

**IN THE DISTRICT COURT
AT AUCKLAND**

CRI-2008-004-006310

**COMMERCE COMMISSION
Informant**

v

THE HOME FINANCE COMPANY LIMITED
Defendant In CRN-08004501978-80, 1982-5, 1987-97, 2001-2, 2004-8, 2010-15,
2021-36, 2274

MEGURO LIMITED
Defendant In CRN-08004502275

CHRISTOPHER MARK ASHENDEN
Defendant In CRN-080004506043-85

Hearing: 6 and 13 September 2010

Appearances: Mr N R Williams (6 September 2010) and Mr J G Donkin (13
September 2010) for Informant
Mr S M Bonnar (granted leave to withdraw on 6 September 2010) for
Defendants

Judgment: 14 September 2010

RESERVED JUDGMENT OF JUDGE L H MOORE

[1] These charges, along with associated charges against what can conveniently be called “the investor companies” (for the most part represented by Mr P Davey), were scheduled for a two-week defended hearing commencing 6 September 2010. On that day (as had been heralded in a pre-trial telephone conference on 25 August 2010) the Court was advised by counsel that the proceedings against the investor companies, along with related civil proceedings in the High Court, had been resolved and it was expected that the settlement arrangements would be completed by 13 September - to which date those cases were then adjourned. On that latter date, matters having been resolved, the Court gave leave to withdraw the charges against each of that group of companies.

[2] Mr Bonnar had advised on 25 August that his instructions came from abroad and were of a limited nature; however he anticipated that the charges against his clients would be resolved prior to the fixture date. On 6 September he found himself without further instructions but advised the Court that his clients were aware of the fixture and that the case was likely to proceed in their absence. Mr Bonnar sought and was granted leave to withdraw. He had properly kept counsel for the informant advised of the state of play, so the informant’s witnesses were not present on 6 September. On none of the unresolved charges were any of the defendants liable on conviction to a sentence of imprisonment so pursuant to s.61(c) Summary Proceedings Act 1957 the informant was able to adduce formal proof by way of affidavit evidence. The Court therefore adjourned the proceedings until 13 September to enable that to be done.

[3] On 12 August 2010 counsel for the informant had filed and served notice pursuant to s.130 Evidence Act 2006 that the informant proposed to offer in evidence, without calling witnesses to produce those documents, an array of documentary evidence defined and described in that notice. Patently it was all material that had been disclosed to the defendants long ago. The Court is satisfied that, in the circumstances, that notice was given a sufficient time before the hearing to provide all the other parties with a fair opportunity to consider the notice and none have objected to the course of action therein proposed. In those circumstances that material, which is otherwise admissible in evidence, is received in the evidence by



way of formal proof, albeit with the added assurance provided by the affidavits which both verify the integrity of the material and put it into context.

[4] So what the Court has before it by way of formal proof are the affidavits of Mr G S Rasmussen and Mr G F Cassidy, the successive Commerce Commission officers who investigated the matters before the Court, along with a sizeable volume of annexures to Mr Cassidy's affidavit and four ring binder files of further exhibits to that affidavit evidence. In addition, counsel for the informant has filed a comprehensive synopsis of submissions and a two-volume case book.

[5] Given the extent and complexity of that material it was necessary for the Court to adjourn to read and consider it all. It is a careful and comprehensive compilation. It proves beyond reasonable doubt each and every one of the charges before the Court. Convictions are entered accordingly. There seems to be no good purpose in setting out at great length the details of what is before the Court in written form, but it is necessary to provide an outline framework as a background not only to the entry of convictions but also as to the reasons for the penalties ultimately imposed.

[6] These charges flow from representations, made by way of advertisements and otherwise, to achieve sales of dwelling houses in some of the less prosperous parts of South Auckland, by way of a rent-to-buy scheme. Such schemes are not unlawful, but they generally expose a purchaser to far more risks and far less security of tenure than do conventional purchase and mortgage finance arrangements. Rent-to-buy schemes are almost always targeted at those whose financial circumstances or credit history make it unlikely that they can achieve home ownership by way of a conventional mortgage-funded purchase.


[7] Such folk are generally not sophisticated in their understanding of financial let alone legal matters and are impelled by a desire to have for themselves and their families (despite their financial situation) the security and other benefits of owning their own homes - however impossible it may seem to achieve that desirable objective. As the evidence before the Court illustrates, such folk are particularly vulnerable to misleading promotional material and representations of the types which



feature in this case, often with the disastrous consequence that after struggling for months or years to keep up their payments they fall behind, are unable to remedy their defaults, lose possession of their dwelling, and come out of the transaction with nothing (or here in a few cases a nominal payment of \$1000). That is often despite the fact that the property may have increased very substantially in value during the time of their occupation: sometimes because of market movement, sometimes because of improvements the “purchasers” have made of their own volition or because of requirements imposed pursuant to their agreement with the vendor, or a combination of those factors.

[8] At all relevant times Mr Ashenden was the director and sole shareholder of The Home Finance Company Limited and Meguro Limited. Although Meguro Limited is in one sense an investor company it was Mr Ashenden’s vehicle and through him fixed with knowledge of the overall structure and details of his activities to an extent probably quite different to that of the other investor companies who have now dropped out of this case. Those, from the Court’s previous experience of cases of this general type, might well be able to claim that they, although arguably caught by provisions of s.45 Fair Trading Act, were in reality also victims of the schemes and sales techniques of Mr Ashenden and his companies. So the circumstance that the informant has continued the prosecution of Meguro Limited but not the other investor companies is unsurprising and provides no mitigation for Meguro Limited.

[9] Mr Ashenden was also the sole director and shareholder of Invest Properties Limited which features in many of the transactions before the Court as the purchaser of properties which were then on-sold (generally at a considerable mark-up) to an investor company and a rent-to-buy purchaser. Invest Properties Limited is not before the Court in present context, but its part in various of the transactions under consideration here illustrates Mr Ashenden’s overall scheme and his involvement in a way which emphasises his personal responsibility in law for what occurred and why.

A handwritten signature in dark ink, appearing to be 'J.M.', with a flourish underneath.

[10] Two themes mark the promotional material which Mr Ashenden devised and promulgated: “why rent when you can buy”, “why rent when you can own, rent is dead money”. Then there were representations directly to intending purchasers that on entering into a rent-to-own agreement they would become the “owners” of the property concerned.

[11] On the evidence before the Court such representations were not only liable to mislead but did in fact gravely mislead people who thus entered into rent-to-own agreements believing they were acquiring ownership of a home, whereas in fact what they were acquiring was far less than the package of rights which most people would associate with that concept.

[12] An aggravating feature of the situation here is that “purchasers” were generally referred to a “tame” solicitor who could be relied upon not to fully and properly explain the many disadvantageous features of the scheme and the risks to which purchasers were subjected. That the documentation recorded that the purchaser had been given the opportunity to seek independent legal advice serves only to pour salt into that particular wound. No competent solicitor could possibly act for a purchaser on one of the transactions before the Court without advising his or her client of their rights, for many reasons, to avoid the transaction, and without advising, in the strongest terms and in writing, of the disadvantages and risks the transaction created. Given that the purchasers were generally humble and unsophisticated people of very limited means, any lawyer who, on a transaction of this sort, chose to act for vendor and purchaser or to otherwise be the only lawyer in the transaction, was placing his or her career (and finances) in grave jeopardy.

[13] The terms of the agreement between each investor company and a “purchaser” were prepared by The Home Finance Company Limited which was very much under the day-to-day control of Mr Ashenden. The then standard form of agreement for sale and purchase of real estate approved by the Real Estate Institute of New Zealand and the Auckland District Law Society was used as a foundation document. But it was very substantially modified by a 16-page “instalment payment schedule” of special conditions which modified and altered the standard form

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agreement and prevailed over any of the general conditions of sale. Features of particular note are well summarised in the synopsis of submissions by the informant's counsel from which the Court quotes with minor amendments:

- The agreement was a long-term instalment agreement for a term of 30 years.
- The occupier was required to pay weekly instalments that consisted of principal, interest, rates, taxes and insurance.
- The vendor could prepare a report on the condition of the property and the occupier was to remedy at their own expense any defects in the property notified by the vendor in such a report.
- The occupier could not part with possession of the property or leave it unoccupied for any continuous period in excess of thirty days without the consent of the vendor.
- The occupier could not make structural alterations to the property without the consent of the vendor which it had absolute discretion to withhold.
- If an event of default by the occupier occurred (which included any default under the general conditions referred to in the agreement) the whole of the current balance price of the property became immediately due and payable and the vendor could rescind the contract and retain as liquidated damages all moneys (not exceeding 10% of the current balance price) paid by the occupier.
- The vendor would retain all documents of title relating to the property which would remain registered in the vendor's name. The vendor granted the occupier a right to occupy that property until the settlement date.
- The vendor could mortgage the property during the term of the agreement as long as the mortgage did not exceed the current balance price due by the occupier under the instalment agreement.
- The settlement date was defined as the due date for payment of the final instalment or the date of the occupier's notice of early settlement.
- The occupier had been given the opportunity to arrange for his/her solicitor to consider the agreement for them before it was signed and they had, of their own free will, declined to take such independent legal advice.



[14] The form of agreement contained an “acknowledgment by purchaser” recording that:

- In the event that the occupier failed to meet all his/her obligations under the agreement, monies paid by the occupier belong to the vendor and there was no right to claim for recovery of such monies.
- If any payments under the instalment payment schedule were missed and remained outstanding for a period of 28 days, the agreement could be terminated.
- The vendor would retain legal title with the purchaser receiving an equitable interest in the property and that legal title would not be transferred until the principal and all other monies owed by the purchaser to the vendor were paid in full.

[15] A particularly objectionable feature of the arrangement was that a purchaser could be compelled (with no limitation as to cost) to remedy defects in the property which existed at the time the rent-to-buy agreement was entered into.

[16] Interest rates applicable under the agreement were fixed by reference to percentage margins over a rate set by the vendor’s bank. The overall effect was that the “purchaser” was fully funding the investor/vendor including a profit component; paying an above market rent, and at high risk of never achieving true ownership.

[17] As to all charges, the evidence established beyond reasonable doubt that the relevant defendant was a “person” as defined in s.2 of the Fair Trading Act and was “in trade” within the meaning of that legislation. So far as the s.11 charges are concerned, the formulation and publication of the promotional material in which the relevant representations were made was certainly conduct which was liable to mislead the public as to the nature, characteristics and suitability for purpose of what was being promoted - which fell within the concept of “services” in that legislation, which term includes “any right in relation to, and interests in, real property”.

[18] In *Sound Plus Limited v Commerce Commission* [1991] 3 NZLR 329, 333 Anderson J said:

“Thus, in relation to ss10 and 11, the question “is the conduct liable to mislead the public?” could equally be posited “looking at the issue sensibly



could the conduct mislead the public?" I would add that the only justification for such tautology is the fact that the employment of different words to explain a particular concept might help to elucidate the concept. "Liable to" may have a synonymous exposition as I have suggested. In the result it connotes a potential which is less restricted in scope than likelihood or probability."

[19] In that context "the public" includes those who are "knowledgeable and those who are not, the superficial reader or listener, as well as the profound, the gullible as well as the cautious" (*Scotch Whiskey Association v Eade*, High Court, Christchurch, CP204/90, Holland J, 4 July 1990).

[20] Here there is no room for any conclusion other than that not only were the references to ownership in the promotional material liable to mislead the public but that they were carefully calculated to induce, in people of the groups to whom the advertising was plainly directed, a strong sense that what was being offered, "ownership", was something far more comprehensive and secure than was the case. Far more is involved than lawyers' distinctions between legal and equitable rights. Such concepts mean little or nothing to most members of the community. To describe as "ownership" the rights conferred by a legal structure wherein the vendor retains not merely title but a right to mortgage is, all other considerations apart, not merely liable to mislead but grossly misleading.

[21] Likewise, in the context of the s.14 charges, it is proved beyond reasonable doubt in each case that the defendant was a person in trade and in connection with the promotion of the sale or grant of an interest in land made a false or misleading representation concerning the nature of that interest. Here what is involved is representations to intending purchasers by way of promotional material, or face-to-face by a person for whose actions the relevant defendant is fixed with responsibility under the Fair Trading Act. The previous reasons and analysis apply because again the issue is "ownership".

[22] That is a very simplified outline of the reasons why there must be convictions entered on all charges, which brings the Court to the issue of appropriate penalties. Counsel's submissions are helpful as are the victim impact statements filed, but reparation is a crucial part of the sentencing process here. Outcomes appear to have



varied considerably among victims. Because of the totality principle it is inappropriate to fix penalties in relation to some charges but not others. Counsel has undertaken to lodge a schedule as to reparation. The Registrar is to adjourn the proceedings to a date to be fixed in consultation with counsel. The Court will, on receipt of counsel's memorandum as to reparation, issue a separate judgment imposing sentences.

Signed at Auckland on 14 September 2010 at 4:57 ^{PM} / pm



L H Moore
District Court Judge