

THURSDAY 14TH MARCH 2013

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

HC09C04850

BEFORE LORD JUSTICE LAWS
LORD JUSTICE JACKSON
LORD JUSTICE MUNBY

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

B E T W E E N

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/RESPONDENTS

-and -

9. PETER HENRY

RESPONDENT TO CROSS APPEAL ONLY

-and -

THE OFFICE OF FAIR TRADING

RESPONDENT/CROSS-APPELLANT

PENAL NOTICE, ORDER & UNDERTAKINGS

IF YOU, THE WITHIN NAMED APPELLANTS/RESPONDENTS, DO NOT COMPLY WITH THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND IMPRISONED OR FINED.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE APPELLANTS/RESPONDENTS TO BREACH ITS TERMS MAY ALSO BE HELD IN CONTEMPT OF COURT AND IMPRISONED OR FINED.

References to 'Appellants/Respondents' mean all the First to Ninth Appellants and Respondents to the cross appeal.

References to the 'Appellants' mean the First to Eighth Appellants/Respondents to the cross appeal.

References to the 'Respondent/Cross-Appellant', and to the 'Cross-Appellant' mean The Office of Fair Trading.

UPON a claim under section 215 of the Enterprise Act 2002 ('EA') and Regulation 19 of the Consumer Protection from Unfair trading Regulations 2008 ('CPRs') issued on 22nd December 2009.

AND UPON the Court considering the appeal brought by the Appellants and the cross-appeal brought by the Cross-Appellant in relation to the Penal Notice Order and Undertakings given by the Appellants/Respondents to the High Court and contained in an Order dated 10 May 2011 ('the Order').



Her Majesty's
Court of Appeal

19 MAR 2013

ON PAPER
Appeal No.

A3/2011/0939

Amended under the slip
rule, as underlined in red
today 3rd April 2013

AND UPON the court reading the judgement of the Court of Justice of the European Union of 18th October 2012 in Case C-428/11, pursuant to a reference made by this Court under Article 267 of the Treaties of the European Union (TFEU) and finding that the High Court erred in its understanding of Paragraph 31 in Schedule 1 to the Consumer Protection from Unfair Trading Regulations 2008 SI 1277/2008 ('the Ruling') and accordingly ,

IT IS ORDERED THAT:

the Order be set aside and replaced as follows. The Appellants' appeal is accordingly dismissed and the Cross-Appellant's cross appeal be allowed.

THE APPELLANTS/DEFENDANT UNDERTAKE THE FOLLOWING:

1. Each Appellant/Respondent will not (whether by himself, his employees or agents or otherwise) continue or repeat the conduct described in paragraph 4-8 below;
2. Each Appellant/Respondent will not (whether by himself, his employees or agents or otherwise) engage in such conduct in the course of his business or another business.
3. Each Appellant/Respondent will not (whether by himself, his employees or agents or otherwise) consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3) of the EA).

Namely

4. 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 Appellant/Respondent in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring any cost whatsoever. Prohibited costs include costs relating to any of the following relevant benefits: requesting information concerning the nature of that prize or equivalent benefit or how to acquire it, registering an entitlement to the prize or equivalent benefit or taking possession of it whether or not:
 - a. the cost is de minimis compared to the value of the prize or equivalent benefit;
 - b. the cost passes to the Appellant/Respondent or to any other person;
 - c. the Appellant/Respondent also offers the consumer any other route to obtain the relevant benefit which is free.
5. Give, whether by act or omission, a misleading impression as to the value to the consumer of a thing described as a prize or equivalent benefit by:
 - a. a misrepresentation as to its geographical origin;
 - b. a misrepresentation or omission as to the nature of a holiday;
 - c. a misrepresentation or omission as to the likely take up cost of a holiday;
6. where offering a premium rate telephone line is not otherwise prohibited by this Order, omit to identify the minimum costs liable to be incurred by a consumer in responding by premium rate telephone call to a promotion;
7. give consumers the misleading impression that they have been fortunate to have won a most frequent award in a scratch card competition when all or substantially all recipients of the scratch cards are winners of at least such awards;

8. where not otherwise prohibited by this Order, describe a cost that the consumer is invited to incur as relating to a particular product or service, such as delivery or insurance, when in fact that is not the case;
9. And the Appellants/Respondents further undertake:
 - a. to ensure that where an item offered as a prize or equivalent benefit excludes significant benefits typically included in the advertised purchase price of an item similarly described by the majority of established retailers, all such exclusions are clearly defined in order that the scope and substance of the prize or equivalent benefit is made clear to the average consumer;
 - b. from the date of this Order, that all promotions commissioned, whether 'mailing promotions' or 'insert promotions', comply with these Undertakings. 'Mailing promotions' mean promotions sent by the Appellants/Respondents to consumers. 'Insert promotions' mean promotions distributed to consumers by being inserted by distributors and publishers into publications;
 - c. from the date of this Order, in respect of insert promotions that do not comply with these Undertakings to halt production, cancel all deliveries and media bookings and destroy stock;
 - d. from the date of this Order, in respect of mailing promotions that do not comply with these Undertakings to cease production and cancel distribution and to destroy stock produced;
 - e. save in respect of the promotions listed at paragraph 9f below, in respect of mailing and insert promotions which do not comply with the Ruling, to fulfil all claims. All prize claim routes advertised as available will remain available to recipients until the closing date and no later than 31 December 2012, on which date the Appellants/Respondents will switch off all relevant premium rate phone lines and SMS claim routes, and from which date the Appellants/Respondents will fulfil all claims without the consumer incurring any costs;
 - f. in relation to 'the £1 Million Cash Card', Are you holding the £1 Million Scratchcard and 'The Magical £Million' insert promotions where the Appellants/Respondents can prove the insert was distributed prior to 18th October 2012 and where major prize winning cards are randomly seeded into promotional stock and in respect of which the Appellants/Respondents can prove distribution was booked to be completed on or before 31 December 2012, to fulfil all residual claims received. All prize claim routes advertised as available will remain available until their closing dates. The Appellants/Respondents will instruct the responsible parties to switch off all relevant premium rate lines and SMS claim routes on the promotion closing dates and in no circumstances later than 30th April 2013 and in relation to these insert promotions:
 - i. in relation to telephone calls, texts messages, postal requests for claim numbers or postal claims made from 1 January 2013, to refund consumers the full cost shown to be incurred of the telephone call or text message or stamps including stamps to send a claim form and any loose stamps enclosed;
 - ii. to provide those consumers who submit claims having used premium rate services between 1 and 14 January 2013 with notification of their entitlement to claim a refund and the dedicated email address to claim refunds at the same time as being provided with their awards;

- iii. by 15th January 2013, to adjust the wording of the telephone and text information services so that consumers are made aware of their entitlement to claim a refund; the wording in relation to entitlement to refunds will be clear and prominent and in the case of the telephone information services, will appear at the beginning of such calls;
- iv. to provide consumers with the facility to identify themselves by email (in addition to any postal alternative route) such that full refunds can be processed and made;
- v. to include a notice and a dedicated email address for consumers to claim refunds on the contact page of Purely Creative Limited's website so that consumers are made aware of their entitlement to claim a refund.

AND IT IS ORDERED that:

10. this Order bind DM plc and any other interconnected bodies corporate as provided in s.223 of the EA;
11. the Appellants pay the Respondent/Cross-Appellant costs of and incidental to these appeal proceedings to be assessed if not agreed.

By the Court



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-and -

THE OFFICE OF FAIR TRADING

- and -

PETER HENRY

ORDER

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