

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2013-004-002473**

**COMMERCE COMMISSION  
Informant**

v

**THE AUTO COMPANY (MILLENIUM) LIMITED  
Defendant**

Hearing: 23 May 2013  
Appearances: J Dixon for the Informant  
D Webster for the Defendant  
Judgment: 23 May 2013

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**NOTES OF JUDGE A SWARAN SINGH ON SENTENCING**

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[1] On 5 March 2013 at the Auckland District Court the defendant, The Auto Company Limited, pleaded guilty to 13 representative charges of being a person in trade engaged in conduct that was liable to mislead the public as to the characteristics of the goods, pursuant to s 40(1) and s 10 Fair Trading Act 1986, in relation to the sale of cars on Trade Me auction site between 27 June 2011 and 9 July 2012.

[2] In sentencing, I have regard to the written and oral submissions from the informant and defence counsel. I am grateful to both counsel for their very comprehensive and detailed sentencing submissions. I also have regard to the summary of facts, which I incorporate as part of my sentencing notes.

[3] Firstly, I will deal with the summary of facts, which I incorporate as part of my sentencing notes. This case involved the practice of shill bidding which misled

the public as to the price of the cars that were being sold with a reserve price of \$1. A total of 530 cars were the subject of shill bidding. The total amount of loss suffered by the victims was in excess of \$89,000. Further, Trade Me incurred \$22,500 in investigation costs.

[4] In sentencing, I have regard to the purposes and principles of sentencing. In particular, there is a need to hold the defendant accountable for the offending and to promote a sense of responsibility for the harm that it has caused to the victims, including consumers who had bid for the cars as well as Trade Me. Clearly, there is a need to both denounce and deter offending of this kind.

[5] I also have regard to the gravity of the offending. Each charge carries a maximum of \$2000 fine. Further, I have regard to the need for consistency in sentencing levels. I have been referred to cases by both counsel, which I have carefully considered. The cases include the case of *Morrison Car Company* DC Christchurch CRI-2011-009-005425, 9 August 2011 which involved guilty pleas to 39 specific charges under s 13(g) Fair Trading Act 1986 for shill bidding over a period of 15 months.

[6] Further, I have regard to the cases of *Commerce Commission v Kathmandu Ltd* DC Auckland CRI-2006-004-500110, 19 June 2006, and *Commerce Commission v Bond & Bond Ltd* (1997) 6 NZBLC 102,314, (1997) 7 TCLR 701.

[7] I also have considered the case of *Commerce Commission v Budget Loans Ltd* DC Auckland CRI-2009-004-028349, 6 July 2010 and *Commerce Commission v O'Neil* [2007] NZCA 466, (2008) 8 NZBLC 102,086, (2007) 12 TCLR 1.

[8] In this case there 530 auctions, compared to 39 auctions in the *Morrison Car Company* case. In this case, the identified loss suffered by 110 victims who bought the cars totals \$89,810. There was further loss to consumers who are not the subject of charge, totalling \$12,352.01. I note that the defendant has paid to Trade Me a sum of \$122,174. I understand all the identified victims have

been paid reparation for the loss that they have suffered. The balance of \$22,500 is reparation to Trade Me.

[9] The defendant has pleaded guilty at an early stage. I also have regard to the victim impact statement, which sets out the victim's views on the impact of the offending on the victim and its customers. In particular I quote from page 2 of Trade Me's victim impact statement on its views on the seriousness of the offending:

The Auto Company has engaged in the most prolific and damaging campaign of shill bidding in the history of Trade Me. Its conduct was clearly more than a one-off occurrence or opportunistic offending. This was intentional, systematic behaviour specifically targeted to circumvent Trade Me's security tools, and mislead both consumers and Trade Me.

[10] At paragraph 3 under the heading of, "Seriousness of the conduct":

I note the Auto Company's offending is the most serious single instance of offending in the history of Trade Me, most significantly in terms of the number of the victims, but also in terms of the impact the offending has had on Trade Me's reputation as a safe and trusted marketplace. To contextualise this, the previous largest incidence of shill bidding on site involved Morrison Auto Company in 2008.

[11] It is clear that the impact on Trade Me and consumers, including the extent of the loss suffered by the victims, has been significant.

[12] Trade Me operates nation-wide. Therefore, the information provided by the defendant had a wide coverage, albeit the market on which The Auto Company traded related to Auckland. It had the impact of enforcing an undisclosed reserve price through shill bids. Not only did it affect Trade Me and the consumers who bought the cars, but it must have impacted on the sale of vehicles by other companies in that by misleading the consumers, consumers were attracted to the defendant company rather than to other sellers.

[13] The offending was premeditated and systematic. It is clear from the maximum penalty of **\$2000** that the Parliament considered consumer protection as paramount. The prosecution submits that, as a starting point, a fine in the range of \$75,000 to \$90,000 on a totality principle is appropriate. Defence counsel submits that a starting point of \$50,000 on a totality principle is appropriate. In particular,

defence points to the fact that unlike many other cases that come before the Courts, the defendant had paid reparation to all the victims who could be identified, including \$22,500 reparation to Trade Me.

[14] As I have earlier observed, to the defendant's credit payment has been made without the need for the Court to make reparation orders. Reparation has been paid at an earlier stage which, no doubt, is beneficial to the victims.

[15] I also have regard to the totality principle. In particular, I have taken into account the need to consider the amount of reparation already paid when considering the fine that is to be imposed on The Auto Company Limited. This approach is consistent with the totality principle.

[16] The Crown submits that, having regard to the guilty plea, co-operation, and the reparation paid in advance, a credit of approximately 40 to 50 percent is appropriate. The Crown submits that an end sentence of between \$37,500 to \$45,000 is appropriate.

[17] On the other hand, the defence submission is that a starting point of \$50,000, a credit of 30 percent for guilty plea equating to \$15,000, 10 percent for co-operation equating to \$5000, and 10 percent for reparation equating to \$5000, leaving an end sentence of \$25,000, is appropriate.

[18] There is considerable divergence between the Crown and the defence submissions on the level of fine to be imposed. The defence position is an end sentence of \$25,000 whereas the Crown position is an end sentence of between \$37,500 and \$45,000.


[19] Having carefully considered the case law, purposes and principles of sentencing, the nature and the extent of the offending and the harm caused to the victims, I consider a starting point of \$75,000 is appropriate. I consider it appropriate to allow a credit of \$19,000 to reflect its co-operation during investigations, the change in its operating system, its financial position, the fact it

has no previous convictions and the payment of reparation in full. At this stage, the indicated fine is in the sum of \$56,000.

[20] The Auto Company Limited is entitled to full credit for early guilty pleas at its first appearance on 5 March 2013. In accordance with the decision in *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, a 25 percent credit, in the sum of \$14,000, is available.

[21] The total fine is \$42,000 in respect of the 13 charges. In respect of the first charge, being information ending 5880, a fine of \$3000 is appropriate with Court costs of \$132.89. On each of the remaining 12 informations, the fine is in the sum of \$3250, together with Court costs of \$132.89.

[22] Insofar as reparation is concerned, both counsel are agreed that there is no need for reparation orders. The Auto Company has already paid \$122,178 in trust to Trade Me. I understand all the identified victims have been paid. The balance remaining after paying all the identified victims will be paid to Trade Me by way of reparation. In the circumstances, there is no need for me to make reparation orders.

  
A Swaran Singh  
District Court Judge