

Re: SHELL U.K. OIL
GAME CONCEPT PROPOSAL

Q.5

A D V I C E

1. I am asked to advise as to the above-named trade promotion scheme, full details of which are contained in a brochure dated 3rd June 1981 provided by Don Marketing, the questions upon which my Advice is sought being set out at pages 7 and 8 of the brochure. The scheme uses the familiar device of a game 'piece' or 'ticket' bearing covered panels which the recipient scrapes off to reveal symbols certain combinations of which will entitle him to a prize. In this instance, the top half of the ticket will contain monetary values in the concealed panels, and, if three match, the recipient will gain a prize equivalent to the value shown, while the bottom half of the ticket contains, also concealed, two half imitation currency notes which, if they match, will also entitle the recipient to a prize equivalent to the value shown but which, if they do not immediately match, can be retained in the hope of obtaining a matching

left or right hand piece at a subsequent time. It is proposed that the tickets will be given away free to those calling at the garages involved in the promotion without any requirement to make a purchase in order to obtain one.

2. The questions set out at pages 7 and 8 of the brochure are more conveniently answered in a slightly different order and so I shall deal, firstly, in this paragraph, with questions 1, 3, 5, and 6.

The scheme is, obviously, a distribution of prizes by chance and thus, in the pure sense of the word, a lottery. However, the House of Lords has held, in Imperial Tobacco Limited v. A.G. [1980] 2 WLR 466 that to come within the legislation on lotteries (presently the Lotteries and Amusements Act 1976) the scheme must be one in which, in one way or another, the participant is required to 'pay for his chance': "What is essential is that there is a distribution of prizes by lot or chance and that the chances should be secured by some payment or contribution by those who take part" - Viscount Dilhorne at page 473; "... a scheme will be a lottery if the prizes are distributed by chance and if persons are induced to make a money payment or to give other valuable consideration in order to obtain a chance of winning a prize" - Lord Fraser at page 480; "... The customer or participant

must give some form of payment or consideration for the chance. The word 'contribution' is sometimes used. That is equally correct if used as a synonym for payment"- Lord Lane at page 482. There is to be no requirement for payment of any kind in return for the ticket in the proposed scheme, whether by way of purchase or otherwise and it is not, therefore, in my view an unlawful lottery.

However, the question is specifically raised whether the fact that a motorist has to visit a Shell site, perhaps even going out of his way to do so, in order to obtain a ticket might constitute "consideration" for it, even though it is given to him perfectly freely. I do not think so. It is a little unfortunate that the House of Lords used the expression, as it were, plain and unvarnished because, although "consideration" is a well known term of art in the English Law of Contract it is a concept of considerable complexity about certain aspects of which there is still considerable debate. It can consist, in contract, merely in some detriment suffered by the one party or some benefit to the other and it could be argued that, say, a requirement to go to a particular place in order to receive money or some other thing might result in the giving or consideration by the proposed recipient if that requirement is complied with. However, in the light of the historical reasons for the control of lotteries, and the words actually used by their Lordships in Imperial Tobacco

I am sure
it was not/intended by the House of Lords that the
doctrine of consideration should be applied to its
widest limits: I think that what was meant to be
indicated by the expression was something given or done
by the participant which was also of really tangible
benefit to the promoter of the lottery or, perhaps,
at his direction to another, not merely some action
or effort on the part of the participant. It is
noticeable that in the Imperial Tobacco case Viscount
Dilhorne, referring to previous cases (but without
actually deciding the point himself) said "I suspect
that Lord Parker and Lord Widgery did not refer only
to payment because in their view it would suffice to
constitute an unlawful lottery if there was any
consideration given to secure the chance"; Lord
Fraser, who did decide the point, spoke of participants
being "induced to make a money payment or to give
other valuable consideration" and Lord Lane said they
"must give some form of payment or consideration".
Where one gives another receives and the clear implication
is that the lottery organiser or promoter will 'receive'
what the participant is required to 'give': the
mere fact that, in order to participate, the participant
must go to a particular place or, say, post a letter,
does not in my opinion amount to the sort of 'consideration
in return for the chance' which the House of Lords had
in mind. Additionally, I must say that I regard it as
highly unlikely that anybody would take the point -

a visit to a filling station does not look to the ordinary person as being 'consideration' for anything in any everyday sense of that word, it would require knowledge of one of the more arcane reaches of the subject and it is, perhaps, significant that it was never raised in the recent cases where it might have been raised such as Whitbread v. Bell [1970] 2 QB 547, where participants had to go to particular public houses, or Reader's Digest Association Limited v. Willims [1976] 1 WLR 1109 where they had to post a letter (which might or might not contain an order for goods) or in Imperial Tobacco where they had to go to cigarette retail outlets.

It is also significant, just in case it might be suggested that the fact that a participant has to visit a filling station does result in a benefit to the promoter, because he might buy the promoter's products, that, in the first of these cases, and dealing with an argument based on a case (Willis v. Young & Stenbridge [1907] 1 K.B. 448 - now overruled), where a free lottery was held unlawful because participants in general would buy the newspaper in connection with which it was conducted, even though they did not have to, Lord Parker C.J. said at page 556: "Here, if any further beer was bought as a result of the promotion of this scheme - and there was no evidence as to this - that would merely be paying for a drink in order to drink it, and in no way concerned with the alleged lottery". That must,

in my view, apply equally to the scheme under consideration here.

I confirm that the problem which used to be caused by the concept of participants vying with each other for the, obviously scarcer, prize-winning ticket has been eliminated by the House of Lords. It will be remembered that in Whitbread v. Bell (above) it was held that as the participants in what was found to be a free distribution of chances would be "in competition" with each other in order to secure the, obviously rare, tickets which qualified for a prize the scheme, although not a lottery, was 'a competition' for the purposes of what is now section 14 of the Lotteries & Amusements Act 1976 and, being run in connection with a trade or business, unlawful. That approach which, as I have advised in the past was, in my view, wrong, has now finally been disapproved of by the House of Lords in Imperial Tobacco (and, also, it is fair to say by Browne L.J. in the Court of Appeal whose judgment on that point was upheld by the House of Lords). The House distinguished between the two meanings of the word 'competition', depending upon whether it is used with a definite or indefinite article or not. Lord Lane (with whom two of the other Law Lords specifically agreed) put it in this way at page 485:

"There are two meanings. The first is the passive 'competition' between, for example, 50 people who enter a raffle when there is only one prize. In one sense of the word each of the 50 is competing with the other 49 for the prize. The second is the active exercise of skill, or strength or prowess of some sort, as striving to do better than other contestants in the hope of excelling. That is the sense in which I believe the word 'competition' is used in the Act of 1976".

I can, therefore, advise that the fact that in the proposed scheme participants are 'in competition' with each other for the scarcer 'prize' tickets does not mean that it is a competition within the meaning of section 14 of the Act of 1976.

Finally, on this aspect of the scheme, the introduction of an additional free prize draw or even a number of additional free prize draws would not affect its legality. The scheme is, itself, as proposed, a free prize draw and, thus, lawful and that is not changed by whether it consists of one or a number of such draws.

3. There is no reason, in so far as the legality or otherwise of the scheme is concerned, why Shell should not be able to recover part of the total cost of the promotion from participating dealers. The only thing which could cause problems would be if the dealers, themselves, could participate. In such circumstances it might be argued that although the scheme was a lawful free lottery at customer level, as between Shell and the dealers, because the dealers were making a payment to Shell, that was a payment, inter alia, 'in return for a chance' and, at that level, the scheme was unlawful. This can, however, be quite easily dealt with by excluding dealers and I note that there is contained in the draft rules at pages 9 and 10 a rule (rule 6) to achieve this. I would, however, suggest a slight alteration in the wording as follows:

'Proprietors, directors and employees (and their immediate families) of any business or company associated with this promotion may not participate'.

4. There is no reason why distribution of the tickets should not be restricted to particular categories of persons such as "motorists" or "drivers": such restriction does not in any way alter the nature of the scheme itself which, as proposed, is a free (and therefore lawful) lottery.

1 Essex Court,
Temple, EC4.

17th June 1981

A handwritten signature in dark ink, possibly reading 'L. P. ...', is written in the bottom right corner. A hand-drawn arrow points from the signature towards the word 'free' in the paragraph above.