



## Carpet Manufacturers' spat clarifies marketers' legal obligations

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### Speed read

We checklist how marketers should handle headline ads with small print carve outs, based on this important case.

Last week, the Court of Appeal made major clarifications to suppliers' obligations under the Fair Trading Act as to the law on misleading and similar statements in ads and websites. The focus was on a wide spread challenge in marketing goods and services: headline claims in ads and websites, where the detail is different in the small print.



Where is the bar to be set in terms of what is to be expected of consumers faced with headline representations where they are qualified in the small print (and therefore, how should advertisers craft such ads and websites)?

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### Checklist for marketers

1. Always, application of the Fair Trading Act is context specific.
2. When drafting an ad, establish who the target prospects are: that will drive the level of detail required in the headlines.
3. Said the Court of Appeal, "*Where....headlines and qualifiers in advertising target a large group of consumers, "the consumer" comprises all the consumers in the class targeted except the outliers. The "outliers" encompass consumers who are unusually stupid or ill equipped, or those whose reactions are extreme or fanciful.*"
4. Sometimes the range of consumers is narrow (for example, expensive furniture ads would target only wealthier and generally more savvy consumers, according to one case). Or, say, in a B2B case, the business consumers may know that the particular goods are typically provided with limitation of liability terms in contracts, so there is not quite so much need to refer to this in the headlines (but, again, that issue is always context specific).
5. That highlights that the Act applies to B2B as well as B2C.
6. Having established the group of relevant consumers, which excludes outliers, the next question is: what standard of care should those consumers be assumed to take? Essentially a reasonable degree of common sense is assumed. If the combination of headline and qualifier is such that a consumer exercising a reasonable degree of common sense is not misled, that will be compliant.
7. Against that background, the applicable principles as to whether headlines breach the Act are:
  - a. What is the overall impression of the ad? What is the dominant message and general thrust? It is wrong just to analyse each statement separately;
  - b. Has the small print been sufficiently drawn to the attention of the targeted consumers, having regard to:
    - i. Proximity of the qualifying information;
    - ii. The prominence of that information
    - iii. Whether that information is sufficiently instructive to nullify the risk that the headline claim might be misleading;
  - c. Is there a glaring disparity between the headline and the small print?
  - d. Is there a tendency to lure consumers into error (for example, by luring the consumer into a "marketing web")?

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**What happened?**

Godfrey Hirst and Cavalier are NZ's two largest carpet manufacturers. Cavalier launched a new synthetic carpet range. The website announcing the range was headed up "SUPERB WARRANTIES WITH NEW SYNTHETIC RANGES".

Having described the new products, the same website page ended with what were called "Limited warranties" such as "Lifetime stain and soil resistance", and "25 year fade resistance". Asterisks took the reader to the end of the page: "Click here to download the \*STAINMASTER® Carpet Care, Maintenance and Limited Warranties booklet for complete details including Terms and Conditions."

Clicking through to the booklet produced substantial qualifiers away from those headline claims.

The Court of Appeal decided that this combination of headline statements with small print qualifiers wouldn't work under the Fair Trading Act. In particular:

- The range of consumers under Fair Trading Act consideration was not just "a comparatively well off and sophisticated segment of the wider public, particularly those searching on the internet for information about carpets". Included were all consumer targets other than outliers (namely those that are unusually stupid, ill equipped or whose reactions are extreme or fanciful). The test is not based on say a single hypothetical consumer.
- The overall impression of the headlines (such as "superb warranties") was contrary to the small print qualifiers. The range of

consumers noted above (all consumers except outliers) included those that would be misled by this. A significant number of the targeted consumers would not be expected to read the warranty booklet.

- Including "limited warranty" in the headlines did not overcome the problem, nor did the link to the detailed warranty conditions.
- The "marketing web" concept continues to apply, and applied to these ads. That's a concept with a big impact. As the Court of Appeal said:

Enticing consumers into "the marketing web" includes, for example, attracting them into premises selling the advertiser's product. Once a prospective customer has entered, he or she will often be more likely to buy. ....That consumers could be expected to understand fully the limitations of the warranties by the time they actually purchased a carpet is no answer to the question whether the advertisement was misleading.

- Even if the consumer read the 23 page warranty booklet, the court said that "the warranties booklet....was too detailed and complex to permit a consumer looking at the website easily to determine what was covered by the warranties. .... [A] consumer attempting to understand the scope of any one of the warranties would need to read the booklet cover to cover ..."
- So, the Court concluded that the dominant message conveyed by the website representations was misleading.

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