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Case No: HC09C04850

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 2nd February 2011

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

Before:

MR JUSTICE BRIGGS

Between:

THE OFFICE OF FAIR TRADING

Claimant

- and -

(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
(9) PETER HENRY

Defendants

Ms Jessica Simor (instructed by **The Office of Fair Trading, General Counsel's Office, Litigation Unit, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX**)
for the Claimant
Mr Kevin de Haan QC (instructed by **Messrs Davies and Partners, Rowan House, Barwood, Gloucester GL4 3RT**)
for the Defendants

Hearing dates: 13th – 18th January 2011

Approved Judgment

Mr Justice Briggs

Mr Justice Briggs :

INTRODUCTION

1. This is an application by The Office of Fair Trading ("the OFT") for an order under section 215 of the Enterprise Act 2002 ("the Act") to prevent the defendants from continuing to distribute promotions to consumers which are alleged to involve unfair commercial practices prohibited by Regulation 3 of the Consumer Protection from Unfair Trading Regulations 2008 ("the Regulations").

2. The defendants' promotions about which the OFT has become concerned consist of the sending to consumers, in the form of personalised letters and of inserts in newspapers and magazines, of invitations to claim prizes, awards or rewards which are alleged to be misleading in a number of specified respects, all of which are prohibited by the Regulations. An enforcement order is sought after a lengthy process of consultation and negotiation during which the parties have attempted, but failed, to agree upon satisfactory undertakings. In short, the OFT has concluded that the undertakings offered by the defendants would fail to deal with the conduct complained of, whereas the defendants say that the undertakings sought by the OFT would require them altogether to discontinue their promotions business.

3. For the purpose of seeking an enforcement order, the OFT asserts and seeks to prove that the defendants have committed breaches of the Regulations in the course of five specified promotions carried out in 2008 ("the 2008 promotions"). Those promotions all took place after an earlier process of consultation and negotiation between the OFT and the defendants which, by contrast with the present impasse, did lead to the giving of undertakings in the form of assurances ("the Assurances") by the defendants on 31st October 2007, which were approved by the OFT on 20th November 2007, under the regime for consumer protection which was the immediate statutory predecessor of the Regulations. The OFT's case is that the 2008 promotions revealed that the defendants were complying neither with the letter nor with the spirit of the Assurances. Alternatively, the OFT claims that, even if the Assurances were being strictly complied with by the defendants in 2008, the content of the 2008 promotions has demonstrated that the Assurances were in any event inadequate to secure compliance with the Regulations in the form in force from their commencement, on 26th May 2008.

4. For their part, the defendants deny any breach of the Regulations or of the Assurances, in their letter or spirit, so that their case is that no occasion (or, alternatively, no sufficient occasion) has arisen for the making of an enforcement order. Alternatively they say that the form of order sought by the OFT goes way beyond that required to secure compliance with the Regulations, and is in any event framed in such a generalised form as to make it in practice impossible for the defendants to know with sufficient precision that which they are to be prohibited from doing.

THE ISSUES

5. There are no significant issues of primary fact. Although both sides have adduced evidence in the form of witness statements they agreed that there was no necessity for cross-examination. Pursuant to statutory powers (under section 224 of the Act) the

OFT sought, and the defendants provided, substantial detailed information about their conduct of the 2008 promotions and, partly in response to inquiries from the court, that process of the provision of information continued during the trial. No complaint has been made by the OFT that the information provided by the defendants has either been inadequate or inaccurate, although in relation to certain limited parts of it, Ms Simor for the OFT submitted that the primary facts disclosed did not always substantiate the conclusions which the defendants' evidence asserted flowed from them, after careful review. Nonetheless, it was and remained common ground that the court could identify the relevant primary facts from the documents and the information provided (mainly) by the defendants, and form its own view after hearing argument and as to relevant matters of inference.

6. As will appear, an important issue between the parties is whether aspects of the 2008 promotions would be likely to mislead the "average consumer" (a statutory concept to which I shall shortly return). In accordance with European and English jurisprudence, the parties abstained (wisely in my judgment) from seeking to pursue their cases on that issue by reference either to expert evidence or to statistical surveys. Both in that respect, and by their declining to cross-examine opposing witnesses, the parties are to be commended for having thereby avoided what would have otherwise have been the near certainty of giving rise to a trial of disproportionate length and expense.

7. The OFT's case was presented in the form of a comprehensive and generally precise statement of case, taking the form of an endorsement to its Part 8 Claim. By contrast the defendants' case was presented in witness statements rather than in a statement of case. Further time and expense might usefully have been saved if the defendants had either volunteered or been directed to prepare a statement of case by way of defence, or if, perhaps more conveniently for present purposes, the parties had agreed or been directed to produce a statement of agreed facts and issues. Nonetheless the parties' cases, and the issues, were helpfully set out in counsel's skeleton arguments.

8. The issues may be divided into three groups:

   (1) Did the 2008 promotions involve breach of the Regulations (or of the Assurances)?

   (2) If so, should the court make any enforcement order?

   (3) If so, what precise form should an enforcement order take? Should the court accept an equivalent undertaking in lieu?

9. I suggested at the beginning of the trial that it might be convenient to take issues (1) and (2) first, and leave issue (3) (should it arise) to be dealt with after judgment on the first two. The parties readily agreed to that course and I have therefore adopted it in this judgment.

10. The questions which arise under the first group of issues may be summarised as follows. First, there are issues of construction or interpretation of the relevant Regulations. This is, so far as I or counsel are aware, the first occasion when an application for an enforcement order arising from alleged breach of the Regulations has been pursued to a contested trial. Since the Regulations were made for the purpose of implementing within the United Kingdom a maximum harmonisation directive, namely the Council Directive 2005/29 known as the Unfair Commercial

Practices Directive ("the UCPD"), issues as to the interpretation of the Regulations depend essentially on EU jurisprudence. In fact, the points of interpretation at issue are not addressed directly in any decision of the ECJ, although the recitals to the UCPD provide a clear identification of the purpose of both the detailed provisions of the Directive itself, and the relevant provisions of the Regulations which, for the most part, mirror the language of the Directive almost word for word. I shall address the issues of interpretation after a general description of the relevant parts of the UCPD, the Act and the Regulations.

11. Secondly, there are serious issues about whether, by commission or omission, the content of the 2008 promotions was misleading to their consumer recipients. Thirdly, there are issues as to whether any such misleading content in the 2008 promotions had any relevant causative consequences. As will appear, the issue is whether any such misleading content causes or is likely to cause the average consumer to take a transactional decision he (or she) would not have taken otherwise. Finally, there are issues whether any breaches of the Regulations which are proved were such as to harm the collective interests of consumers.

12. Thus all the issues under the first group, other than the questions of interpretation, may be viewed as issues as to the application of the Regulations to uncontentious primary facts, or issues as to the inferences to be drawn from those uncontentious primary facts.

13. The second group of issues arise from the fact that the court's power to make an enforcement order is discretionary. In summary, the defendants say that, even if some breaches of the Regulations may be proved, if they can show nonetheless that they conducted the 2008 promotions in accordance with the letter and the spirit of the Assurances, or if the breaches are *de minimis* and unlikely to be repeated, then no enforcement order should be made.

14. In addition, the ninth defendant Mr Peter Henry submits that having resigned his directorship of the third defendant company in October 2009, and having had no involvement of any kind since then with the defendants' promotions (or any other similar promotions), it would be inappropriate for any enforcement order to be made against him.

15. The defendants also submit that it is in any event inappropriate for the OFT to take enforcement proceedings against them, on the ground that the primary regulators of their business activities are PhonepayPlus and the Advertising Standards Authority, neither of which has taken any steps against the defendants in relation to the content of the 2008 promotions or otherwise.

THE PARTIES

16. Save that the OFT is identified in section 213(1)(a) of the Act as a general enforcer, and therefore empowered to apply for enforcement orders under section 215, the claimant needs no further introduction.

17. The first to fifth defendants are all associated companies in a group of which the ultimate parent company is DM plc. Each of the first to fourth defendants is a promoter of prize draw competitions to consumers, and the first, third and fourth defendants were each responsible for one or more of the 2008 promotions. The fifth

defendant is the immediate parent company of the fourth defendant and, in addition, controlled the second defendant.

18. The sixth defendant is Adrian Williams, a director of each of the first to fifth defendants. The seventh defendant Wendy Ruck is the company secretary of each of the first to fifth defendants. The eighth defendant Catherine Cummings is a manager and director of the first defendant and was the General Manager of the first defendant in 2008. The ninth defendant Peter Henry was in 2008 a director of the third defendant albeit that, as I have said, he has since severed his connection with that company and with all the other defendants.

THE LAW

Legislation

19. The relevant legislation consists of the Act, the UCPD and the Regulations. It is convenient to describe the relevant provisions of the Act first, since they confer jurisdiction to make enforcement orders upon the High Court.

The Act

20. Section 215(1) and (2) of the Act provide that a general enforcer (which includes the OFT) may make an application for an enforcement order if it thinks that a person has engaged or is engaging in conduct which constitutes a Community infringement, or is likely to do so. By section 215(5) the High Court has jurisdiction to make enforcement orders where the person against whom the order is sought carries on business or has a place of business in England and Wales or Northern Ireland.

21. A Community infringement is defined by section 212(1) as an act or omission which harms the collective interests of consumers and which (*inter alia*) contravenes 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 UCPD is a listed Directive. Effect is given to it by the Regulations: see section 212(3)(a) of the Act and paragraph 3 of, and the Schedule to, the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003.

22. Section 214(1) provides that, subject to an exception in subsection (3) for urgent cases, an enforcer must not make an application for an enforcement order unless (if the OFT) it has engaged in appropriate consultation with the person against whom an enforcement order would be made ("the target").

23. In relation to a Community infringement, section 217(1) to (3) provide that the court may make an enforcement order if satisfied that the target either has or is likely to engage in conduct which constitutes the infringement.

24. Section 219 makes provision for an enforcer to deal with a target by way of undertakings rather than an application for an enforcement order. Section 217(4) provides that:

> "In considering whether to make an enforcement order the court must have regard to whether the person named in the application—

> (a) has given an undertaking under section 219 in respect of conduct such is mentioned in subsection (3) of that section;
>
> (b) has failed to comply with the undertaking."

The conduct mentioned in section 219(3) includes engaging in conduct which constitutes an infringement, or being likely to engage in conduct which constitutes a Community infringement.

25. Although the court's power to make an enforcement order is plainly discretionary (see section 217(3)), the Act gives no further guidance to the court beyond that set out in section 217(4) as to the matters which the court should take into account when deciding whether or not, and if so how, to exercise that discretion.

26. Breach of an enforcement order is itself to be remedied in substantially the same way as an injunction, i.e. by proceedings for contempt of court. By section 217(9) to (11) the court may accept an undertaking in lieu of an enforcement order, with the same consequences in the event of breach.

The UCPD

27. In its preamble, the UCPD is stated as being made having regard in particular to Article 95 of the Treaty (now Article 114 of the current treaty) each of which at paragraph 3 provide that:

> "The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.... Within their respective powers, the European parliament and the Council will also seek to achieve this objective."

That a main purpose of the UCPD is the conferring upon consumers of a high level of protection is emphasised in its recitals (1), (5) and (11). More specifically, recitals (4), (6), (11) and in particular (13) demonstrate that the UCPD is aimed (*inter alia*) at prohibiting unfair and in particular misleading commercial practices which distort consumers' economic behaviour.

28. An additional main purpose of the UCPD was, in contrast to its immediate predecessor, namely Council Directive 84/450, to harmonise the provision of consumer protection against unfair commercial practices across the EU: see in particular recitals (3) to (6), (11) and (12). Recital (4) notes that disparities in national rules under the earlier Directive were perceived to create undesirable barriers to cross-border marketing, advertising campaigns and sales promotions.

29. It is unnecessary to describe those operative provisions of the UCPD which are relied upon by the OFT since they are, as I have said, repeated almost verbatim in the Regulations. It is sufficient to state that the three provisions in the Regulations, namely Regulations 5 and 6, and Paragraph 31 of Schedule 1, substantially replicate the provisions of Articles 6 and 7 of, and Paragraph 31 of Annex 1 to, the UCPD. Similarly, the relevant definitions in the Regulations largely replicate definitions of the same concepts in Article 2 of the UCPD.

30. The only operative provision of the UCPD which it is necessary to describe at this stage is Article 1, headed "Purpose", (which is not replicated in the Regulations):

> "The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests."

The Regulations

31. 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."

32. It is convenient to take Schedule 1 first. The alleged infringements of Schedule 1 lay in the forefront of the OFT's case and were dealt with first in counsel's submissions. Schedule 1, headed "Commercial Practices Which Are In All Circumstances Considered Unfair" consist of a list of 31 prohibited practices. In the list annexed to the UCPD, items 1 to 23 are headed "Misleading Commercial Practices", whereas items 24 to 31 are headed "Aggressive Commercial Practices". Those sub-headings are not replicated in Schedule 1 to the Regulations.

33. Paragraph 31 identifies the final prohibited commercial practice as follows:

> "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—
>
> (a) there is no prize or other equivalent benefit, or
>
> (b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost."

34. Regulation 5, headed "Misleading Actions" provides so far as relevant as follows:

(1) "A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfied the conditions of this paragraph—

a) If it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

b) It causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."

Paragraph (4) of Regulation 5 contains a long list of the matters referred to in paragraph (2)(a), including the following:

"(a) the existence or nature of the product;

(b) the main characteristics of the product (as defined in paragraph 5);

(c) ...

(d) the motives for the commercial practice;

(e) the nature of the sales progress;

(f) ...

(g) the price or the manner in which the price is calculated;

(h) the existence of a specific price advantage;

(i) ...

(j) ...

(k) the consumer's rights or the risks he may face."

35. Paragraph (5) provides a non-exclusive list of the "main characteristics of the product" within the meaning of paragraph (4)(b). They include:

"(a) availability of the product;

(b) benefits of the product;

(c) risks of the product;

...

(i) the method and date of manufacture of the product;

...

(n) quantity of the product;

(o) specification of the product;

(p) geographical or commercial origin of the product;

(q) results to be expected from use of the product."

...

36. Regulation 6 headed "Misleading Omissions" provides as far is relevant as follows:

(1) "A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

(a) the commercial practice omits material information,

(b) the commercial practice hides material information,

(c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

(d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(2) The matters referred to in paragraph (1) are—

(a) all the features and circumstances of the commercial practice;

(b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and

(c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

(3) In paragraph (1) "material information" means—

(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and

(b) ...

(4) Where a commercial practice is an invitation to purchase, the following information will be material if not immediately apparent from the contextin addition to any other information which is material information under paragraph (3) -

(d) either—

(i) the price, including any taxes; or

(ii) where the nature of the product is such that the price cannot be reasonably calculated in advance, the manner in which the price is calculated;

(e) where appropriate, either—

(i) all additional freight, delivery or postal charges; or

(ii) where such charges cannot be reasonably calculated in advance, the fact that such charges may be payable;"

37. Both Regulations 5 and 6 make repeated use of the phrases "average consumer" and "transactional decision". These are both defined terms, and the definitions appear in Regulation 2. Paragraph (1) provides that:

> ""average consumer" shall be construed in accordance with paragraphs (2) to (6)."

Paragraph (2) provides:

> "In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably informed, reasonably observant and circumspect."

Paragraphs (3) to (6) make special provision in relation to particular groups of consumers, but no reliance was placed upon that extended definition in the OFT's pleaded case.

38. the expression "transactional decision" is defined by Regulation 2(1) as meaning:

> "...any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—
>
> (a) whether, how and what terms to purchase, make payment in whole or in part or retain or dispose of a product; or
>
> (b) whether, how and on what terms to exercise a contractual right in relation to a product."

39. The definition of "average consumer" substantially replicates EU jurisprudence. The definition of "transactional decision" substantially replicates a similar definition in Article 2(k) of the UCPD.

INTERPRETATION

40. The application of those provisions of the Regulations to the particular facts of the 2008 promotions has thrown up a number of issues and difficulties of interpretation. There was no dispute between counsel as to the correct approach to interpretation, which I can therefore summarise briefly as follows. Domestic regulations designed to

implement EU directives, and in particular maximum harmonisation directives, must be construed as far as possible so as to implement the purposes and provisions of the directive. The interpretation of words and phrases is neither a matter of grammars nor dictionaries, nor even a matter of the use of those phrases (or of the underlying concepts) in national law. If similar words and phrases are used in the directive itself, then they must be interpreted both in the directive and in the implementing regulations by means of a process of interpretation which is independent of the member state's national law and, for that matter, independent of any other member state's national law. For that purpose the primary recourse of the national court is to the jurisprudence of the ECJ. The national court may also obtain assistance from, but is not bound by, guidance issued by the Commission, and by the decisions of other national courts as to the meaning of the relevant directive.

41. There was one slight issue between counsel, namely as to whether it is legitimate to have recourse to differences in the manner in which a maximum harmonisation directive has been implemented by the national regulations of different member states, as opposed to the decisions of the courts of member states about the meaning of the governing directive. No authority was cited either way upon the point. 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 Ms Simor's attempt to pray in aid the different language of the Irish regulations implementing paragraph 31 of Annex 1 to the UCPD.

42. It is, again, convenient to begin with interpretation of paragraph 31 of Schedule 1 to the Regulations ("Paragraph 31"). For the OFT Ms Simor submitted that Paragraph 31 is infringed if, under sub-paragraph (b), a monetary payment or cost, however small (whether absolutely or in proportion to the value of the prize or equivalent benefit) has to be paid or incurred in connection with claiming the prize or benefit. Thus, regardless of the value or amount of the prize, she submitted that Paragraph 31 would be infringed if the process of claiming it even involved the winner having to post a letter (other than a prepaid letter) or make a minimum charge telephone call, or pay for a short bus journey in order to go and collect it from somewhere too far to reach by walking.

43. For the defendants Mr de Haan QC submitted that an essential element of proof of any breach of Paragraph 31 was that a false impression had been created. Thus he submitted that, regardless of the amount of the cost, if it was fully and fairly disclosed in the document informing the consumer that he had won or would win a prize or other equivalent benefit, there could be no breach. Similarly if, regardless of the adequacy of the disclosure, the cost of claiming the prize or benefit was *de minimis* by comparison with its value, that cost could not falsify the impression that a prize or equivalent benefit had been won. He also submitted that Paragraph 31 was in terms limited to statements using the expressions "win" or "prize", so that statements that a consumer had been "selected" for "an award" or "a reward" could not constitute an infringement of Paragraph 31, regardless of the cost of claiming it.

44. Ms Simor sought to bolster her interpretation by submitting that each of the prohibited practices in Schedule 1 (replicated in the Annex to the UCPD) ought, if they were to be applied uniformly throughout the EU, to be capable of ready application by reference to bright lines, rather than by requiring any careful factual or analytical

appraisal. She submitted that since the question of false impression was likely on the defendants' interpretation to be potentially fact-sensitive and susceptible to detailed analysis, Paragraph 31 should be construed as if the imposition of any cost in relation to claiming a prize was to be deemed to make false any assertion that a prize or equivalent benefit had been won. She contrasted the language of Paragraph 31 with the more guarded language of paragraph 20, which is as follows:

> "Describing a product as 'gratis', 'free', 'without charge', or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item."

If the framers of the UCPD and the Regulations had intended to permit such modest and unavoidable costs to be levied without an infringement of Paragraph 31, then this could, she said, easily have been made express. Finally Ms Simor relied upon the Irish version of the Regulations which omitted any express requirement that the impression created should be "false".

45. I consider that the interpretation of Paragraph 31 propounded by the OFT should be rejected, for the reasons which follow. I acknowledge that there is some support for that interpretation from a purely literalist or grammatical interpretation of the language of Paragraph 31. I also accept that the OFT's interpretation would provide an easy bright line for testing whether the prohibition had been infringed. Apart from that, all the material considerations relevant to the interpretation of Paragraph 31 seem to me to point to a conclusion that the critical requirement in proving any breach of Paragraph 31 is that a false impression has been created.

46. I note in that context that this prohibition is listed in the annex to the UCPD (albeit not in Schedule 1 to the Regulations) under the heading of aggressive rather than misleading commercial practices, and that some of the practices prohibited under that heading do not impose any requirement of falsity, either expressly or by implication. Generally speaking, the UCPD targets as aggressive commercial practices those which significantly impair the consumer's freedom of choice, whether by harassment, coercion, the use of physical force or undue influence, and that "undue influence" is defined in Article 2(j) of the UCPD as meaning exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

47. Nonetheless it seems to me impossible to understand how or why the imposition of some clearly identified minimal cost (such as buying a postage stamp or making an ordinary telephone call) no part of which reaches the trader's pocket, and which is *de minimis* in comparison to the value of the prize won, could possibly constitute either a misleading or aggressive commercial practice. In short, I consider that falsity lies at the heart of the prohibition in Paragraph 31.

48. There is in my view nothing in the comparison between paragraphs 20 and 31 relied upon by Ms Simor. Paragraph 20 does not expressly require that the impression that something is free or without charge be false. It provides a formula which has substantially the same effect by excluding unavoidable costs of responding, collecting or paying for delivery. For its part Paragraph 31 substitutes for that formula an express requirement that the impression created should be false.

49. Nor do I read into the 31 types of prohibited conduct any general requirement, let alone facility, that they can easily be interpreted and applied by reference to clear bright line distinctions. For example, paragraph 19 introduces the concept of a "reasonable equivalent" to a prize. Paragraph 17 requires it to be shown that a claim that a product is able to cure illnesses, dysfunction or malformations is false. Proof of falsity in that context might depend upon hotly contested expert evidence. Paragraph 13 requires proof of deliberate intent to mislead, i.e. fraud. More generally it is in my judgment not a necessary requirement of maximum harmonisation that the whole of the provisions of a directive, or of implementing regulations, be susceptible to bright line distinctions.

50. Above all, it seems to me that the OFT's interpretation lends itself to absurd results which serve no identifiable purpose, whether expressed in terms of avoiding misleading or aggressive commercial practices, or even in terms of providing a high level of consumer protection. I cannot, for example, conceive of any reason why a consumer who has won, say, a new car for free delivery at the consumer's home, requires to be protected from the cost of telephoning or posting a letter to the promoter specifying his address, and a convenient time at which he will be at home in order to receive his prize.

51. Ms Simor tried to meet that objection by submitting that the OFT could be trusted not to pursue infringements of that type as a matter of discretion. I regard that approach as objectionable in principle. A trader is entitled to know what is or is not prohibited conduct, rather than to be in technical breach for activity which plainly does not harm consumers, and then dependant on the discretion of the enforcer not to pursue him. Furthermore that approach would detract from the uniformity of application of the UCPD, since the extent to which traders were in practice constrained would depend to an excessive extent upon the discretionary policies of enforcers in different member states.

52. While I therefore agree with the general thrust of Mr de Haan's submissions on this question, I do not accept two out of the three conclusions which he sought to draw from the requirement to demonstrate that a false impression had been created. First, a sufficiently clear statement of the cost or expense to be occasioned in claiming the prize may nonetheless fail to dispel a false impression that a prize has been won if, for example, the trader says nothing about the value of the prize where, in fact (but unknown to the consumer), it does not substantially exceed the cost of claiming it. Similarly, there may be many ways of conveying a false impression that a consumer has won a prize or equivalent benefit without either using the words "win" or "prize". The question whether any particular communication to the consumer conveys that impression is to be answered by reference to the whole of the communication including not only the words used, but its layout and get-up.

53. Similarly, the question whether an impression that a prize or equivalent benefit has been won will be falsified by a requirement that the consumer makes some payment or incurs some cost in claiming it will depend upon the particular facts, both about the prize or benefit, and about the cost of claiming. Thus, a cost which is *de minimis* in proportion to the value of the prize will not usually falsify the impression. By contrast, a requirement for payment, all or part of which is received by the trader and used to defray the trader's cost of both the acquisition and delivery of the prize may falsify the impression that a prize has been won, even if its value to the consumer

substantially exceeds the cost of claiming it. This may be because the trader's use of the consumer's payment to finance the transaction means that in truth the consumer has bought rather than won something.

54. A further issue of interpretation of paragraph 31(b) arises from the fact that in all but one of the 2008 promotions, the defendants offered consumers two or more methods of communicating their initial response. One method consisted of posting a letter with one or more stamped self-addressed envelopes to enable the relevant defendant to respond by providing a claim number. The other or others required the consumer to initiate a much more costly electronic form of communication, either by premium rate telephone call or reverse charge multiple text message. In each of those more expensive cases, the lion's share of the consumer's payment was paid by the relevant communications entity to the defendant trader, and constituted the main income stream derived by the defendant from the promotion, and therefore its source for both the acquisition and delivery of the prizes, and of its net profit. By various different means, each of those promotions encouraged the consumer to adopt one or other of the more expensive means of response.

55. The interpretation issue arises from the parts of paragraph 31(b) which I have underlined below:

> "Taking <u>any</u> action in relation to claiming the prize or other equivalent benefit <u>is subject to</u> the consumer paying money or incurring a cost."

The question of interpretation is whether that phraseology requires the enforcer to show that the cheapest method of claiming the prize involves incurring a cost sufficient to falsify the statement that the consumer has won a prize, or merely that any one of the specified methods of response does so. The OFT initially conceded, as part of the interpretation which I have already rejected, that if any claim route was entirely free, then Paragraph 31 would not be infringed merely because there existed an alternative which involved a cost to the consumer. No similar concession was made if the cheapest route involved some cost, however small. Apart from that, the parties took no entrenched positions in relation to this question, and counsel largely left it to the court to decide.

56. The analogy with paragraph 20, which employs the concept of the "unavoidable cost of responding to the commercial practice" may suggest that the first of those alternatives is to be preferred. Why, after all, does the consumer need to be protected against an expensive method of response (always assuming that the expense is sufficiently explained) if a free, *de minimis* or much cheaper alternative is made available? I was initially inclined to that conclusion.

57. On further consideration I have concluded that the enforcer need only prove that a recommended method of claiming involves a cost of an amount which falsifies the impression that the consumer has won a prize. By "recommended" I mean a method of response specifically identified and recommended in the relevant communication rather than, for example, an eccentric choice by the winner of a scratch card lottery prize to hire a Rolls Royce in order to travel to the local post office to collect it. Put another way, Paragraph 31(b) directs attention to the cost to the consumer of taking any action in relation to claiming the prize which has been recommended for that purpose by the trader.

58. This interpretation must be *a fortiori* applicable to a method of claiming the prize which the trader has not merely recommended, but which forms the very basis of the trader's calculation that the promotion will be profitable. In all but one of the 2008 promotions, the defendants' prospects of making a profit depended critically upon a choice by the bulk of those consumers who responded to adopt one or the other of the expensive methods of response, rather than posting a letter containing one or more stamped self-addressed envelopes.

59. In my judgment a purposive interpretation of Paragraph 31 clearly leads to that conclusion. 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.

60. By way of postscript to the interpretation of Paragraph 31, I should note that Ms Simor for the OFT urged me, if not persuaded by the OFT's interpretation of it, to decide as little as possible about its meaning, because of the risk of unintended consequences in relation for example to cross-border promotions, where the cost of claiming the prize might differ radically as between consumers in different and far-flung parts of the EU.

61. I have not been persuaded by that submission. While, as will become apparent, I have been able to conclude that the defendants have committed breaches of Paragraph 31 on either of the competing interpretations of it, the framing of an appropriate enforcement order necessarily requires an informed understanding of that which is prohibited by Paragraph 31. I consider that the possibly difficult issues that may arise from cross-border promotions to consumers all over the EU can best be resolved on their particular facts, if and when the occasion should arise.

62. Regulations 5 and 6 did not give rise to issues of interpretation which the parties raised in their cases or submissions. Nonetheless they do raise difficulties of interpretation and application in an English law context with which it is convenient to deal at this stage. Both these two regulations and their corresponding Articles in the UCPD rely heavily upon the concept of the average consumer. I have already referred to the relevant part of the definition of that phrase in Regulation 2. The requirement to assume that the consumer is reasonably well informed, observant and circumspect reflects the commonsense proposition that the UCPD exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer.

63. Recital 18 to the UCPD explains that:

> "It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality and to permit the effective application of the protections contained in it, this Directive takes as a benchmark

> the average consumer.... The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case."

64. It was common ground that, generally speaking, the EU jurisprudence encourages the court to conduct that exercise so far as possible without recourse to statistical or other expert evidence about typical consumer behaviour, or even the evidence of particular consumers. As Etherton J put it in OFT v. Officers Club [2005] EWHC 1080 at paragraph 146:

> "If the evidence is given by too few of them, their views will not be sufficiently representative of the entire range of such consumers; if a large number, intended to cover the full range, gives evidence, the adverse effect on the cost and duration of the trial may be disproportionate to the value of their evidence."

65. In the present case neither of the parties has sought to adduce statistical or expert evidence, or the evidence of particular consumers, although some reference has been made to the presence or absence of consumer complaints about the 2008 promotions. Although they reminded me of the court's power to require such evidence to be made available, I have not considered it necessary to do so. The complaints were of such a varied nature that no reliable conclusions can be based on them.

66. Mr de Haan submitted, in reliance upon Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Adolf Darbo AG Case C-465/98, that the requirement that the average consumer be assumed to be reasonably observant and circumspect means that I should assume that the average consumer would read the whole of the text of any relevant promotion. I disagree. The Darbo case was about the question whether the description of a jar of jam as "naturally pure" was misleading because of the inclusion of a pectin gelling agent, even though it appeared in the list of ingredients on the label. Basing himself on the decision of the ECJ in Case C51/94 Commission v. Germany, Advocate General Léger advised at paragraph 39 of his opinion that a consumer whose purchasing decisions are based upon the composition of the products in question will first read the list of ingredients, and thereby ascertain that pectin was included, so as to be able to form his own view about the exact scope of the description "naturally pure".

67. In my judgment the Darbo case is no more than an example of the application of the average consumer test to particular facts, and was influenced by the fact that another directive (79/112) specifically required the contents of foodstuffs of that type to be identified on the label. I consider that the question whether the average consumer would read the entirety of the (frequently very small) print of a particular promotion raises fact-intensive issues as to the application of Regulations 5 and 6, rather than being capable of resolution by an invariable and irrebuttable presumption of the type contended for by the defendants.

68. Both Regulations 5 and 6 require it to be shown that the misleading act or omission:

> "causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."

I have already briefly identified the broad meaning of "transactional decision", by reference to the definition of that phrase in Regulation 2(1). Although it may be debatable whether the Commission's guidance that this includes a decision to step into a shop after viewing an advertisement in the window goes too far, it was common ground that any decision with an economic consequence was a transactional decision, even if it was only a decision between doing nothing or responding to a promotion by posting a letter, making a premium rate telephone call or sending a text message.

69. More difficult, in particular to an English lawyer, is the question how high is the hurdle constituted by the causation requirement in each of Regulations 5 and 6. In English law the requirement that a misrepresentation is actionable only if it constitutes an inducement erects a relatively low hurdle, namely that the subsequent decision of the claimant was significantly influenced by the misrepresentation, rather than that the misrepresentation was the sole or even predominant cause. The requirement for an independent interpretation in the present context means that these deep-rooted conceptions must be put on one side.

70. Counsel could offer no guidance from European jurisprudence on the nature of the causation test imposed by Regulations 5 and 6 (based on substantially equivalent language in Articles 6 and 7 of the UCPD). Again, they left it to the court to identify the height of the hurdle. There is therefore little more than the language of the Directive, reflected in Regulations 5 and 6, upon which to form a view. Although it may be said that the general requirement to provide a "high" level of consumer protection may properly incline the court towards a lower rather than higher hurdle in the causation test, it needs to be borne in mind that consumer protection is not to become so paternalistic in its extent as to constitute a barrier to the free movement of goods: see Commission v. Republic of Austria Case-221/00 per Advocate General Geelhoed at paragraph 82 of his opinion.

71. It was common ground that the phrase "causes or is likely to cause" is equivalent to the English standard of the balance of probabilities. The phrase "to take a transactional decision he would not have taken otherwise" suggests a *sine qua non* test, namely, whether but for the relevant misleading action or omission of the trader, the average consumer would have made a different transactional decision from that which he did make. This may not mean that the misleading act or omission was the sole cause of the average consumer's decision, but it appears to mean that those Regulations will not have been infringed if the court concludes that, but for the misleading act or omission, the average consumer would nonetheless have decided as he did.

72. At first sight it might appear from the structure of Regulations 5 and 6 that, for the purposes of applying the causation test, misleading acts require to be assessed separately from misleading omissions. In my judgment that structure did not intentionally impose such an impracticable barrier, in particular because the causation test is the same under each regulation. I consider that the combined effect of all relevant misleading acts and omissions must first be ascertained, and then subjected to the test whether, taken in the aggregate, it would probably cause the average consumer to take a transactional decision which he would not otherwise have taken. Otherwise a communication which contained misleading acts and omissions, none of

which would separately satisfy the causation test, may escape from classification as an infringement, even though (as may have been intended by the trader) their combined effect would satisfy the causation test.

73. The final question of interpretation, which arises only in relation to Regulation 6, relates to the provision in paragraph (3)(a) that "material information" means *inter alia*:

> "The information that the average consumer needs, according to the context, to take an informed transactional decision;"

The starting point under English common law in relation to pre-contractual negotiations is *caveat emptor*. That may be qualified both by statute and even by the common law in relation to particular types of transaction, such as the obligation to disclose latent defects when negotiating a sale of land, and the obligation of utmost good faith on an applicant for insurance. Again, these English law concepts must be put on one side, not least because in systems of civil law widely used in Europe there exist general obligations of good faith in contractual relationships which have no parallel in the common law.

74. A literal reading of Regulation 6(3)(a) and its equivalent in Article 7.1 of the UCPD might suggest that something approaching an utmost good faith obligation is imposed in relation not merely to the consumer's decision whether to contract, but also to every transactional decision, such as, in the present case, a decision whether to respond to a promotion by post, text message or premium rate telephone call. Although qualified by the causation requirement to which I have referred, I regard that analysis as imposing an excessively high hurdle, and counsel did not suggest otherwise. It cannot have been the intention of the framers of the UCPD to require that level of disclosure, and to do so would indeed cause barriers to the free movement of goods and services beyond that necessary to achieve a high degree of consumer protection. In my judgment the key to understanding this paragraph is the concept of "need". The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision.

THE ASSURANCES

75. The 2008 promotions occurred almost immediately after the giving by the first to eighth defendants and one other individual of written assurances to the OFT which had been negotiated over a substantial period against the backdrop of the predecessor to the Regulations. In what was described as "an additional document" which accompanied the Assurances, it was agreed between those parties that the Assurances should be treated as if they were undertakings within the meaning of section 219 of the Act. By the final paragraph of the additional document those defendants (described as "the Assurers") agreed to comply with the spirit of the Assurances and acknowledged that they had been warned by the OFT that, even if they were technically complied with, this would not rule out an application to the court by the OFT if the publication of any advertisements by the defendants thereafter appeared in the OFT's reasonable opinion to mislead consumers.

76. The Assurances themselves consisted of nine paragraphs dealing with a range of matters including a prohibition on congratulatory wording in relation to most

numerous awards, the use of representative quantities, holiday awards for single individuals, delivery costs, emphasis to be given to significant terms and conditions, awards based on participation in previous promotions, the use of phrases implying monetary value, and statements of the relative value of the most numerous awards.

77. It is unnecessary to describe the Assurances in detail, save in relation to paragraphs 4, 5 and 7, in respect of which the OFT alleges that breaches were committed in connection with the 2008 promotions. I shall state the effect of those paragraphs later in this judgment.

THE 2008 PROMOTIONS

78. There is no issue of primary fact about the 2008 promotions, either in relation to the terms of the communications by the defendants to consumers, or as to the underlying statistics as to the number of consumers targeted, the numbers responding, the numbers winning particular types of prize or award, or even as to the economic analysis of the promotions in terms of cost to consumers, and the income, expenditure and profit margins of the defendant promoters. There was, from time to time, rather ineffectual debate about the value of particular prizes or awards to the average consumer, usually by reference to incomplete information about available (but not always contemporaneous) retail prices for equivalent products. I have not found it necessary to resolve valuation issues of that type.

79. The parties' approach to analysis of the 2008 promotions was mainly based upon a detailed identification of the types of alleged misleading acts or omissions, and then a relatively cursory grouping of the allegedly offending promotions under each type. Bearing in mind the requirement to have regard to the overall effect of each promotion upon the average consumer, I have found it more convenient for the purposes of giving intelligible reasons for my conclusions to look at each promotion separately, first in detail, and then in the round.

80. The parties' presentation of their cases also involved a reference to four earlier promotions, albeit only by way of background, to which I have found it unnecessary to make any reference in this judgment. It follows that the 2008 promotions were in the case materials numbered 5 to 9, rather than 1 to 5. To avoid confusion I shall continue to adopt that numbering in my analysis of them.

PROMOTION 5

81. The communication of this promotion to consumers took the form of a standard form single page letter from the fourth defendant, individually addressed to each recipient by name, and giving the appearance of having been manually signed by the Prizes & Awards Controller of the promoter under a letterhead consisting of a logo proclaiming the acronym "UPR", with "unclaimed prize register" in small letters underneath, followed by a PO box address. Under a salutation identifying each consumer individually, and dated 12th June 2008, the text of the letter is as follows:

> "Before we notify your local newspapers, if you are the recipient of the £25,000 top prize, we need your permission. If you prefer to remain anonymous, we will respect your privacy. Simply let us know by ticking the relevant box overleaf on your claim form.

> We are in receipt of your entry into our previous prize promotion. I can confirm that it has been filled in correctly and is fully valid. As a result of this entry, you have been selected to receive a prize or award. One of the following prizes or awards is ready for despatch to you right now: £25,000 Cash, a New Car (or £10,000 Cash), a 42" HD Ready LCD TV†, a Zurich Watch†, £750 of Premium Bonds or £250 Argos Vouchers.
>
> On 9th June you were allocated a personel [*sic*] allocation code, which is 193582, so we can track your prize or award despatch.
>
> To receive your prize or award you need to either telephone 09061 572984* and listen for your claim number or write to the postal address below. The telephone information line will also tell you which award you have been allocated or which prize you have won.
>
> When you have done this, please fill in the claim form overleaf and return it to us. We will then despatch your prize or award to you, which we would like to do by 4th July so please either call or write to us as soon as possible.
>
> Yours sincerely,
>
> [signed]
>
> Jean Francis
>
> Prizes & Awards Controller.
>
> P.S. If you fail to return your claim for, the £25,000 Top Prize will definitely go to someone else."

At the foot of the page, in much smaller but legible print there is the following additional text:

> "*Calls cost £1.50 per minute from a BT landline. Max time 6 minutes. Calls from other networks may vary. If you wish to receive a Claim Number by post, please write with your allocation code to Dept VC, Unclaimed Prize Register, PO Box 29, Ross-on-Wye, HR9 9WZ. All code requests must include a stamped self-addressed envelope and allow 28 days for delivery. New car of your choice up to £10,000 all inclusive.† All electrical items require a payment of £8.50 which includes insurance and delivery."

82. On the back page, there is a cut-out claim form requiring the consumer to provide name, date of birth, address and telephone number and then, in addition, the allocation code (identified on the front page), the claim number, the prize or award and a tick box to indicate whether, if the recipient of £25,000, he did or did not wish to remain anonymous. There followed a verification procedure in the following terms:

"VERIFICATION PROCEDURE

Please read carefully and follow the instructions precisely

① Just call our Claims Hotline now (or by post see overleaf for details) and listen for your **Allocation Code 193582**. Our operator will tell you what you have been allocated. They will also give you your Claim Number, which you need to write down (so please have paper and a pen handy) and confirm which one of these prizes or awards you are entitled to:

- £25,000 Cash x1
- A New Car (or £10,000 Cash) x4
- Argos Vouchers x1000
- A 42" HD Ready LCD TV† x20
- A Zurich Watch† x10,000+
- £750 of Premium Bonds x100

② Now complete the Claim Form above, recording your Claim Number and then return it with a stamped, self-addressed envelope to the address below.

Post this to: Unclaimed Prize register, PO Box 63, Ross-on-Wye, HR9 9WX and enclose a stamped self-addressed envelope"

83. At the foot of the page there appeared a further six lines of small print which included the following relevant matters:

> "... † All electrical items require a payment of £8.50 which includes insurance and delivery. Closing date 31st December 2008.... Prizes/Awards despatched in 28 days.... No purchase necessary. This promotion and the prizes/awards indicated are shared between several different themed mailings...."

84. Letters of this kind were sent to some 1,498,814 consumers, whose names and addresses were obtained by the fourth defendant from a database which recorded consumers who had responded to one or more earlier promotions. It was not targeted at any particular social or economic class.

85. On every letter the allocation code (193582 in the example quoted above) was in fact sufficient to identify the prize or award which the named consumer had been selected to receive. The allocation codes on 1,497,689 of the letters identified the prize as the Zurich watch, and the allocation code on four letters identified the LCD TV. As a result, no less than 99.92% of the targeted consumers were allocated electrical goods, which could only be claimed by tendering payment of £8.50, a requirement identified only in the small print and stated to include insurance and delivery.

86. The low cost postal response alternative referred to under the rubric "or write to the postal address below" in the penultimate paragraph, as amplified in the small print below the letter, required the consumer to incur cost of two stamps, one on the letter itself and the other on the self-addressed envelope which had to be enclosed. As for the more expensive method of response by telephone, correctly priced at £1.50 per minute in the small print, the consumer would upon telephoning be treated to a pre-

recorded response which would, eventually, identify his prize or award by reference to the allocation code on the letter. The evidence showed that the pre-recorded response was structured so as to ensure that a consumer who had been selected to receive the Zurich watch would need to remain on the line for 5 minutes and 58 seconds before receiving notification the claim number necessary in order for him to complete the claim form. If allocated the Zurich watch, he would then have to send a further letter to the fourth defendant, enclosing another stamped self-addressed envelope, together with the £8.50 described as including insurance and delivery.

87. The defendants' evidence was that the overwhelming majority of consumers who responded did so by telephone rather than by post. Those consumers who did so would therefore incur a minimum telephone charge of £8.95, an insurance and delivery charge of £8.50, and the cost of two envelopes and stamps, i.e. some £18.00. Those who chose the postal response alternative and were allocated a Zurich watch would incur £8.50 plus the cost of four stamps and four envelopes, i.e. about £9.50. The defendants received £1.21 of every £1.50 spent by a consumer on responding by telephone. Thus from a consumer who telephoned for long enough to discover that he had been allocated the Zurich watch, and who then claimed it, the fourth defendant would receive income of £7.21 plus £8.50, i.e. £15.71.

88. The 99% odd of consumers who responded and were awarded a Zurich watch would receive a quarter page descriptive voucher, including a slightly larger than life-size picture of it showing a watch face with "Zurich" embossed above a small shield-shaped representation of the Swiss flag, with 'QUARTZ' embossed below the centre and, in barely distinguishable small print, "JAPAN MOVT" on the lower rim of the face. Under a large heading "A GENUINE ZURICH WRIST WATCH" the document continued "This voucher entitles you to claim this genuine Zurich Wrist Watch (£8.50 P & P and delivery insurance applies). The middle of the page contains puffery describing the watch as "a fabulous gift" and "classically elegant". At the bottom right hand corner is a much larger version of the Swiss shield above the word Zurich. On the reverse of the voucher there is a claim form which repeats the description of the watch as a "Genuine Zurich Wrist Watch" and describes the required £8.50 as "to cover P & P and delivery insurance". It includes a guarantee of a refund "of P & P/delivery costs" if the watch is returned by a dissatisfied consumer within 90 days. The Swiss shield and the word Zurich is repeated at the bottom right hand corner of the reverse.

89. It will be noted that in paragraph 1 of the verification procedure on the back page of the promotional letter, the description of each of the six types of prize is followed in slightly smaller print by a multiplication sign followed by a number. These are the "representative quantities" which the defendants used on each of the 2008 promotions pursuant to their undertaking to do so in paragraph 2 of the Assurances. They are designed to be based upon the number of "most numerous awards" likely to be claimed. In the case of the Zurich watch the representative quantity is 10,000+. The OFT does not suggest that the attribution of this representative quantity to the Zurich watch was not strictly in compliance with the requirements of the Assurances, from which I infer that the largest accurate number of Zurich watches which, based on previous average claims for promotions of a similar size, the fourth defendant considered likely to be claimed under promotion 5, was somewhere between 10,000 and 49,999. This is because the next highest representative quantity for a "most

numerous award" specified in the definition of that phrase in the Assurances is 50,000+.

90. A useful (and uncontentious) summary of the evidence as to the unit cost to the fourth defendant of providing a Zurich watch to a consumer claiming under promotion 5 is that it amounted to £9.36 in total, being made up as to £3.50 plus £0.61 VAT for acquisition, £1.94 for postage, £1.31 for packaging, £1.50 for handling and £0.50 for storage. The fourth defendant did not in fact insure the delivery of the watch. The evidence described that delivery as having been "self-insured", meaning that (as was the case) wherever a watch was mislaid during delivery, the consumer would be sent another one free of charge. The evidence did not enable me to form any reliable view about the price which a consumer might have to pay in the retail market for the same watch.

Promotion 5 – Infringement

Paragraph 31

91. The first question is whether promotion 5 conveyed to a consumer who was allocated a Zurich watch (over 99% of the recipients of the promotional letter) a false impression that he had won a prize or other equivalent benefit contrary to Paragraph 31. In my judgment it clearly did, essentially because, when the underlying facts are analysed, the substance of the transaction was one of purchase. The consumer who claimed a watch had in reality bought rather than won it. My reasons follow.

92. The gist of the promotional letter is that, because the named consumer had made a valid entry into a previous prize promotion he had, as a result, "been selected to receive a prize or award". It is by no means suggested that, for example, only the £25,000 cash should be regarded as a prize, or that, therefore, the Zurich watch was an award and not a prize. The words prize and award are used as if they were interchangeable. For all the consumer would know, the promoter regarded a chattel (such as the car, the TV and the watch) as a prize and the cash or cash equivalents as awards. In any case, I consider that the word 'award' in its context connoted a benefit equivalent to a prize. I therefore consider that promotion 5 clearly conveyed the impression that a consumer to whom a watch had been allocated had won a prize or other equivalent benefit.

93. Promotion 5 plainly recommended and encouraged the consumer to respond to the promotional letter by telephone rather than by post. For example, the fourth paragraph suggested that although telephoning or posting were alternative methods of obtaining a claim number, the telephone line had the added benefit of informing the consumer which prize or award he had won or been allocated. Furthermore, the claim form not only required the consumer to identify his claim number, but also to identify his prize or award.

94. The cost of a response to the promotion by telephone was by no means fully explained. In the small print at the foot of the front page to which the consumer was directed by use of the asterisk opposite the telephone number in the fourth paragraph, it explained the cost per minute and identified a maximum time of 6 minutes. Conspicuously absent was the information that nothing less than 5 minutes and 58 seconds would be sufficient to obtain the claim number of the Zurich watch, at a BT landline minimum cost of £8.95.

95. Paragraph 1 of the Verification Procedure again prioritised the telephone response route, leaving the postal route in brackets. There can be no doubt that, objectively, it was the fourth defendant's purpose to encourage consumers to use the telephone route, because that route provided its principal source of revenue and therefore profit from the promotion. Although the revenue from the P&P charge slightly exceeded that from the phone call, the defendants received telephone revenue from every consumer who responded by telephone, whereas the P&P income was received only from those who decided thereafter to pursue their claim. It was common ground that the large majority of consumers who responded did so by telephone rather than by post, although the precise or even approximate percentage is impossible to calculate from the evidence, or from the defendants' records, save for a general conclusion that at least 80% responded by telephone.

96. I consider that the fourth defendant went out of its way in promotion 5 to conceal the fact that, far from being a payment for insurance and delivery of the watch, the £8.50 P&P charge payable by the consumer was on a unit basis sufficient to fund slightly over 90% of the fourth defendant's total cost of acquiring, storing, handling, packing and delivering the watch to the consumer. This deception was achieved in two ways. The first was by attributing the £8.50 to delivery and insurance. Although in the small print below the letter this was described as a payment "which includes insurance and delivery", the watch voucher described the payment as "a cheque or postal order for £8.50 to cover P & P and delivery insurance". In fact, the fourth defendant did not insure and, on its own evidence, delivery cost was only £3.25 (post and packaging).

97. Secondly, the fourth defendant misrepresented the geographical origin or place of manufacture of the watch, or at least of its assembly. The defendants were constrained to admit that the use of the Swiss shield emblem alongside the word Zurich created a misleading impression that the watch had been made or assembled in Switzerland, or at least by a Swiss firm. In my judgment the reference to 'QUARTZ' on the watch face sufficiently disclosed to the average consumer with any interest in watches that it had an electrical movement rather than a (necessarily more expensive) mechanical movement. I regard the small wording "JAPAN MOVT" at the foot of the face as insufficiently distinct. More seriously, the watch was described twice, and conspicuously, in the voucher as a "genuine Zurich" wrist watch. Mr de Haan was constrained to accept that this misleadingly suggested that at least some part of the manufacture or assembly of the watch took place in Switzerland, or under the supervision of a Swiss firm. Although the average consumer test is not expressly incorporated into Paragraph 31, I consider it fair to assume that the average or typical consumer would attribute a higher value to a watch made, assembled or in some way supervised from within Switzerland, than elsewhere. It was not suggested that, in fact, the Zurich watch had anything to do with Switzerland. By contrast, I accept that the description of the watch as a "fabulous gift" or as "classically elegant" was mere puffery.

98. I have already described the minimum payments which would have to be made by a consumer claiming the Zurich watch. In my judgment it is obvious that a consumer responding by telephone and then paying a further £8.50 when returning the voucher was in substance buying rather than winning the watch. I consider also that a consumer using the postal route was buying rather than winning. Accordingly the impression that the consumer is a winner is in my judgment falsified by the cost of

claiming the watch, whether by the expensive telephone route or the cheaper postal alternative. The result is that over 99% of consumers to whom promotion 5 was directed were given that false impression.

Regulations 5 and 6

99. The OFT also alleges numerous breaches of Regulations 5 and 6 in relation to promotion 5, by a series of misleading acts and omissions which, collectively or individually, satisfy the causation test. I shall take each of the alleged misleading acts and omissions in turn, and thereafter label them consistently with the OFT's Statement of Case, because they are repeated in relation to most of the other promotions.

Regulation 5 – misleading acts

(a) Giving the misleading impression that the consumer had been "particularly fortunate" to have been selected or to have won a prize and/or that they were likely to have won a high value prize

100. This allegedly misleading act falls into two parts, namely (i) the "particularly fortunate" impression and (ii) a deception as to the likelihood of winning a high value prize. I do not consider that the "particularly fortunate" part of this allegation is made out in relation to promotion 5. The promotional letter states that the consumer has been selected as the result of having made a valid entry in a previous promotion. It is not suggested that this was itself untrue, and the fact (which is admitted) that just under 1.5 million consumers received the same mailing does not seem to me to render anything in the specifics or even the overall get-up of the promotional letter misleading.

101. Nor do I consider that promotion 5 gives a misleading impression as to the average consumer's chance of having won a high value prize. This allegation is based upon the disparity between the admitted fact that 99.92% of the consumers targeted by promotion 5 were allocated the Zurich watch, whereas the distribution ratio (or chance of winning) as between the more valuable prizes (taken together) and the watch are, according to the representative quantities, slightly better than ten to one.

102. There is a substantial irony in the OFT's reliance upon the representative quantities as giving a misleading impression as to the consumer's chance of winning a prize better than the most numerous award, since in all the 2008 promotions the defendants were doing no more and no less than that required by the Assurances previously negotiated in great detail with the OFT. The purpose of the inclusion of representative quantities was not to transmit an indication of the consumer's chances of winning, but to avoid any misrepresentation as to which of a series of prizes/awards was the most numerous award. Further, the most numerous award in each of the 2008 promotions was identified, in accordance with the Assurances, not merely by a figure, but by a figure accompanied by a plus sign. Ms Simor submitted that the average consumer would ignore the plus sign and make a calculation of his chances based simply on the numbers supplied.

103. I disagree. The starting point is that the average consumer is entirely unaware of the purpose for the insertion of the representative quantities, or even of the statistical basis upon which, pursuant to the Assurances, they were inserted. Doing the best I

can, I consider that the average consumer would think that the representative quantities were a statement of the number of each type of prize available to be "won", and I can see no good reason why the average consumer should fail to appreciate from the inclusion of the plus sign after the most numerous award that a potentially unlimited number of what were therefore the lowest value items were available to be "won", depending on the take-up of the promotion by consumers. I do not therefore accept that the average consumer would think, from reading the representative quantities, that he had a one in ten chance of obtaining something better than the Swiss watch under promotion 5.

(b) - Consumers are likely to have been deceived into believing that they had "won" a prize and not that they were being required to purchase a product.

104. For the reasons given in relation to Paragraph 31, I consider that promotion 5 clearly created this misleading impression. This allegation under Regulation 5 adds nothing to the same allegation under Paragraph 31. Rather, it imposes on the OFT the additional burden of proving causation, either separately or in conjunction with other misleading acts or omissions.

(c) Deceiving consumers into believing that they had been selected as the result of prior entry into a competition and/or to receive an 'unclaimed prize', and/or that they had been allocated a unique personal prize number, and/or that they were required to respond quickly to the promotion.

105. Again, I consider that nothing in this multiple rolled-up allegation is made good in relation to promotion 5. The promotional letter certainly informed consumers that they had been selected as a result of an entry into a prior promotion, but it is not suggested that this was untrue. It is just about arguable that the name "unclaimed prize register" which form part of the trading logo of the fourth defendant at the top of the promotional letter might suggest to some consumers that the listed prizes were all unclaimed. I do not consider that it would do so to the average consumer. The personal allocation code referred to in the third paragraph of the promotional letter is not described as unique. There is nothing in promotion 5 to suggest that consumers are required to respond quickly. Paragraph 5 of the letter indicates a desire by the promoter to despatch prizes by 4th July (less than a month after the date of the letter) but the closing date of the promotion is identified in the small print on the second page as 31st December 2008. In my judgment the consumer is encouraged rather than required to respond quickly, and thereby given no misleading impression.

(d)Consumers are likely to be deceived as to the value, specification and geographical origin of the product

106. For reasons given in relation to Paragraph 31, I consider that promotion 5 was likely to deceive the average consumer as to the geographical origin of the Zurich watch, but I consider that its specification (i.e. as an electronic rather than mechanical watch) was sufficiently apparent from its being described as "QUARTZ" in the image of the watch on the voucher, and by the cross-reference to it being an electrical item conveyed by the sword mark on both pages of the promotional letter, and the corresponding provision in the small print. Nonetheless the geographical deception plainly went indirectly to value, as the promoter no doubt intended.

Regulation 6 – misleading omissions

(i) Omission of chances of winning and representative quantities

107. This overlaps with part of category (a) under Regulation 5 with which I have already dealt.

108. Provided that (whether by representative quantities or otherwise) the consumer has fairly presented to him the identity of the most numerous award, I do not consider that any more sophisticated statement of his chances of 'winning' is necessary to enable him to make an informed decision about whether and if so how he should respond, at the stage when he is still ignorant as to which of the identified prizes or awards he has been allocated. Under promotion 5, the transactional decision which the consumer is required to make before learning which item he has been allocated is whether to respond at all, and if so, whether by telephone or by post. It is a transactional decision which in economic terms leads to him incurring either no cost, the cost of two stamped envelopes, or the cost of a premium rate telephone call. The representative quantities sufficiently explained to an average consumer that the Zurich watch was the most numerous award and I do not consider that the average consumer needed to know more than that about the awards for the purposes of making his first transactional decision in relation to the promotion. The average consumer would know that by responding he was most likely to receive the watch and I would not expect his decision whether, and if so how, to respond to be based upon a fine calculation of his chances of doing better. In short, the provision of a more sophisticated estimate of his chance of success than is implicit in the ratio between 10,000 + and just over 1,000 might be useful to the average consumer, but not necessary at that stage.

109. I was initially concerned that promotion 5 gave the average consumer a misleading impression that, by responding, he had some chance of obtaining the £25,000 Top Prize: see in particular the first paragraph and the PS on the first page of the promotional letter. In truth of course, every one of the 99.9% of the consumers who received a promotion 5 letter with the allocation code 193582 had no chance at all of receiving the Top Prize, which would have been reflected in a different allocation code on a single letter. On that promotion, in the not very unlikely event that the recipient of that letter (in ignorance of the fact that he had been allocated the jackpot) put it in his dustbin, no-one would receive the Top Prize under that process. On no view would the 99.9% of consumers have any greater chance of obtaining the Top Prize by responding rather than by not responding.

110. I was however persuaded by Mr de Haan that the evidence just sufficiently explained that, in circumstances where in a promotion like promotion 5 the valuable prizes were not claimed, then unclaimed prizes would be subjected at the end of the relevant year to a prize draw, and allocated among those who had responded to promotions in which they were offered. The evidence did not clearly explain whether this was done on a separate promotion by promotion basis but, whether it was or was not, it was not untrue to suggest that, by responding, a consumer would (albeit by some extremely small fraction) have a marginally less unlikely prospect of obtaining the Top Prize, than if he did not respond.

(ii) Hid, omitted or provided in an ambiguous form details as to how the claim and the cost of claiming

111. Under this heading, the allegation is not that the postal method of claiming was itself hidden, but first, that the minimum cost of the telephone option was omitted and secondly, that the £8.50 cost of claiming an electrical item was hidden by being buried in the small print.

112. In my judgment the first of those alleged omissions is made out, for the reasons which I have given in relation to Paragraph 31. The true choice for a consumer who wished to obtain the wherewithal to claim (i.e. at least the claim number and possibly also the identity of the prize) was in fact between the cost of two envelopes and stamps and the incurring of not less than £8.95 by making a premium line telephone call, during which the prize and claim number attributable to an allocation code of 193582 (which 99.9% of the consumers received) would take only 2 seconds less than the full 6 minutes to obtain. All the consumer was told was that the premium line telephone call might take a maximum of six minutes, at £1.50 per minute.

113. As to the £8.50, while I have concluded that this was misleadingly described as a payment for delivery and insurance rather than, in truth, a payment of what was in substance a purchase price, I am not persuaded that the requirement to make that payment was misleadingly hidden merely by reason of its inclusion in the small print. The relevant part of the small print was sufficiently identified by the use of the sword sign opposite the watch (and the TV) on both pages of the promotional letter. Whereas relevant terms may be hidden by being buried in small print: see for example OFT v. Foxtons Ltd [2009] EWHC 1681 (Ch), where the relevant small print is both intelligible and identified by a convenient cross-reference, it is unlikely to be found to have been hidden. I consider that it was not hidden in promotion 5.

(iii) Hid, omitted or provided in an ambiguous form details of the conditions applicable to the most numerous award

114. This alleged omission is not relied upon in relation to promotion 5.

The Causation Test

115. The misleading acts or omissions which I have thus identified are therefore three in number, consisting of the deception that consumers allocated the watch had won a prize rather been invited to purchase a product, that the geographical origin of the watch was misleadingly associated with Switzerland, and that the inevitable minimum cost of responding by premium line telephone call (if the consumer remained on the telephone long enough to obtain the relevant claim number) was omitted. The first and third of those deceptions both arose from the promotional letter, and preceded the consumer's decision whether to respond at all, and if so whether by post or by telephone. The second of the deceptions arose from the Zurich watch voucher. I consider that the description of the watch in the promotional letter as merely a Zurich watch was, of itself, not quite sufficient as to create a deception as to geographical origin, any more than describing a Ford car as a Cortina suggests that it has been manufactured in, or is otherwise associated with, Italy.

116. In relation therefore to the first transactional decision whether and if so how to respond, it is therefore the aggregate effect of the first and third deceptions which

matter. In relation to the transactional decision whether or not to claim the watch, once the consumer has been informed that he has won it, it is the first and second deceptions which matter. By then, the consumer will realise how long it took on the telephone, and therefore how much it cost, to obtain his claim number.

117. As for the first decision, it is well arguable that the average consumer is motivated to respond not, at least primarily, by a perception that he will probably obtain the watch, but because of a desire to bet, at a modest cost, on the unspecified chance of winning one or more of the more valuable awards. Similarly, it is well arguable that the average consumer's decision to respond by telephone rather than by post is motivated more by an impatient desire to find out what he has 'won' than by a fine calculation of the differential costs to him involved in choosing between no response, postal response or telephone response.

118. Nonetheless I have on balance concluded that the causation test is satisfied in relation to the first transactional decision, when both relevant deceptions are considered in conjunction. It is axiomatic in passing off cases that where a trader sets out to deceive potential customers for the purpose of obtaining their custom, the court will not find it difficult to infer, as against such a trader, that his deliberate deception has succeeded. Although the court in such a case is not required to apply the average consumer test identified in the UCPD and the Regulations, the practical difference in the court's approach in passing off cases is not in my view substantial.

119. In the present case, the crucial importance in commercial terms of persuading consumers to adopt the telephone rather than postal response (from which most of the promoter's profit is derived), coupled with the use of two separate deceptions as part of that process of encouragement is in my judgment sufficient to tip the scales against the fourth defendant in relation to the causation test. The combination of the deception that 99.9% of consumers stood to 'win' anything, and the hiding of the inevitable minimum cost of responding by telephone is sufficient to satisfy the requirement that, if neither of them had been practised, the average consumer would have decided differently. He would either have responded by post, or not at all.

120. As to the second transactional decision, namely whether to pay £8.50 so as to obtain the watch, once the consumer knows he has 'won' it, then again I consider that the combined effect of the deception that the transaction is not one of purchase and the mis-description of the geographical origin of the Zurich watch is sufficient to satisfy the causation test. While it may be suggested that, having already spent £8.95 on the telephone call, a consumer might think that he had better spend another £8.50 in order to get something rather than nothing, I consider that, on the balance of probabilities, the average consumer would, but for the two deceptions still operative upon him, have decided not to throw good money after bad.

121. In summary therefore, promotion 5 contravened both Paragraph 31 and the combined effect of Regulations 5 and 6, in the specific respects which I have described.

PROMOTION 6

122. This promotion, issued in and after June 2008, took the form of a strip of four apparently identical scratch cards, the functional part of each of which may loosely be described as a two dimensional form of game machine commonly found in amusement arcades and known as a slot machine or one-armed bandit. By scratching

the top of the card the consumer reveals three symbols and, if two or more match, he uncovers a message lower down the card telling him that he can claim either a 'Top Treat' (for two matching symbols) or a 'Cash Payout' (for three matching symbols). The Top Treats and Cash Payouts are all identified (without the need for scratching) on the left hand side of the card under a prominent heading "£1 MILLION CASH CARD". The cash payouts range from £1 million cash, downwards in eleven stages to £10 cash. The Top Treats range from £2,000 worth of Thomas Cook vouchers in seven stages down to a "Greek island cruise for 2". The representative quantities for each item in both series of prizes are stated in small and only just legible print at the foot of the left hand side of each card. At the bottom of the card is the clear message:

> "Last time, the £1 Million jackpot winner was Lorna Carr from Salthill. This time, will it be YOU?"

123. The message revealed by scratching after uncovering two matching symbols is as follows:

> "2 MATCHING SYMBOLS
>
> You can claim a Top Treat. To confirm your Treat & obtain your claim number, you can call:
>
> ☎ **0906 155 3464**
>
> (lines open 24 hrs.) or,
>
> text **FROG29** to **84228** or
>
> no purchase necessary,
>
> see rules overleaf for postal claims details."

The three matching symbol card has a substantially identical message, save for the substitution of three for two at the beginning, and of Cash Payout for Top Treat.

124. There follow four lines of small print, the relevant part of which is as follows:

> "Calls cost £1.50/min from a BT landline & will last no longer than 6 min. Cost of calls from mobiles may vary. Sent texts charged at operator's normal rate, you'll receive 6 texts at £1.50 each." ...PTO for rules.

125. The reverse of the strip is mainly taken up with four identical claim forms behind each of the four scratch cards on the front. They require the consumer first to have obtained his claim number, by telephone, text or post. Below each card the message about the previous £1 million jackpot winner is repeated. Nothing turns on the content of the claim form.

126. Along the right hand side of the reverse of the strip, spanning all four scratch cards, are eight lines of small print, of which the following are the only relevant extracts. The first, forming the second part of the text:

> "Greek cruise for 2 awarded as voucher for 7 day cruise around the Greek Islands. Excludes port taxes (£25 pp) and transport to and from embarkation and disembarkation ports. Terms & Conditions may apply. Dates subject to availability. Minimum 2 weeks notice of departure date."

In the second, two lines further down, the "rules for postal claim details" referred to on the front of each scratch card are as follows:

> "For a claim number/info by post write to [*address*], enclosing a stamped SAE. Allow max 28 days."

127. Each of the four scratch cards measures only 11 x 6.5cm. The small print occupies 18.5 x 1.8cm on the reverse of the strip. It takes something of a hunt through the small print to find the rules for postal claim details and to disentangle them from the rules as to posting the claim form itself, once the claim number is known. By contrast, the alternatives of responding by telephone and text are clearly emphasised (but not their cost), both in larger and bold type on the front of each scratch card.

128. The strips of scratch cards are distributed to consumers by being inserted in newspapers and magazines. The wide range of publications chosen demonstrates that no particular social or economic (or other) class of consumer was targeted by promotion 6.

129. The representative quantities on the front of each scratch card include 5,000+ for the £10 cash prize and 1,000+ for the Greek cruise. The allegations of infringements which are prize specific in relation to promotion 6 all concern the Greek cruise. Having described above what the scratch card and small print on the reverse of the strip tells the consumer about the Greek cruise, it is now necessary to describe in some detail the two stages by which he is further informed, if minded to pursue a claim, once discovering that he has 'won' it. After responding (by telephone, text or post), receiving a claim number, and posting his claim form, the consumer then receives a voucher in the form of an eight page booklet issued by a travel company trading as Whoopydoo, offering three alternative choices. The first is the Greek Islands cruise for two. The second is a seven day self-catering holiday for up to six people in either Spain, Portugal, the Canaries, the Balearics, Turkey, Greece or Cyprus. The third is a two night city break for two to four people in either Amsterdam, Barcelona, Paris, Prague or Tallin. By contrast with the Greek cruise, choices two and three are each inclusive of return flights (but not airport taxes) and cost £39 per person. It is not disputed that the real purpose of the voucher is to advertise choices two and three as alternative low-cost holidays, under the relatively thin disguise of informing a supposed 'winner' of the Greek cruise of the details of his award. The evidence as to the very low take-up rate of the Greek cruise tends to confirm that this was Whoopydoo's objective.

130. The single page of the voucher which deals with the Greek cruise provides the following information to the consumer, beyond that ascertainable from the small print on the reverse of the strip of scratch cards. First, all food, drink and gratuities must be paid for. Secondly, the typical (rather than minimum) period of notice of the offered departure date will be only 2/3 weeks. Thirdly, that an offer may be received, at the earliest, within a few weeks of response, but at the latest up to a maximum of eighteen

months from registration. Fourthly, that the consumer must confirm acceptance of an offered date within four working days, by Special Delivery.

131. A careful student of the terms and conditions applicable to all three offers would discover that a delay in response caused for example by the consumer's absence from home when the offered date arrives by post (or for any other reasons) will absolve Whoopydoo from further responsibility in fulfilling the offer (clause 10). He will also discover that Whoopydoo or its agents "may require" a refundable deposit at the time of confirmation for holidays taken under choices 1, 2 or 3 (clause 15), but the amount is not specified. He would not be told either the embarkation or disembarkation ports, so that an attempt by him to discover what (by comparison with offers 2 and 3) his flights are likely to cost would require further inquiries on his part.

132. It would only be when, at an unspecified date up to eighteen months later, the consumer was offered a specific cruise that he would discover the ports of embarkation and disembarkation, but he would then have only four working days to find out whether satisfactory flights were still available for departure within, on average, two to three weeks, and communicate his decision to Whoopydoo.

133. The economic facts about promotion 6 are as follows. Some nine million scratch card strips were distributed by insertion in publications. Every single one of them contained two winning cards, one of two matching symbols and one of three. 99.9% of the strips were pre-formulated so that the consumer would uncover three crab symbols, winning him the minimum £10 cash prize and two lemon symbols, winning him the Greek cruise.

134. The unit cost to the promoter (the first defendant) of a Greek cruise voucher was no more than 59 pence. Its cost of delivering vouchers to consumers was no more than that of the stamped envelope, together (I assume) with a small element of staff overhead. Whoopydoo operated on a working assumption that between 2% and 10% of voucher recipients would choose the cruise and that most recipients would choose either choices 2 or 3.

135. The minimum costs incurred by consumers claiming the Greek cruise and/or the £10 cash prize may be summarised as follows. Claimants by telephone would incur a minimum cost of £8.43 for learning that they had been awarded the Greek cruise, or £8.50 if they remained on the line long enough to discover that they had also won the £10 prize. If they chose to respond by text message they would incur a minimum cost of £9 for the six reverse charge return messages. The rebate rate to the first defendant of the cost of the telephone calls was the same as under promotion 5. The first defendant received £0.90 of each £1.50 of the reverse charges for text messages. Postal respondents would incur the usual cost of two stamped envelopes. Claimants of the Greek cruise would, in order to enjoy it (rather than merely receive the voucher) have to incur the costs of flights, travel insurance, transits between airport and seaport, all food, drink and gratuities, as well as a minimum £25 per person port taxes (although there was some doubt on the evidence whether in practice those taxes were charged).

136. It is impossible to place any estimate of the value of the Greek cruise voucher to the typical or average consumer. All that can be said with confidence is that the Greek cruise would constitute something of value only to a very narrow category of consumers, namely those who (whether because they are retired or, perhaps, self-

employed) are able to commit within four working days to a holiday abroad at an unspecified time within a frame of eighteen months, with only 2 to 3 weeks notice of the departure date. Even within that class, the voucher would be of value only to consumers ready to take an open-ended risk as to the cost of all food and drink onboard (where the cruise operator would enjoy a monopoly), and the open-ended uncertainties as to the likely cost of flying, and transiting between the UK, the nearest airport and the relevant seaports, with only two weeks to book flights once the departure date and the identity of the relevant embarkation and disembarkation ports had been revealed. Subject to all those discouraging risks and uncertainties, the persistent consumer would at the end of the day receive, in effect, free lodging, but not board, for two in a single cabin on an unspecified cruise ship. It is, in those circumstances, not surprising that the majority of those recipients of the voucher who chose to do anything with it (rather than put it in the waste paper bin) opted for choices 2 or 3, rather than the Greek cruise. There was no evidence that the undoubtedly low cost of choices 2 and 3 was substantially cheaper than that which could be obtained for equivalent holidays on the open market. In any event, neither of them was, by any stretch of the imagination, a cruise.

Promotion 6 - Infringement

Paragraph 31

137. There is in my view a clear encouragement to the consumer to use the telephone or text methods of response rather than the postal method, the rules for which are buried obscurely in the middle of the small print on the reverse of the strip. Again, the revenue of £9 (for texts) and £8.50 or slightly less for telephone calls constituted the first defendant's entire source of revenue and profit under promotion 6. It is therefore appropriate to ask whether by incurring a cost in the region of £8.50 to £9 in order to discover that he had obtained a £10 prize and a Greek cruise voucher the consumer could without falsity be described as having won a prize or equivalent benefit. His cost of claiming, by the time he had also posted his completed claim form, together with a first class stamp (as required by the rules) would be only slightly (if at all) less than the £10 minimum cash prize received in return. It follows that the only significant prize or equivalent benefit obtained by those consumers (if any) would be the cruise voucher.

138. I am not persuaded that the voucher itself could without falsity be described as a prize or equivalent benefit to consumers using either of those two expensive methods of response. This is not merely, or even primarily, because the cost of response, and the amount of that cost passed on to the first defendant, greatly exceeded the unit cost of obtaining and delivering the cruise voucher to the consumer, but because the voucher was in substance a means of promoting the alternative holidays described in choices 2 and 3 in the voucher, rather than the means of conferring a significant benefit to recipients of the voucher in the form of a Greek cruise which, for the reasons that I have given, would be of value or benefit only to a very narrow class of consumer.

139. I am by contrast not persuaded that any similar false impression is conveyed to a consumer who chooses the cheaper postal alternative method of response. His aggregate cost of three envelopes and three stamps is substantially less than the face value of the £10 prize, so that the thrifty consumer who chooses that route does obtain a significant benefit, regardless of the dubious value of the cruise voucher.

140. For reasons which follow under the heading of Regulations 5 and 6, even the thrifty consumer may be deceived in thinking that he has genuinely 'won' something, because of being unaware that all recipients of the strip of scratch cards always win two awards, but this deception is caused neither by the absence of any prize or by the cost of his response, as required by Paragraph 31.

141. It follows that promotion 6 did involve a breach of Paragraph 31 if, but only if, my interpretation that the court is not confined to an analysis of the minimum cost of claiming the award is correct.

Regulation 5 – misleading acts

142. I shall for the purpose of this analysis (as well as under Regulation 6) adopt, without further explanation, the lettered and numbered headings which I have already set out in relation to promotion 5.

(a)

143. I consider that the system of strips of scratch cards adopted under promotion 6 did convey the misleading impression that recipients of the strip had been fortunate, but not that they had been selected, or that they were likely to have won, a high value prize. The subtle mischief behind the use of the scratch cards was that, both before and after being scratched, they conveyed the misleading impression that some other recipients of strips might find that none of the four cards contained any matching symbols. Mr de Haan submitted that, in the real world, regular recipients of scratch cards of this type who took the trouble to scratch them would soon realise that they were of the 'every one a winner' species. I am not persuaded that the test for deception in Regulations 5 and 6 is to be answered by reference to the habitual consumer. Furthermore, it is not obvious how many repetitions of the process would be needed by the average consumer before the penny dropped.

144. Promotion 6 plainly conveyed no impression that recipients had been selected, because the strips were simply inserted in national publications. A moment's thought by the average consumer would leave him in no doubt on that score.

145. I have rejected the alleged high value prize deception for substantially the same reasons as in relation to promotion 5. It is based on the disparity between the unit cost of the cruise voucher and the cost of claiming it. In my judgment the real comparison is between the value, not of the voucher, but of the underlying cruise. The representative quantities suggest that the cruise is the lowest in value of the "Top Treats", and therefore of significantly less value than the case of (entirely unspecified) wine, albeit of a potential value in excess of £10 which has a higher representative quantity attributed to it than the cruise. In any event, I would not expect the average consumer to have any focused impression (true or false) about the value of the cruise to him, bearing in mind that the information about the cruise warned him that he might only obtain a minimum two weeks notice of an unspecified departure date.

(b)

146. For the reasons given under Paragraph 31, I consider that promotion 6 involved a relevant deception under Regulation 5 in this respect.

(c) and (d)

147. No allegations are made under either of these headings in relation to promotion 6.

Regulation 6 – omissions

(i)

148. For the same reasons as under promotion 5, I have not been persuaded that there was an infringing omission of the chances of success. Nor, although by a narrow margin, am I persuaded that the very small print of the representative quantities means that they were hidden, having regard to the severe constraints imposed by the scratch card format: see Regulation 6(2)(b) and (c).

(ii)

149. I consider that promotion 6 did omit material information about the cost of the two expensive alternative methods of response. The failure to specify the minimum cost of a successful telephone call was misleading for the same reason as under promotion 5. By contrast, the inevitable £9.00 cost of the response by text was sufficiently explained.

(iii)

150. The pleaded allegation under this heading is not that the strips omitted material information later supplied in the voucher, but rather that the material information about the Greek cruise was hidden by being buried away in the terms and conditions on the reverse of the strip. In my judgment, while a case might have been made that the strip misleadingly failed to disclose that the consumer would have to pay for his and his companion's food and drink, the case of hiding in the small print is not made out. The information about the Greek cruise appears early in the provisions headed "Prizes & Awards Terms & Conditions" and I would expect the average consumer to take some trouble looking for those if, having scratched the card and realised that he had probably 'won' a Greek cruise, he was sufficiently interested in it. The average consumer would not think that an apparently free cruise would be entirely free of conditions relevant to its value to him.

The Causation Test

151. The operative deceptions under promotion 6 are therefore that the consumer had been fortunate, that he had won a prize and that the minimum cost of telephoning had been concealed. The truth was that 99.9% of consumers were in fact being provided with an advertisement for alternative holidays not specified in the scratch card under what would subsequently be revealed as a thin disguise of offering a Greek cruise, and that their cost of claiming by the alternative recommended routes (as opposed to the under-played postal route) would broadly be compensated by the receipt in due course of a cheque for £10.

152. For reasons similar to those set out in relation to promotion 5 I am on balance persuaded that the average consumer would have made a different transactional decision when deciding whether, and if so how, to respond, after scratching the cards. I am not however persuaded that anything in relation to the Greek cruise would have

dissuaded the average consumer from incurring the cost of two stamps and two envelopes necessary to find out about the Greek cruise, having made the initial transactional decision to respond by one method or the other.

153. In the result therefore, infringements of the combined effect of Regulations 5 and 6 are established in relation to promotion 6.

PROMOTION 7

154. Promotion 7 took the form of a mailing distributed on 17th July 2008 by the third defendant under the trading name "Central Office of Award Allocation". It broadly adopted the same structure as promotion 5, albeit using a different format and text. Passages in the text upon which the OFT placed reliance included the following:

> "My records show that we have written to you several times in the past regarding a number of unclaimed Awards, one of which you are entitled to claim. Unfortunately, we cannot hold these Awards indefinitely and therefore if you fail to claim in response to this letter I regret that it may be necessary to eliminate the name [*title/surname*] and Claimant Postcode [*postcode*] from our Awards database.
>
> As I am sure you are aware, [*title/surname*], our Award computer only selects a small number of postcodes and names in your area to receive these chances to claim an Award. That is why it is always disappointing to me when people don't take advantage of these great opportunities. They are effectively 'throwing away' a great award, a new TV, a cash payment... sometimes £20,000!
>
> We want you to receive your cash, cheque or other award as soon as possible, so please respond quickly.
>
> Just call [*telno**] and listen for your allocation code: FN773 (or by post – see below). You can find out immediately what you've been awarded and receive your claim number."

There is a simulated stamp consisting of the exhortation "LAST CHANCE TO CLAIM YOUR GUARANTEED AWARD" in red towards the foot of the front page of the letter.

155. The asterisk opposite the telephone number to be called leads to very small italic print at the foot of the first page which includes the following relevant passages:

> "Calls cost £1.50 per minute from a BT landline. Max time 7 minutes. Calls from other networks may vary. If you wish to receive a Claim Number by post, please write with your allocation code to [*address*]. All claim number requests must include a stamped, self-addressed envelope and allow 28 [*sic*] for delivery. †All electrical items require a payment of £6.50, which includes insurance and delivery. Jewellery set requires a payment of £2.99, which includes insurance and delivery...."

156. The † is used in a box higher up the page which identifies the six alternative prizes, opposite a TV, a Notebook computer and a "Sterling Silver Jewellery Set" with a reference: "See below for quantities available". The representative quantities include 5,000 + for the jewellery set, indicating that it is the most frequent award, the next most frequent being 100 for a £200 cash prize.

157. On the back page of the letter is a claim form broadly similar to that used in promotion 5, with instructions requiring a claimant to enclose a loose first class stamp and concluding:

> "5. Please complete now in order that your claim can be processed immediately."

158. The underlying economics of promotion 7 were as follows. The personalised letter was distributed to some 484,252 recipients whose names and addresses were available to the third defendant as a result of having participated in one or more earlier promotions. Of those, 484,136 received an allocation code entitling them to claim the jewellery set, i.e. 99.97% of the total. The minimum cost of responding by premium rate telephone call, sufficient to be told the claim number for the jewellery set, was £10.40, of which £8.38 found its way to the third defendant. To claim the jewellery set a further £2.99 was required, together with a first class stamp. Against that income, the third defendant incurred £3.75 plus £0.66 VAT as the unit purchase cost of the jewellery set, together with an additional £1.14 for postage £0.37 for packaging, £1.50 for handling and £0.50 for storage, a total unit cost per jewellery set to the third defendant of £7.92.

Promotion 7 - Infringement

159. The allegations of infringement of the Regulations in relation to promotion 7 are exactly the same as in relation to promotion 5, save that there is no allegation that promotion 7 deceived recipients as to the value, specification or geographical origin of the most frequent award, namely the jewellery set.

160. I have reached the same conclusions in relation to the allegations of infringement under promotion 7 as I have under promotion 5, subject to the following points of distinction, which are for the most part matters of emphasis.

Paragraph 31

161. In relation to Paragraph 31, the substance of the transaction was, again, one of purchase, whereas the promotional letter created the false impression that the recipient had won a prize or other equivalent benefit. The promotional letter prioritised the telephone rather than postal response just as vigorously as in promotion 5. A claimant using the telephone response route would therefore incur £13.39 plus the cost of two stamps, in order to obtain an item with a unit cost to the third defendant of a mere £3.75 plus VAT and a total unit cost (inclusive of handling and delivery) of £7.92. By contrast the postal respondent's payment of £2.99 plus stamps represented a substantially smaller proportion of the promoter's unit outlay than under promotion 5. Nonetheless in my judgment the transaction was, even for a postal respondent, in substance one of purchase rather than winning, because the recipient's outlay was by no means *de minimis* in relation to the unit cost of the jewellery set.

162. Promotion 7 concealed the true minimum cost of responding by telephone in exactly the same way as did promotion 5, and the true status of the £2.99 (namely as a purchase price) was concealed in the same way, by being dressed up as funding insurance and delivery when, in reality, the third defendant incurred only £1.14 for postage and nothing for insurance.

Regulations 5 and 6

163. In relation to Regulations 5 and 6 I am no more persuaded by allegation (a) in relation to promotion 7 than I have been in relation to promotion 5. Allegation (b) is made good because of its substantial equivalence with the requirements of Paragraph 31. As to allegation (c) there is, if anything, a greater encouragement to respond quickly in promotion 7 than in promotion 5, but it nonetheless falls short of a requirement.

164. As for omissions there was, again, a hiding of the minimum cost of the telephone option. By contrast with promotion 5, there was no attempt to encourage the respondent to think that his prospect of obtaining the highest value prize was in any way affected by his decision whether or not to respond.

165. The causation test falls to be addressed in relation therefore to two misleading acts or omissions, namely the deception that consumers to whom the jewellery set was allocated had won a prize rather than been invited to purchase a product, and that the inevitable minimum cost of responding by premium line telephone call (long enough to obtain the relevant claim number) was hidden. In relation to the transactional decision whether to respond at all, and if so whether by telephone or by post, the analysis is therefore the same in relation to promotion 7 as it is in relation to promotion 5, and I consider that the causation test is satisfied, for the same reasons, in relation to that transactional decision.

166. In relation to the second transactional decision, namely whether to pay £2.99 plus the cost of stamps for what was in truth the purchase rather than the winning of the jewellery set, once informed that this was the award which had been 'won', there is only the single operative deception, namely that it was a transaction of winning rather than purchase, and no accompanying deception about the geographical origin of the product. The average consumer would face a slightly different analysis than under promotion 5, because he would have spent over £10 (if responding by telephone, as most did) and face only a further £2.99 in order to complete the transaction. I am, but only on a narrow balance, not persuaded that the causation test is satisfied in relation to the decision whether or not to pursue the claim, once told that the jewellery set had been 'won'. Nonetheless, for the reasons which I have given, promotion 7 contravened both Paragraph 31 and the combined effects of Regulations 5 and 6.

PROMOTION 8

167. This promotion was undertaken by the fourth defendant under the trading name "The Award Winners Exchange" by mailings distributed on 24th July 2008. Although it broadly follows the structure of promotions 5 and 7, it differs in an important respect, by the omission of any premium rate telephone method of response.

168. The first page of the personalised standard form letter was as follows:

> "We are holding a cheque for £25,000 or other reward that has already been allocated to you. This selection* was made on 17th July and we would obviously like to despatch your package to you as soon as possible. If you decide not to reply, you could be throwing away many thousands of pounds.
>
> One of the following rewards is ready for despatch to you right now: A cheque for £25,000 x1, £5,000 of Premium Bonds x4, a Sony Vaio Multimedia Laptop x20, a Mediterranean Cruise x10000+, a 37" HD Digital Plasma TV x100, or £250 worth of Marks & Spencer Vouchers x1000.
>
> On 18th July you were allocated a unique personal code, which is 034702000169259, so we can track the despatch of your reward.
>
> To receive your reward please fill in the claim form overleaf and return it to us with a payment of £14.95, which includes delivery and insurance. We will then despatch your reward to you, which we would like to do by 20th August so please write to us as soon as possible.
>
> Yours sincerely,
>
> [signed]
>
> Carol Brown
>
> Rewards Distribution Manager
>
> P.S. If you fail to return your claim form, the £25,000 reward will definitely be allocated to someone else."

169. On the back page of the letter there is a claim form and instructions for claiming the reward, requiring the claim form to be posted together with a cheque, postal order or credit card payment for £14.95, stated to include insurance and delivery. There follows a promise of a full refund to dissatisfied recipients, if claimed within 90 days of receipt.

170. The small print at the foot of the second page, headed Terms & Conditions, contains in its second paragraph the following information about the Mediterranean Cruise:

> "4 – Day Mediterranean Cruise includes travel & transfers in shared accommodation for 4 people only, dates subject to availability. Port taxes (£30 pp) & transport to departure & from embarkation ports excluded."

171. The economics concerning promotion 8 are as follows. It was distributed to 357,703 recipients, of whom 356,578 (i.e. 99.68%) had been pre-allocated the Mediterranean Cruise. They each received a letter containing the supposedly 'unique' personal allocation code 034702000169259.

172. The 'reward' described as a Mediterranean Cruise took the form of a voucher with a unit cost to the fourth defendant of 35 pence. Of the £14.95, the fourth defendant spent nothing on insurance, and the delivery cost of the voucher amounted to no more than a stamped envelope, together with nominal administrative expense. A study of the voucher reveals that what is described in promotion 8 as a Mediterranean Cruise (and "4 day Mediterranean Cruise" in the small print) is in fact a three day holiday in Corsica and Sardinia, with travel on a ferry from an unspecified departure port on the Tuscany coast of Italy overnight to Sardinia, two nights in an unspecified hotel in Sardinia, a ferry trip to Corsica on the third day, and an overnight journey on another ferry from Corsica to an unspecified port in the South of France. The voucher offers a transfer package by post from England to the departure port and from the arrival port back to England for £159, and notes that additional amounts are payable for two bed or one bed cabins on the ferries, for all food and drink and for port fees.

173. The voucher invites the recipient to complete and post a "reservation request" for a booking and reservation package. That document once received reveals that additional supplements are payable to fix reservation dates, as well as seasonal supplements for departures between mid-September and mid-November. The uncertainties as to allocated departure dates are similar to those affecting the Greek islands cruise under promotion 6, and even the detailed reservation package fails to identify the port of departure in Tuscany. The effect of these time constraints and uncertainties is to put considerable pressure on recipients to elect for fixed dates and the optional coach transit facility. A typical group of four persons consisting of two couples would therefore have to spend a total of £636 for the transfer facility, £200 for fixed date, £240 to obtain two bed rather than four bed cabins, £400 for half board and £120 for port fees, amounting to £1,596 in total, or £399 per person.

Promotion 8 – Infringements

Paragraph 31

174. I consider that promotion 8 involved a clear and serious infringement of Paragraph 31. Whereas the letter informed each recipient that he had been allocated a "reward", the truth was that 99.68% of recipients were being invited to purchase for £14.95 a voucher for a mainly land-based holiday involving overnight trips on two different ferries and a day trip on a third which suffered from all the shortcomings of the Greek island cruise under promotion 6, and which would cost a typical recipient a significant sum to enjoy, either as the leader of a group of four, or as an individual participant. By reference to the nominal unit cost of each voucher to the defendants, the £14.95 being charged represented a gross margin to the promoter (which was not the issuer, but merely the purchaser of the voucher) of some 4,271%. On that analysis, purchase is in my view a rather generous word to use as descriptive of the transaction. I consider that promotion 8 is an archetypal example of the mischief at which Paragraph 31 was aimed.

Regulation 5 – misleading acts

(a)

175. As with promotions 5 and 7, I do not consider that promotion 8 gives a misleading impression that the consumer has either been particularly fortunate, or to have been likely to have won a high value prize. The small print terms and conditions on the

second page of the promotional letter set out the basis upon which rewards are allocated (based on the number of previous entries during a stated period in promotions by identified members of the defendants' group). It is not suggested that this basis of allocation was mis-stated. There is nothing in the criticism based upon the representative quantities, for the reasons already given.

(b)

176. Plainly, this allegation is made out, for the reasons given in relation to Paragraph 31.

(c)

177. Promotion 8 clearly creates the impression that the recipient has been allocated a "unique" personal allocation number, but the evidence did not clearly show that this was misleading. There is no requirement to respond quickly, but merely the usual encouragement to do so.

Regulation 6 – misleading omissions

178. I consider that there was, again, no omission as to chances of winning. Nor in this case was there any omission of details as to the cost of claiming. Under heading (iii) there was however an omission as to the detail of the terms and conditions applicable to the Mediterranean Cruise. For the reasons which I have given, I do not consider that it was truthfully or fairly described as a cruise at all. Furthermore there were, as set out above, likely to be substantial costs which would have to be incurred by a typical consumer seeking to utilise the cruise voucher, and I consider that the holiday offer to a consumer determined not to incur any of those supposedly optional costs would have been of value only to a minutely small class.

179. I consider that the causation test is clearly satisfied in relation to the combined effect of the misleading acts and omissions to which I have referred. In my judgment the average consumer would not spend £14.95 upon the obtaining of a cruise voucher of the type which I have described. The effect of the misrepresentation that the consumer had won something, when aggregated with the serious omissions of material information about the terms and conditions of the so-called 'Mediterranean Cruise' was sufficient that, had the matter been fully and fairly explained to him, the average consumer would in my view have decided not to participate in promotion 8.

PROMOTION 9

180. The last of the 2008 promotions is something of a hybrid between promotions 5 and 6. It consists of a non-personalised letter from the first defendant under the trading name "Unclaimed Prize Register" printed on a card distributed as an insert in national publications between 23rd September and 31st December 2008. The text on the front of the card is as follows:

> "Dear Reader
>
> I am pleased to confirm that as the holder of this card you are entitled to receive an award. You have been allocated one of the following awards:

> £25,000 Cash, a New Car (or £10,000Cash), a 42" HD Ready LCD TV, an MP3 Player, £750 of Premium Bonds, or £250 Argos Vouchers.
>
> Your personal allocation code is 507705. Your code was allocated to you recently. We want you to receive your cash; cheque or other award as soon as possible, so please respond quickly.
>
> Just call 09061 562200* and listen for your allocation code or text TOP1 to 84228* so you can find out immediately what you've been awarded and receive your claim number (or by post see below). I look forward to sending your award.
>
> [signed]
>
> Jean Francis
>
> Award Controller
>
> P.S. You have definitely been selected to receive one of these awards. Call now to find out which is yours."

181. The asterisk beside the telephone and text numbers takes the reader to the first of two paragraphs of small print at the foot of the front page, the relevant parts of the first paragraph being as follows:

> "Calls cost £1.50 minute from a BT landline. Max time 6 minutes. Text x 6, max total cost £9.30. Calls/texts from other networks may vary. To receive a Claim Number by post, write with your Allocation Code to [*address*]. All claim number requests must include a stamped, self-addressed envelope and allow 28 days for delivery."

The † opposite the TV and MP3 Player in the second paragraph of the text refer the reader to the small print at the foot of the back of the card, the relevant part of which is as follows:

> "†All electrical items require a payment of £9.95, which includes insurance and delivery."

The rest of the back of the card is taken up by a claim form and instructions for claiming which, again, prioritise the telephone rather than postal method of claiming.

182. The economics of promotion 9 may be summarised as follows. Some 100,000 cards were distributed, of which 98,875 (98.8%) entitled the consumer to claim the most numerous award of the MP3 Player. The minimum cost of learning that fact from the premium rate telephone call was £8.95 (i.e. 5 pence less than the maximum implied by the small print). The unit costs to the first defendant of delivering an MP3 player to a claimant were £8.18 plus £1.55 VAT for purchase, £0.19 import duty, £0.70 freight, £1.94 postage, £0.72 packaging, £1.50 handling and £0.50 storage, i.e. a total of £15.28. Nothing was spent on insurance. Against those costs, the first defendant

received the whole of the consumer's required payment of £9.95, plus a minimum of £7.21 from each respondent who telephoned and £5.40 from each of those who responded by text.

Promotion 9 – Infringements

Paragraph 31

183. For the reasons given in relation to promotions 5, 6 and 7, I consider that promotion 9 also gave a false impression that a prize or other equivalent benefit had been won, having regard to the cost of claiming. This is, again, manifestly the case in relation to the large majority of consumers who responded by telephone or text message. I consider that it also to be the case in relation to the small number who responded by post, because £9.95 is a substantial proportion (albeit not the whole) of the unit cost to the promoter of supplying the MP3 player to a claimant.

Regulation 5 – misleading acts

184. For reasons substantially the same as those given in relation to promotions 5 and 7, I consider that the allegations made under headings (a) and (c) are not made out. By analogy with Paragraph 31, allegation (b) clearly is. Allegation (d) is not pursued in relation to promotion 9.

Regulation 6 - omissions

185. Again, for reasons already given, allegation (i) is not made out. Under allegation (ii) there is, again, a hiding of the inevitable minimum cost of responding by telephone. Omission of type (iii) is not pursued in relation to promotion 9.

Causation

186. In relation to the transactional decision whether and if so how to respond to promotion 9, I consider that the causation test is satisfied, for essentially the same reasons as in relation to promotions 5 and 7. The addition of the text response method makes no significant difference to the analysis.

187. As for the transactional decision whether to pursue a claim for the MP3 player once the average consumer had discovered that he was one of the 98.8%, I am not persuaded that, in the absence of any relevant deception by act or omission about the quality of value of the MP3 player, that the average consumer would have taken a different decision.

ISSUE 2 - SHOULD ANY ENFORCEMENT ORDER BE MADE?

188. The OFT's application for an enforcement order is based upon conduct alleged to have amounted to a Community infringement, which requires it to be shown that any relevant infringements of the Regulations have, separately or in the aggregate, harmed the collective interests of consumers. This concept requires it to be shown that harm is caused to a section of the public, rather than to an individual consumer, and such harm may be inferred from an accumulation of individual instances of infringement: see OFT v. Miller [2009] EWCA Civ 34 per Arden LJ at paragraphs 44 to 46,

approving in part OFT v. MB Designs (Scotland) Limited [2005] CSOH 85; [2005] SLT 691, per Lord Drummond Young at paragraphs 13 to 14.

189. I consider that the requirement to demonstrate that the infringements of the Regulations which I have identified constitute a Community infringement has been amply satisfied by the OFT, and the contrary was not seriously argued. I have in mind in particular the fact that all five of the 2008 promotions offended both Paragraph 31 and Regulations 5 and 6 taken together. The promotional letters and inserts amounted in the aggregate to almost 11.5 million and, even allowing for a substantial level of overlap and unsold publications into which inserts had been made, the 2008 promotions clearly reached a substantial section of the public.

190. Cases were advanced for and against the making of an enforcement order based upon the Assurances. For the OFT Ms Simor submitted that the Assurances had been breached by the 2008 promotions, in letter and in spirit. Mr de Haan submitted not only that there had been no breach either of the letter or of the spirit of them, but that this was of itself a good reason why the discretionary power to make an enforcement order should not be exercised. The defendants had, he submitted, been carrying on business strictly in accordance with a carefully negotiated regime of undertakings. If notwithstanding that regime the court was satisfied that the Regulations had nonetheless been infringed, then the defendants as long established and respectable businesses should be trusted to amend their *modus operandi* without the need for enforcement.

191. The OFT alleges breach of paragraphs 4 and 5 of the Assurances by all the 2008 promotions, and breach of paragraph 7 by promotion 5, 7 and 9.

192. Paragraph 4 required that all awards subject to delivery or other costs would be clearly marked with an asterisk or other symbol in the headline description of that award and that details of those additional costs would be shown separately from, or given greater prominence than, the bulk of the rules. The allegation is that the payments required, supposedly for insurance and delivery in promotions 5, 7 and 9, and the payments for port fees in connection with the Greek and Mediterranean cruises in promotions 6 and 8 were all specified in very small print as part of the terms and conditions of each of the promotions. I consider that allegation to be established in relation to each of the 2008 promotions, as will be apparent from my description of the detailed content of them earlier in this judgment.

193. Paragraph 5 of the Assurances required that significant terms and conditions relating to any awards would be shown separately from or given greater prominence than the bulk of the rules. This is alleged to have been contravened in relation to all the 2008 promotions by the failure to give any prominence to the cost of premium line telephone calls or texts as alternative methods of response. Again, save in relation to promotion 8, which provided only for response by post, this alleged breach of the Assurances is clearly made out by reference to the facts which I have described.

194. Paragraph 7 of the Assurances prohibited the use of phrases such as 'valuable' or other terms suggesting high monetary value, either in statements relating to all awards collectively, or to any of the most numerous awards specifically. Reliance was placed by the OFT on extracts from the pre-recorded telephone messages accessible by way of response to promotions 5, 7 and 9, and specifically to the use of the words "fabulous... special... amazing... fantastic... great... wonderful" as part of the

collective adjectival descriptions of each set of awards. In my judgment there is nothing of substance in this point. Words of that kind are to my mind nothing more than legitimate advertising puffery, rather than words descriptive of monetary value.

195. No more general case has been pleaded as to breach of the spirit rather than the letter of the Assurances. Nor in my view do the breaches of the Assurances which have been demonstrated go to the heart of the infringements of the Regulations which have been proved. The lack of any close correspondence between the breaches of the Assurances and the infringements of the Regulations goes a long way towards making good Ms Simor's submission that, even if they had been complied with, that would not of itself have been a good reason against the making of an enforcement order. The fact is that the Assurances were an imperfect tool for ensuring that no infringements of the Regulations took place. This is in some respects hardly surprising, since they were negotiated and entered into against the background of the predecessor to the present Regulations which did not, in particular, include Paragraph 31.

196. In conclusion therefore, the defendants' case that the Regulations have been scrupulously complied with has not been made out. Conversely, such breaches of the Assurances as there have been do not add much weight to the case for an enforcement order which springs from the extent and gravity of the infringements of the Regulations, save in the limited sense that they undermine the defendants' case that they can be relied upon without enforcement to adjust their *modus operandi* once a departure from the requirements of the Regulations has been established to the court's satisfaction.

197. The defendants' case that it was in any event inappropriate for the OFT to take enforcement proceedings against them, on the ground that the primary regulators of their business are other than the OFT, was not pursued in submissions during the trial, and I need say nothing more about it than to reject it.

198. Nor am I persuaded that the separate position of Mr Henry, the ninth defendant, justifies taking a different approach to the question whether to make an enforcement order against him than against the other defendants. True it is that he ceased to have any active involvement with the defendant companies and their related businesses in October 2009, or with any other promotional business of the same type. It is however acknowledged on his part that he is within the statutory framework of persons against whom an enforcement order may be made, having had a special relationship (as defined by section 222(3) of the Act) with the third defendant at the material time. While I do not rule out the possibility that, in cases such as retirement, ill heath or a permanent departure from the jurisdiction, it may be possible for a defendant to show that there is no appreciable risk of further infringements by him in the future, sufficient to justify the making of an enforcement order against him, I am by no means persuaded that the risk is that low in relation to Mr Henry. He remains, so far as I am aware, of working age, resident within the jurisdiction, and therefore it is impossible to treat as *de minimis* the risk that at some stage in the future he may wish to re-establish a managerial connection with a promotional business, or some other business dealing with consumers in a manner for which the Regulations are intended to provide consumer protection.

199. More generally, this is in my view clearly a case in which an enforcement order should be made. For that purpose I leave until a further hearing (as agreed) the

separate question whether the court should accept undertakings in lieu of an Order. The infringements of the Regulations which I have found to be proved have occurred on a large scale, in each of the five promotions relied upon by the OFT, and within a short period of time. Very large numbers of consumers have been affected by those promotions (in the sense that promotional letters and/or inserts will have been sent to them or otherwise have come to their attention). There has been a wholesale engagement in conduct altogether prohibited by Paragraph 31 and, save in certain very limited respects, the aggregate effect of the misleading acts or omissions which I have found to be proved pursuant to Regulations 5 and 6 has been such as to satisfy the relatively stringent test for causation laid down by the UCPD and reflected in the Regulations.

200. I will therefore hear submissions as to the form which an enforcement order (or, if appropriate, undertakings in lieu) should take, after the parties have had an opportunity to confer, following the handing down of this judgment.