

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2021-004-001850
[2022] NZDC 23435**

BETWEEN	COMMERCE COMMISSION Applicant
AND	ACE MARKETING LIMITED First Defendant
AND	SANDIP KUMAR Second Defendant

Hearing: 1 November 2022

Appearances: A McClintock and J Barry for the Applicant
No Appearance by or for the First Defendant
No Appearance by or for the Second Defendant

Judgment: 6 December 2022

**RESERVED JUDGMENT OF JUDGE D J CLARK
[Reasons Judgment]**

Introduction

[1] On 1 November I entered judgment in favour of the Commerce Commission (the Commission) against the first and second defendants.¹ I stated detailed reasons for the orders which I made would follow. This judgment sets out those reasons.

[2] I also invited counsel to file memorandum as to whether the Commission sought costs. Counsel have advised the Commission does not seek costs.

Background

[3] Ace Marketing Limited (Ace) is a mobile trading business which has, since 2012, sold products on a door-to-door basis. The products are advertised in brochures which are prepared by Ace. They are sold at prices on credit which is significantly higher than what the same products would be sold in mainstream stores.

[4] The target audience for Ace and other “mobile traders” are generally persons who would not otherwise be able to afford to pay cash prices in mainstream stores or who have financial histories which do not allow them to access credit. Many are vulnerable.

[5] The products are sold on credit, with the terms and conditions of the credit arrangements being deliberately onerous. I go into the detail of these terms below.

The Defendants

[6] Ace was incorporated on 3 February 2012. Mr Kumar, since the date of incorporation has held director and shareholder positions since that time. Whilst other persons have held director roles Mr Kumar has remained the principal person involved in the operations of Ace.

[7] Prior to incorporating Ace, Mr Kumar worked at a company called U Buy Limited (U Buy) for a period of three years. U Buy was also a mobile trader.

¹ *Commerce Commission v Ace Marketing Limited and Sandip Kumar* CIV-2021-004-001850
1 November 2022.

[8] Mr Kumar was the national sales manager for U Buy but was also compliance manager tasked with the role of ensuring compliance with the Credit Contracts and Consumer Finance Act 2003 (CCCFA). U Buy was the subject of investigation by the Commission and had its own compliance issues.

Ace's Trading History

[9] Mr Kumar left U Buy after three years and incorporated Ace.

[10] The operations of Ace were significant. Twenty staff were based in Auckland and 15 in a service centre based in Fiji. Ace's sales representatives were deployed throughout the North Island with the sole task of physically knocking on people's doors to sell the products on deferred payment terms.

[11] The salesperson's job was to get consumers interested in the sale of the product and then explain the contract for sale with them. The salesperson, if the potential customer was interested, would then contact a team leader who would go through the specific terms of the contract over the telephone and confirm the key conditions.

[12] The terms of Ace's contracts changed frequently. The original contract was a copy of the contract which came from U Buy which was used until March 2013. In March 2013 the contract was changed to a "Rent to Own" agreement. It was principally this agreement which was the subject of an investigation by the Commission in 2014 which led to a prosecution in 2016.

[13] Between 1 April 2016 and 31 August 2018, Ace used three different versions of contract. There was little difference between each of the contracts that were used. Each version was based on the premise customers would sign up on four different repayment plans which had varying numbers of total weekly repayments. Depending on which plan a customer was on would dictate the minimum numbers of payments customers had to make before they received their products (the Delayed Delivery Provisions).

[14] Each of the plans were allocated a standard, described as a “gold”, “silver”, “bronze or “custom” plan. Below is a table which breaks down the contracts entered into by customers between 1 April 2016 and 31 August 2018. The total number amounted to 4,124 contracts during this period.

Type of Plan/Year	Bronze	Silver	Gold	Custom	Multiple ⁹¹	TOTAL
April-Dec 2016	1,356 (74%)	17 (0.9%)	18 (1%)	377 (20.5%)	66 (3.6%)	1,834 (100%)
Jan-Dec 2017	927 (51%)	15 (0.8%)	9 (0.5%)	829 (45.6%)	37 (2%)	1,817 (100%)
Jan-July 2018	24 (5.1%)	–	–	428 (90.5%)	21 (4.4%)	473 (100%)
TOTAL	2,307 (56%)	32 (0.8%)	27 (0.6%)	1,634 (39.6%)	124 (3%)	4,124 (100%)

[15] Each of the contract versions contained the Delayed Delivery Provision. The contract consisted of up to 15 pages. The clause did not appear until page 10 in each of the versions. It did not explain how long any deferral would be, but rather referred the reader to clause 3 of the general terms and conditions of the contract. This clause appeared on page 12 of the contract documentation. The clause, as well as the rest of the general terms and conditions were blurry and hard to read, used small font and had very little spaces between the contract clauses. It would be generous to even describe them as the “fine print”.

[16] The consequence of missing payments was therefore difficult to follow, difficult to understand and in any event not explained until the final page of the contract. Even then some explaining would be needed before a customer could understand what those consequences were. Counsel in their submissions have tabulated the missed payment schedule which I have inserted below.

Revised Delivery Schedule should you miss your payments are as follows:	% age of PMT Required	Gold	Silver	Bronze
If you miss 1 payment then the items purchased will be delivered after:	43.0%	13 weeks	23 weeks	32 weeks
If you miss 2 payments then the items purchased will be delivered after:	53%	16 weeks	28 weeks	40 weeks
If you miss 3 payments then the items purchased will be delivered after:	63.0%	19 weeks	33 weeks	48 weeks
If you miss 4 payments then the items purchased will be delivered after:	73.0%	22 weeks	38 weeks	54 weeks
If you miss 5 payments then the items purchased will be delivered after:	83.0%	25 weeks	43 weeks	62 weeks
If you miss 6 payments then the items purchased will be delivered after:	100.0%	30 weeks	52 weeks	78 weeks

Length of delay

Number of missed payments	Gold	Silver	Bronze
1	4 weeks	6 weeks	7 weeks
2	7 weeks	11 weeks	15 weeks
3	10 weeks	16 weeks	22 weeks
4	13 weeks	21 weeks	29 weeks
5	16 weeks	26 weeks	37 weeks
6	21 weeks	35 weeks	53 weeks

The bottom line for customers was if payments were missed, then Ace could continue to delay delivery. These consequences were never properly disclosed from the outset. Significantly, Ace benefitted from failed or delayed payments as they were not obliged to purchase product until it was basically paid for. Because of the numbers of default, in many instances they were not required to acquire the products at all yet received most of the payments for the products.

Ace is Prosecuted

[17] Following the receipt of numerous complaints, the Commission commenced an investigation in 2014. It identified numerous breaches of the CCCFA and the Fair Trading Act (FTA) had occurred between 1 June 2013 and 23 November 2015. Twenty-eight representative charges against Ace were laid for breaches of the CCCFA and the FTA. The charges covered an estimated 8,102 contracts. Ace pleaded guilty to all 28 charges.

[18] The charges related to initial disclosure breaches; disclosure standards; unreasonable or non-existent credit fees being charged (PPSR registration fees being charged when no security interest was ever registered); misleading representations under the FTA where Ace claimed it was not liable for a delay in the delivery of goods; breaches of the Credit (Repossession) Act 1997 for claims goods could be repossessed without notice; the charging of interest after the sale of repossessed goods; the failure to disclose a debtor's rights for relief for unforeseen hardship; and the right for Ace to deliver goods which did not match the description of the goods which were sold, (breach of s 9 of the Consumer Guarantees Act (CGA)).

Consequences of the Convictions

[19] Ace was sentenced by the District Court by His Honour Judge Collins on all 28 charges on 29 September 2016. In respect of the CCCFA offending, Ace was fined the sum of \$150,000 to be paid over two years. Ancillary orders requiring Ace to refund the costs of borrowing to the debtors who had entered into contracts with Ace between 6 June 2015 and 23 November 2015 (covering 1,548 contracts) were also ordered. Ace was required to provide proof to the Commission within 12 months of the order the refunds had been paid.

[20] The Commission continued to monitor the imposition of the ancillary orders made by Judge Collins. Requests by the Commission were either ignored or never answered resulting in the Commission seeking compliance orders from the Court. The information requested by the Commission was only provided at the last minute.

Further Investigations

[21] Ace appeared not to have learnt its lesson from the prosecution and imposition of the fines by the District Court. Complaints continued to be received by the Commission resulting in a new investigation being opened by the Commission in April 2018. Statutory notices under the FTA (s 47G) and the CCCFA (s 113) as well as s 98 of the Commerce Act were served on Ace to provide documentation to the Commissioner. These notices were served in September 2019. Ace complied in a piecemeal fashion to the notices after much delay. Notwithstanding the non-compliance the Commission elected not to take any further steps in respect of the same.

Civil Proceedings

[22] On 12 June 2020 the Commissioner issued civil proceedings in the High Court, primarily relating to the breaches set out in the above tables. Ace again adopted a piecemeal approach to the High Court proceedings. It failed to follow procedural timetables which were imposed resulting in a “Unless Order” being ordered by Fitzgerald J on 26 August 2021. Despite the Unless Order, Ace failed to comply with the timetable orders and Ace’s statement of defence was struck out on 30 September 2021.

[23] The effect of the striking out of the proceedings meant the Commission never received discovery from Ace. It believes further offending would have been apparent if discovery had been completed. Despite this, the Commission obtained judgment² for breaches of the Lender Responsible Principles under s 9C of the CCCFA and a declaration the Delayed Delivery Provisions of the credit contracts were unfair contracts under s 46L (1) of the FTA.

The Current Application

[24] As a result of the constant infringements, the inability to comply with various statutory notices and the Court orders both in the District Court and High Court, the

² *Commerce Commission v Ace Marketing Ltd* [2021] NZHC 1785 per Robinson J.

Commission has formed the view that banning orders are the most appropriate means to prevent any further infringements of the CCCFA and the FTA by the defendants.

[25] Ace continues to be registered although it is uncertain whether Mr Kumar resides in New Zealand or has returned to Fiji. It is noted he was served with these proceedings but has taken no steps to defend them.

[26] Banning orders are sought pursuant to s 108 of the CCCFA. Section 108 provides:

108 Power to order certain persons not to act as creditors, lessors, transferees, or buy-back promoters

- (1) The District Court may make an order prohibiting or restricting a person from doing all or any of the matters set out in subsection (2) if—
- (a) the person—
 - (i) has been convicted of an offence against this Act, or of a crime involving dishonesty (as defined in section 2(1) of the Crimes Act 1961); or
 - (ii) is, or has been, a creditor under a credit contract that has been reopened under the Credit Contracts Act 1981; or
 - (iii) is, or has been, a creditor under a credit contract, a lessor under a consumer lease, or a transferee under a buy-back transaction that has been reopened under section 120; or
 - (iv) is, or has been, a buy-back promoter in connection with a buy-back transaction that has been reopened under section 120; or
 - (v) has failed to comply with any of the provisions of this Act (including, to avoid doubt, the lender responsibility principles (see section 9C(2))); or
 - (va) has failed to comply with any of the provisions of any of the following Acts or of any equivalent overseas legislation:
 - (A) the Fair Trading Act 1986:
 - (B) the Financial Service Providers (Registration and Dispute Resolution) Act 2008:

- (C) the Secondhand Dealers and Pawnbrokers Act 2004; or
- (vi) was a director or principal officer of a body corporate at the time the body corporate acted in the manner referred to in subparagraphs (i) to (va); and
- (b) in the opinion of the District Court, the person is not a fit and proper person to—
 - (i) enter into consumer credit contracts as a creditor; or
 - (ii) enter into consumer leases as a lessor; or
 - (iii) enter into buy-back transactions as a transferee; or
 - (iv) act as a buy-back promoter in connection with a buy-back transaction.
- (1A) [Repealed]
- (2) The matters are—
 - (a) providing credit under consumer credit contracts, leasing goods under consumer leases, purchasing land under buy-back transactions, or acting as a buy-back promoter in connection with a buy-back transaction either alone or in partnership with any person and whether or not through agents:
 - (b) acting as a director or taking part directly or indirectly in the management or control of any company or business that provides credit under consumer credit contracts, leases goods under consumer leases, purchases land under buy-back transactions, or acts as a buy-back promoter in connection with a buy-back transaction:
 - (c) being in the employ, or acting as an agent, of a creditor, a lessor, a transferee, or a buy-back promoter in any capacity that allows the person to take any part in the negotiation of—
 - (i) consumer credit contracts involving the provision of credit by the creditor; or
 - (ii) consumer leases involving the leasing of goods by the lessor; or
 - (iii) buy-back transactions.

[27] I accept the submissions of Ms McClintock the threshold test which is to be satisfied under s 108(1)(a) has been triggered and satisfied. As the background clearly sets out, there has been a deliberate failure and unwillingness by Ace and Mr Kumar to comply with their obligations under the CCCFA and the FTA. This position has

been reinforced by the need to have orders made against them both in the District Court and the High Court.

[28] I am also satisfied Ace and Mr Kumar are not fit and proper persons to be involved in providing credit under the CCCFA (s 108(1)(b)). Both Ace and Mr Kumar have demonstrated over a significant period they had no regard to any statutory compliance obligations. They continued to target vulnerable consumers even when they were under investigation and following the orders which were made by the District Court.

[29] Their actions were deliberate and based on the evidence, cynical. By targeting vulnerable persons, they knew many would default. The sole beneficiaries of the Delayed Delivery Provisions were Ace and Mr Kumar because they received payments without incurring holding costs. The operation was nothing short of a scam. Appropriate orders need to be put in place to prevent their conduct from occurring again in the future.

[30] Counsel advise previous banning orders have been made in criminal proceedings.³ The originating application has been brought in the civil jurisdiction, but Ms McClintock submits the applicable test in terms of non-compliance is no different between a civil proceeding and what has been considered in the criminal jurisdiction. The principles underpinning the decisions remain relevant.

[31] Those principles are:

- (a) The conduct of the person does not need to occur over an extended period. It can occur over a handful of contracts entered into in a short period as what occurred in *Ludlow* and *Yang*; Clearly in this instance the period of offending occurred over a significant period.
- (b) Banning orders have been made where vulnerable persons were the target of the defendant. I agree the vulnerability of the consumers

³ *Commerce Commission v Takarunga Management Limited and Ludlow* DC North Shore, CRI-2009-090-7407; *Commerce Commission v Yang* [2015] NZDC 20403 and *Commerce Commission v Marshich* [2016] NZDC 23919.

affected is an important factor and the more vulnerable, the greater need for protection. I would add however all consumers need to be protected from targeted scams, and therefore the decision to impose such orders needs to be considered against who is being targeted as well as the context of the offending party's conduct and ongoing unwillingness to comply with their obligations under the CCCFA and the FTA.

- (c) Banning orders have been made where there is an absence of engagement with the governing legislation (*Yang* and *Marshich*), but in *Ludlow* it was suggested a small number breaches will still suffice for the thresholds under s 108 to be reached. I agree. Overall, a prescriptive approach is unnecessary and where the nature and circumstances of the offending justifies banning orders then a Court should not be slow in imposing such orders.

How Long Should A Banning Order Be?

[32] In *Ludlow*, *Yang* and *Marshich*, indefinite bans of the individuals were imposed. On appeal, in *Marshich* Heath J queried the imposition of an indefinite ban in the context of having regard to the gravity of the offending and the dangers which Mr Marshich posed to vulnerable borrowers.⁴

[33] Other cases have involved bans of up to 10 years, although it is accepted by the Commission such orders were made before the certification regime was imposed, requiring providers of credit to be certified under Part 5A of the CCCFA. Unless certification is given (or they are exempted) creditors must be certified to provide credit services.⁵ The certifications are issued by the Commission⁶ and are only issued once the Commission is satisfied the applicant, its directors, senior managers or proposed senior managers are fit and proper persons for the purposes of the Act.

⁴ Per Heath J, *supra* at [21].

⁵ Section 131B.

⁶ Section 131E.

[34] Given this layer of added protection, the Commission has accepted that indefinite bans and lengthy bans of 10 years could now be seen in the context prior to when the certification regime was implemented. Under the regime a provider of credit must be re-certified every five years.⁷

[35] The Commission submits a five year ban is therefore appropriate as it is consistent with the certification period and will ensure no certification will be provided to Ace and Mr Kumar unless they are able to convince the Commission they are fit and proper to provide credit.

[36] I agreed with the submissions made by Ms McClintock based on the above analysis and therefore made an order banning Ace and Mr Kumar from providing credit for the period of five years.

Summary

[37] As set out in my judgment of 1 November 2022, I confirm that the following orders are made:

[38] As against Ace Marketing Limited, I grant a banning order to provide a credit under the CCCFA.

[39] As against Mr Kumar I grant a banning order to:

- (a) provide credit under the CCCFA;
- (b) to act as a director or take part directly or indirectly in the management or control of any company or business that provides credit under the CCCFA; and
- (c) to be in the employ or acting as an agent of a creditor in any capacity that allows Mr Kumar to take any part in the negotiation of consumer credit contracts involving the provision of credit by the creditor.

⁷ Section 131O.

[40] The banning orders shall be for a period of five years from 1 November 2022.

Signed at Auckland this 6th day of December 2022 at 4.20 pm

Judge D J Clark

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 06/12/2022