IN THE DISTRICT COURT
AT AUCKLAND

CRI 2011-004-002567

COMMERCE COMMISSION
Informant

v

WENATEX NEW ZEALAND LIMITED
Defendant

Hearing: 14 July 2011

Appearances: Y Clarise for the Informant
PJ McPherson for the Defendant

Judgment: 7 September 2011

SENTENCING DECISION OF JUDGE B A GIBSON

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[1] The defendant, a company selling beds and bedding products, has pleaded guilty to 34 informations, 14 of which are laid under the Fair Trading Act 1986 and the remainder under the Credit Contracts and Consumer Finance Act 2003 (CCCF Act). The company is a subsidiary of an Australian company, Wenatex Australia Pty Limited, and in the 15 months to 30 June, 2009 the defendant had a turnover of approximately $7 million. However it seems its owners have decided that it will shortly stop operating in New Zealand.

[2] The defendant company sells its products, mainly mattresses, duvets and pillows from venues such as Cosmopolitan Clubs, RSAs, and hotels. It targets persons from databases it purchases or from the white pages of the telephone book and invites them to one of its temporary venues offering them a complimentary

dinner and gift. Sales are effected at these venues, with purchasers entering into a sales contract with the defendant company.

[3] Many customers elected to use a deferred payment option offered by the defendant known as "Ezi-Pay". The arrangement was provided by Flexirent (New Zealand) Limited trading as Certegy Ezi-Pay (Certegy) and is widely used in Australia. No interest is payable, however default fees may be imposed. Further, under the Door to Door Sales Act 1967 (DTDS Act), customers have the right to cancel a contract for purchase within seven days of the sale, or within a month if disclosure requirements under the DTDS Act are not met. That Act requires the sales contract to disclose the cancellation right in a prescribed form.

[4] Many of the contracts the defendant had its customers enter into did not contain a statement of the right to cancel and those that did contained terms and conditions that misrepresented the purchaser's statutory cancellation rights. Further, misrepresentations were made to specific customers including a customer who was told she would lose her $1,000 deposit if she cancelled the contract, leaving the customer with the belief that she had no option but to continue with the purchase. Other customers cancelled, as they were entitled to do, but the defendant ignored the notice of cancellation and would not refund the deposit.

[5] As part of its explanation the defendant said the wrong forms were sent to the New Zealand operation of the business which resulted in Ezi-Pay customers not receiving the statement of the right to cancel and with misrepresentations being made in other forms.

[6] With respect to three specific customers for which the Fair Trading Act cause of action under s 13(1) of the Act was brought, those purchasers attempted to exercise their statutory right of cancellation and were expressly told by the defendant, in breach of the provisions of the DTDS Act, it was entitled to retain their deposit.

[7] The informant also sought to have the defendant pay refunds to customers totalling $1,285.55 which related to customers identified by the informant who had entered into contracts and cancelled before receiving full disclosure, but did not receive a refund of their deposit.

Submissions

[8] Both counsel were in agreement as to the law and the principles applicable. The purpose of the legislation on which the defendant has been prosecuted is set out in the decision of Judge JR Callander in *R v Senate Finance Limited,* Auckland District Court, CRN 2006-450-2955, 14 November, 2006, the first prosecution pursuant to the provisions of the CCCF Act, where, at para [7] of his decision His Honour said:

> The purpose of both Acts of Parliament [a reference to the Fair Trading Act 1986 and the CCCF Act] is self evident. It is to protect the interests of consumers entering into credit contracts, provide for the disclosure of adequate information to those consumers, and prevent misleading and deceptive conduct, false misrepresentations, and unfair practices. Consumers must be adequately informed of their rights and responsibilities. Consumer rights to disclosure of information, developed over the last few decades, prescribe that anything that is material in a contractual relationship between a vendor and a purchaser, or a shopkeeper and a customer, must be made clear and conspicuous, in the interests of fairness and honest trading. Those concepts underpin both pieces of legislation.

[9] The penalties prescribed by the legislation are also a reflection of Parliament's intention to ensure sanctions are provided that protect the general public who generally have not read the terms and conditions that attach to these type of purchases, and in any event, are not in a position to attempt to negotiate different terms even if they had. The maximum penalty for the charges laid under the Fair Trading Act is a fine of $200,000 and for those laid under the CCCF Act, $30,000 for each offence.

[10] The primary purpose of sentencing, given Parliament's indication, must be one of deterrence with the imposition of fines that ensure that offenders do not treat the consequences of their breaches as mere incidents of trading. Sentencing policy under the Fair Trading Act was discussed in *Commerce Commission v LD Nathan & Co* [1990] 2 NZLR 160 where it was held, notwithstanding the need for deterrence, penalties should realistically reflect the seriousness of the offence so it is not necessary to begin with substantial fines which should be reserved for repeat offenders, for deliberate breaches, particularly if done for commercial gain, and cases involving a widespread and large scale breach with a clear risk of damage or injury to consumers.

[11] In mitigation, the defendant acknowledged its fault. It said the failure to provide notice of the right of cancellation in the terms as required under the DTDS Act was a consequence of error in the warehouse-to-warehouse delivery of sales contracts that the defendant co-operated with the Commerce Commission and immediately withdrew its offending forms and provided correct advice on its warehouse staff and agents in New Zealand and that, insofar as the failure to provide initial disclosure under the CCCF Act in relation to the Ezi-Pay forms it made a genuine mistake as it thought the obligation to do so was Certigy's and not its own. Consequently, as submitted on its behalf, its failures were not deliberate. They arose, it was said, from a misunderstanding by both its staff and itself as to its legal obligations. In terms of culpability, it was submitted that its negligence and carelessness was towards the lower end of the scale.

[12] The informant's view of culpability was that the defendant had positively misstated the position concerning deposits, on occasions, by alleging they were non-refundable and although it accepted there was no deliberate breach the defendant's actions, particularly with respect to its obligations under the DTDS Act, an Act in force for over 40 years, were reckless rather than merely careless and where there was widespread non-compliance with the disclosure requirements of the CCCF Act in respect of nearly all contracts signed during the period of offending 1 April, 2008 to 30 June, 2009. Further, as well as misstating the customer's rights the defendant went on to illegally retain deposits when customers cancelled their orders. Consequently the informant in a submission with which I agree, said that the position was markedly different from that in *R v Senate Finance* (supra) which concerned the negligence of one officer which led to the company's prosecution.

Penalty

[13] The Crown sought a global starting point of between $100,500 and $119,000 in fines and relied on the decision of Judge Aitken in *Commerce Commission v Baker and Dolbel*, District Court, Auckland 21 May, 2007 where the defendants as directors of Dolbak Finance pleaded guilty to 22 representative charges encompassing a period of approximately one year and were fined a total of $100,000. Ten of the charges were representative charges under s 17 of the CCCF Act, another ten representative charges under s 25 of the same Act and one a representative charge pursuant to s 13(1) of the Fair Trading Act. Dolbak was using

credit contracts drafted under the old Credit Contracts Act 1981 for a six month period and still failed to comply with the CCCF Act even following advice from the Commerce Commission. Her Honour considered the fines, which were agreed amounts, as appropriate having regard to the totality principle, the failure of the company to inform itself of its obligations under the CCCF Act and the fact that the offending occurred over a 12 month period. However the informant submitted that the facts in this present case were more serious because of the statements made by the defendant that it had the right to retain deposits paid by consumers.

[14] The informant sought fines of between $3,500 and $5,000 for the three breaches of s 13(i) of Fair Trading Act relating to the retention of deposits. The defendant accepted the starting point was within that range but sought a starting point towards the lower end to be reduced with credits to which it was entitled to. The defendant is entitled to a credit on the authority of *Hessell v R,* 19/4/10, SCNZ SC102/2009, for pleading guilty. Both counsel agreed the appropriate credit should be 25% and it is also entitled to a further discrete discount, which I assess at 10% to reflect the fact that it has not previously been convicted of any offence.

[15] Accordingly, as a starting point I assess the fines under these three informations as $4,500, a total of $13,500 reduced to a fine of $2,295 on each information taking account of the credit for pleading guilty and the credit for not having any prior convictions. I think that is an appropriate level of fine taking into account the totality principle and the seriousness of the breaches.

[16] There were also 11 informations laid under s 13(i) of the Fair Trading Act concerning misrepresentations as to the right to cancel the contracts which were subject to the DTDS Act. While this may have resulted from internal muddlement in the use of wrong forms, it represented a significant diminishment of consumer rights protected under the DTDS Act. The range of fines sought for by the informant for these charges was between $7,000 and $9,000 per charge. For the defendant it was submitted a lower range was appropriate because the defendant's actions did not amount to a deliberate attempt to deprive consumers of their rights under the legislation. I agree the range submitted by the informant is appropriate, having regard to all matters, including the totality principle and the number of offences and so set a starting point of $7,000 for each charge, a total of $77,000 before discounts

are applied. Applying the discounts referred to in paragraph 14 the defendant is fined $4,550 on each charge or collectively a fine of $50,050 under this head.

[17] The informant also seeks a penalty of $1,000 per charge on the 10 informations laid under s 17 of the CCCF Act for breach of initial disclosure requirements in the consumer credit contracts. The defendant does not disagree and accordingly the starting point for the informations laid under that section of the Act is $1,000 for each information but with the credits referred to earlier the defendant is fined $650 on each, collectively $6,500. With respect to the prosecutions under s 32(1)(d) of the CCCF Act, again the parties were in agreement, that an appropriate starting point was $1,000 per charge for the 10 charges and with the applicable discounts the overall level of fines is $650 for each information, a total of $6,500.

[18] Court costs of $132.89 are to be paid on each of the informations. Further, the defendant agreed that refunds of $1,285.55 relating to customers identified by the Commission who entered into contracts and cancelled before receiving full disclosure, but did not receive a refund of their deposit, are to be made. There is an order accordingly.

Dated at Auckland this 7th day of September 2011 at 2 ~~am~~/pm

B A Gibson
District Court Judge

Delivered to parties by email
7.9.11.