Neutral Citation Number: [2011] EWCA Civ 920

Case No: A3/2011/0939/CHANF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Chancery Division
Mr Justice Briggs
(2011)EWHC106(Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2011

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE JACKSON
and
LORD JUSTICE MUNBY

- -

IN THE MATTER OF THE ENTERPRISE ACT 2002 AND THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008

Between :

(1) PURELY CREATIVE LIMITED **(2) STRIKE LUCKY GAMES LIMITED** **(3) THE WINNERS CLUB LIMITED** **(4) MCINTYRE & DODD MARKETING LIMITED** **(5) DODD MARKETING LIMITED** **(6) ADRIAN WILLIAMS** **(7) WENDY RUCK** **(8) CATHERINE CUMMINGS**	**Appellants / Defendants**
(9) PETER HENRY	**Defendant only**
- and - **THE OFFICE OF FAIR TRADING**	**Respondent / Claimant**

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MR KEVIN DE HAAN QC and Mr TERENCE MOWSCHENSON (instructed by **DAVIES AND PARTNERS**) for the **Appellants**
MISS JESSICA SIMOR (instructed by **THE GENERAL COUNSEL**) for the **Respondent**

Hearing dates : 20 - 21 June 2011

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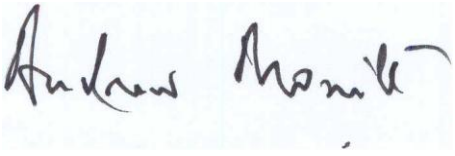
Approved Judgment



The Chancellor :

Introduction

1. The Appellants ("the Promoters") are promoters or officers of the promoters of prize draw competitions to consumers. Their activities in promoting five such competitions came to the attention of the Office of Fair Trading ("OFT") in 2004. In consequence of the investigation the OFT then conducted, on 31st October 2007 the Promoters gave to OFT certain written assurances. The assurances were approved by the OFT on 20th November 2007. In 2008 the Promoters promoted five further competitions to which I shall refer in more detail later. OFT investigated them. On 22nd December 2009, pursuant to s.215 Enterprise Act 2002, the OFT instituted these proceedings by a Part 8 claim seeking injunctions to restrain the Promoters from infringing specified regulations in the Consumer Protection Unfair Trading Regulations 2008 SI 1277/2008 ("the Regulations"). The claim was heard by Briggs J on and between 13th and 18th January 2011. On 2nd February he handed down his judgment containing 200 paragraphs. On 17th March 2011 Briggs J heard further argument and made 5 further rulings. In the event, he accepted undertakings in lieu of injunctions in the form contained in his order made on 21st April 2011. This appeal, brought with the permission of the judge, is in relation to paragraph 1(a) of such undertakings. The Promoters seek an order to delete it.

2. The Regulations seek to implement the United Kingdom's obligation to give effect to the Unfair Commercial Practices Directive 2005/29/EC ("the Directive"). Article 5 of the Directive provides that

> "Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive."

Paragraph 31 of that Annex is in the following terms:

> "Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:
>
> - there is no prize or other equivalent benefit
>
> or
>
> - taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost."

Paragraph 31 in Schedule 1 to the Regulations reproduces paragraph 31 of the Annex I to the Directive literally except that it introduces the indents with the references "(a)" and "(b)".

3. Briggs J concluded that each of the promotions on which the OFT relied infringed that paragraph. The undertakings he accepted included as paragraph 1 an undertaking from the Promoters that they would not in any future promotions:

> "create the false impression that the consumer has already won, will win, or will on a particular act win a prize or other equivalent benefit, when in fact taking any action recommended by the defendant in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost which is either
>
> (a) a substantial proportion of the unit cost to the defendant of the provision to the consumer of the thing described as a prize or other equivalent benefit; or
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> (b) in the case of a charge stated to be for delivery and insurance, used by the defendant to finance in whole or in part its acquisition, handling or other cost of the making available of that thing other than the actual cost of its delivery to the consumer and insurance (if any) in transit."

The Promoters seek the deletion of subparagraph (a).

The Promotions

4. In this action the OFT's complaints relate to five promotions carried out in and between June and December 2008. Whilst they differed in detail they had a number of common features. First the consumer was told that he had won one of a number of specified prizes. At one end of the range was a prize of considerable value at the other end was a prize worth, at most, a few pounds. In between were a number of prizes of values between the two extremes. Second, the consumer was informed that to ascertain which prize he had won and to claim it he had to telephone a specified number to find out. Though the consumer was given a postal alternative it was given minimal prominence in comparison with the telephone number. Third, the telephone number was a premium rate line. The consumer was told the cost per minute and the maximum duration of the call. He was not told that the minimum time within which he would obtain the information he sought was only seconds short of the maximum. Nor was he told that from the cost per minute of £1.50 the promoter took £1.21. In

addition, in some cases, the consumer was invited to pay the cost of delivery and/or insurance. Fourth, except for a very small fraction of 1%, all who claimed a prize got the prize of least value, the equivalent, or a substantial proportion, of which he had already paid in telephone charges and costs of delivery and/or insurance.

The judgment of Briggs J

5. Briggs J considered the proper interpretation of Paragraph 31 in paragraphs 42 to 61 of his judgment. In paragraph 45 he rejected the argument advanced by counsel for the OFT to the effect that the paragraph applied if any payment, however small, had to be made in connection with claiming the prize on the ground that a small payment would not necessarily create a false impression as to the status of the prize. By contrast, in paragraph 47 he accepted the argument, attributed to counsel for the Promoters, to the effect that paragraph 31 would not be engaged if the payment required was *de minimis* in relation to the value of the prize won. He considered that falsity lies at the heart of the prohibition in paragraph 31. Notwithstanding this conclusion paragraph 1(a) of the undertakings refers to payment which is "a substantial proportion of the unit cost to the [promoter]" of providing the prize.

6. In paragraph 57 Briggs J rejected the submission of counsel for the Promoters that if a cheap alternative to the premium line telephone call for claiming the prize is provided then the paragraph is not engaged on the basis that the prize remains a prize and no false impression is created. He noted that his initial reaction had been to accept that submission but had changed his mind. He considered that if the more expensive alternative was presented in the form of a recommended method then the cost incurred in adopting that method should be considered. It was for this reason that paragraph 1(a) of the undertaking refers to "any action recommended by the" promoter.

7. Briggs J concluded in paragraph 59 that:

> "If the consumer is given the impression that he has won a prize even if he adopts the recommended (but relatively more expensive) method or methods of claiming it, then if the cost of that method is sufficient to falsify the impression, that commercial practice should be, and is, prohibited by Paragraph 31. This is because the trader will be profiting by recommending a method of claiming which involves a cost which falsifies the assertion that the consumer has won something, rather than having bought it."

8. In paragraphs 91, 137, 161, 174 and 183 he concluded that in each of the five promotions under consideration paragraph 31 was infringed. In each of them the

telephone claim was recommended and cost, in addition to the delivery and insurance charges where applicable, the equivalent or a substantial proportion of the unit cost to the promoter of providing the prize to the consumer. He concluded in addition that each of them had infringed other regulations relied on by OFT as well.

9. Before leaving the judgment of Briggs J I should note that in paragraph 41 he referred to the submission of counsel for the OFT drawing attention to the various, apparently different, ways in which different Member States had implemented paragraph 31 of the Directive. He concluded:

> "In my judgment recourse to differences of implementation of a directive intended to have uniform effect throughout the EU is likely to prove a time-consuming and ultimately fruitless exercise, as will become apparent from [counsel]'s attempt to pray in aid the different language of the Irish regulations implementing paragraph 31 of Annex 1 to the UCPD."

10. I agree; but the different approaches of Member States may well be important to the exercise of this court's discretion whether to refer questions of interpretation of the Directive to the Court of Justice of the European Union.

The Appeal and Cross Appeal

11. As I have already indicated, the Promoters appeal with the permission of the judge. By a respondent's notice issued on 15th April 2011 the OFT sought permission to cross-appeal. We granted such permission at the commencement of the hearing. The broad effect of the appeal, if successful, would be to limit the scope of paragraph 31 as applied by the judge in paragraph 1 of the undertakings. By contrast, the broad effect of the cross-appeal, if successful, would be to widen its scope.

12. The Promoters suggest that Briggs J erred in five specific respects. First, the Promoters contend that the cost of submitting a claim is not such cost as paragraph (b) of paragraph 31 refers to, particularly where the consumer is given a choice between a premium rate service or a postage stamp. Second, even if the premium rate line was to be regarded as recommended, in the sense the judge used that word, it did not falsify the impression that a prize had been won. Third, the judge was wrong to have considered whether or not the promoter made a profit from a particular consumer by comparing its costs of providing the prize with what he received from the premium rate calls and, where applicable, the costs of delivery and insurance. The Promoters contend that such a consideration is neither decisive nor relevant. Fourth, if there is to be a comparison between the cost to the consumer with some other cost it should be

the cost to the consumer of acquiring the prize from an alternative source. Fifth, the judge was wrong to have characterised the award and claim of the prize as a transaction of sale and purchase.

13. The oral argument of counsel for the Promoters in support of these five grounds focussed on the words "subject to" in paragraph (b) of paragraph 31 and the fact that sub-paragraph (b) is an alternative to sub-paragraph (a). Accordingly, so he submitted, it is necessary to assume the existence of a prize when considering the proper interpretation and application of sub-paragraph (b). The costs to which the claim is subject and to which paragraph (b) applies are, he submitted, only those necessary to the claim, not those of some other more costly method the consumer chose to use. He pointed out that there is nothing in paragraph 31 of either the Directive or the Regulation which requires the method to be recommended or the cost to be compared with any comparator. But if a comparator was required then it should be the cost to the consumer of obtaining the prize from an alternative source and not the cost to the promoter of providing it.

14. If these were the only issues in these appeals I would reject the arguments of counsel for the Promoters and dismiss the appeal. Paragraph 31 is quite specific. It applies to "any action in relation to claiming the prize", not the 'only', 'cheapest' or 'recommended' action. Similarly it applies to the consumer "paying money or incurring a cost". This is entirely unspecific. Literally the words apply to any money or any cost. There is no requirement that they should be substantial in comparison with any other cost. Taking the words of paragraph 31 at their face value each of these promotions infringes the provision. In addition to import the restrictions for which counsel for the Promoters contends would be contrary to one of the clear purposes of the Directive, namely "to establish a high level of consumer protection", see recital 5 to the Directive.

15. In their cross-appeal the OFT raise again the arguments they advanced before Briggs J which I have referred to in paragraph 5 above. They submit that paragraph 1 of the Undertakings should be replaced by one or other of the following:

> "Create the impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact taking any action identified by the Defendants in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.
>
> or
>
> "Create the impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact taking any action identified by

> the Defendants in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring anything other than *a de minimis cost.*"

16. Counsel for the OFT points to the fact that recital 17 indicates that another of the purposes of the Directive is to introduce legal certainty which the 'brightline' interpretation for which she contends would produce. Her primary submission is, therefore, that this court should substitute the first alternative set out in paragraph 14 above for the whole of paragraph 1 of the undertakings. The second alternative is a secondary submission designed to recognise some of the possible objections to her first. She frankly admits that neither of her submissions as to the true construction of paragraph 31 can be described as *acte clair*. Her preferred solution is that if we do not feel able to adopt either of them then we should dismiss the appeal, stay her cross-appeal and refer to the Court of Justice of the European Union questions on the interpretation of paragraph 31 designed to elicit the answer to her cross-appeal.

17. There is much to be said for a reference. We were told that there is no judgment of any court of any Member State on the proper interpretation of paragraph 31 of the Directive or its various national equivalents. In addition the translations of the various provisions enacted by each Member State to give effect to paragraph 31 of the Directive display a divergence indicative of doubt as to what that true interpretation is. As another of the purposes of the Directive, clearly expressed in recitals 6 and 12 and article 5 quoted in paragraph 2 above, is to harmonise the laws of the Member States these translations indicate that that purpose may require a decision of the Court of Justice of the European Union. To give but one example, and one which does not require any translation, the relevant provision in the Republic of Ireland is in the following form:

> "Making a representation or creating an impression that a consumer has won or will win a prize or other equivalent benefit, if –
>
> (i) there is no prize or equivalent benefit, or
>
> (ii) in claiming the prize, the consumer has to make a payment or incur a loss;"

Such an implementation of paragraph 31 omits the word 'false' which had been inserted into the draft Directive by an amendment approved by the European Parliament on 2nd February 2005. Perhaps of greater significance is the substitution of 'loss' for 'cost'.

18. Accordingly, in my view, the need for a reference in order to determine the cross-appeal is clearly made out. Nevertheless I am reluctant only to refer the issues arising on the cross-appeal lest it somehow inhibit the freedom of the European Court of Justice to consider the whole of paragraph 31 in the context of the whole of the Directive. Equally it would be unwise for this court to limit or fetter what order it might make on the appeal in the light of the response to the reference by dismissing the appeal now. For all these reasons I would stay the appeal and the cross appeal and refer to the European Court of Justice the questions (for which I am grateful to counsel) set out in the appendix to this judgment. I would invite counsel for the parties to produce for the consideration of this court a draft of the form of reference required by CPR Part 68 and its PD. Lest there be any misunderstanding I emphasise that all the undertakings given to the court by the Promoters and recorded in the order of Briggs J will remain in full force and effect.

Appendix

1. Does the banned practice set out in paragraph 31 of Annex 1 to Directive 2005/29/EC prohibit traders from informing consumers that they have won a prize or equivalent benefit when in fact the consumer is invited to incur any cost, including a *de minimis* cost, in relation to claiming the prize or equivalent benefit?

2. If the trader offers the consumer a variety of possible methods of claiming the prize or equivalent benefit, is paragraph 31 of Annex 1 breached if taking any action in relation to any of the methods of claiming is subject to the consumer incurring a cost, including a *de minimis* cost?

3. If paragraph 31 of Annex 1 is not breached where the method of claiming involves the consumer in incurring *de minimis* costs only, how is the national court to judge whether such costs are *de minimis*? In particular, must such costs be wholly necessary:
    a. in order for the promoter to identify the consumer as the winner of the prize, and/or
    b. for the consumer to take possession of the prize, and/or
    c. for the consumer to enjoy the experience described as the prize?

4. Does the use of the words ‘false impression’ in paragraph 31 impose some requirement additional to the requirement that the consumer pays money or incurs a cost in relation to claiming the prize, in order for the national court to find that the provisions of paragraph 31 have been contravened?

5. If so, how is the national court to determine whether such a ‘false impression’ has been created? In particular, is the national court required to consider the relative value of the prize as compared with the cost of claiming it in deciding whether a ‘false impression’ has been created? If so, should that ‘relative value’ be assessed by reference to:
    a. the unit cost to the promoter in acquiring the prize; or
    b. to the unit cost to the promoter in providing the prize to the consumer; or

c. to the value that the consumer may attribute to the prize by reference to an assessment of the 'market value' of an equivalent item for purchase?

Lord Justice Jackson

19. I agree.

Lord Justice Munby

20. I also agree.