

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2020-404-869
[2022] NZHC 1785**

UNDER	Parts 1A and 4 of the Credit Contracts and Consumer Finance Act 2003, and Parts 4A and 5 of the Fair Trading Act 1986
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	ACE MARKETING LIMITED Defendant

Hearing:	3 December 2021
Appearances:	J Dixon QC, J Barry and N Herewini for the Plaintiff No appearance for the Defendant
Judgment:	6 December 2021
Reasons:	25 July 2022

REASONS JUDGMENT OF ROBINSON J

*This judgment was delivered by me on 25 July 2022 at 10:00am
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

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Introduction

[1] On 6 December 2021, I issued a results judgment in which I: ¹

- (a) declared that by its conduct Ace Marketing Ltd (Ace) breached s 9C(1) via s 9C(2)(b) and each of ss 9C(3)(b)(ii) and 9C(3)(b)(iii) of the Credit Contracts and Consumer Finance Act 2003 (CCCFA);²
- (b) directed that Ace is not to provide credit under the contracts that are the subject of this proceeding unless and until it complies with ss 9C(3)(b)(ii) and 9C(3)(b)(iii) of the CCCFA;³
- (c) declared (amongst other things) that pursuant to s 46I(1) of the Fair Trading Act 1986 (FTA) that certain terms and provisions of Ace's contract described as the Delayed Delivery Provisions amounted to an unfair contract term in a standard form contract within the meaning of s 46L(1) of the FTA;⁴ and
- (d) declared pursuant to s 26A of the FTA that a person must not include apply, enforce, or rely on the Delayed Delivery Provisions in a standard form contract, with the result that Ace cannot delay delivery of a customer's goods once that customer has made the minimum number of repayments that are required under Ace's contract but for the Delayed Delivery Provisions.

[2] These are my reasons for that judgment.

¹ *Commerce Commission v Ace Marketing Ltd* [2021] NZHC 3312 (the results judgment).

² At [4](a) and [5](a).

³ At [4](b) and [5](b).

⁴ At [68]. For the description and definition of the Delayed Delivery Provisions see [20]–[33] below.

Background

Procedural Background

[3] On 26 August 2021, Fitzgerald J ordered that Ace's statement of defence would be struck out unless Ace complied with its discovery obligations before 23 September 2021.⁵ Ace did not comply with its discovery obligations before 23 September 2021, so on 30 September 2021 Muir J struck out Ace's statement of defence.⁶ The matter proceeded before me by way of formal proof.⁷

[4] The Commerce Commission (the Commission) pleaded six causes of action. Ultimately, it brought evidence and made submissions in pursuit of only the first, second and fourth of those causes of action. The first and second cause of action alleged that by its conduct Ace breached s 9C(1) via s 9C(2)(b) and, respectively, each of ss 9C(3)(b)(ii) and 9C(3)(b)(iii) of the CCCFA. The Commission sought declaratory and injunctive relief, and costs. In its fourth cause of action the Commission alleged that Ace's contract was a standard form contract that contained an unfair contract term within the meaning of s 46L of the FTA. The Commission sought declarations pursuant to each of ss 26A and 46I(1) of the FTA, together with costs.

Factual Background

[5] In advance of the formal proof hearing, the Commission filed a supporting affidavit sworn on 18 November 2021 by Ms Sophie Ridoux, a senior investigator in the Fair Trading Branch of the Commission. Ms Ridoux was the lead investigator in the Commission's investigation into Ace. In her affidavit, Ms Ridoux helpfully sets out the relevant factual background, to which I refer below. Ms Ridoux explains that her evidence is informed by:

⁵ *Commerce Commission v Ace Marketing Ltd* HC Auckland CIV-2020-404-869, 26 August 2021 (Minute of Fitzgerald J) at [5].

⁶ *Commerce Commission v Ace Marketing Ltd* HC Auckland CIV-2020-404-869, 30 September 2021 (Minute of Muir J) at [2].

⁷ High Court Rules 2016, r 15.9.

- (a) information the Commission received in response to notices issued under s 47G of the Fair Trading Act 1986 (FTA) and s 98 of the Commerce Act 1986 (CA);
- (b) information gathered during a compulsory interview with Ace's sole shareholder and director, Sandip Kumar, on 13 December 2018, which Mr Kumar attended with his lawyer;
- (c) her review and analysis of Ace's customer files; and
- (d) her interviews with some of Ace's customers, some of whom provided signed statements.

[6] I summarise, and in places adopt, Ms Ridoux's explanation of the relevant background below.

[7] Ace was incorporated in 2012. Since then, Ace has operated a mobile trader business selling high-priced consumer goods such as televisions and smartphones. Ace would sell these goods door-to-door on credit at prices significantly higher than what is charged in mainstream stores. The consumers would purchase the goods on deferred payment plans. As discussed in more detail below,⁸ Ace's customers would not receive their goods until they had made a specified minimum number of payments.

Ace's customers

[8] In his statutory interview, Mr Kumar was asked whether Ace carried out a credit check of customers before signing up their contracts. The transcript of the interview records that in his reply Mr Kumar described Ace's business model and its customer base as follows:

[The] Commission should actually understand first, the actually [sic] model of the business for Ace Marketing. So like simply we are dealing with sub-prime and like bad credit history people. So basically a actually [sic] traditional credit check won't - the traditional credit check will be like useless because obviously the score will be low.

⁸ See [16]–[19] below.

[9] Mr Kumar explained that Ace's customers typically would not be able to buy the products they wanted from "normal retailers" because of their poor credit histories. Ms Ridoux deposed that Mr Kumar's statements were borne out by the customer files she reviewed and the witness statements taken from some of Ace's customers during the investigation.

[10] By way of example, Ms Ridoux refers to a customer who reports in his witness statement that he was approached at his house to purchase something from Ace's catalogue. He agreed to purchase a Samsung Galaxy S9 at a total contract price of \$5,460, when his stated net income was \$550 per week, or \$28,600 per annum. Therefore, the contract price for the mobile phone was nearly 20 per cent of that customer's annual stated income. The contract provided that the customer would pay the purchase price through 156 weekly instalments and that the product would not be delivered until at least 78 payments had been made. As for all of Ace's customers, and as described more fully below, that delivery date would be deferred if the customer missed any one of the first 78 instalments. Ms Ridoux deposes that this particular customer cancelled his contract shortly after entering into it, and that Ace charged the customer fees of \$769.80.

[11] A further example involved another customer who reports in her witness statement that she was approached by an Ace sales agent who asked her to get into the agent's vehicle. The customer was presented with an Ace catalogue and decided to purchase an iPhone for a total contract price of \$4,290. The customer was a beneficiary, with a weekly after tax income of \$410 per week (or \$21,320 per annum). Again, this purchase price represented approximately 20 per cent of the customer's annual income and was payable in 156 weekly instalments with delivery of the product after a minimum of 78 payments. The customer cancelled the contract within a few weeks of the contract being entered into. Ace charged fees of \$651.70 which it took the customer five months to pay.

Ace's contracts

[12] Ace used a standardised contract consisting of multiple documents (the contract). The Commission alleged that each of these contracts was a consumer credit contract, meaning Ace had to meet various obligations under the CCCFA.

[13] Between 1 April 2016 and 31 August 2018 (the Claim Period), Ace entered into 4,124 contracts with customers. During the Claim Period, Ace used three versions of its contract. Version 1 was used between 1 April 2016 and 16 May 2017. Version 2 was used between 17 May 2017 and sometime in March 2018. Version 3 was used until 31 August 2018 by which time Ace had ceased new sales.

[14] Version 1 and Version 2 of the contract were materially similar for present purposes. In summary, they were set out as follows:

- (a) pages 1 to 2: a document entitled: “Purchase Agreement [Specific Terms]”, which contained:
 - (i) spaces to record (amongst other things), the customer’s personal details, the type of repayment plan that applied to the customer’s contract, and the day of the week that payments would be due under that repayment plan;
 - (ii) notices regarding cancellation rights, how to make complaints, credit fees and charges; and
 - (iii) a notice section entitled: “What could happen if you fail to meet your commitments” which outlined Ace’s right to repossess the goods and charge default fees.
- (b) pages 3 to 4: a “Direct Debit Authority Form”;
- (c) pages 5 to 8: a “Disclosure Statement for Consumer Credit Contracts”, which purported to provide initial disclosure under s 17 of the CCCFA,

and which also contained a notice section entitled: “What could happen if you fail to meet your commitments”;

- (d) page 9: a form entitled “Applicant’s personal income/expenditure statement summary”;
- (e) page 10: a checklist regarding certain key aspects of the contract;
- (f) page 11: a “Notice of Cancellation” form, which the customer could complete if they elected to cancel the contract within five working days; and
- (g) pages 12 to 15: a document entitled: “Purchase Agreement – General Terms and Conditions”.

[15] Version 3 of the contract differed slightly to the previous versions. The “Direct Debit Authority Form” was removed from pages 3 to 4 and a generic document headed “Budget Advise [sic] Sheet” at pages 8 to 9 was added.

Repayment plans

[16] As with the examples set out above, Ace’s customers paid for the goods they purchased from Ace by weekly instalments. Goods would only be delivered to customers once a specified minimum number of payments were made by the customer. Ace had four types of payment plans: Gold, Silver, Bronze, and Custom. Which of these four plans applied to a particular customer would determine: the total number of payments a customer had to make over the life of the contract; and the minimum number of payments required before Ace would deliver goods to the customer.

[17] For Gold, Silver and Bronze payment plans, Ace’s repayment and delivery schedules were as follows:

- (a) the Gold plan provided for the customer to make 30 weekly payments to purchase the product, with delivery after nine weeks (for first time customers) or eight weeks (for repeat customers);

- (b) the Silver plan provided for the customer to make 52 weekly payments to purchase the product, with delivery after 17 weeks (for first time customers) or 15 weeks (for repeat customers); and
- (c) the Bronze plan provided for the customer to make 78 weekly payments to purchase the product, with delivery after 25 weeks (for first time customers) or 24 weeks (for repeat customers).

[18] The Commission provided the following table which breaks down per year the number of contracts entered into and the payment plan adopted during the Claim Period:

Types of plan/ year	Bronze	Silver	Gold	Custom	Multiple	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 – Dec 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%)

[19] As is evident from the table, a significant majority of Ace’s customers during the Claim Period entered contracts with Ace on the Bronze or Custom plans, with 90.5 per cent of contracts entered into in 2018 being on Custom plans. Custom plans did not have a default number of total weekly payments required before delivery. Ms Ridoux deposes that Custom plans were for typically longer periods than the other payment plans. She says that of the customer files she reviewed, nearly all of them were for a duration of 156 weeks (three years) with 78 weekly payments required before delivery. The customer experiences described at [10]–[11] above are examples of this.

Delayed Delivery Provisions

[20] All three versions of the contract contained terms that purported to provide Ace with the right to delay delivery of products to customers who failed to make one or more payments in accordance with the payment schedule.

[21] Pages 1 to 9 of all versions of Ace's contract contained no express reference to delivery being delayed if the customer had a missed or dishonoured payment. Where a payment was missed or dishonoured payments are referred to in the first nine pages, the contract only disclosed the possibility of a customer being charged certain default fees. In particular:

- (a) On page 2 of the contract, under the heading "What could happen if you fail to meet your commitments" references made to default fees for dishonoured or missed payments. However, there is no mention of the possibility that Ace could delay delivery if the customer was late with a payment.
- (b) On page 7 of Versions 1 and 2 of the contract and on page 5 of Version 3, there are two boxes containing text under the heading "what could happen if you fail to meet your commitments". There was a further subheading that read "default interest charges and default fees", under which it made reference to the customer having to pay default interest and default fees when the customer failed to make a payment. Again, there was nothing on this page that said Ace could delay delivery of the product if the customer was late with a payment.
- (c) On page 8 of Version 3 of the contract was a "budget advise [sic] sheet", which was introduced with this version of the contract. That document stated that customers should "make sure that you know exactly what is payable in the event you miss payments" and to ask themselves if they are "aware of the number of repayments [they] are required to complete in order to qualify for delivery and also to complete the contract". But nowhere on this sheet did it state that Ace could delay delivery if the customer was late with a payment.

[22] Ace's contractual right to delay delivery of goods is not mentioned until page 10 of each version of the contract on the checklist document. In each version it states:

Delivery

You will only be entitled to delivery of the Products once you have made certain number of payments [sic]. The number of minimum payments before you are entitled to delivery of the Products may be increased IF you default under the Agreement. Please refer to clause 3 of the Terms and Conditions.

What Happens if you Default

If you default in making any payments under the Agreement, there may be consequences on you including a deferment of the delivery date, and the incurring of additional payments.

[23] As is apparent, the checklist document did not explain how long delivery would be delayed if a customer missed a payment. Customers were instead directed to cl 3 of the General Terms and Conditions (General Terms).

[24] The General Terms is a four page document. It is typed in size 8 font and formatted in dual columns. There is little to no spacing between different clauses. Ms Ridoux accurately describes it as "Fine Print". The Commissioner describes this as "Fine Print".

[25] Clause 3 of the General Terms in Versions 1 and 2 of Ace's contract states:⁹

3.0 Your entitlement to delivery and possession

3.1 Subject to clause 3.2, you are entitled to delivery and use of the Products for the term of the Agreement once you have paid to Ace Marketing the Minimum Payments, unless Ace Marketing becomes entitled under the Agreement to inspect or repossess the Products (for example, where you breach the terms of the Agreement). *If you fail to make any payment on or before the due date, Ace Marketing reserves the right to increase the number of Minimum Payments required to be made by you before delivery.* If you fail to make payments while delivery is in process Ace Marketing reserves the right to hold delivery until continued payments are received.

⁹ Emphasis added.

[26] The wording of cl 3 of Version 3 of the contract was altered slightly but had the same effect:¹⁰

3.0 Your entitlement to delivery and possession

3.1 Subject to clause 3.2, you are entitled to delivery and use of the Products for the term of the Agreement once you have paid to Ace Marketing the Minimum Payments. *If you fail to make any payment on or before the due date, Ace Marketing reserves the right to increase the number of Minimum Payments required to be made by you before delivery.* If you fail to make payments while delivery is in process Ace Marketing reserves the right to hold delivery until continued payments are received.

[27] Although cl 3 appears on page 12 of Ace’s contract (being the first page of the General Terms), the specific consequences of missing payments are not spelt out. Ace merely “reserves the right” to increase the number of Minimum Payments “required before delivery”.

[28] However, on page 15 there is a schedule setting out the number of payments that a customer will need to make before being entitled to delivery in the event that any payments are missed (Delayed Delivery Schedule).

[29] For present purposes, I will refer to the Delayed Delivery Schedule, together with cl 3 of each version of the General Terms, as the Delayed Delivery Provisions.

[30] Significantly, the Delayed Delivery Schedule is not introduced, explained, or cross-referenced in any way to cl 3 of the General Terms. It appears entirely out of context underneath a privacy waiver.

[31] The Delayed Delivery Schedule sets out the length of time by which delivery “will be” deferred. This depends on how many payments the customer has missed.

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:	43.00%	13 weeks	23 weeks	32 weeks

¹⁰ Emphasis added.

If you miss 2 payment then the items purchased will be delivered after:	53.00%	16 weeks	28 weeks	40 weeks
If you miss 3 payment then the items purchased will be delivered after:	63.00%	19 weeks	33 weeks	47 weeks
If you miss 4 payment then the items purchased will be delivered after:	73.00%	22 weeks	38 weeks	54 weeks
If you miss 5 payment then the items purchased will be delivered after:	83.00%	25 weeks	43 weeks	62 weeks
If you miss 6 payment then the items purchased will be delivered after:	100.0%	30 weeks	52 weeks	78 weeks

[32] It is also significant that although cl 3 of the General Terms suggests that Ace “reserves the right” to increase the number of payments before delivery, the Delayed Delivery Schedule stated that the number of payments before delivery “will be” increased.

[33] The contract does not specify in the Delayed Delivery Schedule or anywhere else the length of time that Ace might (or will) delay delivery for customers on Custom plans. As noted at [18] above, by 2018 more than 90 per cent of Ace’s customers were on Custom plans.

Ace’s additional documentation

[34] During the course of the Commission’s investigation (and after some prompting) Ace provided additional documentation relevant to the Delayed Delivery Provisions. In particular, the Commission requested documents and any other material in which Ace might have informed customers of the Delayed Delivery Provisions. That material included Ace’s sales catalogue; templates of the sales verification call questions used by call centre staff; and a separate leaflet given to customers (referred to as the Reminder Document).

Ace’s sales catalogues

[35] The sales catalogues showing the goods Ace had for sale did indicate that delivery would take place after a certain number of weekly payments. But none of the

sales catalogues provided by Ace expressly referenced the possibility of delivery being delayed as a result of missed or late payments. They simply referred to cl 3 of the General Terms (but not the Delayed Delivery Schedule).

Sales verification calls

[36] Ace advised the Commission that the templates of the sales verification call questions were used by call centre staff from January 2017 onwards. These included a list of questions to be asked of each customer. One of the questions required the customer to confirm that they understood the number of payments required before delivery of the product. Another required the customer to confirm they understood that delivery would be delayed if payments were late or missed prior to delivery. However, there was nothing in the templates to indicate that Ace staff raised or discussed with customers the particular length of time by which delivery would be delayed as a result of one or more missed payments.

[37] Ms Ridoux deposed that having listened to recordings of actual phone calls with customers there is nothing to suggest that the discussions with Ace's customers were carried out any differently to what the template suggests. Moreover, Ms Ridoux has provided a transcript of a sample call in which a customer specifically asks for clarification about Ace's right to defer delivery. Even then the customer was not provided with correct information about the Delayed Delivery Provisions. Instead, the call centre operator incorrectly advised the customer that delivery would be delayed by only a week following a missed or late payment.

Reminder Document

[38] Ace told the Commission it began providing customers with the Reminder Document from January 2017. The Reminder Document includes the following passage:

Please refer to clause 3.0 of terms & condition [sic] and the below table in case if you fail certain payments your delivery period will be extended [sic]. You can avoid any deferment of your delivery period if you contact us NO LESS than 48 hours before your payment is due to be made, that you are unable to make payment for that week. If you do, then we will put your payments on hold and this WILL NOT affect your delivery period.

[39] The Reminder Document then includes the Delayed Delivery Schedule.

[40] The Reminder Document also states “please refer to our explanation on effective budgeting”. In her affidavit, Ms Ridoux says this is likely to be a reference to Ace’s “Budget Advise (sic) Sheet”. But this was only included in Version 3 of the contract, which was not used by Ace until March 2018. Ms Ridoux also deposes that there was no evidence in any of the complaints the Commission received or the files that Ace provided to indicate that the Reminder Document was provided to relevant customers.

[41] In any event, the Reminder Document does not set out or refer to the specific consequences of missed or delayed payments by customers on Custom plans, which in 2018 accounted for more than 90 per cent of Ace’s contracts.

Ace’s explanation

[42] As noted at [8] above, Mr Kumar advised the Commission that Ace’s customer base is made up of “sub-prime and like bad credit history people”. Later in the interview Mr Kumar advised that in order to explain how the deferred delivery arrangements worked, and why it is necessary to extend the minimum number of payments prior to delivery:

...first I have to actually explain you the like business. So I will have to first explain the Company’s model which is Ace Marketing was created to help consumers with sub-prime or bad credit history to purchase goods and products of their desire which they cannot purchase traditionally on finance from retail store. It is able to do so by offering its actually customers products and the products on payment or instalment basis which is stretched out either under the gold, silver, bronze or other ways longer term depending on the payment amount suiting to the client’s like budget. This form of lending has got no interest fees and no default interest fees.

Description of – basically the description of sub-prime or bad credit can be generally described as a record of past failures to keep up with payments on credit agreement on time, failure to meet obligations or not payment the credit loan at all. So like basically this is Ace like marketing client’s base. Since Ace marketing is working with high risk consumers who already have a record of default or not paying the loan at all, the traditional credit check becomes useless or senseless in this like market, because again, there is no point for us doing a credit check and charging the customers for like credit check in terms of because again these fees are... with a credit check which we have to pass on to the customer eventually anyway. So like basically our like credit check is useless is actually senseless there. So Ace Marketing had actually derived

its own credit rating mechanism because the traditional credit check won't work, which is called the delivery schedule. With it the company tries to keep the customers motivated to keep up with regular payments, to receive delivery of the goods by meeting the required number of like payments. And basically that is the reason why our actually deferred is not straight away you miss one payment and then you have to pay off the product to actually receive it. It is actually growing gradually 10% increase per every default.

Causes of Action One and Two - Breach of Responsible Lender Principles

[43] Because both the first and the second causes of action allege a breach of s 9C(1) of the CCCFA via ss 9C(2)(b) and 9C(3)(b), I will deal with them together.

[44] The relevant provisions of s 9C of the CCCFA provide:

9C Lender responsibility principles

- (1) Every lender must comply with the lender responsibility principles.
- (2) The lender responsibility principles are that every lender must, at all times,—

...

(b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).
- (3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—

...

(b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that—

...

(ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and

(iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing;

...

[45] The Commission’s first cause of action alleges a breach of s 9C(3)(b)(ii), and the second cause of action alleges a breach of s 9C(3)(b)(iii). To establish these causes of action, the Commission needed to establish:

- (a) that Ace was a “lender”;
- (b) that Ace’s customers were “borrowers”;
- (c) for the first cause of action, that the terms of the contract were not expressed in plain language in a clear, concise, and intelligible manner; and
- (d) for the second cause of action, that the information Ace provided its customers was presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.

Was Ace a lender?

[46] Section 9B of the CCCFA defines a lender as:¹¹

lender means—

- (a) *a creditor* under a consumer credit contract;
- (b) a transferee under a buy-back transaction.

[47] Creditor is relevantly defined in the interpretation section of the CCCFA as follows:¹²

creditor means a person who provides, or may provide, credit under a credit contract.

[48] Credit is defined in s 6 of the CCCFA:

6 Meaning of credit

In this Act, unless the context otherwise requires, credit is provided under a contract if a right is granted by a person to another person to—

¹¹ Emphasis added.

¹² Credit Contracts and Consumer Finance Act 2003, s 5.

- (a) defer payment of a debt; or
- (b) incur a debt and defer its payment; or
- (c) purchase property or services and defer payment for that purchase (in whole or in part).

[49] Credit contract is relevantly defined in s 7 of the CCCFA:

7 Meaning of credit contract

- (1) In this Act, unless the context otherwise requires, credit contract means a contract under which credit is or may be provided.
- (2) If, because of any contract or contracts (none of which by itself constitutes a credit contract) or any arrangement, there is a transaction that is in substance or effect a credit contract, the contract, contracts, or arrangement must, for the purposes of this Act, be treated as a credit contract made at the time when the contract, or the last of those contracts, or the arrangement, was made, as the case may be.

[50] To be a consumer credit contract, the credit contract must meet the definition in s 11(1) of the CCCFA:

11 Meaning of consumer credit contract

- (1) A credit contract is a consumer credit contract if—
 - (a) the debtor is a natural person; and
 - (b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and
 - (c) 1 or more of the following applies:
 - (i) interest charges are or may be payable under the contract:
 - (ii) credit fees are or may be payable under the contract:
 - (iii) a security interest is or may be taken under the contract; and
 - (d) when the contract is entered into, 1 or more of the following applies:
 - (i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business):

- (ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:
- (iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:
- (iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

...

[51] In applying this statutory framework, I agree with counsel for the Commission that whether Ace is a lender is to be determined by answering the following questions:

- (a) Did Ace provide credit to its customers?
- (b) If so, was this credit provided under credit contracts?
- (c) If so, were the credit contracts consumer credit contracts? This in turn raises the following sub-questions:
 - (i) were the debtors' natural persons?
 - (ii) was the credit to be used, or intended to be used, wholly or predominantly for personal, domestic, or household purposes?
 - (iii) were interest charges or credit fees payable under the contract, or was a security interest taken?
 - (iv) was Ace carrying on the business of providing credit or in the practice of providing credit in the course of its business?

[52] I deal with each of these questions in turn.

Did Ace provide credit to its customers?

[53] Ace's business involved selling products on terms that granted customers a right to purchase property and defer payment for that purchase. Ace therefore provided credit to its customers, as credit is defined in s 6(c) of the CCCFA.

Did Ace provide credit under credit contracts?

[54] During the Claim Period, Ace entered into 4,124 contracts with its customers. Each of those contracts involved the provision of credit, namely the deferred payment for the purchase of property. I agree with the Commission that these contracts are credit contracts as defined in s 7 of the CCCFA.

Were the credit contracts consumer credit contracts?

[55] Section 13 of the CCCFA provides that:

13 Presumption relating to consumer credit contract

In any proceedings in which a party claims that a credit contract is a consumer credit contract, it is presumed that the credit contract is a consumer credit contract unless the contrary is established.

[56] The Commission alleged that Ace's credit contracts are consumer credit contracts. So the s 13 presumption applies. Ace has not rebutted the statutory presumption. As such, I may proceed on the basis that Ace's credit contracts are consumer credit contracts. Nevertheless, because the matter proceeded by way of formal proof, I will consider the requirements of s 11.

[57] As stated by Mr Kumar, Ace's client base was people with a poor credit history. He did not suggest in his interview with Ms Ridoux that any of Ace's customers were corporate entities or businesses. Ms Ridoux says that she saw no evidence in her investigation of Ace that any of its sales were to corporate entities or business. Therefore, I accept that Ace's debtors were natural persons as required by s 11(1)(a) of the CCCFA.

[58] The products sold by Ace to its customers were high priced consumer goods. These were electronic goods such as smart phones or laptops and included some

furniture products. Given the nature of Ace’s business targeting consumers who could not otherwise afford these products from ordinary retail stores because of poor credit histories, I am satisfied that the credit under these contracts was to be used wholly or predominantly for personal, domestic, or household purposes, as required by s 11(1)(b) of the CCCFA.

[59] To meet the definition of a consumer credit contract under s 11(1)(c), the contract needs to provide for at least one of the following: interest charges, credit fees, or the taking of a security interest. Ace’s Contract provided for credit fees including an application fee, a direct debit set up fee and a transaction fee. It also provided for Ace to take a security interest in the products sold. It asserted a right to repossess and sell the products sold if customers failed to meet their contractual obligations (including payment obligations). I am therefore satisfied that one or more of the requirements of s 11(1)(c) of the CCCFA applies.

[60] Finally, I am satisfied that Ace was carrying on a business of providing credit and made a practice of providing credit in the course of carrying on its business.¹³ Selling goods to consumers on deferred payment terms was an essential part of Ace’s business. That is clear from (amongst other things) Mr Kumar’s interview; the terms of each version of Ace’s contracts; Ace’s sales catalogues; and the 4,124 contracts it entered into during the Claim Period.

[61] For these reasons, I am satisfied that Ace was a lender for the purposes of the CCCFA. As such s 9C(1) required Ace to comply with the lender responsibility principles set out in s 9C(2), including the lender responsibilities specified in s 9C(3).

Were Ace’s customers borrowers?

[62] Under s 9B(1) of the CCCFA a borrower is “any person who has entered into, or is seeking to enter into, an agreement with a lender”. Having found that Ace was a lender, I am satisfied that Ace’s customers for the 4,124 contracts entered into during the Claim Period were borrowers.

¹³ Credit Contracts and Consumer Finance Act, s 11(1)(d)(i).

First Cause of Action: Were the terms of the contract expressed in plain language in a clear, concise, and intelligible manner?

[63] The Commission alleged that, contrary to s 9C(3)(b)(ii) of the CCCFA, the Delayed Delivery Provisions were not expressed in plain language, in a clear, concise and intelligible manner.

[64] In support of its allegation, the Commission referred to the Responsible Lending Code (the Code). The Code is issued by the Minister of Commerce and Consumer Affairs.¹⁴ The purpose of the Code is to elaborate on the lender responsibility principles specified in s 9C(2), including the lender responsibilities in s 9C(3), and to offer guidance on how those principles may be implemented by lenders.¹⁵ The Code is not binding. However, evidence of a lender's compliance with the Code is to be treated as evidence of compliance with s 9C(2).¹⁶

[65] Part 7 of the Code provides lenders with guidance on how to assist borrowers to make an informed decision as to whether or not to enter into an agreement.¹⁷ Clause 7.2 addresses the communication of key features of the agreement:

7.2 To assist a borrower to make an informed decision as to whether to enter into an agreement and to be reasonably aware of the full implications of entering that agreement, a lender should inform the borrower of the key features of the agreement. The lender should clearly highlight those features in a way that draws the borrower's attention to that information. This information should be provided at a time that assists the borrower to make an informed decision. The key features should include:

- a. key risks and characteristics of the specific product. For instance, where applicable;
 - i. that secured property is at risk if the borrower defaults or does not make the repayments, ...

...

[66] Counsel for the Commission submitted that the key features of Ace's contract include the terms that determine when customers will receive the goods they have

¹⁴ Section 9G.

¹⁵ Section 9E(1).

¹⁶ Section 9E(3).

¹⁷ All references to the text of the Responsible Lending Code (the Code) in this judgment are as the Code was stated as at 6 July 2017 (during the Claim Period). The Code has subsequently been amended.

contracted to purchase; and that these key features include the Deferred Delivery Provisions. I agree. I also accept counsel's submission that any risk of delay to the delivery date of those goods arising out of the Delayed Delivery Provisions is a key risk for purchasers. It is analogous to the risk to secured property arising from non-payment or other default, as expressly referred to in the example given at cl 7.2(a)(i) of the Code.

[67] I am therefore satisfied that in order to comply with cl 7.2 of the Code, Ace should have clearly highlighted the Delayed Delivery Provisions in a way that draws the customer's attention to them.

[68] Clause 7.11 of the Code states that the level of explanation and assistance that is reasonable for a lender to provide when informing a borrower of the key features of the contract may differ depending on the circumstances. Greater assistance may be needed where:

- (a) there is a greater risk that a borrower may not be aware of the implications of entering into the agreement, including when the borrower is a vulnerable borrower or a new customer of the lender;¹⁸
- (b) there is a greater risk that the borrower will not be able to comply with the terms of the agreement, including where the size of the loan is large relative to the borrower's ability to repay;¹⁹ and
- (c) the consequences of the borrower not being able to comply with the agreement may be serious, including through the loss of a significant asset or where the default interest plus default fees are high relative to the amount of the loan or credit limit.

[69] Based on the evidence in Ms Ridoux's affidavit, there was a significant risk that many borrowers would not be able to comply with the terms of the contract. The amount of the deferred purchase price was often large relative to the customer's

¹⁸ Responsible Lending Code 2017, cl 7.11(a)(iii) and (iv).

¹⁹ Code, cl 7.11(b).

income. Over half of the customer files reviewed by Ms Ridoux involved customers on some form of income assistance from the government.

[70] In all the circumstances, Ace should have clearly highlighted the Delayed Delivery Provisions to its customers in a way that drew their attention to those provisions. There was no mention that Ace could delay delivery of the product if the customer missed payments until page 10 of the contract. The first nine pages of the contract only refer to customers having to pay default interest and default fees if they fail to make a payment. Even then, the Delayed Delivery Provisions themselves are not clearly stated. They are hard to find, inconsistent, and hidden in the fine print.

[71] Clauses 7.18 to 7.20 of the Code are directly relevant to the issue of whether the relevant terms of the contract were expressed in plain language in a clear, concise, and intelligible manner. These state:

- 7.18 To comply with the lender responsibility to ensure that the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner, a lender should
 - a. set out agreements using a layout and font size that can be easily read;
 - b. set out the terms in a logical order that is easy for borrowers to follow;
 - c. highlight important information; and
 - d. explain complex information in plain language and include a clear explanation of any necessary jargon.
- 7.19 “Concise” refers to the presentation of specific information rather than the overall length of the communication or document. A longer but clearly written document, may take less time to read and understand than a shorter, but poorly written one.
- 7.20 “Intelligible” involves an overall assessment of whether the terms are understandable and comprehensible to borrowers in the target market.

[72] However, the Delayed Delivery Provisions are not outlined in the contract until pages 12 to 15 in the General Terms as set out above at [27]–[28]. I agree with counsel for the Commission that the layout, structure and content of the contract breaches the guiding principles in cl 7.18 of the Code. The Delayed Delivery Provisions are:

- (a) Not set out using a layout and font that can be easily read. The clauses are buried in text that has a dual column layout, with the text in a small font size (size 8) and narrow line spacing.
- (b) Not set out in a logical order that is easy to follow. The customer first reads that product delivery “may be” delayed in the event of missed payments at page 10 of the contract. They are then directed to cl 3 of the contract which is on page 12 and sets out the consequence of missing payments. No reference is made to the Delayed Delivery Schedule, which then appears on the final page of contract.
- (c) Not highlighted or given any prominence in the contract. At best, the Delayed Delivery Provisions were one of a number of pieces of information referred to in the checklist on page 10. But they were not explained or highlighted in any sort of detail proportionate with their importance.

[73] Although failure to comply with the Code is not determinative of the Commission’s claim, I am also satisfied that the Delayed Delivery Provisions are not expressed in plain language in a clear, concise, and intelligible manner as is required by s 9C(3)(b)(ii).

[74] There is no case law concerning s 9C(3)(b)(ii), but I agree with counsel that case law concerning s 32(1)(c) of the CCCFA relating to disclosure standards and methods of disclosure is of some assistance. Section 32(1)(c) states “Disclosure must... express the required information clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person”. Sections 9C(3)(b)(ii) and 32(1)(c) both require clarity and concision. Section 9C(3)(b)(ii) requires terms to be expressed in an “intelligible manner”, while s 32(1)(c) requires information to be brought to the attention of a reasonable person. Both provisions are intended to ensure that contracting parties are properly informed.

[75] In *Commerce Commission v Betterlife Corporation Ltd and Goodring Company Ltd*, the District Court found disclosure too inadequate and in breach of s 32

where the terms were in small font and in two condensed columns with no spaces between the terms and conditions.²⁰ I agree with Judge Sharp that this can render a contract difficult to read and obscure key information.²¹ With respect, that may be particularly so for some members of Ace’s customer base, which Mr Kumar described as being “sub-prime” and made up of customers with poor credit histories.

[76] I do not consider that either the sales verification call or the “Reminder Document” would cure the breach of s 9C(3)(b)(ii) (even if the “Reminder Document” was in fact sent to customers and the sales verification calls followed the template). The call templates suggested employees were directed to bring to the customer’s attention the possibility of delayed delivery in the event of missed payments. But it did not direct customers to the length of any delayed delivery.

[77] The “Reminder Document” provided relevant information to customers, explaining how customers could avoid deferment of the delivery, and setting out the Delayed Delivery Schedule. However, there was no evidence of it being provided to customers. If it was provided to customers it is likely it was only provided after Version 3 of the contract was introduced and in any event, it contained no information in relation to Custom plans.

[78] For these reasons, I am satisfied that Ace has failed to comply with cl 7.2 and 7.11 of the Code. The Delayed Delivery Provisions are key provisions of each version of the contract, but they were neither clearly highlighted nor properly explained. Although failure to comply with the Code is not determinative of the Commissions claim, I am also satisfied that Ace breached its statutory obligation pursuant to s 9C(3)(ii) of the CCCFA to assist its customers to reach an informed decision as to whether or not to enter into the contracts; and to be reasonably aware of the full implications of doing so, including by ensuring that the Deferred Delivery Provisions were expressed in plain language in a clear, concise and intelligible manner.

²⁰ *Commerce Commission v Betterlife Corporation Ltd and Goodring Company Ltd* [2016] NZDC 10579 at [31].

²¹ At [31].

Second Cause of Action: Was the information Ace provided its customers presented in a manner that is, or is likely to be, misleading, deceptive or confusing?

[79] The Commission also alleged that in breach of s 9C(3)(b)(iii) the Delayed Delivery Provisions are presented in a manner that is likely to be misleading, deceptive, or confusing.

[80] Clause 7.22 of the Code provides relevant guidance. It states:

7.22 A lender should comply with the following practices to ensure that information provided to the borrower is not misleading, deceptive or confusing:

- a. make sure important information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with the importance of it;

...

[81] As with the first cause of action, there is no case law under s 9C(3)(b)(iii), but case law in relation to s 32(1)(d) of the CCCFA may be relevant. Section 32(1)(d) provides that:

Disclosure must not be likely to deceive or mislead a reasonable person with regard to any particular that is material to the consumer credit contract, guarantee, consumer lease, or buy-back transaction (as the case may be).

[82] The District Court has found companies to have breached s 32(1)(d) where their contracts mislead customers about the customers' ability to cancel the contract contrary to customers' statutory rights,²² and where contracts have "confusing phraseology" relating to fees and charges payable under the contract.²³

[83] Counsel for the Commission submits that in any contract for the sale of goods, the timing of delivery and a customer's entitlement to delivery will be a key consideration. In this regard, I accept counsel's submission that the presentation of the Delayed Delivery Provisions was likely to be misleading, deceptive and/or confusing to Ace's customers.

²² *Commerce Commission v Macful International Ltd* [2017] NZDC 18615 at [36].

²³ *Commerce Commission v Flexibuy Ltd* [2016] NZDC 2990 at [6].

In particular:

- (a) Where default is mentioned in the first nine pages of the contract (when consumers are more likely to be reading detail), there is no indication that a payment default will result in delivery being deferred.
- (b) When the possibility of deferred delivery is first raised on page 10 of the contract, the full consequences of a payment default are still not explained. Instead, there are cross-references to a different part of the contract.
- (c) The primary clause of the Delayed Delivery Provisions (cl 3.1) does not refer to the Delayed Delivery Schedule. That is positioned in an entirely different part of the contract (some three pages later). Nor is the Delayed Delivery Schedule referred to earlier in the contract.
- (d) The Delayed Delivery Schedule is set out only on the final page of the contract. Even then it is not labelled, it is neither introduced nor explained, and it is not clearly distinguished or separated from the unrelated privacy waiver that immediately precedes it.

[84] I agree with the Commission that these concerns are particularly acute for customers on Custom plans. For these customers, the length of time by which delivery is deferred as a consequence of a payment default is not set out at all.

[85] For these reasons, I am satisfied that, contrary to s 9C(3)(b)(iii) of the CCCFA, Ace has failed to assist borrowers to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, by ensuring that the Delayed Delivery Provisions are not presented in a manner that is likely to be misleading, deceptive or confusing. And, for the reasons previously set out, the misleading, deceptive and confusing manner in which the Delayed Delivery Provisions are presented is unlikely to have been cured by the sales verification process or the possible presentation of the Reminder Document to some customers.

Relief for Causes of Action One and Two

Declaratory relief

[86] In the results judgment, I issued declarations that Ace breached:

- (a) s 9C(1) via ss 9C(2)(b) and 9C(3)(b)(ii) of the CCCFA; and
- (b) s 9C(1) via ss 9C(2)(b) and 9C(3)(b)(iii) of the CCCFA.

[87] The CCCFA does not directly empower the Court to make a declaration that a lender has breached the lender responsibility principles. However, I agree with Fitzgerald J in *Commerce Commission v Ferratum New Zealand Ltd* that in the absence of clear and unambiguous language ousting the Court's inherent jurisdiction to make such declaration that jurisdiction remains.²⁴ Fitzgerald J recorded that:²⁵

[16] ... [T]he CCCFA does not expressly *preclude* the Court from exercising its inherent jurisdiction to grant declaratory relief of the nature sought, and it does limit enforcement only to those remedies listed in the Act. Section 2 of the Declaratory Judgments Act 1908 "makes it clear the High Court retains the power to grant freestanding declarations". If the CCCFA enforcement regime did oust the Court's inherent jurisdiction to make the declaration sought, one would expect to see clear and unambiguous language to that effect.

[88] Fitzgerald J also relied on the decision of Venning J in *Commerce Commission v ANZ Bank New Zealand Ltd*,²⁶ holding that a declaration for breach of s 9 of the FTA would be granted where there is practical utility in doing so. Although ANZ had admitted the breaches of s 9 of the FTA, Venning J found there was still utility in granting the declaration sought because:²⁷

- (a) ANZ's conduct was a matter of public interest and there was a real interest in a Court declaring the conduct was in breach of the FTA rather than the breach being admitted in a private settlement;

²⁴ *Commerce Commission v Ferratum New Zealand Ltd* [2020] NZHC 1607, (2020) 15 TCLR 621.

²⁵ At [16] (original emphasis).

²⁶ *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71.

²⁷ At [18].

- (b) the declaration would provide a public record of the breach which, in addition to censuring ANZ's conduct, would be relevant should ANZ come before the Court again;
- (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) the declaration would confirm to the public and the commercial community generally that the Commission is willing to and will act to enforce the FTA where appropriate.

[89] Ms Ridoux's evidence is that Ace's business has largely wound up. However, I am satisfied that there is utility in granting the declarations sought in this case because:

- (a) there is significant public interest in having the Commission pursue traders such as Ace who, by their own admissions, target vulnerable "subprime" borrowers who are unable to obtain credit from ordinary sources;
- (b) the public nature of the declarations will act as a deterrent to those operating in similar markets to Ace to ensure compliance with the lender responsibility principles; and
- (c) as acknowledged in both *ANZ Bank New Zealand Ltd* and *Ferratum*, the declaratory relief in this case would confirm to the public and the commercial community generally that the Commission is willing to and will act to enforce consumer protection legislation where appropriate.

[90] For these reasons, I exercised my discretion to grant the declarations sought.

Injunctive relief

[91] In the first and second causes of action, the Commission also sought injunctive relief to restrain Ace from providing credit under any new consumer credit contracts unless and until it amends its contracts in such a way as to comply with both ss 9C(3)(b)(ii) and 9C(3)(b)(iii).

[92] Section 96(1)(aa) of the CCCFA provides that, on application by the Commission, the Court may grant an injunction restraining a person from engaging in conduct that breaches s 9C of the CCCFA. The Court may grant the injunction where it is satisfied that the person has engaged in conduct in breach of s 9C²⁸ whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind.²⁹

[93] Because I am satisfied that Ace has engaged in conduct that constitutes a breach of certain lender responsibility principles set out in s 9C of the CCCFA, I may grant the injunction sought by the Commission pursuant to ss 96 and 97. For the reasons canvassed at some length above, I am satisfied that it is appropriate in the circumstances to do so. I also note Ms Ridoux's evidence that although, to the best of her knowledge, Ace had not recommenced sales, Mr Kumar stated in his interview with the Commission that he would like to recommence sales if he could make appropriate financing arrangements and hire staff.

Fourth Cause of Action – Unfair Contract Terms – s 46L of the Fair Trading Act 1986 (FTA)

[94] In its fourth cause of action, the Commission alleged that the Delayed Delivery Provisions are an unfair contract term under s 46L of the FTA. It applied pursuant to s 46H of the FTA for a declaration to that effect. I granted that declaration for the following reasons.

[95] The Court's statutory power to declare that a term in a standard form contract is an unfair contract term is contained in s 46(I) of the FTA, which provides:

²⁸ Credit Contracts and Consumer Finance Act, s 96(1)(aa).

²⁹ Section 97(2)(a).

46I Declaration of unfair contract terms

- (1) The High Court or the District Court may, on application by the Commission, declare that a term in a standard form consumer contract is an unfair contract term.
- (2) The Court may make the declaration only if it is satisfied that—
 - (a) the term is in a contract that is a consumer contract; and
 - (b) the consumer contract is a standard form contract (as determined in accordance with section 46J); and
 - (c) the declaration is not prohibited by section 46K(1); and
 - (d) the term is unfair in the sense described in section 46L.
- (3) A declaration under this section—
 - (a) must identify the contract to which it applies by reference to at least 1 of the parties to the contract; and
 - (b) may describe the context or conditions in which the term's inclusion in a standard form contract means that the term is an unfair contract term.

[96] I set out below the reasons why I am satisfied each of the four matters described in s 46I(2) are met.

Is the contract a consumer contract?

[97] I am satisfied that the contract is a consumer contract for the purposes of s 46I(2)(a) of the FTA. The FTA defines a consumer contract to include a contract relating to goods (that is personal property) between: a supplier supplying the goods in trade; and at least one consumer. A consumer includes a person who acquires goods of a kind ordinarily acquired for personal, domestic, or household use or consumption; and not for the purpose of resupplying them in trade or consuming them in the course of a process of production or manufacture.

[98] In the circumstances described above, I consider it is clear that Ace supplied the goods in trade; its customers were consumers; and the contracts between them were consumer contracts.

Is the consumer contract a standard form contract?

[99] I am satisfied that the contract is a standard form contract for the purposes of s 46I(2)(b) of the FTA, (as determined in accordance with s 46J of the FTA).

[100] Section 46J(2) of the FTA provides as follows:

46J Standard form contracts

...

- (2) In determining whether a contract is a standard form contract, the Court must (without limitation) take into account the following:
 - (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
 - (b) whether the contract was prepared by one or more parties before any discussion relating to the transaction occurred with the other party or parties;
 - (c) whether one or more of the parties was, in effect, required either to accept or reject the terms of the contract (other than terms referred to in section 46K) in the form in which they were presented;
 - (d) the extent to which the parties had an effective opportunity to negotiate the terms (other than terms referred to in section 46K) of the contract;
 - (e) the extent to which the terms of the contract take into account the specific characteristics of any party to the contract.
- (3) If a party to a proceeding alleges that a contract is a standard form contract, the contract is presumed to be a standard form contract unless any other party to the proceedings proves otherwise.

[101] The presumption set out in s 46J(3) assists the Commission and has not been rebutted by Ace. Moreover, in its statement of defence, Ace admitted the allegation that its contracts were standard form contracts for the purposes of s 46I(b) (although as noted at [3] above, Ace's statement of defence was struck out for non-compliance with an unless order made in respect of Ace's discovery obligations).

[102] However, even without the statutory presumption or Ace's admission I am satisfied that the contract is a standard form contract.

In particular:

- (a) Ace had all of the bargaining power in the transaction.
- (b) Ace prepared the contract.
- (c) Ace's customers may have been able to select which of the four different payment plans might apply, each of which provided for a different number of weekly payments and a different number of minimum payments before delivery. But other than that, Ace's customers were effectively required to accept or reject the terms of the contract on a "take it or leave it" basis, that is without effective negotiations.
- (d) Each customer's budget constraints may have been taken into account in selecting the payment plan, but beyond this, the contract did not take into account the specific characteristics of the customer.

Is the declaration prohibited by s 46K(i)?

[103] I am satisfied that the declaration sought is not prohibited by s 46K. The Delayed Delivery Provisions do not define the main subject matter of the contract,³⁰ which is the particular product being sold by Ace. The Delayed Delivery Provisions do not set the upfront price payable under the contract,³¹ nor are they required by any enactment.³²

Are the Delayed Delivery Provisions unfair in the sense described in s 46L?

[104] For the reasons set out below, I am satisfied for the purposes of s 46I(2)(d) that the Delayed Delivery Provisions are unfair in the sense described in s 46L of the FTA.

³⁰ Fair Trading Act 1986, s 46K(1)(a).

³¹ Section 46K(1)(b).

³² Section 46K(1)(c).

[105] Section 46L(1) provides that a term in a consumer contract is unfair if the Court is satisfied that the term:

- (a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

[106] Section 46L(2) provides that the Court may take into account any matters it considers relevant in determining whether a term is unfair but must take into account: the extent to which the term is transparent;³³ and the contract as a whole.³⁴

Significant imbalance

[107] The leading decision on unfair contract terms under s 46L is *Commerce Commission v Home Direct Ltd*.³⁵ In the absence of earlier authorities in New Zealand concerning s 46L, Muir J referred to developing principles in Australian case law concerning the application of very similar statutory provisions. In particular, Muir J referred to the Federal Court of Australia's leading decision in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1) (Chrisco)* which set out principles relevant to determining whether there is a "significant imbalance in the parties' rights and obligations arising under the contract".³⁶ I agree with counsel that these principles may be summarised as follows:

- (a) The Court must scrutinise the purported "benefits" to consumers closely.
- (b) Imbalance is not necessarily negated by the fact small sums are involved.

³³ Section 46L(2)(a).

³⁴ Section 46L(2)(b).

³⁵ *Commerce Commission v Home Direct Ltd* [2019] NZHC 2943, [2019] 3 NZLR 904.

³⁶ *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1)* [2015] FCA 1204.

- (c) A “significant imbalance” will exist where a party’s obligations and rights are not broadly equivalent. In *Chrisco*, Edelman J endorsed the approach taken by Lord Bingham in *Director General of Fair Trading v First National Bank Plc*, where his Lordship stated:³⁷

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.

- (d) Transparency will be relevant in determining whether any imbalance is significant.³⁸ Put another way, an imbalance in rights and obligations may be exacerbated where contractual terms are difficult for a party to find and understand.
- (e) In order to assess the transparency of impugned terms, the Court must consider whether it is “expressed in reasonably plain language; legible; presented clearly; and readily available to the consumer”.³⁹

[108] In *Commerce Commission v Home Direct Ltd*, Muir J identified other principles emerging from Australian case law:⁴⁰

[37] ...

- (a) In assessing whether there is a significant imbalance, it is useful to assess the impact of the impugned term on the parties’ rights and obligations by comparing the effect of the contract with the term and the effect it would have without it.
- (b) The significant imbalance assessment requires the Court to compare the trader’s rights and liabilities as a result of the impinged term, with the rights and liabilities of the consumer as the result of that term, to see whether there is a significant imbalance between the two. The requirement of a “significant imbalance” directs attention to the substantive unfairness of the contract, which needs to be considered in the context of the contract as a whole.

³⁷ At [47], citing *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 AC 481 at [17] per Lord Bingham.

³⁸ At [74].

³⁹ *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 1)*, above n 36, at [75].

⁴⁰ *Commerce Commission v Home Direct Ltd*, above n 35, at [37] (footnotes omitted).

- (c) The significant imbalance requirement will be met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour. In this context, "significant" means "significantly large to be important".
- (d) A term is less likely to give rise to a significant imbalance if there is a meaningful relationship between the term and the protection of a party, and that the relationship is reasonably foreseeable at the time of contracting.
- (e) A significant imbalance may be created by a clause which allows a party to charge customers for services it has not rendered for reasons beyond the customer's control.
- (f) In considering the contract as a whole, not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.

Was there a significant imbalance between the contracts?

[109] The Commission submits that there was a significant imbalance between Ace and its customers. It says the imbalance is best illustrated by comparing the consequences of Ace's customers missing payments against the consequence on Ace for missing delivery.

[110] The Commission refers to the following table to demonstrate the increase in wait time for delivery where Ace's customers miss a payment:

Number of missed payments	Length of delay		
	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

[111] The Commission says this demonstrates that the consequence of even one missed payment is severe for customers, increasing the time customers would have to

wait for delivery by between 28 and 44 per cent, depending on their plan. If there are six missed payments, the wait time increases by 205 to 233 per cent.⁴¹ Therefore, the consequences for customers on Gold, Silver or Bronze plans who miss payments are significant. The consequences for the customers on Custom plans are not apparent, but there is no evidence to suggest they would be any less severe.

[112] By way of contrast, the consequences to Ace if it fails to meet its delivery obligations are set out at cl 3.2 of each version of Ace's contract:

Ace Marketing will use its best endeavours to have the products delivered to the address stated in this Agreement within ... 15 working days of Ace Marketing receiving the Minimum Payment. Any time stated for delivery is an estimate only. Ace Marketing will not be liable for any delay in delivery if the reason for the delay is beyond our reasonable control. If for any reason whatsoever delivery is delayed, we will notify you and explain to you the cause(s) of the delay, and when we expect delivery to take place. In such cases, you will be entitled to claim compensation available to you under New Zealand consumer laws.

[113] I accept the Commission's submission that this amounts to a significant imbalance in the parties contractual rights and obligations. For example, if a customer was on a Bronze plan and made all their weekly payments, they would be entitled to receive the goods after 25 weeks. But Ace could delay delivery of the goods by up to three weeks with no consequence to Ace. However, if the customer on the Bronze plan misses even a single week's payment, Ace can charge them a \$10 default fee per missed payment and delay delivery of the goods by an additional seven weeks.

[114] I accept counsel's submissions that the Delayed Delivery Provisions are "so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour". That is particularly so in light of my earlier findings that these Delayed Delivery Provisions are expressed and presented in a way that breaches the relevant Lender Responsibility Principles set out in s 9C of the CCCFA.

⁴¹ These calculations express the increased delivery time as a percentage of the original delivery time as set out at [17].

Were the Delayed Delivery Provisions reasonably necessary to protect Ace's interests?

[115] Pursuant to s 46L(3), a term in a consumer contract must be presumed *not* to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise. In the end Ace took no steps to rebut the presumption, so it applies and assists the Commission. However, even without the benefit of the presumption I am satisfied that the Delayed Delivery Provisions are not reasonably necessary to protect Ace's legitimate interests.

[116] As noted at [42] above, in his interview with the Commission, Mr Kumar appears initially to have suggested that the Delayed Delivery Provisions are intended to incentivise customers:

With [the Delayed Delivery Schedule] the company tries to keep customers motivated to keep up with regular payments, to receive delivery of the goods by meeting the required number of ... payments.

[117] However, Mr Kumar went on to explain that the rationale behind the Delayed Delivery Provisions was to safeguard Ace's interests:

Remember these like clients are actually defaulters anyway, right, so like basically it like shows that like they would be in their defaulting habits which actually becomes an actual risk for the company. "In order to safeguard its business interests, Ace marketing has prescribed a revised delivery schedule in which the required number of payments for the delivery gradually increases 10% with the number of defaults". Again, this is to keep the customer motivated to avoid further defaults.

[118] I accept that Ace has a legitimate business interest to protect, and that it is not necessarily unreasonable to delay delivery of the products to customers who miss one or more of the minimum number of payments they are required to make prior to delivery.

[119] Ace may have been able to demonstrate that the Delayed Delivery Provisions were reasonably necessary to protect Ace's interests if, for example, delivery had been delayed for a week in relation to each missed payment. This would have the effect of delaying delivery until the customer had made the agreed minimum number of payments. In principle, a delay of even more than one week for each missed payment may be reasonably necessary to protect Ace's interests, if Ace could demonstrate that

the risk of default after delivery was greater for customers who had missed payments prior to delivery. And in principle it may be reasonable for Ace to look to protect its interests prior to delivery rather than after delivery, whether by repossession or otherwise.

[120] However, I am satisfied that in this case the Delayed Delivery Provisions delayed delivery for much longer than is reasonably necessary to protect Ace's interests. As noted above, delivery times are increased by 28 to 44 per cent as a result of one missed payment, and by 205 to 233 per cent as a result of six missed payments. That is not reasonably necessary to protect Ace's interests.

[121] In reaching this conclusion I note the evidence tends to suggest that the purchase prices payable to Ace were considerably higher than those for which the products were available through more traditional retailers. Also, the value of the products sold, particularly electronic products, would likely have depreciated significantly between the time they were purchased and the time they were delivered, even if the customer did not miss payments prior to delivery. Although the Commission does not allege that these matters of price and value themselves arise out of unfair contract terms, I consider they are relevant to an assessment of whether the Delayed Delivery Provisions are unfair contract terms.

Would enforcement of the Delayed Delivery Provision cause detriment to consumers?

[122] Finally, I am satisfied that the Delayed Delivery Provisions would cause detriment to Ace's customers if they were to be enforced or otherwise relied upon by Ace. In those circumstances customers will have to continue making weekly payments notwithstanding lengthy delays before they take delivery of the purchased products.

[123] The two mandatory considerations under s 46L(2), namely: the extent to which the term is transparent to the contract as a whole, also support the conclusion that the Provisions are unfair.

[124] As discussed in detail in relation to the CCCFA causes of action,⁴² the Delayed Delivery Provisions were not expressed in a transparent manner. Instead they were written in fine print and disclosed across different sections of the contract; presented in an illogical manner likely to cause confusion; presented without any emphasis or prominence related to their importance; and did not provide any detail concerning the consequences of missed payments for customers on Custom plans.

[125] Nor is there anything in the terms of the contract as a whole, or in the sales verification process or in the Reminder Document, to mitigate the harshness of the Delayed Delivery Provisions.

[126] For these reasons, I am satisfied that the Delayed Delivery Provisions are an unfair contract term under s 46L of the FTA. There is a gross imbalance between the rights and obligations of Ace and its customers when it comes to the issue of delivery. While Ace has a legitimate business interest to protect by delaying delivery where customers miss payments, the length of the deferral periods provided for in Delayed Delivery Provisions mean that they are not reasonably necessary to protect that legitimate business interest. It would be detrimental to customers if those Delayed Delivery Provisions were enforced.

Relief for Fourth Cause of Action

[127] Having been satisfied of the matters set out in s 46I(2), I am also satisfied it is appropriate to exercise the Court's discretion to grant a declaration that the Delayed Delivery Provisions amount to an unfair contract term. I am satisfied there is utility in granting the declaration for the same reasons set out at [89] above. I also accept the Commission's submission that a declaration would serve as something of a deterrent to other traders from replicating or adopting similar provisions. I also note Ms Ridoux's evidence of Mr Kumar's most recent advice that although Ace is no longer making new sales, at that time it had 144 customers on active contracts. A declaration of unfairness would therefore prohibit Ace from relying upon the Delayed Delivery Provisions in any of those contracts.

⁴² See for example [72]–[73].

Form of declaration

[128] There is no prescribed form for a declaration of unfairness although it must be in terms consistent with the requirements of s 46I(3) of the FTA. Counsel also helpfully referred me to the terms of the declarations granted by Muir J in *Home Direct*,⁴³ which in turn were informed by the terms of the declaration granted by Edelman J in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (No 3)*.⁴⁴

[129] Taking all of these matters into account, I was satisfied it was appropriate to grant the declaration pursuant to s 46I in the terms sought.

Robinson J

⁴³ *Home Direct*, above n 35, at [60].

⁴⁴ *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited (No 3)* [2016] FCA 206. Counsel helpfully point out that the declaration in that case was one agreed upon by the parties and approved by Edelman J following his Honour's observations in *ACCC v Chrisco Hampers Australia Limited (No 2)* [2016] FCA 144, that the declaration previously put forward by the ACC was too lengthy and complex to be understood by consumers, while the declaration previously put forward by Chrisco was too "succinct" to have any real utility (at [7]–[11]).