

REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Referring Court

1. The referring court is Her Majesty's Court of Appeal (Civil Division).

The Parties

2. The parties to these proceedings are five associated companies in a group of which the ultimate parent company is DM plc, namely: 1) Purely Creative Limited; (2) Strike Lucky Games Limited; (3) The Winners Club Limited (4) McIntyre & Dodd Marketing Limited; (5) Dodd Marketing Limited; and four individuals who are or were at the relevant time officers of those companies: (6) Adrian Williams; (7) Wendy Ruck; (8) Catherine Cummings; (9) Peter Henry. Peter Henry is not a party to the appeal but is subject to the cross appeal by the OFT. The Appellants are referred to collectively in this reference as "the traders". The traders are (or in the case of Peter Henry were) involved in the distribution of mailings and inserts, including scratch-cards, whereby consumers are told that they have won one of a number of specified prizes and are invited to find out which prize they have won and claim it. These commercial activities are referred to collectively in this reference as "the Promotions".
3. The Respondent is the Office of Fair Trading ("OFT"), responsible for enforcing consumer protection laws. It is named as a general enforcer in Section 213 (1) (a) of the Enterprise Act ("the Act"). By s. 215 (1) and (2) of the Act it is empowered to apply for an Enforcement Order if it takes the view that a person has engaged or is engaging in conduct which constitutes a Community infringement, or is likely to do so. A Community infringement is

defined by section 212 (1) as an act or omission which harms the collective interests of consumers and which contravenes the provisions of a listed Directive as given effect by the laws, regulations, or administrative provisions of an EEA State. By section 210 (7) (b) and paragraph 9C of Schedule 13, the Unfair Commercial Practices Directive 2005/29/EC (“the Directive”) is a listed Directive.

The Nature and History of the Proceedings

4. This reference originates in proceedings brought by the OFT under section 215 of the Act for an Enforcement Order to restrain the traders from continuing to distribute promotions similar to five specific ones that the OFT claimed involved unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008 SI 1277/2008 (“the Regulations”), which implement the Directive. These are accordingly civil proceedings although breach of an Enforcement Order is a contempt of court potentially punishable with imprisonment and other penalties.
5. The proceedings were issued on 22nd December 2009. The OFT claimed that the Promotions were prohibited as “unfair commercial practices” under regulation 3 of the Regulations on the basis that (a) they breached paragraph 31(b) of Schedule 1 to the Regulations; (b) they included misleading actions within the meaning of regulation 5 of the Regulations and (c) misleading omissions under regulation 6 of the Regulations.

The Relevant Factual Matrix

6. The Promotions [Copies attached] include individually addressed letters, scratch-cards and other inserts that were placed into newspapers and magazines. Whilst they differ in detail, they have a number of common features.
 - (i) The consumer was informed that he was entitled to claim one of a number of specified prizes or awards ranging from a prize of considerable value to a

prize worth, at most, a few pounds referred to throughout the proceedings as the “most numerous award”. In between there were a number of prizes of values between the two extremes. It was not disputed that the prizes were genuinely available.

(ii) With the exception of Promotion 8 in order to find out what a consumer was entitled to claim and to obtain a claim number the consumer was given the option:-

- (a) of calling a premium rate telephone number; or
- (b) using a reverse SMS Text Messaging Service; or
- (c) obtaining the information by ordinary post.

Less prominence was given to the postal method than to the premium rate telephone method with the result that consumers were encouraged to use a more expensive route than the postal route. In relation to Promotion 5 it was found that at least 80% of participating consumers responded by telephone or text. No specific finding in this regard was made in relation to the other Promotions. The telephone number was a premium rate line. The consumer was told the cost per minute and the maximum duration of the call.

(iv) The consumer was not told:

- (a) that the minimum time within which he would obtain the information necessary to claim the most numerous award was a few seconds short of the maximum call duration;
- (b) that from the cost per minute of £1.50 the Promoter took £1.21

(v) In some cases the consumer had to pay an additional cost stated to include delivery and insurance, part of which was used by the promoter to finance the cost of acquiring the item claimed.

(vi) Over 99% of those claiming a prize were entitled to receive the most numerous award, the equivalent or a substantial proportion of the value of

which he may already have paid in telephone/text charges and/or charges stated to include delivery and insurance.

The Relevant Rules of Law

The Directive

7. 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.”

8. Annex I is headed “Commercial Practices which are in all circumstances considered unfair” and consists of a list of 31 practices deemed to be unfair without the need for a case-by-case assessment against the provisions of Articles 5-9. In other words each specified practice is prohibited without the need to establish that it would materially distort the economic behaviour of the average consumer. 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.”

The UK Regulations

9. Regulation 3 headed “Prohibition of unfair commercial practices” provides, so far as is relevant, as follows:

“(1) Unfair commercial practices are prohibited.

(2) Paragraphs (3) and (4) set out the circumstances when a commercial practice is unfair.

(3) ...

(4) A commercial practice is unfair if –

(a) it is a misleading action under the provisions of regulation 5;

(b) it is a misleading omission under the provisions of regulation 6;

(c) ...

(d) it is listed in Schedule 1.”

10. Schedule 1 reproduces literally the list of practices deemed to be unfair in all circumstances contained in Annex I of the Directive save to the extent that in the latter items 1 to 23 are headed “Misleading Commercial Practices”, whereas items 24 to 31 are headed “Aggressive Commercial Practices”. Those sub-headings are omitted from Schedule 1.

11. Paragraph 31 of Schedule 1 is in identical terms to paragraph 31 of Annex I, cited above.

By virtue of Regulation 13 it is a criminal offence to contravene paragraph 31 punishable on indictment with a maximum sentence of 2 years imprisonment.

The ruling of the High Court (“the Court”)

12. The application was heard by Briggs J over 4.5 days from 13th to 18th January 2011. Judgment was handed down on 2nd February 2011. The Court found that the promotions involved unfair commercial practices, albeit on a more limited basis than had been contended for by the OFT. In relation to the finding that the traders had breached the practice banned by paragraph 31 to Annex I to the Directive, the Judge considered that ‘falsity’ lay at the heart of paragraph 31, such that provided the cost incurred by the consumer in claiming the prize was not so great as to ‘falsify’ the impression that a prize had been won, no breach of paragraph 31 would have taken place. At paragraph 47 of his judgment, he accepted the argument, attributed to counsel for the traders, 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. Notwithstanding this, paragraph 1(a) of the undertakings refers to payment which is a “substantial proportion of the unit cost to the [trader]” of providing the prize.

13. The Judge rejected the submission of the traders 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 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. He concluded at 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.”

14. Pursuant to the Court’s powers under section 217 (1) to (3) of the Act (by which the court may make an enforcement order if satisfied that the target either has engaged or is likely to engage in conduct which constitutes the infringement) and its powers under section 217 (9) to (11) (to accept undertakings in lieu), on 17 March 2011 the Court made an order setting out undertakings from the traders. These undertakings were in the terms required by the Judge following prolonged oral argument.

15. In so far as relevant to the reference, the traders undertook under paragraph 1 of the Order, by themselves, their employees, agents or otherwise, in any future promotions, not to:

“1. Create 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 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
- (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."

16. The Court made clear in his ruling that by 'recommended' he meant "*any action which can be taken to have the recommendation of the Defendant. It plainly does not just mean the cheapest action.*" : Ruling No. 1, 17 March 2011.

The hearing before the referring court

17. The High Court granted permission to appeal to the Court of Appeal on the grounds that the case was "*the first contested hearing under the applicable Regulations [and] raises important questions of interpretation.*" The Court of Appeal heard submissions from the parties on 20-21 June 2011.

Contentions of the traders

18. By notice of appeal filed on 7th April 2011 the traders submitted that that paragraph 1 should be varied to delete sub-paragraph (a) or in the alternative, to replace it with:

"(a) a substantial proportion of the likely cost to the average consumer of acquiring the thing described as a prize or other equivalent benefit; or."

The Promoters contended that

- a. Paragraph 31 (b) does not apply to the cost of submitting a claim per se; alternatively,
- b. That the requirement that taking any action in relation to claiming the prize or equivalent benefit is not subject to the consumer

paying money or incurring a cost in circumstances where the consumer has a choice between using a premium rate service or using a postage stamp.

- c. Briggs J was wrong to hold that the enforcer need only prove that a recommended method of claiming a prize involves a cost or an amount which falsifies the impression that a consumer has won a prize. He should have held that the fact that one of the methods of claiming a prize involved the use of a premium rate service (whether recommended, in the particular sense adopted by Briggs J, or not) did not falsify the impression that a prize had been won.
- d. Briggs J was wrong to hold that if the Promoters made a profit on their promotions by reference to the aggregate cost of all the calls from consumers or on a particular call from a single winning consumer in relation to a prize, that falsified the impression that the consumer had won a prize. He should have held that whether or not the Promoters made a profit in relation to the claim for a prize was not a relevant or decisive factor in determining whether a consumer had won a prize.
- e. Briggs J was wrong to attach all, or nearly all, the weight in his determination of whether a consumer was misled as to whether he had won a prize to the relationship between the cost or possible cost to the consumer of claiming a prize and the cost to the promoter in acquiring the prize as opposed to the likely cost to the average consumer of acquiring the prize from another source. He should have held that the respective calculations afforded little if any assistance to the determination whether a consumer had been misled as to whether he had won a prize the issue not being whether the prize was a valuable prize but whether the consumer had won a prize.

- f. Briggs J was wrong to recharacterise the award and claim of a prize as a transaction of sale and purchase. Briggs J should have held that the transaction remained one of the award of a prize

Opinion of the Court of Appeal on these contentions

19. The Court of Appeal considers that if these were the only issues in the appeals, it would reject the appeal. In its view paragraph 31 is quite specific: it applies to “any action in relation to claiming the prize”, not the “only”, or “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 the promotions infringes the provision. In addition to import the restrictions for which the traders contend would be contrary to one of the clear purposes of the Directive, namely “to establish a high level of consumer protection.”

The Contentions of the OFT

20. On 15th April 2011 the OFT filed a notice cross-appealing in respect of the terms of paragraph 1(a) of the Order. The OFT sought to replace the terms of paragraph 1(a) with the following:

“Create the impression that the consumer has already won, will win or will on doing a particular act win, a prize or 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 alternatively, “[anything other than a *de minimis* cost].”

21. The OFT’s primary submission was that paragraph 31 prohibits traders from involving the consumer in incurring any cost to claim a prize or equivalent benefit. It pointed out that recital 17 indicates that another of the purposes of the Directive is to introduce legal certainty which this ‘bright line’

interpretation would produce. The alternative submission is that *de minimis* costs are permissible.

Opinion of the Court of Appeal on these contentions

22. The Court of Appeal did not feel able to express an opinion as to the correct interpretation in the light of the divergence of national legislation implementing paragraph 31 of Annex I to the Directive.

Reasons for seeking a preliminary ruling from the Court of Justice

On 21 June 2011 the Court of Appeal decided to make a reference. Judgment was given on 29 July 2011. The Court considers a reference necessary in order to ascertain the proper interpretation of paragraph 31 of the Annex to the Directive. In that regard, it notes that in so far as it is aware, there is no judgment of any court of any Member State on its proper interpretation. The Court has considered translations of the various provisions enacted by each Member State to give effect to paragraph 31 of the Directive and notes that these 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, is to harmonise the laws of the Member States these translations indicate that that purpose may require a decision of the Court of Justice.

The questions for the Court of Justice

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?