

**IN THE DISTRICT COURT
AT PAPA KURA**

**CRI-2017-055-002537
[2018] NZDC 14788**

COMMERCE COMMISSION
Prosecutor

v

VEHICLE LOGISTICS LIMITED
Defendant

Hearing: 18 July 2018

Appearances: J Barry for the Prosecutor
R Coltman and E Boshier for the Defendant

Judgment: 18 July 2018

NOTES OF JUDGE G T WINTER ON SENTENCING

[1] *The defendant company has been before the Court on prosecutions by the Commerce Commission since August of last year. It pleaded guilty early to the various charges I am about to detail. Sentencing has been delayed due to unavailability of time for sentencing in the South Auckland Courts.*

[2] *Usually on a matter of this nature I would reserve the sentencing decision. However, because of the delay in getting the sentencing to this point, I believe it is more important that the defendant company knows the result of the Court's sentencing. So, rather than delay that process further I intend to deliver an oral sentencing judgment. As I am doing so in a sentencing list that has nine category 3 matters to deal with this will not be a perfect judgment and I accordingly reserve the right to perfect it, once it has been transcribed for me (the sentencing notes follow in respect of the Commerce Commission and Vehicle Logistics Limited CRI-2017-055-001545).*

[3] To be productive and comfortable in our lives, we must routinely place our trust in people for the online services or goods those people provide. For E-commerce to flourish; consumers must not be fearful that they will be cheated, defrauded or receive poor quality goods. In the interests of fairness and honest dealing, consumer rights to disclosure of information have developed into law obliging all rights and responsibilities between a shopkeeper and a customer must be made clear and conspicuous; traders cannot avoid that obligation nor be lazy about it and, to encourage compliance with the law and deter avoidance, the penalties are harsh.

[4] Vehicle Logistics Limited offered to sell 381 vehicles on Trade Me over a 19-month period. It had offered the vehicles for sale on an “as is, where is” basis and/or represented that no guarantee or warranty applied. Those statements were a false or misleading representation to any purchaser that the rights and remedies offered by Consumer Guarantees Act 1993 did not apply. The company pleaded guilty, early, to five representative charges under s 13(i) Fair Trading Act 1986. That charge has a maximum penalty of a \$600,000 fine.

[5] In these online advertisements, the defendant was also required to clearly and prominently display or provide access to a Consumer Information Notice. On 122 occasions, it did not do so. A CIN provides the consumer with essential information about the used vehicle for sale. This infringement of s 28(1) of the Fair Trading Act carries with it a fine of up to \$30,000. The defendant pleaded guilty, early, to three representative infringements.

[6] The statutory context in which this offending occurred, underpinned by the policy I have just described, focuses on the obligation upon traders using the internet to ensure their compliance with the disclosure of information.

[7] The sale of used motor vehicles is governed by Consumer Information Standards (Used Motor Vehicles) Regulations 2008. Section 13(i) of the Fair-Trading Act prohibits anyone from making false or misleading representations about the supply of goods or services. It expressly prohibits representations that the guarantees, rights and remedies offered by the Consumer Guarantees Act do not apply to any transaction. Representing that vehicles are offered for sale on an “as is, where is”

basis and/or that no guarantee or warranty is available amounts to an attempt to contract out of the Act regarding those guarantees, rights and remedies.

[8] The regulations also require that, for the purposes of compliance with the Fair Trading Act, a CIN or access to a CIN relating to a used motor vehicle offered for online sale must be clearly and prominently displayed. Frequently the information contained in a CIN (which on its front page has details about the vehicle for sale such as its make / model / year, whether there is any security interest or other charges associated with it and that the vehicle has a current Warrant of Fitness) is accompanied on the back of the Notice with consumer information including reference to the intended purchaser's consumer rights under the Consumer Guarantees and Fair-Trading Acts.

[9] The aggravating and mitigating factors of this offending have been the subject of concentrated effort in both the written submissions and the oral remarks made to me in Court this morning. The Commerce Commission adopts the position that this was flagrant, wilful and deliberate commercial offending that needs to be treated with deterrent penalties that reflect that primary aggravating feature. Whereas the defendant rather portrays its position as careless or reckless.

[10] The relevant factors provided by Sentencing Act 2002 are the need to hold the defendant to account and make it responsible for this offending, but primarily to deter this company and any others who seek to avoid their obligations in the consumer rights space. Those purposes from the Sentencing Act 2002 must be accompanied by two further principles; the first is to respect the principle of totality and the second is to impose a penalty that respects the least restrictive option of sentence available upon the defendant.

[11] These features were reflected in the High Court's decision of *Commerce Commission v LD Nathan & Co Ltd* [1992] NZLR 160¹, a decision that has been the subject of much comment since. However, the principles have been maintained. The case, having first described the legislative objectives regarding the need to protect the

¹ *Commerce Commission v LD Nathan & Co Ltd* [1992] NZLR 160.

interests of consumers by prohibiting unfair conduct in trade, then directs the Court's attention to several sentencing considerations. I comment on these only briefly.

[12] Firstly, whether the failures to comply were important. In my view, the importance of these failures is clearly displayed by one practical analogy. If a motor vehicle dealer was selling a cheap second-hand car off its yard, it would be unlawful for it to avoid the obligations for disclosure and attempt to persuade the purchaser that the guarantees, rights and remedies offered by the Consumer Guarantees Act did not apply. There is absolutely no difference between that physical on-the-ground car sale and the advertisements accompanying E-commerce for sale of the same vehicle. Any attempt to contract out of consumer rights is an extremely important and serious offence as it strikes not only at the heart of the individual contract involved but moreover in the internet space risks a breach of trust that will seriously degrade the opportunity for consumers to use E-commerce in their daily lives.

[13] In terms of the degree of culpability; as the facts have developed, it is clear to me that the defendant company cheaply traded cars to support newer vehicle sales. No doubt, there being little profit in selling those cheaply-traded cars, it sought out a way to find as broad a market as possible to attract buyers; for that purpose, it used the internet. Whereas it would never countenance contracting out of consumer rights for sales "off-the-yard", it attempted to do so on the internet. I am not satisfied that it did so with the high degree of culpability portrayed by the prosecution. Rather I find that in seeking to quickly dispose of these cheaply-traded cars by internet sales the company then noted the constraints of the advertisement space available on Internet listings and was then lazy if not wilfully blind about its obligations under the Acts.

[14] However, I note that as early as August 2016 the company had been provided with a factsheet entitled, "*Buying and selling online*" from the Commerce Commission. This contained information about how traders could sell used motor vehicles online including the provision of rights to purchasers under the Consumer Guarantees Act. In addition, over the 19 months, I am satisfied that the company received advice from Trade Me on the need to clearly and prominently display Consumer Information Notices in their internet advertisements.

[15] The company seeks to mitigate its failure to include CIN's by saying that the notices were in any event attached to the individual vehicles for sale and would during any business deal be made available to the purchaser to see and sign when the sale was concluded on the yard. That submission misses the entire point about the company's obligations for disclosure under the Act and Regulations. I am satisfied that, having been in business for 30 years, the company, perhaps out of a need to quickly dispose of these cheaply-traded cars, was wilfully blind about its obligations when it used Trade Me to attract purchasers to buy its cars.

[16] The Fair-Trading Act prohibits anyone from making false or misleading representations about the supply of goods or services. It expressly prohibits representations that the guarantees, rights and remedies offered by the Consumer Guarantees Act do not apply to any transaction. There can be no greater departure from that truth than to say that the consumer guarantees provided to purchasers did not apply to the sale of a vehicle. That, by inference, is what the defendant was saying when it attempted to contract out of those provisions by selling the vehicle in an "as is where is, without guarantee" manner.

[17] In terms of the extent of the offending; in total, there were 381 vehicles listed for sale on an "as is" basis and 122 of those did not prominently display nor provide reasonable access to CINs. It is fortunate that there is no evidence of any resulting prejudice to individual consumers; however, the prejudice is of a more general nature concerning the need to encourage compliance with the law to ensure that traders do not avoid the protections given to consumers under the Act.

[18] The Commission made some effort to persuade me that there was an enhanced need for deterrent penalties because of the prevalence of this type of offending within the motor vehicle dealers community. However, as discussed with counsel during his submissions there is absolutely no evidence that is so and I put that matter to one side.

[19] Both counsel have commented on analogous cases to derive a starting point for penalty. Counsel referred to the so-called mobile-shop cases of *Commerce*

*Commission v Ace Marketing Ltd*² and *Smart Shop Ltd*³ and *Budget Warehouse Ltd*⁴. Those cases are best explained by my brother Judge Ronayne in the *Smart Shop Ltd* case where at paragraph 36 His Honour described the offending as being the misleading representation about the debtor's rights under Credit Contracts and Consumer Finance Acts such that purchasers using credit were unlikely to exercise their rights accorded to them because the express terms of the credit contract did not appear to allow them to do so.

[20] There are no tariff decisions in respect of the charges that this defendant faces. I find some guidance by way of the application of principle from the mobile shop cases. However, as with all cases involving comparison, there is a great degree of fragility at the margins of factual difference. That said, the common principle that traders cannot avoid their obligations to disclose consumer rights is underscored by each of those cases, and the more commercial and deliberate the offending then the higher the starting point will be.

[21] The starting points for the *Ace Marketing*, *Smart Shop* and *Budget Warehouse* cases were fixed in a context that recognised the primary principle of deterrence in response to prevalent mobile-shop offending. In my mind, there is a balance to be achieved in the comparison. Whereas the intense offending in those cases involved a much greater degree of culpability; regard should be had, in this case, to the fact that the purchase of used motor vehicles inevitably involves a greater outlay for consumers than is the case in the lower value purchase of goods for credit in the mobile-shop prosecutions.

[22] I draw then from the comment contained in *Commerce Commission v Sunrise Motor Group*⁵ at paragraph 9 where my brother Judge Mill observed that the nature of cars was such that they are often not sold at large prices, but the very fact no doubt means that the people buying those cheap cars had little money to spend in this

² *Commerce Commission v Ace Marketing Ltd* [2016] NZDC 19165.

³ *R v SMART SHOP LIMITED* [2016] NZDC 19377.

⁴ *Commerce Commission v Budget Warehouse Limited* [2017] NZDC 14223.

⁵ *Commerce Commission v Sunrise Motor Group Ltd* [2010] NZDC.

way and were affected personally to a significant degree. Moreover, as anyone living in Auckland will know, the need for a reliable motor vehicle to commute on the largely blocked motorways in the city must mean that motor vehicle dealers should know that any guarantees designed to afford the consumer the protection of reliable motoring is indeed very important.

[23] The other balance that must be given to the assessment on a starting point is that while I do accept that the company was lazy in terms of its initial statutory obligations for trading on the internet, it also did not heed the warnings given to it by Trade Me over the need to prominently display CINs on the advertisements for sale of its vehicles.

[24] I dwell briefly on the mitigating features available in this sentencing. I immediately acknowledge that, with 30 years in the trade and no previous convictions whatsoever, the defendant company could be described as a good corporate citizen. No doubt that is also reflected in the fact that at the early stages of the Commerce Commission investigation, the company co-operated fully with the Commission's inquiry.

[25] In summary then, to my mind this offending was lazy to wilfully blind but does not deserve a starting point in scope or scale approaching that achieved against the offenders in the mobile-shop cases. I am satisfied that as against the \$600,000 maximum available penalty in respect of charges under s 13(i) of the Fair Trading Act 1986, a starting point of \$100,000 is an appropriate penalty.

[26] In terms of the Consumer Information Notices and the infringement taken under s 28 of the Act I see this as again a lazy avoidance of an obligation, aggravated by the warning given to the company about the need to prominently display the CIN in its advertisements. However, at the point of purchase the consumer would have had to receive the so-called window notice and sign that document before the purchase was complete.

[27] I am satisfied that as against the maximum available fine of \$30,000; the starting point should be \$10,000, taking the aggravated total to \$110,000. I note in

that regard, in relation to the s 28 starting point, that if I was solely dealing with that matter on its own (there being three representative infringements) then I would have considered a starting point of some \$20,000 as appropriate, but I have adjusted it down to \$10,000 to respect the principles of totality.

[28] From that \$110,000 I am satisfied that this good corporate citizen is entitled to a deduction, for its character, of \$10,000; taking the aggravated total to \$100,000 and a further 25 percent *Hessell*⁶ discount for its very early plea and co-operation. The end fine I have set it on is therefore some \$75,000.

[29] There being no application for costs, the defendant company is fined a total of \$75,000 against the lead offences.

Judge G T Winter
District Court Judge

Date of authentication: 16/08/2018
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

⁶ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.