IN THE DISTRICT COURT
AT AUCKLAND

CRI-2016-004-012904
[2018] NZDC 1853

COMMERCE COMMISSION
Prosecutor

v

APPENTURE MARKETING LIMITED
Defendant

Hearing: 2 February 2018

Appearances: K Muirhead for the Prosecutor
No appearance by or for the Defendant

Judgment: 2 February 2018

NOTES OF JUDGE M-E SHARP ON SENTENCING

Introduction

[1] Appenture Marketing Limited, in liquidation, appears for sentence on 24 charges under the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003. Those charges were formally proved by a decision of Judge Thorburn dated 17 October 2017 following the grant of consent by the High Court to continue with the prosecution after Appenture went into voluntary liquidation on 27 April 2017.

[2] The charges are representative and relate to 908 consumer credit contracts that Appenture entered into before it went into liquidation. The charges relate to the inadequate disclosure of key information in the contracts as well as misrepresentations about the creditors' and debtors' legal rights under the Credit Contracts and Consumer Finance Act 2003 and Consumer Guarantees Act 1993.

[3] The 24 charges are as follows:

(a) Six charges for breaches of s 17 Credit Contracts and Consumer Finance Act (CCCFA) for failing to disclose to debtors certain key information required under schedule 1 of that Act. Maximum penalty $30,000 per charge.

(b) Eighteen charges for breaches of s 13(1) Fair Trading Act (FTA) by making false or misleading representations to consumers. Maximum penalty, $600,000 per charge.

(c) For false or misleading representations related to:

(i) The Consumer Guarantees Act (CGA) guarantee regarding delivery of goods (six charges).

(ii) The CGA guarantee relating to goods matching their description (six charges).

(iii) The amount recoverable by the creditor under the contract following repossession and sale of goods (six charges).

History

[4] Prior to its liquidation, Appenture operated as a mobile trader in Auckland but active throughout the North Island in all of the lower socio-economic suburbs of various cities, for example, Flaxmere, Hastings, Manurewa, Ranui, Whakatane and Whangarei. It sold consumer goods such as electronics door-to-door on credit for much greater prices than the charges for those same items in mainstream stores.

[5] Because of what I would colloquially call a "crack-down" by the Commerce Commission on the disclosure practices within the mobile trader industry, and a widespread investigation of those practices, Appenture came to light. It did not form part of the Commission's initial mobile trader project but the Commission opened an investigation into the company in March 2006 as part of a second industry-

wide review of mobile traders to ensure that they were complying with their disclosure obligations.

[6] The defendant company (in liquidation) is not represented today and does not appear. The liquidators are aware of this sentencing and did not wish to take any part.

[7] In summary, the Commission submits at 2.1 of its memorandum of submissions:

(a) Both the Fair Trading Act and Credit Contracts and Consumer Finance Act offending is serious in its own right due to the extent of the false and misleading representations about the creditors' and debtors' legal rights and the extent of the disclosure failures. This is particularly so against a background of compliance advice having been provided extensively to the industry by the Commission.

(b) The appropriate starting point ranges are:

(i) Misrepresentation charges under the FTA $100,000-$120,000.

(ii) Non-disclosure charges under CCCFA, $50,000-$60,000.

(iii) The combined starting points reach a range of $150,000-$180,000 but on a totality-adjusted basis an appropriate global starting point is in a range of $130,000-$160,000.

(iv) Appenture is entitled to a discount in the region of five percent for co-operation.

(v) Applying those adjustments and discounts results in a fine ranging between $122,000-$152,000.

[8] As the liquidation of Appenture remains in process, and at the moment there are no assets to liquidate, naturally, many of the orders that I will make will be, shall we say, pyrrhic only because whilst they will have an impact by way of precedent

within this industry, in reality it is most unlikely that those fines or any part of them that I impose will be met.

The defendant's obligations and the statutory context

[9] For the sake of brevity, and because the Commerce Commission's submissions are so excellent, I do not propose to traverse these in any detail whatsoever but with thanks do rely on the memorandum that has been provided to me by the Commission dated 26 January 2018. In particular, I rely on and endorse paragraphs 3.1 to 3.13 of those submissions; equally, paragraph 4.

[10] The core aspects of the offending are that over the 11 months between 6 June 2015 and 30 April 2016 Appenture entered into 908 consumer credit contracts described as rent-to-own agreements. They had a total value of $1,852,556. Both sets of charges against Appenture relate to the quality of those rent-to-own agreement documents and/or representations made in them. Charges 1 to 6 relate to breaches of s 17 Credit Contracts and Consumer Finance Act because the rent-to-own agreement documents provided to the 908 debtors failed to disclose the required information. Specifically, the documents failed to accurately state the correct initial unpaid balance by omitting to include an application booking fee charge of $40. They failed to accurately state the correct amount of the final payment and the correct number of payments required by failing to correctly include the application booking fee charge. They failed to state when the credit fees became payable under the contract and specifically failed to identify when the direct debit set-up fee and weekly transaction fee became payable. They failed to state how the debtor could make a hardship application under s 55 Credit Contracts and Consumer Finance Act. They failed to state the frequency with which continuing disclosure statements would be provided to debtors and they failed to state Appenture's registration number under the Register of Financial Service Providers or the name under which it was registered.

[11] The breaches of s 13(1) Fair Trading Act (charges 7 to 24) are about the misrepresentation about customers' right to cancel for delivery delay (charges 7 to 12); the representation to debtors that it would not be liable for any delay in the delivery of the goods to be supplied, and the debtor would not be entitled to cancel the contract as a result of delay, was false and misleading because of the guarantee under

s 5A Consumer Guarantees Act that goods will be received by the consumer at a time within a period agreed between the supplier and the consumer or, if no time period has been agreed, within a reasonable time.

[12] Failure to comply with the guarantee gives the consumer a right of redress against the supplier including the right to reject goods for a failure of the substantial character and a right to damages. There was misrepresentation about creditors' right to provide a substitute product (charges 13 to 18). The representations in that regard were false and/or misleading because under s 9 Consumer Guarantees Act (CGA) where goods are supplied by description to a consumer, there is a guarantee that they will correspond with the description. Breach of that gives the consumer a right of redress against the supplier under part 2 of the CGA.

[13] There was misrepresentation about creditors' right to charge interest following repossession and sale (charges 19 to 24). Under the contracts, Appenture gave itself the right to repossess and sell the products that were the subject of the contract and specifically represented in relation to that right that any proceeds of sale would be applied to the outstanding amount owing under the agreement and if the sale proceeds were less than the outstanding amount owing under the agreement, the debtor would remain liable to Appenture for the outstanding amount together with default interest charges on the balance which would accrue from the date the outstanding amount became owing until the date it was paid. That representation was false and/or misleading because under s 83ZM Credit Contracts and Consumer Finance Act, if the net proceeds of sale are less than the amount required to settle the agreement as at the date of sale, the creditor is not entitled to recover more than the balance left after deducting those proceeds from that amount so a creditor cannot continue to charge interest post-repossession and sale.

Purposes and principles of this sentencing

[14] I agree with the Crown. The most important purpose and principles of sentencing which apply to this case (from those set out in ss 7 and 8 Sentencing Act 2002) are the need to denounce and deter the offending as well as to ensure parity with like cases. In this case, specific deterrence is unnecessary given that the company is in liquidation but general deterrence is vital. The sentencing in this case must have

the effect of denouncing the conduct and penalising it in such a way that others in this industry will think twice before they offend against any of the statutes concerned. I accept without hesitation the statements that were made by my colleague, Judge Aitken, in the *Commerce Commission v Bestdeals 4 You Ltd*[1] case when she said the creditor:

> ...targeted, arguably, the most vulnerable members of our society: those for whom the items they wanted could not be paid for outright and to whom credit facilities were otherwise not being extended. It is not an overstatement, in my view, to observe that the defendant's business, like most mobile traders, likely provided the only opportunity to this client base to acquire goods and it is likely often that these agreements were entered into or contemplated with unreal expectations as to their own ability to pay.

The target group can be:

> ...described as the precariat: that group who live in our society in precariously balanced circumstances, circumstances in which a single event, for example a loss of a tenancy or a loss of job, can tip the individual and their family into poverty or at the very least can create significant stress...

In other words, create a tipping point.

[15] This industry is notorious and this offender has behaved no differently from so many that have been the subject of Commerce Commission prosecutions successfully brought and which the District Court has both heard and determined.

Aggravating features of the offending

[16] I agree again with the Commission in its counsel's memorandum of submissions at paragraph 6. The extent of the offending is great. The s 17 failures were widespread. The s 13 Fair Trading Act misrepresentations were similarly systemic. Debtors were misled as to their rights under the CGA and the CCCFA. The offending involved a high degree of carelessness. There was a significant lead-in time for the amendment Act coming into force, that is the CCCFA, in which the commission was a leader in approaching this industry to advise them of their obligations, of the changes to the legislation and of the requirements for them to make changes which meant that they would be in conformity with the coming into force of that Act.

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[1] *Commerce Commission v Bestdeals 4 You Ltd* [2017] NZDC 3427

Similarly, the FTA offending involved actively misleading debtors as to legal rights. Appenture should have been fully familiar with all of these matters.

[17] It seems to me, from what I have read on this file, that Appenture was actually considerably more than just particularly careless as it has been described in the Commission's counsel's memorandum but in some instances, in fact probably the majority of the time, there was significantly greater criminality than the mere standard of carelessness would connote.

[18] The number of victims was significant; 908 debtors' contracts over 11 months. The victims were particularly vulnerable which is a central feature of the mobile trader industry, as I have already said. The people who are approached by mobile traders are generally most in need of the projection of the CCCFA and the FTA. It is of paramount importance that every effort is taken to assist them to understand their statutory rights and their statutory obligations.

[19] There are no mitigating factors of the offending.

Starting points

[20] Again, I agree with the Commerce Commission. The two separate types of statutory offending are quite distinct. One relates to contract disclosure failures, the other to active misrepresentations which I find to be significantly more wilful and intentional than negligent. I agree, therefore, that the starting points for each set of offending must be assessed distinctly before being considered on a totality basis at the end.

[21] The FTA charges do amount to the lead offending for the purposes of sentencing, given the higher maximum penalty adopted by Parliament. There is no tariff for this type of offending. The Commission has very helpfully provided a schedule of sentencing decisions involving mobile traders. Each of the cases is attached in full in the bundle of authorities filed with the submissions. I agree, not to appear completely sycophantic with counsel for the Commission, that the cases of the most assistance here are *Commerce Commission v Budget Warehouse Ltd*[2], *Commerce*

[2] *Commerce Commission v Budget Warehouse Ltd* [2017] NZDC 14223

Commission v Smart Shop Ltd[3], *Commerce Commission v Ace Marketing Ltd*[4] and *Commerce Commission v Wenatex NZ Ltd.*[5] Of these, *Commerce Commission v Budget Warehouse Ltd* gives the most assistance. In that case, Budget Warehouse Ltd was sentenced on nine charges of misleading representations under the FTA and nine for s 17 CCCFA disclosure failures over an 11 month period of offending, affecting 817 contracts. In that case the court found that the conduct involved a high degree of negligence and adopted a starting point of $90,000 for the FTA offending and a separate starting point of $90,000 for the CCCFA offending.

[22] In *Commerce Commission v Smart Shop* there were 11 charges; three under the FTA and three under s 17 CCCFA amongst those 11 charges. The offending occurred over eight months. It affected 2415 contracts. The court there imposed a starting point of $150,000 for the FTS charges and $70,000 for the CCCFA charges.

[23] In *Commerce Commission v Ace Marketing Ltd* the Court sentenced on 28 charges which included 19 under s 13(1) Fair Trading Act, offending spanning 30 months and affecting 8102 contracts. The Court adopted a starting point on that offending of $255,000.

[24] In *Commerce Commission v Wenatex NZ Ltd* where the defendant faced 11 charges under s 13(1) Fair Trading Act (under the previous maximum penalty of $200,000) for offending over a 15 month period involving 638 contracts with consumers, the Court adopted a global starting point of $77,000.

Analysis of starting point for the FTA offending

[25] It is true that Appenture's offending is most similar to Budget Warehouse, Smart Shop and Ace Marketing because the representations were similar, the degree of carelessness involved was similar and the offending was targeted at a very similar group of highly vulnerable victims. It has to be said, however, that mobile traders always prey on the vulnerable the most dispossessed who reside in the lower socio-economic bracket of our society.

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[3] *Commerce Commission v Smart Shop Ltd* [2016] NZDC 19377
[4] *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165
[5] *Commerce Commission v Wenatex New Zealand Ltd* DC Auckland CRI-2011-004-2567, 7 September 2011

[26] The timespan and volume of contracts in the present case is lower than in Smart Shop where a $150,000 starting point was adopted and significantly lower than in Ace Marketing where a $255,000 starting point was adopted. I agree though, its offending was still significant, spanning 11 months and 908 contracts. *Commerce Commission v Wenatex* involved fewer contracts and attracted a starting point of $77,000 although the previous maximum penalty applied in that case was $200,000.

[27] Had Appenture been sentenced under the old maximum penalty, the Commission submits, and I agree, that it would have attracted a penalty in the region of $50,000 to $60,000. So, after that analysis, the Commission submits that the appropriate starting point for the FTA charges is between $100,000 and $120,000, recognising the similarities with Smart Shop and Ace Marketing while accounting for the greater extent of the offending and high level of culpability, namely negligence, which was found in those cases.

[28] I agree with the Commission. The range that it suggests for this offending is an appropriate one. It was serious offending, for all of the reasons given. I consider that on each charge the starting point should be $100,000. Of course, when I say on each charge, the principle of totality, which will be adopted at the end of the analysis of starting points overall for all charges exercised, will require that each charge have a concurrent penalty imposed.

The starting point for the CCCFA offending

[29] Again, the most assistance comes from Commerce Commission v Budget Warehouse Ltd although Commerce Commission v Bestdeals 4 You Ltd, Commerce Commission v Zee Shop Ltd[6] and Commerce Commission v Smart Shop Ltd are also relevant. In Commerce Commission v Budget Warehouse Ltd there were nine charges under s 17 Credit Contracts and Consumer Finance Act. I repeat that that offending occurred over 11 months and affected 817 contracts. The starting point for the CCCFA offending in that case was $90,000. In Commerce Commission v Budget Warehouse Ltd the extent of disclosure failures were more significant than in the present case but

[6] *Commerce Commission v Zee Shop Limited*

Commerce Commission v Budget Warehouse Ltd gives a good view of the seriousness with which the Courts have viewed this type of offending. In Commerce Commission v Bestdeals 4 You Ltd there was s 17 Credit Contracts and Consumer Finance Act offending affecting 1307 contracts over 11 months and this offending attracted a starting point of $50,000. In Commerce Commission v Zee Shop Ltd there were three charges of breaches of s 32 Credit Contracts and Consumer Finance Act and four charges of breaches of s 17 for offending spanning seven months, affecting 2540 contracts worth $761,801. The lead offending was taken to be the s 32 charges and the Court adopted a starting point of $100,000. The s 17 disclosure charges then attracted a starting point of $60,000.

[30] *Commerce Commission v Smart Shop NZ Ltd* has already been discussed. That is eight months of offending, 2415 contracts. In that case, the Court noted that the volume of contracts increased the negligence and the widespread failures seriously undermined the protection of consumers. The starting point there was $70,000.

An analysis of the appropriate starting point for CCCFA offending in this case

[31] Appenture's s 17 offending does most closely resemble the offending in *Commerce Commission v Bestdeals 4 You Ltd,* which attracted a starting point of $50,000, in that the charge period is the same. The disclosure failures themselves are similar. *Commerce Commission v Bestdeals 4 You Ltd* involved seven s 17 failures and Appenture's offending involved six, with five of those failures being in respect of the same items. The number of contracts entered into by Appenture is slightly lower but still high. The total value of Appenture's affected contracts was greater, however.

[32] The *Commerce Commission v Zee Shop* offending is similar; greater number of contracts but actual value of contracts less. The Commerce Commission submits that Appenture and Zee Shop are overall at a very similar level. The Commission submits after this analysis that a starting point of $50,000 to $60,000 is appropriate for this offending. I agree but at the lower end of that range and I propose a starting point for this bracket of charges of $50,000.

Adjustments for totality

[33] The global starting point of $150,000 as a combination of both the CCCFA and FTA starting points must be adjusted for totality to reflect the overall gravity of the offending and culpability of the defendant. The Commission submits a global starting point of $130,000 to $160,000. I consider that an appropriate adjustment for totality should bring the global starting point down to $120,000.

Personal, aggravating and mitigating features

[34] There are no known aggravating features. The Commission acknowledges co-operation by the company, Appenture, and submits a five percent discount is appropriate to recognise that. There is nothing before me to indicate that that is either too high or too low as a discount and I am prepared, therefore, to accede to that suggestion.

Ancillary orders

[35] The Commission seeks ancillary orders, all of which are necessary. The Commission tells me that its application to continue proceedings against Appenture in liquidation was brought because of the importance of attempting to obtain refunds or credits for monies already paid to Appenture by debtors, precluded by the CCCFA. The submissions that the Commission made about these matters appear to have been accepted by Venning J in his decision to allow the prosecution to continue. The orders sought, which I am happy to make are orders under ss 93 and 94 Credit Contracts and Consumer Finance Act that the creditor either refund all costs of borrowing incurred by those who entered into contracts with Appenture during the charge period or credit the account of each of the affected debtors with all costs of borrowing paid by the defendant, whichever alternative fits the circumstances.

[36] In addition, an order, which I make, that those refunds or credits must be paid or applied prior to the sale of any of the loans captured by the charge period to any third party and an order that evidence of the refunds or credits be provided to the Commission in a report to be filed with the Court and served on the Commission within three months, as well as an order in accordance with s 99(1) that the contracts

are not to be enforced until the creditor has confirmed proper disclosure is complete under s 17.

[37] I agree with the Commission that orders under s 94 are consistent with the defendant's obligations under s 48 of the CCCFA Act and I note that similar orders were made in *Commerce Commission v Ace Marketing Ltd* and *Commerce Commission v Macful International Ltd.*[7]

The liquidation position

[38] I have to have regard to the financial capacity of the offender where considering whether to impose a fine. This company at the moment, it would appear, has no resources so it may be that the fines that I intend to impose will never be met but I have already discussed the need for general deterrence of mobile traders in this industry and consider that that is more important than the lack of financial capacity of the offender.

[39] My only concern here has been with the unpaid wages totalling $32,477.58 which the liquidators' first report refers to as two preferential claims. I am advised by the Commission that the fines that I impose in this sentencing would rank above those claims filed for wages and GST. It has concerned me that possibly innocent former employees would, if there are any funds to be realised by the liquidators, and these, it would appear, could only come from successful demands on shareholders' loan accounts or shareholders' current accounts, would go first to payment of fines, leaving aside those employees who are owed wages. But, in the end, as sorry as I might be for them, given that they may never see the wages that they are owed, I have reached the conclusion that general deterrence in this particular industry, which frankly is a scourge on the lower socio-economic bracket of this country, is more important.

[40] I have no way of knowing, nor does the commission, just exactly what the prospect of recovery from the shareholders' overdrawn current account, and from the directors' possible breaches of directors' duties, is. There is a second liquidation report but it is not at all helpful to the Court in terms of giving direction about the possibility

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[7] *Commerce Commission v Macful International Ltd*

of recovery timeframes, let alone quantum. Frankly, it may all be completely "pie in the sky" and is not something that I think I should worry about.

[41] Accordingly, from the global starting point of $120,000 there is a discount of five percent for the defendant's co-operation with the investigation, or $6000, leaving fines to be imposed of $114,000. Obviously, they will all be concurrent so the maximum fine that will be imposed is of that sum, $114,000.

[42] In addition, I make the ancillary orders which I have already referred to earlier.

[43] Because the CCCFA charges, or some of them, carry lower maximum penalties, I am going to have to divide up the charges and impose different fines on each but on the lead charges, which are misrepresentation under the FTA, the fines are of $114,000.

[44] On all the CCCFA charges the company is convicted and fined $47,500. All fines are concurrent.

[45] Ancillary orders in terms of paragraphs 12.7 and 12.8 of the Commission's memorandum of submissions on sentence.

M-E Sharp
District Court Judge