



Welcome to the Winter 2008 edition of Business Law. In this issue we outline some of the recent key legislative changes to hit the commercial landscape and, as the economic downturn hardens, suggest some of the watch words for acquirers making purchases in less than certain times. On a more general commercial level we focus on particular elements of companies' web strategy and suggest what organisations can be doing to ensure that their promotions/competitions comply with the Gambling Act 2005.

As we all try to navigate through these murky economic waters my intention as editor is to continue to bring you articles that suggest how to not only survive but thrive in these difficult times. As ever I would be delighted to hear from you with feedback.

For further details and more information please contact the author of the relevant article.

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All Change!

You may be feeling that the law affecting your business is like the Number 10 bus - you wait for ages and then three come along at once.

There has been a raft of new legislation in 2008, most notably the latest implementation stage of the Companies Act 2006 on 1 October 2008. This note aims to provide a checklist of recent changes of which we think you should be aware, but is not intended to be comprehensive and does not substitute the need for obtaining legal advice directly.

Companies Act 2006

The job of reforming UK company law was never going to be a brief one and at 1300 sections long, it's no wonder the Companies Act 2006 is being implemented in stages. Most sections have now come into force, although final implementation will take place on 1st October 2009. The main changes that already apply to private companies are as follows:

- power to communicate electronically with shareholders;
- codification of director's duties, ie setting out general duties owed by a director to the company as follows:
 - acting within powers;
 - promoting the success of the company;
 - exercising independent judgment;
 - avoiding conflicts of interest;
 - not accepting third party benefits; and
 - declaring interests in transactions or arrangements with the company;
- a new derivative (shareholder) claims regime, allowing actions to be brought by shareholders against directors for breach of any duty and in cases of negligence, whether or not the director controls the company and regardless of whether he benefited from such breach;
- written resolution procedure;
- abolition of the need to hold an annual general meeting;
- abolition of the requirement to have a company secretary;
- allowing auditor liability limitation agreements, limiting auditors' liability relating to any negligence, default, breach of duty or trust in respect of the audit of the company's accounts;

- nine month period for filing accounts;
- single director in presence of a witness execution of documents;
- abolition of the prohibition on giving financial assistance;
- a new solvency statement procedure for reducing capital, making it simpler and cheaper to:
 - return surplus capital; or
 - eliminate losses, which may be preventing the payment of dividends, among other things.

We will send you an update on the final changes before they come into force on 1st October 2009.

Companies (Trading Disclosure) Regulations 2008

Companies must display their registered names in a prominent position at:

- the registered office;
- any location at which they carry on business, except where such location is used primarily for living accommodation;
- any location at which they keep company records available for inspection.

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'The internet makes it particularly easy for people to copy and distribute copyrights works without permission of the author.'

Countering on-line intellectual property infringement: what are your web-rights?

The growth of the internet has made intellectual property far more relevant for almost every business and is now especially relevant for individual users. What can you do to counter attacks on your IPR on the web.

Intellectual Property Law has sometimes wrongly been considered the preserve of large manufacturers (patents and designs) major household brands (trade marks) or television and artists (copyright). This is not the case on the internet. Misuse of the internet tends to manifest itself in the unauthorised use of copyright works, trade marks or brand names and also through the use of key words and metatags (text coding hidden from normal view within a specially designated part of the HTML code that generates a webpage).

A frequent complaint from clients revolves around the wrongful use of metatags between rival businesses on the internet. Metatags and keywords are essential for the proper indexation by search engines. The prominence of search engine websites such as Google in our everyday lives has resulted in cases where businesses have diverted traffic to their sites by the unauthorised use of a third party's trade mark, logo or materials such as a competitor's name or trade mark within their metatag data.

It is often a surprise to our clients who seek advice in this area that the main case *Reed Executive plc v Reed Business Information* [2004] RPC 40, shows that the Courts consider internet users to be 'sophisticated surfers'. The use of, for example, a competitor's brand or business name within your metatags to attract their customers to your website would be likely to form the basis for a claim of trade mark infringement or

for an unregistered mark, passing off. However, for these two rights, 'confusion' as to a trade mark's origin is of utmost importance. What the UK Courts have found is that where an internet user is directed towards a third party website because of a metatag term being incorporated within the metatag data he or she will soon realise their mistake and carry on surfing until they have found the correct product or service that they are looking for. Often our advice has been in these circumstances for clients to look at on-line technical ways of boosting their placing within search engine ratings to combat this possible confusion.

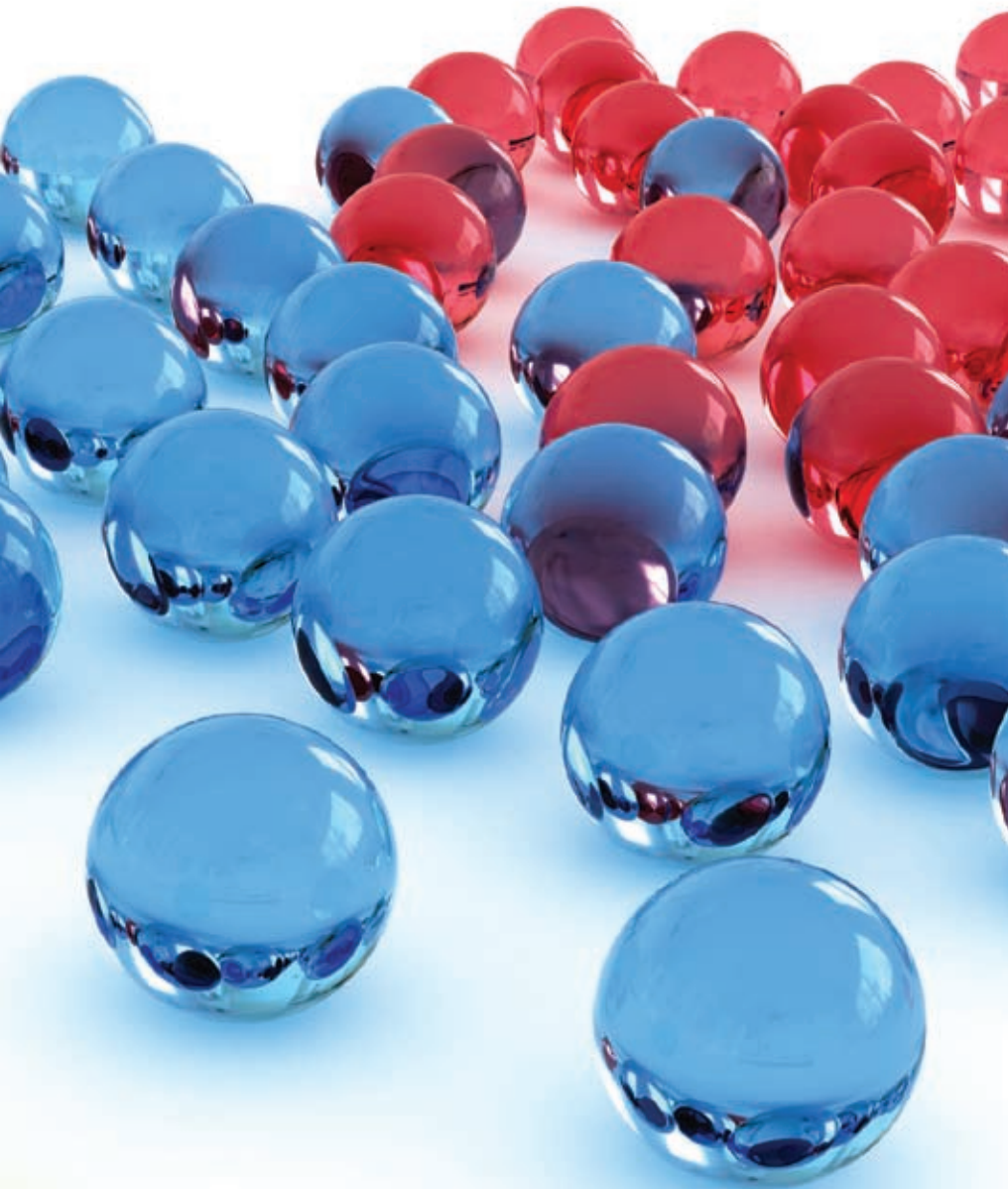
The internet makes it particularly easy for people including children to copy and distribute copyright works without permission of the author. We are all familiar now with music sharing websites but equally photographs, images, film clips or musical broadcasts can be easily distributed across the web. Such acts without consent are likely to breach the Copyrights Designs and Patents Act 1988 (CDPA).

YouTube allows ordinary people to prepare, compile and up load video clips that they produce onto a website where they can be viewed, downloaded, linked to and moved into other web based content by others. In this circumstance both the author of the uploaded work and YouTube are likely to have infringed the copyright in that original work in terms of the reproduction right or the right to communicate the work to the public.



Infringement of copyright on this basis has not yet been tested in the UK Courts but in the current climate providers such as YouTube should be concerned that the Courts may soon focus on indirect copyright liability. We only need to look at the various actions that have been taken against individuals for the unauthorised downloading of music to see the likely consequences and possible enforcement actions.

Equally ISPs (internet service providers) are often looked to, to monitor actual and potential copyright infringement on the web. Whilst the ISPs have relied on a basic defence that they are a conduit



for third party material and therefore not responsible for the actual content or material that is available from that website, the E-Commerce Directive, does allow a Court to grant an injunction against a service provider that has 'actual knowledge' of another person using their service to infringe copyright.

Countering on-line intellectual property infringement is still largely a monitoring game as the law is still untested in many areas of infringement. Monitoring can be done by individuals, businesses or by using third party investigators to conduct more detailed investigations into activities carried out by websites and

to identify the individuals behind them. Media can also be a useful tool to make sure that infringers perceive the threat that their infringements may be made public. Encrypting copyright works using encryption technology ensures that their distribution can be tracked across the internet. We regularly deal with distinct queries in this area. There is often a mixture of legal and technical strategy in our response.

If you would like to discuss web based tactics and strategy with us please contact Joshy Thomas on 023 8083 1232 or joshy.thomas@thomaseggar.com

Newsbrief

Fair and reasonable?

On the pensions front, things as usual have not been quiet. A recent case concerning the Financial Ombudsman Service may have consequences for the Pension Ombudsman.

The case *R (Heather Moor & Edgecomb Ltd.) v Financial Ombudsman Service* was heard in the Court of Appeal which decided that the Financial Ombudsman Service (FOS) is able to determine complaints by reference to what is 'fair and reasonable' rather than on strict common law principles.

L consulted Heather Moor & Edgecomb Ltd. (HME), an independent financial adviser, about his benefits in the British Airways final salary pension scheme. HME advised L to leave the scheme on retirement and to invest the proceeds elsewhere. Unfortunately for L four years later the value of his pension fund had fallen 23 per cent and he was nearly £350,000 worse off than if he had stayed put. L complained to the Financial Ombudsman Service who duly ordered compensation to be paid.

On a judicial review application HME argued that the FOS was required to determine complaints in accordance with the rules of English law, and that the FOS had instead adopted a 'fair and reasonable' test.

The Court of Appeal dismissed this argument and held that the FOS must determine complaints by reference to what is 'fair and reasonable' in all the circumstances of the case' and as long as the decisions were not perverse or irrational, the FOS was not bound by common law.

The Pension Ombudsman and the FOS have a different statutory framework however so we wait to see if this flexibility is adopted more widely.

'A successful acquirer must be focused from the outset.'

Acquirers: gaining the upper hand

The M&A market has been very active over the last few years. However, as a result of the recent economic downturn and reduction of availability of funding, the market has become a much more cautious place.

Deals are still going through, but they are taking longer with more stringent due diligence processes in place. So, how does an acquirer secure a good deal and take advantage of the current climate? Following these ten tips should assist:

1 Research the market place - be informed

An acquirer should complete as much research as possible before approaching a target. Knowledge of the industry, market, target and its competitors is vital. Speak to corporate finance advisers for specialist industry knowledge as well as lawyers and investigate any opportunity on their books. Conduct a SWOT analysis of the industry/target so you understand the possible opportunities and risks involved. Knowledge is power.

2 Acquirer's approach - be prepared

A successful acquirer must be focused from the outset. Often the level of work involved in purchasing a target is underestimated and the process is poorly managed leading to increased costs and drawn out negotiations. I would say this, but try to get lawyers involved from an early stage to point you in the right direction as this should minimise costs going forwards. Establish a team and agree a specific costs budget. Negotiate heads of agreement with the sellers which will save time and money later on in the process, but be aware these are not binding. Secure exclusivity for as long as possible and try to get an indemnity for your costs if the transaction does not go ahead. However, do not spend too much time negotiating the heads as there is a tendency to try to negotiate all the terms of the deal at that stage which is not possible.

At this point, identify your principle objectives and what issues you believe will be key to the deal. Also consider who you may need to keep the target business going. Try to agree terms with any sellers/managers asap as this is often left to the last minute and can cause a great deal of unease between the sellers/managers and acquirer and damage the transaction process.

3 Project management and the purchase process - be organised

A dedicated person/team within your company managing the transaction is invaluable. Someone who is on top of the latest version of the agreement and the current status of the due diligence process and who can push things along and has a contact at the target to discuss any sticking issues/problems. Set a time table and try to stick to it; in all probability you will need to be flexible but it focuses everyone's mind.

Decide who will lead the project - someone in house, the lawyers or the corporate finance advisers?

Prepare for the purchase process, which can take on a life of its own. The process usually takes between 3 and 6 months, but given the current climate be aware that it may take longer. Bear in mind that both the acquirer and the seller will need to keep running their businesses so this is where your dedicated project manager and team selection comes into their own.

4 Consideration structure/funding - be savvy

Purchasers have a variety of options when it comes to funding a purchase. In the current climate it is popular to pay the minimum amount of cash upfront,

combining this with shares, further/earn-out and deferred consideration (potentially linked to ongoing performance). Consider how you will 'sell' such a structure to the sellers; are there tax advantages? Do you want a no cash/no debt deal? Will you be needing debt or equity investment? If funders are involved they will want their say in relation to the transaction and will expect the acquirer to pay their costs. Funders may look on a deal with deferred consideration more favourably than an all out cash deal from day one.





your main concerns are, what is material to the deal and consider having a focussed report, identifying only areas of specific risk.

6 Indemnities/warranties and financial housekeeping - be specific

A full warranty schedule with specific warranties relating to sector specific areas should be incorporated in the sale agreement together with any specific indemnities required as a result of the due diligence process. Consider how long warranties should be enforceable for and also what excess on warranty claims should be agreed - the lower the better. Try not to accept any limits on liability relating to any indemnities (including tax) and any breaches of fundamental, title warranties.

Consider any assets which may need to be stripped out of the target prior to completion. This is particularly relevant with 'lifestyle' companies where it has not been unusual to find Spanish villas, helicopters and Bentleys as assets. Are there any parts of the target that are not profitable? Try to only purchase what you need - would a re-organisation of the target be sensible?

7 Disclosure - be aware

An acquirer will use the due diligence process as a way to quantify its liability whereas the sellers will use the disclosure process to qualify

their liability. The sellers will attempt to disclose as much as possible against the warranties and it is necessary to ensure that such disclosure is fair. The lawyers will manage this process, but an acquirer should be on the look out as the lawyers can only deal with information they receive during the disclosure process, whereas documentation and information may be sent between the sellers and acquirer directly. Again, it is vital that the project manager and acquisition team work closely together. Sellers may try to hold on to certain disclosures until the very last minute and these may impact substantially on the transaction, if

possible, a final date for disclosures should be set after which no further disclosures should be accepted.

8 Split exchange and completion? - be on your guard

In some circumstances, exchange and completion may not be able to happen simultaneously, as certain regulatory approvals may be required, for example. Consider carefully any specific conditions for completion and what needs to be done in order for these to be achieved. Ensure that an acquirer has full protection in the period between exchange and completion and restrictions should be placed on the seller as to what can and cannot be done in that period. Warranties should be repeated on every day between exchange and completion and an acquirer should retain the ability to pull out of the agreement prior to completion.

9 Post-completion... when the dust has settled - be persistent

Ensure that any post-completion tidy ups have been dealt with and it is important to liaise with the lawyers in respect of this process to continue to keep minds focused which may have strayed as there is a tendency to consider the deal is done and nothing further is required. Note and diarise important follow up dates (determination of completions accounts, payment of further consideration, warranty/indemnity periods, for example).

10. Review - be ready for next time!

If thinking of a series of acquisitions or another acquisition in the future, review the whole purchase process carefully. What would you change? Common issues considered include: amount of time involved; number of problems that arise that cannot be anticipated; on the other hand, problems that could have been discovered earlier if the right acquisition team structure had been in place; levels of costs spiralling out of control and a lack of knowledge of target industry/company.

For more information on this or related issues please contact Lucy Lea on 01293 742919 or lucy.lea@thomaseggar.com

5 Due diligence - be thorough

A targeted, specific and controlled due diligence exercise enables an acquirer to quantify the liabilities of a target going forward. An acquirer will need to complete legal, commercial and financial due diligence. Where specific issues have been identified, this may result in specific indemnities, a retention, price reduction, change in the deal structure or the deal no longer being viable.

An acquirer who has done its research can concentrate its due diligence into known/likely risk areas. Establish what

'A prize draw or competition will not be a lottery if there is an element of skill, judgement or knowledge required from the participants...'

Prize draws and competitions your questions answered

Prize draws and competitions are a widely used and essential marketing tool for many successful organisations to attract customers and publicity. However, in light of recent scandals over phone-in competitions such as GMTV, X Factor and the BBC it is likely that competitions encouraging public participation will come under increasing scrutiny.

It is essential that organisations are fully aware of the restrictions relating to competitions and their legal obligations under the Gambling Act 2005 (the 'Act') and the British Code of Advertising, Sale Promotion and Direct Marketing (also known as 'the CAP Code').

The Act was introduced on the 1 September 2007 and replaces existing legislation governing the running of lotteries and competitions contained in the Gaming Act 1968, the Lotteries and Amusement Act 1976 and the Betting, Gaming and Lotteries Act 1963 with a more definitive and comprehensive piece of legislation.

The Gambling Act 2005

Prize draws and competitions generally remain outside the regulatory controls imposed by the Act. However, organisations must be aware that when making the decision to hold a prize draw or a competition that it is structured in such a way that it does not fall within the statutory definition of a 'lottery' under the Act. Lotteries are heavily regulated and in order to be organised lawfully require a licence to be issued by the Gambling Commission (unless the lottery is exempt under the Act). Therefore, for a simple prize draw or competition it is best to avoid inadvertently falling within the definition of a lottery.

What is a lottery under the Act?

The Act defines two types of lottery:

1 A simple lottery - this is where:

- persons are required to pay to participate;
- one or more prizes are allocated to one or more participants in the scheme; and

- prizes are allocated by a process which relies wholly on chance.

2 A complex lottery - this is where:

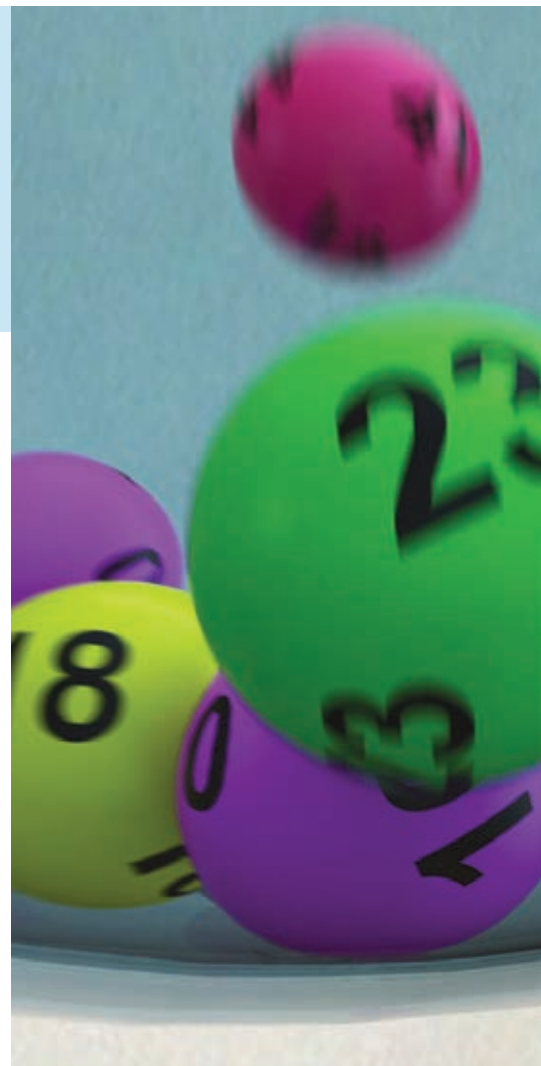
- persons are required to pay to participate;
- one or more prizes are allocated to one or more participants in the scheme;
- prizes are allocated by a series of processes; and
- the first of those processes relies wholly on chance.

What is the distinction between a lottery and competition?

A prize draw or competition will not be a lottery if there is an element of skill, judgement or knowledge required from the participants and it does not rely wholly on chance, or if no payment is required to participate in the competition. The Act states the test is whether the skill requirement can be reasonably expected to prevent a significant proportion of people from entering the competition or prevent a significant proportion of participants from receiving a prize. If the test is not satisfied, then any element of skill, judgement or knowledge present will be insufficient to prevent the competition not relying wholly on chance and will therefore be a lottery for the purposes of the Act.

The skills test

Competitions which genuinely require skill, judgement or knowledge can continue to operate outside the regulatory controls imposed by the Act. For example, a crossword puzzle featured in a magazine satisfies the skills test. A crossword puzzle requires the participant to solve a large number of clues and only completed



entries are submitted. It will still qualify as a competition, not a lottery where there are several stages provided the first stage requires an element of skill. For example, if all the participants who complete the crossword puzzle successfully are entered into a prize draw to pick the overall winner.

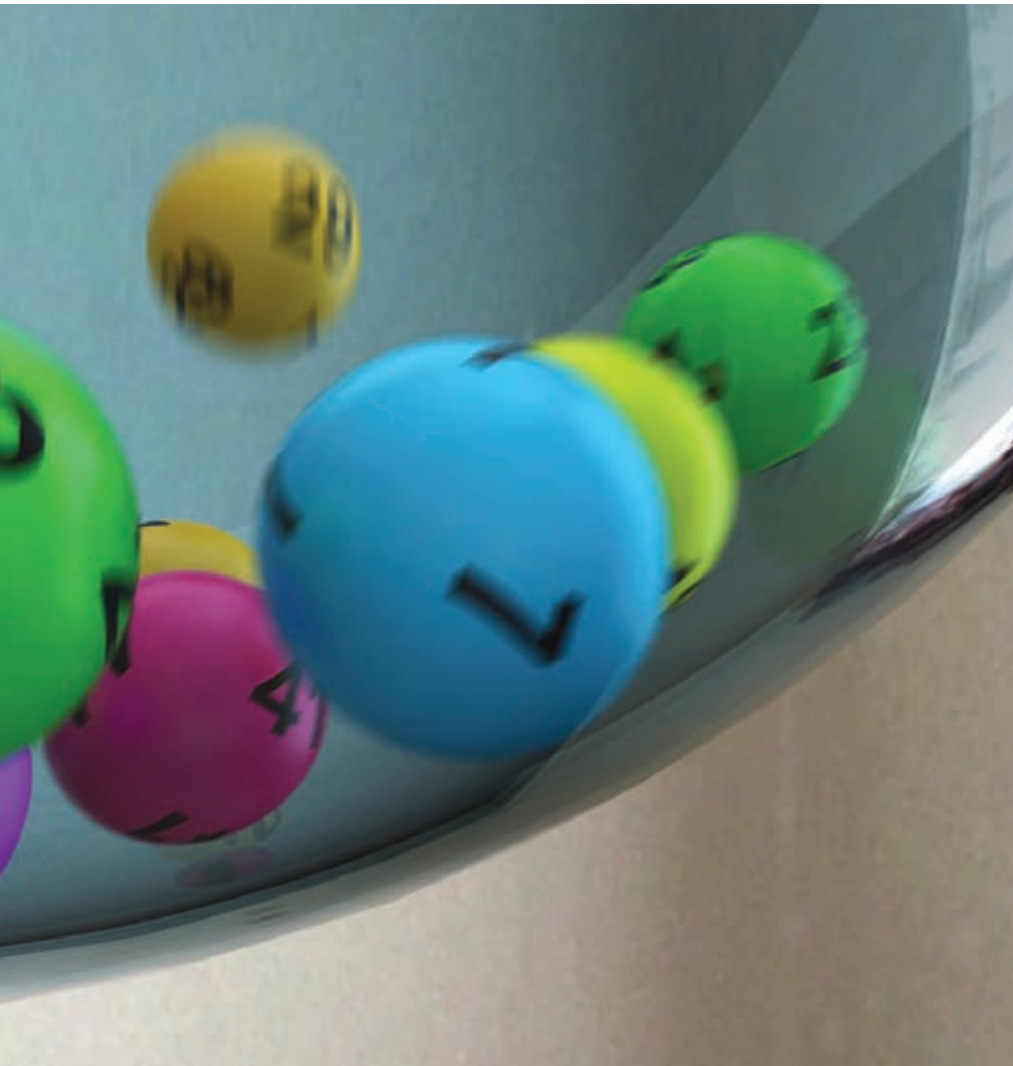
The Gambling Commission considers a question to which the answer is blatantly obvious from the material accompanying the question or is commonly known is unlikely to satisfy the test because it is unlikely to deter a significant proportion of people from entering. However, a competition question will not fall foul of the skills test if the answer can be found through basic research.

No payment is required to enter

Where a competition does not satisfy the skill requirement, it may still be exempt and may not be a lottery if no payment is required to enter the competition. The Act sets out what amounts to 'payment to enter' for the purposes of distinguishing free draws from lotteries. The Act envisages the following two circumstances:

1 The single entry route

This is where there is only one way in which to enter the competition. This includes any



normal method of communication such as first or second class post or telephone, at a normal rate which does not reflect the opportunity to enter a lottery. There can be no additional cost over what it would normally cost to use that method of communication. For example, if in order to enter a competition an entrant has to telephone a premium rate number this will involve a 'payment to enter'. It will therefore amount to a lottery if the criteria mentioned above are satisfied.

2 Alternative choices of entry

The Gambling Commission states that even if there is a paid route to entry, a competition will be treated as free to enter if there is an alternative free entry route, provided that the following are satisfied:

- The alternative route is not only a communication method which does not involve payment but is also a reasonable alternative and is no less convenient than the paid route. This is particularly important where the competition requires a response within a set time period or an immediate response is required to win.
- The choice of entry method is publicised so that it is likely to come to the attention of all those intending to participate in the competition.

- The system for allocating prizes does not distinguish between those using either route.

It is irrelevant who benefits from any payments made. For example, if a telecommunications company charges, but the organiser of the competition does not it will still involve a payment for the purposes of the Act.

Consequences of breaching the Gambling Act 2005

Failure to abide by the Act may result in the organisation or an individual being found guilty of promoting or managing an illegal lottery which is a criminal offence and is punishable by up to 51 weeks imprisonment or a fine of £5,000.

CAP Code on promotions

The CAP Code places additional obligations on organisations when organising prize draws and competitions. The CAP Code requires that the following information is given to all entrants before or at the time of entry into the prize draw or competition:

- details about how to participate (including an explanation of any free entry route);
- the start date and closing date;

- any restrictions on the number of entries;
- if relevant, who will own the copyright in competition entries;
- the organisers full name and address;
- the criteria for judging the winning entries (eg the most apt and original);
- details about how and when the winners will be notified of results;
- details about when the winners will receive their prizes;
- if applicable, whether the organiser intends to use the winners in post event publicity;
- the minimum number and nature of the prizes;
- details about when the results will be announced; and
- if applicable, how the entries will be returned to the entrants.

Lessons learnt

You may remember the time that Hoover held a promotion offering a free flight with every vacuum cleaner purchased, which resulted in huge unanticipated financial costs to the company. The promotion was simply too generous. Spend just £100 on any Hoover product and two free return flights anywhere in Europe. This cost Hoover £48 million. Ensure that when you do hold a promotion or similar prize drawer that the terms of the offer have been properly drafted and are complete in all respects.

The rules relating to holding competitions, prize draws and similar ways to promote goods or services can be complex and if a company gets it wrong, this can result in bad publicity through CAP or result in criminal sanctions on both the company and the officers of that company.

If you require further advice on whether your proposed promotion is legal and to ensure that the T&Cs for that competition are legal, valid and binding, please contact Richard Hastings on 023 8083 1216 or richard.hastings@thomaseggar.com or contact Oliver Knowles on 01293 742822 or oliver.knowles@thomaseggar.com.

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The regulations also require that companies disclose their names in legible characters on all of the documents listed below, whether they are in hard copy, electronic or any other form:

- business letters;
- all websites;
- order forms;
- notices and other 'official publications';
- cheques, bills of exchange etc;
- invoices;
- receipts; and
- all other forms of business correspondence and documentation.

Company Names Adjudicator Rules 2008

Under the Company Names Adjudicator Rules 2008, any person or company is now entitled to lodge an objection with the Company Names Adjudicator if:

- a company name is similar to a name in which they have goodwill; and
- they believe that the name has been registered opportunistically by someone with a view to obtaining money from them for the name; and/or
- to prevent them from registering the name.

Consumer Protection from Unfair Trading Regulations 2008 ('Consumer Regulations')

The Consumer Regulations:

- introduce a general duty on business not to trade unfairly; and
- require businesses not to mislead consumers through acts or omissions or subject them to aggressive commercial practices.

The aim of the Consumer Regulations is to strengthen the UK's consumer protection regime and improve cross-border trade, as well as make it easier for enforcers to take action.

Business Protection from Misleading Marketing Regulations 2008 ('Business Regulations')

The Business Regulations:

- prohibit misleading business-to-business advertising; and

- set out the conditions under which comparative advertisements (those adverts identifying a competitor or a competitor's product) are permitted.

Trade Mark Rules 2008 (the 'Rules')

This consolidated set of trade mark rules came into force on 1 October 2008. The main provisions:

- mean trade mark applicants or owners will have the right to an extension of time to complete an action required to be taken under the Rules, provided such extension is sought within two months of the initial period's expiry;
- improve the procedures for hearings under the Rules or the Trade Marks Act 1994 before the Registrar;
- make registrations, renewals and other post-registration information available on the Intellectual Property Office's website; and
- reduce the period for remedying deficiencies in an application, or correcting classification queries, to a minimum of one month.

Consumer Credit Agreements

As from 6 April 2008, the Consumer Credit Act 2006 has removed the £25,000 limit for regulated consumer credit agreements. The limit remains in respect of any agreement which varies or supplements an existing agreement made before 6 April 2008 for the provision of credit exceeding £25,000 which either does not itself provide for further advancement of credit or is itself an agreement under the Consumer Credit Act 1974.

Immigration Law Update

Are you aware of the most significant change to the immigration system in 45 years? The new points-based system goes live on 27 November 2008. Under the new system, employers need a sponsor licence to bring in skilled workers (tier 2) or temporary workers (tier 5) from outside the European Economic Area or Switzerland. The UK Border Agency recommends that if you have not yet applied for a sponsor's licence and wish to bring in migrants under tiers 2 and 5 you need to apply for your licence as soon as possible. Go to www.ukba.homeoffice.gov.uk to apply online.

Entrepreneurs' Relief

Entrepreneurs' relief was introduced on 6 April 2008 and is regarded as being less generous than business asset taper relief. Entrepreneurs' relief only applies to share disposals if the individual is an employee or officer of, and holds at least a 5% stake in, a trading company. The effect of entrepreneurs' relief is to apply an effective CGT rate of 10% to the first £1 million of lifetime gains made by an individual on the disposal of certain qualifying assets. The claim must be made on or before the first anniversary of 31 January after the tax year of disposal.

If you would like to discuss any of these changes please contact a member of our Corporate Commercial Practice Group on 0870 160 1300.

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