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CONTINUING LEGAL EDUCATION
NEW ZEALAND LAW SOCIETY



MASTERCLASS DECEPTION IN COMMERCIAL DEALINGS

June 2019

IN THIS MASTERCLASS

Practical guidance on:

- *cause of action selection*
- *best approach to plead a claim*
- *negotiate a deal.*

DECEPTION IN COMMERCIAL DEALINGS MASTERCLASS

FROM THE CHAIR



The law has an array of approaches to deal with deception; some are somewhat arcane, while others have developed as simple and effective ways to address the issues. It's topical and continually relevant and pervades all areas of legal practice.

The idea of this Masterclass is to delve into some key areas of interest – pitfalls when guiding a commercial deal from sales pitch to signature; understanding and identifying the best way to plead a claim; keeping an eye on the outcome when the case finishes. Importantly, we will also be dealing with the perennial issues and pitfalls which arise in advertising, and hearing from the Commerce Commission.

Some recent developments which will merit discussion include the findings of the Australian Royal Commission into the conduct of the banking industry, and what that might mean for New Zealand and trans-Tasman dealings.

It's going to be an interesting day and I am very much looking forward to seeing you there.

Bob Hollyman QC

LEARNING OBJECTIVES

In this Masterclass you will be:

- Identifying the different causes of action available for obtaining relief for a client who believes they have been misled or deceived.
- Learning how to defend your clients against deception claims and what avenues are likely to be more successful.
- Understanding client and lawyer liabilities.

WHO SHOULD ATTEND

Civil and commercial litigators and lawyers who advise on commercial transactions.

8.30-9.00

REGISTRATION

9.00-9.05

INTRODUCTION TO THE DAY: Chair – Bob Hollyman QC

9.05-11.00

SESSION 1: UNTANGALING THE WEB OF THE MISLEADING CONDUCT AND DECEPTION: CHOOSING THE RIGHT CAUSE OF ACTION AND PLEADING IT

- An overview of how to choose a cause of action and plead it, based on a fact scenario
- The effect of exclusion clauses on the theory of the case
- Potential liability for lawyers.

Presenters

Adam Ross QC

Jane Standage

11.00-11.20

MORNING TEA

11.20-12.10

SESSION 2: DOCUMENTING THE DEAL

This session will consider the process of negotiating a deal from term sheet to completion and how to best manage clients and their expectations along the way. John will share his experience of M&A deals being terminated and the consequences. He will speak to recent case law interpreting earn-out provisions and touch on the differences between assignment and novation, and why it matters.

Presenter

John Horner

12.10-1.00

SESSION 3: MISLEADING CONDUCT: BUILDING A COMPLAINT INTO A CASE

This session will assist practitioners who act for consumers or competitors to understand the most effective ways to shape a complaint to the Commerce Commission and to build a case.

The session will cover:

- Applying the Fair Trading Act 1986 to the conduct
- Demonstrating reliance and harm
- Assisting the Commission to understand your complaint.

Presenter

Mary-Anne Borrowdale

1.00-2.00

LUNCH

2.00-2.40

SESSION 4: TRUTH IN ADVERTISING

When to complain to the Advertising Standards Authority (ASA) and when to approach the Commerce Commission. The importance of context and placement in truthful advertising.

What do businesses need to support an advertising claim and in 2019, what is an ad? Illustrated by recent decisions from the ASA and cases taken by the Commerce Commission under the Fair Trading Act 1986.

Presenters

Hilary Souter

Stuart Wallace

2.40-3.20

SESSION 5: REMEDIES: TRACING AND CONSTRUCTIVE TRUSTS

In this session, Mike will cover recent remedy issues in the context of fraud and deceptive dealings. He will focus on tracing (including “backwards tracing”) and constructive trusts. Mike will provide an update on recent case law in the area and consider how it may continue to develop.

Presenter

Mike Colson

3.20-3.40

AFTERNOON TEA

3.40-4.20

SESSION 6: ENFORCEMENT AND LIMITS OF THE REGULATORS' POWERS

This session will consider the information-gathering powers available to regulators to facilitate enforcement, and the safeguards on the exercise of such powers. Iva will discuss the application of legal privilege in investigations, availability of legal representation and choice of counsel, and protections that are available when a regulator intends to disclose information obtained under compulsion. The discussion will cover recent decisions and address the relevance of the New Zealand Bill of Rights Act 1990 in this sphere. What remedies are available when the regulator’s powers are used improperly?

Presenter

Iva Rosic

4.20-4.50

SESSION 7: FUTURE DEVELOPMENTS

We don't need a crystal ball to see what is coming. There are immediate and important issues to address, and not just changes already implemented in Australia. The Australian Royal Commission into the conduct of the banking industry raises its own questions, and there is also the looming question of expanding criminalisation, as has happened in competition law.

Presenter

Bob Hollyman QC

4.50-5.00

SUMMARY OF THE DAY – CHAIR: BOB HOLLYMAN QC

CHAIR



Bob Hollyman QC, Shortland Chambers, Auckland

Bob practises as a barrister primarily in commercial litigation. He was admitted in 1995 and has been a member of Shortland Chambers since 2006. Bob is the author of *Falsehood and Breach of Contract in New Zealand* (2017) and has taught Advanced Tort at Auckland University.

PRESENTERS



Mary-Anne Borrowdale, General Counsel, Commerce Commission, Wellington

Mary-Anne has been General Counsel, Competition and Consumer at the Commerce Commission since 2010. She has worked in the Commission's enforcement and merger areas since 2005, having come to the Commission from private practice as a commercial and criminal litigator. Mary-Anne has a Master of Laws (Hons) from Canterbury University in the subject of directors' torts, and has published articles primarily on negligence and company law topics.

PRESENTERS



Mike Colson, Stout Street Chambers, Wellington

Mike was a litigation partner at Bell Gully for 16 years before moving to the bar in June 2017. He specialises in commercial and insolvency litigation. Mike has acted for the liquidators of Ross Asset Management Limited (New Zealand's largest ponzi).



John Horner, Quigg Partners, Wellington

John is a transactional lawyer practising in mergers and acquisitions and competition law. He has a particular interest in takeovers and joint ventures and gets irritated if an assignment is confused for a novation.



Iva Rosic, Gilbert/Walker, Auckland

Iva is a partner at Gilbert/Walker. She advises and represents clients in a broad range of commercial disputes and investigations brought by the Financial Markets Authority (FMA), Commerce Commission and other regulatory agencies.



Adam Ross QC, Shortland Chambers, Auckland

Adam practises in civil, corporate and commercial law (including insurance) and regulatory crime (securities, corporate, trade practices, environmental). He commenced practice in 1989 and joined Chapman Tripp's litigation department as a partner in 1996, where Adam worked for the next 18 years on disputes great and small, and on corporate/commercial advisory matters. He commenced practice as a barrister sole at Shortland Chambers in March 2015 and took silk in 2017.



Hilary Souter, Chief Executive, Advertising Standards Authority (ASA), Wellington

Hilary has spent over 20 years working in the wider media industry on advertising standards and compliance with codes and legislation. The ASA is a leader in industry regulation and provides robust standards to support responsible advertising.

PRESENTERS



Jane Standage, MinterEllisonRuddWatts, Auckland

Jane is a litigation partner at MinterEllisonRuddWatts. She has a wide ranging commercial litigation practice with an emphasis on financial and regulatory litigation, complex contractual disputes and consumer law. Jane has practiced in New Zealand and in the United Kingdom. She completed a Master of Laws at New York University on Fulbright and Hauser Global Law scholarships.



Stuart Wallace, Head of Consumer, Commerce Commission, Wellington

Stuart joined the Commission in 1987, shortly after the Fair Trading Act (FTA) was passed. He can speak with authority as he has had oversight of numerous investigations and built up a wealth of knowledge about how the courts have interpreted the FTA over the years.

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