IN THE COURT OF APPEAL OF NEW ZEALAND

CA148/04

BETWEEN	THE COMMERCE COMMISSION Appellant
AND	TELECOM MOBILE LIMITED Respondent

Hearing: 2 August 2005

Court: Anderson P, William Young and Robertson JJ

Counsel: T Sissons and K S Grau for Appellant
J B M Smith and J A Kean for Respondent

Judgment: 25 August 2005

JUDGMENT OF THE COURT

A The appeal is allowed and the cross-appeal is dismissed.

B Telecom Mobile is to engage in a corrective advertising exercise in terms to be agreed between the parties and in default of agreement to be fixed by this Court.

C Telecom Mobile is to pay to the Commerce Commission costs in the sum $6,000 together with usual disbursements.

REASONS

(Given by William Young J)

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Introduction

[1] The Commerce Commission brought proceedings in the High Court at Auckland alleging that two marketing campaigns carried out in 2001 and 2002 on behalf of Telecom Mobile Ltd had breached the Door to Door Sales Act 1967 and

the Fair Trading Act 1986. It sought relief primarily by way of orders as to corrective advertising.

[2] On an application by the Commission for summary judgment, Ellen France J, in a decision now reported at [2004] 3 NZLR 667, found that Telecom Mobile had breached both the Door to Door Sales Act and the Fair Trading Act but she declined to grant the relief sought by the Commission.

[3] The Commission now appeals and Telecom Mobile cross-appeals.

Overview of the facts

[4] In 2001 and 2002, Telecom Mobile engaged marketers to promote the sale of cellphones and connection services for its 027 network. The marketers were Appco Direct Ltd, which conducted a door to door campaign, and Mainly Mobile Ltd, which was involved in telemarketing from a call centre.

[5] Appco and Mainly Mobile made calls (either physically at the door in the case of Appco or by telephone in the case of Mainly Mobile) to prospects who were existing users of cellphones. The primary targets were consumers on the rival Vodafone network and this was reflected in the marketing strategy and telemarketing scripts.

[6] Appco and Mainly Mobile provided Telecom Mobile with the names and addresses of prospects who responded positively to the marketing. Telecom Mobile performed credit checks on those prospects and sent out cellphones to those who had satisfactory credit records.

[7] Each cellphone was delivered in a courier pack and was accompanied by documentation which included a packing slip, an accompanying letter (from either Appco or Mainly Mobile) and a copy of the standard Telecom Mobile contractual terms. The cellphones were contained in boxes with red seals. The documentation made it clear that breaking the seal would constitute acceptance of the cellphone and

Telecom's standard conditions of contract and that no returns would be accepted once the seal was broken.

The Commission's case

[8] The Commission's case has been structured around four propositions.

[9] The first proposition is that the contracts entered into as a result of the two campaigns were subject to the Door to Door Sales Act. It is common ground that the campaign carried out by Appco engaged the Door to Door Sales Act and, on this phase of the case, controversy was confined to the contracts entered into as a result of the telemarketing campaign carried out by Mainly Mobile. The Judge found in favour of the Commission on this point and her conclusion is challenged by Telecom Mobile on its cross-appeal.

[10] The second proposition is that Telecom Mobile's conduct breached the Door to Door Sales Act. Telecom Mobile accepts that, to the extent to which the campaigns were subject to the Door to Door Sales Act, it was in breach of that Act. It will however be necessary to discuss in a little detail the respects in which this was so.

[11] The third proposition is that Telecom Mobile's conduct breached the Fair Trading Act. Telecom Mobile accepts that, where it breached the Door to Door Sales Act, its conduct was necessarily in breach of the Fair Trading Act. It will be necessary to discuss in a little more detail the respects in which this was so.

[12] The fourth proposition is that Telecom Mobile should be required under s 42(a) and (b) of the Fair Trading Act to engage in corrective advertising and in particular to notify customers of claims which they may have against Telecom Mobile. The Judge found in favour of Telecom Mobile on this question and it is this aspect of her judgment which is the subject of the Commission's appeal.

[13] We propose to discuss the case largely by reference to these four propositions.

The Commission's first proposition: The contracts entered into as a result of the two campaigns were subject to the Door to Door Sales Act

General

[14] It is common ground that the contracts entered into as a result of the Appco marketing campaign were subject to the Door to Door Sales Act. Consequently we will confine our discussion to whether the same is true of the contracts entered into as a result of Mainly Mobile's efforts.

The relevant legislation

[15] Section 5(1) of the Door to Door Sales Act provides:

> … where a credit agreement is made at a place other than appropriate trade premises the vendor shall not be entitled to enforce the agreement unless the requirements of section 6 of this Act are complied with.

[16] The agreements entered into by Telecom Mobile and its customers, as a result of the two campaigns in issue in this case, were credit agreements for the purposes of the Door to Door Sales Act except where the purchases were "business purchasers" (a term used by both counsel in the case as referring to certain exclusions in the definition of "credit agreement" in the Door to Door Sales Act). On the basis of the evidence, it is probable that the majority of the sales were made to people who were not "business purchasers" and were thus pursuant to "credit agreements" for the purposes of s 5(1).

[17] The expression "appropriate trade premises" is defined as:

> (a) In relation to an agreement for the sale, letting, hiring, or bailment of goods, premises at which the vendor normally carries on a business or at which goods of the description to which the agreement relates, or goods of a similar description, are normally offered or exposed for sale in the course of a business carried on at those premises:
>
> (b) In relation to an agreement for the provision of services (whether alone or together with goods), premises (not being premises belonging to or occupied by the purchaser) at which the vendor or any bank, solicitor, or chartered accountant normally carries on business.

The conflicting positions adopted by the parties – an overview

[18] Telecom Mobile's argument is that the contracts between it and the customers were made on the telephone when the customers accepted offers conveyed to them by Mainly Mobile. Telecom Mobile maintains that this means that the contracts were made at the call centre operated by Mainly Mobile.

[19] The Telecom argument proceeds on the assumption that where an agreement is "made" for the purposes of s 5(1) of the Door to Door Sales Act is to be determined in accordance with the approach taken by the courts in the line of cases culminating in the House of Lords decision, *Brinkibon Ltd v Stahag Stahl GmbH* [1983] 2 AC 34. Despite reservations about this assumption (which we will discuss later) we proceed on the basis that it is correct. If the telephone calls initiated by Mainly Mobile are properly analysed as involving Mainly Mobile making an offer on behalf of Telecom Mobile and an acceptance of that offer by the customer, then the *Brinkibon* approach would mean that the contract was "made" at the place where the customer's acceptance of Telecom Mobile's offer was received, which on the hypothesis referred to in [18] above, was at Mainly Mobile's call centre.

[20] The Mainly Mobile call centre forms part of business premises, which, although operated by Mainly Mobile and an associated company, have the appearance of being a Telecom retail outlet. In the High Court and in the submissions made to us, the case has been conducted on the assumption that if the contracts with consumers were entered into at the call centre operated by Mainly Mobile, the Door to Door Sales Act did not apply; this because those premises could be regarded as being "appropriate trade premises" for the purposes of s 5(1). We are prepared to decide the case on the same basis, albeit that we have some reservations (to which we will revert) as to the correctness of this assumption.

[21] The Commission's argument is that the contracts between Telecom Mobile and the consumers were not effected on the telephone but rather were completed when the seal on the box containing the cellphone was broken by the consumer. On the Commission's case the usual requirement of communication of acceptance was waived by Telecom Mobile. This concept of waiver is explained in the well-known

judgment of Bowen LJ in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 at 269:

> … One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law … to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance … .

[22] All the Commission must show is that the contract was not effected at "appropriate trade premises". If the contract was completed when the cellphone was received by the customer or perhaps when the customer first used the cellphone, the contract would necessarily be made otherwise than at "appropriate trade premises" and would thus be subject to the Door to Door Sales Act.

[23] As will become apparent, the actual arguments advanced by the parties, and particularly by Telecom Mobile, involved more refinements than we have so far noted. It is convenient, however, to defer discussion of those refinements until we have set out in more detail the underlying facts.

The facts in more detail

[24] The Mainly Mobile campaign was conducted pursuant to an agreement between Telecom Mobile, Mainly Mobile and a third party. The key provisions of that agreement, for present purposes, are as follows:

> 3.5 Mainly Mobile will attempt to secure offers from consumers to purchase a Phone Deal and connect to a Plan and will, on receipt of all offers, advise Telecom of the Phone Deal required by the consumer.
>
> …
>
> 3.8 … Telecom will perform a credit check on all Referrals and will advise Mainly Mobile whether:

> (a) the Referral was accepted;
>
> (b) the Referral was declined; or
>
> (c) further information is required.
>
> 3.9 Telecom will arrange for all accepted Referrals to be sent the relevant mobile phone and will provide a copy of the Standard Terms to each Customer …
>
> …
>
> 3.11 Telecom may, at its discretion refuse to provide (or continue to provide) a connection to the Mobile Network to any Referral. Telecom need not give a reason for its refusal.

[25] Mainly Mobile and Telecom Mobile agreed on a series of procedures which under "business rule 2" provided that:

> Mainly Mobile will ensure Customers know that once the red sticker on the phone box is broken the customer has agreed to accept the mobile phone and read, understood and accepted the terms and conditions of the Telecom Mobile Services Agreement. …

[26] Thus the arrangements between Telecom Mobile and Mainly Mobile proceeded on the basis that the function of Mainly Mobile was to refer prospects to Telecom Mobile rather than to complete contracts with those prospects on behalf of Telecom Mobile. Further, it was open to Telecom Mobile (at least vis à vis Mainly Mobile) to refuse to contract with any prospect for reasons which were not confined to unsatisfactory credit worthiness.

[27] The telemarketers operated off pre-prepared scripts. There were three such scripts but the differences between them are not material for present purposes. More material is the likelihood that the telemarketers would depart from the script. The evidence shows that this did happen on occasion. It is important to note, however, that Mainly Mobile monitored the performance of its telemarketers and could be expected, therefore, to pick up significant deviations from the relevant script. Further, when a prospect reacted positively to an approach, the prospect was referred to a second person and the conversation between the prospect and that person was recorded.

[28] After the preliminary stages of the telephone conversations, which identified potential savings and advantages to the prospect, two steps were used to complete the telephone exchange: a residential disclosure statement and "a verification of sale script". The residential disclosure statement is of little relevance to the legal issues arising on this appeal but the "verification of sale script" is reasonably significant. This was in the following terms:

> Now, I just need to record this conversation to verify the information of the sale that we have discussed today. Is that OK?
>
> Great! I will recap:
>
> Plan –
>
> Monthly Fee –
>
> Is this plan affordable <NAME>?
>
> National Minutes Free
>
> Peak to Peak calling price is
>
> The Peak Time is???
>
> The off Peak calling price is
>
> The off Peak calling times e.g. are
>
> AND the term of the contract is 24 months.
>
> Once your application has been approved by Telecom, you will receive the mobile phone within 5 to 7 Working days by courier post. Your new number will accompany your new phone and is displayed on the end of the box. You do have to return your existing handset and charger to us in the courier bag provided to you. A copy of the terms and conditions is included with the mobile phone for your records.
>
> …
>
> If you break the seal on the box you cannot return the phone.
>
> Do you have any questions?
>
> [Give the Unique ID to customer and advise to write this down with the Mainly Mobile 0800 005 006 number for any questions]
>
> [Close call with] Welcome to Telecom Mobile Mr./Ms ________. Thank you for your time and you should be receiving your phone shortly.

We note that the square brackets ([]) denote instructions to the telemarketer.

[29] Once Telecom Mobile had completed a satisfactory credit check, it sent a cellphone package and accompanying documentation by courier to the prospective customer. The accompanying documentation included a letter from Mainly Mobile, a packing slip and the standard terms of agreement.

[30] The letter was in these terms:

> Dear Customer
>
> Congratulations !!!!
>
> CDMA is here and now you are part of Telecom's 027 network.
>
> [Features discussed].
>
> Your phone is enclosed and as you will see, it has been delivered in a sealed box. By breaking this seal you agree that you have accepted the terms and conditions of the Telecom Mobile Service Agreement that accompany this letter.
>
> Before you open the phone box, we need to confirm that you have agreed to connect to the Telecom mobile network on a new 24 month Telecom Anytime 80 plan for a monthly access fee of $84.38, which includes 80 free minutes per month.
>
> [Rates set out in table]
>
> [Details about returns of 021/029 phones]
>
> Please keep the packing slip for proof of purchase for warranty purposes.
>
> [Letter closes]

[31] The seal on the box containing the phone had the following statement written on it:

> IMPORTANT – PLEASE READ THIS
>
> This mobile phone, and the services you receive for using it, are supplied on the terms of the Telecom Mobile Communications Service Agreement, which is also supplied with this mobile phone. By breaking the seal on this phone box you agree that you have accepted this mobile phone and read, understood, and accepted the terms of the Telecom Mobile Communications Service Agreement. IF YOU NO LONGER WANT THIS MOBILE PHONE YOU MUST RETURN IT UNOPENED.

The same message was conveyed by the packing slip.

Evaluation

[32] In her judgment Ellen France J concluded that the agreements were not made on the telephone. She did so by a survey of the documents (including scripts) which corresponds, at least broadly, to our own analysis of the documents.

[33] We agree entirely with her conclusions.

[34] It is clear that the marketing campaign, as designed, was not intended to result in concluded contracts effected during the telephone call phase of the procedure. The marketing agreement between Telecom Mobile and Mainly Mobile did not confer on Mainly Mobile any authority to conclude such agreements. There are ambiguities in the various telemarketing scripts which were put to us. But the overall impression which they convey is that the final decision whether or not to proceed with the transaction would be made by Telecom Mobile. The material which was sent by Telecom Mobile to the customer is plainly inconsistent with the view that a contract between the customer and Telecom Mobile had been already effected in the telephone call.

[35] Telecom Mobile's arguments were necessarily sinuous. The agency agreement between Telecom Mobile and Mainly Mobile is irrelevant because the customers never saw it and they would have treated Mainly Mobile as having ostensible authority to complete contracts on behalf of Telecom Mobile. That the telephone scripts made it clear that the final decision whether to proceed was Telecom Mobile's merely means that the "contract" between Telecom Mobile and the customer effected by the telephone call was subject to a condition subsequent as to Telecom Mobile being satisfied as to the credit worthiness of the customer. That this approach is inconsistent with the marketing agreement (which permitted Telecom Mobile to decline a referral on grounds which were not confined to lack of credit worthiness) is of no moment (presumably on the basis of the ostensible authority argument, although this was not developed by counsel for Telecom Mobile). The documentation which accompanied the cellphone when it arrived at the customers house is irrelevant as merely representing a misapprehension by Telecom Mobile of the contractual position.

[36] We see the Telecom Mobile argument as too convoluted to be credible.

[37] The only sensible and fair commercial way of looking at the transactions is to regard the discussions on the telephone as being merely precursors to the completion of a contract. That is, in effect, what the script provides for and particularly the reference to "your application [being] approved by Telecom". This approach is likewise the only sensible way of explaining the documentation which accompanied the cellphones.

[38] In our view the contract was completed when the seal was broken (which is what Telecom Mobile expressly asserted in its own documentation). Telecom Mobile waived communication of acceptance of the offer (in the manner postulated by Bowen LJ in the *Carbolic Smoke Ball* case). In any event, any conceivable alternative view as to when the contract was formed would involve the contract being made otherwise than at appropriate trade premises. We have in mind the possibilities that the contract might be completed when the cellphone arrived at the customer's house or perhaps when the cellphone was first used.

[39] We recognise that there may have been occasional script deviations so radical that the resulting contracts were not subject to the Act. We also accept that agreements with "business purchasers" are exempt from the requirements of the Act. But, that said, we are satisfied that a very substantial proportion of the contracts entered into as a result of the Mainly Mobile campaign were subject to the Act.

Some other considerations

[40] We have already referred to our reservations as to certain assumptions which formed part of Telecom Mobile's case, see [19] and [20] above.

[41] If these assumptions were correct, it follows that Telecom Mobile and Mainly Mobile could have avoided the operation of the Door to Door Sales Act by slightly tweaking the scripts from which the telemarketers operated. Such a result would not conform to the policy of the Door to Door Sales Act which would be more engaged by contracts made over the telephone in the course of cold calls than by the

actual contracting process put in place by Telecom Mobile (which at least provided some measure of "cooling off" for prospects).

[42] The Telecom Mobile arguments involved a reasonably technical application of *Brinkibon*. This case turned on whether a contract effected by telex was "made within the jurisdiction" for the purposes of RSC Ord 11 r 1(1)(f) (which is addressed to the circumstances in which proceedings may be served outside the jurisdiction). So the case was decided in a context which had nothing to do with consumer protection legislation. Further, *Brinkibon* proceeds very much on the basis of pragmatic considerations rather than a tabulated application of the principles of offer and acceptance. This is made clear from the speeches of Lords Wilberforce and Brandon at 42 and 50.

[43] On the Telecom Mobile case, much rests on the coincidence that the call centre from which the Mainly Mobile telemarketing campaign was conducted happened to be part of retail premises operated by Mainly Mobile and its associated company. In the context of the consumer protection orientated Door to Door Sales Act, it is difficult to see how this consideration (of which consumers were necessarily ignorant) can genuinely bear the weight placed on it by Telecom Mobile.

[44] In that general context, there may be something to be said for the view that sales effected by a telemarketing campaign involving the cold calling of prospects at their homes and completed, from the point of view of such prospects at their homes, should be regarded as having been made otherwise than at "appropriate trade premises" even if the telemarketer happens to be ringing from a shop. Given our conclusions already recorded in this judgment, it is not necessary for us to form a final view on this aspect of the case.

The Commerce Commission's second proposition: Telecom Mobile's conduct breached the Door to Door Sales Act

General

[45] Telecom Mobile accepts that if its activities were subject to the Door to Door Sales Act, it has failed to comply with its obligations under that Act.

[46] In order, however, to provide a context for the evaluation of the Commerce Commission's third and fourth propositions it is necessary to discuss in a little detail the respects in which this was so.

The relevant legislative provisions

[47] Section 5 of the Door to Door Sales Act provides that agreements which are subject to the Act are unenforceable unless the provisions of s 6 are complied with.

[48] Section 6 of the Door to Door Sales Act provides as follows:

> **6 Requirements as to agreements**
>
> (1) The requirements of this section, in relation to an agreement, are that—
>
> > (a) The agreement shall be in writing and shall be signed by the purchaser and by or on behalf of all other parties to the agreement; and
> >
> > (b) The agreement shall contain a statement in the form set out in Part 1 of the First Schedule to this Act which statement shall comply with Part 2 of that Schedule and shall be duly completed by the vendor in accordance with the instructions contained in that Schedule; and
>
> …
>
> > (c) A copy of the agreement and a copy of the form set out in the Second Schedule to this Act shall be given to the purchaser at the time at which the agreement is made; and
>
> …
>
> (2) If in any proceedings before any Court the Court is satisfied that a failure to comply with any of the requirements of subsection (1) of this section is a minor failure which has not prejudiced the purchaser, and that it would be just and equitable to dispense with the requirement, the Court may, subject to such conditions as it thinks fit to impose, dispense with that requirement for the purposes of those proceedings.

[49] The First Schedule Form referred to in s 6(1)(b) is a bold notice of a right of cancellation. This notice is, after the heading, in these terms:

> You have for a short time a legal right to cancel this Agreement.

You can do this by completing and giving to*, before the end of the period of 7 days beginning with the day after the day on which you signed the agreement, the notice of cancellation handed to you on that day. You can give the notice by posting it in a prepaid letter, or by delivering it, to the above-named vendor at the address shown in this statement.

If you cancel this agreement any money you have already paid must be refunded to you. If you have given any goods in part-exchange (trade-in) these goods, or their value, must also be returned to you. If you have received the goods purchased by you, you need take no action to return them but can wait for them to be collected. You need not hand them over unless you have received a request to do so and have had your money and goods (trade-in) returned to you.

*Insert name and address of vendor

[50] Section 7 of the Door to Door Sales Act provides:

7 Right of cancellation

(1) Subject to section 11 of this Act and to subsection (3) of this section, where a credit agreement is made at a place other than appropriate trade premises the purchaser may cancel that agreement at any time before the end of the period of 7 days beginning with the day after the date of the making of the agreement by giving to the person named as vendor in the statement required under paragraph (b) of subsection (1) of section 6 of this Act a notice in the form set out in the Second Schedule to this Act or any other written form of notice if, however expressed, it indicates the intention of the purchaser to cancel or withdraw from the agreement.

…

(3) Where by virtue of subsection (1) of section 5 of this Act the vendor is not entitled to enforce a credit agreement the purchaser may cancel the agreement at any time before the end of the period of one month beginning with the day after the date of the making of the agreement by giving the required notice in accordance with subsections (1) and (2) of this section. Those subsections shall apply accordingly with such modifications as are necessary and if paragraph (b) of subsection (1) of section 6 of this Act has not been complied with the notice may be delivered personally at, or posted to, the last known address of the vendor.

(4) If the notice is posted in accordance with subsection (2) of this section the notice shall be deemed to have been given to the vendor at the time when it is posted.

(5) Any person who conducted any antecedent negotiations which promoted the transaction to which the agreement relates, but who is not the vendor, shall be deemed to be an agent of the vendor for the purpose of receiving any notice given by the purchaser under this section.

[51] Section 9 of the Door to Door Sales Act provides:

9 Effect of cancellation

(1) Where a notice of cancellation is given pursuant to section 7 of this Act:

(a) The agreement to which it relates shall be deemed to have been rescinded by mutual consent and never to have had effect:

(b) Any collateral agreement and any contract of guarantee relating to the agreement shall be deemed never to have had effect:

(c) Any security given by the purchaser in respect of money payable under the agreement, or given by a guarantor in respect of money payable under such a contract of guarantee, shall be deemed never to have been enforceable:

(d) Any money paid under the agreement or any collateral agreement shall be repaid forthwith by the vendor or other person to whom the money has been paid, and if the purchaser is in possession of the goods he shall have a lien on them for any sum which he is entitled to be repaid:

(e) Where the purchaser has supplied other goods in part-exchange for the goods that are the subject of the agreement or any collateral agreement the vendor shall forthwith redeliver the goods so supplied to the purchaser.

…

(3) The vendor shall be liable to pay compensation to the purchaser for any damage done to the goods supplied by the purchaser in part-exchange, while these goods have been in the custody of the vendor, other than damage arising from the normal use of the goods or damage arising from circumstances beyond the vendor's control.

…

(5) Any sum payable under any of the provisions of subsections (1) to (3) of this section shall be recoverable as a simple contract debt in any Court of competent jurisdiction. In any action for the recovery of any such sum the purchaser shall, if successful, be entitled to recover from the vendor his full costs, fees, and other reasonable expenses, including reasonable costs incurred between solicitor and client.

(6) If the vendor has provided any services under the agreement before it is cancelled, he shall not be entitled to any compensation for those services. … .

Rights of the consumers vis à vis Telecom Mobile under the Door to Door Sales Act

[52] Under the Door to Door Sales Act:

(a) The agreements between Telecom Mobile and the consumers (other than "business purchasers") were not enforceable; this pursuant to s 5 (as s 6 had not been complied with).

(b) By virtue of s 7(3) consumers had a right of cancellation at any time before the end of one month after the making of the agreement.

(c) In the event that the agreement was cancelled customers were entitled to be repaid forthwith by the vendor anything which they had paid. As well they had no liability to pay anything for the use of the cellphones or telecommunication services provided by Telecom Mobile although they would be liable to pay for damage done to the goods other than damage associated with their normal use or arising from events beyond the control of the purchaser (see s 10(3)).

[53] So much is common ground between the parties. What is in issue is whether s 12 of the Door to Door Sales Act provides for more extensive relief for customers, and in particular for the right to recover from Telecom Mobile all payments which had been paid. This is a point which is most helpfully discussed when we address the Commission's fourth proposition.

The Commerce Commission's third proposition: Telecom Mobile's conduct also breached the Fair Trading Act

[54] Again, there was no controversy in relation to this aspect of the case in that Telecom Mobile accepts that, to the extent to which the contractual arrangements were subject to the Door to Door Sales Act, its conduct in relation to those contracts was in breach of the Fair Trading Act and in particular ss 9 and 13(i). In order, however, to provide a context for our discussion of the fourth proposition advanced by the Commerce Commission, it is necessary to refer, in a little detail, to the respects in which Telecom Mobile's conduct breached the Fair Trading Act. Broadly, these respects were as follows:

(a) Under the Door to Door Sales Act, customers had a right to cancel and to return the goods which differed very substantially from those which were conveyed in the documentation prepared by Telecom Mobile.

(b) Telecom Mobile's documents proceeded on the basis that the agreements were enforceable when in fact, under ss 5 and 6 of the Door to Door Sales Act, they were not enforceable.

The Commerce Commission's fourth proposition: Telecom Mobile should be required under s 42(a) and (b) of the Fair Trading Act to engage in corrective advertising and in particular to notify customers of claims which they may have against Telecom Mobile

General

[55] It was in this aspect of the case that the Judge found against the Commerce Commission.

[56] Section 42(a) and (b) of the Fair Trading Act provide as follows:

> **42 Order to disclose information or publish advertisement**
>
> Where, on the application of the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of any of the provisions of Parts 1 to 4 of this Act, the Court may (whether or not that person has previously engaged in such conduct), make either or both of the following orders:
>
> (a) An order requiring that person, or any other person involved in the contravention, to disclose, at that person's own expense, to the public, or to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that person has access:
>
> (b) An order requiring that person, or any other person involved in the contravention, to publish, at that person's own expense, in such manner and at such times as are specified in the order, corrective statements the terms of which are specified in, or are to be determined in accordance with, the order.

[57] The Commission's broad position is that Telecom Mobile's conduct is such that it is required to refund to consumers all monies paid under the transactions in question. The Commission contends that this is so by reason of s 12 of the Door to Door Sales Act and maintains that any corrective advertising engaged in by Telecom Mobile should make it clear to consumers their rights to recover money against Telecom Mobile.

[58] We consider that the arguments of the Commission are consistent with the purpose of s 42 and we likewise endorse the approach taken by Tamberlin J in *ACCC v On Clinic Australia Pty Ltd* (1996) ATPR 41-517 at 42,459 in relation to the comparable provision in the Australian Trade Practices Act:

> The purpose of corrective advertising is to protect the public interest. See *Makita (Australia) Pty Ltd v Black and Decker (Australasia) Pty Ltd* (1990) 12 ATPR 41-030 at 51,477 to 51,478. Corrective advertising is intended to dispel incorrect or false impressions which may have been created as a result of deceptive or misleading conduct. It is not intended to be punitive. …

[59] Whether corrective advertising is appropriate turns largely on the question whether s 12(2) of the Door to Door Sales Act applies. The Judge held against the Commission on this point and this would appear to have been the primary reason why she declined to make the orders sought. For this reason we propose to address first the s 12(2) issue. As well, we propose to revert briefly to the facts before determining what, if any, relief should be granted.

Section 12(2) of the Door to Door Sales Act

[60] This section provides as follows:

> **12 No contracting out**
>
> (1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any agreement.
>
> (2) Any transaction entered into or any contract or arrangement made, whether orally or in writing for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, avoiding, or preventing the operation of this Act in any respect shall be unenforceable except that any money paid as part of any such transaction or under any such contract or arrangement may be recovered by the person who paid it from the person to whom it was paid.

[61] Telecom Mobile's broad position both in the High Court and before us is that it can not be the case that s 12 applies in any situation where a vendor has acted in breach of the Act. Telecom Mobile maintains that the primary remedy under the Act lies in unenforceability of the resulting agreement (by reason of ss 5 and 6). Such unenforceability would not provide a basis, in itself, for recoupment. Telecom Mobile argues that there must be a difference between the circumstances which justify the invocation of s 12(2) and those which merely result in unenforceability under ss 5 and 6. Its broad position was that the facts of the present case did not warrant the invocation of s 12.

[62] This approach was accepted by the Judge in the High Court when she said:

> [107] Telecom submits that its approach to unenforceability provisions is consistent with that taken by the Courts to "unenforceability provisions" following on from non–compliance with the formal requirement for land transfers. In *Take Harvest Ltd v Liu* [1993] AC 552 at p 569, the Privy Council on appeal from the Court of Appeal of Hong Kong held that:
>
> > ". . . the question in any given case must be whether the party who relies on the oral agreement is in substance seeking to enforce it. If he is so seeking, it matters not whether he happens to be the plaintiff or defendant in the proceedings or whether, as a matter of formal pleading, he is seeking to enforce the oral agreement by way of claim, defence, counterclaim or otherwise."
>
> [108] In that judgment at p 570, Their Lordships approved *Thomas v Brown* (1876) 1 QBD 714 on the grounds that:
>
> > ". . . in resisting the purchaser's claim, the vendor was not seeking in substance to enforce the oral agreement; he was merely asking the court to recognise the title to the money which he had already acquired by virtue of the valid, though unenforceable, contract."
>
> [109] The submission is that the dictum of the Privy Council approving *Thomas v Brown* is directly applicable to this case.
>
> …
>
> [111] I agree with the Commission that the words "having the effect of" do broaden the scope of s 12(2). (They were not included in the Bill as introduced in 1966 but were added in the Bill as reported back. Another version of the Bill was referred to the Committee of the Whole House in 1967. There are equivalent provisions in equivalent overseas legislation such as the Door to Door Sales Act 1967 (NSW), s 7, and see s 40G of the Fair Trading Amendment Act 2003, and s 29 of the Ontario Consumer Protection Act 1966 (s 23).) However, I have concluded that Telecom is right that s 12(2) does not apply. Rather, the position is governed by s 5. That means only that Telecom cannot bring proceedings for unpaid bills.

> [112] I reach this view given the purpose of s 12 which is to prevent contracting out. In that context, the relevant effects, that is, "defeating, evading, avoiding, or preventing the operation of this Act", must mean something other than just not meeting the s 6 requirements.

[63] We agree that s 12 is not engaged merely because there has been a breach of the s 6 requirements. For instance, if all the s 6 requirements were met save for the requirement that the agreement be signed by the vendor (see s 6(1)(a)) it could not credibly be suggested that the circumstances were within s 12(2). Nor would inconsequential variations from the s 6 requirements justify the application of s 12(2). Indeed, we accept that there will be circumstances which involve a breach of s 6(1) and lie beyond the s 6(2) dispensing power but which nonetheless would not fall within s 12. So in broad terms we accept that the distinction drawn by Telecom Mobile and the Judge is correct, and indeed the Commission did not suggest otherwise.

[64] On the other hand, we think it plain that the conduct of Telecom Mobile did engage s 12 of the Act. Section 12(2) applies to "any contract … for the purpose of or having the effect of, in any way, … defeating, evading, avoiding, or preventing the operation of this Act in any respect …". The right of cancellation provisions in the Door to Door Sales Act are the centre piece of the consumer rights conferred by that statute. Telecom Mobile's purported contractual arrangements had the purpose or effect of preventing the operation of the Act (or evading or avoiding that operation) because they hid from consumers the reality as to their true rights of cancellation. Further, they necessarily misled consumers into believing that they were subject to contractual obligations which were enforceable, when this was not the case.

[65] Mr Smith in his argument for Telecom Mobile on this aspect of the case sought to invoke the tax cases dealing with anti-avoidance provisions, and in particular the line of cases commencing with *Newton v Commissioner of Taxation of the Commonwealth of Australia* [1958] AC 450. He said that in this case the contractual arrangements imposed by Telecom Mobile were referable to a business purpose other than the avoiding or evading of the application of the Door to Door Sales Act, namely the unwillingness of Telecom Mobile to accept back used goods.

We have found this argument unpersuasive. No doubt Telecom Mobile did not wish to accept back from customers cellphones which had been used (let alone permit customers to make free calls for seven days). But, this business purpose seems to us to be simply the other side of the coin to avoidance of the Door to Door Sales Act.

[66] Telecom Mobile had a choice whether or not to do business in a way which engaged the Door to Door Sales Act. It chose to sell cellphones and telecommunications services in a way which engaged that Act. The contractual documentation which it prepared completely misstated the position regarding rights of cancellation and necessarily left consumers with erroneous understandings as to their liabilities.

[67] In any event, we do not see the *Newton* line of cases as being particularly helpful in the present context. *Newton* represented an attempt by the Privy Council to resolve the now very familiar difficulty of distinguishing between conduct which justifies the application of legislative anti-avoidance provisions and the legitimate exercise by taxpayers of choices between difference courses of action which have different tax consequences. The problems posed by the Door to Door Sales Act seem to us to be somewhat less complex.

[68] Mr Smith also sought to argue that s 12(2) applied only in the case of the deliberate attempts to contravene the Act. He envisaged s 12(2) applying in cases where the contract perhaps recorded, falsely, that the agreement had been entered into at appropriate trade premises. He conceded that s 12(2) would have applied in the present case if the cancellation provisions stipulated for by Telecom Mobile were accompanied by a statement to the effect that:

> These cancellation provisions apply notwithstanding anything provided for in the Door to Door Sales Act 1967.

Such words would be mere surplusage as the effect of the contractual documentation actually used (which stipulated for cancellation provisions which differed from what was provided for in the Act) would seem to us to be very much the same as the effect of documentation of the type postulated by Mr Smith.

[69] Given the language employed in s 12(2) and in particular, the disjunctive "purpose or effect" test, we see no basis for concluding that s 12(2) is confined in its application to attempts to contract out of the Door to Door Sales Act.

Back to the facts

[70] No one suggests that at the inception of the campaigns, Telecom Mobile recognised that it was acting in a way which breached the Door to Door Sales Act. What troubles us, however, is that once Telecom Mobile recognised the difficulties with the legislation, it was slow to take appropriate action.

[71] Telecom Mobile first became aware of the Commission's concerns in September 2002. Email communications between Telecom Mobile and Appco show that as early as 18 September 2002, Telecom Mobile was on notice that the door to door campaign conducted on its behalf by Appco did not comply with the Door to Door Sales Act. Yet it was not until late November 2002 that steps were taken to ensure compliance with the Act.

[72] More significantly, Telecom Mobile has throughout acted on the basis that the apparent contractual obligations of the customers were enforceable. It has done this by:

(a) Not telling its customers that their apparent obligations were unenforceable; and

(b) Billing its customers in a way which, at least by implication, asserts that the apparent obligations are enforceable.

[73] The effluction of time has largely resolved Telecom Mobile's legal problems associated with unenforceability of the contracts under ss 5 and 6 of the Act, this because the relevant contracts must now all have expired (in not earlier varied or replaced).

The relief to be granted

[74] Even if wrong on the s 12 issue (as we have held it is), Telecom Mobile resists the making of orders requiring corrective advertising.

[75] The issues on this aspect of the case are broadly summarised in the following passage of the judgment of Ellen France J:

> [119] … Telecom says the declarations sought are too broad on three grounds:
>
> (a) They encompass business customers;
>
> (b) They encompass former customers and so utility is absent; and
>
> (c) They would be ineffective.
>
> [120] In expanding on the first point, Telecom submits that an unknown number of customers, those who bought their mobile phones for business use whether in whole or in part, must be excluded from the ambit of any order made by the Court because otherwise the declaration will be inapplicable to them as a matter of law. That is because, as explained above, the agreements these customers entered into are not credit–sale agreements.
>
> [121] On the second point, the submission is that a number of the customers who signed contracts with Telecom Mobile as a result of the marketing campaigns, are no longer connected to Telecom's network or have changed from their original plan or have upgraded their handset. … Because the effect of s 5 is not to oblige Telecom to return money already paid under the contracts, Telecom submits that any declaration will be irrelevant to those former customers. The granting of the orders sought would therefore be contradictory to the basic principle that a declaration will not be granted unless it will be of some utility (*Turner v Pickering* [1976] 1 NZLR 129 at p 141).
>
> [122] Finally, under this head, Telecom submits that the declarations or orders sought will be ineffective because the enforcement will still require a significant amount of evidence to be brought in each individual case. The plaintiff would still need to prove, on a separate case-by-case basis, that there was an agreement, that the agreement was made at other than appropriate trade premises, that the Door to Door Sales Act was not complied with, and that each customer does not come within either a business user or a former customer. Following that, for each customer not entirely excluded, there is also likely to be a factual issue about the extent to which the phone and its services have been consumed or depleted. In essence, Telecom submits that any declaration would leave too many factual issues unresolved in respect of each customer to be workable.

[123] On the question of utility, the commission submits that the declarations sought would have the benefit of correcting an individual's misapprehension that they do in fact have to pay.

[124] In terms of the coverage of business customers, the commission says that this is a problem of Telecom's making. It is up to them to know who they are dealing with so they can in fact comply with the law.

[125] As to the effectiveness of the relief sought, the Commission submits that Telecom's arguments suggest that implementing the relief sought would be time-consuming rather than too complex or impossible.

[126] The declarations/orders sought are overly broad in that they would encompass business customers. Similarly, it follows from my conclusion on the inapplicability of s 12(2), that Telecom is correct about the lack of utility in the declarations/orders in terms of former customers. Telecom's other point about the need for a factual inquiry does not take the matter very far.

[127] Finally, Telecom submits that the relief sought should be declined under s 42 of the Fair Trading Act. That is on the basis that Telecom has already taken remedial steps. Telecom says that relief under s 42 is directed to the correction of misleading conduct that was in breach of the Act. Where the defendant had already taken corrective action in *Commerce Commission v Fresh Juice Co Ltd* (1997) TCLR 131 at p 141, Greig J cited with approval the statement of Tamberlin J in *ACCC v On Clinic Australia Pty Ltd* (1996) ATPR 41-517 at p 42-459 that:

> "Corrective advertising is intended to dispel incorrect or false impressions which may have been created as a result of deceptive or misleading conduct. It is not intended to be punitive."

[128] In that regard Telecom refers to Appco's complete review of its processes and suspended sales activity and the fact that the documents now being used were drafted by Telecom Mobile together with its lawyers.

[129] In terms of s 42(a) Telecom submits that it would be necessary to bring the orders sought within the confines of "information". Enforceability for the future and details about that are not "information". In terms of s 42(b), that has to be corrective and the orders sought do not correct anything. There is nothing said by the defendant that the contracts are enforceable.

[130] On this aspect, the Commission submits that the evidence is that Appco has corrected its procedures but that there is no evidence before the Court that Telecom has changed its business practices. There is certainly a contrast between the evidence about the follow–up to the various complaints about Telecom's campaigns, and the evidence before Harrison J in *Carter Holt Harvey Ltd v Cottonsoft Ltd* (High Court, Auckland, CIV 2003–404–4809, 8 April 2004). In *Carter Holt Harvey*, Cottonsoft's solicitors had advised that they were deleting on an interim basis all references in its packaging to the offending words.

…

> [132] Telecom may well be right that advice about future enforceability is not "information" of the sort to which s 42(a) is directed. The declarations/orders sought could, however, be corrective of a customer's misapprehension about the effect of non–compliance with the 1967 Act. However, because I consider the relief sought is too broad anyway I do not make any conclusive findings on these aspects.
>
> [133] While there has been non–compliance by Telecom, the relief sought by the commission is too broad in three respects:
>
> (a) The application to business customers;
>
> (b) The application to former account holders; and
>
> (c) As to the nature of the unenforceability, especially because the declarations/orders would, incorrectly, say customers could get all of their money back.
>
> [134] The first two matters could probably be overcome – a person seeking the benefit of Telecom's failure would have to satisfy Telecom he or she was not either a business customer or was still a customer. The third matter is more fundamental.
>
> [135] I have considered whether the opportunity should be given to the commission to refine the terms of the declarations/orders sought. However, I have concluded that to do so on a summary judgment application would not be appropriate. The commission has had plenty of time to get that right and indeed filed an amended application. …

We note that the point raised by the Judge as to "former customers" is no longer of relevance given our conclusion as to s 12(2).

[76] We have set out this passage at length because there was perhaps a sense in which the parties, in the course of argument before us, were at cross-purposes. Mr Sissons presented his argument very much on the basis that if we found in favour of the Commission on the s 12(2) issue it really followed as a matter of course, that orders as to corrective advertising should be made. This seems to us to have been an understandable approach because the flavour of the judgment of Ellen France J as a whole, is that it was her conclusion as to the s 12(2) issue which resulted in the refusal of relief.

[77] Mr Smith, however, for Telecom Mobile presented his argument on the basis that if we found against Telecom Mobile on the s 12(2) issue the case should be remitted to the High Court for determination of all other issues as to whether

corrective advertising should be imposed, and if so, as to the details of the orders to be made.

[78] Mr Smith was particularly concerned about the Commission's argument that the corrective advertising to be carried out should notify consumers of their rights under s 12(2) of the Act. He suggested that this went beyond "correction" and was punitive.

[79] We disagree. If misinformation is to be corrected, what is required is complete correction. Telecom Mobile made false representations as to the enforceability of the contracts. Correction of those false representations must necessarily involve informing customers of the unenforceability of the contracts. It is difficult to see how that could be done honestly without explaining to consumers that the unenforceability, in context, is such that payments made by them may be recovered.

[80] Mr Smith's position was that the relief sought by the Commission was too broad. In part this related to the "business customers" issue which we have already discussed. But he said, and rightly, that recoverability of all payments made in any particular case would necessarily depend upon the circumstances of that case and that there may well be a number of non-business customers who, for one reason or another, are not entitled to recover their money back even on the s 12(2) approach which we prefer. That is no doubt true (although we suspect that there will be comparatively few customers in that category). More importantly, however, the Commission is not seeking an adjudication to the effect that everyone who entered into agreements with Telecom Mobile as a result of the two campaigns in issue is necessarily entitled to rely on s 12(2). If the misapprehensions as to entitlements induced by Telecom Mobile are corrected, there will, perhaps, be some element of "overshoot" in corrective advertising; this because the information in question will necessarily reach people who are not entitled to rely on s 12(2). In this context, however, we think that the undesirability of an "overshoot" is more than counteracted by the reality that, in the absence of orders as to corrective advertising, the Court's response to what has happened will involve a massive "undershoot".

[81] Telecom Mobile seriously misled customers as to their rights. We can see no basis upon which Telecom Mobile could legitimately cavil at dispelling the misinformation for which it was responsible. This proposition was put to Mr Smith reasonably forcefully from the Bench in the course of argument and, in the end, he indicated that he would be taking further instructions from Telecom Mobile on this point.

[82] We envisage corrective advertising along the lines of:

(a) An acknowledgement by Telecom Mobile that the campaigns in question engaged the Door to Door Sales Act in respect of all contracts entered into other than those involving business customers (a term which will no doubt have to be explained);

(b) An acceptance that the contracts themselves were unenforceable under ss 5 and 6 of the Door to Door Sales Act; and

(c) An acceptance that any monies paid by consumers (other than business customers) are recoverable under s 12(2) of the Door to Door Sales Act subject to any specific defences which Telecom Mobile may have in particular cases.

[83] We further envisage that notices to this effect are to be sent to the last known addresses of all those who acquired cellphones as a result of the two marketing campaigns and will, as well, be published by say full page advertisements in the major New Zealand newspapers at least twice within a period of a week.

[84] We believe that the detail of such orders can probably be determined by agreement between the parties but in default of agreement we will fix the detail upon application by either of the parties.

Summary judgment principles

[85] We have not overlooked the reality that these proceeding were before Ellen France J by way of summary judgment.

[86] She found in favour of the Commerce Commission on all critical issues other than the application of s 12(2) in respect of which we disagree with her. We think it reasonably plain that if she had found in favour of the Commission in relation to the interpretation of that section she would have made orders broadly as sought by the Commission (but perhaps with the details to be determined later).

[87] It is not uncommon in cases in which summary judgment is sought for there to be scope for debate as to the minutiae of the details of the resulting orders; for instance where specific performance is decreed there may be debate as to the day of the settlement. We do not regard the existence or possibility of there being legitimate debate as to the fine details of the relief to be regarded as being inconsistent with the exercise of the summary judgment jurisdiction.

Disposition

[88] The appeal is allowed and the cross-appeal is dismissed.

[89] Telecom Mobile is to engage in a corrective advertising exercise in terms to be agreed between the parties and in default of agreement to be fixed by this Court.

[90] Telecom Mobile is to pay to the Commerce Commission costs in the sum $6,000 together with usual disbursements.

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