IN THE DISTRICT COURT
AT MANUKAU

CRI-2011-092-014683

COMMERCE COMMISSION
Informant

v

CHRISCO HAMPERS LIMITED
Defendant

Hearing: 1 February 2012

Appearances: H Ifwersen and F Hall for the Informant
J Long and E Nilsson for the Defendant

Judgment: 1 February 2012

NOTES OF JUDGE C S BLACKIE ON SENTENCING

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[1] Chrisco Hampers Limited is before the Court for sentence on 10 charges laid under the Fair Trading Act 1986, but as they involve consumer rights that are set out in the Layby Sales Act 1971.

[2] Chrisco Hampers Limited is a well known company, I am not sure whether it operates throughout New Zealand, but certainly in the Auckland area, that provides a service whereby people are able to purchase in advance a variety of goods largely for use over the Christmas period. The prospective purchasers do so by taking advantage of layby facilities that are made available by Chrisco Hampers Limited. In other words, a potential purchaser can select goods from a catalogue for up to a year in advance and during the course of that year pay regular instalments to the company in anticipation that they will have paid for the goods in full during the

period and that they will be available to them in time for Christmas. I am told that Chrisco Hampers Limited have been operating this service for a number of years, and over that time has built up a very large customer base, particularly in South Auckland. The business operated by Chrisco Hampers Limited would have appeal to those of more limited means and who need to budget carefully, particularly for major expenses that might be involved over such periods as Christmas. Toys are one of the aspects of Chrisco's business, but it is far wider than that.

[3] The issue which has come to the attention of the Commerce Commission relates to the obtaining by prospective purchasers, or by the customers, of refunds in the event of cancelation. The law provides that persons acquiring goods on layby may cancel the transaction and receive an appropriate refund. The issue here is the quantification of that refund and the advice given by Chrisco Hampers Limited as to the availability of that refund, and the Commission has alleged that in various areas the company fell short of the provisions provided by the Acts, when I refer to the two Acts that is the Layby Sales Act 1971 and the Fair Trading Act 1986, in relation to advice on the availability of refunds and the terms of those refunds.

[4] Largely Chrisco conducts its business through either mail order, orders from catalogues, or on a website. Purchasers who acquire goods on the website would normally have full access to the policy in relation to cancellation refunds, but not perhaps those who make application by way of telecom type marketing techniques.

[5] The company faces a total of 10 charges which have been laid as representative charges, in other words they are examples of what is alleged to have occurred rather than a blanket coverage of all cases where concern could be expressed. The charges fall into five categories which have been outlined by the Crown in their submissions.

[6] The first category is that it is alleged that between 2009 and 2010 Chrisco's customer confirmation and notifications on the website advised the customers that if they cancelled their order within 90 days prior to the final payment due to Chrisco then Chrisco was entitled to deduct 50 percent of the payments made to the date of cancellation. This would be contrary to the rights that are prescribed under s 9

Layby Sales Act 1971, and Crown counsel gave the example that if the customer had ordered $1000 worth of goods and during the course of the payment period had paid 90 percent of that $1000, that is $900, then in the event that they cancelled the contract they would receive $450 by way of refund and the company would retain the balance. That is contrary to the provisions of the Act.

[7] The second category is where the Chrisco catalogues, either on its website or in its customer notifications of confirmation documents, advised customers that if they were to cancel the Chrisco order then Chrisco would recover its costs from the customer and it is alleged that in doing so the costs that were recovered were in excess of what might be considered reasonable costs.

[8] The third category involves cases where Chrisco, over the telephone, would advise that the cancellation of any order with Chrisco must be in writing. That is contrary to the provisions of the Layby Sales Act 1971 in that cancellation may be given orally. It is contended by the Commission that there may have been a number of customers who did not take advantage of their cancellation rights because they were not informed that they could do so orally.

[9] The fourth category involves representations made over the same general period, 2008 and 2009, that in Chrisco catalogues that customers did not have the right to cancel their order at any time up till the final payment date. In other words that was an omission by Chrisco to explain a fundamental right that exists under the provisions of the Act.

[10] Finally, the fifth category is those cases which relate to what is called a HeadStart Plan. A HeadStart Plan is where a customer has already paid for one year's worth of purchases and may have in fact received those purchases, but nevertheless has continued with instalments in anticipation that they could be put towards purchases for future years. The catalogue gave the impression, or would have given the impression, that funds paid pursuant to a HeadStart Plan were fully refundable when in fact they were not.

[11] It is not necessary for me to go into the individual factual situations regarding each category of charge because the defendant company Chrisco readily accepts responsibility and have pleaded guilty at the earliest possible occasion when the charges came before the Court. There has been no attempt by Chrisco to avoid responsibility for these actions. The categories of charges as I have outlined them should be self explanatory.

[12] There may be a variation in the seriousness between the charges, but that is something which I do not feel I need to take time to really differentiate, except to say this; categories four and five, if taken by themselves, could be seen as more serious because they are a complete misrepresentation of the law whereas categories one, two and three are not so much misrepresentations of the law itself but relate to the defendant's own interpretation of how they might deal with issues, and as Mr Long points out in his submissions the legislation which dates back to 1971 is not entirely clear how categories one, two and three should be actually implemented. He points out that the legislation may have been overtaken by modern sales procedures such as that adopted by Chrisco Hampers Limited, which is something more of the 21st century method of marketing than perhaps was experienced in the 20th century.

[13] However, I have to apply the principles of the Sentencing Act 2002 to this factual background, and that requires five basic elements. First of all that Chrisco have to be seen to be responsible for what they have done. They have to be seen to be accountable for what they have done. I also have to take into account in a general sense the interests of victims, and in this case there are no physical victims before the Court but of course there are all those that have been involved in the transactions with Chrisco Hampers Limited who may at various stages have been what I might call short-changed. I also have to apply a penalty which will be seen as a deterrent to Chrisco not only to comply with the provisions of the law, particularly the provisions obviously in these two Acts, but also others who are involved in marketing, particularly this type of marketing, to comply with the law. In other words there must be a deterrent aspect of the penalty and that must be a penalty which can be seen to have what is often called "a bite".

[14] Somewhat unusually, counsel for the Crown and counsel for the defence have exchanged their submissions. There is nothing unusual about that but they have almost come to a mind as to where an appropriate penalty might be. They can do this because they have been able to make reference to other cases that have been before the Court, not necessarily identical to this case, but with distinct similarities. For example, there has been over the years *Commerce Commission v Alstom Holdings SA* (CIV-2007-404-2165, 22 December 2008) which involves Siemens, there has been *Commerce Commission v GlaxoSmithKline (New Zealand) Ltd* (DC Auckland, CRI-2006-004-503913, 27 March 2007) which involved the Ribena drink, there has been *Commerce Commission v The Warehouse Ltd* (DC Auckland, CRI-2007-004-14313, CRI-2008-004-11407, 27 February 2009), and there has been the case of *Commerce Commission v Wenatex New Zealand Limited* (DC Auckland, CRI-2011-004-002567, 14 July 2011). They are all decisions of either this Court or the High Court concerning similar types of trading techniques, advice to the purchasing public, and errors or breaches of the law in relation to that advice.

[15] The Crown accept that once the various concerns of the Commission have been made known to Chrisco Hampers Limited that the company took immediate steps to remedy the situation. Past policies which have given rise to the charges were reviewed so that the errors of the past, if I can call them that, were unlikely to be repeated again in the future. Chrisco carried out an analysis of those persons who might have been affected by their business procedures, particularly those where there have been what I might call an overcharging as to costs, and refunds have been made to a number of customers, those refunds totalling over $100,000. In fact, those refunds also included a 10 percent interest payment for the period during which the funds had been, if I can say this, utilised by the company. So the Crown accept that the company must be given credit for the responsible way in which they have conducted their business since these matters came to notice, and the co-operation which has been afforded to the Crown, that is to the Commerce Commission in relation to their enquiries.

[16] What the Crown accept, of course, have been largely pointed out and indeed emphasised by Mr Long during the course of both his written submissions that were filed with the Court and his oral submissions that were made today. As in some

cases there are variations and particular emphasis as to the approach that the parties urge that the Court should adopt, but by and large there is a great deal of what I might describe as "ad idem".

[17] The Crown contend that if one was considering this case following a defended hearing then a starting point by way of a sentence would be a fine in the vicinity of $240,000 and $260,000. I should point out that the maximum penalty on any one of these charges is a fine of $200,000.

[18] Adopting the principles that the Court now does in following the case involving *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, immediate credit has to be given to the defendant company for its guilty plea. I accept, and I do not think it is contested seriously by the defence, that a starting point for these 10 charges, that is a total fine looking at the totality, should be between $240,000 and $260,000. From that starting point I consider that the defendant company should be given the full benefit of a discount, which in cases where the guilty plea is entered at the earliest opportunity is up to 25 percent.

[19] In addition to that a discount can be given, often very modest though, for expression of remorse. It is probably difficult to express a physical remorse in a case like this, but some remorse has obviously been expressed by the fact that refunds have been made in a number of cases. On the other hand, the Court has to bear in mind that there may well be a substantial number of people out there for whom no refund has been made nor no refund has been claimed because they were not fully advised of their rights in the first place.

[20] Looking at the case overall, and bearing in mind what has been said on behalf of the Commission through the Crown counsel, and the materials put before me by defence counsel in his submissions, I consider that the finishing point for a fine, looked at in totally, should indeed be at a figure of $175,000. That of course has to be applied across 10 separate counts to which a guilty plea has been entered.

[21] Accordingly, on each count the defendant company is convicted now and fined $17,500, which across 10 counts totals $175,000.

[22] In respect of each count the defendant company will need to pay the Court costs of $132.89.

C S Blackie
District Court Judge