

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

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

**CIV-2020-404-869
[2021] NZHC 3312**

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
Reissued:	8 December 2021

RESULTS JUDGMENT OF ROBINSON J

*This judgment was delivered by me on 6 December 2021 at 2:00 pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors/Counsel:
Meredith Connell, Auckland
Russell McVeagh, Auckland

[1] On 3 December 2021 I heard the plaintiff's (Commission) application for declaratory and injunctive relief. The matter proceeded by way formal proof,¹ the defendant's (ACE) statement of defence having been struck-out by Muir J on 30 September 2021,² because ACE failed to comply with an "unless order" made by Fitzgerald J in respect of ACE's discovery obligations.³

[2] The Commission brought evidence and made submissions only in pursuit of the relief sought in its first, second and fourth causes of action. The Commission withdrew its third, fifth and sixth causes of action.

[3] This is a results judgment. The reasons will follow shortly.

First cause of action

[4] In respect of the first cause of action I:

- (a) declare that by its conduct pleaded at paragraphs 4.2 - 4.11 of the statement of claim dated 12 June 2020 ACE breached s 9C(1) via ss 9C(2)(b) and 9C(3)(b)(ii) of the Credit Contracts and Consumer Finance Act 2003;
- (b) direct that ACE is not to provide credit under the Contracts described at paragraphs 3.4 and 3.5 of the Statement of Claim or otherwise unless and until it amends its Contract in such away as to comply with s 9C(3)(b)(ii) of the Credit Contracts and Consumer Finance Act 2003.

Second cause of action

[5] In respect of the second cause of action I:

- (a) declare that by its conduct pleaded at paragraphs 4.2 – 4.11 of the Statement of Claim, ACE breached s 9C(1) via ss 9C(2)(b) and

¹ High Court Rules 2016, r 15.9.

² Minute of Muir J, dated 30 September 2021 at [2].

³ Minute of Fitzgerald J, dated 26 August 2021 para [5].

9C(3)(b)(iii) of the Credit Contracts and Consumer Finance Act 2003;
and

- (b) direct that ACE is not to provide credit under the Contracts described at paragraphs 3.4 and 3.5 of the Statement of Claim or otherwise unless and until it complies with s 9C(3)(b)(iii) of the Credit Contracts and Consumer Finance Act 2003.

Fourth cause of action

[6] In respect of the fourth cause of action I declare as follow:

- (a) ACE Marketing Limited, entered into standard form consumer contracts on deferred payment terms (ACE's Contract) between 1 April 2016 and 31 August 2018 (Claim Period);
- (b) ACE's customers signed up to one of four types of payment plans: Gold, Silver, Bronze, and Custom. Each payment plan had a different number of weekly instalments to be paid under the contract, and a different number of minimum weekly instalments that had to be paid before ACE would deliver the product to the customer;
- (c) The General Terms of Versions 1 and 2 of ACE's Contract used in the Claim Period included the following clause regarding delivery (on page 12 of ACE's Contract):

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.

- (d) Version 3 of ACE's Contract used in the Claim Period included the following wording, which was of the same effect:

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.

- (e) On the final page of the Contract (page 15), the general terms included the following schedule (Delayed Delivery Schedule):

Revised Delivery Schedule should you miss your payments are as follows:	% age of PMT Required	Gold	Silver	Bronze
If you miss 1 payment then the items purchased will be delivered after:	43.0%	13 weeks	23 weeks	32 weeks
If you miss 2 payments then the items purchased will be delivered after:	53.0%	16 weeks	28 weeks	40 weeks
If you miss 3 payments then the items purchased will be delivered after:	63.0%	19 weeks	33 weeks	47 weeks
If you miss 4 payments then the items purchased will be delivered after:	73.0%	22 weeks	38 weeks	54 weeks
If you miss 5 payments then the items purchased will be delivered after:	83.0%	25 weeks	43 wees	62 weeks
If you miss 6 payments then the items purchased will be delivered after:	100%	30 weeks	52 weeks	78 weeks

- (f) The Delayed Delivery Schedule was beneath a privacy waiver in the contract and contained no reference to clauses 3.0 to 3.2. Equally, clauses 3.0 to 3.2 made no reference to the Delayed Delivery Schedule.

- (g) The Delayed Delivery Schedule also did not identify the length of deferral that customers on Custom plans could expect for missed or dishonoured payments.
- (h) The terms of ACE's Contract set out at paragraphs 6(c) and 6(d) above together with the Delayed Delivery Schedule combined to make the Delayed Delivery Provisions of ACE's Contract. When taking into account the contract as a whole and the extent to which the terms were transparent, the Delayed Delivery Provisions amounted to an unfair contract term in a standard form contract within the meaning of s 46L(1) of the Fair Trading Act 1986 (FTA). This is because the Delayed Delivery Provisions:
- (i) cause a significant imbalance in the parties' rights and obligations arising under the contract which are not balanced by any substantial corresponding right in favour of the customer;
 - (ii) are not reasonably necessary to protect the legitimate interests of ACE, as the party who would be advantaged by the terms; and
 - (iii) would cause a detriment to customers if they were applied, enforced, or relied on.
- (i) Accordingly, pursuant to s 26A of the FTA:
- (i) a person must not:
 - include the Delayed Delivery Provisions in a standard form contract; or
 - apply, enforce, or rely on the Delayed Delivery Provisions in a standard form contract; and

- (ii) given the effect of the second bullet point listed at paragraph [6](i)(i) above, ACE cannot rely on the Delayed Delivery Provisions to delay delivery of a customer's goods once that customer has made the minimum number of payments that are required under ACE's Contract but for the Delayed Delivery Provisions.

[7] The Commission is entitled to costs on a 2B basis.

Robinson J

Addendum: This judgment is being re-issued to correct two typographical errors in the judgment originally issued on Monday 6 December 2021.