IN THE COURT OF APPEAL OF NEW ZEALAND

CA564/2013
[2014] NZCA 418

	BETWEEN	GODFREY HIRST NZ LIMITED Appellant
	AND	CAVALIER BREMWORTH LIMITED Respondent

Hearing:	17 June 2014
Court:	Stevens, Wild and Miller JJ
Counsel:	JCL Dixon and J B Hamlin for Appellant S E Fitzgerald and J Edwards for Respondent V E Casey and M M Borrowdale for Commerce Commission as Intervenor
Judgment:	27 August 2014 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Insofar as it is inconsistent with this judgment, the judgment of the High Court is set aside.

C There is no order as to the costs of the appeal.

REASONS OF THE COURT

(Given by Wild J)

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Introduction

[1] "Fly to Sydney for $50". "Hire a car for only $20 a day". Consumers are familiar with such offers. Sometimes scrutiny of the conditions attaching to the offer shows it is not what it seems. For example, the $20 per day rate is available only if the car is hired for at least a week during certain off-peak periods.[1] Such offers or representations are sometimes called "headlines", and the terms and conditions attaching to them "qualifiers". We adopt that convenient, if somewhat jargonistic, terminology.

[2] This case concerns headline representations made by the respondent (Cavalier). In the judgment under appeal Gilbert J held the qualifiers to those representations meant the representations breached ss 9 and 13(i) of the Fair Trading Act 1986 (the Act) in some of the many respects alleged by the appellant (Godfrey Hirst).[2] Prior to the hearing in the High Court Cavalier had altered the

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1 Roughly the fact situation in *Commerce Commission v Leisure Rentals Ltd* [2002] DCR 69 (DC).

2 *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2013] NZHC 1907 [High Court judgment].

representations and, following the hearing, gave the Court an undertaking not to repeat them.

[3] Counsel for Godfrey Hirst opened their argument to us by accepting Godfrey Hirst had largely achieved success in the High Court, obtaining most of what it had sought either through the judgment or through Cavalier's earlier withdrawal of the representations and subsequent undertaking. Counsel claimed this appeal was brought in the public interest, motivated by an altruistic desire to "clean up" the carpet manufacturing industry, so there was a "level playing field" for carpet manufacturers in terms of the representations they can make about their carpets. Counsel explained Godfrey Hirst considers the judgment under appeal contains serious errors in approach which it asks this Court to correct.

[4] The Commerce Commission was granted leave to intervene on this appeal. Its submissions convey its growing concern at the prevalence of what the Commission considers are misleading headline representations, particularly given the increasing use of online advertising and selling. While the Commission has successfully prosecuted a number of cases in the District Court, it seeks guidance from this Court as to the correct standards or tests to apply in assessing whether headline representations breach s 9.

[5] As will emerge, we consider the most important point on this appeal, in terms of its ramifications for advertising generally, is whether Gilbert J correctly set the bar in terms of what is to be expected of consumers faced with headline representations in advertising, and qualifiers to them. Godfrey Hirst submits the Judge set the bar too high.

Background

[6] Godfrey Hirst and Cavalier are New Zealand's two largest manufacturers of carpet. In mid-March 2013 Cavalier launched its "Habitat Collection" range of synthetic carpets supported by warranties from INVISTA (Australia) Pty Ltd, the manufacturer of the synthetic fibres used in the carpets. Cavalier posted, on its website, marketing material about the warranties. On 15 March 2013 Cavalier sent a circular letter to retailers introducing its Habitat Collection range. This letter

contained representations about the warranties in the same terms as those on the website but enclosed the warranty wording adding "(printed booklet due shortly)". Affixed to the samples of the Habitat Collection range Cavalier distributed to carpet retailers was a label which also referred to the warranties. This case concerns the representations about the warranties made on the website, in the letter and on the sample labels. But the focus is on the representations made on the website.

[7] Early in April 2013 Godfrey Hirst became aware of what it understood to be "the imminent launch" by Cavalier of its Habitat Collection range.

[8] On 18 April the General Manager of Godfrey Hirst wrote to the Chief Executive Officer of Cavalier. She referred to industry concerns that some warranties offered in the market mislead and confuse consumers or have the potential to do so. She wrote:

> Godfrey Hirst New Zealand Limited considers that the warranties used with respective to the Habitat range, and the way in which they are described on our website and elsewhere, fall into that category [of being likely to mislead and confuse consumers].
>
> Godfrey Hirst New Zealand Limited asks that you change your approach now, before the Habitat range is launched. If Cavalier insists on marketing Habitat on the basis of the warranties, and describing them as you have, Godfrey Hirst New Zealand Limited will have no choice but to respond.

She asked for a response by midday on 22 April.

[9] The CEO of Cavalier responded on 22 April advising he was waiting for a response from INVISTA and requesting "Can you provide some insight into what areas you specifically regard as being a breach of any form?". The General Manager of Godfrey Hirst did not acknowledge this response.

[10] The same day, 22 April, Godfrey Hirst applied to the High Court in Auckland for an order under s 41 of the Act restraining Cavalier from engaging in conduct in breach of the Act. The application set out in a schedule the conduct Godfrey Hirst sought to restrain. Effectively, it was all the representations Cavalier had made about the warranties for its Habitat Collection range.

[11] Following a teleconference with counsel on 23 April, Priestley J gave directions aimed at achieving an early hearing of Godfrey Hirst's application. The application was heard by Gilbert J three weeks later, on 13 May.

The law

[12] It is convenient next to consider the law. Having set out the applicable legal principles and tests, we will then consider Cavalier's warranties in detail, and can decide whether they breach the applicable principles and tests.

[13] Dealing with the legal principles, Gilbert J first set out the relevant provisions of the Act:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,
>
> …
>
> (i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right, or remedy;

[14] The Judge then distilled these legal principles, which he said are well established:[3]

> (a) Whether the conduct complained of is misleading or deceptive is to be determined objectively in the context of the particular circumstances, including the characteristics of the persons said to be affected.[4]
>
> (b) Conduct is likely to mislead or deceive if it might well happen. There must be a real risk of this occurring, not merely a possibility.[5]
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> (c) Where the conduct is directed towards a wide section of the community, the matter is to be assessed having regard to all who

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3 At [20].
4 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
5 *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 (HC); aff'd (1996) 7 TCLR 206 (CA).

come within that section including "the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations".[6]

(d) Consumers may be prone to some "looseness of thought".[7] They may not undertake careful analysis and may be influenced by the overall impression conveyed. However, they "will not be lacking in perception and can be expected to bring a reasonable degree of common sense".[8]

[15] Counsel for Godfrey Hirst did not directly challenge (a) and (b) of this statement of principles. As we mentioned in [5], Godfrey Hirst's primary submission is that Gilbert J set the bar too high in terms of what is to be expected of the consumers targeted by the headline representations and qualifiers in issue. So there is a challenge to (c) and (d), at least to Gilbert J's application of them.

[16] Our approach will be to consider in turn these three questions:

1. Who is the consumer?

2. What standard of care is to be expected of the consumer?

3. Did Gilbert J impose on the consumer too high a standard?

Question 2 is an aspect of question 1, but is best separated out. Until we have determined who is the consumer, we cannot assess what standard of care is to be expected of the consumer. And until we have determined that standard of care, we cannot decide whether Gilbert J imposed on the consumer too high a standard. So there is a logical sequence in these three questions. The first two questions are part of our consideration of the applicable law. The third we set apart, because it involves Gilbert J's application of the law to Cavalier's representations.

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6 *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1980) 31 ALR 73 (FCAFC) at 93 [*Puxu* (Federal Court)]; *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (FCAFC).

7 *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 507.

8 *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 (CA) at 192.

Who is the consumer?

[17] As Ms Fitzgerald submitted for Cavalier, this question is not the focus of the appeal. Nevertheless, the parties differ as to the correct answer.

[18] In the High Court Godfrey Hirst essentially submitted the answer is "the reasonable average consumer".[9] It relied on the High Court's decision in *Energizer NZ Ltd v Panasonic New Zealand Ltd* and this Court's decision in *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd.*[10]

[19] In what Ms Fitzgerald justifiably categorises as a change of tack, Godfrey Hirst now submits the appropriate test is to ask whether a sufficient number of people are likely to be misled by the statement.

[20] This altered submission is more on course. But, for reasons we will explain, we do not agree with the concept of a "sufficient" or "significant" group of consumers being misled. Where, as in this case, 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. We expand on this in [47]–[50] below. This formulation endorses, but clarifies, the test or approach laid down by this Court in *Commerce Commission v Adair*, and *Unilever v Cerebos Gregg's Ltd*, decisions to which we revert in more detail shortly.[11]

[21] Ms Fitzgerald submitted this test does not reflect the current approach adopted by the Australian courts, including the High Court of Australia. Consequently, we need to consider the Australian cases, in particular whether they differ from the answer we have given in [20]. At the same time, we will consider New Zealand decisions since *Adair*.

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9 Appellant's submissions to the High Court at [4.2](d)(iii).

10 *Energizer NZ Ltd v Panasonic New Zealand Ltd* HC Auckland CIV-2009-404-4087, 16 November 2009; *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd* [2012] NZCA 357.

11 *Commerce Commission v Adair* (1995) 6 TCLR 655 (CA); *Unilever New Zealand Ltd*, above n 8, at 193.

[22] Before doing that we return, in more detail, to this Court's decision in *Adair*. The principal issue there was whether a cycle retailer had misled consumers in advertising along the lines "buy one bike get another bike free". In considering the decision of the High Court under appeal this Court noted the trial Judge had adopted the approach taken by Tipping J in 1990 in *Marcol Manufacturers Ltd v Commerce Commission*.[12] Tipping J had asked whether the average New Zealand shopper would derive from the representation a message which was in fact misleading? He took into account that the mind of the representee is likely to work "more by impression than analysis and to be prone to some looseness of thought".[13] This Court also noted the trial Judge had treated "the average New Zealand shopper" as the person described by Lockhart J in *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd*, a case under the corresponding Australian legislation.[14] We refer further to *Marcol* and what Lockhart J said in *Puxu* in [25]–[26] below.

[23] The *Adair* Court then said this:[15]

> … Lockhart J gave these as examples of the relevant class of persons likely to be exposed to the misleading or deceptive conduct in the case before him. With respect, it is not appropriate to combine all these groups to arrive at a hypothetical "average New Zealand shopper", and to use such a mythical person to determine whether a representation is misleading. The question is rather whether the representation was misleading to *any significant group of people within the wide class of those entitled to the protection of the section*.

[24] Our formulation in [20] above removes any ambiguity – perhaps even contradiction – there may be in the words we have emphasised. We interpret those words as referring to all consumers in the targeted group except the outliers.

[25] In *Marcol* the issue was whether Marcol, a Christchurch manufacturer, had made a misleading representation in labelling jackets it had imported from Korea "Marcol Christchurch New Zealand". Tipping J's decision must have been one of the first under the then fairly new Fair Trading Act. With one exception not relevant to this appeal, all the cases Tipping J referred to were Australian. The Judge held the correct approach was to ask (1) whether "the average New Zealand shopper" would

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12 *Marcol Manufacturers Ltd*, above n 7, at 507.
13 At 507.
14 *Puxu* (Federal Court), above n 6.
15 *Adair*, above n 11, at 659–660 (emphasis added).

view the label on the jackets as a representation and (2) whether such a shopper would be misled by it. Tipping J then explained:[16]

> I have used the expression "average shopper" rather than "ordinary shopper" in order to try and capture the synthesis necessary to reflect our multicultural society. I have also tried to reflect the words of Lockhart J in *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* to the effect that those affected are likely to include:
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> > "… the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, [and] men and women of various ages pursuing a variety of vocations."

[26] We think Tipping J used the word "average" in its dictionary sense of "typical". "Average" is not a good choice of word because of the potential for confusion with its mathematical meaning, which would take as the standard the consumer falling in the middle of the class.

[27] Although not noted by Tipping J in *Marcol* or by this Court in *Adair*, the decision of the full Federal Court in *Puxu* had been reversed by a majority of the High Court of Australia.[17] The High Court's *Puxu* decision is perhaps more relevant to the representations on the labels on the carpet samples, and we revert to it in [88] below. The ratio of the High Court's decision is that manufacture and sale of a closely similar, if not exact copy, product (in that case a lounge suite and chairs) properly labelled with the different manufacturer's name is not a breach of s 52 of the Trade Practices Act 1974 (Cth) (the substantially similar equivalent of our s 9).

[28] Nevertheless, there are statements in the judgments of the High Court of Australia in *Puxu* relevant to the "who is the consumer?" question we are considering. The first is the reference by Gibbs CJ to s 52 "contemplating the effect of the conduct on reasonable members of the class … of consumers likely to be affected by the conduct".[18] By "reasonable" Gibbs CJ excluded "persons who fail to take reasonable care of their own interests".[19]

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16 *Marcol Manufacturers Ltd*, above n 7, at 507.

17 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 [*Puxu* (High Court)]. Murphy J dissented and Aickin J died during the 16 month period between hearing and judgment.

18 At 199.

19 At 199.

[29] Second, is Mason J's view that:[20]

> … Lockhart J [in the decision under appeal] is correct in stating that here "the relevant class of persons likely to be exposed to the alleged misleading or deceptive conduct would be anyone interested in purchasing lounge suites or chairs in the higher price range".

[30] Lastly, under the heading "Persons to be protected", Murphy J observed "the Act aims to protect the imprudent as well as the prudent" and "laws are made to protect the trusting as well as the suspicious".[21] In concluding his dissenting judgment, Murphy J stated: "Without extending to extremes the reach of s 52, my view is that the case fits within it".[22]

[31] About three weeks before the High Court of Australia delivered its judgment in *Puxu*, the full Federal Court gave judgment in *Taco Company of Australia Inc v Taco Bell Pty Ltd*.[23] The issue was whether the American Taco Bell restaurant chain had breached s 52 in opening Taco Bell restaurants in Sydney when there had long been in Bondi a locally owned restaurant called "Taco Bill's", and later "Taco Bill's Casa", then "Taco Bell's Casa". Passing off was also alleged. Deane and Fitzgerald JJ suggested the s 52 claim be approached in three steps. Step one was to identify the relevant section(s) of the public affected by the allegedly misleading or deceptive conduct. Then:[24]

> Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, "including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations"…

[32] In November 1994 this Court delivered its judgment in *Unilever*.[25] There, the respondent had been successful in the High Court on its claim that the appellant had misled consumers in the way it packaged and marketed its new range of coffee bags which contained a mix of roast and ground, and instant, coffee. The parties were

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20 At 209.
21 At 214 and 215.
22 At 215.
23 *Taco Company of Australia Inc*, above n 6.
24 At 202 (footnote omitted), citing *Puxu* (Federal Court), above n 6; and *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 (FCAFC) at 203 per Brennan J.
25 *Unilever New Zealand Ltd*, above n 8.

trade competitors. Having set out the principles relating to s 9 of the Act, this Court said:[26]

> [The first issue is] whether Unilever's conduct has misled or has been likely to mislead *a significant section of the relevant purchasing public* to believe contrary to the fact that its coffee bags contain only roast and ground coffee and produce a drink the same as one produced using roast and ground coffee.

Although *Unilever* was – perhaps surprisingly – not referred to by this Court in *Adair*, the words we have emphasised are closely similar to the words this Court used in *Adair* in the passage we have cited in [23] above.

[33] That, then, was how Australasian case law stood when this Court decided *Adair*.

[34] The case first in time after *Adair* is the High Court of Australia's judgment in *Campomar Sociedad, Limitada v Nike International Ltd*.[27] There the respondent American Nike company alleged contravention of s 52 by the appellant Spanish company in selling its Nike sport fragrance in Australia. Where the alleged misrepresentations are directed to members of a class, the Court said it is necessary first:[28]

> … to isolate by some criterion a representative member of that class. The inquiry thus is to be made with respect to this hypothetical individual …

[35] A little later the Court added this:[29]

> … in an assessment of the reactions or likely reactions of the "ordinary" or "reasonable" members of the class of prospective purchasers of a mass-marketed product for general use … the court may well decline to regard as controlling the application of s 52 those assumptions by persons whose reactions are extreme or fanciful.

[36] *Campomar* was followed by Moore J in the Federal Court in *George Weston Foods Ltd v Goodman Fielder Ltd*.[30] Both parties manufactured bread. George Weston alleged Goodman Fielder had breached s 52 and other provisions of the

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[26] At 193 (emphasis added).

[27] *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12, (2000) 202 CLR 45 [*Campomar*].

[28] At [103].

[29] At [105].

[30] *George Weston Foods Ltd v Goodman Fielder Ltd* [2000] FCA 1632, (2000) 49 IPR 553.

Trade Practices Act in advertising its "Wonder White" bread as containing "now twice the fibre*", where the asterisk read "* of regular white bread". Moore J cited a passage from Hill J from the full Federal Court decision of *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc.*[31] In that case, having cited a passage from Franki J's judgment in *Annand & Thompson Pty Ltd v Trade Practices Commission*,[32] Hill J added:[33]

> … The extremely stupid, and perhaps the gullible, may well be excluded from the class of persons who read such advertisements in newspapers. Some members of the class may, in reading the advertisement, be misled by a misconception of their own, howsoever arising. Those persons will not have been led into error by the representation made in the advertisement.

[37] Next in time comes this Court's decision in *Geddes v New Zealand Dairy Board*.[34] That involved a challenge under the Act by one dairy farmer and two importers of bovine genetic material to the new animal evaluation system introduced by the respondents for New Zealand's dairy industry. In delivering the Court's judgment, Chambers J assembled the applicable legal principles. The second was the need, in evaluating allegedly misleading conduct, for the Court always to identify "those who have been or are likely to be misled or deceived".[35] In reiterating that need, this Court cited its judgment in *Unilever*, to which we have referred in [32] above. The Court added:[36]

> In this case, the audience is clear, the dairy farmers of New Zealand. It is reasonable to assume that those dairy farmers know a lot about cows and bulls. As well, virtually all would have a reasonably good knowledge of systems like the [animal evaluation system], as less sophisticated versions had been in use for decades.

[38] The focus in New Zealand then moved from dairy cows and bulls to batteries, with the interim judgment of Allan J in *Energizer NZ Ltd v Panasonic New Zealand Ltd*.[37] On the basis it breached s 9 of the Act, the Judge restrained Panasonic from

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31 *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 (FCAFC) at 49.

32 *Annand & Thompson Pty Ltd v Trade Practices Commission* (1979) 40 FLR 165 (FCAFC) at 176.

33 *Tobacco Institute of Australia Ltd*, above n 31, at 49, cited in *George Weston Foods Ltd*, above n 30, at 563.

34 *Geddes v New Zealand Dairy Board* CA180/03, 20 June 2005.

35 At [78].

36 At [78].

37 *Energizer NZ Ltd*, above n 10.

advertising its Evolta battery with a "headline" claim that Evolta was the "Guinness World Record Holder For The Longest Lasting AA Alkaline Battery", with an asterisk referring to a "largely illegible" qualifier. Noting the advertising was aimed at the general public, Allan J stated:[38]

> … the overall assessment is to be conducted having regard to the effect of the advertisement on reasonable members of the public. What is reasonable will depend on all the circumstances of the case.

[39] Later in the judgment he repeated his reference to the overall impression made by the advertisement "on a reasonable viewer", then asked whether the advertisement is likely to mislead "the battery purchasing public", adding that the advertisement must be considered "… in the matrix of the market, bearing in mind the persons to whom the statement is addressed and the likely customers whom it intended to affect".[39] The Judge drew those words from the judgment of the High Court in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*.[40]

[40] There followed the Supreme Court's decision in *Red Eagle Corporation Ltd v Ellis*.[41] In that case an experienced businessman lent and lost money on the basis of what he alleged was a misleading representation by an investment banker. In a case of that kind the Court considered the question was "whether a reasonable person in the claimant's situation" would likely have been misled or deceived.[42] What Godfrey Hirst fastens on is footnote 15 to the judgment, which contrasted the position "where the conduct is directed toward a wide section of the community, as in an advertisement". The Court cited the passage in *Taco* which we have set out in [31] above, adding:

> But in such cases the test has also been said to be not the effect on a person who is quite unusually stupid: *Annand & Thompson Pty Ltd v Trade Practices Commission*.[43]

Those footnoted observations are obviously obiter dicta.

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38 At [44].
39 At [56] and [64].
40 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* (1992) 4 NZBLC 102,839 (HC) at 102,842.
41 *Red Eagle Corporation Ltd*, above n 4.
42 At [28].
43 *Annand & Thompson Pty Ltd*, above n 32, at 176.

[41] Next came this Court's judgment in *Luxottica Retail New Zealand Ltd v Specsavers New Zealand Ltd*.[44] The case concerned television advertisements by Specsavers for its progressive spectacles. There were prominent headlines with qualifiers screened in smaller print and for a shorter time. The Court based its assessment of whether the advertisements were misleading on their "overall impression conveyed to the average consumer …".[45]

[42] The most recent case is the decision of the High Court of Australia in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd.*[46] The ACCC alleged TPG's multimedia advertising campaign was misleading because of the disparity between the prominent headline offering of broadband internet services and the less prominent terms qualifying that offer. Under the heading "The knowledge base of the target audience", the Court considered the impression of the advertising on "the hypothetical reasonable consumer".[47]

[43] We see no real divergence in the way all these cases have answered the question "who is the consumer?". All the formulations seem to us to encompass most of the public, where the representation is made to the public at large, or most of the consumers in any class specifically targeted. Many of the cases refer, almost interchangeably, to the "average" or "ordinary" or "reasonable" member(s) of the public or the class. That perhaps is a consequence of the High Court of Australia in *Campomar* perceiving the need "to isolate by some criterion a representative member of that class".[48] That representative member, which the Court in *Campomar* described as "this hypothetical individual", is none other than the average or ordinary or reasonable member of the class. In a similar endeavour Tipping J, as he explained in *Marcol*, used the expression "average shopper" "to try and capture the synthesis necessary to reflect our multicultural society".[49] As we observed in [26], we think Tipping J used the word "average" as synonymous with typical, not in its

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44 *Luxottica Retail New Zealand Ltd*, above n 10.
45 At [61].
46 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54, (2013) 304 ALR 186 [*ACCC v TPG*].
47 At [53].
48 This is part of the passage we cite in [34] above.
49 This is part of the passage we cite in [25] above.

mathematical sense. The same, we think, applies to the other cases. Because of the potential for confusion, "average" is a term best avoided.

[44] Our view that there is no disparity in the various approaches is supported by the judgment of the full Federal Court of Australia in *Domain Names Australia Pty Ltd v .au Domain Administration Ltd*.[50] After referring to the *Campomar* test, the Court said:[51]

> There is no inconsistency between testing the effect of the representation by reference to ordinary or reasonable members of the class and by reference to the hypothetical individual. The attribution of characteristics to the ordinary and reasonable members of the class must be objective in order to allow for the wide range of persons who would in fact make up the class …

[45] While the description "reasonable" is used in many of the cases synonymously with "average" or "ordinary", in one or two cases it has been accorded a different, specific meaning. For example, in *Puxu* in the High Court of Australia, Gibbs CJ observed:[52]

> Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will of course depend on all the circumstances.

[46] In *ACCC v TPG*, the High Court of Australia offered this explanation of what Gibbs CJ had said in *Puxu*:[53]

> Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error. That is to say there must be a sufficient causal link between the conduct and error on the part of persons exposed to it.[54] It is in that sense that it can be said that the prohibitions in ss 52 and 18 were not enacted for the benefit of people who failed to take reasonable care of their own interests.

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50 *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247, (2004) 139 FCR 215.

51 At [20] (footnote omitted).

52 *Puxu* (High Court), above n 17, at 199.

53 *ACCC v TPG*, above n 46, at [39].

54 *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 (FCA) at 241.

[47] That the protection of ss 9 and 13 of the Act is restricted to reasonable consumers is confirmed by the several cases which exclude from the protection consumers who are "quite unusually stupid"[55] and "perhaps the gullible".[56] Other cases exclude the extremes or consumers "whose reactions are extreme or fanciful".[57] Those are the consumers we have termed outliers and excluded in our formulation in [20].

[48] If you take all the "average" or "ordinary" or "reasonable" (or, as we prefer, all the typical) members of the public generally, or of any targeted class of the public, you will end up with all the consumers in the class targeted except the outliers, which is our formulation in [20] above, reiterated in [50] below. The breadth of the consumer group is confirmed by the use in other cases of expressions such as "anyone interested in purchasing lounge suites or chairs in the higher price range" (Mason J in the High Court of Australia in *Puxu*),[58] "all who come within [the relevant section of the public]" (Deane and Fitzgerald JJ in *Taco Company*),[59] all "the dairy farmers of New Zealand" (Chambers J for this Court in *Geddes*)[60] and "the battery purchasing public" (Allan J in *Energizer*).[61] As the full Federal Court in *Domain Names* pointed out, "… a finding that reasonable members of the class would be likely to be misled carried with it the determination that a significant number of recipients of a representation would be misled".[62]

[49] We summarise. We have endorsed, but at the same time attempted to clarify, the test this Court laid down in *Adair* because we consider it is consistent with the corresponding tests adopted in the cases we have reviewed. And consistency with the Australian cases is important because the legislation in the two countries is substantially the same and because of the trans-Tasman trade ties. We endorse the *Adair* test also because we consider it is the easiest to apply. We agree with the *Adair* Court that it is not appropriate – and we do not think it necessary – to apply ss 9 and 13(i) of the Act to an "hypothetical individual". It is best and easiest to

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55 *Red Eagle Corporation Ltd*, above n 4, at footnote 15, cited in [40] above.
56 *Tobacco Institute of Australia Ltd*, above n 31, at 49, cited in [36] above.
57 *Campomar*, above n 27, at [105], as cited in [35] above.
58 *Puxu* (High Court), above n 17, at 209, as cited in [29] above.
59 *Taco Company of Australia Inc*, above n 6, at 202, as cited in [31] above.
60 *Geddes*, above n 34, at [78], as cited in [37] above.
61 *Energizer NZ Ltd*, above n 10, at [56], as cited in [39] above.
62 *Domain Names Australia Pty Ltd*, above n 50, at [28].

apply the two sections to the actual consumers in the target class excepting the outliers.

[50] We reiterate our response to the question "who is the consumer?". "The consumer" encompasses all the consumers in the class targeted by the allegedly misleading representations, except the outliers as we have explained them in [20] above. Or, if the representations are made to the public at large, it is all the public except the outliers.

What standard of care is to be expected of the consumer?

[51] The answer emerges from several of the cases we have referred to in answering the first question. Consumers must exercise a degree of care which is reasonable having regard to all the circumstances including the characteristics of the target group of consumers. By "characteristics" we refer to the consumers' level of knowledge, acumen, ability and the like.

[52] This point about the "characteristics" of consumers is well demonstrated by this Court's approach in *Geddes* referred to in [37] above. Having identified the target audience as the dairy farmers of New Zealand, Chambers J observed:[63]

> It is reasonable to assume that those dairy farmers know a lot about cows and bulls. As well, virtually all would have a reasonably good knowledge of systems like the [animal evaluation system], as less sophisticated versions have been in use for decades.

[53] Because the outliers in any target group of consumers are to be disregarded in determining who is the consumer, so must they be disregarded in determining the standard of care expected of the consumer. It is not the lack of care which would be shown by "extremely stupid" or "fanciful" or "perhaps gullible" consumers (all terms used in the Australian cases). It is the standard of care to be expected of reasonable consumers. Or, to put it accurately, by reasonably careful consumers. This is because, as Gibbs CJ observed in *Puxu* in the High Court of Australia, the legislature did not intend the protection afforded by ss 9 and 13 of the Act to benefit

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63 *Geddes*, above n 34, at [78].

consumers "who fail to take reasonable care of their own interests".[64] And, as the Chief Justice said, "what is reasonable will … depend on all the circumstances".[65]

[54] The standard of care to be expected of the consumer is perhaps best encapsulated in this Court's judgment in this passage in *Unilever*:[66]

> It is, of course, necessary to keep firmly in mind the consumer protection objections of the Fair Trading Act even where, as here, the dispute is between large commercial competitors whose primary objectives may not be wholly altruistic. Nevertheless it may be said of New Zealand consumers (perhaps more particularly those contemplating the purchase of fresh ground coffee), as has often been said of juries, that they *will not be lacking in perception and can be expected to bring to bear a reasonable degree of common sense*.

Did the High Court impose on the consumer too high a standard?

Limits on our consideration

[55] Our answer to this question will be limited to the Judge's approach to the headline representations Cavalier posted on its website and those printed on the labels on the back of the carpet samples Cavalier provided to retailers. Those are the two sets of representations Cavalier made directly to the carpet buying public. Our focus will be on the website representations, because they were made to every consumer looking on the internet for information about carpets. We elaborate upon the reasons for our focus in [88].

[56] We will not deal with the circular letter Cavalier sent to carpet retailers on 15 March 2013. We consider Ms Fitzgerald is correct in submitting this letter must be placed in a different category. It was directed to a much narrower target group, one possessing a sound trade knowledge of carpets and the sort of warranties provided by their manufacturers and distributors. As we pointed out in [6] above, the letter enclosed the warranty wording and advised the printed warranty booklet was due shortly. Consideration of the letter to retailers would not add usefully to the guidance this judgment affords.

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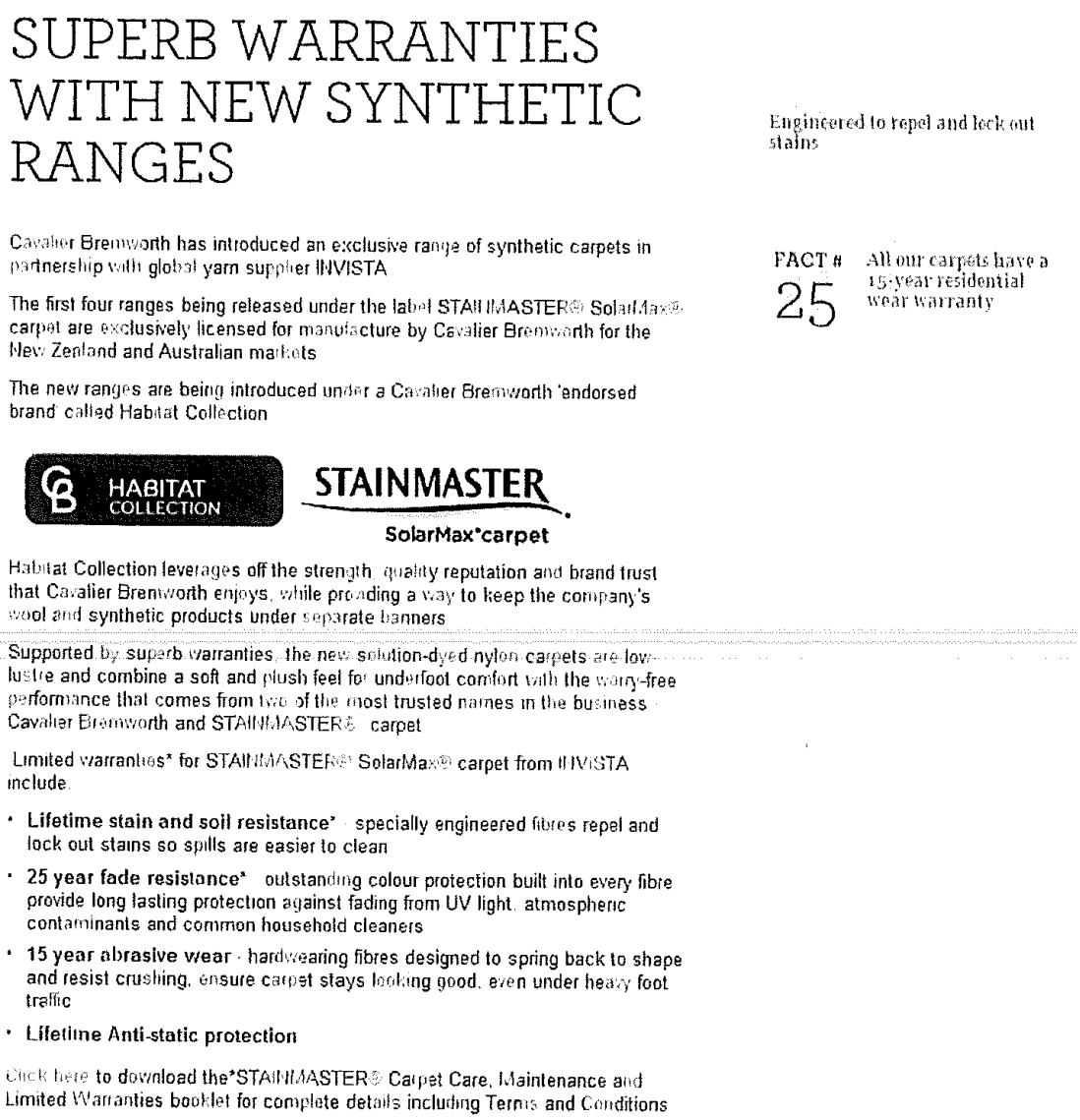
64 *Puxu* (High Court), above n 17, at 199.
65 At 199.
66 *Unilever New Zealand Ltd*, above n 8, at 192 (emphasis added).

The representations on the website

[57] These were the headline representations posted on the website (this scanned copy is the best print-off quality counsel could provide):



SUPERB WARRANTIES WITH NEW SYNTHETIC RANGES

Engineered to repel and lock out stains

Cavalier Bremworth has introduced an exclusive range of synthetic carpets in partnership with global yarn supplier INVISTA

FACT # 25 All our carpets have a 15-year residential wear warranty

The first four ranges being released under the label STAINMASTER® SolarMax® carpet are exclusively licensed for manufacture by Cavalier Bremworth for the New Zealand and Australian markets

The new ranges are being introduced under a Cavalier Bremworth 'endorsed brand' called Habitat Collection

HABITAT COLLECTION

STAINMASTER SolarMax*carpet

Habitat Collection leverages off the strength, quality reputation and brand trust that Cavalier Bremworth enjoys, while providing a way to keep the company's wool and synthetic products under separate banners

Supported by superb warranties, the new solution-dyed nylon carpets are low-lustre and combine a soft and plush feel for underfoot comfort with the worry-free performance that comes from two of the most trusted names in the business - Cavalier Bremworth and STAINMASTER® carpet

Limited warranties* for STAINMASTER® SolarMax® carpet from INVISTA include:

- **Lifetime stain and soil resistance*** - specially engineered fibres repel and lock out stains so spills are easier to clean
- **25 year fade resistance*** - outstanding colour protection built into every fibre provide long lasting protection against fading from UV light, atmospheric contaminants and common household cleaners
- **15 year abrasive wear** - hardwearing fibres designed to spring back to shape and resist crushing, ensure carpet stays looking good, even under heavy foot traffic
- **Lifetime Anti-static protection**

Click here to download the*STAINMASTER® Carpet Care, Maintenance and Limited Warranties booklet for complete details including Terms and Conditions

[58] As the website instructed, a click gave consumers hyperlink access to the booklet containing the full terms and conditions of the warranties.

The principles in considering headline representations with qualifying information

[59] In considering whether headline representations such as these breach ss 9 and 13(i) of the Act the following principles should guide a court:

(a) *Overall impression*: it is the "dominant message" or "general thrust" of the advertisement that is of crucial importance.[67]

(b) *Wrong only to analyse separate effect of each representation*: as a corollary from (a), when assessing the mental impression on consumers created by a number of representations in a single advertisement, it is insufficient only to analyse the separate effect of each representation.[68] The overall impression cannot be assessed by analysing each separate representation in isolation.

(c) *Qualifying information sufficiently prominent?*: whether headline representations are misleading or deceptive depends on whether the qualifications to them have been sufficiently drawn to the attention of targeted consumers.[69] This includes consideration of:

(i) the proximity of the qualifying information;[70]

(ii) the prominence of the qualifying information;[71] and

(iii) whether the qualifying information is sufficiently instructive to nullify the risk that the headline claim might mislead or deceive.[72]

(d) *Glaring disparity*: where the disparity between the headline representation and the information qualifying it is great, it is necessary

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67 *ACCC v TPG*, above n 46, at [45], [51] and [52]; *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3, (2003) ATPR 41–908 at [28] [*ACCC v Signature Security*].

68 *ACCC v TPG*, above n 46, at [52], citing *Arnison v Smith* (1889) 41 Ch D 348 (CA) at 369; *Gould v Vaggelas* [1985] HCA 75, (1985) 157 CLR 215 at 252; *Puxu* (High Court), above n 17, at 199 and 210–11.

69 *ACCC v Signature Security*, above n 67, at [25].

70 *ACCC v Signature Security*, above n 67, at [26], citing *George Weston Foods Ltd*, above n 30, at [46].

71 *ACCC v Signature Security*, above n 67, at [27]; *National Exchange Pty Ltd v Australian Securities and Investment Commission* [2004] FCAFC 90, (2004) 49 ACSR 369 at [51]–[52] [*National Exchange v ASIC*].

72 *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289, (2003) ATPR 41-971 at [35]–[41]; *Energizer NZ Ltd*, above n 10, at [81].

for the maker of the statement to draw the consumer's attention to the true position in the clearest possible way.[73]

(e) *Tendency to lure consumers into error*: applying principles (a) to (d), the question for the court is whether the advertisement viewed as a whole has a tendency to entice consumers into "the marketing web" by an erroneous belief engendered by the advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded.[74] 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. The misleading advertising would then have contributed to any sale. It must follow that rival traders would also have been prejudiced, although protecting them is not the aim of ss 9 and 13.[75] 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.

Did the High Court apply these principles?

[60] We think the High Court did not.

[61] As a preliminary observation, we think Gilbert J may have taken an overly restrictive view of the consumers targeted by Cavalier's website – "the carpet buying public". In [14] above we set out the Judge's statement of the legal principles, observing in [15] that (c) and (d) – the two principles dealing with the consumer –

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73 *National Exchange v ASIC*, above n 71, at [55], [58] and [62]; *ACCC v Signature Security*, above n 67, at [27].

74 *ACCC v TPG*, above n 46, at [50], citing *Trade Practices Commission v Optus Communications Pty Ltd* (1996) 64 FCR 326 (FCA) at 338–9; *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* [1999] FCA 1821, (1999) 169 ALR 1 at [51]; *Australian Competition and Consumer Commission v Commonwealth Bank of Australia* [2003] FCA 1129, (2003) 133 FCR 149 at [47]; and *Bridge Stockbrokers Ltd v Bridges* (1984) 4 FCR 460 (FCAFC) at 475.

75 *Trust Bank Auckland v ASB Ltd* [1989] 3 NZLR 385 (CA) at 389; *Commerce Commission v Noel Leeming Ltd* HC Christchurch AP196/96, 21 August 1996 at 4–5; *Zennith Publishing Ltd v Commerce Commission* HC Auckland AP139/98, 20 November 1998 at 11–12; *Taco Company of Australia Inc*, above n 6, at 197–199; *Commerce Commission v ABC Motor Group* [2005] DCR 262 (DC) at [10].

were challenged, at least the Judge's application of them. Comments the Judge made later in his judgment indicate he viewed the carpet buying public as a comparatively well off and sophisticated segment of the wider public, particularly those searching on the internet for information about carpets.

[62] Paragraphs [37] to [41] of the High Court judgment, in which the Judge deals with the lifetime stain and soil resistance warranties, demonstrate this. In [37] the Judge expressed the view that "any … visitor" to the website would notice that the four warranties were limited, in the sense that they were subject to terms and conditions which could be reviewed by clicking on the link provided. Then the Judge said:[76]

> I consider that prospective purchasers would expect, as a matter of common sense, that the limited stain resistance warranty would be subject to some terms and conditions and may exclude stains caused by some substances, for example, paints, bleaches, inks or dyes. They would understand that they would need to review the Limited Warranties booklet to see whether such stains would be covered. They could do this simply by clicking on the link provided.

[63] Then, in relation to "soil resistance" the Judge said:[77]

> A prospective purchaser would apply reasonable common sense and realise that they would need to click on the link to the warranties booklet to determine the extent of this warranty and whether it covered damage caused by something other than soil.

[64] The Judge's conclusions about the lifetime stain and soil resistance warranties followed:

> [41] For these reasons, I consider that prospective purchasers visiting the website … would have looked beyond the few words used to describe the warranties and referred to the warranties booklet to determine their scope. The booklet specifies the exclusions applicable to the stain and soil resistance warranties. Subject to the question as to whether the warranties booklet is itself misleading which I deal with later in this judgment, [prospective purchasers] would not have been misled.
>
> [42] I conclude that the words "lifetime stain and soil resistance" did not convey the implicit representations alleged and were not misleading when viewed in context. …

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[76] High Court judgment, above n 1, at [38].
[77] At [39].

[65] The Judge took the same approach when considering the other warranties. For example, when dealing with the 25 year fade resistance warranty, he stated:[78]

> Prospective purchasers … would understand that they would need to review the warranties booklet to determine the extent of the fade resistance covered by the warranty.

[66] Similarly, when dealing with the 15 year abrasive wear warranty, the Judge again expressed his view that "most prospective purchasers would review the warranties booklet to determine the scope of cover".[79]

[67] In our view, this approach does not apply the principles we have set out at [59] above. Nowhere did the Judge ask himself what was the dominant message or general thrust of the website advertisement. Instead, he considered consumers could be expected to read the warranty booklet to ascertain for themselves what were the limitations of each of the warranties. So we do not think the Judge correctly applied the principle we have set out in [59](a).

[68] As to principle (b), the Judge's approach was undoubtedly to analyse the separate effect of each representation. He worked through each of the warranties in turn. But he erred in leaving his analysis there. So the Judge did not follow principle (b).

[69] In the last part of [37] of his judgment, Gilbert J observed:

> (f) full details of the warranties and the applicable terms and conditions could be reviewed by clicking on the link provided. Cavalier Bremworth placed an asterisk next to the description of the first two warranties to draw attention to the link to the Limited Warranties booklet. The reference and link to this booklet were in the same print, both font and size, and appeared immediately below the summary.

So the Judge was certainly alive to principle (c). But, as a consequence of his view that consumers would read the warranties booklet, the Judge did not consider the extent of any disparity between the headline representations and the qualifying information, nor whether the qualifying information on the web page and the link to

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78 At [47].
79 At [52].

the warranties booklet nullified the likelihood of consumers being misled or deceived. So the Judge did not apply principle (d).

[70] Finally, Gilbert J did not consider the tendency of the website advertisement to entice consumers into "the marketing web". This was a consequence of the Judge not considering the overall impression of the website advertisement. Consequently, the Judge did not apply principle (e).

The dominant message conveyed by the website

[71] We think the dominant message that the website advertisement conveyed to at least a significant number of the carpet buying public was that Cavalier's new Habitat Collection of carpets came with superb warranties that:

(a) stains would wipe off easily (we accept most consumers would realise they needed to clean up a spill quickly), and if they did not the carpet would be replaced;

(b) the carpet would not soil during its lifetime;

(c) the carpet would not noticeably fade – change colour – for 25 years;

(d) the carpet was so hardwearing it would still be in much the same shape and condition after 15 years. Even under heavy foot traffic it would spring back and would not crush down; and

(e) throughout its lifetime the carpet would be anti-static.

[72] Although consumers might notice some of the warranties were limited and subject to terms and conditions, in our view that would not detract from the dominant message or overall impression conveyed to a significant number of consumers.

Was that dominant message misleading?

[73] Consideration of three of the warranties provides a sufficient basis to answer this question. First, the lifetime stain resistance warranty. A careful reading of the 23 pages of the warranties booklet demonstrates the following:

(1) The warranty was provided by INVISTA, not by Cavalier (p 3 of the warranties booklet).

(2) Carpets installed by landlords in rental residential dwellings are excluded, as are carpets laid in time-share dwellings (p 13).

(3) The warranty begins diminishing in value after year 15. By year 25 it reduces in value to 15 per cent (of the cost of INVISTA, at its sole option, either repairing or replacing the affected area). Beyond year 25 the value reduces to 10 per cent (pp 4 and 7).

(4) The consumer is required to provide the original sales receipt or other documentation acceptable to INVISTA which demonstrates proof of purchase of a STAINMASTER® carpet and proof of installation date (proof of purchase must reflect that full payment has been made for the STAINMASTER® carpet). The documentation must include the STAINMASTER® carpet name and complete colour and style information (p 14).

(5) The consumer must vacuum the carpet frequently (pp 4 and 17).

(6) The consumer must have the carpet professionally (not DIY) steam cleaned at least every 24 months and must provide INVISTA with professional cleaning receipts, if required (pp 4, 14, 17–21).

(7) The consumer must clean a spill promptly using the Basic Cleaning Steps (BCS) set out in the warranties booklet (pp 4 and 17–18).

(8) If the BCS fail, the consumer must have the affected area of the carpet professionally cleaned at their own expense (pp 4 and 17–21).

(9) If the affected area remains unsatisfactory after the professional cleaning, the consumer must contact the STAINMASTER® carpet service centre and provide proof of the professional cleaning within 30 days of the professional carpet cleaning (p 4).

(10) Excluded from the warranty are (p 4):

> 1 Non-food and non-beverage substances, including, for example, but not limited to, cosmetics, bleaches, inks, etc.
>
> 2 Foods and beverages that contain strongly coloured natural substantive dyes as found in, for example, but not limited to, mustard, curry powder, turmeric and herbal tea.
>
> 3 Substances which destroy or change the colour of carpets, including, for example, but not limited to, stains caused by dyes (such as clothing or food colouring), bleaches, acne medications, drain cleaners and plant food.
>
> 4 Pet or human stains (such as vomit, blood, urine, faeces).

Page 4 of the warranties booklet indicates that "a more detailed list of the non-covered stains, including typical non-food and non-beverage stains can be found on p 14 of this booklet". That list is actually on p 18 of the booklet and lists 50 typical non-food and non-beverage stains not covered by the warranty. These include blood, crayon, furniture polish, hair spray, hand lotion, insecticide, lipstick, toilet cleaner and vomit.

[74] Second, the soil resistance warranty. Points (1) to (9) set out in [73] in relation to the stain resistance warranty apply equally to the soil resistance warranty, save (in relation to (9)), it is the "noticeable colour change" that must still remain despite professional cleaning by hot water extraction (steam cleaning). "Noticeable colour change" is defined later in this paragraph. The additional points about the soil resistance warranty are:

(1) The warranty is (p 5):

> … your carpet will not have a 'noticeable colour change'* due to deposits of dry soil as a result of foot traffic from normal, indoor household use.
>
> …
>
> * 'Noticeable colour change' is defined as a rating of 3 or less on the American Association of Textile Chemists and Colourists (AATCC) Gray Scale for Colour Change. The AATCC Grey Scale for Colour Change is internationally recognised in the carpet industry as a standardised tool for measuring a degree of colour change.

(2) Excluded are (p 5):

> … colour changes from grease, mud, asphalt, tar, paints, ink, rust, blood, cement, materials that permanently destroy dyes or alter colours (such as bleaches, acne medications, drain cleaners and plant food), urine, faeces, vomit, appearance or colour changes due to burns, pets, tears, cuts, pulls, shading or pile reversal, furniture depressions or athletic equipment.

[75] Thus, the soil resistance warranty is limited to "noticeable colour change" caused by dry soil. It is difficult to conceive how much, if any, dry soil would get onto or into the carpet. Dry soil – dry dirt – is not generally picked up by footwear or wheels or other such items which routinely come inside and leave deposits on a carpet. We think consumers reading the website advertisement would have got the dominant message that the carpet was resistant to soiling by such common things as mud or pets. Yet both these are expressly excluded.

[76] Third is the abrasive wear warranty. Points (1), (2), (4) and (6) set out in [73] above apply also to this warranty. The additional points are:

(1) The warranty is (p 6):

> … your carpet will not incur Fibre Loss from Abrasive Wear (as hereinafter defined) by more than 10% in any area. 'Fibre Loss from Abrasive Wear' is defined as actual loss of fibre, due to abrasion, from the surface pile of the carpet …

(2) Excluded is damage (the warranty wording actually states "damages") caused by (p 6):

> … caused by or resulting in tears, pulls, cuts, pilling, shedding, burns, pets, fuzzing, matting, crushing, shading or pile reversal, fading, improper cleaning, improper installation or defective construction.

(3) Also excluded are "damages caused by improper cleaning methods and materials" (p 6).

[77] Gilbert J accepted the website conveyed the misleading impression Cavalier was providing the warranties or at least standing behind them.[80] The Judge also accepted the website representation about the abrasive wear warranty conveyed the misleading impression it covered crushing caused by heavy foot traffic, whereas in fact it covered only fibre loss.[81] Gilbert J also took the view that the fade resistance warranty (which we have not analysed in detail) conveyed the misleading impression that fading caused by common household cleaners was covered.[82] Beyond those aspects, the Judge did not consider the website representations were misleading.[83]

[78] For Godfrey Hirst, Mr Dixon argued the actual warranties fell far short of the general impression conveyed by the headline representations. To take, as an example, the stain resistance warranty, Mr Dixon submitted: "Arguably … anything that might conceivably cause a stain is excluded from the warranty. … Unquestionably … the coverage under the warranty is nowhere near as comprehensive as a consumer might have believed it to be, based on Cavalier's representations". Similarly, he argued the message conveyed by the headline representation was that the warranty lasted "for the lifetime of the carpet". The reality – the diminishing value after 15 years – was very different. Mr Dixon also submitted the other "onerous" preconditions, exclusions and limitations rendered the dominant message misleading and deceptive.

[79] Ms Fitzgerald responded that the representations Cavalier made on its website "in fact say very little, being very brief summaries of the Warranties only, coupled with equally prominent references to where further details can be found,

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80 At [31].
81 At [51].
82 At [46].
83 Gilbert J summarised at [96] of his judgment the three respects in which he had found Cavalier breached ss 9 and 13 of the Fair Trading Act 1986.

including Terms and Conditions". In the case of the stain and soil resistance warranties, Ms Fitzgerald submitted the brief representation on the website was factually correct: the warranties *do* include lifetime stain and soil resistance warranties and the Habitat Collection *did* contain specifically engineered fibres to repel and lock out stains so that spills were easier to clean. Ms Fitzgerald adopted the Judge's reasoning in relation to the stain and soil resistance warranty.

[80] We accept Mr Dixon's argument. We have set out in [71] the dominant message we consider Cavalier's website representations conveyed to a significant number of the carpet buying public. The analysis of the preconditions to, scope of, and exclusions from, the warranties we have described in [73] to [76] can only lead to the conclusion that the dominant message was misleading. Accordingly, our answer to the question "was the dominant message conveyed by the website representations misleading?" is yes.

[81] Gilbert J set out in his judgment the changes Cavalier made to its website within two days of service of Godfrey Hirst's proceeding. The Judge noted those changes had been agreed with Godfrey Hirst's solicitors. These are the changes (the previous wording is struck through, the replacement wording is in square brackets):[84]

> ~~SUPERB WARRANTIES WITH NEW SYNTHETIC RANGES~~
>
> [SYNTHETIC WARRANTY]
>
> ~~Cavalier Bremworth has introduced an exclusive range of synthetic carpets in partnership with global yarn supplier INVISTA.~~
>
> ~~The first four ranges being released under the label STAINMASTER® SolarMax® carpet are exclusively licensed for manufacture by Cavalier Bremworth for the New Zealand and Australian markets.~~
>
> ~~The new ranges are being introduced under a Cavalier Bremworth "endorsed brand" called Habitat Collection.~~
>
> …
>
> ~~Habitat Collection leverages off the strength, quality reputation and brand trust that Cavalier Bremworth enjoys, while providing a way to keep the company's wool and synthetic products under separate banners.~~

[84] At [14].

~~Supported by superb warranties, the new solution dyed nylon carpets are low lustre and combine a soft and plush feel for underfoot comfort with the worry-free performance that comes from two of the most trusted names in the business – Cavalier Bremworth and STAINMASTER® carpet~~.

[Synthetic carpets launched under the Habitat Collection are made using yarn supplied by INVISTA. The new STAINMASTER® SolarMax® carpet is exclusively licensed for manufacture by Cavalier Bremworth in New Zealand and Australia with the warranty provided by INVISTA.

The STAINMASTER® carpet with SolarMax™ Fibre Technology is specially made to resist fading from sun exposure as well as aggressive cleaning]

~~Limited warranties* for STAINMASTER® SolarMax® carpet from INVISTA include~~:

[Limited warranties from INVISTA for STAINMASTER® SolarMax® carpet]

- ~~**Lifetime stain and soil resistance*** – specifically engineered fibres repel and lock out stains so spills are easier to clean.~~
- ~~**25 year fade resistance*** – outstanding colour protection built into every fibre, provide long lasting protection against fading from UV light, atmospheric contaminants and common household cleaners.~~
- ~~**15 year abrasive wear** – hardwearing fibres designed to spring back to shape and resist crushing, ensure carpet stays looking good, even under heavy foot traffic.~~
- ~~**Lifetime Anti-static protection**.~~

Click here to download the *STAINMASTER® Carpet Care, Maintenance and Limited Warranties booklet for complete details including Terms and Conditions.

[82] It need hardly be said that changes after the event do not in themselves establish a breach of ss 9 and 13 of the Act in the event. But they demonstrate Cavalier's own prompt – and we think responsible – response to Godfrey Hirst's complaint. The changes altogether remove the misleading dominant message previously conveyed by the website advertisement.

Was the qualifying information on the website sufficiently prominent?

[83] There was nothing on Cavalier's website, in terms of the proximity or prominence of the qualifying information, which corrected the tendency of the headline representations to mislead. We disagree with Gilbert J that the description

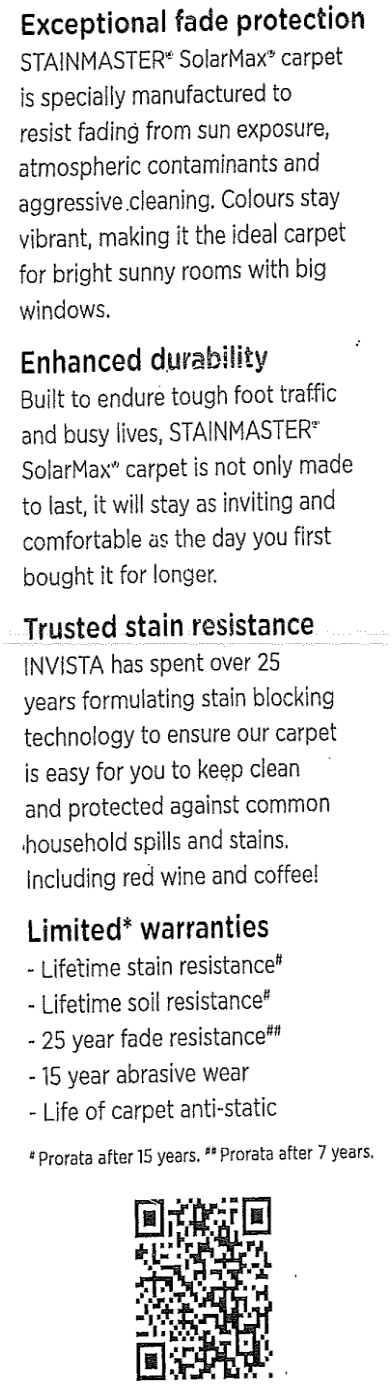
of the warranties as "Limited" sufficiently drew consumers' attention to the qualifications to the warranties, including those we have summarised in [73]–[76] above. Nor do we consider the hyperlink to the warranties booklet averted the misleading dominant message. Even if the Judge was correct in his view that consumers could be expected to know they should click on the hyperlink and review the warranties booklet, we consider the booklet was too detailed and complex to permit a consumer looking at the website easily to determine what was covered by the warranties. As our summary in [73]–[76] demonstrates, a consumer attempting to understand the scope of any one of the warranties would need to read the booklet cover to cover and, in the case of the stain resistance warranty, would also need to contend with incorrect cross-referencing in the booklet.

Tendency to entice consumers into the "marketing web"?

[84] We have concluded the dominant message conveyed by the website advertisement was misleading and was not corrected by the qualifying information. The result, in our view, was that the website advertisement viewed as a whole had a tendency to entice consumers into "the marketing web" by the erroneous belief it engendered. Under the impression the Habitat Collection comprised very high performing carpets supported by "superb" comprehensive warranties, consumers would be drawn to the premises of retailers offering Cavalier's Habitat collection of carpets.

The carpet labels

[85] These are the impugned representations on the label on the carpet samples:



Exceptional fade protection

STAINMASTER® SolarMax® carpet is specially manufactured to resist fading from sun exposure, atmospheric contaminants and aggressive cleaning. Colours stay vibrant, making it the ideal carpet for bright sunny rooms with big windows.

Enhanced durability

Built to endure tough foot traffic and busy lives, STAINMASTER® SolarMax® carpet is not only made to last, it will stay as inviting and comfortable as the day you first bought it for longer.

Trusted stain resistance

INVISTA has spent over 25 years formulating stain blocking technology to ensure our carpet is easy for you to keep clean and protected against common household spills and stains. Including red wine and coffee!

Limited* warranties

- Lifetime stain resistance#
- Lifetime soil resistance#
- 25 year fade resistance##
- 15 year abrasive wear
- Life of carpet anti-static

Prorata after 15 years. ## Prorata after 7 years.

[86] Gilbert J recorded these representations had not been changed.[85] We understand that remains the position. We presume the reason is logistical.

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85 At [16].

[87] Gilbert J found the representations on the labels about the fade resistance warranty were misleading because it covered only exposure to sunlight or atmospheric contaminants, and not fading caused by cleaning.[86] For the reasons we have given in relation to the website representation, we consider the label representation about the "trusted stain resistance" is also misleading. There is, on the label, an implicit connection between the representation of "enhanced durability" and the 15 year abrasive wear warranty. Accordingly, we consider the representation about "enhanced durability" is also misleading, again for the reasons given in relation to the website representation about the abrasive wear warranty.

[88] In [55] above, we explained briefly why our focus would be on the representations Cavalier made on its website, rather than those made on the labels on the carpet samples. To elaborate, the concern we described in [59](e) above about luring customers into the "marketing web" is less in relation to the representations on the labels on the carpet samples. The circumstances or context in relation to the representations on the labels are different. They are more akin, though certainly not identical, to those in *Puxu* than they are to the circumstances in any of the other cases we canvassed in distilling the principles set out in [59] above. In *ACCC v TPG*, the majority offered this description of the circumstances in *Puxu* which they said were "in stark contrast":[87]

> … potential purchasers focused on the subject matter of their purchase in the calm of the showroom to which they had come with a substantial purchase in mind.

[89] The group of consumers looking at the labels on the carpet samples will have narrowed to prospective buyers who have moved a step further toward a prospective carpet purchase by coming in to a carpet retailer's showroom and looking at the samples of carpets on offer. If they do not have a smartphone capable of reading the QR code on the label and linking them directly to the website, or if that is not practicable (perhaps because of the size of a smartphone screen), such consumers will have available the carpet retailer equipped with a copy of the warranties booklet.

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86 At [46].

87 *ACCC v TPG*, above n 46, at [47]. The relevant context in *Puxu* was the impact on potential purchasers of a suite of lounge furniture costing about $1,500 of labels sewn onto the front of the chairs. Thus, the potential purchasers were those in the showrooms of furniture retailers, looking at the range of lounge suites for sale.

Relief

[90] Early in this judgment, at [3], we referred to Godfrey Hirst's claimed altruistic motives in bringing this appeal. To recap, Mr Dixon claimed the aim of the appeal was to "clean up" the carpet industry by obtaining clear guidelines as to the proper limits of representations about carpets.

[91] In its notice of appeal Godfrey Hirst sought a declaration that Cavalier's publications breached or would breach ss 9 and 13(i) of the Act. In his oral submissions, Mr Dixon was ambivalent about declaratory relief.

[92] We accept Ms Fitzgerald's submissions that any declaration we made would essentially not be aimed at Cavalier, and would thus not be of practical utility. The contents of this judgment should afford the carpet industry the guidance Mr Dixon and the Commerce Commission seek. Our view is that a declaration would not add usefully to that guidance and may well detract from it, because of the difficulties of framing an accurate and comprehensive declaration.

[93] For those reasons, although Godfrey Hirst essentially succeeds with its appeal, we decline it declaratory relief.

Costs

[94] Ultimately Mr Dixon accepted there should be no order for costs if the appeal succeeded. He acknowledged that Godfrey Hirst had essentially brought the appeal in the public interest.

[95] Should the result go against Cavalier, Ms Fitzgerald also submitted costs "might appropriately lie where they fall".

[96] In all the circumstances, we agree that no order for the costs of this appeal is appropriate.

Result

[97] The appeal is allowed. Insofar as it is inconsistent with this judgment, the judgment of the High Court is set aside.

[98] There will be no order as to the costs of this appeal.

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