IN THE DISTRICT COURT
AT WAITAKERE

CRN-0909-050-1751 & Ors

BETWEEN	COMMERCE COMMISSION Informant
AND	TAKARUNGA MANAGEMENT LIMITED T/A MORTGAGE RESCUE TREVOR ALLAN LUDLOW Defendants

Appearances: Mr Donkin and Ms Hall for the Informant
Mr Ludlow in Person

Judgment: 7 June 2011

JUDGMENT OF JUDGE L I HINTON

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[1] This defended hearing involved seven charges laid by the Commerce Commission alleging breaches of the Credit Contracts and Consumer Finance Act 2003 (the CCCF Act) and the Fair Trading Act 1986 (the FT Act) against each of Takarunga Management Limited (TML) and Allan Ludlow. In each case two charges were alternatives.

[2] TML was incorporated in May 2006 and was initially, according to the evidence of Mr Ludlow, the vehicle assisting in the receivership of another finance company. TML was to branch out into mortgage lending. Its product was called Mortgage Rescue, and that was the title TML gave itself in some of its loan documentation. Mr Ludlow was one of two directors and shareholders of TML at the time of the events the subject of the charges. His co-director and equal shareholder was his partner.

[3] Mr Ludlow was to advise the Commerce Commission during its investigations that there were only four consumer credit contracts entered into by

TML. These charges involved two of those contracts. TML ceased trading on 26 June 2008.

The Charges

[4] The Commerce Commission alleged breaches by TML and Mr Ludlow (i) of the FT Act, the allegation being that they made a false or misleading representation in trade concerning the existence of a right, namely the right to payments of a fee or a total amount, and (ii) of the CCCF Act in that debtors were charged costs or fees that were not properly recoverable under that Act.

[5] The charges involved two borrowers, the Mataias and the Ofanoas.

[6] In relation to the Mataias, loan documentation was entered into on 6 December 2007 following an initial meeting with the prospective borrowers on 22 November 2007. Mr Mataia reviewed the loan documentation following the meeting and cancelled the credit contract the next day. On 13 December 2007, TML's solicitors sent a letter of demand to the Mataias claiming $10,323.31 made up of:

(a) Payment of arrears to Liberty Financial Limited of $3,823.21;

(b) Legal fees of $1,500; and

(c) Mortgage Rescue fee of $5,000.

[7] The Commission's case in relation to the Mataias was that:

(a) The legal fees of $1,500 was a third party cost that exceeded the actual amount payable, and was not claimable; and

(b) The Mortgage Rescue fee of $5,000 was not for reasonable expenses necessarily incurred in connection with the contract and its cancellation, or alternatively was a credit fee that was unreasonable, and was not claimable either from the Mataias.

[8] In relation to the Ofanoas, Mr and Mrs Ofanoa entered into relevant documentation dated 10 December 2007, on the basis of which a default notice under the Property Law Act 2007 was issued dated 20 May 2008 for a total of $54,065.38. The Commission's case here was that pursuant to the default notice:

(a) The Services Fee of $7,762.50 claimed was not payable by the Ofanoas and that it was false or misleading for the defendants to represent that they had a right to claim it;

(b) The total amount claimed of $54,065.38 was not payable by the Ofanoas because variations to the loan amount were not rightly claimed, and it was thus false or misleading to represent a right to payment of that total amount; and

(c) In any event, any amount claimed was not then due as the earliest that the loan advance could have been due under the documentation was 10 September 2008.

TML operations and documentation – background

[9] TML's business was to assist homeowners who were in difficulty with mortgage loans by way of assistance with refinancing or sale. According to TML's solicitor Mr Holmes, who gave evidence, Mr Ludlow had perceived (as he put it) a niche in the market:

> for assisting homeowners who were struggling with their mortgages and were at risk of losing their homes, and he had a plan by which he could assist them through that, either by refinancing or by a controlled sale of the home rather than a mortgagee sale accompanied in some cases by assistance with presentation of the house, upgrading, deferred maintenance.

[10] Mr Holmes confirmed in his evidence that he had drafted the core documentation used by TML. This included the Mortgage Rescue Agreement, an early version of which was also produced in evidence. Interestingly, I noted that this early version of the document referred at recital (d) in the Background to TML's having offered to assist the homeowner in an orderly sale of the property in order to avoid further costs which the homeowner would incur in the event of forced sale,

and that the homeowner has agreed to accept that assistance. The agreement contemplated an advance of $1,000 to obtain a valuation and provide a one hour legal consultation. Even at this early stage, the legal costs were said to be $1,500 and there was a Mortgage Rescue fee of $6,000 provided for. There was a sale fee of 2.75% of the gross sale price. There is no mention then of refinancing in that early version of the Mortgage Rescue agreement.

[11] TML's standard documentation apparently included three documents:

(a) An Authority to Act;

(b) A term loan agreement; and

(c) A Mortgage Rescue Agreement.

[12] The Authority to Act (in which TML is referred to as Mortgage Rescue or MR) was apparently the initial document of retainer in relation to an appointment described as follows:

> On a sole and exclusive basis to arrange finance on substantially the same terms set out in the schedule. Such appointment shall remain in force until MR at its sole discretion terminates the appointment.

[13] Evidently in its terms TML was going to assess whether it was possible to assist the client with refinancing, the client acknowledging that the assessment may take up to seven days to complete and that:

> 8. On completion of the Assessment, MR will at its sole discretion determine whether or not MR can assist the Client to refinance the Property.

[14] Clauses [9] and [10] of the Authority to Act provided as follows:

> 9. The Client agrees to pay MR it *[sic]* recoverable costs as provided by MR as invoices and tasks completed by MR and/or third parties, where those tasks have been required to have been completed. This may include Registered Valuation reports, invoices for legal services, Local Body reports and other general contract work.
>
> 10. If on completion of the Assessment MR in its sole discretion determines that it cannot assist the Client or the Client decides not to

> enter into a Mortgage Rescue Agreement with MR, the Client agrees to reimburse MR the costs set out at paragraph 9, together with the time spent by MR completing the Assessment at the rate of $125 plus GST per hour. Any outstanding funds beyond 30 days, shall be charged 2%, per month.

[15] Logically, in the case of both the Mataias and the Ofanoas or in any other case where a Mortgage Rescue Agreement would have been entered into and things progressed beyond the Authority to Act, one would assume that:

(a) TML must have completed a favourable assessment of refinancing under the Authority to Act; and

(b) No costs would be payable or claimable under clause [10] of the Authority to Act on completion of the assessment, because a favourable assessment had been made and the Mortgage Rescue Agreement entered into.

[16] The term loan agreement which Mr Holmes advised had been drafted by his law firm was the standard ADLS term loan agreement at the relevant time. This document on its first page referred to the Mortgage Rescue Agreement as containing terms and conditions applying to the relevant Consumer Credit contract. In respect of several details filled in on this (standard) form, reference was specifically made again to the Mortgage Rescue Agreement.

[17] The Mortgage Rescue Agreement (where TML is referred to as Mortgage Rescue) referred in its recitals to the homeowner's facing the prospect of a mortgagee sale, which the homeowner wished to avoid. Recital [E] of the Background is as follows:

> Mortgage Rescue has offered to assist the Homeowner initially with temporary funding, to give the Homeowner an opportunity to refinance the Property. The Homeowner has agreed to accept this assistance from Mortgage Rescue on the terms of this Agreement.

[18] There is no mention in the Mortgage Rescue agreement of covenants in relation to a sale or orderly sale of the property, completion of upgrade work or

maintenance or renovations to any standard or by any time or under any particular agency or commission.

[19] Under clause [1.0] headed "Assistance to Refinance the Property" the Advance is set out to include a Mortgage Rescue Fee. The Mortgage Rescue Fee is referred to in clause [1.4] in these terms:

> The Mortgage Rescue Fee covers Mortgage Rescue's costs associated with entering into this Agreement. The Mortgage Rescue Fee forms part of and is repayable on the same terms as the Advance.

[20] The following clauses deal with the refinance:

> 1.7 Mortgage Rescue will endeavour to refinance the Property within 3 months of the date of the Advance, on terms most favourable to the Homeowner.
>
> 1.8 The Homeowner acknowledges that the amount of the refinance will include the amount required to repay the Advance.
>
> 1.10 The Homeowner acknowledges that the terms of any refinance are at the sole discretion of the proposed financier/mortgagee.
>
> 1.11 Mortgage Rescue will use its best endeavours but does not guarantee that the Property will be re-financed.

[21] Importantly, there is a Services Fee payable on completion of the refinance, under clause [1.9] as follows:

> 1.9 Upon the successful completion of the refinance of the Property, the Homeowner shall pay:
>
> (a) the amount of the Advance under clause 1.1 and 1.3 together with the interest payable under clause 1.2; and
>
> (b) a services fee of 2.0% (plus GST) of the gross value of the Property ("Services Fee").

[22] Importantly also, there is a right to terminate the agreement and call up the advance if no refinancing within nine months:

> 1.13 Mortgage Rescue may terminate this Agreement and call up the Advance if the Property is not refinanced within 9 months from the date of the Advance.

The relevant statutory provisions

[23] Section 13(i) of the FT Act provides relevantly:

> No person shall, in trade, in connection with the supply or possible supply of services or with the promotion by any means of the supply or use of services, make a false or misleading representation concerning the existence, exclusion, or effect of any condition.

[24] That section creates an offence of strict liability, subject to the statutory defences provided in s 44.

[25] Section 44 of the FT Act provides as follows:

> (1) Subject to this section, it is a defence to a prosecution for an offence against section 40 of this Act if the defendant proves—
>
> (a) That the contravention was due to a reasonable mistake; or
>
> (b) That the contravention was due to reasonable reliance on information supplied by another person; or
>
> (c) That—
>
> (i) The contravention was due to the act or default of another person, or to an accident or to some other cause beyond the defendant's control; and
>
> (ii) The defendant took reasonable precautions and exercised due diligence to avoid the contravention.

[26] Sections 45 and 30 of the CCCF Act contain relevantly the following provisions:

> **45 Fees or charges passed on by creditor**
>
> (1) A fee or charge payable by a debtor for an amount payable or to reimburse an amount paid by the creditor to another person, body, or agency must not exceed the actual amount payable by the creditor if that amount is ascertainable when the fee or charge is paid by the debtor.
>
> **30 Effect of cancellation**
>
> (1) If a consumer credit contract is cancelled under section 27(1)(b),—
>
> (a) no party is obliged or entitled to perform it further:

(e) unless the contract otherwise provides, the debtor is liable to pay to the creditor.

(i) any reasonable expenses necessarily incurred by the creditor in connection with the contract and the cancellation of the contract; and

(ii) if property is returned to a creditor that has been damaged while in the possession of a debtor, the cost of repairing the damage.

[27] There is a statutory defence of reasonable mistake provided for:

106 Reasonable mistake defence

(1) Every person has a defence to a claim for statutory damages under section 88 or a prosecution under section 103(1), in connection with a breach of this Act, if the person proves that—

(a) the breach was due to a reasonable mistake or due to events outside of the person's control; and

(b) the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the person or brought to the person's notice; and

(c) the person has compensated or offered to compensate any person who has suffered loss or damage by that breach.

(2) For the avoidance of doubt, a mistake does not include a mistake of law or a mistake in the interpretation of any enactment or of any document.

107 Relevance of compliance programme

The court must, in determining whether the breach is due to reasonable mistake, take into account whether the person has in place an appropriate compliance programme.

The Mataias

[28] The charge in relation to the Mataias under s 45 of the CCCF Act involved the claim by TML to legal fees of $1,500.

[29] Those legal fees were claimed under the demand letter sent by Holmes Dangen dated 13 December 2007. Of course the claim here was to a third party fee being passed on to the debtors the Mataias, for reimbursement. The claim should not exceed the actual amount payable, pursuant to s 45. Self-evidently this was a claim greater than that paid by TML. The evidence was that the legal fees

payable to Holmes Dangen by TML as at 13 December 2007 were under fee invoices totalling $675.25. That amount might have been payable by the Mataias. The sum of $1,500 was not however payable, and should never have been claimed.

[30] The legal fees might have been in reality an estimate given by Mr Holmes in relation to the likely requisite attendances, at the outset. The $1,500 figure was mentioned in the early version of the Mortgage Rescue Agreement.

[31] The defendants accept that the $1,500 legal fees claim was not justified. The suggestion for the defendants however was that Mr Holmes without authority had included a demand for those legal fees.

[32] The demand made of the Mataias was issued and made by TML. It may be that Mr Holmes or another operative at Holmes Dangen included $1,500 without Mr Ludlow's express direction, possibly based on an earlier estimate or even an intention to charge it, but the fact is TML issued the demand and Mr Holmes was acting for TML. The only sensible conclusion here is that TML claimed an amount to which it was not entitled. I found the charge proven against TML.

[33] So far as Mr Ludlow personally is concerned his thesis was that he had never requested the legal fees amount of $1,500 be specifically demanded. It is a close call to assess Mr Ludlow's personal involvement here. There were certainly suboptimal aspects of the evidence here so far as Mr Ludlow was concerned and possible deficiencies with respect to his cross-examination of Mr Holmes. However my overall impression of Mr Ludlow here was favourable. I noted his frank acceptance that the $1,500 should not have been claimed. I noted the general, perhaps discursive, nature of Mr Holmes' evidence. I am prepared here to give Mr Ludlow the benefit of the doubt.

[34] My impression is that Mr Ludlow (perhaps naively) believed that mere involvement of a legal adviser tended to absolve him or mean at least less need for concern over the details. I think Mr Holmes may have had rather lighter involvement following initial "concept" discussions than was optimal. There was a

mismatch from the outset. And of course one cannot overlook the arrangements were in development stage perhaps – there were never many transactions.

[35] The second charge in relation to the Mataias involved the claim for payment of the Mortgage Rescue fee of $5,000. This was for services down to the date of cancellation, more specifically being "costs associated with entering into this Agreement" under clause 1.4 of the Mortgage Rescue Agreement, probably between 22 November 2007 and 6 December 2007 but not longer.

[36] The question here amounts to whether this was an unreasonable fee charged on cancellation. I find that the contract had been cancelled either in the express terms of the cancellation letter, or was accepted to have been cancelled in the ensuing discussions with the Mataias and by virtue of the correspondence. The reasonableness of the fee claim here must be judged in the context of the agreement between the parties and their reasonable expectations of it, attendances by TML in relation to that agreement, including time spent on relevant tasks and so forth. There must in addition be a reasonable quantification of applicable hourly rates.

[37] The parties had differing recollections of the number of meetings. Certainly the first meeting was on 22 November, and it seems that there may have been two further meetings, culminating with the 6 December meeting when the documentation was signed. It was immediately following that meeting that the cancellation letter was sent by the Mataias.

[38] Repeated requests from the Commission could not unearth the detail that was put before the Court in relation to this Mortgage Rescue fee of $5,000. Mr Ludlow's recollection and methodology, in relation to that, did not impress me. Equally, Ms Bauer was in my view decidedly vague, and could not assist the analysis.

[39] Mr Ludlow proposed in his evidence that there had been attendances in relation to refinancing advice and costs concerning proposed renovations that were claimable from the Mataias as the Mortgage Rescue fee. He produced invoices in relation to those attendances. I did not find Mr Ludlow's explanations in relation to those invoices helpful. Nor did I find Ms Bauer's evidence in relation to them

helpful either. The attendances referred to were, on my understanding, essentially for refinancing advice and arranging finance outside of the period of the meetings prior to the entry into the requisite documentation, plus costs in relation to a proposed renovation which is not evidently the subject of the Mortgage Rescue Agreement. In addition, the preparation of the fee invoices some three years following the attendances cannot be overlooked, when Mr Ludlow had earlier been unable to provide the Commission (in relation to the Commission's specific and relevant requests) with any information at all concerning TML's costs in relation to the Mataias' contract and all relevant accounts. No detail at all had been supplied to the Commission support any claim, including any details of contractors who were met at the property in relation to the proposed renovation.

[40] Of course, as Mr Donkin pointed out, this contract was not in its terms a contract for the renovation of the property but a short term credit contract. Even if there were meetings with contractors concerning potential renovations these were not expenses that arose as a result of that contract. The Commission's position was that they arose from a peripheral desire of Mr Ludlow to undertake renovation work on the Mataias' property personally.

[41] I have not overlooked too Ms Bauer's evidence that she had seen no documents that supported the figures claimed in the invoices that Mr Ludlow had prepared and produced in evidence.

[42] The Mortgage Rescue fee of $5,000 was distinctly not claimable by TML, and was not payable by the Mataias. There was no proper evidence of the make-up of the fee, even if components of it were to be accepted. But attendances claimed with respect to, for example, renovations to the property were of doubtful validity. On the evidence before me, having regard to the documentary evidence, I could not agree a fee claim could be made for some components. As to the make-up of any valid possible claim, there was no sufficient detail or quantifying that was convincing to the requisite standard.

[43] This charge is proven against TML. It is, I find, proven against Mr Ludlow too. In my view Mr Ludlow was a party to the offending, for the purposes of s 66 of

the Crimes Act 1961. I find that he assisted and caused TML to claim the fee to which TML was not entitled. Self-evidently Mr Ludlow devised and understood the Mortgage Rescue fee concept, failed to explain its components to the Commission and produced the sub-optimal fee invoices three years later, including claims for attendances evidently not the subject of the documentation. At the time the demand for the Mortgage Rescue Fee was made on the Mataias, there is no sensible conclusion other than it was made by Mr Ludlow, who understood TML was not entitled to it.

[44] The alternative charge in relation to this was that there was an unreasonable fee, under CCCF Act which, were it necessary to decide, I would decide was proven.

The Ofanoas

[45] In relation to the Ofanoas, the charges alleged a breach of s 13(1) of the FT Act in that the defendants made a false or misleading representation as to the existence of a right (to claim payments that were due).

[46] The first charge involved the claim to the Services Fee of $7,762.50 under the term loan agreement and mortgage loan agreement dated 10 December 2007. The Services Fee was payable on completion of the refinance under clause 1.9 of the Mortgage Rescue Agreement which specifically referred to the obligation of the homeowner to pay upon the successful completion of the refinance:

> (b) A services fee of 2% (plus GST) of the gross value of the Property (Services Fee).

[47] The refinancing or successful refinancing did not occur. There was no dispute about that. Therefore this Services Fee could not be payable, on any view. Mr Ludlow accepted that that was the case in his evidence.

[48] Quite obviously, this charge is proven against TML. In relation to Mr Ludlow personally, I find that charge proven also. He was, for purposes of the FT Act, in my view, in trade and did everything the company did that constituted the offending. Thus, on my analysis, he is liable. Mr Ludlow knew the Services Fee was not properly claimable, and claimed it.

[49] The second charge in relation to the Ofanoas related to the alleged right to enforce payment of a total of $54,065.38. This included the original advance and the Services Fee referred to above, but also (the additional item of) renovation costs of $33,888.19.

[50] There was no dispute that the initial loan to the Ofanoas was for $20,699.15 plus interest. This was the principal sum set out in the term loan agreement.

[51] Mr Ludlow's evidence was that there had been a variation (orally agreed) of the loan terms, with respect to the renovation costs. He accepted that no written agreement with or disclosure under the CCCF Act to the Ofanoas had been completed in relation to that variation. The CCCF Act precludes enforcement in the absence of such disclosure. There was therefore no right to enforce the contract for payment of $54,065.38. That charge was proven against TML.

[52] So far, however, as Mr Ludlow personally is concerned, I find the charge not proven.

[53] Mr Ludlow's assumption or understanding seemed to be that technical enforceability (by virtue of disclosure of variation circumstances) was not a problem. It was something he might have expected could either have been drawn to his attention for remedy, or alternatively have been earlier remedied with the assistance of legal advice. He seemed to me to have a view honestly held even if naive. It was such that I would hold him reasonably mistaken, for the purposes of this charge.

[54] The remaining charge concerned the due date of the advances in any event. The demand of 20 May 2008 claimed amounts due as at 18 April 2008.

[55] Mr Ludlow accepted in evidence that a demand for repayment of the loan could not be made on 20 May 2008, as the loan was not then due. Rather it was due, and Mr Ludlow accepted it was due, in September 2008. Mr Ludlow's explanation as to why the defendants demanded repayment prior to due date was simply that the Ofanoas were, in his view, losing interest in refinancing the property. He thought the Ofanoas were never going to repay, and he simply decided to demand payment at

that point. The earliest that the loan advance could have been due was 10 September 2008. It was clearly false or misleading to claim that the advance was then due or to claim an ability or entitlement to seek repayment.

[56] The company and Mr Ludlow accepted that they were, in effect, short circuiting the termination date or final repayment date by the earlier demand, and exercising self help to repayment, simply because of the view Mr Ludlow took of future possible conduct of the Ofanoas.

[57] It follows that that charge must be proven, and I find it is proven so far as TML is concerned and equally, obviously, so far as Mr Ludlow is concerned.

[58] So, in summary overall, I find for the Commission and essentially against the defence position here, save in two respects, so far as Mr Ludlow personally is concerned.

[59] In both cases, that is to say the Mataias' legal fees point and the variation of principal so far as the Ofanoas are concerned, I in effect give Mr Ludlow the benefit of the doubt. I note that overall reliance on legal advice appeared to be a significant defence plank or background issue here, along with the proposition that Mr Ludlow was a "mere servant" of TML who could not be liable personally as a matter of law. Substantially I have found against those propositions. To me, dealing with TML, TML's liability was reasonably straightforward on the evidence and not eroded by the involvement of a legal advisor.

[60] Mr Ludlow seemed, in my view, to have been the sole business generator and chief operative of TML and its sole decision maker. Certainly, it seems that TML had no other employees. There was a consultant who worked sometimes alongside Mr Ludlow. She likely did not, however, have any decision making role of any significance with TML. That was my impression from the evidence.

[61] With respect to the CCCF Act, I have found Mr Ludlow not guilty on one charge because he did not do everything in a personal capacity that constituted the offence, in my view, for purposes of s 90. In relation to the $1,500 legal fees

claimed from the Mataias, in my view Mr Ludlow either did not include the $1,500 in the demand, or did or acquiesced but intended or assumed it was payable or claimable, and had not committed an offence. He was quite obviously not liable as a party under s 66 of the Crimes Act.

[62] I have not overlooked defences raised by the defendants under s 44 of the FT Act and s 106 of the CCCF Act, concerning reasonable mistake and reasonable reliance. I have found in Mr Ludlow's favour there with respect to two charges, but not otherwise. The evidence was not such to elevate any legal or commercial advice by Holmes Dangen above the general and unrelated to any specific transaction. I was not satisfied TML, via Mr Ludlow, had specifically sought information, figures or advice that was imparted in response by Holmes Dangen that was relied on, or reasonably relied on and material, for the purposes of the particular charges against TML.

[63] For completeness, Mr Ludlow had raised also s 138 of the Companies Act, which concerns essentially the reliance by a director, when exercising powers or performing duties as a director, on professional advice. Mr Donkin submitted that the specific statutory defences in the FT Act and the CCCF Act precluded any application of s 138 here. I agree. It may be too that Mr Ludlow was not actually "exercising powers or performing duties as a director" in his dealings with Holmes Dangen concerning the Mortgage Rescue product. In any event, there is in my view no requisite actual information or advice or reliance on it that is relevant, for the purposes of these charges. I accept Mr Donkin's submissions on s 138.

[64] I found all charges against TML proven. I found the charges against Mr Ludlow proven, with the exception of two charges. I confirm this decision summarises and records the oral decision given by me to the parties on 7 June 2011.

L I Hinton
District Court Judge

Signed 14 October 2011 at 11 *am/~~pm~~*