

# RETAIL ISSUES UNWRAPPED

## CURRENT TOPICS IN THE RETAIL INDUSTRY

CMS Cameron McKenna

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- Pricing claims that come at a cost
- Disposing of surplus property – what recent case law has taught us in relation to break rights
- Wine may not be promoted as being ‘easily digestible’
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Retail Issues is prepared by the Consumer Products Group of CMS Cameron McKenna. It should not be treated as a comprehensive review of all developments in this area of law or of the topics it covers. Also, while we aim for it to be as up-to-date as possible, some recent developments may miss our printing deadline.

This newsletter is intended for clients and professional contacts of CMS Cameron McKenna. It is not an exhaustive review of recent developments and must not be relied upon as giving definitive advice. The newsletter is intended to simplify and summarise the issues which it covers.

# Welcome

Welcome to the Summer 2013 edition of our Retail Issues update, where we take a look at some of the legal issues affecting the industry



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I am pleased to welcome you to our Summer 2013 Retail Issues update. We capture relevant issues and topics of interest for in-house legal and business personnel alike. In particular, in this issue we cover the following:

#### **Pricing claims that come at a cost**

We have started to see the results of the OFT's enforcement action following its 2010 market study into the advertising of prices. That report highlighted certain pricing practices that were 'more likely to lead to consumer harm' (such as drip pricing and time limited offers) and made clear that advertised prices must be both transparent and upfront. We look further at recent ASA cases in relation to pricing issues.

#### **Disposing of surplus property – what recent case law has taught us in relation to Break Rights**

As companies continue to look for ways to save money, downsizing of property portfolios remains high on the agenda. Conversely landlords don't want to suffer another void in this climate and look for ways to retain tenants, often resorting to Court. We have reviewed the trends in relation to break clause cases before the Courts and examine the lessons learnt.

#### **Wine may not be promoted as being 'easily digestible'**

The Court of Justice of the European Union has sought to clarify the principles for determining whether a statement can be properly considered a health claim in relation to food labelling. We look further at using the claim 'easily digestible' for a wine.

#### **Caution on consumer competitions**

Beware - the Court of Justice of the European Union has made a far reaching decision on consumer competitions which has an unwanted impact on promoters in the UK and elsewhere across Europe. We explore the particular requirements in relation to consumer competitions and what promoters should be aware of.

#### **Interflora stems Marks and Spencer keyword advertising**

Keywords play a crucial role in internet advertising. We look at the recent trade mark infringement case in relation to Marks and Spencer purchasing advertising keywords on Google for 'INTERFLORA'.

If you would like to discuss any of the issues in this update please contact the person whose contact details are above the relevant articles or your usual contact at CMS Cameron McKenna.

I hope you find the articles interesting and informative.

# Pricing claims that come at a cost



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In the past 12 months we have started to see the results of the OFT's enforcement action following its 2010 market study into the advertising of prices. That report highlighted certain pricing practices that were 'more likely to lead to consumer harm' (such as drip pricing and time limited offers) and made clear that advertised prices must be both transparent and upfront.

In July 2012, 12 airlines agreed to abandon the industry's infamous drip pricing policy that saw charges for debit card payments added to the headline price just prior to booking. In November 2012, following an OFT investigation, eight supermarkets agreed to adopt a set of OFT principles in relation to special offers and promotions for food and drink. The principles prohibited practices such as artificially increasing prices to make subsequent discounts more attractive.

The ASA has also been busy with pricing issues. In February 2013, the Advertising Codes rules relating to price comparisons were amended to remove the requirement to compare prices against identical or substantially equivalent products only. The new position brings the Advertising Codes into line with EU law and allows advertisers to compare prices of goods and services that meet the same need or are intended for the same purpose. In addition, a further amendment allows VAT exclusive pricing to feature in advertising targeted at both business and consumers as long as the VAT exclusive price is clearly addressed to those who pay no VAT or can recover it. The Committee of Advertising Practice has also seen fit to remind advertisers of two of its positions: firstly, that the claim 'free' should not be used if consumers have to pay anything other than the unavoidable cost of responding and collecting or paying for delivery of the item, and secondly that, when using qualified promotional pricing such as 'up to 70%' or 'prices from £99', at least 10% of the discounted products must be available at the headline discount/price.

In a ruling in May 2012 against a Virgin Media ad for telecom packages, the ASA held that, because it considered line rental was a non-optional charge when taking a telecoms package from Virgin Media, the cost of line rental must be displayed with sufficient prominence. Virgin Media sought independent review but the outcome remained unchanged. The ASA, however, accepted that the decision had a significant impact on the telecommunications industry and allowed advertisers a three month grace period to amend their advertising accordingly. The ruling demonstrates that following an accepted industry pricing practice may not prevent an adverse ASA ruling.

Numerous ASA complaints were upheld in 2012 in relation to daily deal sites which struggled to demonstrate that the saving claims made in their advertising were achievable. Whilst the ASA appears to recognise that these complaints were largely due to teething problems within a nascent industry, this did not stop the regulator taking a hard-line approach on the matter. It even took the unusual step of referring Groupon to the OFT in December 2011 despite not exhausting its available sanctions. To avoid these issues, advertisers should ensure they hold robust evidence to substantiate any saving claims made.

Advertisers will be aware that, in November 2010, the Department for Business, Innovation & Skills (BIS) issued a revised pricing practices guide to help



advertisers ensure their advertising of prices is compliant. This guide has been endorsed by the OFT and the ASA has stated that advertisers should take into account its provisions. Advertisers seeking to rely on that guidance, however, should take note of an ASA ruling from February 2012 in relation to Comet.

A TV ad for Comet featured savings claims for various products based on the advertiser's previous selling price. Comet argued that the ad was compliant with the BIS guidance as the period for which the higher prices were charged was made known to viewers as required. The ASA, however, did not agree and considered that whilst 14 days was a long enough period to establish a genuine retail price for a washing machine, seven days was not sufficient for previous selling prices for a printer and a TV to also be considered genuine. Considering that the advertised saving claims were upfront, transparent, approved by Clearcast and appeared to adhere to official guidance, Comet seems to have been dealt with harshly.

Nevertheless, the ruling serves as a valuable reminder that advertisers must ensure they keep up to date with the activities of both the OFT and the ASA in relation to pricing, and carefully review any claims relating to pricing before publication/broadcast.

'In February 2013, the Advertising Codes rules relating to price comparisons were amended to remove the requirement to compare prices against identical or substantially equivalent products only. The new position brings the Advertising Codes into line with EU law and allows advertisers to compare prices of goods and services that meet the same need or are intended for the same purpose.'

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# Disposing of surplus property – what recent case law has taught us in relation to break rights



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As companies continue to look for ways to save money, downsizing of property portfolios remains high on the agenda. Conversely landlords don't want to suffer another void in this climate and look for ways to retain tenants, often resorting to Court. The past 12 months have seen a number of break cases come before the Courts. Below is a summary of the lessons learnt from such recent break cases.

## **Payment of all sums due up to the break date**

Often leases make payment of all sums due up to the break date a condition of the break right. A failure to pay will invalidate the break. A tenant should not assume that a cheque handed over on the last day of the term will be sufficient. To avoid argument, any amounts payable should be made in cleared funds.

If interest is due on late payment under the terms of a lease, a tenant should ensure that there are no amounts due for interest that remain outstanding, whether demanded or not. Any interest owing will invalidate the break.

## **A full quarter's rent**

Often break dates fall between two rent payment dates. If the lease is silent, how much rent does a tenant have to pay? In 2012 two cases looked at this point and both concluded that the full quarter's rent is payable, even if the reservation of rent in the lease says 'yielding and paying therefore during the term ... yearly (and proportionately for any part of a year) rent...'. It may be that a lease provides for excess rent to be repaid following the successful termination of the term. This, however, does not relieve from the obligation to pay the full quarter's rent in advance.

## **Satisfaction of conditions**

Often tenants are required to ensure there are no subsisting breaches of leases and that vacant possession is given on the break date to ensure a successful termination. If an agreement is reached with the landlord for a payment in lieu of satisfying the conditions it is important that that payment is made before the break date, otherwise the lease will continue. The Court is likely to hold that time will be of the essence for any payment in settlement of outstanding obligations.

## **Personal break rights**

If a break right is expressed to be personal to the original tenant then subsequent tenants will not be able to take advantage of the option to terminate.

Some of these cases will be subject to appeal this year. However, for the time being this is the current position.

**'If you are considering exercising a break right it is important to be aware of the potential pitfalls.'**

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# Wine may not be promoted as being 'easily digestible'



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Food products sold in the European Union which have labelling and advertising claiming health and medical benefits must comply with Regulation No. 1924/2006 on nutrition and health claims made on foods (the Regulation). Nevertheless, despite the European Commission publishing a list of health claims which are permitted for use on food products, some uncertainty remains on the extent to which nutrition and health claims can be properly made.

In *Deutsches Weintor eG v Land Rheinland-Pfalz*, the Court of Justice of the European Union (the CJEU) sought to clarify the principles for determining whether a statement can be considered a health claim. The claim in question related to 'easily digestible' wine which the German producer Deutsches Weintor claimed caused less adverse effects compared to other wines due to the lower acidity levels. The German supervisory authority objected to the use of the phrase 'easily digestible' on the basis that the phrase qualified as a health claim according to the Regulation and that the Regulation prohibited the use of such claims on the labelling and advertising of alcoholic beverages containing an alcoholic content of more than 1.2%.

When interpreting whether a statement is a health claim, the CJEU confirmed that the relationship between food and health must be understood in a broad sense. The Regulation provides no clarification as to whether the relationship between food and health must be direct or indirect and what the intensity or duration of the relationship should be.

In its reasoning, the CJEU suggested that a 'health claim':

- includes not only claims promising health improvements as a result of consuming the food product but also claims which imply that negative or harmful effects on health, which would typically accompany or follow consumption, would be eliminated or reduced. The description 'easily digestible' suggested that the wine was easily absorbed and digested by the consumer due to the lower acidity of the wine and, as a result, the consumer would maintain a state of good health in comparison to when consuming a wine with a higher acidity level; and
- may refer not only to the temporary effects of consuming a precise quantity of food but also the cumulative purported health benefits of repeated or long-term consumption of the product.

In light of its above conclusions, the CJEU ruled that, in the context of the reduced acidity of wine, the phrase 'easily digestible' did qualify as a health claim. As such, Deutsches Weintor was prohibited from using the phrase on the labelling or advertising of wine which has an alcoholic content of more than 1.2%.

This is a landmark decision. As a result of the dangers relating to the consumption of alcoholic beverages, the CJEU attempted to both protect and prioritise the health of consumers whose consumption habits may be directly influenced by such claims. To do so, the CJEU adopted a broad interpretation of the concept of a health claim to prevent the use of unclear or misleading labelling and advertising on food products.

**'When interpreting whether a statement is a health claim, the relationship between food and health must be understood in a broad sense.'**

# Caution on consumer competitions



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The Court of Justice of the European Union (CJEU) has made a far reaching decision on consumer competitions which has an unwanted impact on promoters in the UK and elsewhere across Europe. The Court has indicated that consumers must not be required to bear any cost in finding out if they have won a prize, or in claiming a prize, even the unavoidable cost of a postage stamp or local rate telephone call. The reasoning for this decision derives from the Unfair Commercial Practices Directive 2005/29/EC (the Directive), which is aimed primarily at unscrupulous traders.

Initially, proceedings were brought by the OFT against Purely Creative and other traders in the High Court in December 2009. The OFT sought to restrain the traders from distributing promotions which informed consumers that they could claim one of a number of prizes. In order to find out which prize had been won, consumers called a premium rate telephone number, used a reverse SMS text messaging service, or obtained the information by ordinary post. Prominence was given in advertising to the premium rate method.

Consumers were told the cost per minute for telephone calls and the maximum duration of the call. They were not told that from the charge of £1.50 per minute, the promoter took £1.21. While the prizes were genuinely available, the process of claiming incurred a substantial proportion of the prize value through telephone/text charges and delivery and insurance costs.

The High Court held that the promotions involved unfair practices. On appeal, the Court of Appeal made a reference to the CJEU regarding the interpretation of the Directive concerning business-to-consumer commercial practices which are regarded as unfair in all circumstances:

‘Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

- there is no prize or other equivalent benefit, or
- taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.’

The traders argued that there could be no unfair practice if consumers were sufficiently informed of the cost of claiming the prize. However, this interpretation was rejected. It is straightforward to see how a false impression is created if in reality there is no prize to be won. However, the CJEU appeared also to say that the very fact that winners are required to pay a cost means that a false impression is created when they are informed that they have won a prize. The CJEU also held that offering a number of options to consumers would not eliminate the unfair character of the practice if any of the options required consumers to bear any cost whatsoever, as ‘a prize in respect of which the consumer is obliged to make a payment of whatever kind cannot be regarded as a ‘prize’.



The CJEU emphasised the need for clear and sufficient information to be provided to consumers in order to enable them to identify precisely the nature of the prize. By way of example, a prize defined as an 'entrance ticket' for a football match would not cover the costs of transport from the winner's home to the football stadium. However, a prize of 'attendance' at the game would require the trader to bear the travel costs.

The case appears to go much further than curtailing the type of promotions run by Purely Creative. However, there remains some uncertainty as to the extent to which the decision is relevant to genuine and legitimate prize promotions, especially where costs to be incurred by consumers are kept to a minimum.

The case will now return to the Court of Appeal. Until that time, promoters should proceed with caution.

'The Court has indicated that consumers must not be required to bear any cost in finding out if they have won a prize, or in claiming a prize, even the unavoidable cost of a postage stamp or local rate telephone call.'

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# Interflora stems Marks and Spencer keyword advertising



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The High Court has ruled that Marks and Spencer infringed Interflora's trade mark by purchasing advertising keywords on Google for 'INTERFLORA'. Keywords play a crucial role in internet advertising but this case highlights that there is a fine line between fair, competitive advertising and trade mark infringement.

In May 2008 Google changed its policy for the UK and Ireland so as to allow advertisers to purchase keywords registered as third party trade marks. Following Google's policy change, M&S purchased keywords from Google so that ads for its own flower delivery service were displayed when users searched Google for INTERFLORA and similar terms.

Interflora complained and alleged trade mark infringement as soon as M&S started bidding on 'INTERFLORA' keywords. The case was originally heard in the UK in 2009 but the High Court referred several questions to the CJEU, which were answered in September 2011.

To succeed on a claim for infringement the claimant must show that one of the functions of the trade mark is adversely affected by the alleged infringing activity: Interflora alleged an adverse effect to the origin and investment functions of its trade marks. The CJEU held that the origin function of the mark would be adversely affected if the ad did not enable normally informed and reasonably attentive internet users, or enabled them only with difficulty, to ascertain whether the goods or services referred to by the ad originated from the proprietor of the mark (or an economically connected undertaking) or a third party. The High Court has now concluded that keyword advertising

is not inherently objectionable from a trade mark perspective, but considered that M&S had infringed Interflora's marks under Article 5(1) of the Trade Marks Directive. The origin function of the mark was adversely affected for the following reasons:

- A significant proportion of internet users in the UK do not appreciate the difference between natural search results and paid-for advertising via keywords (although a majority are so aware);
- The reasonably well-informed and reasonably observant internet user did not know that M&S's flower delivery service was not part of the Interflora network;
- There was nothing in M&S's advertisements to inform a reader that M&S was not part of the Interflora network;
- The nature of the Interflora network made this difficult to tell, as members trade under their own names, with varying prominence given to the Interflora brand; and
- Interflora had co-branding arrangements with several large retailers, which made a connection with M&S plausible.

Separately, Interflora also argued that use of its mark as a keyword was taking an unfair advantage under Article 5(2) of the Trade Marks Directive. This argument did not succeed, however, as the CJEU took the view that M&S had not taken unfair advantage of the mark "without due cause" and, as such, use of the mark as a keyword, for the purposes of Article 5(2), fell "within the ambit of fair competition".

Keyword advertising plays a crucial role in the online



market place, with Interflora itself having spent over £2.2 million on keyword advertising in 2012, which generated estimated revenues of £29 million. There is no doubt that the individual facts of this case were significant, and it is therefore possible that there might be a different result in other circumstances. It is clear, however, that there is a fine line between acceptable competitive advertising and trade mark infringement.

Advertisers considering purchasing competitors' registered trade marks as keywords should ensure that normally informed and reasonably attentive internet users can determine, without difficulty, whether the goods or services referred to by the ad originated from the proprietor of the trade mark or a third party. Conversely, trade mark proprietors should be alert to the fact that, since 2008, Google has allowed third parties to purchase keywords registered as trade marks and should seek to enforce their rights to protect their brands.

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