

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-004-007825
[2016] NZDC 24695**

COMMERCE COMMISSION
Prosecutor

v

HARMONEY LIMITED
Defendant

Hearing: 2 December 2016
Appearances: J Dixon and J Cairney for the Prosecutor
A Callinan for the Defendant
Judgment: 2 December 2016

NOTES OF JUDGE S A THORBURN ON SENTENCING

[1] I am dealing now with Harmony, which has pleaded guilty to six representative charges specifying the months of October, November and December 2014 and February, March and April 2015, of offending against s 11 of Fair Trading Act 1986 in that it was engaged in conduct which was liable to mislead the public as to the nature or characteristics of a service being offered, namely personal loans as specified in the charge description with particularisation on each charging document.

[2] There has been a remarkable exercise can I suggest of due diligence by both counsel for the informant and for Harmony in thoroughly perusing the circumstances of the offending, and analytically seeing where the offending sits in terms of the statutory scheme of the Fair Trading Act 1986, and in terms of maximum penalties which increased substantially in 2014, and analysing cases and then placing before the Court a strong indication as to what the appropriate outcome could be in terms of a fine.

[3] In a totality sense with these six informations both analyses have touched together in a conclusion that \$292,500 would be the final fine imposable for these six matters, taking into account a starting point, given the analysis I have referred to and appropriate and sustainable discounts.

[4] I have read all of the material and the submissions and the methodologies that have been adopted by each in coming to this point have not raised for me any particular reason in my view to disagree, critique or challenge. There are one or two fine tuning matters one might describe in which it could be thought that a different point of view or a different nuance could be cast around one dimension or another of the scenario that the Court is being asked to sentence on, but in the overall it has been a commendable exercise of responsible analysis and legal reasoning and I find myself pretty comfortable with most things which I read from both the prosecutor's point of view and the defence in respect to this matter.

[5] I could spend a lot of time going over the offending, the facts and my views this way or that, but I do not need to given that there is not a lot that I disagree with or that I felt was wrong or needed correcting, and so I commend counsel both for this. It is rather unique. Can I say this too in these preliminary remarks; inevitably this must somewhat gratifyingly reflect upon a degree of integrity which would seem therefore to reside in the ethos of Harmony as a new corporate entity. Because Harmony in pleading as it has and in instructing its solicitor to approach the matter as it has as well, has certainly accepted responsibility and thrown up no smoke screens of denial or fudging with mirrors of deflection. It has been pretty robust and so I think that is worth saying.

[6] Harmony is a new company in the market of finance and loan brokering in the community, having been incorporated in around May of 2014 and obviously embarked upon a major wave of promotion of its services into the public by a mail drop of some half a million to specifically designated individuals with a brochure or a pamphlet that was quite personal in using their names and greeting the recipient in a familial sort of sense and then making it clear, as one would quickly look at the brochure, that they had been selected and thus approved for a loan offer; in most cases I think of up to \$25,000. Embarking upon promotion and establishing itself in

that particular market it was fledgling and new and this would probably have been its first major effort and it has got it wrong.

[7] Again in respect to that, it is clear through counsel today that Harmony has been compelled very quickly to revise some of its approaches in this area, modify them and/or even cease certain things and so I think in a way the context does exist for me to view Harmony as likely to be well directed with integrity although this particular matter got it off to a very bad start.

[8] So what did Harmony do that offended the Fair Trading Act 1986? Very broadly stated and this will be quite inadequate in terms of a full understanding of all the implications – in a mail drop that invited people who were designated to go onto their website and fill out particulars of their personal circumstances on the basis that they have been “pre-approved” for a loan offer. The fact of the matter is that they had not been. The pre-approval that might ordinarily have been expected when one reads something like that was not what it seemed. They had been put through screening, through a third party agency of credit check, so that the people who received the invitation to borrow through Harmony were not people who had a record of bankruptcy or other negative credit elements. So in that sense their personal circumstances had been looked at but as far as qualifying for certainty of a loan that was ostensibly offered, they still had yet to go through a process.

[9] When I looked at this, because the representation that they were eligible having been pre-approved for a loan was not correct, I rather predictably felt there was something cynical in respect to that representation. Then of course there is the disclaimer which was on most of the pamphlets that were sent out. The disclaimer has attracted attention today in submissions because it is a disclaimer which does point out that the pre-approval which was mentioned on the front side and of first impression, to the recipient might not have meant what it said. There was no assurance that they would be getting the loan; they would still have to go through a process. The disclaimer too it seemed to me was a little cynical, because Harmony was to rely upon a disclaimer to avoid a misrepresentation and such a disclaimer as it was, seemed to me to be only there because what the representation portrayed Harmony knew would not necessarily be true. I have not expressed that very well

but this is how it seemed to me when I first looked at the material and the alleged offending.

[10] A representation that one had been pre-approved for a loan is to be expected to be taken as what it says and then in some fine print somewhere else in a document, a disclaimer that that might not be right would only be necessary if the offeror of the opportunity or the invitation knew that it might not be right.

[11] Now I have modified my stance a little in listening both to counsel, bearing in mind that Harmony was new and that perhaps it ought to have taken legal advice in a special way before it permitted its brochure to go out in this massive letter drop, and that it now realises that what the brochure contained by way of a representation of pre-approval, offended against the Fair Trading Act 1986.

[12] It probably, I now think, sits on the curve of learning that a new enterprise inevitably has to go through in order to get everything right. So whether or not that justifies some cynicism about the representation and then the curious disclaimer, I think is equivocal and I am encouraged in that because of what I have already said about Harmony's clear and ready acceptance of responsibility that it has offended.

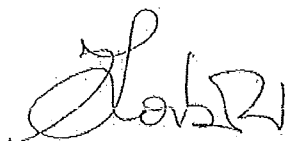
[13] Counsel have taken me through all of the relevant and major cases in respect to the nature of the offending, alongside other corporations which have been through the Court for similar charges and also in respect to the pitch of fine. Clearly because there has been a major increase in the maximum penalties under the fine structure Parliament has declared its intention that any agency which is involved in representations in trade has to be imbued with unequivocal integrity and transparency about its intention and the services that it is offering, and that is because the pearl of great price in the marketplace is that people can respond with full and fair information about services that are being offered and that there is no subterfuge or deception or elements that might mislead people so that they are left with a sense that they have not got what they bargained for. Transparency in the marketplace and the world of business equates to the establishment of integrity in business and the importance of this cannot be understated clearly in Parliament's view.

[14] It would be a commendable thing if the New Zealand business community was renowned for its integrity and for the government's insistence that business operations were of course above reproach, and increasing penalties clearly are with the intent to heighten denunciation when there is a fall off of quality of representation that results in liability to mislead in trading exercises.

[15] This brings me to my opening remarks about the way in which the parties have worked through all of this and come to unity of outcome. Clearly a full discount for plea is appropriate and clearly I have no problem with the additional 10% in respect to co-operation and remedial steps that the business has taken to avoid falling in to misfavour again.

[16] There is not anything repugnant given the right circumstances, to the Court agreeing with and embracing a joint statement from parties as to where the resting point seems to be. This has been addressed in such cases such as *Commerce Commission v New Zealand Milk Corporation*¹ and dicta to support this which appears in the informant's memorandum, paragraphs 10.4 and 10.5.

[17] To conclude I simply say having read everything and wondered about the swings this way and that which inevitably can happen when arguments and points of view are processed, I take no exception with anything. There has been a truly responsible approach I believe demonstrated in the way in which this matter has been handled and so I am perfectly comfortable with the methodology of a \$450,000 total with a 35 percent discount, resulting in a totality of \$292,000. Therefore, on each of the six informations I do impose a fine of \$48,750.



S A Thorburn
District Court Judge

¹ *Commerce Commission v New Zealand Milk Corporation* [1994] 2 NZLR 730 (HC)