

Misleading carpet ads cause all advertisers to rethink how they qualify their advertising claims

The recent Court of Appeal decision¹ involving Godfrey Hirst and Cavalier Bremworth (**Decision**) could have far reaching implications for many advertisers, especially those who:

- Advertise warranties to consumers; and / or
- Make 'headline' claims about their product or service, to which qualifications or exclusions apply.

While the Decision specifically relates to the carpet industry, it is very relevant to anyone who advertises warranties – for example, this might include those in the flooring, electronics, whiteware and automobile industries.

The Court found that a number of the statements on Cavalier Bremworth's website were misleading under sections 9 and 13 of the Fair Trading Act 1993 (**Act**). These sections prohibit a person in trade from undertaking conduct, or making representations, that are false or misleading.

The Decision focused on certain "*headline*" claims in website ads, and how those claims were then subject to conditions or "*qualifiers*". For example, Cavalier Bremworth advertised a "*lifetime stain and soil resistance*" warranty. That warranty was then subject to a number of qualifications and exclusions in a separate warranty booklet. The Court concluded that the headline messages conveyed by the website ads were misleading and the qualifying information contained in a detailed warranty booklet did not correct the misleading impression given to consumers.

Paragraph [59] of the Decision sets out principles to guide a Court on whether headline claims are false or misleading under the Act. These principles can be summarised as follows:

- The overall impression or dominant message of an ad is of crucial importance.
- It is wrong only to analyse the separate effect of each representation in an ad in isolation.
- Qualifying information (such as fine print or warranty booklets) must be sufficiently prominent in ads and sufficiently instructive so that customers are aware of the qualifications.
- If there is a glaring disparity between representations made in the headline message of an ad and any qualifying information (e.g. in warranty booklets), the advertiser must draw the customer's attention to the true position in the clearest possible way.
- The Courts will assess all of the above to determine whether an ad as a whole has a tendency to lure customers into the "marketing web" of the advertiser based on an erroneous belief of the true position based on the ad.

¹ *Godfrey Hirst NZ Limited v Cavalier Bremworth Limited* CA564/2013 [2014] NZCA 418 [27 August 2014]

The Decision placed significant importance on the first principle, which the Court described as the “*dominant message*” or “*general thrust*” of the advertisement.

The Court considered that the dominant messages given by the relevant carpet ads were that:

- Stains would wipe off easily...and if they did not the carpet would be replaced;
- The carpet would not soil during its lifetime;
- The carpet would not noticeably fade – change colour – for 25 years;
- The carpet was so hardwearing it would still be in much the same condition after 15 years. Even under heavy foot traffic it would spring back and would not crush down; and
- Throughout its lifetime the carpet would be anti-static.

The Court concluded that the preconditions to, scope of, and exclusions from, the warranties made the dominant messages above misleading. One example noted by the Court, was that the qualifiers to the “*lifetime stain and soil resistance*” warranty excluded soiling by “*such common things as mud and pets*”. The Court considered that consumers reading the website ads would have got the dominant message that the carpet was resistant to soiling by mud and pets.

The Court noted that “*the contents of this judgment should afford the carpet industry the guidance ... the Commerce Commission seek*”. The Commerce Commission had joined the Court case and made submissions to the Court, because the Commission obviously thought that the issues being considered were important. What this means is that the Commission will likely use this Decision as a basis to assess carpet advertising across the industry to ensure that it complies with the Act. However, this Decision has broader application beyond the carpet industry, and we expect that the Commission will apply the principles of the Decision to all advertisers.

We recommend that advertisers take a proactive approach and get their advertisements (including websites, print ads, TV commercials, labels etc.) reviewed by a specialist lawyer to ensure those ads comply with the Act (and the principles laid out in the Decision). Doing this before receiving a letter from the Commission is recommended.

As specialists in sales and marketing law, the team at Martelli McKegg regularly review advertisements to ensure compliance with the Act, and are available to assist with any advertising review. We also have experience advising advertisers who are being investigated by the Commission for alleged breaches of the Act – but if you are act now to review your ads, you should not need our help in that regard.

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