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The Art of Law

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PRIVATE & CONFIDENTIAL

COURIER

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Friday, 19 June 2009

NBO NZ LIMITED / ABOL.COM.AU LIMITED

1. We act for NBO NZ Limited ("**NBO**") and abol.com.au Limited ("**ABOL**").
2. We have been instructed to write to you regarding defamatory and offensive comments about NBO and ABOL made by you and posted by users on your "*iTamers Simple SEO*" and "*NZ Scams to Avoid*" blogs.

Immediate Action Required

3. **You are required to remove all defamatory and offensive statements about our client and post a retraction within 5 working days (by 5:00 pm, Friday, 26 June 2009), as set out in paragraphs 21 to 23 of this letter. If you do not do so or ignore this letter, we are instructed to immediately commence legal proceedings against you, as set out in paragraphs 24 to 28 of this letter.**

Background

4. You have been posting material on your blogs about NBO and its associated companies since March 2005. Your posts typically describe our client's businesses as "*scams*" and warn consumers against signing up with our client's businesses (in some cases, successfully). Posts on both blogs are tagged with identifiers such as "*Proforma Scam*" and "*Proforma*", which is clearly inaccurate.
5. In an attempt to clarify any confusion over the legitimacy of NBO's business practices, our client volunteered to have NBO investigated by the Commerce Commission. The Commerce Commission "*has looked into NBO and found nothing illegal*" (quoted from a TVNZ interview dated 1 September 2008).
6. Your blogs also mention jobleader.co.nz. That business and its website are no longer operating and Job Leader Limited has been struck off the Companies Register.

7. We draw to your attention that NBO is not associated with NZBO Limited or Searcha Limited. Those companies are both under different and entirely separate ownership, and our client is not involved in the management or administration of those businesses.

Defamation

8. A large proportion of the content related to our client's businesses is defamatory. A statement is defamatory if the statement tends to lower the reputation of the person about whom the statement is made in the estimation of right-thinking members of society generally.
9. Throughout both of your blogs, you emphasise the point that our client's businesses are "scams". A scam is, by its nature, fraudulent and therefore illegal. Your numerous statements that our client's businesses are scams would undoubtedly lower the reputation of the businesses and Shallandra Singh, and are accordingly defamatory. By even mentioning our client's businesses on your "NZ Scams to Avoid" blog, you are implying that our client's businesses are scams and should therefore be avoided. This implication is clear from the title of the blog, and is also defamatory.
10. None of the available defences apply in the current circumstances. In particular:
- a. a scam is designed to trick people into giving away their money or personal information. Our client's businesses only target business customers, and offer those customers legitimate online business listings in exchange for a fee. Also, our client has obtained a determination from the Commerce Commission upholding its business practices, and therefore any allegations that our client's businesses are "scams" are false;
 - b. your blogs confirm that you are aware of the Commerce Commission determination. Specifically, your blog posts on "NZ Scams to Avoid" dated 20 October 2008 and on "iTamer" dated 1 September 2008 link to a TV1 interview with our client, and that interview segment confirms that the "Commerce Commission has looked into NBO and found nothing illegal". You have also commented on the Commerce Commission determination in your blogs (for example, on the "iTamer" blog on 2 September 2008). In the face of such overwhelming evidence to the contrary, it cannot be your "honest opinion" that our client's businesses are scams; and
 - c. there are no other governmental agencies or departments that deal with consumers and businesses that in any way associate our client's businesses with being scams.
11. Your conduct is causing ongoing damage to our client's business and our client cannot allow such conduct to continue unchallenged any longer. Comments on your blogs provide evidence of damage to our client's businesses. For example:
- a. on 15 January 2007 "AM" posted the following comment regarding NBO on the "iTamer" blog: "NBO called me today to tell me that it was time to renew ... It was \$96 to renew ... I was going to too, \$96 ain't much and all our competitors were on the site! ... I googled it and found this ... I am supposed to fax the order back by 12pm to get an extra 3 months free ... I will ignore it ..."; and

- b. on 5 January 2009 "Soph" posted the following comment regarding NBO on the "NZ Scams to Avoid" blog: "He faxed his forms through to us at the office to be signed & returned. Yeah right. I discovered when I did a search regarding NBO that it was listed as a scam ...". We note that all references on the internet to NBO being a scam are linked back to your blogs or are posted by you.
- 12. We are aware from reviewing your blogs that you have been subject to allegations of defamation in the past and have seen fit to ignore such allegations. Given the severity of these current allegations, and our client's determination to see this matter through to its full legal conclusion, it would not be in your best interests to ignore this letter.
- 13. We have also reviewed your blog on the businesstalk forum and your posts on the propertytalk forum. While the statements on those forums are not defamatory, both forums link to your "iTamer" blog, which does contain defamatory material.

Liability for Users' Comments

- 14. Many of the user comments posted on your blogs also allege that our client's businesses are scams and are defamatory. Under defamation laws, you are liable for any content posted on your blogs, and are consequently liable for all defamatory and/or offensive comments posted by users on your blogs.
- 15. The defence of "*innocent dissemination*" does not apply here. This would apply if, for example, you were unaware that the comments posted by your blog users were defamatory. This does not apply here. You frequently respond to users' comments and it can be reasonably inferred that you are aware of the content of those comments.
- 16. In any case, in the (highly) unlikely event that you were not aware of defamatory comments posted by users on your blog, this letter serves as notice in writing to that effect.

Injurious Falsehood

- 17. We consider that you are also liable under the law of injurious falsehood for the defamatory and offensive comments made by you and your users on your blogs. Injurious falsehood is concerned with the malicious infliction of financial loss on a person by making false statements about that person to a third party or parties. Injurious falsehood is established if:
 - a. a false statement is made to a third party or parties;
 - b. the statement was published maliciously; and
 - c. the statement resulted in damage to the person about whom the statement was made.
- 18. We consider that these criteria are met in the current case. Specifically:
 - a. your allegation that our client's businesses are scams is undoubtedly false. This is confirmed by the Commerce Commission's findings and there is no other basis for this allegation;

- b. there are several statements on your blog telling people to beware of NBO and its related companies and not to advertise or list with those businesses. As discussed in paragraph 10 above, you are aware that your allegations that our client's businesses are scams are false. Nevertheless, your blogs contain several statements that are clearly calculated to induce others not to deal with our client. In legal terms, this is malicious behaviour; and
- c. your conduct has caused damage to our client's businesses (discussed further in paragraph 11 above).

Fair Trading Act 1986

- 19. It appears that you use your blogs to promote your own services as a technology and SEO specialist, so your conduct is also covered by the Fair Trading Act. Section 9 of that Act prohibits misleading or deceptive conduct in trade, and section 13 prohibits false and misleading representations in trade. Your allegations that NBO and ABOL are scams are (for the reasons outlined above) false and misleading and as such are prohibited by the Fair Trading Act.
- 20. As you are no doubt aware, our client has the right to complain to the Commerce Commission about your false and misleading conduct and representations. Under the Fair Trading Act, our client also has the right to apply for an injunction or other relief from the Court.

Required Actions

- 21. Our client requires that all defamatory and offensive material be removed immediately from your blogs. Specifically, our client requires that:
 - a. all references to jobleader.co.nz be removed from your blogs;
 - b. all references to NZBO and Searcha as related companies of NBO (or owned by the same owner as NBO) be deleted;
 - c. all comments or posts containing the word "scam", "proforma", "illegal", "fraud", "fake", "rip off", "sham", "thieving", "hoax" or "crooks" (or any variations, such as "scammer" or "fraudulent" and including misspellings) be removed from your blogs;
 - d. all offensive comments (for example, relating to our client's race) be removed from your blog posts on NBO and ABOL;
 - e. all posts on your "NZ Scams to Avoid" blog relating to NBO or ABOL be removed; and
 - f. all links to your posts on NBO be removed from the propertytalk and businesstalk forums.
- 22. Given the volume of defamatory and offensive content regarding NBO and its associated businesses posted on your blogs, we require that you remove all references to our client and our client's businesses from your blogs.

23. We understand that, despite removing the defamatory and offensive content from your blogs, content may still show up in Google searches. Therefore, we also require that you post the following retraction on both of your blogs:

"We have removed all statements containing various allegations made against NBO, ABOL, jobleader and Shallandra Singh from this website. NBO's business practices have been investigated by the Commerce Commission. The Commission found nothing illegal and no action was taken. I accept that there was no basis to the allegations that those businesses are scams and I apologise for making those statements."

Next Steps

24. We require you to perform the actions outlined in the above paragraphs, and confirm the same to us in writing, **by 5:00 pm on Friday, 26 June, 2009**. You may provide confirmation by signing and returning to us by facsimile (or by scanning and emailing) a copy of this letter.
25. If you fail to provide the above confirmation, our client will urgently take steps to protect its rights without further notice to you. Specifically, if you do not provide the above confirmation in accordance with paragraph 24, then we are instructed to immediately take the following steps:
- a. Commence proceedings for defamation, injurious falsehood and breach of the Fair Trading Act against you in the High Court at Auckland; and
 - b. file an application with the High Court seeking urgent injunctive relief.
26. In the event that any proceedings become necessary, our client will seek to recover all legal costs (including solicitor's costs) from you, as well as compensatory and punitive damages.
27. Our client reserves the right to produce this letter in support of an application for injunctive relief, and reserves all other rights it may have in law or otherwise.
28. Our client is committed to enforcing its rights and, given the damaging effect your actions are having on our client's business, will pursue this matter to its full legal conclusion. Given the seriousness of the matters contained in this letter, we recommend that you seek legal advice.

HESKETH HENRY



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