IN THE DISTRICT COURT
AT AUCKLAND

CRI-2013-004-014130
CRI-2013-004-014125
CRI-2013-004-014128

COMMERCE COMMISSION
Informant

v

MAC WARRANTIES LIMITED
ALAN DAVID SPIERS
Defendants

Hearing: 20 March 2014

Appearances: A McClintock for the Informant
J Stevens for the Defendants

Judgment: 1 April 2014

ORAL JUDGMENT OF JUDGE P A CUNNINGHAM

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[1] MAC Warranties Limited is a limited liability company which has its registered office at Tauranga. Alan David Spiers is the sole director and through a trust is a shareholder in MAC Warranties. Mr Spiers was the sole director of Mount Autos Limited, a used car dealership in Mount Maunganui at the relevant time. MAC Warranties operates a finance company, which provides vehicle finance to individuals, primarily people who buy cars from Mount Autos.

[2] MAC Warranties is charged with and has pleaded guilty to 17 breaches of The Fair Trading Act 1986 and Mr Spiers is charged with 11 breaches of the same Act. He has pleaded guilty to these charges. They arise from misrepresentations made during the course of repossession and resale of vehicles that were the subject of finance. The charges can be divided into three groups; firstly misrepresentations

relating to whether MAC Warranties have complied with the debtor's right under s 26 Credit Repossession Act 1997, to ensure that the creditor, that is MAC Warranties, used all reasonable efforts to obtain the best price for the vehicles. Secondly, misrepresentations relating to whether MAC Warranties complied with the debtor's right under s 23 Credit Repossession Act, to ensure the creditor only sold repossessed vehicles after the expiry of the statutory notice period of 15 days from the date of service of the post-possession notice. Thirdly, in relation to two vehicles the standard or quality of them was described as, "Wrecks," or represented that they had been sold to the wreckers when in fact they were not.

[3] These representations were contained in two documents, a statement of account after sale and a loan details report. The best price representations and the timing representations relate to the issuing of the statement of account after sale. The "wreck" representations relate to the loan details report, which as I understand it was an internal document.

[4] Mr Spiers is charged as a party to the offending of MAC Warranties in relation to the best price representations. Loans approved by MAC Warranties almost exclusively related to cars and other vehicles sold by Mount Autos. The charges relate to vehicles repossessed by MAC Warranties between 2008 and 2011. Mr Spiers was actively involved in the day-to-day management of both companies. In relation to MAC Warranties this included oversight of the repossession and resale of vehicles. His role included arranging and carrying out pre-purchase inspections, test driving vehicles, visits to Turners Auctions and assisting in vehicle pricing.

[5] The majority of people who purchased vehicles from Mount Autos financed their vehicles with MAC Warranties. Vehicles sold by Mount Autos and financed by MAC Warranties were predominantly between the price of $5000 and $10,000. On site signage and advertising stated the following in relation to finance availability, "We specialise in no deposit car finance, instant or no deposit finance" and "beneficiaries welcome."

[6] Under the Credit Repossession Act a creditor is required to follow proscribed steps to effect a repossession and sale. That includes statutory notices, adherence to

timeframes and duties of care. The creditor must serve a post-possession notice on the debtor and every guarantor within 21 days of taking possession of the goods. It must be in the form provided by the Credit Repossession Act, which requires the creditor to provide the amount required to reinstate the agreement and to provide an estimate of the value of the goods in question. The goods or vehicles are not able to be sold until the expiration of 15 days from the service of the post-possession notice.

[7] As I have already said, the creditor is also obliged to use all reasonable efforts to obtain the best price and to give the debtor the statement of account after sale within 10 days of the date of sale. When a debtor defaulted on their loan payments and was unable to come to a payment arrangement with MAC Warranties, the company repossessed the vehicle under the terms of the loan agreement and that included repossession of vehicles of guarantors. Vehicles that were voluntarily returned due to debtor default followed the same process as repossessed vehicles as required by the Credit Repossession Act.

[8] MAC Warranties was required to and did provide the debtor with a post-possession notice with an estimate of the value of the goods. There were occasions, however, when no post-possession notice was retained on a customer's file. To make the estimate MAC Warranties obtained or prepared a valuation of the repossessed vehicle and placed it on the debtor's file and this occurred in one of two ways. Usually MAC Warranties obtained these estimates from Turners Car Auctions, but sometimes MAC Warranties did not use Turners to prepare a written valuation and either Mr Spiers or his son would do it themselves.

[9] Turners did not do the valuation but Mr Spiers or his son wrote up the valuation on one of the two types of Turners' forms. There were some vehicles for which neither MAC Warranties nor Mr Spiers obtained or prepared any written valuation, instead either Mr Alan Spiers or his son assessed the value of the vehicle for the purposes of putting a value in the post-possession notice.

[10] No attempt was made to sell these vehicles in the marketplace or take proper steps to obtain the best price for the vehicle; instead all of them were sold to Mount Autos for a price at or very near the estimate of the value in the

post-possession notice or the valuation form. The debtor's account was then credited with the amount that the vehicle was sold for and MAC Warranties deducted this sum from the loan balance to give the balance due after sale.

[11] Having purchased the vehicles Mount Autos then prepared them for resale, in most cases this involved repair or reconditioning being carried out.

[12] Following the sale of two repossessed vehicles to Mount Autos, MAC Warranties recorded the sale transaction against the loan in its accounting software, using the transaction code "Wreck."

[13] In relation to the, "Wreck," representations there were two specific cases. In the case of Mr Rahurui he purchased a 1993 Mazda station wagon from Mount Autos in February 2006 for $8995, which was financed through MAC Warranties. The company repossessed the vehicle in February 2008 and sent a post-possession notice to Mr Rahurui giving an estimate of the vehicle for $300. Mr Rahurui spoke to the finance administrator at MAC Warranties following repossession and was told that the vehicle had been sold to the wreckers. In fact MAC Warranties did not sell the vehicle to a wrecking yard but sold it to Mount Autos. It was repaired or reconditioned at a cost of $717.00 and resold.

[14] Ms Rudolph purchased a 1997 Toyota Impsum from Mount Autos on 19 July 2006 for $7995. It was financed through MAC Warranties. The company repossessed the vehicle on 9 October 2009. The post-possession notice gave an estimate of value of the vehicle of $800. The loan details report records the notation, "Wreck," against three entries relating to the vehicle's sale on 28 January 2010. MAC Warranties provided the loan details report to Ms Rudolph on request in January 2010. She subsequently saw the car for sale in the Bay News on 24 February 2010 and 10 March 2010. She saw it being driven in the vicinity of her home address, it had a current registration and WOF at the time of repossession, but MAC Warranties did not have a key for a vehicle. She considered the car to be in good condition at the time it was repossessed, she said it did not require any major repairs and it drove well. Mount Autos subsequently sold it following recondition work, which cost $3248, for $6995.

[15] There are 11 charges against MAC Warranties and Mr Spiers relating to the best price representations and this relates to the representations contained in this statement of account after sale sent to the debtors. In issuing this document MAC Warranties was implicitly representing that it had complied with the statutory obligation and fulfilled the debtor's rights. However, in each case the steps taken by MAC Warranties to obtain the best price went no further than transferring it to its sister company.

[16] There are two representative charges against each defendant for instances where Turners' valuation forms were completed by Mr Spiers or his son for vehicles repossessed by MAC Warranties and there are two representative charges against each defendant for instances where Turners' evaluation forms were completed by Mr Spiers and his son and four representative charges against each of them for instances where no written valuation was carried out. Three representative charges against each defendant for instances where Turners completed an evaluation of MAC Warranties vehicles. The best price charges cover a total of 79 vehicles.

[17] In terms of the timing representations there are four charges relating to timing representations against MAC Warranties Limited. They encompass 29 occasions when vehicles were sold to Mount Autos in advance of the statutory notice period. A majority of those were fairly close to the 15 day statutory period, but there were a reasonable number that were between five and 10 days and in one case the time was one and not 15 days.

[18] The Commerce Commission commenced an investigation as a result of a complaint from a debtor and in February 2011 the *Fair Go* television programme ran an article on MAC Warranties, Mount Autos and Mr Spiers. In connection with that programme Fair Go wrote to Mr Spiers seeking information about its processes and how they were followed with respect to Ms Rudolph.

[19] In a letter of response in February Mr Spiers emphasised that MAC Warranties used a reputable third party valuation to value Ms Rudolph's vehicle and a public relations advisor on behalf of MAC Warranties subsequently drafted a press release and a letter to debtors to the same effect, stating that Turners

provided MAC Warranties with official certificates of current valuations. Ultimately MAC Warranties elected not to issue the press release or to send the letters.

[20] In May 2011 the Commission Commerce executed a search warrant at the premises of MAC Warranties and Mount Autos and seized debtor files relating to repossession, valuation and subsequent resale of vehicles. They also looked at the computer system. Eventually Ms Glynn of MAC Warranties was interviewed and following the interview Mr Spiers provided written explanations to the Commission acknowledging that the failure to observe the statutory notice period was the result of a miscalculation of the date these vehicles could be sold on the part of the staff member responsible.

[21] As to the best price representations he said that Mount Autos offered debtors a better outcome than would have been achieved elsewhere, this is because they could be sold quickly without additional storage and interest costs accruing on the debtor's account and without Turners' fees.

[22] When questioned about both the valuation and evaluation documents in the name of Turners that appeared to have been completed in his handwriting and that of another employee, Mr Spiers acknowledged that he and his son did from time to time complete vehicle valuations themselves, either on valuation or evaluation forms in the name of Turners and that the forms were used for internal purposes only for convenience and were not provided to debtors.

[23] In relation to the, "Wreck," representations, Mr Spiers said that it was an error and he was not previously aware that this code was being used until it had been pointed out to him. MAC Warranties have advised the Commission that it has now changed its practices; it no longer uses the word, "Wreck," in its coding reference. For the post-possession purposes MAC Warranties now values vehicles either itself using its own custom designed form or through Turners and in terms of selling repossessed vehicles, those are now all sold at auction.

[24] MAC Warranties and Mr Spiers agreed to an audit to assist the Commission in verifying that this correction action has indeed been taken. MAC Warranties have agreed to pay compensation to debtors of approximately $182,237.

[25] In relation to each charge there is a $200,000 maximum fine in relation to charges against MAC Warranties Limited and a $60,000 fine in relation to Mr Spiers. MAC Warranties Limited has never appeared before the Court before and Mr Spiers has never appeared before the Court in relation to any charges under the Fair Trading Act.

[26] The Fair Trading Act is consumer protection legislation and the Credit Repossession Act can be described similarly, because it sets out rules that apply when a creditor repossesses goods. In this case in relation to the best price representation the actions of the defendants meant it is not known if another person would have paid more for the vehicle than the valuation ascribed to it by MAC Warranties. If a low value had been ascribed to the vehicle then the debtor's ledger would have been at a disadvantage to the debtor. These people who purchased vehicles were generally from low income groupings or beneficiaries and have been described as being people less likely to know their rights or to exercise them than other people in the community.

[27] The whole point of the obligations under the Credit Repossession Act is to take reasonable steps to obtain the best price for repossessed goods, so that when the amount is deducted the amount the debtor still owes the finance company, it is the appropriate amount.

[28] In terms of the timing representations the Credit Repossession Act sets out a period of time that needs to pass before the vehicle is sold. That enables the debtor to be able to challenge the actions of the creditor and accordingly it is important that a creditor provides accurate information to the debtor or the person who purchased the car using the company's finance.

[29] When the parties made submissions before me earlier this month, I was told that the Commerce Commission and the defendants have reached an agreement on

the level of fines to be imposed. However, the final decision is one for me to make but in doing so I need to take into account how the parties have reached that level of fine and why.

[30] Although there is that level of agreement around the fine, in terms of the nature of the offending there is a disagreement as between the Commerce Commission on the one hand and the defendants on the other hand as to how this offending should be characterised.

[31] For Mr Spiers and MAC Warranties Limited, Ms Stevens described it as careless, pointing out that the majority of vehicles financed by MAC Warranties are not repossessed. Mr Spiers has over 35 years experience in the industry and operates a business that was previously operated by his father.

[32] Ms McClintock for the Commerce Commission described the conduct as reckless, saying that MAC Warranties Limited made and broke their own rules in relation to valuations of repossessed vehicles and that the practices of MAC Warranties was well below the mark.

[33] Ms Stevens began her submissions by conveying an unreserved apology for the stress caused to customers and said how much Mr Spiers and MAC Warranties regretted that these matters were before the Court. MAC Warranties has voluntarily developed a compensation package, which has worked in one of two ways, either by giving a credit to customers who still have a debtor balance, or in cases where accounts have been fully paid, a cash refund. However, a large number of these people have still not been able to be contacted so they do not know that they either due a cash refund or a credit on their account.

[34] The explanation for values ascribed by Mr Spiers or his son included that other alternatives could be more expensive, for example, selling a car at auction. That could have resulted in a lesser value being ascribed to the vehicle, which would have increased the debt for customers. Ms Stevens also pointed out that MAC Warranties Limited has taken remedial action by now selling all cars at auction.

[35] In terms of timing, as I have already said, Mr Spiers has explained that the compliance manual did not adhere to the formula in the Act and that has now been corrected. The word, "Wreck," said to be a coding error is no longer used.

[36] For the Commission, Ms McClintock referred me to a decision of Judge Hubble in *Vehicle Finance Limited v Smeath* North Shore District Court 22 April 2002, where Judge Hubble said that it was incumbent on the finance company to obtain at least one independent valuation. Ms McClintock pointed out that there were other methods of getting best prices for the vehicles, for example, by selling or looking at similar vehicles on TradeMe and consulting other trade publications, such actions would have brought independence to the pricing process.

[37] In terms of the timing breaches, there was a clear statutory requirement that was breached. I do not intend to spend time on the, "Wreck," representations because the facts speak for themselves.

[38] The words, "All reasonable efforts to obtain the best possible price," are not defined in the Credit Repossession Act, however, since the 2002 case of *Vehicle Finance Limited v Smeath* our law has required independence to be brought to the valuation process.

[39] In this case there were three different ways in which a value was ascribed to a vehicle, either getting Turners to do it, using the Turner's form themselves or doing nothing and ascribing a value, no doubt based on industry knowledge. In my view those practices are not consistent with saying that the actions of Mr Spires and his son and MAC Warranties were careless and I say that in spite of the obvious experience that Mr Spiers had.

[40] The reason that it was not careless is that there is a requirement to bring independence to the process and it is an important part, in my view, of the repossession process. When that is viewed in the context that this is consumer protection legislation where the statutory requirements are there to ensure that the debtor's losses are accurately calculated, it cannot be called careless and must be called reckless.

[41] In terms of the timing representations, or those where cars were sold to Mount Autos short of the 15 days statutory requirement, there is no evidence that any consumer or car owner or debtor has been affected by breaching those time lines, however, there is a clear statutory requirement and the internal processes of the company should have ensured that it was observed. That it is even more so, given the experience of Mr Spiers in the industry and MAC Warranties. If it happened once or twice one could have said it was careless, but the number of times it happened inclines me to view it more as reckless.

[42] In terms of the, "Wreck," representations, in the case of Ms Rudolph where she was told the car was worth $800 and with an expenditure of $3248 the car was sold for nearly $7000 the disadvantage to her is obvious. Similarly to Mr Rahurui being told that the car had been sold to the wreckers when in fact it had been sold to Mount Autos, it would have been pointless for him to take any steps given what he was told. I accept that there was no deliberate dishonesty in relation to either of these two cases; however, I cannot call it anything other than reckless.

[43] Looking at the three classifications of charges, that is the best price, the timing and the, "Wreck," representations, in my view I would describe what happened overall as amounting to a moderate degree of recklessness.

[44] I now turn to the assessment of the fine. The representations, or rather misrepresentations are important, particularly because they were made to people who are on low incomes and, therefore, in a socio-economic grouping where they are less likely to be apprised of their rights or in a position to exercise them. I have already said that there is a moderate degree of recklessness.

[45] It is also important to have regard to two purposes of the Sentencing Act 2002 and the first one is deterrence. Deterrence not only to MAC Warranties Limited and to Mr Spiers but to other car dealers and finance companies, that this sort of recklessness will not be tolerated by the Courts and will incur significant monetary penalties. In addition, it is important that MAC Warranties Limited and Mr Spiers are held accountable for their actions.

[46] The starting point suggested by the Commission, and agreed to by MAC Warranties and Mr Spiers, is between one hundred and ten and one hundred and twenty thousand dollars. This is said to reflect the totality of the offending.

[47] A number of similar cases were presented to me, including the *Commerce Commission v Budget Loans Limited*, a decision of this Court on 26 July 2010, a decision of Judge Wilson QC. Here there were 34 breaches of The Fair Trading Act for not disclosing a fee, attempting to contract out of the Credit Repossession Act and also attempting to contract out of the Personal Property Securities Act 1999. In that case Judge Wilson adopted a starting point of $3000 per charge, which amounted to $61,500. In this case there are a greater number of charges.

[48] In the *Commerce Commission v Budget Loans Limited* Judge Wilson described the offending as low-level recklessness and I have described it as moderate recklessness. In the *Commerce Commission v Budget Loans Limited* there was independent legal advice taken before the actions were carried out. I was also referred to two other cases by The Commission Commerce that I have had regard to and those are the *Commerce Commission v Marchione,* Auckland District Court 19 July 2006 and R v *Senate Finance Limited.*

[49] From there it is suggested that there should be significant reductions for two factors. The first is the fact there has been a compensation package devised and agreed to in the sum of $182,237 over 79 people. Ms McClintock, for the Commission, submitted that, as most of it was a decrease in a debtor ledger as opposed to paying out cash, that it was not such a severe penalty. I do not agree. Whether it is deducting an amount owed from an outstanding debtor ledger or paying cash, it is still a loss to the company and an expense to the company. In my view the development of a compensation package was both responsible and appropriate and should attract a 15 percent discount.

[50] Secondly, and it is obvious from what I have already said, that steps have been taken to remedy the internal processes of MAC Warranties to prevent this happening again. Again that is both responsible and appropriate.

[51] The fact that there was a guilty plea, not only is appropriate but it signifies an acceptance of responsibility as well as an acknowledgement that the actions of the defendants were false and misleading.

[52] In my view a 45 percent discount from the level of the fine is available and possibly even more. In terms of the starting point of one hundred and ten to one hundred and twenty thousand dollars, in my view it would be at the top end, however, in this case the parties have agreed on a fine of $65,000, which might be a little short of a fine I may have imposed if it had been up to me. There certainly is a benefit in the parties agreeing the level of a fine, if for no reason other than it leads to a situation where there is less stress on the 79 debtors and the community because the proceedings are able to be disposed of more easily.

[53] There are a number of cases, which acknowledge that there is nothing wrong with the parties reaching a negotiated settlement and the first of those cases was the *Commerce Commission v New Zealand Milk Corporation* (1994) 2 NZLR. As to the way I might have calculated the fine and the factors to be taken into account in mitigation they might differ slightly but they are not significant compared to the level of fine reached by the parties by agreement. I am happy to adopt the sanction that they have agreed upon.

[54] That fine of $65,000 is to be split 65 percent to the company amounting to $42,250 and 35 percent amounting to $22,750 to Mr Spiers. I am going to put the fine in relation to Mr Spiers on information ending 4915 and the fine for MAC Warranties Limited is on information ending 4922 and I will enter a conviction and discharge in relation to all the other charges. There should also be Court costs of $130 on each of those two informations and none on those where I have entered a conviction and discharge.

P A Cunningham
District Court Judge