



SALLIE SPILSBURY

MEDIA LAW

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COMPETITIONS

The media sometimes try to increase viewing/circulation figures by running competitions. But competitions involve serious legal risks. Care must be taken to ensure that a competition does not take the form of a lottery. This is because, subject to very limited exceptions (for example, the National Lottery), lotteries are *illegal* under the Lotteries and Amusements Act 1976 ('the Act'). The Act makes it a *criminal offence* to conduct an illegal lottery.

WHAT IS A LOTTERY?

The Act uses the word 'lottery' in a broader sense than most people would expect. A lottery has been defined as the distribution of prizes by chance where the participants, or a substantial number of them, make a payment or other consideration in return for obtaining the chance to win a prize.¹ It is the substance of the competition that is important, and not the label that is applied to it.

The definition of a lottery breaks down into three elements as follows:

- (a) the distribution of *prizes*;
- (b) which must be *by chance*;
- (c) in circumstances where a *contribution* is made by participants in return for the chance of winning a prize.

If one of these elements was removed, a competition would *not* be a lottery and consequentially would not be illegal under the Act. Whenever a competition is devised, care should therefore be taken to ensure that it does not satisfy all three of the above criteria.

Example of an illegal lottery

Packets of tea were produced containing a coupon which informed purchasers that he/she had won a named prize. It was only after opening the packet that the purchaser knew what the prize was.

This promotion was illegal for the following reasons:

- (a) it involved a distribution of prizes;
- (b) which depended on chance; and

1 *Reader's Digest Association Ltd v Williams* [1976] 3 All ER 737.

(c) by purchasing the tea, the consumer was making a payment for the chance of winning a particular prize.²

How to ensure that a promotion is not an illegal lottery

The creation of an illegal lottery will be avoided if *any one* of the three elements set out above is removed.

Ensuring that prizes are not distributed by chance

To ensure that prizes are not distributed by chance, the promotion must involve participants in the exercise of skill or judgment. The degree and type of skill or judgment which is required must meet certain requirements.

Type of skill

The Act contains restrictions on certain types of skill as follows:

- where prizes are offered for the forecast of a future event, the competition will be unlawful;
- where prizes are offered for the forecast of a past event where the result is not yet ascertained or is not widely known, the competition will be unlawful.

What is 'skill'?

The Act does not define what is meant by skill. Each competition must be judged on its own merits.

Competitions which involve *questions* will generally involve the necessary skill and judgment. However if a *very* obvious question is asked (for example, 'what is the name of the day that follows Monday?'), the competition will risk falling foul of the legal requirements on the ground that the degree of skill required to answer the question is insufficient.

Competitions which involve puzzles, multiple choice type questions or the exercise of judgment (for example, 'arrange the following criteria in the order of importance ...') will generally involve sufficient skill, as will competitions which involve originality (for example, 'devise a slogan in x words' type promotions).

2 *Taylor v Smeton* (1883) 11 QBD 207.

Two stage promotions

Competitions sometimes have two stages. It is important that neither stage is determined by chance. Success must depend on the exercise of skill at each stage of the promotion. If any part of a promotion involves a lottery, the whole promotion will become unlawful.

Example of an illegal two stage promotion

Tins of cat food were sold bearing labels on the inside of which were a bingo card and a line of numbers. If the numbers matched the numbers on the bingo card, the consumer was entitled to a prize. In order to claim the prize, the contestant had to solve an accompanying puzzle, involving an element of skill.

It was held that the scheme was in two stages. The first was the chance of finding a label with numbers that matched the numbers on the card. This stage was determined entirely by chance. The second stage was the puzzle and involved skill. No skill was required by the first stage. The inclusion of an element of skill in stage two was not sufficient to prevent the scheme being an illegal lottery.³

The selection of prize winners

The selection of prize winners must not be dependent on chance. If a tiebreaker decides the winner, it will probably be legal. But if the prize winner is chosen at random, for example, where the winning answer is pulled out of a hat, it is likely to be illegal, because the selection is dependent on chance.

Removal of the requirement for contribution

In order to remove the requirement for contribution, a competition has to be free of *any charge whatsoever* to at least a substantial number of participants. It is not sufficient that the entry into the promotion does not involve an *extra* charge over and above what the contestant would usually pay, for example, the cover price of a newspaper or magazine.

In the case of *Imperial Tobacco v HM AG*,⁴ packets of cigarettes were sold containing scratch cards which featured cash prizes. The packets containing the cards were distinguishable from packets which did not have cards. The packs with cards retailed at the same price as the packs without the cards.

3 *DPP v Bradfute Associates Ltd* [1967] 2 QB 291.

4 *Imperial Tobacco v HM AG* [1981] AC 718.

It was held that the promotion was an illegal lottery. It involved a payment for the chance to win a prize; namely, the price of the cigarettes. It was immaterial that no part of the purchase price could be allocated to the chance to win a prize.

A good working test to adopt in determining whether a competition is free is whether entry into the competition is conditional on any type of cost to the participant. Is there a hidden entry fee, such as the cost of a premium rate telephone call? If so, warning bells should start to ring alerting all concerned to the possibility that the promotion may be an illegal lottery.

Alternative methods of entry

The creation of an illegal lottery can be avoided by offering participants an alternative way of taking part which does not involve any cost.

In the case of *Express Newspapers v Liverpool Daily Post*,⁵ a newspaper bingo game was held not to be dependent on payment. Copies of the newspaper, and therefore of the bingo numbers, were available free of charge from a number of sources, such as public libraries or from contestants' friends. The numbers could also be obtained by telephoning the newspaper.

The Crown Prosecution Service has issued a policy statement concerning alternative methods of entry. The statement indicates that:

- it is not in itself sufficient to make a scheme lawful that some participants do not have to purchase a chance in the draw;
- however, the competition may be lawful where there is a *genuine, realistic and unlimited* alternative method of entry which is free of charge.

How to ensure that the alternative entry method is genuine, realistic and unlimited

Information about the existence of the alternative method of entry should be available to potential participants *before* they make a decision to purchase. Ideally, the information should appear on all promotional or advertising material relating to the competition, in the rules of the competition itself and on all packs of any products to which the promotion relates. The statement should be sufficiently prominent to come to the attention of purchasers without them having to scrutinise small print.

Where prizes are awarded by means of something that is found within the product packaging, for example, in coupons enclosed in goods or within the pages of a magazine, the alternative entry procedure should give contestants the opportunity to send away for the means of entry free of charge, without the need to make a purchase.

5 *Express Newspapers v Liverpool Daily Post* [1985] 1 WLR 1089.

Only one of the elements which make up a lottery has to be removed in order to avoid the creation of an illegal lottery. A competition which depends on chance, such as a prize draw or a scratch card promotion, will not be illegal if entry to the competition is free. On the other hand, an entry charge can be levied for competitions involving skill. The introduction of the requirement for skill will avoid the creation of an illegal lottery.

The criminal offences relating to lotteries

If the *promoter of an illegal lottery or any party which is directly involved in running an illegal lottery* does any of the activities set out below, it will have committed a criminal offence. The offences are punishable by imprisonment and/or fines. The activities giving rise to criminal liability are as follows:

- printing tickets for use in the lottery. *Tickets* include any documents which are evidence of participation in a lottery and will include entry forms or scratch cards, for example;
- selling or distributing or offering or advertising for sale or distributing any tickets or chances in the lottery;
- possessing tickets or chances in the lottery for the purpose of publication or distribution;
- bringing or inviting any person to send into Great Britain any ticket in or advertisement of the lottery for the purpose of sale or distribution;
- sending out of Great Britain, or attempting to do so, the proceeds of sale of any ticket or chance in the lottery or any document recording such sale or distribution or the identities of the holders of the tickets/chances;
- printing, publishing or distributing or possessing for the purpose of doing so:
 - an advertisement for the lottery;
 - a list of prize winners or of winning tickets in the lottery;
 - any document descriptive of the drawing of the lottery which is calculated to induce people to enter;
- using any premises or causing or knowingly permitting any premises to be used for purposes connected with the promotion or conduct of the lottery;
- causing, procuring or attempting to procure any person to do any of the above acts.

Liability does not depend on the intention of the promoter. Lotteries can be created inadvertently.

Who can be liable?

The company whose goods are the subject of the promotion will usually be liable as the *publisher* of the promotion. A *third party handling house* may also be liable if it is engaged in activities which are caught by the above provisions.

In theory, *printers* and *retailers* will also be guilty of a criminal offence if they engage in the above activities. In practice, the authorities will be more likely to direct their attention to the publisher of the promotion.

PART 2

