



[2015] JMCC Comm 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013CD00121

**IN THE MATTER OF CRICHTON
AUTOMOTIVE LIMITED'S
CONTRAVENTION OF THE
OBLIGATIONS AND/OR
PROHIBITIONS CONTAINED IN PART
VI OF THE FAIR COMPETITION ACT
1993**

AND

**IN THE MATTER OF AN
APPLICATION FOR ENFORCEMENT
OF THE SAID OBLIGATIONS AND/OR
PROHIBITIONS BY THE FAIR
TRADING COMMISSION
PURSUANT TO PART VIII OF THE
ACT AFORESAID**

BETWEEN THE FAIR TRADING COMMISSION CLAIMANT
AND CRICHTON AUTOMOTIVE LIMITED DEFENDANT

IN CHAMBERS

Dr Delroy Beckford and Marc Jones for the claimant

Christopher Dunkley and Jahyudah Barrett instructed by Phillipson Partners for the defendant

FAIR COMPETITION – FALSE OR MISLEADING REPRESENTATION – SECTION 37 OF FAIR COMPETITION ACT

April 27, 28 and May 22, 2015

SYKES

[1] Miss Lisbeth Mills wanted to purchase a second hand car that could give her ten years of service. She scoured the newspapers and saw that Crichton Automotive Limited ('CAL') was one place she might visit to see if her preference could be met. She was interested in the Toyota brand. On arrival, one Mr Percy Williams, an agent or employee of CAL, told her that there no Toyotas were available for the price range that she had in mind but she may wish to consider the Nissan brand. His blandishments were successful. Her attention was redirected to the Nissan line of cars. It should be stated that it is not the advertisement in the newspaper that has led to this enforcement action against CAL.

[2] Miss Mills became interested in a particular Nissan car. Mr Williams showed her a document and at the end of the discussion she was told that the car was a

2007 one. Armed with information she decided to make the purchase at a cost of \$1.44m. It turned out that the car was a 2005 motor car. It is this false representation that has caused the problems for CAL. She returned to CAL and after several attempts to resolve the issue, which all failed, she turned to the Fair Trading Commission ('FTC').

[3] The FTC took action against CAL under section 37 (1) (a) of the Fair Competition Act ('FCA') alleging that CAL was guilty of false and misleading advertisement. CAL has resisted this allegation on the ground that (a) it had an honest belief that the information on the document it received from the Singaporean exporter was correct and (b) government agencies in Jamaica had acted on the same information which meant that CAL was entitled to believe that the government agencies had satisfied themselves that the information was correct and therefore CAL is without fault and consequently no breach of section 37 (1) (a) was committed by it. These submissions are not accepted and CAL is liable. These are the reasons.

[4] The FTC is also asking that the court impose the maximum fine of \$5m should the court find that the breach is proven.

How the false representation was discovered

[5] When Miss Mills decided to purchase the car, Mr Williams gave her a pro forma invoice that she took a financial institution which would finance the purchase. The pro forma invoice referred to the car as a 2007 model. Later on she was also given a valuation report and a customs declaration form and both these documents referred to the car as a 2007 model.

[6] Her suspicions about the year of the car were first aroused when upon taking possession of the car she went across the road from CAL to an auto accessory shop to purchase a movable rain shield. From the reaction of the store clerk, she developed a sinking feeling that the car may not be what she thought. Her

intuition was confirmed by hard evidence. She contacted Fidelity Motors Jamaica Limited ('Fidelity'), the only authorised dealers for Nissan motor cars in Jamaica. Fidelity told her that the car was a 2005 car.

[7] Miss Mills went back to CAL where there she met Miss Nordia Lewars, another employee or agent of CAL. Miss Mills was advised to have the model verified by the Island Traffic Authority ('ITA'). She took the car there. She was told that the car was a 2005 model.

[8] Miss Mills again contacted CAL and told them that the ITA found that the car was a 2005 car. She made two proposals to CAL to resolve the matter and each was rejected by CAL. Her first suggestion was that she be refunded the difference between the years 2007 and 2005 and alter the documents accordingly. Her second suggestion for a total refund in exchange for a return of the car.

[9] She then took her complaint to the FTC who investigated. This claim is the fruit of the investigation.

CAL's response

[10] CAL claims that it imported the Nissan from Singapore and there is quite an involved process that is undertaken before the cars are exported from Singapore. Mr Kirk Crichton, Chief Executive Officer of CAL, provided the affidavit evidence. He stated that before any used car can be imported into Jamaica the relevant documents from the exporting country are sent to his company and then sent on to the Trade Board along with an application for an import licence. He stated that the Trade Board insists that no vehicle is to leave the exporting country until a licence is issued. Once the licence is issued then the used car can be exported and then imported into the island on the strength of that licence. The court's observation about this is that what is undeniable is that the initial information about the car that is provided to the government agencies comes from CAL and nowhere else. What CAL is seeking to say a number of things: first, it honestly

believed that the information was correct and second, it received information from a third party which it passed on to Miss Mills. The court accepts that what CAL is saying is true but as will be shown these are not defences under the statute in light of the interpretation put on the statute by the Court of Appeal.

[11] The documents received from Singapore are (a) a deregistration certificate and (b) an invoice. This invoice has the price which is the transaction value of the car which is determined by the year of manufacture and physical condition of the car. It also speaks to the type and model of the car. It these documents along with the application for an import licence that are sent to the Trade Board.

[12] When the car arrives in Jamaica, a C 78 form (that is also called an import entry form) is generated by the customs broker and this document is the one on which duties are paid. The import entry has on it the engine number, chassis number, the make, model and year of manufacture. The court understood that once the duties are paid, the car can be removed from the wharf but before it can be sold to the public it has to be registered with the ITA.

[13] All this explanation from Mr Crichton was to say that CAL was not responsible for any wrong information being given to Miss Mills because none of the crucial information that went into the official documents originated with CAL, that is to say, the engine number, chassis number, model and year came from Singapore. CAL was simply a conduit through which the information flowed. By this he meant that CAL relied on documents from Singapore and it had no reason to believe that the information was inaccurate or unreliable in any material particular.

[14] He also took the view that the Trade Board, customs department and the ITA in Jamaica must have verified that the car was indeed a 2007 car when they processed the various documents. This led Mr Dunkley to submit that since the Government of Jamaica through its agencies accepted the information as accurate and issued documents based on that then CAL should not be held

responsible. Implicit in this submission is the proposition that the government agencies must have satisfied themselves that the information was accurate before they acted upon it and therefore CAL was entitled to believe that all was well.

The FTC's position

[15] Mr David Miller, Executive Director, outlined that he received the complaint from Miss Mills, conducted an investigation, sought legal advice and took the view that section 37 of FCA was breached.

[16] The FTC itself went to Fidelity which provided an affidavit to say that it checked Nissan's data base and found that the car was a 2005 car.

The statute

[17] Section 37 (1) (a) of the FCA states:

A person shall not, in the pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest by any means

(a) make a representation to the public that is false or misleading or is likely to be misleading in a material respect;

[18] Under section 2 (1) of the FCA trade means any trade, business, industry, profession or occupation, relating to the supply or acquisition of goods or services.

The analysis

[19] Section 37 (1) (a) has been interpreted by the Court of Appeal of Jamaica in **The Fair Trading Commission v SBH Holdings Ltd and another** SCCA No 92/2002 (unreported) (delivered March 30, 2004). In that case it was held that the provision imposed strict liability on the offender. It was also held that an intention to make a false representation is not required. In order to establish a breach of section 37 (1) (a) K Harrison JA (Ag) held that the following four things must be established. These are

- a. the person was in pursuance of a trade;
- b. the person made a representation to the public;
- c. the representation is false or misleading;
- d. the representation was made for the purpose of promoting directly or indirectly the supply of goods and services.

[20] The court also defined false to mean ‘any representation that is inconsistent with the facts and where the deviation would be unacceptable to a significant number of the general public and would lead to misunderstanding or incorrect decisions.’ Misleading was defined to mean ‘a representation that would cause the general public to misunderstand or make incorrect decisions, regardless of whether such representation is consistent with facts’ (page 28 per K Harrison JA (Ag)). The other two judges, Forte P and P Harrison JA, expressly agreed with the judgment of K Harrison JA (Ag).

[21] It is not immediately clear why the definition of false includes ‘and where the deviation would be unacceptable to a significant number of the general public and would lead to misunderstanding or incorrect decisions’ since falsity is usually an objective determination.

[22] Mr Dunkley sought to say that it was still open to a first instance court to decide that the provision required some mental element before the breach was

established. The court does not accept this position. All the judgments were of one accord that mens rea was not required and that liability was strict.

[23] The best starting point is the actual words of the provision. It is open to CAL to prove that it does not fall within the provision by establishing any of the following: (a) it was not in the pursuance of a trade; or (b) whatever was represented was not for the purpose of promoting the supply of goods or services; or (c) whatever was represented was not for the purpose of promoting its business interest or (d) it did not make a representation at all or if it did it was not to the public or (e) the representation was true.

[24] The first question is whether CAL made a representation. In this context representation means an assertion of the existence or non-existence of certain facts pertaining to a given subject matter (developed from Black's Law Dictionary (8th)). CAL did represent that the car was a 2007 car.

[25] The second question is whether the representation was false. Liability is predicated on the representation being false or misleading. These words are not synonyms (see K Harrison JA (Ag) in **SBH**). False means untrue. To say that something is false says nothing about the intention of the person from whom the false information comes. What is false may be so by intent, accident or by mistake. All the word false does is to say that something is not true. A representation can be literally true but misleading. The court will use an example from Stephen J in **Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Pty Ltd** 140 CLR 216, 227 who said:

To announce an opera as one in which a named and famous prima donna will appear and then to produce an unknown young lady bearing by chance that name will clearly be to mislead and deceive. The announcement would be literally true but none the less deceptive, and this because it

*conveyed to others something more than the literal meaning
which the words spelled out.*

[26] Falsity is determined objectively under the FCA. In this case the car was a 2005 car and not a 2007 one. Therefore the presentation of the car as a 2007 one when it was not was objectively false regardless of CAL's intent. The court finds that at the time CAL made the representation it honestly believed it to be true but regrettably for CAL honesty in the belief in the accuracy of the information is irrelevant for liability.

[27] The third question is whether the representation was made to the public. As this court understands the statute, it is not about numbers of persons to whom the representation was made but rather whether the representation was intended to be acted upon by any member of the public who received the information. In other words, the statute is directed at representations made in pursuance of a trade and for promoting supply or use of goods or services. From this perspective public includes a single person to whom an assertion of fact about the goods or services is made by the person in the trade. Therefore it is not about numbers but circumstances. The provision is of very wide ambit. Miss Mills was clearly a member of the public for the purposes of the provision. She went to CAL making enquiries about motor cars. She wanted to a car. A car is a good. CAL was pursuing it trade. CAL made the representation to Miss Mills for the purpose of getting her to purchase the Nissan motor car.

[28] Some may say that the statute is promoting honesty in trade. The court prefers to say that the statute is insisting on accuracy in statements about good and services because it is entirely possible that a trader can make an honest mistake which this court accepts happened in this case.

[29] The provision makes no reference to advertisement. The word advertisement appears in the marginal note and it is the word used in the fixed date claim form by the FTC. The court is not sure why advertisement is being used in the fixed

date claim form. The provision does not speak to advertisement but representation, a term of wider import. It is advisable to use the statutory language in order to avoid the submission that the order sought could not be granted because it has seeking a remedy in relation to conduct that is not described in section 37 (1) (a).

[30] Perhaps this misleading way of talking about section 37 (1) (a) flows from the fact that in the **SBH** case, the fixed date claim form, the grounds of appeal and other documents spoke to advertising without any comment from the Court of Appeal. Also in the case of **Fair Trading Commission v Errol Baily** Claim No 2007CD003 (unreported) (delivered July 4, 2008) the fixed date claim form also spoke to advertisement. From the two cases referred to the use of advertisement in the part of the claim form stating the remedy sought has not prevented enforcement and neither shall it do so now. Mr Dunkley's submissions on this point are not accepted.

[31] The fourth question is whether the representation was made in pursuance of a trade. There is no difficulty with that question here. CAL was in the business of trading in used cars.

[32] The fifth question is whether the representation was made for the purpose of promoting the supply of good or services or any business interest. The answer is self evident. CAL was promoting the supply of used cars and also advancing its business interests. The act of selling the used car and inviting persons to purchase the used cars served both purposes.

[33] During the course of the hearing the court was referred to the Ministry Paper on Motor Vehicle Import Policy that came into effect on April 3, 2014. Mr Dunkley, on behalf of CAL, referred to this document and in particular paragraphs 7.4 – 7.6 dealing with the determination of the age of vehicles. This policy commenced in 2014 is not of assistance to deciding what happened in 2011. In any event, as far as the court is concerned the Executive branch of government cannot alter a

law enacted by the legislature; only the legislature can do that. The court cannot apply the views of the Executive in a Ministry Paper to determine what the proper interpretation of a statute is. A Ministry Paper is not a source of law for these purposes. To hold otherwise would mean that the courts would be handing over the judicial function of interpretation of law to the Executive branch of government; that is not permissible under our present constitutional arrangements.

[34] Factually, the proposition that CAL relied on the government agencies' use of the information provided by him as confirmation that it was genuine must be rejected. The representation was made to Miss Mills on March 31, 2011. On that very date she paid \$10,000.00 deposit on a 2007 car. She received a receipt showing that she had paid for a 2007 car. There is an April 5, 2011 pro forma invoice from CAL showing that the car was described as a 2007 model. The C 78 form from customs dated April 28, 2011 came into existence well after the representation was made. The certificate of fitness and registration issued by the ITA came into existence after the representation was made to Miss Mills.

[35] Regarding the import licence, the evidence is that it was applied for in February 2011. As the court understands the process, the Trade Board, at that time at any rate, relied on the importer to provide the correct information. CAL provided the information to the Trade Board. This establishes that CAL provided false information to the Trade Board first and secondly to Miss Mills. This circumstance cannot provide a defence to CAL.

[36] Having regard to the fact that a Ministry Paper cannot alter the words of a statute it means that even if the government agencies took it upon themselves to guarantee the accuracy of the year of manufacture that would not exonerate CAL. Under the statute CAL must give accurate information to the public that purchases its goods and services. There is no defence under the statute of 'it is not false if verified by a government agency.' All the requirements for liability have been met.

The penalty

[37] The FTC is asking for the maximum penalty of \$5m. CAL asks for a nominal penalty in the event that a breach is established. In the **SBH** case the sum imposed was \$2.5m in a context where the court found that the offending party knew that what it was saying was false. In this case there is no such evidence. This court accepts whole heartedly that CAL, initially, honestly believed that the deregistration certificate on which it relied was correct. That document would be the one from the Singaporean authorities. It should be noted that CAL did not exhibit the actual document used to ground the application to the Trade Board for the import licence. What was exhibited was representative sample of the deregistration certificate but the court understands that the certificate for this car would have the same notice from the Singaporean authorities.

[38] The deregistration certificate expressly stated that the accuracy of the information on the document is not guaranteed. This was putting CAL on alert that the information may be incorrect. This should have meant that if the customer turns up with credible evidence that the information was incorrect then CAL should have taken it seriously. CAL took the position that everyone else was to blame but itself. It tried to say that since the Trade Board, the customs department and the ITA accepted the information then all was well. In its initial response to the FTC, CAL stated in its letter dated October 31, 2011 that it *'cannot provide any additional information on this vehicle as what we have provided constitutes all the documents provided on any imported vehicle. Crichton Automotive has always relied on the requisite government authorities to verify the information provided for each of our vehicles imported and will continue to do so.'* This position is misconceived because all the important information going to these agencies came from CAL. The statute places the onus on the trader not to make false or misleading representations and not government departments.

[39] The other point that struck the court was the relative ease with which Miss Mills, who does not appear to be mechanically inclined, was able to find out that the year of the car was incorrect. CAL has been in the business over a decade and one would think that it would be able to resolve a matter of this nature without litigation. Two solutions were put forward by Miss Mills. They were rejected. Even when CAL was presented with evidence from Fidelity, the only authorised dealer, that the year was incorrect CAL refused to budge. One of the eminently reasonable solutions presented by Miss Mills was a refund of the difference between a 2005 and 2007 car. In other words, she was prepared to keep the older car if she got back the difference in price. CAL would still have made the sale and indeed would have gotten the price it really ought to have received for a 2005 car. CAL took the view that despite the very authorised dealer saying that the car was 2005 it would insist on treating the car as a 2007 car and keep the money which was over and above the cost of a 2005 car.

[40] Mr Dunkley sought to say that there is a very serious problem in the industry regarding the determination of the models of some used cars. That may be true but in this specific case there was no such problem. The ITA went to Fidelity to get the information. Miss Mills went to Fidelity. There is no evidence that CAL sought to avail itself of Fidelity's assistance. The point being made here is that from all the indications there was a very quick and easy way for CAL to find out if the information it supplied was correct.

[41] This court takes the view that the statute must be rigidly enforced because of the objective of section 37 (1) (a). The section insists on accuracy of information to the public. K Harrison JA (Ag) has stated that a very clear and strong message must be sent to those who make false or misleading representations.

[42] It is the view of this court that the penalty should be \$2m. The breach was not as egregious as **SBH** but the circumstances of this case are of concern. The concern is that CAL refused to take responsibility for the error. The court is not saying that CAL did not initially believe that the information on the document

regarding the year of the car was correct but surely it could not continue in that belief when clear, reliable and unambiguous evidence showed that it was incorrect. Additionally, there is evidence from Mr David Miller that when contacted by the FTC and offered an opportunity to resolve the matter CAL did not respond to the overtures. Indeed, the FTC pointed out that its defence which was that it relied on documents from the Trade Board and Customs Department could not be accurate because those documents came into being after the representation was made to Miss Mills. Also in respect of the Trade Board, the application for the import licence was made in February, the month before Miss Mills went to CAL but the plain fact is that it was CAL that provided the incorrect information to the Trade Board so that when the licence was finally issued, the incorrect information was contained in it. Even in the face of this CAL was not prepared to alter course. CAL was presented with two separate opportunities to resolve the matter by Miss Mills in the first instance and by the FTC in the second instance.

[43] The court is also of the view that CAL should pay the costs of this enforcement action.

Disposition

[44] The breach of section 37 (1) (a) of the FCA has been established. The penalty is \$2m. Costs to the FTC to be agreed or taxed.