IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1032
[2020] NZHC 1607

UNDER	Parts 1A, 4 and 5 of the Credit Contracts and Consumer Finance Act 2003
BETWEEN	COMMERCE COMMISSION Plaintiff
AND	FERRATUM NEW ZEALAND LIMITED Defendant

Hearing: On the papers

Counsel: S Mills QC, L Farmer and V Fowler for plaintiff
S East, T Fitzgerald and RDH Massey for defendant

Judgment: 7 July 2020

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 7 July 2020 at 4pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Meredith Connell, Auckland
Bell Gully, Auckland

Introduction

[1] Ferratum New Zealand Ltd (Ferratum) is a creditor who provided high-cost credit agreements to New Zealand borrowers under consumer credit contracts. It marketed itself as offering quick and easy loans.

[2] Ferratum was one of a number of short term lenders whose lending practices were examined during the Commerce Commission's review of the responsible lending practices of high cost short term lenders. Following an investigation to determine whether Ferratum had breached any of the lender responsibility principles in the Credit Contracts and Consumer Finance Act 2003 (CCCFA), the Commission commenced proceedings on 28 May 2018 alleging Ferratum had breached various aspects of s 9C of the CCCFA (with which outlines lender responsibility principles which all lenders must comply), by failing to make reasonable inquiries of its borrowers, failing to exercise care in its advertising and failing to assist borrowers.

[3] The Commission and Ferratum subsequently entered into discussions which culminated in the parties reaching a settlement. The settlement relevantly involved Ferratum agreeing to admit the breaches of ss 9C(2)(a)(ii), 9C(3)(a), 9C(2)(a)(i), 9C(3)(b)(i), (ii) and (iii) of the CCCFA, as pleaded in the first, second and third causes of action.

[4] Ferratum accordingly filed a statement of defence making the admissions outlined at [3] above.

[5] The Commission now applies for a declaratory order on admission of facts (pursuant to r 15.15 of the High Court Rules 2016), seeking declarations that Ferratum breached s 9C in the manner alleged (and admitted). Ferratum does not oppose relief being granted. The parties agreed that the Commission's application would be determined by me on the papers.

Background

[6] Ferratum was incorporated on 17 February 2011 and trades as "Ferratum", "Just Cash" and "Simple Cash". It is wholly owned by Ferratum Oyj, a company registered in Finland. Ferratum had no physical presence in New Zealand and instead operated an online and electronic business model. It no longer offers new loans in New Zealand.

[7] Ferratum lent borrowers between $100 and $1,000 and charged interest ranging between 52 per cent and 803 per cent per annum. Loan terms ranged between seven and 45 days. No payments were required during the loan term. At the end of the loan period, the principal and all interest was required to be paid. A significant portion of Ferratum's loans were made with existing borrowers.[1] Its method of offering "quick and easy loans" is highlighted by the allegation that during September 2015, over half of Ferratum's loans were approved within ten minutes of an application being made.

[8] Ferratum's advertising involved both direct advertising (text messages and emails) as well as public advertising (which included billboards and bus, radio, website, and Facebook advertisements). Its direct advertising to borrowers encouraged borrowers to reapply for new loans, including those with overdue payments who were encouraged to reapply for further, and sometimes larger, loans.

[9] First time borrowers made online applications through the Ferratum website. The application required borrowers to identify the requested amount and period of the loan. Between June 2015 and 15 July 2016, the online application form asked new borrowers to provide their employment type, monthly income, payday frequency, and next pay date. From approximately 15 July 2016, the application form was changed. In addition to the information requested in the earlier form, new borrowers were asked to provide their *net* monthly income, total monthly living expenses and loan purpose.

[10] Ferratum says that its loan handling staff used a number of sources of information in deciding whether or not to approve a loan application and in what

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1 For example, in September 2015 approximately 80 per cent of Ferratum's loans were provided to "repeat" borrowers, a figure which increased to 90 per cent by September 2016.

amount. However, it admits that an automated "scoring" system approved loan amounts and set the maximum amount a borrower could be loaned. To do so, the scoring system considered various criteria. Until 12 October 2016, this did not include consideration of income, expenses and loan purposes. From 13 October 2016, income and expenses were considered by the system but only where new borrowers had "bad credit".

[11] Repeat borrowers could re-apply for a loan online or via text message. When re-applying online, while the amount requested and period of the loan needed to be identified, the application form was pre-populated with the last information the borrowers had provided online. Repeat borrowers who chose to apply using the text message option simply sent a text message to Ferratum with the requested amount and term of the loan along with a PIN number. Ferratum would ask for confirmation of the acceptance of the loan and once confirmation was received, would transfer the funds into the borrowers account. The Commission's fourth amended statement of claim alleges that between June 2015 and June 2016, repeat borrowers were not required to update their financial information, whether applying via text message or online. Loans were sometimes approved without any updated information about the repeat borrower's income, expenses or loan purpose (however, sometimes the repeat borrower's income was known). Between July 2016 and February 2017, Ferratum's application process prompted, but did not require, repeat borrowers to update their financial information when applying for a new loan. Where information as to the repeat borrower's income, expenses or loan purpose was on the file from a previous loan, it was often not updated for subsequent loans.

[12] Ferratum admits that while its processes for repeat borrowers were as described above, at all times the standard terms of it loans required borrowers to provide true, correct and complete information, including at the point of applying for loans. From June 2016 onwards, it says that repeat borrowers would receive an email prior to the issue of any funds which referred customers to the standard terms and required confirmation that application details were correct and up to date.

[13] Repeat borrowers could be offered a larger loan if they had repaid a loan. The Commission says this was regardless of whether their income, expenses or other

circumstances had changed, but Ferratum denies this. The Commission further alleges that since 9 June 2015, Ferratum approved loans for repeat borrowers when the only financial information it held in relation to repeat borrowers was out of date, such as obsolete income, expenses or loan purpose information provided in relation to earlier loans. This is not admitted by Ferratum.

[14] Once a loan had been approved, Ferratum would send an email to the borrower which asked the borrower to reply, either via email or text message, confirming that the loan was sought. Once the borrower sent through confirmation, the funds would be transferred and the borrower would receive an email with loan documentation attached. This included the standard terms and conditions. Those conditions were 32 pages long and it is not in dispute that not all aspects were expressed in plain language, in a clear, concise and intelligible manner.

Pleadings

[15] The declarations sought by the Commission concern three particular paragraphs of its fourth amended statement of claim. Ferratum has formally admitted each:

> 3.1 Ferratum breached sections 9C(2)(a)(ii) and 9C(3)(a) of the CCCFA by failing to make reasonable inquiries so as to be satisfied that it was likely that credit provided under agreements met the Borrower's requirements and objectives and that Borrowers would be able to make repayments without suffering substantial hardship, in that:
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> (a) for the borrowers listed in Schedule One to the Fourth Amended Statement of Claim (Borrowers) who had previously entered into a loan agreement with Ferratum (Repeat Borrowers) between 9 June 2015 and February 2017, Ferratum failed to ensure that the Repeat Borrowers provided updated information about income, expenses and loan purpose before entering into a new loan agreement; and
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> (b) between 9 June 2015 and 14 July 2016, Ferratum failed to obtain: (i) loan purpose information from the Borrowers or (ii) sufficient information about Borrowers' income and expenses.
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> …
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> 4.1 Between 9 June 2015 and 23 October 2018, Ferratum breached the lender responsibility principles in ss 9C(2)(a)(i) and 9C(3)(b)(i) of the CCCFA, in relation to the Borrowers, by failing to exercise the care, diligence and skill of a responsible lender in advertisements for

providing credit under an agreement and failed to assist the Borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, in that:

(a) Ferratum's Direct and Public Advertising, as detailed in Schedules Two and Three, did not include a prominent risk warning within those advertisements that made it clear that high cost credit agreements should not be used for long term or regular borrowing and are suitable only to improve short term cash flows; and

(b) The Direct Advertising sent by Ferratum to Borrowers, as detailed in Schedule Two, invited the Borrowers who received them, in circumstances that included those with overdue payments on an existing Ferratum loan, to apply for further, and sometimes larger, loans; and

(c) Ferratum used text message advertising, as detailed in Schedule Two, which encouraged the Borrowers to reapply for new loans without saying that the interest rate on new loans offered may not be the same as previous loans.

…

5.1 Ferratum breached sections 9C(3)(b)(i), (9C(3)(b)(ii) and 9C(3)(b)(iii) by failing to assist Borrowers to reach an informed decision as to whether or not to enter into agreements and to be reasonable aware of the full implications of entering into those agreements, in that:

(a) Ferratum failed to ensure that all aspects of the Standard Terms provided to Borrowers were expressed in plain language in a clear, concise, and intelligible manner and were not likely to be confusing to Borrowers; and

(b) Ferratum used text message advertising, as detailed in Schedule Two, which encouraged the Borrowers to reapply for new loans without saying that the interest rate on new loans offered may not be the same as previous loans.

Jurisdiction to make the declarations sought?

[16] As counsel recognise, the CCCFA does not contain an express power for the Court to make a declaration of breach. However, as counsel agree in a joint memorandum filed on this topic, the CCCFA does not expressly *preclude* the Court from exercising its inherent jurisdiction to grant declaratory relief of the nature sought, and it does not limit enforcement only to those remedies listed in the Act. Section 2 of the Declaratory Judgments Act 1908 "makes it clear the High Court retains the

power to grant freestanding declarations".[2] If the CCCFA enforcement regime did oust the Court's inherent jurisdiction to make the declarations sought, one would expect to see clear and unambiguous language to that effect.

[17] In *Commerce Commission v Fletcher Challenge Ltd*, McGechan J considered whether the High Court had the ability to grant a declaratory judgment in light of the specific remedies contained in the Commerce Act 1986.[3] The Commerce Act, like the CCCFA, did not contain an express power for a court to make a declaration of breach. McGechan J held that such jurisdiction did exist; there were no clear words to the contrary in the Commerce Act, and "[t]he Court always will be reluctant to give up a remedy which can enable it to do justice, and will not hurry to do so in the absence of clear words".[4] McGechan J's reasoning has been adopted in later decisions of this Court.[5] The Court of Appeal also confirmed the High Court has jurisdiction to give declaratory relief in respect of breaches of the Commerce Act in *Telecom Corporation of New Zealand Ltd v Commerce Commission*, with Chambers J noting the "starting point is that the High Court has jurisdiction to grant declaratory relief…even though that remedy is mentioned nowhere in the Commerce Act".[6]

[18] For the above reasons, I am satisfied there is jurisdiction to make the declarations sought as to breaches of the CCCFA.

Should a declaration by made in this case?

[19] The parties, via a joint memorandum, submit the making of a declaration is appropriate here on the basis of the factors set out in the decision of Venning J in *Commerce Commission v ANZ Bank New Zealand Ltd*.[7] Venning J considered that a declaration as to an accepted breach of the Fair Trading Act 1986 concerned a matter

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2 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [122], fn 116.

3 *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC).

4 At 611.

5 See *Commerce Commission v Sweetline Distributors Ltd* (2000) 6 NZBLC 103,130 (HC) at [16]; and *Commerce Commission v ANZ Bank New Zealand Ltd* [2015] NZHC 1168, (2015) 14 TCLR 71 at [16].

6 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 278 at [78], [303] and [312].

7 *Commerce Commission v ANZ Bank New Zealand Ltd*, above n 5, at [18].

of public interest and a declaration would deter other entities from engaging in similar conduct in the future.[8]

[20] I agree there is a public interest in identifying the kinds of behaviour that breach the CCCFA's responsible lending principles, particularly given this case is one of the first cases brought by the Commission alleging breaches of those principles. As Venning J noted in *ANZ Bank New Zealand Ltd,* there is a "real interest" in a court declaring such conduct to be in breach of an Act rather than that breach being acknowledged and admitted in a private settlement agreement between the parties.[9] Ferratum does not oppose the declarations in the terms sought, given this formed part of the negotiated settlement reached.

[21] I also agree that declarations will both censure and deter Ferratum's admitted conduct. The declarations sought will – at least to some extent – "confirm to the public and to the commercial community generally that the Commission is willing to and will act to enforce the [CCCFA] where appropriate".[10]

[22] Further, and as observed by Venning J in *ANZ Bank New Zealand Ltd*:[11]

> …it is in the public interest that litigation be brought to a conclusion and if possible at an early date. Defendants such as the Bank who are pursued by regulatory authorities and are prepared to acknowledge culpability on the basis of a negotiated settlement rather than take matters to a hearing should be encouraged to do so. A procedure that permits for a negotiated settlement is in the interests of all parties and the community as a whole…

[23] For the reasons stated above, I am satisfied it is appropriate to make the declarations sought.

[24] In light of Ferratum's formal admissions of breaches of the CCFA, I accordingly make a declaratory order as sought at paragraphs 3.3, 4.3 and 5.2 of the fourth amended statement of claim (as set out above at [15] above) in the following terms:

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8 At [18].
9 At [18(a)].
10 At [18(d)].
11 At [19].

(a) a declaration that Ferratum's conduct in paragraph 3.1 of the claim has breached ss 9C(2)(a)(ii) and 9C(3)(a) of the CCCFA;

(b) a declaration that Ferratum's conduct in paragraph 4.1 of the claim has breached s 9C(2)(a)(i) and s 9C(3)(b)(i) of the CCCFA; and

(c) a declaration that Ferratum's conduct in paragraph 5.1 of the claim has breached ss 9C(3)(b)(i), (ii) and (iii) of the CCCFA.

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Fitzgerald J