ltd* McGechan J confirmed the Court had jurisdiction to grant a declaration under the Commerce Act 1986.[2] The Commerce Act, like the Act, does not contain an express provision for a declaration. In *Telecom Corporation of New Zealand Ltd v Commerce Commission* the Court of Appeal confirmed that jurisdiction.[3]

[17] In *Commerce Commission v Sweetline Distributors Ltd* this Court took the view that jurisdiction existed to make declarations as to a party's position under the Act.[4] Two later cases that counsel have referred to have either endorsed that

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2 *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 544 (HC).
3 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 278.
4 *Commerce Commission v Sweetline Distributors Ltd* (2000) 6 NZBLC 103,130 (HC) at [16].

approach or made declarations under the Act.[5] I am satisfied there is jurisdiction to make a declaration as to a breach of the Act.

Should a declaration be made in this case?

[18] A declaration will not be granted where the matter is moot or the relief will be of no practical utility. However I am satisfied on the basis of the submissions advanced on behalf of the Commission that the declaration sought in this case will have practical utility for the following reasons:

(a) ANZ's marketing of swaps is a matter of public interest. There is real interest in a Court declaring ANZ's conduct to be in breach of the Act rather than that breach being acknowledged and admitted in a private settlement agreement between the parties.

(b) the declaration will also publicly record a breach of the Act which, apart from publicly censuring ANZ's conduct, will be material should ANZ come before the Court again for a further breach of the Act or of relevant provisions of the Commerce Act.

(c) the public nature and effect of the Court's declaration will also act to deter ANZ and other banks or commercial entities from engaging in similar conduct in the future; and

(d) to some extent the declaration will confirm to the public and to the commercial community generally that the Commission is willing to and will act to enforce the Act where appropriate.

[19] I also note that as part of the negotiated settlement ANZ responsibly does not oppose the declaration in the terms sought leaving it to the Court to determine if it is appropriate. As was observed by a full Court of this Court in the *Commerce Commission v New Zealand Milk Corporation Ltd*[6] it is in the public interest that

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5 *Commerce Commission v Telecom Mobile Limited* [2004] 3 NZLR 667 (HC) at [99]; and *Commerce Commission v Grenadier Real Estate Ltd* (2002) 10 TCLR 648 (HC).

6 *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730.

litigation be brought to a conclusion and if possible at an early date. Defendants such as the Bank who are pursued by regulatory authorities and are prepared to acknowledge culpability on the basis of a negotiated settlement rather than take matters to a hearing should be encouraged to do so. A procedure that permits for a negotiated settlement is in the interests of all parties and the community as a whole. I note that at least the decision of the Federal Court of Australia in *Australian Competition and Consumer Commission v Star Promotions Club Pty Ltd* is to similar effect.[7]

[20] For the above reasons and on the basis of the pleadings and the admissions in the pleadings noted above I am satisfied that the declaration sought is appropriate and there is practical effect which supports making the declaration. There will therefore be the following declaration:

> Between on or about July 2005, and 31 March 2009, ANZ Bank New Zealand Limited breached s 9 of the Fair Trading Act 1986, in that, being in trade, it engaged in conduct that was misleading in relation to some of the customers listed in Schedule 1 to the Statement of Claim, in that it understated some of the risks and/or overstated some of the benefits of interest rate swap arrangements to those customers.

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Venning J

[7] *Australian Competition and Consumer Commission v Star Promotions Club Pty Ltd* [2010] FCA 139.