September 2011

Review

Promotions scam banned by OFT goes to European Court

Summary

Earlier this year the Office of Fair Trading (OFT) was successful in taking court action against a company called Purely Creative in relation to five prize promotions it had marketed. There has been an appeal to the Court of Appeal, which has decided to refer several questions to the Court of Justice of the European Union (CJEU).

The questions are about the interpretation of a European Directive and focus on the extent to which one can offer a promotion to claim a prize and charge consumers to find out about the prize or to claim it. The Court of Appeal has also clarified the extent to which differing interpretations of European legislation are relevant in (i) interpreting UK legislation; and (ii) making a reference to the CJEU.

The Court of Appeal referred questions to the CJEU even though it had serious doubts about the strength of the defendants' arguments.

Background

Marketing material distributed by Purely Creative told consumers that they had won a prize (which ranged from high value prizes to some worth just a few pounds). In each promotion, consumers were informed that they had to call a premium rate telephone number to find out what they had won. Consumers were told that calls cost £1.50 per minute (but not that £1.21 of this went to Purely Creative), neither were they told that they would need to be on the line for nearly 6 minutes in order to obtain the information they sought. There was a postal alternative, but few people used this since it was given minimal prominence.

More than 99% of those claiming a prize received the prize of least value, all (or a substantial proportion) of which they had already paid in telephone charges or delivery/insurance costs.

High Court decision

The OFT took court action against Purely Creative under Part 8 of the Enterprise Act 2002. At first instance, the court found the promotions to be in breach of paragraph 31 of Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) (which derive from paragraph 31 of the Annex to the Unfair Commercial Practices Directive 2005/29/EC).

Under the CPRs it is an offence to create the:

> "*false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: (a) there is no prize or other equivalent benefit; or (b) taking any action in relation to claiming the prize or the equivalent benefit is subject to the consumer paying money or incurring a cost*".
>
> In lieu of an injunction, the court accepted undertakings from the defendants, which included the following undertaking not to, in any future promotions:

"*create the false impression that the consumer has already won, will win, or will on a particular act win a prize or other equivalent benefit, when in fact taking any action recommended by the defendant in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost which is either:*

a substantial proportion of the unit cost to the defendant of the provision to the consumer of the thing described as a prize or other equivalent benefit; or

in the case of a charge stated to be for delivery and insurance, used by the defendant to finance in whole or in part its acquisition, handling or other cost of the making available of that thing other than the actual cost of its delivery to the consumer and insurance (if any) in transit."

The defendants appealed saying that part (a) of the above undertaking was too wide. The OFT cross-appealed, complaining that the same part of the undertaking was actually too narrow.

Court of Appeal decision

The Court of Appeal agreed with Briggs J that an examination of any divergence in the approach to the interpretation of the Directive by different Member States was "*likely to prove a time-consuming and ultimately fruitless exercise*" with respect to how the UK Regulations should be interpreted. However, the appellate court also said that the true construction of the provision was not clear and such divergence (citing the significantly different Irish equivalent as an example) was relevant to its discretion whether to refer questions of interpretation to the Court of Justice.

It was also relevant that there were no judgments of any other Member State courts on the point. Accordingly, whilst Jackson LJ cast serious doubt on the strength of many of the defendants' appeal arguments, the appeal and the cross appeal would both be stayed (with the undertakings remaining in place in the meantime) and the court would make a reference to the Court of Justice.

Comment

Even if a reference does not result in a very strict interpretation of the Directive and the UK Regulations, it seems Purely Creative are unlikely to be able to operate the promotions in exactly the same fashion as before, in particular when one notes that the Court of Appeal was keen to emphasise the "high level of consumer protection" the Directive is supposed to establish. Briggs J also found the promotions to be in breach of other provisions of the Regulations, against which there is no appeal.

Jackson LJ's comments may also encourage those seeking to persuade the court to make references to the Court of Justice in design and trade mark cases to pray in aid different implementations of Directives in those fields by other Member States. The Chancellor's comments are a reminder however, that the court will not generally give much weight to legislation of other Member States when interpreting the domestic equivalent.

Questions referred to the Court of Justice.

The questions due to be referred are as follows:

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

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

3) If paragraph 31 of Annex 1 is not breached where the method of claiming involves the consumer in incurring de minimis costs only, how is the national court to judge whether such costs are *de minimis*? In particular, must such costs be wholly necessary:

   - in order for the promoter to identify the consumer as the winner of the prize, and/or
   - for the consumer to take possession of the prize, and/or
   - for the consumer to enjoy the experience described as the prize?

The questions referred to the CJEU will hopefully clarify whether these popular type of promotions are permissible within the EU and their limits.

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

5) If so, how is the national court to determine whether such a “false impression” has been created? In particular, is the national court required to consider the relative value of the prize as compared with the cost of claiming it in deciding whether a “false impression” has been created? If so, should that “relative value” be assessed by reference to:

- the unit cost to the promoter in acquiring the prize; or
- to the unit cost to the promoter in providing the prize to the consumer; or
- to the value that the consumer may attribute to the prize by reference to an assessment of the “market value” of an equivalent item for purchase?

The first instance decision is reported here: http://www.bailii.org/ew/cases/EWHC/Ch/2011/106.html

The appeal can be found here: http://www.bailii.org/ew/cases/EWCA/Civ/2011/920.html

FURTHER INFORMATION

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