CAPTION SUMMARY

COMMERCE COMMISSION	v	Budget Loans Limited

CHARGE(S):	Act/Section:	Section 13(i) Fair Trading Act 1986 (x 102)
	Penalty:	$200,000 For each charge

SUMMARY OF FACTS

The charges before the Court are all pursuant to section 13(i) of the Fair Trading Act 1986 ("the FTA"). All charges involve representations made by Budget Loans Limited ("BLL") to debtors under consumer credit contracts of which it was the creditor or became the creditor through the purchase of the loan ledger of failed finance company National Finance 2000 Limited (in receivership) ("NFL") (as detailed below). The charges relate to rights that BLL represented to debtors the credit contracts gave it either over the security to which the credit contract related or as to BLL's right to charge default interest and letter fees. The representations made by BLL involve a number of different pieces of legislation. The relevant provisions of each of the applicable Acts are broadly outlined below.

Credit Contracts and Consumer Finance Act 2003

The Credit Contracts and Consumer Finance Act 2003 ("CCCF Act") came fully into force on 1 April 2005. The Commerce Commission ("the Commission") is responsible for promoting compliance with and enforcing the CCCF Act.

Pursuant to section 3 of the CCCF Act, one of the primary objectives is to "provide for the disclosure of adequate information to consumers under consumer credit contracts... to enable consumers to distinguish between competing credit arrangements... and to enable consumers to become informed of the terms of consumer credit contracts... before they become irrevocably committed to them..."

BLL is a creditor in terms of section 2 of the CCCF Act as it provides or may provide credit under a credit contract. A credit contract under the Act is defined as a contract under which credit is or may be provided.

Key information which must be disclosed to a debtor is set out in schedule 1 of the CCCF Act. This disclosure includes any credit fees that are or may become payable under the agreement. The interest payable under the credit contract must also be disclosed (including default interest).

Section 17 of the CCCF Act provides that every creditor under a consumer credit contract must ensure that disclosure of as much of the key information as set out in schedule 1 as is applicable to the contract is made to every debtor under the contract before the contract is made or within 5 working days of the day on which the contract is made.

Under section 32 of the CCCF Act, a creditor must ensure that disclosure contains the information required by the Act and is not likely to deceive or mislead a reasonable person with regard to any particular that is material to the consumer credit contract.

Section 99 of the CCCF Act provides that if disclosure is required under section 17 of the Act, a creditor may not enforce the contract or enforce any right to recover property to which the contract relates before that disclosure is made.

Section 99 of the CCCF Act clearly anticipates that a creditor can correct initial disclosure irrespective of the timeframes set out in section 17. Accordingly, a failure to disclose under section 17 does not render the contract unenforceable but does mean that the contract is unenforceable until the error in initial disclosure is corrected.

The Credit (Repossession) Act 1997

The Credit (Repossession) Act 1997 ("the CRA") was enacted to set out the rules that apply when a creditor takes possession of consumer goods under a security agreement to which the CRA applies. Provided a creditor follows the rules in Part 2 of the CRA, they can take possession of consumer goods where the debtor is in default under a security agreement. "Consumer goods" is defined (s2 of the CRA) to mean goods that are used or acquired for use for personal, domestic or household purposes.

The credit contracts in this case are also security agreements as defined by the CRA.

Part 4 of the CRA sets out the rules that apply after possession of the goods is taken. Section 35 of the CRA is in Part 4 of the Act and provides as follows:

35 Limit on creditor's right to recover from debtor

If the net proceeds of sale are less than the amount required to settle the agreement under section 31 as at the date of the sale, the creditor is not entitled to recover more than the balance left after deducting those proceeds from that amount (whether under a judgment or otherwise).

The effect of section 35 of the CRA in relation to the loan contracts the subject of these charges is to freeze the amount owed by the debtor at the balance that remains after the security has been sold. If the creditor recovers less than the balance owing as at the date of sale, the remainder can be recovered (including by way of judgment), but no more. In other words, interest does not accrue on the outstanding balance.

Part 5 of the CRA deals with miscellaneous provisions. Section 42 of the CRA is in Part 5 and relevantly provides:

42 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any security agreement.

(2) ..

(3) Every creditor commits an offence against section 13(i) of the Fair Trading Act 1986 who purports to contract out of any provision of this Act.

Section 13(i) of the FTA prohibits traders in connection with the supply of services (including the lending of money) from making a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, **right**, or remedy.

The Personal Property Securities Act 1999

The Personal Property Securities Act 1999 ("the PPSA") governs the enforceability of security interests in personal property. Part 4 of the Act deals with attachment of security interests in particular kinds of personal property. Section 44 is in Part 4 of the Act and deals with attachment of security interests in after acquired property.

Section 44 provides:

44 Attachment of security interests in after-acquired property

A security interest in after-acquired property attaches without specific appropriation by the debtor unless the after-acquired property is consumer goods where-

(a) Those consumer goods are not an accession or do not replace the collateral described in the security agreement; or

(b) The security interest in those consumer goods is not a purchase money interest.

The Defendant

BLL is a limited liability company which was incorporated in August 2004.

BLL is a wholly owned subsidiary of Cynotech Finance Group Limited which is in turn owned by Cynotech Holdings Limited ("Cynotech"). Cynotech is a publicly listed company which owns a number of subsidiaries involved in finance (commercial and consumer), food manufacturing and corporate advisory services.

On 6 October 2006, Cynotech acquired the loan book of NFL for $7.7million and arranged to have the loans assigned to BLL in December 2006. The price of the loan book reflected that many of the loans were in arrears or non-paying.

NFL letter fees

In endeavouring to get loans repaid, BLL contacted debtors and offered to refinance their NFL loans with BLL. In order to initiate contact with the debtors, BLL sent out "Welcome Letters" to debtors advising that they had acquired the NFL loan book and inviting the debtors to contact BLL about setting up a new loan agreement with them. A copy of the "Welcome Letter" is **attached** marked **"A"**. BLL then charged $15.00 per welcome letter to the debtors NFL Loan on either 13 or 17 October 2006.

Debtors who made contact with BLL and agreed to sign new contracts with them were subsequently sent Disclosure Statements by BLL for the new contracts. Those statements gave the initial unpaid balance of the loan, which was the amount required for BLL to settle each debtor's contract with NFL plus any additional fees incurred through the set up of the new contract with BLL. Included in the initial unpaid balance of the loan in the disclosure statement was the cost of the $15.00 letter fee.

The inclusion of the letter fee in the initial unpaid balance was a representation by BLL to the debtor that it was entitled to charge the $15.00 fee, when in fact BLL was not authorised to do so, either by the original NFL contract or through the new BLL contract. Neither contract disclosed the charging of a letter fee, or the amount of any such fee. In practice, NFL did not charge letter fees. The failure to disclose the letter fee and its amount to the debtor meant that BLL had no authorisation from the debtor for the charging of the fee and had misrepresented the right to do so by including it in the initial unpaid balance.

There are seven informations relating to the charging of the NFL letter fees. The details of each information are listed in the Schedule **attached** marked **"B"**.

Contracting out of the Credit Repossession Act

Some debtors on the BLL loan book had entered consumer credit contracts with BLL under which they granted BLL a security interest in consumer goods, most commonly their motor vehicle.

Clause 14 of their contracts with BLL stated as follows:

> 14. If you fail to pay any instalment or other money (including any amount for which payment has been accelerated) due on the due date or on demand as the case may be you shall pay to the lender default interest on the unpaid daily balance from the due date of such instalment or from the date of receipt or deemed receipt of demand for the money as the case may be until actual payment of the instalment of amount. All default interest shall continue to be payable after and notwithstanding judgment against you.

Clause 14 of the BLL contracts therefore purported to allow the charging of penalty interest on the unpaid balance until the full settlement of the loan contract and notwithstanding judgment against the debtor. In respect of the loans the subject of these charges, BLL accepts that clause 14 was contrary to section 35 of the CRA and also purported to contract out of the CRA (in breach of section 13(i) of the FTA).

There are 12 charges in relation to Clause 14 of the BLL contracts. The details of each affected debtor are provided in the schedule **attached** marked **"B"**.

Representations as to right to recover default interest made in settlement quotes, pre and post possession notices and letters to debtors

When providing settlement quotes to debtors post the sale of the security the subject of the credit contract, BLL also represented that it was entitled to default interest on the unpaid balance of the loan after sale of the security. The same representations were made in pre and post possession notices and in letters sent to debtors. These representations were false and/or misleading for the same reasons as set out above. Examples of these representations are **attached** marked **"C"**. They breach s35 of the CRA and in making them BLL misrepresented their rights in breach of s13(i) of the FTA.

There are thirteen charges in relation to representations made in pre and post possession notices and letters to debtors. The details of each charge are provided in the schedule **attached** marked **"B"**.

PPSA representations

BLL registered a security interest in collateral specifically itemised in the credit contracts (most commonly a motor vehicle).

In addition to requiring a security interest in specific collateral, BLL often required debtors to provide collateral in the form of a security interest described in the credit contracts as "all present and after acquired personal property" ("APAAP clause").

BLL subsequently told debtor they had a right to take **all** of their personal belongings as a result of the debtors default under the credit contracts. This misrepresented BLL's rights under the PPSA.

The security granted by the APAAP clause only attached to consumer goods with specific appropriation by the debtor pursuant to section 44 of the PPSA, which requires an action by the debtor specifically identifying the after acquired goods that become subject to the credit contract. The debtors in this case did not provide any such specific appropriation. BLL did not seek to specifically identify the after acquired goods that were subject to the credit contract. Instead, they advised the debtor they had rights over all of their personal belongings, which misrepresented the effect of the security interest granted under section 44 of the PPSA in breach of section 13(i) of the FTA.

There are two charges in relation to representations made about the APAAP clause. The details of these are listed in the **schedule attached** marked **"B"**. In each case BLL told the debtors they had a right to take **all** of their personal belongings. The representations misrepresented BLL's rights under the CRA in breach of s13(i) of the FTA.

The Defendant's explanation

BLL has fully co-operated with the Commission during its investigation. It provided a number of responses during the course of the investigation in answer to questions asked by the Commission, and its responses to the issues the subject of the charges can be summarised as follows:

- NFL Letter Fees – BLL confirmed as manager of the NFL contracts it applied the letter fees to those loans. BLL now accepts that it was not authorised to charge the fee.
- Charging of default interest post the sale of the security – BLL confirmed it did continue to charge recovery costs, fees and default interest after the sale of the itemised security and stated that it had acted on legal advice that it was entitled to do so.
- Representations about the APAAP clause – again BLL accepted they represented a right to take all of a debtor's belongings under the APAAP clause and stated that it had acted on legal advice that it was entitled to do so.
- The total amount of letter fees and unauthorised interest and fees charged by BLL was **$500,386.01**. Of that total, BLL has made reversals and undertaken to make further reversals as set out below.
- BLL has identified all NFL contracts where it has charged letter fees and where the debtor has a current loan account with BLL it has reversed those fees. To date it has reversed letter fees in the amount of **$30,917.85**. Where debtors have repaid their loans in full and paid the letter fees, BLL has undertaken to refund those debtors.
- BLL has identified all contracts where it has charged interest and fees to debtors after the date an item of security interest has been repossessed and sold. Where the debtor has a current loan account with BLL it has reversed those charges. To date it has reversed interest and fees in the amount of **$382,954.74**. Where debtors have repaid their loans in full and paid the letter fees, BLL has undertaken to refund those debtors.
- The defendant has undertaken to refund a further **$86,513.42**, which relates to both letter fees and unauthorised interest and fee after an item of security has been repossessed and sold.

The defendant has not previously appeared.

"A"

(C15)

Budget Loans
Straight talking finance

PO Box 9846, Newmarket
Auckland, New Zealand

Phone: 09-520-6066
Fax: 09-520-6068
Email: credit@cynotech.co.nz

Tuesday, 10th October, 2006

NATIONAL FINANCE 2000 LIMITED

Budget Loans now own the Loan you have with NATIONAL FINANCE 2000 LIMITED.

If you are paying your loan by Automatic payment, deposit card or by Internet banking, you do not need to make any changes at all.

If you were paying your loan by cash at the office of National Finance you will now need to come to the **4th Floor, National Bank Building, 187 Broadway, Newmarket** or we can send you a deposit booklet or card so that you can pay cash at any branch of the BNZ. Please call us if you want a deposit booklet or deposit card.

If for whatever reason you wish to change the way you are making your payments, please ring us first on 09-520-6066.

Please continue to make your payments on time and in the usual way. If you want any information at all please ring us on 09-520-6066.

By law we are required to provide you with a notice of assignment. This is the notice that gives us the legal right and entitlement to all the loans of National Finance 2000 Limited. We include that notice here for you.

If you require any further information, help, or want to borrow some more money please ring us on 09-520-6066.
We may even be able to refinance your existing loan with lower payments.

Notice of Assignment
National Finance 2000 Limited (in receivership) (National Finance) gives you notice that by Deed of Assignment of Debt dated October 6th, 2006 National Finance has disposed of its interest under the loan contract between you and National Finance to Wairahi Finance Limited, who have contracted Budget Loans Ltd as their manager and agent, both of whose addresses are Level 4, National Bank Building, 187 Broadway, Newmarket, Auckland, and that all payments of principal, interest or other money due after this date are to continue to be made to the same Bank account at the BNZ as per previous arrangements, or such alternate account as you may be instructed from time to time.

Dated: 6th October 2006

For National Finance 2000 Limited (in receivership)

Budget Loans Limited

BLL-C015

"B"

Schedule of Informations

Welcome Letters	
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Clause 14, BLL Contracts	
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Pre and Post Possession Notices	
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7686	
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APAAP	
7621	
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"C"

Budget Loans
Straight talking finance

PO Box 9846, Newmarket
Auckland, New Zealand
Phone: 64-9-520 6066
Fax: 64-9-520 6068
Email: finance@budgetloans.co.nz
www.budgetloans.co.nz

Fax To: Vanburwray – Chartered Accountants Ltd
Fax No: 06 758 6691

Attention: John Angell

Re: Settlement Figure - Mrs [redacted] - Contract 7417

Our apologies, the correct settlement figure is stated below:

The settlement figure for the above debt is as follows;

Settlement Date	30 March 2007
Total Payable as at Settlement Date	$25,805.06

If settlement does not occur on or before the Settlement Date you will need to contact us to confirm a new settlement amount. Settlement will be considered complete upon confirmation to us of cleared and immediately available funds being deposited into our account (bank cheques and solicitor trust cheques are not automatically cleared funds). Further penalty interest will continue until that time.

Our account details for payment are;

Bank	ASB Bank
Branch	Eastridge
Account Name	Budget Loans Ltd
Account Number	12-3073-0157993-00
Deposit Reference	7417

Upon confirmation of cleared funds in our account, we undertake to attend to the removal of all securities registered in regards to this loan agreement.

If you have any queries please don't hesitate to contact us.

Yours faithfully

Budget Loans Ltd

"C"

Budget Loans
Straight talking finance

PO Box 9846, Newmarket
Auckland, New Zealand
Phone: 64-9-520 6066
Fax: 64-9-520 6068
Email: finance@budgetloans.co.nz
www.budgetloans.co.nz

28 August 2007

[redacted]
HUNTLY

Re: Settlement Figure - Miss [redacted] - Contract 8323

The settlement figure for the above debt is as follows;

Settlement Valid To	07 September 2007
Total Payable as at Settlement Date	$6,633.00

If settlement does not occur on or before the Settlement Date you will need to contact us to confirm a new settlement amount. Settlement will be considered complete upon confirmation to us of cleared and immediately available funds being deposited into our account (bank cheques and solicitor trust cheques are not automatically cleared funds). Further interest will continue until that time.

Our account details for payment are;

Bank	ASB Bank
Branch	Eastridge
Account Name	Budget Loans Ltd
Account Number	12-3073-0157993-00
Deposit Reference	8323

Upon confirmation of cleared funds in our account, we undertake to attend to the removal of all securities registered in regards to this loan agreement.

If you have any queries please don't hesitate to contact us.

Yours faithfully

Budget Loans Ltd

"C"

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POST-POSSESSION NOTICE
Credit (Repossession) Act 1997, Section 21

Tuesday, 17 March 2009

[redacted],
Otara

LOAN No. 8433

This is about your Honda CRV 1995 [redacted] Silver, which is subject to a credit agreement with BUDGET LOANS LIMITED. The agreement is dated 26/02/2007.

This is to notify you that-
The Honda CRV 1995 [redacted] Silver was repossessed on 07/12/07.
You will be entitled to get it back if, within a period of 15 days, you EITHER reinstate OR settle the agreement.

"Reinstate" means to resume the agreement by paying the arrears of instalments owing (plus costs) and remedying other breaches of the agreement.
"Settle" means to completely pay off, and finish, the agreement

To reinstate the agreement, you must pay the amount required to reinstate the agreement.
The Creditor's estimate of the amount you must pay to reinstate the agreement is:

Arrears of instalments (including interest and other charges)	$395.52
Repossession costs	$270.00
Cost of valuation and preparing goods for sale	$150.00
Cost of Redelivery	$100.00
Amount required (excluding storage)	($)916.52
Plus Cost of holding/storage (per week)	($)47.25

To settle the agreement, you must pay the amount required to settle the agreement. The creditor's estimate of the amount required to settle the agreement is:

Current Balance outstanding	($)17,341.90
Repossession costs	($)270.00
Cost of valuation and preparing goods for sale	($)150.00
Cost of Redelivery	($)100.00
Settlement fees	($)50.00
Amount required (excluding storage)	($)17,911.90
Plus Cost of holding/storage (per week)	($)47.25

IF YOU DON'T REINSTATE OR SETTLE THE AGREEMENT-
The creditor is required to sell the goods:
You will be liable for the creditor's loss unless the net proceeds of the sale of the goods is enough to cover your liability.
You will be entitled to a refund if the net proceeds of the sale of the goods is more than enough to cover your liability.

The creditor's estimate of the value of the goods repossessed is unknown

NOTES

1. You have the right to apply to a Court for relief if a creditor has served a pre-possession notice on you or has taken possession of goods in contravention of the Act. In most cases, the application can be made to a Disputes Tribunal.

2. You may, at any time until the creditor sell or agrees to sell the goods, reinstate the agreement or introduce a cash buyer who will pay not less than the creditor's estimate of the value of the goods
Within a period of 15 days after service of this notice, the vendor may not dispose of the goods without your written consent.

3. You may, at any time before the creditor sell or agrees to sell the goods, settle the agreement.

4. The creditor is not obliged to sell the goods by public auction or public tender, but if the creditor does, you are entitled to reasonable notice of-
The time and place of any proposed offering of the goods for sale by public auction, and of the existence and amount of any reserve price:
Any proposed offering of the goods for sale by public tender. This does not apply if the goods are perishable or threaten to decline speedily in value.

5. You are entitled, at any time after the creditor takes possession of the goods but before the creditor sells or agrees to sell the goods, to obtain a valuation of the goods at your expense. The creditor must give you or your valuer access to the goods to enable the valuation to be completed.

6. At any offering of the goods for sale by public auction or public tender, you are entitled to bid or tender for them.

7. If the creditor does not sell the goods within 3 months of taking possession, you may-
Apply to the Court for an order directing the sale of the goods; or
Require the creditor to put them up for sale by public auction without reserve.

8. Within 10 days after the sale of the goods, whether by auction or otherwise, the creditor is required to give you a statement of account which will show whether you are entitled to a refund or whether you are still indebted to the creditor in respect of the credit agreement.

9. If you are entitled to a refund and the creditor does not pay it to you, you must, if you wish to recover, sue the creditor within 6 months after you are given the statement of account.

DO NOT DELAY

Action to enforce your rights should be taken at once. At the end of 15 DAYS after the service of this notice, the creditor is free to sell the goods, if you have notice, the creditor is free to sell the goods, if you have not reinstated or settled the agreement or introduced a cash buyer who will pay not less that the creditor's estimate of the value of the goods.

IF YOU ARE IN DOUBT ABOUT WHAT YOU SHOULD DO, YOU SHOULD SEEK ADVICE AT ONCE.

(This Act is administered in the Ministry of Consumer Affairs)

Budget Loans
Straight talking finance

PO Box 9846, Newmarket
Auckland, New Zealand
Phone: 64-9-520 6066
Fax: 64-9-520 6068
Email: credit@budgetloans.co.nz
www.budgetloans.co.nz

POST-POSSESSION NOTICE
Credit (Repossession) Act 1997, Section 21

Tuesday, 17 March 2009

[redacted]
Kawerau

LOAN No. 8006

This is about your

1996 Nissan Primera [redacted]
Panasonic 29 inch TV& Cabinett (no remote)
Microwave model number MW17A
Solid wood dining table with 5 blue cushioned chairs
L G double door fridge freezer with water feature on door
1 mat red/blue
Millennium computer hardrive, key board, mouse & moniter
Free standing fan
Panasonic DVD player 4 speakers amp & sub
Telescope stand & lenses
Pasta maker
Polaris wall clock
Transonic CD Player
Pioneer sterao & Panasonic speakers
Crock Pot
Pop corn maker
Dyson vacume cleaner

which is subject to a credit agreement with BUDGET LOANS LIMITED. The agreement is dated 14/11/2006.

This is to notify you that-
The above items were repossessed on 22/08/07.
You will be entitled to get it back if, within a period of 15 days, you EITHER reinstate OR settle the agreement.

"Reinstate" means to resume the agreement by paying the arrears of installments owing (plus costs) and remedying other breaches of the agreement.
"Settle" means to completely pay off, and finish, the agreement

To reinstate the agreement, you must pay the amount required to reinstate the agreement. The Creditor's estimate of the amount you must pay to reinstate the agreement is:

Arrears of instalments (including interest and other charges)	$4,194.50
Repossession costs	$1,113.75
Cost of valuation and preparing goods for sale	$150.00
Cost of Redelivery	$100.00
Amount required (excluding storage)	($)5,558.25
Plus Cost of holding/storage (per week)	($)157.50

To settle the agreement, you must pay the amount required to settle the agreement. The creditor's estimate of the amount required to settle the agreement is:

Current Balance outstanding	($)23,676.21
Repossession costs	($)1,113.75
Cost of valuation and preparing goods for sale	($)150.00
Cost of Redelivery	($)100.00
Settlement fees	($)50.00
Amount required (excluding storage)	($)25,089.96
Plus Cost of holding/storage (per week)	($)157.50

IF YOU DON'T REINSTATE OR SETTLE THE AGREEMENT-
The creditor is required to sell the goods:
You will be liable for the creditor's loss unless the net proceeds of the sale of the goods is enough to cover your liability.
You will be entitled to a refund if the net proceeds of the sale of the goods is more than enough to cover your liability.

The creditor's estimate of the value of the goods repossessed is unknown

NOTES

1. You have the right to apply to a Court for relief if a creditor has served a pre-possession notice on you or has taken possession of goods in contravention of the Act. In most cases, the application can be made to a Disputes Tribunal.

2. You may, at any time until the creditor sell or agrees to sell the goods, reinstate the agreement or introduce a cash buyer who will pay not less than the creditor's estimate of the value of the goods
Within a period of 15 days after service of this notice, the vendor may not dispose of the goods without your written consent.

3. You may, at any time before the creditor sell or agrees to sell the goods, settle the agreement.

4. The creditor is not obliged to sell the goods by public auction or public tender, but if the creditor does, you are entitled to reasonable notice of-

The time and place of any proposed offering of the goods for sale by public auction, and of the existence and amount of any reserve price:
Any proposed offering of the goods for sale by public tender. This does not apply if the goods are perishable or threaten to decline speedily in value.

5. You are entitled, at any time after the creditor takes possession of the goods but before the creditor sells or agrees to sell the goods, to obtain a valuation of the goods at your expense. The creditor must give you or your valuer access to the goods to enable the valuation to be completed.

6. At any offering of the goods for sale by public auction or public tender, you are entitled to bid or tender for them.

7. If the creditor does not sell the goods within 3 months of taking possession, you may-

Apply to the Court for an order directing the sale of the goods; or
Require the creditor to put them up for sale by public auction without reserve.

8. Within 10 days after the sale of the goods, whether by auction or otherwise, the creditor is required to give you a statement of account which will show whether you are entitled to a refund or whether you are still indebted to the creditor in respect of the credit agreement.

9. If you are entitled to a refund and the creditor does not pay it to you, you must, if you wish to recover, sue the creditor within 6 months after you are given the statement of account.

DO NOT DELAY

Action to enforce your rights should be taken at once. At the end of 15 DAYS after the service of this notice, the creditor is free to sell the goods, if you have notice, the creditor is free to sell the goods, if you have not reinstated or settled the agreement or introduced a cash buyer who will pay not less that the creditor's estimate of the value of the goods.

IF YOU ARE IN DOUBT ABOUT WHAT YOU SHOULD DO, YOU SHOULD SEEK ADVICE AT ONCE.

(This Act is administered in the Ministry of Consumer Affairs)

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2009-004-028349

COMMERCE COMMISSION
Informant

v

BUDGET LOANS LIMITED
Defendant

Hearing: 26 July 2010

Appearances: C Paterson for the Informant
G Walker for the Defendant

Judgment: 26 July 2010

NOTES OF JUDGE D M WILSON QC ON SENTENCING (ORALLY)

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[1] Budget Loans Limited is a limited liability company. It is a wholly-owned subsidiary of Cynotech Finance Group Limited, which in turn is owned by Cynotech Holdings Limited.

[2] In November 2006 Cynotech Holdings Limited acquired the loan book of National Finance 2000 Limited for $7.7 million. Many of those loans were in arrears. The work that Budget Loans Limited does is in subprime lending. What happens is it lends to people who do not have access to money through first tier lenders, banks and the like. This means that the people with whom it deals are generally less sophisticated, less aware and less able to protect themselves. The factor in the case, therefore, is victim vulnerability.

[3] There were originally some 110 individual informations, but when the case was called today on its first calling, counsel for the defendant company, Mr Walker, entered pleas of guilty to 34 informations and the prosecution withdrew the rest. These are charges that relate to breaches of the Fair Trading Act. They fall into four categories.

The welcome letters

[4] Those that are recognised by counsel for the informant, Ms Paterson, and also by Mr Walker as the most serious category of offending were what is being called in this case, the welcome letters. There were seven of these. The letters themselves were written to the debtors of the defendant company and in the course of the letters it was stated that the defendant had acquired the loan book. It invited debtors to contact the defendant about setting a loan agreement with them. $15 was charged per welcome letter to the loan on either 13 or 17 October 2006. Those debtors who did make contact and agreed to sign new contracts received disclosure statements. The initial unpaid balance of the loan, which would be enough to settle the debt, included the $15 letter fee. This amounts to a representation that the defendant had the right to charge the letter fee, but it did not have that right as is conceded. The failure to disclose the letter fee and its amount to the debtor meant that the defendant had no authorisation from the debtor for the charging of the fee and therefore had misrepresented its right to do so by including that in the initial unpaid balance.

[5] These letters and the charges that arose from them were done without (the defendant) obtaining legal advice. Counsel for the informant submitted that the welcome letter charges were imposed recklessly and without any right to do so. Counsel took a rather stern view of the way in which this was undertaken. Counsel suggested that a starting point in relation to those charges, of which there are seven, should be in the range of $35,000 to $42,000. Counsel relied on *R v Senate Finance Limited*[1]; an oral decision of Judge Callander given in the early days of prosecutions

[1] 14/11/06, Judge Callander, Auckland DC CRN 2006-450-2955.

of this type under the Credit Contracts and Consumer Finance Act 2003 in November 2006. In that case, disclosure requirements were not met because the contracts were sent out by facsimile and no one could read them. There was, therefore, no disclosure.

[6] Mr Walker submitted that it was unfair to criticise these actions as being "Grossly reckless". Certainly responsibility has been accepted, but he points out that the purchase of the loan book had taken place in November 2006. The loans were in arrears. He submitted that, generally speaking, the $15 would be regarded as a fairly modest establishment fee and that figure should be regarded as a contribution to the administrative costs. He says that such establishment fees are commonplace, even amongst first tier lenders. But the defendant here does submit that it was wrong to make the charges. On the evidence of the affidavit filed with these submissions, he points out that each of these charges has been reversed.

[7] I am inclined to accept the submission of Mr Walker, that the action of seeking recovery of this contribution to the cost of establishing the new loans following the failure of National Finance, should not be described as "grossly reckless". But to be fair to the submissions made by Ms Paterson, the action was taken without advice and during the setup of a significant enterprise like this, it should be expected that an operator like Budget Loans Limited would take advice.

[8] I agree with both counsel that the welcome letters charges are those that carry the greatest degree of culpability.

The lesser charges

[9] The rest of the charges relate to breaches which, in effect, amount to attempts to contract out of the legislative framework which overlies transactions of this kind, and in particular, the Credit (Repossession) Act 1997. When the contracts were taken over, the arrangements were that the defendant was granted a security interest in consumer goods, mostly motor vehicles.

[10] Clause 14 of the contracts purported to allow the charging of penalty interest on the out paying balance until full settlement of the loan contract, notwithstanding judgment against the debtor. Clause 14 amounted to a representation of a right by the defendant that it was entitled to make that claim, that is to allow the charging of penalty interest until the instalment had been paid by the debtor notwithstanding judgment against the debtor. This is in the face of s 35 of the specific provisions of the Credit (Repossession) Act 1997 which prohibits the charging of interest on a debt once the secured item has been seized and sold by the creditor. There is also an effect which is that clause 14 was, in effect, an attempt to contract out of the Credit (Repossession) Act 1997 in breach of s 42 of the Act. So that this can be seen in context, I set out clause 14 at this point.

> If you fail to pay any instalment or other money (including any amount for which payment has been accelerated) due on the due date or on demand as the case may be you shall pay to the lender default interest on the unpaid daily balance from the due date of such instalment or from the date of receipt or deemed receipt of demand for the money as the case may be until actual payment of the instalment or amount. All default interest shall continue to be payable after and notwithstanding judgment against you.

[11] Mr Walker submitted that the clause as set out was not sufficiently sophisticated to deal with the exceptional case where s 35 of the Credit (Repossession) Act 1997 stopped the interest running. The relevant part of s 35 of that Act provides as follows:

> If the net proceeds of sale [of securitised goods which have been repossessed] are less than the amount required to settle the agreement under s 31 as at the date of sale, the creditor is not entitled to recover more than the balance left to deducting those proceeds from that amount (whether under a judgment or otherwise)

[12] Mr Walker submitted that the provision in the clause would have been satisfactory if the words, "subject to s 35 of the Act had been added". He also made the point that had those words been added, the generality of customers who were dealing with the defendant company would not have understood the import of those words.

Legal advice taken by defendant

[13] It is acknowledged by the Commission that in proceeding in respect to that part of the case, and indeed the pre and post possession notices and settlement quotes and indeed the final Personal Property Securities Act 1999 matters, the defendant company had taken legal advice and acted consistently with that legal advice. This means that the 12 charges which relate to clause 14, the 13 charges which relate to the pre and post possession notes and the two charges which relate to the "All present and after-acquired property" clauses were entered upon by the defendant company on advice.

[14] The person from whom they took the advice was a Mr Liddell, an experienced solicitor who has practised in Credit Law for many years. He is a published author in that area, he has given regular seminars, some of them, in fact, in conjunction with the Ministry of Consumer Affairs and the Commerce Commission. He has co-authored a book on the Personal Property Securities Act 1999. Mr Liddell specifically advised the defendant company that it was entitled to charge interest until securitised goods had been repossessed and sold. Apparently, I am advised, that he maintains that view despite having considered the Commission's opinion to the contrary.

[15] Of course what has happened here is the defendant has admitted these charges, so at least implies that it accepts the Commission's view of these matters (which the Commission had conveyed to the defendant company) was to be preferred. Mr Walker makes the submission that having sought and acted on advice from the acknowledged expert, the defendant's conduct cannot be described as the informant would have it, as "reckless" or "grossly reckless".

[16] In relation to the charges under the pre and post possession notices that the defendant was entitled to repossess "All present and after-acquired property", including household goods, again, the defendant acted in accordance with Mr Liddell's advice. In those cases, the defendant held security over all present and after-acquired property under s 44 of the Personal Property Securities Act 1999. That section provides:

> A security interest in after-acquired property attaches without specific appropriation by the debtor, unless the after-acquired property is consumer goods where –
>
> (a) those consumer goods are not an accession or do not replace the collateral described in the security agreement; or
>
> (b) the security interest in those consumer goods is not a purchase money security interest.

[17] The legal result of that section is that the defendant had to appropriate the consumer goods falling within the exceptions provided by s 44(a) and 44(b) before repossessing them. Again, the defendant acted in accordance with Mr Liddell's advice: advice he still thinks it is correct. However, the defendant has modified its notices so that they now conform to the Commission's view of the legislation. There is no evidence that any consumer goods were repossessed in breach of the Act.

The informant's submissions on sentence

[18] Ms Paterson relies on the characterisation of the conduct of the defendant as reckless or grossly reckless to submit that an appropriate overall starting point for these offences would be in the range of $90,000 to $110,000. The informant acknowledges the steps that have been taken by the defendant, including the obtaining of legal advice and acknowledges that a significant discount should be available. She submits that given the objectives of the Act which are essentially consumer protection objectives, the importance of the untrue statements that were made is also a significant factor.

[19] There were three types of false representations and these, in many cases, were in fact acted upon by the defendant as if it had the right, which it asserted, when it did not have that right. She submitted that the culpability in terms of the representations were reckless, if not grossly reckless, and submits also that although the defendant obtained external and expert advice, that that characterisation of reckless or grossly reckless is still justified because the Commerce Commission's position was known in the industry and the defendant did not go to the Commission

to discuss those views or seek a second opinion. She points to the Commission specifically advising the defendant about its concerns regarding the practice of repossession by letter on 19 December 2007, 23 May 2008, 18 December 2008 and 29 April 2008. She points out that there was an interview on 13 June 2008 where the charging of letter fees was discussed.

[20] Ms Paterson relies also on what she describes as the complete departures from the truth in the sense that the defendant purported to have a right which it did not in fact have. The wide dissemination was a factor as well. Prejudice arises from debtors being charged fees and interest which they should not have been charged. The Commission's job is to deter breaches of the Act and call upon the Court to support it in that area.

[21] So she asks the Court to denounce the behaviour, deter the defendant and others from the conduct and to deal consistently with other authorities. The informant submits that the defendant should be held accountable because consumer protection legislation aimed at protecting the rights of consumers and preventing misleading and deceptive conduct are principles which need to be upheld.

The authorities

[22] She cites the decision of Judge Callander at paragraph 17 in *R v Senate Finance Limited*[2] where His Honour said:

> The purpose of both Acts (the CCCF Act and the FTA) 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 representations and unfair practices. Consumer rights, the disclosure of information developed over the last few decades prescribe that anything that is material in a contractual relationship between vendor and purchaser or a shopkeeper and consumer must be made clear and conspicuous in the interests of fairness and honest trading. Those concepts underpin both pieces of legislation.

[23] Of course that was a case where the detailed terms of the contracts could not be read because they were faxed out. This informant also refers to the need to provide for interests of the victims of the offence. She says that the gravity of the offending can be measured, because the overcharge amounted to $500,386.01.

[24] Both counsel have referred to a number of cases. None of those cases are exactly the same as this. In *Commerce Commission v Marchione*[3]. Judge Bouchier was dealing with purported sales of motor vehicles by competitive tender auction processes. Once the sale had gone through, there was a deliberate arrangement under which employees of the defendant company would have people sign up to documents which purported to cancel out of the Fair Trading Act and the Consumer Guarantees Act 1993. Judge Bouchier held that that conduct was deliberate, designed to deceive members of the public, and that the statements were completely false. There had been wide dissemination of the representations, the defendant had been uncooperative and shown no remorse. A starting point of $1500 on each of the 32 charges was adopted and a fine of $48,000 was imposed.

[25] Even the prosecutor acknowledges that those more serious charges are more serious than the present. They were deliberate and premeditated and that as opposed to nearly as the prosecutor would have it, reckless. Counsel also referred to *Commerce Commission v Baker and Dolbel*[4]. In that instance there had been 22 representative charges and fines of $100,000 were imposed. The charges involved 10 representative charges under s 17 of the Credit Contracts and Consumer Finance Act 2003. Ten representative charges under s 17 and s 10 under s 25 of that Act. One representative charge under s 38 and one representative charge pursuant to s 13(1) of the Fair Trading Act. That, in fact, led to agreed fines being reached which do not, in my view, and with respect, are of limited value as precedent.

[26] In *Commerce Commission v Galistair Enterprises Limited*[5]. Judge Aitken was dealing with pleas of guilty to 98 representative charges under the Credit Contracts and Consumer Finance Act 2003 and one under the Fair Trading Act. The fine there was $45,000. That was a case involving security for loans being secured over cars. In that case it had written asking for advice about whether their arrangements complied with the law under the Credit Contracts and Consumer

[2] 14/11/06, Judge Callander, Auckland DC CRN 2006-450-2955.

[3] 19/7/06, Judge Bouchier, Auckland DC CRN 2004-004-21773.
[4] Decision of Judge Aitken, 21 May 2007.

Finance Act 2003 and continued to use the old and non-complying forms in the meantime.

[27] It was a small company with something under half of its pre-tax profit coming from motor vehicle lending, which was what was the subject matter. A starting point was taken there of $70,000. There was discount made for a guilty plea and the repayment of excessive interest which amounted to just short of $24,000. Galistair was fined $45,000.

Defence submissions

[28] I agree with Mr Walker's submission that the actions of the defendant, the letters apart, cannot be characterised as "grossly reckless". The defendant had taken a responsible approach by seeking specialist legal advice. It tried to ensure that it was acting in full compliance with the relevant legislation. The distinction must be made with *Galistair*, where the starting point was $70,000 where *Galistair* proceeded without any legal advice. I think his point is a sound one, that in the case of Budget Loans Limited, they sought advice from a recognised expert and received advice that it was acting in accordance with its legal responsibilities.

[29] Indeed, also since this matter came to light, the defendant has undertaken to make cash refunds totalling $86,513.42. That is the actual amount that had been overpaid by people rather than the figure of over $500,000. Those were overcharges which were not paid and have been subsequently reversed. In addition to that, the defendant company has reordered its arrangements so that it complies with what it accepts to be the Commission's view of its legal obligations. It has, therefore, taken a significant number of genuine steps to put right what has been done that was wrong. For that, it deserves significant credit.

Discussion

[30] The result is that all that could have been done by way of reparation and amelioration has been done. The conduct of the defendant, once these matters came to light, has been such that it has remodelled its arrangements. It is now compliant, it has made good voluntarily. It has pleaded guilty on the first appearance in Court.

[31] The prosecutor submitted that an overall fine in the region of $90,000 to $100,000 subject to a very significant discount in the range of 40 to 50 percent to reflect the admitted and asserted mitigating factors would be appropriate. This would lead, on a 50 percent reduction, to an end fine in the range of $45,000 to $50,000.

Result

[32] The greatest degree of culpability, as is accepted, applies to the seven welcome letters. In my view, an appropriate starting point there, bearing in mind that the maximum penalty for each breach is $200,000 would be a figure of $3000. In my view, and having regard to the decisions that I have referred to, the other 27 charges should not attract a greater starting point than $1500. The overall figure is one of $61,500 against which it is appropriate to allow a discount recognising the guilty pleas and the other mitigating factors of 50 percent. The overall fine, accordingly, should be $30,750.

[33] There is no application for solicitor's fees.

D M Wilson QC
District Court Judge

[5] 6/12/07, Judge Aitken, Auckland DC CRI 2007-004-004009.