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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 23/10/2007

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES
COURTS (NORTHERN IRELAND) ORDER 1981**

Between:

DEPARTMENT OF ENTERPRISE TRADE AND INVESTMENT

Complainant/Appellant

and

THE CARVILL GROUP LTD

Defendant/Respondent

Before Kerr LCJ, Morgan J and Treacy J

MORGAN J

Introduction

[1] This is an appeal by way of case stated from a decision of Mr Harry Coll, a deputy Resident Magistrate sitting at Newry Magistrates' Court, dismissing a complaint by the appellant which charged the respondent with having offered apartments for sale in Newry on terms that gave a misleading

indication as to their price. The complaint alleged that the offer for sale by the respondent took place on a date between 1 September 2004 and 1 October 2004 and it was claimed that the respondent, in the course of its business, gave an indication as to the price at which an apartment could be purchased that was misleading contrary to article 13 (1) of the Consumer Protection Order (Northern Ireland) 1987.

The facts

[2] The facts found by the Resident Magistrate were set out by him at paragraph 5 of the case stated as follows:-

- (a) The defendant had developed 60 apartments at a site in Newry.
- (b) The defendant had decided, after taking advice from an experienced and reputable estate agent, Mr Hall, that a reasonable market price for the apartments was £79,950, taking into account what it considered was a poor market in Newry for apartments.
- (c) Accordingly on 2 September the defendant had an advertisement published in the Homefinder section of Belfast Telegraph which stated, inter alia, that the apartments were available from £79,950. (The advertisement was appended to the case stated. It was headed "Proposed sales release late September 2004". It referred to the location of the development and described the type of dwelling as two-bedroom apartments. It stated "prices from approximately £79,950" and gave a telephone number and e-mail address at which interest in the purchase of apartments could be registered.)
- (d) An identical advertisement was also published in the same newspaper on 9 September 2004. After that date it became clear that there was considerably more interest in the apartments than had been anticipated.
- (e) The apartments were made available for bidding by interested parties in a series of phases from 9 September 2004 until 8 October 2004, inclusive. The apartments had been released in five separate phases up to 27 September 2004. During these five phases the defendant only accepted bids from individuals who met criteria set by the defendant (these were referred to as "the preferred bidders"). To qualify as a preferred bidder one had to be an employee of the defendant firm or to be otherwise connected to it. An increase in the price of the apartments took place at each phase of release.
- (f) At least two of the apartments had been offered to interested parties at £79,950.

(g) 39 apartments were sold at different prices during the period after 9 September to 8 October 2004. The remaining 21 apartments were sold after 8 October at a price of £99,450.

(h) A witness on behalf of the prosecution, Brian Patterson, gave evidence that he had contacted the telephone number shown in the advertisement sometime after 9 September 2004 to express an interest. He gave evidence that he had been told in that telephone conversation that the handling of the sales had been delegated to the defendant's estate agent and was advised to contact that firm if he wished to continue his interest.

(i) Sometime later (between 10 -- 13 September) Mr Paterson telephoned the estate agents who explained to him the apartments were no longer available at £79,950. Mr Paterson indicated that he was disappointed at that news and did not follow up his interest. On 13 September (the papers suggest this was in fact October) 2004 he contacted the Trading Standards Service and made a complaint alleging a misleading advertisement.

(j) Mr Paterson stated that his interest in the apartment was, as he described, "in the broadest sense as an investment". He indicated that he either intended to buy as an investment for himself or to encourage his son to do so to get on the property ladder. He did not intend to occupy the apartment for his own use.

The relevant statutory provisions

[3] Article 13 (1) of the 1987 Order provides:-

“Offence of giving a misleading indication

13. - (1) Subject to this Part, a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons)”.

[4] Article 13 (2) deals with the situation where an indication *becomes* misleading as a result of events that occur subsequent to the time that it was given. It provides: -

“(2) Subject as aforesaid, a person shall be guilty of an offence if-

(a) in the course of any business of his, he has given an indication to any consumers which, after it was given, has become misleading as mentioned in paragraph (1); and

(b) some or all of those consumers might reasonably be expected to rely on the indication at a time after it has become misleading; and

(c) he fails to take all such steps as are reasonable to prevent those consumers from relying on the indication.”

[5] Article 13 (6) (c) defines consumer in relation to accommodation, as follows: -

“(6) In this Part –

‘consumer’ –

...

(c) in relation to any accommodation, means any person who might wish to occupy the accommodation otherwise than for the purposes of any business of his;”

[6] Article 14 defines “misleading”, as follows: -

“Meaning of “misleading”

14. – (1) For the purposes of Article 13 an indication given to any consumers is misleading as to a price if what is conveyed by the indication, or what those consumers might reasonably be expected to infer from the indication or any omission from it, includes any of the following, that is to say –

(a) that the price is less than in fact it is;

(b) that the applicability of the price does not depend on facts or circumstances on which its applicability does in fact depend;

(c) that the price covers matters in respect of which an additional charge is in fact made;

(d) that a person who in fact has no such expectation—

(i) expects the price to be increased or reduced (whether or not at a particular time or by a particular amount); or

(ii) expects the price, or the price as increased or reduced, to be maintained (whether or not for a particular period);

or

(e) that the facts or circumstances by reference to which the consumers might reasonably be expected to judge the validity of any relevant comparison made or implied by the indication are not what in fact they are”.

[7] Article 30 deals with a defence to a charge under article 13 (1) known as ‘due diligence’. It provides: -

“Defence of due diligence

30. – (1) Subject to paragraphs (2) to (4), in proceedings against any person for an offence under Article 13(1) it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.

(2) Where in any proceedings against any person for such an offence the defence provided by paragraph (1) involves an allegation that the commission of the offence was due—

(a) to the act or default of another; or

(b) to reliance on information given by another, that person shall not, without the leave of the court, be entitled to rely on the defence unless, not less than seven clear days before the hearing of the proceedings, he has served a notice under paragraph (3) on the person bringing the proceedings.

(3) A notice under this paragraph shall give such information identifying or assisting in the identification of the person who committed the act or default or gave the information as is in the possession of the person serving the notice at the time he serves it.

(4) It is hereby declared that a person shall not be entitled to rely on the defence provided by paragraph (1) by reason of his reliance on information supplied by another, unless he shows that it was reasonable in all the circumstances for him to have relied on the information, having regard in particular –

(a) to the steps which he took, and those which might reasonably have been taken, for the purpose of verifying the information; and
(b) to whether he had any reason to disbelieve the information”.

The magistrate's decision

[8] The magistrate set out his conclusions in paragraph 6 of the case stated. He stated that the protection afforded by Part 3 of the Order (which includes article 13) was only available to consumers and Mr Patterson was not a consumer for the purposes of article 13 (6) (c) since he did not intend to occupy the apartment.

[9] The magistrate found that there was no evidence that any other person who could meet the definition of “consumer” was misled as to the price or had a reasonable expectation to infer from the indication that the price was less than in fact it turned out to be. Since the legislation required that there must be a consumer or consumers who alleged that he or they had been misled, one of the necessary constituent elements of the offence under article 13 (1) of the 1987 Order had not been established. On that basis the magistrate dismissed the charge.

[10] Although the charge was dismissed on the basis that it had not been proved that Mr Patterson was a consumer and that it had not been shown that any other person who could be so described had been misled, the magistrate proceeded to consider the other issues that had been raised. He found that the defendant had taken all proper steps to obtain professional advice and had acted in accordance with that advice before placing the advertisements. He concluded therefore that the defendant had taken all reasonable steps and exercised due diligence to avoid committing an offence under the 1987 Order and that it was entitled to be acquitted under article 30 (1). The magistrate held that it was not necessary for the defendant to have served a notice under article 30 (2) and (3) of the Order.

[11] Finally, the magistrate decided that the wording of the advertisement did not amount to an indication that all the apartments were available for purchase at £79,950. The wording of the advertisement was, he said, "particularly non-definitive" as to the price at which one could buy or as to whether apartments would be released for sale at the price stated in the advertisement at all.

The questions posed in the case stated

[12] The magistrate posed the following questions for the opinion of this court: -

“1. Was I correct in law in deciding that it was necessary for the prosecution to establish that a consumer, as defined in article 13(6)(c) of the Consumer Protection (Northern Ireland) Order 1987 had been misled by the advertisement?

2. Was I correct in law in deciding that the advertisement was not misleading, notwithstanding that not all the apartments were available to purchase at the price of £79 950?

3. Was there sufficient evidence in law for the defendant to discharge the burden of establishing the “due diligence” defence provided for in article 30?

4. Before relying upon the defence set out at article 30(1) was it necessary for the defendant to give notice to the prosecution under article 30(3)?”

Is it necessary to establish that a particular consumer has been misled?

[13] In *MFI Furniture Centre Ltd v Hibbert* [1995] 160 JP 178 the appellant had been convicted of two offences contrary to section 20 (1) of the Consumer Protection Act 1987 (which is in identical terms to article 13 (1) of the Order). The prosecution related to the advertising for sale of furniture in the appellants' store. Price tags on the furniture indicated that the goods had previously been on sale for a higher price. In fact they had not been on sale at that store for that price during twenty-eight consecutive days in the previous six months. The appellants claimed that there was no evidence that any consumer had been misled by the price tickets since the discovery had been made by a trading standards officer. In the Divisional Court, Balcombe LJ rejected that submission in the following passage: -

“In my judgment the references to, and definition of, consumers contained in section 20 were clearly intended to limit the offence to those cases where the misleading indication was, in the circumstances in which it was made, intended to affect the actions of a person who might wish to be supplied with the goods for his own private use or consumption ... I find nothing in sections 20 or 21 which requires the prosecutor to prove that a particular misleading indication of price has been given to a particular person who might wish to be supplied with the goods for his own private use or consumption ... Indeed if in every case the prosecution had to lead evidence by an individual or individuals showing that those individuals might wish to be supplied with the goods, as well as establishing that the indication as to the price of the goods was misleading, it might well deprive the section of much of its effect. ... I am not prepared to attribute to Parliament an intention so to confine the ambit of the section which, as I have already said, is not justified by the actual language used.”

[14] Mr Lyttle QC, who appeared with Mr Ronan Lavery for the respondent, was not disposed to dispute the reasoning contained in this passage and he was wise to accept its correctness. We can find nothing in the language of article 13 that requires that an individual consumer must be identified who can be shown to have been in fact misled. An advertisement can be intrinsically misleading and it appears to us to be abundantly clear that the intention of the legislature was that such advertisements should be subject to article 13. As Balcombe LJ observed, if it was necessary to establish that a particular consumer had in fact been misled, this would make substantial

inroads in the efficacy of the provision. We therefore answer the first question posed in the case stated, "No".

Was the indication misleading?

[15] For the appellant Mr Valentine claimed that it had been established that the offer for sale of the only two apartments at £79,950 had occurred at or about the time of the advertisement of 9 September 2004 and that these apartments had been offered only to the preferred bidders. It was the respondent's policy to offer for sale on a preferential basis houses and apartments in its various developments to its employees and others associated with its firm. On this occasion the advertisement did not disclose that the release would be subject to the prior offer of apartments to the preferred bidders or that they would be the only persons to have the opportunity to purchase at the advertised price. The appellant contended, therefore, that the offence was committed at the time of the publication of the advertisement when this intention to make a prior offer to the preferred bidders was not disclosed.

[16] Mr Lyttle's riposte to this claim was that the magistrate had not found that, at the time of the advertisements, the respondent intended to offer the apartments at the advertised price only to the preferred bidders. The decision to adjust the price had been taken after it was discovered that there was much greater than anticipated interest in the apartments. That discovery had occurred after the advertisements had been placed. There was therefore no intention to mislead at the time that the advertisements appeared and indeed no misstatement had been then made because it was the respondent's intention at that time to offer the apartments for sale to the general public at the advertised price. Mr Lyttle accepted that an argument arose as to whether, in those circumstances, an offence under article 13 (2) had been committed but he pointed out that, although this was mooted in the course of the hearing before the magistrate, the appellant had elected not to seek to prefer such a charge.

[17] By way of alternative to his primary submission, Mr Lyttle argued that the apartments were not 'available' as required by article 13 (1) at the time of the publication of the advertisement because the proposed sales release was not to occur until late September 2004.

[18] We shall deal first with the argument that the apartments were not available at the time of the advertisement. Although article 14 provides a definition of 'misleading' for the purposes of the Order, the meaning of 'available' is not specified. It must therefore be given its ordinary and natural meaning. It is not to be qualified by any requirement of immediacy in terms

of the instantaneous availability of the goods, services, accommodation or facilities offered. In the present case the advertisement was intended to provoke immediate interest in the sale of the apartments. It provided a mechanism for consumers to register their interest in anticipation of a sales release within a matter of weeks. The opportunity to register their interest was available to members of the public without delay. We consider, therefore, that the apartments were available at the time of the advertisement, as that term should be understood for the purposes of article 13 (1). It appears that the magistrate proceeded on that basis and in our view he was right to do so.

[19] To come within the definition of 'misleading' in article 14 (1) (b) (which is the relevant provision in this instance) it must be shown that what was conveyed by the advertisement or what consumers might reasonably be expected to infer from it was that the applicability of the advertised price did not depend on facts or circumstances on which its applicability in fact depended. In other words, it had to be established that consumers were unaware of conditions known to the respondent that would affect the price.

[20] In the present case it is clear that the fact that apartments were to be offered first to preferred bidders was not disclosed to consumers. At the time that the advertisements were placed, however, there is no evidence that the respondent intended that that circumstance would affect the price at which apartments would ultimately become available to the public. On the contrary, at that time the respondent, relying on the advice of its estate agent, assumed that it would sell the apartments to members of the public at the advertised price. Unanticipated interest in the purchase of the apartments prompted the increase in price. There is no evidence that the respondent believed that the price of the apartments would rise as a result of the response of preferred bidders to the sale. While, therefore, the advertisements may have (in the words of article 13 (2)) become misleading, at the time of their publication there is no evidence that they were so.

[21] We consider, therefore, that the conclusion reached by the magistrate that the advertisement was not misleading was open to him and, on the evidence presented, inevitable. The correctness of this conclusion is not affected by the fact that not all of the apartments were available to be purchased at £79,950. We answer the second question "Yes".

Conclusions

[22] In view of our conclusion on the second question, the questions relating to due diligence under article 30 of the Order do not require to be answered. It would be not be appropriate to deal with these on an academic basis. The appeal is dismissed.