IN THE DISTRICT COURT
AT AUCKLAND

CRI-2015-004-000415
[2016] NZDC 9294

THE COMMERCE COMMISSION
Prosecutor

v

BUDGET LOANS LIMITED
EVOLUTION FINANCE LIMITED
Defendant(s)

Hearing:	2,3,4,5,6 & 9 May 2016
Appearances:	Ms A McClintock & Ms C Paterson for the Prosecution Ms B Frowein & Ms G Im for the Defendants
Judgment:	4 July 2016

RESERVED DECISION OF JUDGE D J SHARP

Introduction

[1] The defendants face 103 charges under s 13(i) and 3 charges under s 13(e) of the Fair Trading Act 1986 (FTA). The prosecution may be divided into the following categories:

(a) Representing a right to repossess goods when they did not have that right;

(b) Representing a right to repossess goods when a valid pre-possession notice had not been issued;

(c) Representing a right to repossess goods because goods were *"at risk"* when the goods did not meet that definition;

(d) Representing a right to add interest to loans after repossession and sale of secured goods;

(e) Representing a right to add costs to loans after repossession and sale of secured goods;

(f) Representing a right to add interest to loans beyond the amount approved in an attachment order;

(g) Representing a right to require debtors to make loan payments at a higher rate than specified in an attachment order;

(h) Representing benefits to debtors refinancing their loans.

[2] A separate decision has considered the defendants' challenges to the prosecution on the basis that the charges are unsupportable.[1] Nineteen charges were dismissed as a result of a lack of certainty about the application of s 35 of the Credit (Repossession) Act 1997 where *"all present and after acquired security"* clauses were included in the loan documentation.

[3] The prosecution retains the onus of proving the remaining charges beyond reasonable doubt.

Issues

[4] The defence did not make any significant challenges to the evidence of the Commerce Commission Investigator, Mr James McIvor, and 13 supporting witnesses. Apart from Mr McIvor the witnesses were debtors who had made statements to the Commerce Commission in the investigation of the defendant companies.

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[1] Section 147 Decision CRI-2015-004-000415

Has the prosecution proven the elements of each charging document beyond reasonable doubt?

Proof of essential elements

(a) the defendant is a person (within the meaning of the FTA); and

(b) was "in trade" and;

(c) being in trade made a representation and;

(d) … in connection with the supply of services and;

(e) … concerning the existence of a right; and

(f) that representation was false or misleading.

[5] The defence specifically raise the following matters:

(a) *Were "representations" sufficient to have application under the FTA made and can this be proven beyond reasonable doubt and;*

(b) *If there were representations can the prosecution prove they were communicated, the defence has raised particular charging documents as being situations in which it contends there was no communication of a "representation" and;*

(c) *Can the prosecution establish to the required standard goods deemed "at risk" by the defendants were not "at risk" pursuant to s 7(2) of the Credit (Repossession) Act 1997.*

(d) *Because part of the contract for Ms M[redacted] is of poor quality and is indistinct can the prosecution still prove its case with regard to her?*

The evidence

[6] The statement of Mr McIvor is referenced to the prosecutor's bundle of exhibits.

[7] Mr McIvor obtained the loan documentation and records held by the defendant companies for 21 debtors.

[8] Mr Wayne Hawkins, a director of the defendant companies, was interviewed on two occasions and transcripts of the interviews were placed in evidence.

Consideration of the Evidence

[9] In general the defence have raised the issues which I have set out above. The method I selected for consideration of the evidence is firstly to examine the specific challenges which the defence has made. Secondly having resolved those challenges to then look at each individual debtor and consider whether the evidence proves the allegations which the charging documents contain.

Was there a "representation"?

[10] The defence rely upon the decision of Tipping J in *Marcol Manufacturers Limited v Commerce Commission*[2] for the meaning of *"representation"*. In that case, the Court found that *"representation"* it is not defined in the FTA and is to be given its ordinary and natural meaning.

[11] His Honour drew a distinction between the making of a representation for the purposes of s 13 and engaging in conduct, which is the concept under which ss 9 and 10 are concerned. The making of a representation, although a species of conduct, is a narrower concept than conduct generally.

[12] The Court approved a definition from Halsbury's Laws of England[3] *"a representation is a statement made by a representor to a representee and relating by*

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[2] *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502.
[3] Ibid at page 506.

way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct."

Can the prosecution prove the representations were communicated?

[13] The defence submit the prosecutor must prove beyond reasonable doubt that the defendants as representors have communicated a statement of fact to another person (or "representee"). The defence maintain if this has not occurred, there can be no representation. The evidence is what the prosecutor has extracted from the defendants' files, various letters and other documents.

[14] The defence identifies particular instances where it contends non-communication of the alleged misrepresentation has occurred and submits the prosecution is unable to satisfy the court beyond reasonable doubt that an actionable misrepresentation occurred.[4]

Were the goods *"at risk"*?

[15] The defendants position as advised by Mr Hawkins at interview was that he gave five examples of where it was suggested goods were *"at risk"*.

[16] The defence submit s 7(2) of the Credit (Repossession) Act 1997 (the "CRA") does not act to reverse the presumption of innocence in the context of a criminal prosecution. In particular the words "but the onus of proving the existence of those grounds is on the creditor", do not change the position regarding criminal liability.

[17] The defence submit that the effect of s 67(a) of the Summary Proceedings Act 1957 was to place the burden of proof on the defendant even in a criminal prosecution. That section stated: *"any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of s 17 of this act, need not be negatived in the information, and*

[4] The instances identified by the defence are set out by complainant at schedule 1.

whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant." The defence submission is that this was repealed by the Criminal Procedure Act 2011, on the basis that shifting the onus of proof to the defendant limits their rights under s 25(c) the New Zealand Bill of Rights 1990 to be proved innocent until proven guilty.[5] The defence rely upon *Saddle Views Estate Ltd v Dunedin City Council.*[6] The test is *"if the person adduces evidence which is sufficient to raise an issue with respect to the matter the Court shall assume the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."*

[18] The defence says in applying that approach in this case, the defendants must point to evidence that reasonable grounds existed for the defendant companies belief that consumer goods had been or would be destroyed, damage, endangered, disassembled, removed, or concealed contrary to the provisions of the agreement. If the evidence raises a reasonable possibility of the grounds existing the defence submit the Court is then to accept that reasonable grounds existed, unless the prosecution can prove beyond reasonable doubt they did not.

[19] The defence lists a number of the debtors and sets out the basis upon which the defence believes the basis for an evidential foundation existed for the defendants to believe goods held by those debtors were *"at risk"*. These are set out in schedule 2.

Conditions of credit contract and security interest not proved.

[20] The defence submits terms and conditions of the credit contract for debtor B[redacted] M[redacted] including those relating to security are not legible.[7] Charges relating to this debtor CRN 223 and CRN 254 are submitted not to be proven beyond reasonable doubt.

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[5] Departmental Report for the Justice & Electrocal Committee Criminal Procedure (Reform & Modernisation) Bill 16 May 2011 paras 1549 and following.
[6] *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZ HC 2897 at para 89 and following.
[7] See exhibits 41 and 42.

The Prosecution Submissions

Representations

[21] The prosecution submits that in line with it not needing to prove that the debtors were actually mislead, it need not prove the debtors in fact received the documents at issue. The prosecution submit this was dealt with under the Australian Trade Practices Act 1974 in *Thompson v Riley McKay Pty Ltd (No 2)* [8] where the Court held *"the act of representing is complete once the subject matter is irrevocably set forth or disseminated upon the course which is intended to lead to the intended representee or representees."*

[22] The prosecution rely on *Thompson v Riley*[9] where the Court said: *"in essence a representation is the making of a statement in fact intending it to be received by another"*.

[23] The Commission's position is that whether the representation was made to an external contractor, or even to a repossession agent that is also an employee of Budge Loans is irrelevant. The provision of a document purporting to give authority to repossess or take steps in recovery of loans is submitted by the prosecution to be an act sufficiently connected to the defendants' trade activity to be covered by the FTA.

[24] The prosecution submit whether a representation is misleading is an objective test. It does not matter whether the representor intended their representation to be misleading. Rather, the Court must look at the representation and ask whether a typical consumer, in the shoes of the person receiving the representation, would derive from it a message that is in fact misleading.[10]

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[8] *Thompson v Riley McKay Pty Ltd (No 2)* 1980 29 ALR 267.
[9] Ibid at page 100.
[10] *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 507. See also *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] 3 NZLR 611 (CA) at [48] regarding the use of the word "typical" consumer.

[25] The Commission submit it is not necessary that they prove any particular debtor was actually misled. The Commission must simply establish that a typical consumer would be misled, in the sense the representation is likely to mislead.

[26] The prosecution case is that the defendants' representations were false or misleading (that is apt to misled) because the representations either expressed outright or implied the defendants had a right to take particular action in relation to a debtors loan when as a matter of law the defendants did not have that right.

Goods "at risk"

[27] The prosecution submits that 9 of the 21 debtors were in the position where the defendants had represented they had a right to repossess goods without issuing a pre-possession notice on the basis the goods were *"at risk"*.

[28] The Commission alleges the circumstances did not meet the statutory definition of that phrase.

[29] The documents at issue are the "*authority to act*" documents which were issued. These documents contained a large watermark across the document stating *"at risk"*.

[30] In the definition of *"at risk"* contained in s 7 of the CRA is *"in this section and s 8, consumer goods are "at risk" if the creditor has reasonable grounds to believe that the consumer goods have been or will be destroyed, damaged, endangered, disassembled, removed or concealed contrary to the provisions of the agreement; but the onus of proving the existence of those grounds is on the creditor."*

[31] The prosecution point to the fact that goods *"at risk"* must be secured goods under the loan agreement, not just goods belonging to the debtor. The right to repossess under the CRA only extends to the secured goods.

[32] The prosecution submit, the onus requirement in s 7(2) still applies in this criminal case. It does not reverse the onus of proof of the substantive representation. That is, it is for the defendants to satisfy the Court on an evidential basis that the

grounds for categorising the goods *"at risk"* existed at the time the representation was made. The prosecution retains the criminal burden of proof to demonstrate the representation made was false or misleading.

[33] The prosecution rely on *Taplin v Linus Finance Ltd.*[11] In that case the Court focused on the requirement that the secured property needed to be endangered rather than showing that there might be the potential for a lessening in the value of the secured item. The prosecution also rely on clause 13.6 of the subsequently enacted code[12] which provides the existence of only one factor (e.g. being in default or changing address without notifying the lender) is unlikely to provide reasonable grounds for the belief the goods are *"at risk"*.

[34] Clause 13.5 of the code[13] also suggests that lenders who rely on the *"at risk"* ground to repossess goods should make and retain a record of the reasonable grounds for their belief that the goods were *"at risk"*. While the code does not apply in this case the Commission submits that its wording supports the finding in *Taplin v Linus Fiance Ltd*[14] as being accurate.

[35] The prosecution alleges there was no basis at all on the defendants part to support statements in the *'authority to act'* documents that the debtors secured goods were *"at risk"*. The prosecution say the defendants instructed the repossession agents to use a "template" authority to act document which specifies the goods as being *"at risk"* as a default position. The repossession of debtors goods without notice appears to have routinely occurred. The prosecution give the example of the R[redacted] C[redacted] *'authority to act'*[15] which shows that Evolution Finance were aware of where Mr C[redacted] was living at least two months prior to the repossession, he was at that address at the time the repossession was carried out, and had been making regular loan payments in accordance with an attachment order since July 2009. The goods repossessed were not even subject to any security

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[11] *Taplin v Linus Finance Ltd* [1994] DCR 641
[12] Responsible lending code inserted by the Credit Contracts and Consumer Finance Act 2014 into force 6 June 2015.
[13] Ibid.
[14] Ibid.
[15] Page 411 of the Commissions exhibit bundle, loan note page 367.

interest. The only security interest was his car, which was repossessed and sold in 2005.

[36] The prosecution takes the position that in some cases loans had been completely repaid at the stage *"at risk"* repossessions were carried out. The prosecution point being that there would be no *"at risk"* goods if the loans had been effectively repaid prior to the repossession.

[37] The unchallenged evidence of Mr McIvor was that on his review of the 9 debtor files which are the subject of charges, there was nothing in any of them to indicate the goods had been or would be destroyed, damaged, endangered, disassembled, removed, or concealed contrary to the provisions of the agreement. Mr McIvor found nothing on any of the files that records the reasons why the defendant's had deemed the goods to be *"at risk"*.

Consideration

The defence has raised a number of particular debtors cases as being situations in which it contends there was no communication of a representation.

[38] The defence position is that *Marcol Manufacturers*[16]is authority to say that the prosecutor must prove beyond reasonable doubt that the defendants as representor have communicated a fact to another person (or representee). This has not occurred here so there can be no representation. The defence submission is that it is insufficient to have extracted this from the defendants' files letters and other documents. The defence says the prosecution must prove the statement of fact, letters and documents had been communicated to their intended recipients. The defence lists named debtors and points to the absence of the proof it says is required.[17]

[39] *Concrete Constructions (NSW) Pty Ltd v Nelson*[18]is authority for the proposition that a representation does not necessarily have to be made to a debtor or

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[16] Ibid.
[17] See Schedule 3.
[18] *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17

consumer specifically. It is clear from the facts that the *'authority to act'* documents were representations made to repossession agents. The loan notes make it clear that such authorities were disseminated and acted upon.

[40] The statements made by the defendant companies to the defendants about the defendants actions in repossessing goods and recording that the goods secured were "*at risk*", the right to add interest to loans after repossession of goods, the right to add costs after repossession of goods, the right to interest in excess of attachment order levels of payment required, the right to require loan repayments at a rate higher than specified in attachment orders and in representing benefits to debtors of refinancing loans all concern or infer a state of affairs which justified those statements being made and with those statements consequences were visited upon the debtors.

[41] The representations were of fact, actions described were taken, and the respective position of the defendants and the debtors reinforced the authority of the statements.

[42] The ordinary use of the word 'represent' dictates that in all of the above cases the defendant companies were representing a certain state of affairs. A distinction between legal rights and a factual representation is illusory when the nature of the defendant's businesses involve the enforcement of their rights. This is set out in the documentation between themselves and the debtors to whom they made the statements. In the case of all of the alleged representations the conduct as described provides representations that are actionable under the FTA.[19]

[43] Actual dissemination to the named debtors is unnecessary but by reference to the statement of Mr McIvor[20] evidence of specific representations are identified. The prosecution has proved beyond reasonable doubt that representations as defined as sufficient under the FTA were made. This is proven in each case.

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[19] See Schedule 3.
[20] Statement of James Richard McIvor, dated 27 April 2016, Paragraphs 14 to 35 (inclusive).

Can the prosecution prove that the representations made were communicated?

[44] The defence refer to the absence of direct communication between the defendant companies and the named debtors.[21] This is said to show an absence of proof beyond reasonable doubt of communication of the representations. The prosecution argument succeeds because the points at which representations were disseminated with a view that those representations would be relied upon and were intended to reach recipients of the misrepresentations can be established.

[45] The prosecutions submission from *Thompson v Riley McKay Pty Ltd*[22]is accepted. The prosecution does not have to prove any debtor was actually misled. The distinction between this case and *Concrete Constructions*[23] is instructive in that dissemination of information intended for external consumption is a significant difference from that where communication passed internally and only related to matters pertinent to the company itself. Here the representations were intended to be communicated by the agents of the defendant companies if not by passing the representation then by carrying out actions demonstrating the right to repossess. The representations relied upon by the prosecution are sufficient in terms of the level of communication needed.

Can the prosecution establish to the required standard that goods deemed "*at risk*" by the defendants were not *at risk* pursuant to s 7(2) of the Credit (Repossession) Act 1997?

[46] This issue requires consideration of the factual basis for the claim initially made by the defendant companies that goods were "*at risk*". It is necessary to consider the factual material provided by Mr McIvor. This factual material was produced without challenge and it includes an assessment of the file held by the defendant companies relating to each debtor.

[47] The reasons which were put forward for goods being "*at risk*" do not factually establish a basis sufficient under the CRA.

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[21] See Schedule 1.
[22] Ibid.
[23] Ibid.

[48] I accept the factual position as described by Mr McIvor. In his interview Mr Hawkins speaks of risk factors being taken into account, however the practice appears to have been to use an "at risk" template on a default basis. Debtors such as Mr S[redacted], Ms T[redacted] and Mr I[redacted] by way of example, show cases in which no basis can be identified on consideration of each debtors file. In no case did Mr McIvor identify a factual basis upon which it could be properly said that goods were "*at risk*" and/or that such a designation was a possible position for the defendants to take.

[49] In circumstances where the defendants had sought to enforce greater sums than those secured by way of attachment orders and have added costs and interest by way of additions post repossession (in cases where no 'all present and after acquired property' (APAAP) clause was present or virtually all security was exhausted) the defendants were imposing an "*at risk*" designation where no security remained under the loan because the security provided had already been repossessed.

[50] I have considered the factual contentions made by the defence in relation to the *"at risk"* designation but in no case does either defendant satisfy the test provided in *Taplin v Linus Finance Ltd*[24] I find no factual basis suggested on the part of the defendants that satisfies an evidentiary requirement that the prosecution need do more than the analysis which has been provided by Mr McIvor.

[51] Accordingly I find that in all cases where the *"at risk"* designation was provided (save the situations where APPAP clauses were present and the previous repossessions may have allowed subsequent processes following repossession) that designation could not be properly made.

To add interest and/or costs post repossession

[52] In relation to Ms H[redacted] T[redacted], Mr R[redacted] C[redacted], Ms M[redacted] K[redacted] and Mr P[redacted] T[redacted] on examination of their loan contracts with the defendants no clauses relating to all present and after acquired property (APAAP) appear. There was no lawful basis for the defendants to represent additional interest or costs as

[24] Ibid.

being owing following sale of the repossessed security. Such representations are proven and consequentially the charges are proven. Mr H[redacted] S[redacted] did have a contract containing an APPAP clause but given the repeated repossessions and the loan reports of the limited value of what was taken I conclude s 35 of the CRA was triggered, as effectively all possible security was taken. The charges relating to Mr S[redacted] are proven also.

The contract relating to Ms M[redacted]

[53] This submission relates to the quality of the printing of the loan agreements shown at 41 and 42 of the prosecution bundle of exhibits.[25] The loan contract is indistinct on the second page of the loan contract document. The other exhibits relating to the contract follow the same pattern as each of the other debtor files. The log notes in relation to the loan details indicate management of the loan that is consistent with the other debtor files. Statements recording interest, default interest, court process such as judgments, orders for examination and attachment orders, indicate that this loan proceeded on a basis which is equivalent to the other debtor files. The absence of a fully complete loan document raises no doubt concerning the elements of the charge which the prosecution must make out and accordingly I am prepared to infer that the absence of a complete loan document with the terms specified does not provide a basis upon which the charge should be dismissed.

Proof of essential elements

[54] In each charge under s 13(1) of the FTA the following matters must be proved beyond reasonable doubt;

(a) the defendant is a person (within the meaning of the FTA); and

(b) was "in trade" and;

(c) being in trade made a representation and;

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[25] Volume 1

(d) … in connection with the supply of services and;

(e) … concerning the existence of a right; and

(f) that representation was false or misleading.

[55] Issue (a) was never contested and is found to be proven to the required standard.

[56] The findings made in relation to the s 147 application[26] address the issue of whether the representations were made *"in trade"* and were made *"in connection with the supply or services"* and the findings which have been made show those representations to have been false or misleading.

[57] In addition I have found that those representations in each case in the charges under s 13(1) of the FTA concern the existence of a *"right"* the defendant asserted, either directly or by agents or employees that the defendants had a right to take a particular action in relation to the defendants loan (e.g. to repossess goods or to add interest/costs or other factors represented).

[58] Under s 13(3) of the FTA the elements of the offence are the same except the prosecution must establish the *"representation"* relates to a service having *"benefit"* instead of the existence of a right. The evidence about the refinancing does establish the falsely contended 'benefit' as alleged and those 3 charges are proven.

[59] The representations are false in that the representations indicted a state of affairs that did not exist. The debtors have on an objective standard received misleading assertions about their position.[27]

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[26] The s 147 decision CRI-2015-004-000415
[27] See Schedule 3.

[60] Accordingly in each case I find the 106 charges proven to the required standard.

DJ Sharp
District Court Judge

Schedule 1

S[redacted] L[redacted]

CRN 1449

Mr L[redacted] at paragraph 18 of his evidence says *"I have not seen this document before"*.

CRN 1447

In relation to authority act document of 4 September 2013 paragraph 24 of his statement he says *"I have been shown by Investigator McIvor an authority to act letter dated 4 September 2013 I have not seen this document.*

CRN 1445

Mr L[redacted] said at paragraph 30 of his evidence *"I have been shown by Investigator McIvor an authority to act letter dated 30 October 2013 I do not remember seeing this"*. There is no evidence in the loan notes[28] that the debtor saw the document.

H[redacted] T[redacted]

CRN 234

There is no indication in Ms T[redacted]'s statement or in the defendant's loan notes[29] that she received the letter dated 7 February containing the alleged representation.

M[redacted] K[redacted]

CRN 251

The defence contends there is reasonable doubt as to whether Miss K[redacted] received the pre-possession notice dated 9 November 2011 (paragraph 15 of her statement).

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[28] P 734 prosecutors bundle.
[29] P 95 prosecutors bundle.

"I have been shown by investigator McIvor a pre-possession notice dated 9 November 2011. I do not remember getting this letter. In addition the defendant's loan notice suggests Miss K had left the address to which the letter was sent."[30] The defence contend there is reasonable doubt as to whether Miss K received the pre-possession notice of 9 March 2012 (refer to para 16 of her statement of evidence) *"I have been shown by Investigator McIvor the pre-possession notice dated 9 March 2012. I do not remember getting this letter. In addition, the defendant's loan notes suggest Miss K had left the address to which the notice was sent in a note dated 23 March 2012."*[31]

CRN 232

It is submitted by the defence there is reasonable doubt for the reasons set out in the above paragraph.

A M

CRN 1489 and CRN 1490

Ms M 's statement does not include any reference to a repossession on 27 May 2011 of her goods. A loan note dated 27 May 2011[32] records a repossession of the goods of a C E who had moved into Ms 's former address, while nobody was home. The note also records that once the defendant's became aware of the error they returned the goods. This is submitted not to amount to conduct that it was a *"representation"* of *"the existence of a right"*.

CRN 1491

Ms M 's statement does not include reference to receiving an authority to act document dated 3 September 2013. There is no confirmation of receipt of this document in the loan notes.[33]

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[30] At page 469.
[31] At page 469.
[32] At page 849.
[33] At page 852.

CRN 1492

Ms M[redacted]'s statement does not include a reference to a repossession on 10 September 2013.

H[redacted] S[redacted]

CRN 1482

There is no evidence in Mr S[redacted]l's statement or in the defendants' loan notes.[34] He received the authority to act document dated 8 December 2011 containing the alleged representation.

CRN's 1483, 1484 and 1488

It is alleged by the defence there is reasonable doubt for the reasons in the above paragraph.

C[redacted] W[redacted]

CRN 214

The alleged representation is not mentioned in the defendants' loan notes.[35] And further does not appear to have been communicated to the debtor who states in her evidence *"I have been shown by Investigator McIvor a post-possession notice dated 13 October 2011. I am surprised this is Budget Loans as I thought Aotea Finance took the microwave, fridge freezer and orbitrek."* This indicates the notice dated 13 October 2011 was never communicated to Ms W[redacted] other than by the Commission during its investigation.

The defence submits there is reasonable doubt as to whether Ms W[redacted] received an authority to act document dated 26 September 2011 given her statement that she thought the repossession had been carried out by Aotea Finance. The defendants'

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[34] At page 1017.
[35] CC[redacted].001.0014.

loan notes do not indicate the document of 26 September 2011 was communicated to Ms W[redacted]

N[redacted] T[redacted]

CRN 209

In relation to the alleged representation in the authority to act document dated 24 June 2011 Ms T[redacted] states at paragraph 11 *"I have been shown by Investigator McIvor an authority to act letter dated 24 June 2011. I have not seen this document. I have not seen any document that looks like this."* The defendant's loan notes do not indicate she received the document.[36]

In relation to the alleged representation in the post possession notice dated 6 July 2011 Ms T[redacted] states at paragraph 14 of her evidence *"I have been shown by Investigator McIvor a post possession notice dated 6 July 2011. I have never seen one of these"*. Defendant's loan notes do not indicate she received the document.[37]

CRN 1480

It is submitted by the defence that there is reasonable doubt, for the reasons in the above paragraphs.

A[redacted] C[redacted]

CRN 1430

In relation to the representation contained in the authority to act document dated 22 July 2013, Ms C[redacted]'s evidence is that she had not seen an authority to act document before Investigator McIvor showed one to her. She states at paragraph 23 of her evidence *"I have been shown a Budget Loans document type of authority to act dated 1 August 2013. I have never seen this document and I cannot remember ever seeing a document like this."*

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[36] At page 1351.
[37] At pages 1351 and 1352.

CRN 1431

It is submitted by the defence there is reasonable doubt for the reason in the above paragraph.

The remainder of the debtors did not give a statement to the prosecutor or otherwise assist the prosecutor with its investigation. As such, the prosecutor relies on documents as extracted from the defendant's files. The defence submit the fact the document has been generated or sent by the defendants does not prove it as being received by or communicated to the debtors. For the following representations, there is no evidence in defendants loan notes that they were received by or communicated to the debtors.

R [redacted] C [redacted]

CRN 1366

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 10 April 2013 was received by the debtor.[38]

CRN 245

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 10 April 2013 or a post possession notice dated 22 April 2013 were received by the debtor.[39]

CRN 231

The defence submit there is not proof beyond reasonable doubt that a prepossession notice dated 8 March 2012 was received by the debtor.[40] The defendants' loan note record nothing was heard of it by the debtor.

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[38] Included in the defendants loan notes at page 374.
[39] Included in the defendants loan notes at page 374.
[40] Included in the defendants loan notes at page 372.

CRN 197 The defence submit there is not proof beyond reasonable doubt that a letter dated 22 February 2013 was received by the debtor. The defendants' loan notes *"no response"* to letter raising reasonable doubt.[41]

CRN 250

The defence submit there is not proof beyond reasonable doubt that a prepossession notice dated 8 March 2012 was received by the debtor. The defendants' loan note[42] record *"nothing heard from debtor."*

A[redacted] R[redacted]

CRN 215

The defendants' loan notes do not prove beyond reasonable doubt that the authority to act document dated 21 July 2011 and a post possession notice dated 27 July 2011 were ever received by the debtor.

CRN 206

The defence submit there is reasonable doubt for the reason in the above paragraph.

S[redacted] T[redacted]

CRN 226

The defence submit there is reasonable doubt whether the debtor received the prepossession notice dated 23 November 2011 as the defendants did not appear to have a current address for Mr T[redacted] at the time and there is no indication he received the notice.[43]

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[41] Loan notes page 373.
[42] At page 372.
[43] Pages 286 and 287.

S[redacted] R[redacted]

CRN 1379

The defence submit there is not proof beyond reasonable doubt that an authority to act document dated 15 February 2013 was received by the debtor by reference to the defendants' loan notes[44]

CRN 1377

The defence submit there is not proof beyond reasonable doubt that an authority to act document dated 23 November 2012 was received by the debtor, by reference to the defendants' loan notes.[45]

CRN 1376

The defendants submit there is not proof of a repossession attempt on 10 May 2012 as alleged. Rather, the loan note shows the subject as a "field visit" on 11 May 2012 rather than a "repo".[46]

CRN 1375

The defence submit there is not proof beyond reasonable doubt that an authority to act document dated 23 April 2012 was either sent by the defendants or received by the debtor by reference to the defendants' loan notes.[47]

CRN 1373

The defence submit there is not proof beyond reasonable doubt that an authority to act document dated 23 February 2012 was ever received by the debtor by reference to the defendants' loan notes.[48]

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[44] At page 599.
[45] At page 598.
[46] At page 597.
[47] At page 597.
[48] At page 596.

CRN 1443

The defendants submit there is not proof beyond reasonable doubt that an authority to act document dated 14 April 2011 was ever received by the debtor by reference to the defendant's loan notes.[49]

P[redacted] T[redacted]

CRN 211

The defence submit there is not proof beyond reasonable doubt that an authority to act document dated 26 March 2013 was received by the debtor by reference to the defendants' loan notes.[50] The defence submit there is not proof beyond reasonable doubt a letter dated 10 May 2013 was received by the debtor as the defendants' loan notes record "no response".[51]

CRN 978

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 26 March 2013 was received by the debtor by reference to the defendants' loan notes.[52]

K[redacted] F[redacted]

CRN 1371

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 17 May 2013 was received by the debtor by reference to the defendants' loan notes.[53]

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[49] At page 595.
[50] At page 1259.
[51] At page 1259.
[52] At page 1259.
[53] At page 195.

CRN 1369

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 12 April 2013 was received by the debtor by reference to the defendants' loan notes.[54]

CRN 239

The defence submit there is not proof beyond reasonable doubt a pre-possession notice dated 9 May 2013 was received by the debtor.[55] The defence contend there is not proof beyond reasonable doubt an authority to act document dated 12 April 2013 was received by the debtor.[56] Further that there is not proof beyond reasonable doubt a letter dated 3 April 2013 was received by the debtor as the defendants' loan notes record *"no response from debtor".*[57]

CRN 235

The defence submit there is not proof beyond reasonable doubt a letter dated 3 April 2013 was received by the debtor as the defendants' loan note record *"no response from debtor".*[58]

CRN 1363

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 17 May 2013 was received by the debtor.[59]

CRN 1362

The defence submit there is not proof beyond reasonable doubt an authority to act document dated 12 April 2013 was received by the debtor.[60]

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[54] At page 193.
[55] At page 194 defendants loan notes.
[56] At page 194 defendants loan notes.
[57] At page 193 defendants loan notes.
[58] At page 193 defendants loan notes.
[59] At page 195 defendants loan notes.
[60] At page 193 defendants loan notes.

D[redacted] N[redacted]

CRN 1478

The defence submit there is not proof beyond reasonable doubt a letter dated 6 May 2011 was received by the debtor.[61] The defendants submit there is not proof beyond reasonable doubt an authority to act document dated 6 May 2011 was received by the debtor.[62] The defendant is recorded *"gone no address"*. The defendants contend there is no proof beyond reasonable doubt an authority to act document dated 1 August 2013 was received by the debtor.[63] The defendants submit there is no proof beyond reasonable doubt an authority to act document dated 7 August 2013 was received by the debtor.[64]

CRN 222

The defence submit there is reasonable doubt for the reasons given in CRN 1478 above.

CRN 202

The defence submit there is no proof beyond reasonable doubt an authority to act document dated 30 November 2010 was received by the debtor.[65] The defence contend there is no proof beyond reasonable doubt an authority to act document dated 7 December 2010 was received by the debtor.[66] The defendants contend there is no proof beyond reasonable doubt a pre-possession notice dated 9 December 2010 was received by the debtor.[67]

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[61] At page 1233 defendants loan notes.
[62] At page 1234 defendants loan notes.
[63] At page 1235 defendants loan notes.
[64] At page 1235 defendants loan notes.
[65] Refer to the defendants loan notes 1232.
[66] Refer to the defendants loan notes 1232.
[67] Defendants loan notes page 1232.

CRN 204

The defence submit there is no proof beyond reasonable doubt a letter dated 5 April 2011 was received by the debtor.[68] The letter is addressed to Mr N[redacted], who was overseas at the time according to the defendants' loan notes which record "*Spoke with A[redacted] ... she confirmed D[redacted] is gone to England for good.*" [69]

The defence submit there is no proof beyond reasonable doubt a post sale letter dated 11 April 2011 was received by the debtor. As noted above, it appears Mr N[redacted] was overseas at this time.

A[redacted] N[redacted]

CRN 1481

The defence submit there is no proof beyond reasonable doubt an authority to act document dated 1 February 2011 was received by the debtor. [70] The defence contend there is no proof beyond reasonable doubt an authority to act document dated 6 March 2012 was either sent by the defendants' or received by the debtor by reference to the defendants' loan notes.[71]

CRN 220

The defence submit there is no proof beyond reasonable doubt the alleged refinance offer at page 1149 of the defendants' loan notes was communicated to the debtor. The loan notes do not refer to the refinance offer for $9,221.43, nor do they refer to a 50% discount. Rather, the note for 4 February 2011 refers to a refinance to $8,320 over 4 years, which was offered by repossession agents in person.

CRN 201

The defence submit there is no proof beyond reasonable doubt an authority to act document dated 4 February 2011 was received by the debtor by reference to the loan

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[68] Defendants loan notes page 1233.
[69] Page 1233.
[70] Defendants loan notes page 1154.
[71] Page 1154.

notes.[72] The defence contend there is not proof beyond reasonable doubt an authority to act document dated 6 March 2012 was received by the debtor by reference to loan notes.

Schedule 2

At schedule 2 a list of debtors and the factual basis relied upon for *"at risk"* designations are set out.

(a) **Ms M[redacted]** CRN's ending 1435, 1436[73] record on loan notes 21 September 2011 debtor *"gone no address."* She was unable to be located until the next log report confirmed a new address on 14 December 2011.

(i) The defence submit this debtor had a previous history of removing, concealing and damaging goods. A note on 23 April 2007 records a vehicle securing the loan being concealed. And a note on 30 October 2007 records the vehicle as being both uninsured and in a car accident. On two prior occasions 13 September 2010 and 27 May 2011 the debtor had been recorded as *"gone no address"*. The debtors loan contract[74] recorded at clause 21 *"you must store any collateral at the address shown as that of its owner in the schedule,"* and at clause 23 *you must not ... allow collateral to be ... removed from the place we are required to keep it"*. In addition, clause 30 requires the collateral to be insured by the debtor and the debtor had not in the past complied with this requirement.

(ii) Mr McIvor has given evidence for the prosecution on the *"at risk"* question in relation to Ms M[redacted]. He took the view that the debt was paid off at 14 December 2014. As such there were clear records to suggest the goods were not *"at risk"*.

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[72] Page 1154.
[73] Defendants loan notes 849
[74] At page 829 of the prosecutors bundle

(b) Miss C[redacted] CRN 1477 asserts the defendants goods were not *"at risk"* on 1 August 2013. CRN 1450 asserts the defendant's goods were not *"at risk"* on 6 August 2013. The defence submit there were reasonable grounds for believing the goods were concealed or removed contrary to the loan contract.[75] On 18 June 2013 the debtor was recorded as *"gone no address"*. The debtor was traced to a new address which was then identified on 22 July 2013.

(i) As such the defendant submits the goods were removed in contravention of clause 2 of the security agreement which prohibits the collateral for being removed from the premises *"unless and subject to the consent in writing of the creditor first and obtained."*

(ii) As such, the defence submit there were clear records to suggest the goods were *"at risk"* on 1 and 6 August 2013 and the defence submits the prosecutor is not discharged its onus to prove they were not.

(iii) Mr McIvor has given evidence that the prosecutor did not investigate where the goods were *"at risk"* because he understood the debt to have been paid off at 1 and 6 August 2013.

(c) Ms R[redacted] CRN 1443 states Ms R[redacted]'s goods (comprising all present and after acquired property) were *"at risk"* on 14 April 2011. CRN 1444 asserts they were *"at risk"* on 19 April 2011. CRN 1373 asserts they were *"at risk"* on 23 February 2012. CRN 1374 asserts that were *"at risk"* on 24 February 2012. CRN 1375 asserts they were *"at risk"* on 23 April 2012. CRN 1376 asserts they were *"at risk"* on 10 May 2012. CRN 1377 asserts they were *"at risk"* on 23 November 2012. CRN 1378 asserts they were *"at risk"* on 27 November 2012. CRN 1379 asserts they were *"at risk"* on 15

[75] At page 1227 of the prosecutors bundle

February 2013. CRN 1380 asserts they were *"at risk"* on 20 February 2013. The defence submit Ms R's property was *"at risk"* on all the various dates from 14 April 2011 to 20 February 2013 for the following reasons:

(i) Ms R was both removing and concealing property contrary to the provisions of her loan contract.

(ii) Under clause 2 of the security agreement[76] Ms R agreed not to remove the collateral from her address at unless consent in writing had first been obtained from the defendant.

(iii) Under clause 17(1)(d) of the loan contract, Ms R undertook to *"give the creditor not less than 20 days notice of any ... change in the debtors detail (including but not limited to, changes in the debtors ownership address, facsimile number or business practice)."*

(iv) Ms R had not notified the defendants of a change of address or obtained consent in writing. The defendants loan notes record at page 593 of the prosecutors bundle:

i. 20 September 2007 the defendants tried the home phone number provided by the debtor and they were told it wasn't her home phone number but that of an acquaintance.

ii. Agents discovered Ms R had moved from her address at some time prior to 23 December 2011 and she was recorded as gone no address in a loan note[77] records the debtor found to be temporarily living in a garage of her inlaws.

[76] Exhibit 107 page 479 of the prosecutors bundle
[77] Dated 14 February 2012

Reasonable grounds for the defendants to believe the goods were "at risk" in these circumstances.

(d) Ms T[redacted] CRN 1424 asserts the debtors goods were *"at risk"* on 26 August 2010. The defendants' loan notes show she had not been answering her phone on 17 May 2010. Next phone attempt on 10 June 2010 revealed the number had been disconnected. The defendants contend reasonable grounds for believing the goods were *"at risk"* were present.

Schedule 3

H[redacted] T[redacted]

[61] On 22nd February 2012 Evolution Finance represented that it had a right to repossess consumer goods from Miss T[redacted] by its repossession agents repossessing a Honda Integra from her.[78] The only security item listed under Miss T[redacted]'s loan agreement was her previous car a Nissan Laurel which had already been repossessed and sold. The repossession constituted a representation of the fact. A representation was made of the right to add interest post repossession and sale of goods.[79] The specific representation is contained in an authority to act document. Further there is a representation of a right to costs post repossession and sale of goods.[80] As set out above in the decision regarding the s 147 application this was a representation of a right that did not exist. The representation of a right to require higher repayments than that specified in an attachment order was also made.[81] No present and after required property clause was present and s 35 CRA prohibited adding the interest and costs as shown in the loan notes.

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[78] Loan notes p 95.
[79] Loan notes p 115.
[80] See loan notes p 115.
[81] See loan statement p 115.

K[redacted] F[redacted]

[62] A representation was made of a right to repossess goods, an *'authority to act'* document was forwarded to its repossession agent.[82] On 6 May 2013 Evolution Finance's repossession agents carried out a repossession of Miss F[redacted]'s goods including a car and household goods. At the time of the representation the sole security item in this loan agreement was Ms F[redacted]'s vehicle, a 1990 Torano. Evolution Finance did not have a security interest over any of the items repossessed. A representation of the right to repossess on the basis that goods were *"at risk"* was made. The examination referred to in the unchallenged evidence of Mr McIvor paragraph 16.9 showed no documents or records indicating a factual basis for concluding any security item listed under Ms F[redacted]'s loan were *"at risk"* in terms of s 7 of the CRA. A letter was sent to Ms F[redacted] representing a right to add interest beyond the amount approved in attachment order on 3 April 2013. Representations were also made of a total outstanding balance that was higher than the total sum ordered to be paid by Ms F[redacted] in an attachment order against her dated 8 December 2008.

[63] The representation of a right to require repayments higher than specified in attachment order was made on 3 April 2013 when Evolution Finance sent a letter to Ms F[redacted] representing at a right to require Ms F[redacted] to increase her repayment amounts from $25 per week (specified in the attachment order) to the contract rate of $409.00 per month $93.25 per week.[83]

S[redacted] T[redacted]

[64] Representation of a right to repossess without a valid pre-possession notice was made when Evolution Finance issued a pre-possession notice to Mr Teohaere on 23 November 2011. The notice represented that if the said default was not remedied within 7 days of the notice Evolution Finance would exercise its rights under the CRA and that it intended to send its repossession agents to Mr T[redacted]'s address.

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[82] See loan notes p 1487.
[83] Prosecution bundle of exhibits page 203.

As such the representation was of a fact that was not a representation of the true position.

B[redacted] M[redacted]

[65] Representation of a right to repossess goods was made a letter dated 20 September 2011.[84] Further on 27 September 2011 Budget Loans issued a letter and an attached pre-possession notice Ms M[redacted].[85] On 18 October 2012 Evolution Finance issued a letter with a pre-possession notice to Ms M[redacted] advising that if she did not comply with the terms of the notice within 7 days it intended to send a repossession agent to her address. Ms M[redacted] was guarantor for Mr T[redacted] and at the time the security interest of Budget Loans was limited to Mr T[redacted] vehicle. It did not extend to any other chattels or household goods. Representing a right to repossess without a valid pre-possession notice occurred when a pre-possession notice dated 18 October 2012 was sent to Ms M[redacted] Evolution Finance advised Ms M[redacted] she had defaulted under her loan that she must pay a total of $9,026.75 within 7 days of the notice. Evolution Finance Ltd represented a right to add interest beyond the amount approved in attachment order. An attachment order was made by the Court on 9 June 2008. On 27 February 2013 following other representations, Jared Hawkins sent an email on behalf of Budget Loans to East Auckland Home and Budget Service attaching a loan statement showing the amount owing on the loan guaranteed by Ms M[redacted] The total balance shown as outstanding on the loan statement as at 26 February 2013 was $55,774.84. The defendant represented a right to require higher repayments than specified in an attachment order. The Court attachment order of 9 June 2008 required payments of $20.00 a week to be deducted from Ms M[redacted]'s income. On 20 September 2011 Budget Loans issued a letter to Ms M[redacted] which represented it has a right to require Ms M[redacted] to increase the amount of her loan repayments.[86]

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[84] Prosecution bundle of exhibits page 243.
[85] Prosecution bundle of exhibits page 245 and 247.
[86] Prosecution bundle of exhibits page 243.

N[redacted] M[redacted] H[redacted] V[redacted]

[66] Evolution Finance issued a pre-possession notice to Ms H[redacted] V[redacted] on 13 June 2013. In that notice Evolution Finance represented it had a right to repossess consumer goods from her in the event she did not remedy her default on the loan.[87] The sole security item under the loan was Ms H[redacted] V[redacted]'s car this had already been repossessed by Western Bay Finance at the time Evolution Finance made the representation. There was a representation of a right to repossess without a valid pre-possession notice. Evolution Finance made a number of representations in pre-possession notices issued to Ms H[redacted] V[redacted], that it had a right to repossess goods from her after 7 days from the notice,[88] and representing a right to add interest beyond the amount of an attachment order. On 15 May 2013 Evolution Finance sent a letter to Ms H[redacted] V[redacted] which represented current loan balance owing to it by Ms H[redacted] V[redacted] was $56,728.04. That amount was higher than the sum ordered to be paid by the attachment order. The sum due was $11,088.12. This was increased by the accrual of interest. In the letter Evolution Finance refers to the fact that it had been charging post judgment interest at 8.4% since May 2005.

R[redacted] C[redacted]

[67] The defendant misrepresented a right to repossess goods in a letter and pre-possession notice dated 8 March 2012. Evolution Finance advised Mr C[redacted] there was default under his loans and that failure to remedy the default within 7 days would bring repossession agents to his address.[89] A file note dated 19 April 2014 records *"spoke with Mino and told him they need to continue with the repo as he needs an incentive to make sure that the ap will start for another $20 pw once we see this increase then the client can collect his stuff from Turners told to take the washing machine, his bed and his TV"*. A right to repossess without a valid pre-possession notice was representated on 8 March 2012 when Evolution Finance issued a letter and pre-possession notice to Mr C[redacted] advising him that he was in default on his loan the current and outstanding balance owing to Evolution

[87] Prosecution bundle of exhibits page 311.
[88] Prosecutions exhibit page 315.
[89] Prosecution bundle of exhibits page 405.

Finance was $12,568.10.[90] The letter and notice represented that if the default was not remedied within 7 days Evolution Finance would exercise its rights and send its repossession agents to Mr C[redacted]'s address. A representation of a right to repossess on the basis goods were *"at risk"* was made on 10 April 2013. Evolution Finance issued an *'authority to act'* document to its repossession agents authorising a repossession of Mr C[redacted]'s goods.

[68] On Mr McIvor's assessment of the file relating to Mr C[redacted] no documents or records providing a factual basis for concluding any security items listed under Mr C[redacted]'s loans were *"at risk"* in terms of s 7 of the CRA existed. Rather the loan notes indicate that Evolution Finance had been aware from at least February 2013 that Mr C[redacted] was living at the address of [redacted] and that he was at home at the address at the time the repossession was carried out. A right to add interest post repossession and sale of goods was represented in the authority to act document issued by Evolution Finance to its repossession agents on 10 April 2013.[91] Evolution Finance represented that it was entitled to be paid an outstanding loan balance of $12,020.44. That sum was in part made up of interest added to Mr C[redacted]'s loan balance after his car was repossessed and sold. Mr McIvor has summarised the actual outstanding loan balances from the represented amounts 10 April 2013, and the actual loan balance was $8,880.71. Representing a right to add costs post repossession and sale of goods in a post possession notice issued by Evolution Finance on 21 May 2013.[92] Evolution Finance represented that it was entitled to be paid a total of $11,900.44 which included courier charges of $2.96 and repossession costs of $200 imposed on 24 April 2013. The pre-possession notice also represented that Evolution Finance was entitled to charge further costs by stating that *"payment of the said sum of $11,900.44 plus ongoing costs payment maybe made at the offices of Evolution Finance Ltd, 20 Kent St, Level 4, Synotech Building, Newmarket, Auckland"*. Evolution Finance represented a right to require higher repayments that specified an attachment order. An attachment order was made by the Court on 9 July 2009 requiring payments of $20 per week to be deducted from Mr C[redacted]'s income

[90] Prosecution bundle of exhibits page 405.
[91] Prosecution bundle of exhibits page 411.
[92] Prosecution bundle of exhibits page 421.

and paid towards his loan. On 22 February 2013 Evolution Finance issued a letter to Mr C[redacted] in which it represented it had a right to require Mr C[redacted] to increase the amount of his loan repayments beyond the $20 per week specified in the attachment order.[93] No present and after acquired property clause was present and s 35 of the CRA prohibited adding interest and costs post repossession.

M[redacted] K[redacted]

[69] On 30 October 2007 Ms K[redacted]'s car was repossessed by Equality Finance. Representing right to repossess goods during the course of Ms K[redacted]'s loan, Budget Loans made a number of representations that it had the right to repossess consumer goods from her. On 9 November 2011 a notice was ordered indicating that if Ms K[redacted] did not comply with the notice within 7 days repossession agents would be sent to her address.[94] On 9 March 2012 Evolution Finance issued another letter and pre-possession notice.[95] Notice was again provided that if Ms K[redacted] did not comply with the notice within 7 days Evolution Finance *"intends to send our repossession agents to your address"*. There is an entry in the loan notes on 20 October 2011 which Mr McIvor says relates to the defendants' right to repossess Ms K[redacted]'s goods, the defendants' notes record *"rang Ms K[redacted]'s home phone number no answer, no option to leave message". Called back 16. 45 spoke with debtors partner the note records "she is not home told him tell her I am waiting for her to return my call. If debtor calls her payment by aps is yet to start, she has had enough chances so needs to stop bullshitting. Tell her I'll send the boys to repo when I get back, debtor isn't to know we can't repo"*. The defendants represented that it had the right to repossess without a valid repossession notice in pre-possession notices dated 9 November 2011 and 9 March 2012. The defendant also represented a right to add interest post repossession and sale. On 30 June 2011, the defendants sent a letter in which it represented that Ms K[redacted] was required to pay an outstanding balance of $12,462.01. This amount included interest accrued after the repossession and sale of Ms K[redacted]'s car on 14 November 2007. Mr McIvor has calculated the actual loan balance outstanding as at the date of Budget Loans representation (30 June 2011)

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[93] Prosecution exhibit page 433.
[94] Prosecution exhibits page 455 and 457.
[95] Prosecution bundle of exhibits page 451 and 461.

was $8,077. In the pre-possession notice dated 9 March 2012, Evolution Finance represented that the loan balance included time charges, charges for home visits, charges for judgment costs, charges for other court applications, examination hearings and hearing time. These charges were added post repossession. No present and after acquired property clause was present and s 35 of the CRA prohibited adding interest and costs post repossession.

S[redacted] R[redacted]

[70] The security listed under the loan agreement was Ms R[redacted]'s 1993 Toyota Corona. On or about 15 March 2005 this vehicle was repossessed. During the course of Ms R[redacted] loans there were a number of representations of a right to repossess consumer goods from her. On 10 March 2008, Budget loans obtained an attachment order requiring Ms R[redacted] to pay a total of $6,261.69 at a rate of $20 per week. On 27 November 2012 Evolution Finance repossession agents repossessed consumer goods from Ms R[redacted] including a fridge freezer, dining table and dining chairs. In addition the repossession agents obtained from Ms R[redacted] further authorisation for automatic payment of $40 per week.[96] On 20 February 2013 Evolution Finance repossession agents repossessed consumer goods from Ms R[redacted]. The goods repossessed were a fridge freezer, dining table and dining chairs.[97] At the time of all of those representations Ms R[redacted] had already made payments in excess of the amount Budget Loans was entitled to recover after the sale of the debtors goods on 27 May 2005. Mr McIvor has produced a table showing that at 20 February 2013 (the date of the second repossession) Ms R[redacted] was in credit for $428.59. Representations were made on the basis that goods were *"at risk"* Mr McIvor's assessment was no information providing a basis for a belief on reasonable grounds that items were *"at risk"* could be found in the documents. In addition to this, Ms R[redacted] was at the time of both repossessions in credit in terms of the amount that could legitimately have been claimed. The defendant represented a right to add costs post repossession and sale of goods[98] Mr McIvor

[96] Page 489 prosecution bundle of exhibits.
[97] Prosecution bundle of exhibits page 491.
[98] At paragraph 22.11

particularises the documents which show costs being added to the amount outstanding.

S[redacted] N[redacted]

[71] Representations were made of the right to repossess on the basis the goods were *"at risk."*[99] The following discussion is refered to in the loan notes *"inbound call from the outraged debtor, who said that she just got repod while she wasn't home, they took a TV, cabinet and lawnmower. She said why did we repo told her cos she didn't pay, she said she has no job, told her its no my problem, spoke with Kylie advised pay $600 to get things back she said I don't have money, not paying you anything anymore, I know my legal rights and etc, told her she wouldn't know a legal right if she stepped on one and that we are supported by the law and as per the contract which she signed we can repo and take everything. She threatened with police I told her to call Phil Geoff [sic] while she's at it, the police will tell her the same thing we did. She then said that the things we took were her Aunty's told her to provide proof. She then said I am a thief and have no right to do this, reply wishing her at [sic] the best in coming up with the $600 and that if she doesn't pay we will take her court and repo again, she said I'll just buy a new TV – we'll just take your new one too. Told her to come up with the money the [sic] terminated the call".*

The assessment by Mr McIvor of the file relating to Ms N[redacted] is said by him to contain no documents or records providing a factual basis for concluding that any security item listed on her loan were *"at risk"* in terms of s 7 of the CRA. The loan notes indicated Ms N[redacted] was in regular contact with Budget Loans regarding her loan during the period in which the representations were made.

S[redacted] I[redacted]

[72] The original security in respect of the loan was settled by National Finance Ltd with insurers following destruction of the vehicle. This may be seen in a letter from GAB Robins to Mr I[redacted] dated 19 May 2004. The defendant represented a right to repossess goods. An authority to act document was issued to repossession

[99] Prosecution bundle of documents page 617

agents on 4 September 2013.[100] The instructions to agents were *"repo warrant prepared for debtor and issued to BLL Agents for AP AAP at* [redacted] *the full balance of $10,174.21.*

"Agents are to continue with repo and take trailer to fully clear his house out. No payments are being made by both debtors, [redacted] *is not working anymore and* [redacted] *is waiting for an OE to be served".*

[73] Details of the repossession are recorded in the agents repossession report dated 5 September 2013.[101] That records Mr I[redacted] objected to the repossession, so the agents called the police to assist. The police obtained from Mr I[redacted] the keys to a vehicle outside, a 2001 Toyota Estema which was repossessed by the agents. A number of other household items were also taken including a fridge/freezer, computer hard drive, mouse, keyboard and monitor and a queen size mattress. The repossession report records the agents also tried to take Mr I[redacted]'s bed base but tools were required to disassemble which evidently they did not have. At the time of all those repossessions the I[redacted]'s had already made payments in excess of the amount Budget Loans was entitled to recover under the attachment order made on 21 April 2010.

[74] As can be seen from the loan statements payments of $50 per fortnight required under an attachment order made on 21 April 2010 continue to be deducted from Mr L[redacted]'s income until at least July 2013. Mr McIvor calculated the full amount of the attachment order was paid off on 8 April 2013 following the sale of Mr L[redacted]'s Chrysler Valiant vehicle.

[75] Mr McIvor calculates by subtracting the payments made by the I[redacted]'s in the total amount of the attachment order the amount of $2,488.46 was owed to Mr I[redacted].

[76] Representations of the right to repossess on the basis goods were *"at risk"* were made. Proceeding without any pre-repossession noticed also occurred. On the assessment made by Mr McIvor of the file relating to Mr I[redacted], there were no

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[100] Prosecution bundle of exhibits page 775 and 725
[101] Prosecution bundle of documents 777.

documents or records providing a factual basis for concluding any security item listed under Mr I[redacted]'s loan was *"at risk"* terms of s 7 of CRA. As indicated by the loan notes Mr I[redacted] was in regular contact with Budget Loans at the time the above representations were made. Representations made on 8 November 2012, 13 November 2012, 4 September 2013, 30 October 2013 and 31 October 2013. The items repossessed were also not listed as security items under the loan agreement prior to the repossession.

[77] As noted above, an attachment order was made by the court on 21 April 2010 requiring payments of $50 per fortnight. Following making the order regular payments continued to be deducted from Mr I[redacted]'s income as required until well into 2013. By letter dated 7 November 2012[102] Budget Loans represented to Mr L[redacted] that had a right to require into increase his loan repayments to the higher amount of $100 per week; a sum greater than that specified in the attachment order. No evidence of a variation to the attachment order of 21 April 2010 was provided by the defendant or has been obtained by Mr McIvor.

F[redacted] T[redacted]

[78] The sole security provided under the original loan National Finance Ltd was a 1989 Holden Calais. This vehicle was repossessed on or about 4 June 2003. On 26 August 2010 Budget Loans issued an authority to act documents to its repossession agents also authorising a repossession of Ms T[redacted]'s goods. That document was endorsed with a large *"at risk"* watermark. It also stated that the security was *"at risk"* pursuant to s 7(2) of the CRA. On 2 September 2010 Budget Loans repossession agents carried out a repossession of Ms T[redacted]'s consumer goods including a computer when no pre-repossession notice was issued in advance.

[79] On the assessment of Mr McIvor considering the file there were no records or documents providing a factual basis for concluding that any security items listed under her loan were *"at risk"* in terms of s 7 of the CRA. Budget Loans were in regular contact with Ms T[redacted] and at the time of the representations were made she continued to reside at the same address throughout.

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[102] Page 787 prosecution bundle of exhibits.

A[redacted] M[redacted]

[80] In 31 May 2010 Budget Loans issued a letter to Ms M[redacted][103] thanking her for having paid off judgment balance reflected in an attachment order made on 18 January 2008. However the letter then continued *"... we would like to point out that this is not the full balance payable in accordance with your loan agreement dated 26 January 2007"*. The letter then asserted that the balance due as at 31 May 2010 was $4,068.01 and requested that Ms M[redacted] resume her payments of $75 per week towards that balance. The letter indicated that the balance was determined by calculations set out. A right to repossess goods during the course of Ms M[redacted]'s loan was represented. Budget Loans made a number of representations it had a right to repossess consumer goods from her. These representations are set out in paragraph 26.7 (a) – (m) inclusive of Mr McIvor's evidence.

[81] At the time the above representation concerning the rights to repossess was made, Ms M[redacted] had already paid off the judgment amount reflected in the attachment order.

[82] During the course of Ms M[redacted]'s loan Budget Loans made a number of representations had the right to repossess consumer goods from her on the basis of those goods were *"at risk"* in terms of s 7 of the CRA. Therefore no pre-possession notices were required to be served in advance. The representations are set out in paragraph 26.9 (a) and (b) Mr McIvor's evidence.

[83] On the assessment of Mr McIvor the file relating to Ms M[redacted] contained no documents or record providing a factual basis for concluding any security items listed under her loan were *"at risk"* in terms of s 7 of the CRA. Given that at the time of the above representations, Ms M[redacted] had already paid off the judgment debt and attachment order the position of the Commission is that the loan was at an end and any security interest Budget Loans might have had been extinguished. Accordingly there were no security items to be *"at risk"*.

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[103] Prosecution bundle of documents page 855.

H[redacted] S[redacted]

[84] Paragraph 27.8 paragraphs (a) – (p) of Mr McIvor's statement sets out representations which were made by Budget Loans stating that it had a right to repossess consumer goods on the basis that they were *"at risk"*. The defendants carried out a number of repossessions of Mr S[redacted]'s property between 23 September 2011 and 13 September 2013, following these representations.

[85] On 17 June 2013 Budget Loans repossession agents carried out a further repossession at Mr S[redacted]'s address taking a fridge, couch, mattress and a vehicle a 1997 Honda Odessy. Again the debtor file indicates that no pre-possession notice was issued. Details of the repossession are recorded in the agents repossession report[104]. Loan notes record budget loans directed the agents to see if there was a washing machine, dryer or microwave to take them. The entry then further records [Richard] a repossession agent called back and spoke with Kylie said got the van stuck clients wife had come home with their car and towed them out after a PPSR check the vehicle was secured to the defendant and repossessed.

[86] On assessment of the file relating to Mr S[redacted] Mr McIvor found it contained no documents or records providing a factual basis for concluding that any security items listed under the loan were *"at risk"* in terms of s 7 of the CRA at the time of the representation. The file indicates that Mr S[redacted] was living at the same address throughout the life of his loan and as confirmed by the evidence which is provided by Mr S[redacted].

[87] Budget loans made a number of representations it was entitled to pursue the loan balance and included interest added to Mr S[redacted]'s loan after his TV was repossessed and then sold on 5 July 2010. The specific representations made be found paragraph 27.11, paragraphs (a) through (f) and inclusive of Mr McIvor's statement.

[88] Mr McIvor noted that in the case of all of the representations the loan balance represented as outstanding does not match that shown in the loan statement for the

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[104] Prosecution bundle of exhibits page 1027.

same date. In all cases the loan balance referred to and the representations exceed that shown in the loan statement. There is nothing in the debtor file for Mr S[redacted] that explains how the loan balance sought by Mr S[redacted] in each representation had been calculated or why they exceed those shown in the loan statement. Notwithstanding that the loan statement shows the default interest of 10% continued to be added to Mr S[redacted]'s loan on a weekly basis after his TV was sold on 5 July 2010 until 6 November 2011 when it appears to have been stopped.

[89] Mr McIvor had produced a table which shows the represented outstanding loan balance on 13 September 2013 was $5,689.07 when the actual loan balance was $1,102. At paragraph 27.15 (a) – (g) and in paragraph 27.16 (a) and (b) of Mr McIvor's evidence, he sets out details of additional costs which were after or added to the loan balance after a repossession was carried out on 5 July 2010.

[90] Although an all present and after acquired property clause was present the continuing nature of the repossessions reached a point it could not be argued that the security for the loan had been repossessed.

C[redacted] W[redacted]

[91] 28 May 2003 Ms W[redacted] entered a loan agreement with Western Bay Finance Ltd. The sole item of security under the agreement was Ms W[redacted]'s vehicle – a 1992 Mitsubishi RVR. On 11 August 2003 Ms W[redacted]'s vehicle was repossessed by Western Bay. The defendant represented a right to add costs post repossession in sale of goods.[105]

[92] Mr McIvor identifies representations regarding an authority to act for the repossession of Ms W[redacted]'s goods.[106] The sum indicated as owing included repossession charges of $250. At paragraph 28.11 (b) Mr McIvor identifies further repossession, valuation and redelivery costs.

[93] The defendant represented a right to require higher repayments than that specified in an attachment order dated 8 September 2010. The Court made an

[105] Paragraph [28.11]
[106] Prosecution bundle of exhibits 1121.

attachment order requiring payments of $10 per week to be deducted from Ms W[redacted]'s income and paid towards her loan. On 30 August 2011 Budget Loans issued a letter to Ms W[redacted] which represented it had the right to require her to increase the amount of her repayments beyond the $10 per week specified.[107]

[94] On 1 October 2009 Budget Loans issued a letter to Ms W[redacted] in relation to the possible refinancing of her loan. In the letter Budget Loans stated it was offering her a reduction in the loan balance. Given that s 35 of the CRA was in force the maximum amount Budget Loans were entitled to recover under Ms W[redacted]'s loan was $7,129.76.

[95] The amount which Ms W[redacted] was required to pay under the purported new loan, as shown,[108] was the sum of $7,587.78. In addition although the initial loan was unsecured (the sole item of security (her vehicle) had already been repossessed and sold), under the new loan agreement Budget Loans obtained a wide ranging all present and after acquired securities interest.

A[redacted] N[redacted]

[96] On 5 July 2001 Ms N[redacted] entered a loan agreement with National Finance Ltd under which National Finance Ltd obtained a security agreement of Ms N[redacted]'s vehicle, a Toyota Levin. On 11 December 2002 Ms N[redacted]'s car was repossessed and sold by National Finance. At that time the loan balance was $10,225.91.[109]

[97] On 2 February 2010, Budget Loans issued a letter to Ms N[redacted] regarding refinancing her loan.[110] The letter represented the outstanding balance of Ms N[redacted]'s loan at that date was $18,439.86. Mr McIvor's calculation was that the actual outstanding loan balance at that time was $8,725.91. The new balance which was said to be applicable with the refinance was $9,221.43. In addition at the time of Budget Loans representation, Ms N[redacted]'s original loan was unsecured. The sole item of security (her vehicle) had already been repossessed and sold. Under the new

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[107] See prosecution exhibit page 1125.
[108] Page 1079 and 1089.
[109] See prosecution exhibits page 1133.
[110] See prosecution exhibits page 1149.

loan agreement Budget Loans obtained a security interest in the new vehicle a 1993 Mitsubishi Gallant as well as a security interest in all present and after acquired property.

A[redacted] C[redacted]

[98] On 14 June 2004, Ms C[redacted] guaranteed a loan from National Finance Limited to Mr D[redacted] N[redacted]. During in the course of the loan guaranteed by Ms C[redacted], Budget Loans made a number of representations that it had a right to repossess consumer goods from her. These are set out in paragraph 31.7 (a) to (e) inclusive of Mr McIvor's evidence. At the time of all of those representations, Ms C[redacted] had already made payments in excess of the amount Budget Loans was entitled to recover after the sale of Mr N[redacted]'s goods on 16 June 2008. By the calculations conducted by Mr McIvor on 7 June 2013, Ms C[redacted] had overpaid any liability she may have had in the sum of $3,551.89.

[99] During the course of the loan guaranteed by Ms C[redacted], Budget Loans made a number of representations, that it had a right to repossess consumer goods from her on the basis that those goods were *"at risk"*. The representations are set out at Mr McIvor's evidence 31.9 (a) and (b). On Mr McIvor's assessment the file relating to Ms C[redacted] contains no documents or record providing a factual basis for including that any security items listed under Ms C[redacted]' loan were *"at risk"* in terms of s 7 of the CRA.

Schedule 4

[100] I note that, as a closing statement, the defence indicated that changes were required in respect of the date charges were filed. This appears to be an administrative error and, accordingly, the following amendments are made:

(a) CRN 16004501482 (H[redacted] S[redacted]) filing date 15 March 2016.

(b) CRN 16004501483 (H[redacted] S[redacted]) filing date 15 March 2016.

(c) CRN 16004501484 (H[redacted] S[redacted]) filing date 15 March 2016.

(d) CRN 16004501485 (H[redacted] S[redacted]) filing date 15 March 2016.

(e) CRN 16004501487 (H[redacted] S[redacted]) filing date 15 March 2016.

(f) CRN 16004501488 (H[redacted] S[redacted]) filing date 15 March 2016.

(g) CRN 16004501489 (A[redacted] M[redacted]) filing date 15 March 2016.

(h) CRN 16004501490 (A[redacted] M[redacted]) filing date 15 March 2016.

(i) CRN 16004501491 (A[redacted] M[redacted]) filing date 15 March 2016.

(j) CRN 16004501492 (A[redacted] M[redacted]) filing date 15 March 2016.

And further the Court records are amended with regard to the following:

(a) CRN 16004501437 (S[redacted] N[redacted]) filing date 25 March 2015.

(b) CRN 16004501438 (S[redacted] N[redacted]) filing date 25 March 2015.

(c) CRN 16004501439 (S[redacted] N[redacted]) filing date 25 March 2015.

(d) CRN 16004501440 (S[redacted] N[redacted]) filing date 25 March 2015.

(e) CRN 16004501441 (S[redacted] N[redacted]) filing date 25 March 2015.

(f) CRN 16004501442 (S[redacted] N[redacted]) filing date 25 March 2015.

(g) CRN 16004501428 (A[redacted] C[redacted]) filing date 25 March 2015.

(h) CRN 16004501429 (A[redacted] C[redacted]) filing date 25 March 2015.

(i) CRN 16004501430 (A[redacted] C[redacted]) filing date 25 March 2015.

(j) CRN 16004501431 (A[redacted] C[redacted]) filing date 25 March 2015.

(k) CRN 16004501432 (A[redacted] C[redacted]) filing date 25 March 2015.

(l) CRN 16004501426 (F[redacted] B[redacted]) filing date 25 March 2015.

(m) CRN 16004501427 (F[redacted] B[redacted]) filing date 25 March 2015.