

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2015-004-011372
[2016] NZDC 3028**

COMMERCE COMMISSION

v

FLEXI BUY LIMITED

Hearing: 19 February 2016
Appearances: A McClintock for the Prosecutor
No appearance by or for the Defendant
Judgment: 19 February 2016

NOTES OF JUDGE C J FIELD ON SENTENCING

[1] The charges against the defendant company having been proven I now turn to the issue of penalty. I have been assisted by written submissions on behalf of the Commission who point out a number of features justifying, in its submission, a starting point of between \$50,000 and \$60,000.

[2] In support of that by way of a general submission the Commission points out that the defendant company has failed to comply with not one but a range of mandatory disclosure requirements, both in its standard contract terms and in the core information filled out for individual debtors.

[3] I have already referred to the notably manifest deficiencies in the disclosure which should properly have been made to a debtor and clearly this is a case where

the company has been entirely reckless in its dealings with the members of the public.

[4] The purpose of the legislation is to provide protection for consumers and debtors in situations such as this. I say “situations such as this” because I am told and I accept that activity of this kind is by no means unknown and the aspects of sentencing involving accountability, deterrence and denunciation are matters that the Court should take into account.

[5] The offending took place over a significant period of time of approximately one year, between early 2013 and 2014. I mention this because the company has not previously appeared and it might perhaps have sought credit for a previous good record, however two issues arise from that. The first is that I am told the company was incorporated in 2012 and the offending took place over that 12 month period, so that no real allowance can be made for any perceived lack of offending on the company’s part.

[6] This has been a complex investigation and the company has provided limited assistance so that co-operation with the authorities again is not something that the couple can place much weight on in the circumstances of this case.

[7] The submission of reckless behaviour on the part of the company is substantiated by evidence of the company’s inability to provide copies of its contract when required to do so. The obvious eligibility of the contracts, the core nature of the information that was not disclosed was clearly necessary for the debtor understanding the contract and its resulting obligations and the information that was disclosed was very difficult to follow given that the ground that was used and the nature of the explanation provided, it seems almost as though the information was provided by someone for whom English was a second language. In any event, clearly no ordinary member of the public could be expected to understand their rights and obligations on these contracts as they appear to have been. As I have said the purposes of accountability, deterrence and denunciation loom large in this case.

[8] The extent of the offending is perhaps a matter of conjecture. The informant points out that five of the charges relate to the standard contract to which I have referred, the breaches related to key information including the right to cancelling what credit fees applied.

[9] Now it seems likely that assuming these, the contracts, are all the same or very similar that the 360 Flexi Buy customers would likely have received contracts of this kind. There is a significant harm caused by the offending, no doubt stress was suffered by the debtors as they have tried to decipher just what their rights and obligations were in terms of each contract.

[10] In terms of starting point I have been referred to a number of authorities emphasising the serious way in which the Court views this kind of activity, leading to a submission that a starting point range of \$50,000 to \$60,000 is appropriate having regard to the totality of the offending and the culpability of the defendant as assessed by the Court as a whole. I agree that a starting point range of \$50,000 to \$60,000 is appropriate together with statutory damages to which I will return in a moment.

[11] The financial position of the company is not known. I am unable to therefore make any allowance for impecuniosity or indeed an enhanced ability to pay for that matter, but bearing in mind the need to impose the least restrictive outcome that is appropriate in the circumstances, I consider that the start and end point should be one of \$50,000. Therefore in respect of each of the charging documents the company is fined the sum of \$5000.

[12] I return now to the issue of statutory damages and the amount is somewhat difficult to ascertain in any individual case. What the Commission has provided the Court is a schedule of statutory damages based on what can be ascertained in the case of individual losses and in the case of others the minimum amount of \$100.

[13] I adopt that schedule as the appropriate basis to assess statutory damages and statutory damages are awarded in respect of each debtor as listed in the schedule that being a total amount of \$3480. Therefore the outcome for the company is a fine as I

have indicated, together with the statutory damages. That then subject to anything further is the outcome for the company.

A handwritten signature in black ink, appearing to read 'C J Field', written over a horizontal line.

C J Field
District Court Judge

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2015-004-011372
[2016] NZDC 2990**

COMMERCE COMMISSION
Prosecutor

v

FLEXI BUY LIMITED
Defendant

Hearing: 19 February 2016
Appearances: A McClintock for the Informant
No appearance by or for the Respondent
Judgment: 19 February 2016

ORAL JUDGMENT OF JUDGE C J FIELD

[1] In this matter the defendant company, Flexi Buy Limited, faces a number of charges brought against it under the Credit Contracts and Consumer Finance Act 2003. The defendant company faces 10 charges under s 17 and 32 of the Act. Each charge alleges a failure to provide either any disclosure at all or adequate disclosure to debtors who entered into consumer credit contracts for the sale and purchase on goods. I am advised that for the most part these involved purchases of household goods, appliances and some instances, furniture.

[2] The prosecution concerns some 19 contracts on a standard form which is subject to a significant number of criticisms by the informant, all of which I accept as being justified. I have heard evidence from senior investigator Ms Shaab, who has prepared an affidavit setting out the process of investigation, the defects found and the way in which each charge is substantiated.

[3] The caption summary and affidavit contain a considerable volume of material which it would not be helpful to itemise in detail now but will form part of the judgment concerning the proof of these allegations.

[4] Effectively, it is said that the disclosure in each case is totally inadequate and the rights given, or purported to be given to each purchaser, again, are totally inadequate. Similarly, with standards of disclosure and the means by which disclosure is to be made, pursuant to s 32 of the Act, is defective in the ways specified in respect of each of the charging documents.

[5] By way of illustration for example, referring to exhibit marked B in Ms Shaab's affidavit the right of cancellation for the customer is misleading and totally inadequate, its phraseology is confusing and unclear. It is said that the purchaser could cancel the agreement as they have a short time legal right by completing and giving to Flexi Buy Limited the notice of cancellation handed to you. This notice was in a form specified by the company. The right of cancellation is almost incomprehensible as phrase and, in my view, it could not be deciphered by any member of the public looking at it.

[6] Another criticism of the form of contract is noted under notation two in relation to the cancellation before delivery of goods, standard delivery fees or early delivery options plus any selling cost. Further, if the home is required to be visited by a collector a further cost of \$65. A further example of confusing phraseology is under the heading of "Default Interest Charges" if a client or a customer defaults in payment he or she must pay default interest fees and just whether these amount to fees or interest charges or default interest fees is a matter of conjecture. The payment start date, for example, is left blank in many of the contracts. The weekly payments are not specified and it can in no way be said that these contracts comply in any meaningful way with the requirement of the Act.

[7] For these reasons, without itemising each particular charge, I am satisfied that the ingredients of each particular charge are met and I am grateful to the informant for attaching a schedule setting out the way in which each particular individual contract is said to be defective and I accept this as being accurate.

[8] In the circumstances therefore, I am satisfied beyond reasonable doubt that the company has, indeed, committed the offences with which it is charged and convictions will be entered accordingly.

A handwritten signature in black ink, appearing to read 'C J Field', written over a horizontal line.

C J Field
District Court Judge