

Review

Advertising & Marketing Law and Regulation



OFT slams creative promotions scam

Background

OFT v Purely Creative is a recent case that relates to enforcement action taken by the Office of Fair Trading (OFT) under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) against Purely Creative Limited and others. The case is interesting because it is the first time that the courts have examined the provisions of the CPRs in any detail.

Purely Creative's Promotions

Purely Creative operated a series of promotions whereby a letter or scratch card was sent or distributed to a substantial number of people (11.5 million in aggregate). Each of the promotions informed the recipient that they had won a prize, and invited them to call or text a premium rate number in order to discover what they had won. Although the publications generally informed recipients of the cost per minute of a phone call to a maximum of 6 minutes, it did not tell them that they would have to remain on the line two seconds short of the maximum in order to discover what they had won. The consumer did have the option to write to the promoter to find out what they had won, but the court heard that the vast majority of participants in the scheme called or texted, as the publications encouraged them to do so.

The OFT took action against the companies operating the promotions and their directors under the enforcement of consumer protection legislation provisions of Part 8 of the Enterprise Act 2002.

Legislation

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".

It is also an offence to use commercial practices which contain false information and cause (or are likely to cause) the average consumer to take a transactional decision he would not otherwise have taken (Regulation 5) or to omit material information to the same effect (Regulation 6).

Court Decision

The court held that, in claiming the prize, it was not an offence to require the consumer to pay a minimal cost (such as a postage stamp or making an ordinary telephone call) which is *de minimis* in comparison to the value of the prize, provided that the cost was clearly disclosed and the receipts did not go to the promoter. However, in this case, the publications had created a "false impression" (even though they did not always use the word "win" or "prize") that the consumer had won something; in reality they had purchased the reward by making the premium rate call/texts.

Prize promotion scam shut down by OFT court action

CPRs provide a 'high level' of protection for the 'average consumer'

Briggs J held that the promotions were each in breach of Regulations 5 and 6 and provided some useful analysis of the tests to be applied under the CPRs. Taking the now common approach of rejecting the need for evidence on the question of the actions of the “average consumer”, the court emphasised that the CPRs provide a “high level” of consumer protection to prevent consumers who take reasonable care of themselves from being misled, rather than “the ignorant, the careless or the over-hasty consumer”.

Briggs J said that a “transactional decision” was any decision with an economic consequence, but cast doubt on the breadth of that phrase as interpreted by the European Commission, who consider that the consumer’s decision to go into a shop having viewed an advertisement would qualify. The court ruled that “causes or is likely to cause the average consumer to take a transactional decision he would not otherwise have taken” is a ‘but for’ type test i.e. whether, on the balance of probabilities, the combined effect of all the relevant misleading actions/omissions would cause the average consumer to take a transactional decision he would not otherwise have taken.

Comment

The decision is particularly useful because it clarifies that any of the case law under the previous legislative regime (e.g. Trade Descriptions Act, Consumer Protection Act and Control of Misleading Advertisements Regulations) is not relevant. The formulation of the test to be applied under the CPRs will be handy for traders who seek to use advertising puffery and claims which would not, in fact, mislead a sensible consumer.

Discussion of the Gambling Act 2005 was notably absent from the judgment, which is strange since the promotions would seem to fall within its remit, although the enforcer of that legislation is the Gambling Commission and not the OFT.

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

Key test is a ‘but for’ causation test assessed on the balance of probabilities

CONTACT INFORMATION

For further information on advertising and marketing law, including the regulatory issues arising, please contact:



CARLTON DANIEL
SENIOR ASSOCIATE
T: +44 (0)20 7655 1026
E: carlton.daniel@ssd.com



CARL ROHSLER
PARTNER
T: +44 (0)20 7655 1662
E: carl.rohsler@ssd.com



ROB ELVIN
PARTNER
T: +44 (0)161 830 5257
E: rob.elvin@ssd.com



ROBERT WEGENEK
PARTNER
+44 (0)20 7655 1534
E: robert.wegenek@ssd.com

Squire Sanders Hammonds acts for a wide range of advertisers and marketers, including international brands, agencies and media owners. The team is experienced in handling advertising and marketing industry issues, including action in respect of competitors and working with regulators such as the Advertising Standards Authority, trading standards, the Gambling Commission and the OFT.

4894/03/11

If you do not wish to receive further legal updates or information about Squire, Sanders & Dempsey (UK) LLP's products and services, please write to Richard Green at Squire, Sanders & Dempsey (UK) LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or e-mail richard.green@ssd.com.

Squire Sanders Hammonds is the trade name of Squire, Sanders & Dempsey (UK) LLP, a Limited Liability Partnership registered in England and Wales with number OC 335584 and regulated by the Solicitors Regulation Authority. Squire, Sanders & Dempsey (UK) LLP, is part of the international legal practice Squire, Sanders & Dempsey which operates worldwide through a number of separate legal entities. Please visit www.ssd.com for more information.