IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2005
[2006] NZSC 17

	BETWEEN	TELECOM MOBILE LIMITED Appellant
	AND	THE COMMERCE COMMISSION Respondent

Hearing: 9 February 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Eichelbaum JJ

Counsel: A R Galbraith QC, J B M Smith and M C Smith for Appellant
T Arnold QC, Solicitor-General, T Sissons and K S Grau for Respondent

Judgment: 30 March 2006

JUDGMENT OF THE COURT

A. The appeal is allowed and the order of the Court of Appeal is set aside.

B. The matter is remitted to the High Court for consideration of the formal orders which should now be made, including an order for costs in that Court.

C. The costs award in the Court of Appeal is affirmed. Costs in this Court will lie where they fall.

REASONS

(Given by Blanchard J)

Introduction

[1] The Commerce Commission has established in a proceeding against Telecom Mobile Limited under the Fair Trading Act 1986 that Telecom has been guilty of breaches of ss 9 and 13(i) of that Act in the marketing of certain mobile telephones in 2001 and 2002 because it misled its customers concerning their right of cancellation under the Door to Door Sales Act 1967. Telecom now accepts that finding of the High Court, confirmed by the Court of Appeal, but it appeals to this Court against an order made by the Court of Appeal, reversing the High Court, requiring Telecom to engage in a corrective advertising exercise which would involve not only an acknowledgement by Telecom that the Door to Door Sales Act was engaged but also statements that the contracts were unenforceable under ss 5 and 6 of that Act and, most importantly, that any moneys paid by the customers are recoverable by them from Telecom under s 12(2) of that Act, subject to any specific defences which Telecom might have in particular cases. Telecom says that the Door to Door Sales Act does not permit the making of an order enabling recovery under s 12(2).[1] The critical question in this Court is therefore whether s 12(2) applies in the circumstances of this case.

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[1] It has not been suggested for the Commerce Commission that any order of such a nature could be made at its behest under the Fair Trading Act.

The Door to Door Sales Act

[2] Section 5(1) of the Door to Door Sales Act provides that where a "credit agreement"[2] is made at a place other than "appropriate trade premises",[3] the vendor is not entitled to enforce the agreement unless the requirements of s 6 are complied with. Section 6 requires, *inter alia*, that the agreement must be in writing signed by the purchaser and must contain a statement in the form set out in Part 1 of the First Schedule to the Act. That statement is a notice to the customer of a right of cancellation exercisable by completing and giving to the vendor at its nominated address "before the end of the period of 7 days beginning with the day after the day

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[2] "Credit agreement" means any credit-sale agreement, hire purchase agreement, or hiring agreement under which the vendor sells, lets, hires, or bails the goods that are the subject of the agreement in the ordinary course of a business carried on by him; but does not include—

(a) Any agreement under which the purchaser is a body corporate; or

(b) Any agreement under which the purchaser is a person engaged in buying and selling goods of the same or a similar nature or description as the goods that are the subject of the agreement; or

(c) Any agreement under which the purchaser is a person who is carrying on any farming, agricultural, or manufacturing business, or any other business of any kind whatsoever or who is practising any profession if the goods that are the subject of the agreement are goods of a type that are normally used in the carrying on of the business or in the practice of the profession; or

(d) Any credit-sale agreement if the goods that are the subject of the agreement comprise mainly books or printed matter and the total purchase price does not exceed $20; or

(e) Any credit-sale agreement (other than one of the kind described in paragraph (d) of this definition) under which the total purchase price does not exceed $40; or

(f) Any hire purchase agreement or hiring agreement under which the total purchase price does not exceed $20:

"Credit-sale agreement" means an agreement for the sale of goods under which the total purchase price is not paid in full at, or before, the time at which the agreement is made; but does not include a hire purchase agreement:…

Also relevant is:

3A Provision of services

(1) Every agreement whereby a person agrees in the ordinary course of a business carried on by him to provide services for any other person for valuable consideration, whether alone or together with goods, shall (subject to subsection (3) of this section) be deemed to be a credit agreement within the meaning of this Act, and the provisions of this Act shall, so far as applicable, apply accordingly, with all necessary modifications, as if the services were goods within the meaning of this Act.

[3] "Appropriate trade premises" means—

(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:…

on which you signed the agreement, the notice of cancellation handed to you on that day". Under s 6(1)(c) the vendor is required to give to the purchaser at the time when the agreement is made a prescribed specimen form of notice of cancellation which the purchaser can elect to sign and post or deliver to the vendor within the seven day period. A minor failure in compliance with s 6 – one which has not prejudiced the purchaser – can be dispensed with by a Court if that would be just and equitable.[4]

[3] Section 7(1) gives the purchaser the right of cancellation mentioned in s 6. Section 7(3) provides that where an agreement does not comply with s 6, so that under s 5(1) it is unenforceable by the vendor, 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 notice to the vendor. Notably, there is no provision extending the one month period where the purchaser is unaware of the vendor's non-compliance, as, for example, when the purchaser has no knowledge of the existence of the Act.

[4] Section 8 applies if the vendor has not complied with the requirements of s 6, that failure has not been dispensed with by a Court, the purchaser has not cancelled and the one month period has expired.[5] In such circumstances and after that time, s 8 provides that the vendor may give the purchaser a copy of the agreement, a statement advising of a right to cancel within a further seven days and a form of cancellation notice. The purchaser then has the right to cancel within that further period.[6] If the purchaser does not cancel during the further seven day period under s 8, then s 5 of the Act ceases to apply to the agreement, so that it becomes enforceable by the vendor.[7] A vendor in default under s 6 is not obliged to utilise s 8.

[5] If a cancellation notice is given by the purchaser the agreement is deemed rescinded and any money paid under it must be refunded.[8] The purchaser must redeliver the goods at the purchaser's premises and has a lien on them for the refund

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4 Section 6(2).
5 Section 8(1).
6 Section 8(2) and (4).
7 Section 8(3).
8 Section 9(1). A vendor who knowingly fails to repay money to a purchaser after a notice of cancellation under s 7 commits an offence: s 14(1).

which is due by the vendor.[9] The purchaser must in some circumstances compensate the vendor for any damage to or loss or destruction of the goods while in the purchaser's custody, other than from normal use or from circumstances beyond the purchaser's control.[10] The purchaser must also compensate for consumption or depletion in normal use.[11]

[6] It is s 12 of the Act which is at the heart of the question which this Court must determine, namely whether, under subs (2), in the circumstances which have arisen Telecom's customers can now recover the money paid to it for the mobile phones and services. It reads:

> **12 No contracting out**
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> (1) The provisions of this Act shall have effect notwithstanding any provision to the contrary in any agreement.
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> (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.

The facts

[7] The facts in this case are no longer in dispute and can be briefly stated. The events concerned were in 2001 and 2002. After agents for Telecom had made an initial contact with a domestic customer by telephone or at their door and Telecom had carried out a credit check, a package consisting of a telephone and certain contractual materials and advice were sent to the customer at his or her home. The packing slip notified the customer that any product return must take place within seven days. It was also plainly notified to the customer that by breaking the seal on

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9 Sections 9(1) and (4) and 10(1) and (2). There are other forms of relief concerning any collateral agreement and any security given by the purchaser for any goods supplied by the purchaser in part-exchange for the goods which are the subject of the agreement.

10 Section 10(8).

11 Section 10(7).

the box containing the telephone the customer was accepting the telephone and also accepting Telecom's terms and conditions for a 24 month supply of telephone services. The terms included a statement that if a customer wanted to end the agreement then, unless both parties had agreed to the contrary, it would end and charges would stop one month after receipt of the customer's notice of termination, but subject to the application of disconnection charges, namely a fee of $100 and GST plus $10 and GST per month or part month remaining of the contract term.

[8] The Courts below have held, and Telecom now accepts, that in these circumstances no contract for the goods, i.e. the telephone, or the associated telephone services was made before the customer received the package and by breaking the seal manifested agreement to Telecom's terms and conditions. The contract was therefore made at the customer's home, not at the trade premises of Telecom or its agent. As it involved the giving of credit by Telecom to the customer for a price exceeding $40 the Door to Door Sales Act applied. Telecom was in breach of s 6 because it did not inform customers of the right of cancellation afforded by s 7. Indeed, they were actually misled by its terms and conditions. We were told from the bar that up to 22,000 customers have been affected.[12]

The High Court judgment

[9] The Commerce Commission applied to the High Court for summary judgment on its claim against Telecom under the Fair Trading Act. It sought the following declarations:

> (a) Telecom Mobile's direct door to door marketing campaign to residential homes for the sale of mobile phones and connected services…resulted in agreements for the sale of goods and the provision of services that are regulated by the Door to Door Sales Act 1967;
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> (b) Telecom Mobile's telemarketing campaign for the sale of mobile phones and connected services…resulted in agreements for the sale of goods and the provision of services that are regulated by the Door to Door Sales Act 1967; and

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[12] It is not now suggested for Telecom that the failure to comply with s 6 is one that could be dispensed with under s 6(2).

> (c) As a result of Telecom Mobile's failure to comply with the requirements of the Door to Door Sales Act 1967: all of the agreements…are unenforceable by Telecom Mobile; the customers who entered into such agreements are entitled to recover all money paid to Telecom Mobile under their agreements: and Telecom Mobile has no right to compensation for services supplied.

The Commission also sought an order under s 42(a) and/or (b) of the Fair Trading Act that Telecom disclose at its expense to all the affected customers the position stated in the third declaration.

[10] In a judgment delivered on 23 June 2004[13] Ellen France J found that the Door to Door Sales Act applied except to those transactions where the mobile phone was used for business purposes and that in relation to the other customers there had been non-compliance with that Act which was more than minor. She concluded that the omission from the documentation of the statement and form required by s 6 was misleading conduct under the Fair Trading Act and that the statements made by Telecom in its documentation "…were also misleading conduct/representations because the breach of the Door to Door Sales Act means in fact that the customers had other rights of which they were not advised, in particular, the right to cancel at any time up to one month later without penalty".[14]

[11] Ellen France J rejected an argument from Telecom that there was no jurisdiction to grant declaratory relief to the Commerce Commission. However, she did not consider that declarations should be made. She said that s 12(2) did not apply and that the position was governed by s 5. That meant only that Telecom could not bring proceedings for unpaid bills. The Judge said that the purpose of s 12 was to prevent contracting out. In that context the relevant effects, i.e. "defeating, evading, avoiding, or preventing the operation of the Act" must mean something other than just not meeting the s 6 requirements.[15] Ellen France J also considered

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13 HC WN CIV-2003-485-2605.
14 At [87].
15 At [112].

that the declarations and orders sought by the Commission were overly broad in that they would encompass business customers and former customers. She said it followed from her conclusion on s 12(2) that there was "lack of utility in the declarations/orders in terms of former customers".[16] The declarations would also incorrectly say that customers could get all their money back. The Judge was of the view that on a summary judgment application it was not appropriate to give the Commission an opportunity to refine the terms of the declarations and orders sought. Summary judgment was declined.

The Court of Appeal judgment

[12] The Commerce Commission appealed against the High Court's finding that s 12 did not apply and its holding that the orders sought were too broad. Telecom cross-appealed against the finding that the Door to Door Sales Act applied to its telephone sales.

[13] In its judgment[17] the Court of Appeal agreed that Telecom's contracts with non-business customers were subject to the Door to Door Sales Act. Telecom now accepted that, in that event, it had failed to comply with that Act and that to such extent its conduct was in breach of ss 9 and 13(i) of the Fair Trading Act. The Court considered that an order for corrective advertising was therefore appropriate provided that s 12(2) of the Door to Door Sales Act applied to the situation. It agreed that s 12 was not engaged merely because there had been a breach of the s 6 requirements. It accepted that inconsequential variations from those requirements would not justify the application of s 12(2) and that there would be circumstances which involved a breach of s 6(1) and lay beyond the s 6(2) dispensing power but which nonetheless would not fall within s 12. But the Court said that Telecom's purported contractual arrangements:[18]

> …had the purpose or effect of preventing the operation of the Act (or evading or avoiding that operation) because they hid from consumers the

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16 At [126].
17 [2006] 1 NZLR 190 (Anderson P, William Young and Robertson JJ).
18 At [64].

> 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.

The Court said that s 12(2) was not confined in its application to attempts to contract out of the Door to Door Sales Act.[19]

[14] Because Telecom had seriously misled customers as to their rights, the Court of Appeal ordered that Telecom should engage in a corrective advertising exercise in terms to be agreed between the parties and in default of agreement to be fixed by the Court. It gave an indication of what that advertising might require. It allowed the Commission's appeal and dismissed Telecom's cross-appeal.

New argument for the appellant

[15] As late as the oral argument in this Court Mr Galbraith QC, for Telecom, put forward a new argument concerning the role of s 12(2). It had not been signalled even in the written submissions required under the Supreme Court Rules 2004. It was unsatisfactory that a new argument should emerge only at this stage but, as the argument was one directed to the interpretation of a statute, the Court could not properly decline to consider it.[20] Because this development understandably took counsel for the respondent by surprise the Court afforded them the opportunity of supplementing their oral submissions with a further written submission after the hearing. This has been received and considered.

[16] What follows is our own summary of the essence of Mr Galbraith's argument. Section 12 deals with two different situations. Section 12(1) is the only true contracting out provision. That subsection is concerned with agreements etc. which are caught by s 5(1), and thus subject to the Act, but contain one or more provisions which are contrary to it. Such provisions have no effect. The Act simply overrides them. In the present case, Telecom's agreement was subject to the Act. In

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19 At [69].

20 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 at [8] and [9] (PC).

so far as the agreement purported to deny its domestic customers the right of cancellation given by the Act, s 12(1) rendered it ineffective. No matter what customers were told or may have accepted by contract, their agreements fell within the Act and they had the right of cancellation which it gave. The Act operated in full and as if the inconsistent contractual provision(s) had never existed. Therefore the agreement could not possibly, as required by s 12(2), be regarded as having the effect of defeating etc. the operation of the Act in any respect.

[17] Read in context, the argument continues, s 12(2) must have been intended for different situations from those covered by subs (1), namely those in which an agreement is structured in a manner which takes it outside the operation of the Act and thereby prevents the Act from operating when it would otherwise have done so. Examples given by counsel were the use of multiple agreements in each of which the value of the goods was below the level found in the definition of a credit agreement when there would normally have been only one agreement; or a provision declaring the customer's home to be premises of the vendor at the time of the making of a contract. Such arrangements would be lawful and effective because the Act contains no provision declaring them to be unlawful. Hence the need for subs (2); an anti-avoidance provision which applies only when an agreement is taken outside the reach of the rest of the Act. That explains why the subsection is positioned where it is – not as part of the general scheme of the Act – and why, if read as an additional feature of the regime in ss 5-10, it is such a bad fit with those provisions.

Analysis

[18] We have been brought to the view that Mr Galbraith has identified the true operation of s 12(2). It indeed does not sit comfortably with ss 5-10 if it is read as applying to cases which are already within the Act. Being open-ended as to time, it seems quite inconsistent with the prescription of time periods for cancellation found in s 7, particularly considering there is no provision for any extension of the one month period in s 7(3). Further, under s 12(2), no matter when the purchaser chooses to seek recovery – perhaps after having received full value from the goods he or she has retained and/or from services already provided by the vendor – the

vendor must disgorge all money paid. That is a potentially draconian penalty seemingly inconsistent with the balancing of interests found elsewhere in the statute, for example, in the detailed arrangements in ss 9 and 10 for unravelling a transaction cancelled under s 7. Moreover, on the view taken for the Commerce Commission, the penalty could apply not only where the departure by the vendor from the requirements of s 6 was with deliberate intent to defeat the operation of the Act but also where, as Telecom says is the case here, it occurred, at most, negligently and without any such intention.

[19] It is significant also that the Act does not require a vendor who becomes aware of its failure to comply with s 6 then to give a notice under s 8. If the statute meant a purchaser always to have an extended or renewed opportunity to cancel the contract and recover moneys paid as a consequence of non-compliance with s 6, it might have been expected that it would have provided accordingly. The absence of any such provision may well have reflected a recognition that in many circumstances the passage of time would render unfair even the restitutionary regime in ss 9 and 10, and that there would be sufficient remaining sanction against vendor non-compliance in the unenforceability of the contract under s 5(1) if the purchaser stopped making payments but retained the goods and/or the benefit of the services already rendered. It seems therefore to have been left to the vendor to decide whether, on balance, the consequences of a cancellation by the purchaser in response to a s 8 notice are preferable to the prospect of continuing unenforceability. In some circumstances and at some stages of a transaction there might be an incentive to use s 8, in others not.

[20] It may be said that the scheme of ss 5-10 is unsatisfactory because purchasers who remain in ignorance of their right of cancellation during the one month period then lose that right. And, so long as they are unaware of the unenforceability of the agreement, they may simply continue to make payments which are likely to be accepted by vendors without demur. To this extent the legislative scheme, which appears to have been modest in its objective, is arguably imperfect.[21] But that is no reason to treat the very blunt instrument of s 12(2) as a means of filling a perceived

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[21] It has since enactment in 1967 been supplemented by the Fair Trading Act provisions dealing with deceptive and misleading conduct, which may deliver a remedy to an individual purchaser on a more flexible and measured basis with a three year time limit: see Fair Trading Act 1986, ss 41-43.

gap in a relatively detailed legislative scheme when, as it seems to us, that is not the purpose of that subsection.

[21] Rather, s 12(2) can, when read in the context of the Act as a whole, be seen to be an anti-avoidance provision which was necessary in order to catch arrangements which are not a sham and which could be lawfully structured so as to fall outside the Act, but whose substance can properly be regarded as falling within it. But for s 12(2), such arrangements might succeed in removing a transaction from the ambit of the Act and thereby defeating, evading, avoiding, or preventing its operation. The likelihood of this occurring without deliberation was perhaps slight, but that possibility was covered by the use of the familiar statutory expression "purpose or effect". At the time the Act was passed, it was not uncommon for those drafting regulatory measures to include a provision in the form of s 12(2) to discourage persons who would otherwise be affected from using forms or devices in structuring their contractual arrangements which would put a transaction outside the regulatory framework. Where the transaction was one which was capable of being regarded as having the purpose or effect of defeating the regulatory scheme in some way, and the Court was satisfied that was so, the provision would be applied to negate the circumvention of the statute or regulations.[22]

[22] The Solicitor-General submitted that there was no logical rationale for any distinction between subss (1) and (2). Since it is clear that s 12(1) would apply even to very sophisticated attempts to mislead customers as to their rights under agreements which were plainly within the Act, he said that the sanction in subs (2) must be available in such cases to provide some greater disincentive than the ss 5-10 procedures. It was suggested that subs (2) should apply whenever the transaction is more than a mere failure of compliance and has "in fundamental respects" defeated the operation of the Act whilst not avoiding, at least theoretically, all aspects of its operation.

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[22] See *Carroll v Credit Services Investments Limited* [1973] 1 NZLR 246, 255 and 258 (CA).

[23] This argument cannot withstand a comparison of the language of the two limbs of s 12. If the only feature of an agreement impugned under both subss (1) and (2) as amounting to "contracting out" is the presence of provisions inconsistent with ss 5-10, the operation of the Act is in no way hindered in terms of subs (2), because subs (1) has already rendered those provisions ineffective. As the appellant submitted, the two limbs are logically distinct: it is only when an agreement is structured so as to be beyond the reach of subs (1) that the defeating effect envisaged by subs (2) is possible.

[24] The further difficulty with the respondent's argument is that it attempts to elide the practical and legal aspects of the operation of a statute. If the argument were accepted, subs (2) would be able to be invoked where the defeating effect complained of related to the practical efficacy of the Act rather than to its non-application, in whole or in part, to a particular agreement. The Act need not, in fact, be defeated in any "fundamental" way to trigger subs (2), which is phrased broadly to catch defeating effects "whether directly or indirectly" and "in any respect". However, there is a need for the relevant defeating effect to be, to adopt the Solicitor-General's description, "theoretical" rather than merely practical. The fact that vendor conduct encouraging and preserving consumers' ignorance may prevent the Act from having any practical impact does not mean that such conduct prevents the operation of the Act, including the expiration of its limited opportunities for cancellation, as a matter of law.

[25] It seems to us, finally, that if s 12(2) were applied as overlapping with and supplementing s 12(1), the breadth of its language would make classification of cases falling within it, and thereby attracting very severe consequences, extremely difficult. To give but one example, are there to be different consequences for an agreement which does not mention cancellation rights at all from the consequences for one which misstates them or refers to them in a misleading way? We are not persuaded that the Courts should have to undertake the task of distinguishing between such situations. One of the attractions of the legislation as a whole when it was enacted in 1967 was no doubt its relative simplicity in a less complicated age.

[26] The Court of Appeal therefore erred in considering that s 12(2) applied in the circumstances of this case, where the provisions of Telecom's contracts which did not comply with the Act were rendered ineffective by s 12(1). The order for corrective advertising envisaging a statement that moneys paid by consumers were recoverable under s 12(2) should not have been made.

Result

[27] The appeal is allowed and the order of the Court of Appeal is set aside. As it has been found that Telecom was in breach of the Door to Door Sales Act but no declarations have yet been made to that effect, the matter is remitted to the High Court for consideration of the formal orders which should now be made, including an order for costs. The costs award in the Court of Appeal will remain as it reflects the success of the Commission on issues other than relief. Costs in this Court will lie where they fall.

Solicitors:
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