

**IN THE DISTRICT COURT  
AT AUCKLAND**

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

**CRI-2018-004-011737  
[2019] NZDC 12800**

**COMMERCE COMMISSION**  
Prosecutor

v

**2 CHEAP CARS LIMITED**  
Defendant

Hearing: 5 July 2019

Appearances: A McClintock and D Taylor for the Prosecutor  
J Land and T Bielby for the Defendant

Judgment: 8 July 2019

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**RESERVED JUDGMENT OF JUDGE R G RONAYNE**  
**[On sentence]**

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**Introduction**

[1] The defendant faces 10 charges under the Fair Trading Act 1986 (“FTA”) brought by the Commerce Commission. The charges relate to offers made for the sale of used motor vehicles between 1 January 2014 and 31 December 2017. Each charge is representative.

[2] The charges relate to the following conduct:

- (a) Charges 1-8: breaches of s 13(i) of the FTA, for making false and/or misleading representations in “Warranty Waiver” documents about consumers’ rights.

- (b) Charge 9: breach of s 13(g) of the FTA for false and/or misleading representations with respect to the price of cars in advertising “liquidation” sales. These representations were made between about 26 September 2017 and 1 October 2017.
- (c) Charge 10: breach of s 13(g) for false and/or misleading representations about the price of cars in advertising “84% off” sales. These representations were made between about 14 and 29 January 2017.

[3] The maximum penalty for charge 1 is a fine of \$200,000 and for each other charge \$600,000.

### **The facts**

#### **The defendant**

[4] 2 Cheap Cars is a significant used car motor vehicle dealer in New Zealand. It was incorporated on 7 June 2011 and has grown rapidly from a single car yard to 14 car yards across New Zealand.

[5] 2 Cheap Cars’ business model is to buy in large volumes and sell cheap cars with fast sales turnover.

[6] In 2017, 2 Cheap Cars turned over an average of approximately 1,000 vehicles per month. 2 Cheap Cars’ turnover in 2016/2017 was \$66,197,000 with a net profit of \$3,679,000. In 2015/2016, its turnover was \$72,814,300 with a net profit of \$3,083,000.

[7] 2 Cheap Cars has an inhouse marketing team with all advertising created and approved by the defendant’s head office. It operates a dedicated website and a Facebook page and also uses print, television, radio and cinema.

## **Statutory obligations of used motor vehicle traders**

[8] Selling used motor vehicles places, through the mechanism of the Consumer Guarantees Act 1993 (“CGA”), obligations on the supplier and provides the consumer with certain rights and guarantees, such as goods requiring to be of acceptable quality (s 6 CGA), fit for purpose (s 8 CGA) and the goods must comply with their description (s 9 CGA).

[9] In addition, consumers have certain rights of remedy, including repair, which are enforceable against a supplier (s 19 CGA). A remedy must occur within a reasonable time and not just at the convenience of a supplier.

[10] The CGA prohibits contracting out and any trader who purports to contract out of the CGA commits an offence under s 13(i) of the FTA.

[11] Section 13(i) of the FTA prohibits a person, in trade, in connection with the supply or possible supply of goods from making a false and/or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right or remedy. It expressly includes any condition, warranty, guarantee, right or remedy available under the CGA.

[12] Similarly, seeking to limit consumers’ rights of repair can be misleading given the rights of remedy available.

[13] False or misleading representations with respect to the price of any goods or services are also prohibited.

## **The Warranty Waiver charges**

[14] The defendant works with third parties, including Protecta Insurance New Zealand Limited (“Protecta”), to offer finance and insurance to its New Zealand customers. In particular, it sells extended warranties on behalf of Protecta and keeps a percentage of the profit.

[15] Over the charge period, it was usual practice for staff at 2 Cheap Cars to request that consumers purchasing a car sign a “Warranty Waiver” document if they chose not to purchase an additional extended warranty. Two versions of the Warranty Waiver document were used with no material differences between them. Examples of the Warranty Waivers are attached to the summary of facts.

*The misleading representations*

[16] The Warranty Waivers contained representations that were false or misleading about consumers’ rights under the CGA.

[17] In particular, the Warranty Waivers contained the following representations (“the warranty representations”):

- (a) The documents are titled “Warranty Waiver”.
- (b) “This notice is to inform you that the vehicle you are purchasing does not include a warranty of any kind.”
- (c) “If you choose not to purchase the indicated warranty at this time, you must sign this waiver.”
- (d) “I understand the vehicle I am purchasing does not include a warranty. I do understand that 2 Cheap Cars will comply with the [CGA]. I also understand that I am, and would prefer to be, solely responsible for any repair bills.”
- (e) “I understand that if any repairs are carried out it will be done by 2 Cheap Cars Limited at a time of their convenience and that there are no courtesy cars provided.”
- (f) “Consumable items such as but not limited to tyres and batteries...are not covered by the [CGA].”

[18] The warranty representations were false and/or misleading because:

- (a) Consumers' rights under the CGA continue to apply notwithstanding anything in the Warranty Waivers. It was therefore misleading to describe the documents as "Warranty Waivers" and to purport to deprive consumers of their specific rights set out below.
- (b) Consumers' CGA rights extend to remedies including repair, enforceable against suppliers, whether or not the goods are covered by any other warranty.
- (c) Where a supplier is required under the CGA to remedy a failure, this must be done within a "reasonable time", not at the convenience of the supplier.
- (d) Consumers can recover from the supplier costs that were reasonably foreseeable as a result of the failure, which may include the cost of hiring a rental car while a repair is being undertaken.
- (e) The CGA applies to the good purchased which, in this case, includes the tyres and batteries.

[19] The Warranty Waivers included in a statement that "2 Cheap Cars will comply with the [CGA]." However, this statement was at odds with the false and/or misleading impression created by the misrepresentations set out in para [17] above. The Commission says that this statement did nothing to communicate to consumers an accurate sense of their repair rights.

[20] The Commission estimates that, over the charge period, consumers signed in excess of 20,000 Warranty Waivers, based on the Commission's following yearly estimates:

- (a) approximately 3,414 in 2014;
- (b) approximately 7,283 in 2015;
- (c) approximately 5,962 in 2016; and

(d) approximately 5,967 in 2017.

[21] 2 Cheap Cars told the Commission during the investigation that:

- (a) Its practice is to explain the consumer's statutory rights and what the additional warranty offers in addition to those rights;
- (b) It is "usual practice" to provide a consumer who does not wish to purchase an extended warranty with a Warranty Waiver;
- (c) The purpose of the Warranty Waiver is to remind the customer that they declined the extended warranty and are happy with the protections provided by the CGA; and
- (d) There are no consequences of not signing the Warranty Waiver.

### **The Liquidation Sale charge**

#### *The liquidation sales*

[22] On 30 September 2017 and 1 October 2017, 2 Cheap Cars had a sale, which was advertised as a "Liquidation Sale".

#### *The misleading representations*

[23] Between about 26 September 2017 and 1 October 2017, 2 Cheap Cars ran advertisements for the Liquidation Sale that made false and/or misleading representations with respect to the price of goods by creating the impression 2 Cheap Cars was in, or was going into, liquidation when it was not (the liquidation sale representations).

[24] Advertisements were published on the 2 Cheap Cars' website, Facebook, Stuff.co.nz, and in a 2 Cheap Cars newsletter.

[25] Between about 26 September 2017 and 1 October 2017, 2 Cheap Cars' website had an advertisement that said:

Japanese imported vehicles  
Liquidation Sale  
Ends Sunday!

[26] Between about 26 September 2017 and 1 October 2017, 2 Cheap Cars' Facebook page advertised an event called "Japanese Imported Vehicles Liquidation Sale". The details for the event said "2 Cheap Cars is in hot water, it must liquidate immediately! A massive price drop this weekend!" The event was advertised as being from 30 September to 1 October at "14 branches nationwide".

[27] Between on or about 28 September 2017 and 1 October 2017, Stuff.co.nz advertised an offer promoted by 2 Cheap Cars. The headline said "Japanese Imported Vehicles Liquidation Sale". The next line said "2 Cheap Cars is in hot water, it must liquidate immediately".

[28] Between about 30 September 2017 and 1 October 2017, 2 Cheap Cars' Facebook page advertised an event "Japanese Imported Vehicles Liquidation Sale! Free Umbrella!" The event was advertised as being from 30 September to 1 October at "14 branches nationwide".

[29] Between about 30 September 2017 and 1 October 2017, 2 Cheap Cars published a newsletter that advertised a "Japanese Imported Vehicles Liquidation Sale" from 30 September to 1 October at "14 branches nationwide".

[30] The Liquidation Sale Representations were false and/or misleading because:

(a) They created the impression 2 Cheap Cars was in, or was going into, liquidation when it was not and never has been;

(b) The purported reason for the Liquidation Sale, namely that 2 Cheap Cars was in, or was going into, liquidation, created the impression that many vehicles would be significantly discounted, when the majority were not discounted at all and many of the discounts were limited. Of the 710 cars for sale (nationwide) at the time of the Liquidation Sale:

(i) 170 had a discount of \$30 or more;

- (ii) 127 were reduced by \$5; and
- (iii) the remaining 413 vehicles did not have any advertised price reduction.

[31] By way of context, 2 Cheap Cars advised the Commission during the investigation that:

- (a) There have been seven “liquidation” sales since 1 January 2017;
- (b) These were advertised through Facebook, newspaper, 2 Cheap Cars’ website, Stuff.co.nz, and an internal company newsletter; and
- (c) Its rationale for representing the sales as “liquidation” sales was that it had to liquidate stock as it had inadvertently imported more cars than it had space to hold.

[32] The advertisements for these earlier sales use the phrase “stock liquidation” and in some cases stated, “We miscalculated our purchases from Japan and must offload stock”.

[33] During the Liquidation Sale, on 1 October 2017, a compliance officer from the Commission visited the Lower Hutt branch of 2 Cheap Cars. During that visit, a sales person at 2 Cheap Cars informed the Commission that the Lower Hutt branch was not selling vehicles at lower prices than usual, even though the sale was advertised as nationwide.

[34] On a separate occasion during the liquidation sale, 2 Cheap Cars told another customer, who understood from the Liquidation Sale advertisements that 2 Cheap Cars was closing down, that it was not going into liquidation and that it was a “marketing exercise”.



### **The 84% Off charge**

[35] At the GrabOne website, where the terms of the offer were clearer (that is, the offer was to pay \$49 for a \$300 car discount voucher). Consumers could purchase the voucher at this site. An example of the voucher is attached to the summary of facts filed.

[36] The newspaper advertisements also included the phrase: “Massive Stock Liquidation: This Weekend Only”.

[37] The 84% Off representations were false and/or misleading because their placement, together with the phrase “Massive Stock Liquidation: This Weekend Only”, and the lack of clarity created the impression that the discount would apply to the price of the cars. The terms of the offer were not made clear until the consumer accessed the GrabOne website.

[38] 2 Cheap Cars has provided other advertisements run on the GrabOne website and in other forums as part of the same promotion in which the terms of the offer were clearer (“84% Off: Get A \$300 Voucher For Just \$49”). However, the 84% Off representations set out above were false and/or misleading for the reasons given.

[39] 2 Cheap Cars told the Commission during the investigation that:

- (a) It sold the \$300 vouchers on GrabOne for \$49. These vouchers could be used towards any car purchase at any 2 Cheap Cars branch.
- (b) It sold 219 vouchers on GrabOne between the middle of October 2016 and the middle of January 2017. 107 vouchers were redeemed during this period. It is not known how many vouchers were sold as a result of the January representations.

### **The Commission’s investigation**

[40] The Commission opened an investigation into 2 Cheap Cars on 7 November 2017 after receiving a number of complaints from consumers.

[41] 2 Cheap Cars stopped using the Warranty Waivers in December 2017, after being notified of the Commission's investigation.

[42] 2 Cheap Cars has co-operated with the Commission's investigation, including by voluntarily providing documents in response to the Commission's requests for information and attending an interview with the Commission on 11 April 2018.

[43] 2 Cheap Cars told the Commission:

- (a) That it has, as a result of the Commission's investigation, recognised aspects of its business that require more sophisticated systems and professional advice, including a more comprehensive approach to staff training. It has taken steps to address these matters.
- (b) 2 Cheap Cars' solicitors have provided detailed advertising and marketing guidelines to the company with a view to ensuring compliance with the FTA.
- (c) No further liquidation sale or stock liquidation sale advertising campaigns have been run since 2 Cheap Cars became aware of the Commission's investigation.

### **Detriment**

[44] The conduct of 2 Cheap Cars had the ability to cause harm to consumers:

- (a) The charges cover a total of approximately 22,626 Warranty Waivers.
- (b) The Warranty Waivers were false and/or misleading as to the consumers' rights under the CGA. This may have had the effect that consumers did not seek to enforce their rights under the CGA where a vehicle had a fault of some kind, because 2 Cheap Cars had disavowed its responsibility for providing the consumer remedies.

- (c) These vehicles did not come with a manufacturer's warranty, so the CGA provided important rights and guarantees to the purchaser.

[45] The Warranty Waiver practice may also have led to 2 Cheap Cars selling more extended warranties because some consumers are likely to have understood their only choice was to purchase the extended warranty or to have no warranty at all.

[46] The Liquidation Sale representations and the 84% Off representations are likely to have attracted consumers to 2 Cheap Cars on a false and/or misleading basis. These representations were widely disseminated: the Liquidation Sale representations were published on Stuff.co.nz, Facebook, the 2 Cheap Cars' website and in a 2 Cheap Cars' newsletter; and the 84% Off representations were advertised in a number of newspapers. As such, it is likely they were seen by thousands of potential customers.

[47] Promotions that mislead consumers are harmful to competitors who comply with their legal obligations.

[48] 2 Cheap Cars Limited has no previous convictions.

### **Defendant's affidavit**

[49] On 27 June 2019, Eugene Williams affirmed an affidavit which was, on 28 June, filed with this Court along with the defendant's submission in mitigation of sentence. Some noteworthy features of the affidavit are as follows:

- (a) Mr Williams claims that the defendant had approximately a seven percent share of the New Zealand market for used motor vehicle imports and approximately 1.25 percent of the total used car market.
- (b) Mr Williams agrees with the summary of facts.
- (c) Mr Williams asserts that the defendant retains a percentage of the insurance premium paid by purchasers of the "extended warranties". However, the quantum of that percentage remains unstated.

(d) It is claimed that “Protecta”, the proposed insurer:

...advised [the defendant] to implement a warranty waiver form for customers purchasing vehicles to sign if they did not wish to purchase an extended warranty.<sup>1</sup>

This Court is at a loss to understand why this would be so. Essentially, it is asserted that the Warranty Waiver form was sourced from the insurer who advised the defendant to implement it.

There could be no interest on the part of the insurer in a Warranty Waiver when no insurance was purchased by any particular customer as the insurer would be legally out of the loop and have no interest in the relationship between the defendant and any purchaser. I take the view that the insurer, if it did indeed provide the form, did so because the overall tenor and effect of the form is coercive and only a short step back from bullying.

By means of misinformation and untruths, the Warranty Waiver form creates a clear impression that, unless an extended warranty is purchased (profiting both the defendant and Protecta) then, in essence, the purchaser had no rights. This must have been designed to encourage (unlawfully) the purchase of insurance product.

Mr Williams went on<sup>2</sup> to assert that Protecta provided the defendant with a template document which the defendant’s finance and insurance team then adapted into what became the Warranty Waiver form. This exercise simply involved adding the defendant’s branding to the document. Somewhat bizarrely, counsel for the defendant has filed, on 4 July 2019, a second version of Mr Williams’ affidavit where he purports to “withdraw” paras 24 and 29.1 of his earlier affidavit. There is no explanation or submission regarding the basis upon which that could possibly be done. The only justification given is that the

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<sup>1</sup> Para 23 of affidavit.

<sup>2</sup> Para 24 of affidavit

prosecutor advised that it contested the defendant's claim that Protecta had provided the Warranty Waiver document.

It is, in my view, disingenuous for the defendant, through Mr Williams, to assert that there is, in this regard, no attempt to shift blame. I reject that claim. The assertion that there is no attempt to shift blame is contained in para 29.1 of the original affidavit which the defendant now "withdraws".

- (e) Mr Williams claims that an intention behind the Warranty Waiver was to make it clear that there was no manufacturer's warranty available such as would occur with the purchase of a new car.

If such a purpose was bona fide then the document could simply have been informative rather than a requirement. The sentence, as follows, would not have been needed:

However, if you choose not to purchase the indicated warranty at this time, **you must sign this waiver.**  
[Emphasis added.]

In the Warranty Waiver there is no mention of a lack of any manufacturer's warranty. I take the view that the Warranty Waiver seriously and deliberately departs from the truth and is, in essence, compulsory unless insurance product is purchased.

It is also disingenuous and an act of minimising responsibility for Mr Williams to suggest that the Warranty Waiver form:

...could have been open to misinterpretation and could have been viewed as being misleading or confusing to customers as regards their statutory rights under the Consumer Guarantees Act. For that reason, [the defendant] has pleaded guilty to those charges.

This is not a case of possible misinterpretation. The Warranty Waiver is blatantly untrue and misleading. There is no room for a rationalisation of the illegality merely by characterising the Warranty Waiver as creating the potential for misinterpretation.

If that is the basis upon which guilty pleas were entered, as now claimed, then there is a corresponding lack of acceptance of full responsibility for the use of untruthful statements.

- (f) Mr Williams, in his affidavit, also both agrees with the summary of facts (having reviewed it)<sup>3</sup> and later asserts that the number of Warranty Waiver forms estimated to have been signed represents a substantial overstatement.<sup>4</sup>

I am satisfied that the assertion made in the summary of facts represents a logical analysis.

This sentencing proceeds on the agreed summary of facts.

## **Submissions**

### **Prosecutor's submissions**

[50] After drawing this Court's attention to various culpability factors and previously decided decisions of this Court that the Court should adopt starting points as follows:

- (a) For the Warranty Waiver charges, in the range of \$500,000-\$550,000 (\$62,000-\$68,750 per charge).
- (b) For the Liquidation Sale charge and 84% Off charge, between \$100,000-\$150,000.
- (c) From the global total of \$600,000-\$700,000 range an adjustment of up to \$50,000 to reflect the need to recognise the totality of the offending thus reducing the overall range to \$550,000 to \$650,000.

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<sup>3</sup> Para 17 of affidavit.

<sup>4</sup> Para 29.3 of affidavit.

- (d) Up to 10 percent for co-operation and a lack of prior convictions would then reduce the range down to \$495,000-\$585,000 with a 25 percent discount for guilty pleas in all the circumstances.

### **Defendant's submissions**

[51] The defendant draws attention to the affidavit of Eugene Hamilton, a director of 2 Cheap Cars Limited, filed in support of the submissions in mitigation.

[52] Essentially, it is submitted that with regard to the Warranty Waiver charges, the representations were not a complete departure from the truth because the relevant material includes the statement, "I do understand that 2 Cheap Cars will comply with the [CGA]".

[53] Regarding the two misleading advertising charges, counsel characterises the problem as a lack of consistency in the advertising. It is also submitted that there has never been any intention on the part of 2 Cheap Cars Limited to mislead.

[54] It is submitted that the breaches occurred because of a failure by marketing staff to consistently include relevant information in advertising. There is also a suggestion made in submissions that the Warranty Waiver form was implemented at the request of an insurer without care being taken to ensure its accuracy.

[55] Insofar as a lack of any intention to mislead is concerned, it is submitted that, aside from an inconsistency in the wording of advertisements, a reference in the Warranty Waiver documents to the CGA shows that there was no intent to hide from consumers the fact that they had rights under the CGA.

[56] It is submitted that 2 Cheap Cars Limited has taken appropriate steps to put its house in order.

[57] In relation to the Warranty Waiver charges, the Court is urged to adopt a starting point range of \$150,000-\$200,000.

[58] For the two charges under s 13(g), the defendant agrees with the assessment of the prosecutor of an overall range for a starting point of \$100,000-\$150,000.

[59] It is then submitted that an adjustment for totality should see the Court adopting a total starting point of an overall fine in the range of \$175,000-\$275,000. For co-operation, a lack of previous convictions and guilty pleas, a total discount of 35 percent is then submitted as appropriate.

### **Culpability factors**

[60] There is a well-recognised approach to the assessment of culpability factors.<sup>5</sup>

### **The conduct undermines the objectives of the FTA**

[61] This was plainly unfair conduct in trade. A very substantial business such as the defendant has a responsibility to apply appropriate legal knowledge to its commercial activity. Most consumers do not have detailed legal knowledge about their rights. Thus, they rely on representations made by traders such as the defendant. It follows that misrepresentations are a breach of trust. It is not only consumers harmed but also competitors complying with their legal obligations and thus the objectives of the FTA, being consumer welfare, are undermined.

### **The failures to comply were important**

[62] A number of core rights and remedies available to consumers were clearly misrepresented by the Warranty Waiver documents. In this regard, Judge Winter in *Commerce Commission v Vehicle Logistics Ltd*<sup>6</sup> had this to say:

In my view, the importance of these failures is clearly displayed by one practical analogy. If a motor vehicle dealer was selling a cheap second-hand car off its yard, it would be unlawful for it to avoid the obligations for disclosure and attempt to persuade the purchaser that the guarantees, rights and remedies offered by the Consumer Guarantees Act did not apply. There is absolutely no difference between that physical on-the-ground car sale and the advertisements accompanying E-commerce for sale of the same vehicle. Any attempt to contract out of consumer rights is an extremely important and serious offence as it strikes not only at the heart of the individual contract

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<sup>5</sup> *Commerce Commission v LD Nathan and Co Ltd* [1992] NZLR 160 (HC).

<sup>6</sup> *Commerce Commission v Vehicle Logistics Ltd* [2018] NZDC 14788.



involved but moreover in the internet space risks a breach of trust that will seriously degrade the opportunity for consumers to use E-commerce in their daily lives.

[63] Judge Winter's comments, although directed at E-commerce have broad application in my view. There is a heightened importance of consumer rights protected by the CGA in the context of used car sales because used cars do not come with a manufacturer's warranty.

[64] The purchase of a motor vehicle, for the vast majority of consumers, involves one of their biggest outlays. In the *Vehicle Logistics* case, the Judge went on to say this:

I draw then from the comment contained in *Commerce Commission v Sunrise Motor Group* DC Wellington CRI-2010-091-2305, 12 October 2010 at paragraph 9 where my brother Judge Mill observed that the nature of cars was such that they are often not sold at large prices, but the very fact no doubt means that the people buying those cheap cars had little money to spend in this way and were affected personally to a significant degree. Moreover, as anyone living in Auckland will know, the need for a reliable motor vehicle to commute on the largely blocked motorways in the city must mean that motor vehicle dealers should know that any guarantees designed to afford the consumer the protection of reliable motoring is indeed very important.

### **The degree of culpability is high**

[65] The Crown submits that the defendant's conduct in relation to the Warranty Waiver charges was reckless and highly careless in relation to the Liquidation Sale and 84% Off charges. The defendant, on the other hand, submits that a reading of the wording of the Warranty Waiver documents shows that there was no intent to hide from consumers the fact that they had rights under the CGA.<sup>7</sup>

[66] I reject the submission made on behalf of the defendant. It is sophistry to quote, out of context, one sentence from the Warranty Waiver documents reading "I do understand that 2 Cheap Cars will comply with the [CGA]". That is so because of the juxtaposition of that sentence with surrounding sentences. The full relevant part of the passage reads:

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<sup>7</sup> Para 52 supra.

I understand the vehicle I am purchasing does not include a warranty. I do understand that 2 Cheap Cars will comply with the [CGA]. I also understand that I am, and would prefer to be, solely responsible for any repair bills.

[67] It becomes immediately apparent that the single sentence quoted by counsel, in support of the proposition that there was no intent to hide from the CGA, does not support that fallacious proposition. The sentences which bookend the quoted sentence are plainly wrong and seriously misleading. The Waiver Warranty documents, specifically prepared by a business with a year on year turnover in excess of \$66 million, actively misrepresented consumers rights. There could be no legitimate legal purpose served by the documents. When read as a whole, I am satisfied that the purpose of the Warranty Waiver documents was to encourage and even coerce consumers to buy a further product in the form of an extended warranty and otherwise forego their rights under the CGA.

[68] The Warranty Waiver documents were reviewed over the years but the misrepresentations remained.

[69] In relation to the Liquidation Sale charge, it is not mitigating to say that other advertising spoke of "Stock Liquidation". Indeed, such a comparison simply illustrates the deliberate wording adopted in the offending advertising. I take the view that the advertising was deliberately misleading rather than simply careless. The advertising included wording such as "2 Cheap Cars is in hot water".

[70] I accept the proposition that the 84% Off charge represents behaviour which was highly careless.

**The representations were a substantial departure from the truth**

[71] I accept the submission of the prosecutor that the Warranty Waiver charges relate to representations which were a complete departure from the truth. The passage I have quoted above illustrates this point. The CGA applied. The Warranty Waiver documents plainly said it did not. The departure from the truth was absolute and deliberate.

[72] The Liquidation Sale charge is based on behaviour which was a complete departure from the truth. The 84% Off charge relates to behaviour which was misleading and careless and, when viewed as a complete advertisement, tantamount to devious.

### **The offending was extensive**

[73] Well over 22,000 Warranty Waivers were presented to customers. How many were eventually signed is largely beside the point. That took place over a period of about four years.

[74] The representations were widely disseminated. The Liquidation Sale representations were published on Stuff.co.nz, Facebook, the 2 Cheap Cars' website and in a 2 Cheap Cars' newsletter. The 84% Off representations were advertised in a number of newspapers. I accept the prosecutor's submission that these representations were likely to be seen by thousands of potential customers. Moreover, 2 Cheap Cars operates 14 branches nationwide. Thus, the offending was extensive offending by a large company with what appears to be a significant presence in the used motor vehicle market.

### **The resulting prejudice to consumers**

[75] Because the defendant has indicated that it has no centralised record of the number of Warranty Waivers signed it is impossible to quantify the level of harm done. Furthermore, the nature of the representations themselves makes quantification of harm inherently difficult. That is so because purchasers experiencing difficulties with a motor vehicle may well have been discouraged from taking any action. Furthermore, I am quite satisfied that the Warranty Waiver documents, when read as a whole, would naturally place pressure on a purchaser, by means of the direct misrepresentations contained, into purchasing an extended warranty. Although impossible to quantify, there would have been a profit accruing to the defendant by avoiding obligations to repair.

[76] I am satisfied that the Liquidation Sale representations and the 84% Off representations (the latter perhaps to a lesser extent) are likely to have attracted customers to the defendant and away from competitors.

#### **The need to impose deterrent penalties**

[77] Plainly, the defendant has a significant presence in the used motor vehicle market. It has a very significant annual turnover and has made annual profits exceeding \$3 million dollars. An inadequate response by the Court to the defendant's behaviour should not amount to what might be considered a mere licensing fee or cost of doing business. Specific and general deterrence is required.

[78] I accept the prosecutor's submission that compliance with the law, especially for a business the size of the defendant, is not, in relative terms, a costly exercise. Such compliance costs are vanishingly small in comparison to the benefits that the defendant might receive by misleading customers who purchase, from the defendant, approaching 1,000 vehicles per month.

[79] Plainly, the annual profits of the defendant give it the ability to pay a significant penalty.

#### **No efforts to correct were made**

[80] No efforts have been made by the defendant to correct the misleading Warranty Waiver representations. It would be perfectly feasible for the defendant to have done so. Corrective advertising, recall advertising or contacting misled purchasers through motor vehicle registration records are some options. None have been taken. Given the huge number of vehicles sold, it is reasonable to assume that some will have developed faults and some purchasers have shouldered the cost as a result of being misled.

### Starting point – Warranty Waiver charges

[81] I have borne carefully in mind all submissions made by the prosecutor and the defendant as to starting points. I have also borne carefully in mind the case law brought to this Court's attention.

[82] Specifically, the Court's attention is drawn to the decisions in *Commerce Commission v Ace Marketing Ltd*,<sup>8</sup> *Commerce Commission v Vehicle Logistics Ltd*,<sup>9</sup> *Commerce Commission v Smart Shop Ltd*,<sup>10</sup> *Commerce Commission v Budget Warehouse Ltd*,<sup>11</sup> and *Commerce Commission v Noel Leeming Group Ltd*.<sup>12</sup>

[83] I accept the prosecutor's analysis of key features comparing the present case with those referred to in submissions.

[84] The Warranty Waivers, which the defendant had consumers sign, is:

- (a) More than twice the number of contracts entered into in *Ace Marketing*, where a starting point of \$225,000 was adopted. The offending in that case occurred over two and a half years. Six of the 19 charges faced in *Ace Marketing* were subject to the earlier maximum penalty of \$200,000.
- (b) Ten times the number of contracts entered into in *Smart Shop*, and over a period roughly five times longer. In *Smart Shop* the starting point adopted was \$150,000.

[85] The duration of the offending in this case:

- (a) Is roughly two and a half times the duration of that in *Vehicle Logistics*, where a starting point of \$100,000 was adopted. Approximately 381

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<sup>8</sup> *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.

<sup>9</sup> *Commerce Commission v Vehicle Logistics Ltd* above at note 2.

<sup>10</sup> *Commerce Commission v Smart Shop Ltd* [2016] NZDC 19377.

<sup>11</sup> *Commerce Commission v Budget Warehouse Ltd* [2017] NZDC 14223.

<sup>12</sup> *Commerce Commission v Noel Leeming Group Ltd* [2018] NZDC 27403.

cars were sold in the *Vehicle Logistics* case as opposed to sales in the tens of thousands in this case.

- (b) Is roughly two and a half times the duration of the offending in *Noel Leeming* where a starting point of \$275,000 was adopted in relation to eight separate instances of CGA rights being misrepresented. Noel Leeming is a much bigger company than the defendant.
- (c) Is roughly four times the duration of the offending in *Budget Warehouse*, and more than 20 times the number of contracts. In *Budget Warehouse*, a starting point of \$90,000-\$100,000 was adopted.

[86] There is no simple arithmetic comparison that can be drawn.

[87] For the Warranty Waiver charges, I adopt a starting point of \$550,000.

**Starting point Liquidation Sale charge and 84% Off charge**

[88] With regard to these charges, this Court's attention has been drawn to *Commerce Commission v Bike Retail Group Ltd*,<sup>13</sup> *Commerce Commission v Sales Concepts Ltd*<sup>14</sup> and *Commerce Commission v The Warehouse Ltd*.<sup>15</sup>

[89] In the *Bike Retail Group* case, "Clearance Sale" misrepresentations were made which were, in my view, similar to the Liquidation Sale misrepresentations in this case. The Bike Retail Group, however, disseminated its advertising more widely than in the present case. Moreover, the Bike Retail Group faced many more charges and offended over a more extended period of time.

[90] In the *Sales Concepts* case, misrepresentations were made in door-to-door sales as to the true price of goods being sold. The dissemination, however, was not widespread and not all sales people made the misrepresentations. The starting point adopted for seven misrepresentation charges was \$215,000.

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<sup>13</sup> *Commerce Commission v Bike Retail Group Ltd* [2017] NZDC 2670.

<sup>14</sup> *Commerce Commission v Sales Concepts Ltd* [2017] NZDC 16387.

<sup>15</sup> *Commerce Commission v The Warehouse Ltd* DC Auckland, CRI-2008-004-11407, 27 February 2009.

[91] In *The Warehouse* case, serious misrepresentations were made as to the price in a Christmas catalogue and various specials for toys suggesting they were at a reduced sale price were wrong. The departure from the truth in this case was considered to be high and the advertising was widely disseminated and represented a major motivator for consumers. For 15 charges, the Court adopted a starting point of \$130,000 and credit was then given for guilty pleas and remedial steps taken.

[92] Bearing in mind all submissions made and the cases to which this Court's attention has been drawn, I take a starting point for the Liquidation Sale and 84% Off charges of \$150,000.

[93] Thus, a global starting point of \$700,000 is reached.

### **Totality**

[94] Significant reductions were made in *Budget Warehouse*, *Ace Marketing*, and *Smart Shop* to reflect totality. I make an adjustment to reflect totality in this case of \$50,000, thus a global notional sentence of a fine of \$650,000 results.


[95] As has previously been recognised, it is appropriate that a discount be given for cooperation and a lack of previous convictions. I give a discount of 10 percent in that regard, reducing the notional overall fine of \$585,000.

[96] In all the circumstances, it is appropriate to allow a 25 percent discount to recognise the entry of guilty pleas. That then reduces the final penalty by \$146,250 which I round up to \$147,000. The resulting final penalty of \$438,000 is applied thus.

### **Result**

	<b>CRN Ending</b>	<b>Maximum Penalty</b>	<b>Offence Description</b>	<b>Fine Imposed</b>	<b>Court Costs</b>
1	-4619	\$200,000	Warranty Waiver	\$15,700	\$130
2	-4620	\$600,000	Warranty Waiver	\$46,900	\$130
3	-4621	\$600,000	Warranty Waiver	\$46,900	\$130
4	-4622	\$600,000	Warranty Waiver	\$46,900	\$130
5	-4623	\$600,000	Warranty Waiver	\$46,900	\$130
6	-4624	\$600,000	Warranty Waiver	\$46,900	\$130
7	-4625	\$600,000	Warranty Waiver	\$46,900	\$130

8	-4626	\$600,000	Warranty Waiver	\$46,900	\$130
9	-4627	\$600,000	Liquidation Sale	\$47,000	\$130
10	-4628	\$600,000	84% Off	\$47,000	\$130



R G Ronayne  
District Court Judge