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Accountancy Update

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"It's easier to sleep with a Chartered Accountant"

Oliver Bray, head of RPC's branding team, considers some marketing pitfalls which may trap the unwary and provides a round-up of some of the dangers arising from recent legislation

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"*It's easier to sleep with a Chartered Accountant*". Advertising puffery or (dare we say it) a claim capable of objective substantiation? Harmless puffery of course, and no doubt the Institute of Chartered Accountants in England and Wales (ICAEW) left nothing to chance by running this strapline past their lawyers before the launch of their first ever marketing campaign in 1995. Or did they? While there was nothing wrong with the ICAEW's campaign, it highlights the dangers facing an accountancy firm (indeed any firm) embarking on a new marketing campaign or promotional activity. For what may appear to be a bit of light-hearted creativity may end up costing a firm dearly in terms of reputational damage, if not client defections.

Cue the example of the unfortunate firm (not RPC!) who rashly decided to publish a long list (by individual name) of its most eminent clients/target clients within an advert bearing the header "*If you'd like your name kept out of the legal pages, take a note of ours*." The implication that the individuals were personally involved in litigation did not sit well with said clients who lodged, and succeeded in, a complaint to the ASA. Worse still, the gaff led a high street bank to utter the chilling words: "*We were a client. We are no longer*."
Summarising all the pitfalls of advertising/marketing law into a single article is impossible. But here are a few tips to bear in mind, plus a round up of some of the (new) dangers brought in by recent legislation.

The Committee of Advertising Practice/Advertising Standards Authority

The Committee of Advertising Practice (CAP) administers the British Code of Advertising, Marketing and Sales Promotion (the CAP Code), while the Advertising Standards Authority (ASA) adjudicates on breaches. Given that accountancy firms (generally) focus on print advertising, the CAP Code is likely to be your most immediate point of reference. Although the self-regulatory regime does not have power to fine, it does have the power to request a change to adverts/marketing material, with the ultimate sanction of referring persistent offenders to the OFT - as has recently happened in the lively spat between Ryanair and the ASA over Ryanair's bold pricing campaigns and its punchy press ads. Check out www.cap.org.uk for the CAP Code/guidance notes and www.asa.org.uk for ASA adjudications.

The ICAEW Code of Ethics

The accountancy profession has its own set of marketing guidelines contained within the ICAEW Code. S250 broadly reflects key themes in the CAP Code, but the emphasis is clearly on avoiding bringing the profession into disrepute. The ICAEW Code highlights unclear or subjective claims as to size or quality as problem areas (eg

claims that a firm is the 'largest' or the 'best').

Data protection: the direct marketing angle

Direct mail campaigns are a frequent source of complaint. Double-checking marketing lists (in particular consents obtained) is a must. If a list has been bought in, then ensure that appropriate contractual protections are in place with the seller. Even then, still sample test how the list has been compiled and remember to run it past the preference services.

ING Direct got caught out lately. It sent out a newsletter to its client database, which contained details on new mortgage, insurance and ISA products. A recipient who had opted out of receiving marketing material from ING complained to the ASA that the newsletter was in fact a marketing communication on account of those product references, and the ASA upheld the complaint. This case drives home the point that all marketing activity needs robust checking and is a reminder that it is not just the Information Commissioner who adjudicates on data breaches.

Third party intellectual property rights

Marketing is, by its nature, a creative process and the danger of infringing third party IP rights is high. Claims for copyright, trade mark or design right infringement or for passing off give rise to the greatest number of disputes, but remember also the defamation threat. *Eddie Irvine v TalkSport* is a classic example of over-energetic marketing landing a corporation (here the radio station) in a messy passing-off action. The claim related to an image of Mr Irvine, manipulated so that he was holding a TalkSport radio rather than a walkie-talkie. The Court of Appeal agreed with him that "*he would not get out of bed for less than £25,000*" to engage in this type of endorsement and awarded him that sum, plus (substantial) legal costs.

Turning now to some recent changes in legislation which add further to the marketing minefield…

The Unfair Commercial Practice Directive

The Consumer Protection from Unfair Trading Regulations (CPRs) and the Business Protection from Misleading Marketing Regulations (BPRs) came into force on 26 May 2008, in line with the EU's new Unfair Commercial Practices Directive. The CPRs introduce, for the first time, a general duty on all businesses not to trade unfairly with consumers. Breaches result (for the most part) in the commission of criminal offences.

...all marketing activity needs robust checking...

Pay particular attention to the Banned List, which lists 31 banned practices deemed unfair in any circumstances, but also the new prohibitions for misleading actions/omissions, aggressive practices etc. In short, the CPRs are one of the most significant changes to the regulatory landscape in recent decades and provides the regulators (OFT and Trading Standards) with substantial new powers to stop almost any unfair trading activities. A separate briefing note is available on request from the author.

Gambling Act 2005: impact on prize draws and competitions

Prize draws and competitions have always been a particularly tricky area of the law, catching out many who stray inadvertently into the prohibited zone of running an illegal lottery. The impact of the new Act is still to be fully felt in marketing circles, but be aware of the new test for skill-based promotions (eg skill levels must be such as to prevent a significant proportion of potential entrants from entering/claiming a prize) and the clarification over what actually constitutes a 'free' prize draw (eg a draw will only be deemed free if there is no additional payment over the normal cost of entry).

The London Olympic Games and Paralympic Games Act 2006

Given the breadth of the new London Olympic Association Right (LOAR), it will be surprising if there are not a number of high profile casualties in the build up to the London Olympic Games. In addition to existing Olympic protection regulations, the LOAR grants the London Organising Committee of the Olympic Games wide powers to prevent any form of unauthorised association in the course of trade between a business and the London Olympics. "Any" association means just that - so any word, image or sound is caught. There is even a list of 'banned expressions' (eg the use of combinations of the words "Games", "2012", "London", "summer" etc could amount to an offence). Hailed as "*the most draconian intellectual property law ever enacted*", this is definitely one advertising trap to avoid.

Conclusion

Racy advertising is not the natural path for an accountancy firm to take, even if the ICAEW's 1995 campaign might suggest otherwise. Even so, case law and adjudications clearly show that even the most innocuous-looking marketing can land a firm in hot water. The best advice is to simply remember that very fact, and to build legal consultation as early as possible into the creative process such that the firm's name is kept in the spotlight for all the right (and not all the wrong) reasons.

Top tips

- Carry out trade mark searches on new names/ slogans
- Beware using people's images/names without consent
- Check for third party intellectual property (eg copyright licences)
- Remember foreign regulation and territorial IP rights if advertising may be used abroad
- Check your contract with your advertising agency to clarify responsibilities for legal sign-off
- Check your databases - are you honouring your clients' data consents?

Casenotes

Where an individual's fraud activity is attributed to the company, the company cannot bring a claim based on the fraud, so the maxim ex turpi causa non oritur actio *will apply*[1]

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Stone & Rolls (S&R) commenced a claim against its auditors Moore Stephens (MS). The essence of the claim was that MS failed to detect the dishonest behaviour of Mr Stojevic who was at all material times, the sole directing mind and will of S&R. As a result of the frauds, successful claims were brought against S&R by certain banks. S&R was put into liquidation by the banks and the liquidator sought a recovery against MS.

MS applied to strike out S&R's claim on the basis that S&R's claim was barred on the *ex turpi causa non oritur actio* maxim; that a claimant cannot establish a cause of action based on its own illegal acts. The judge declined to strike out the claim at first instance.

MS appealed. There was no question as to the facts, Mr Stojevic was fraudulent and the directing mind and will of S&R. The appeal, therefore, concerned the following questions of law:

(i) whether the *ex turpi causa* maxim prevented S&R from suing for recovery in respect of its losses caused by an individual who was the directing mind and will of S&R (or more specifically, was S&R a victim of the fraud or should Mr Stojevic's knowledge of the fraud be attributed to S&R) and,

(ii) whether the maxim provided a defence at all when detection of the fraud was the "very thing" that MS was engaged to do.

In respect of the first question, the Court of Appeal considered the Hampshire Land principle; that a company will not have attributed to it the knowledge of a fraud which is being practised on itself. The Court of Appeal decided that the Hampshire Land principle did not apply because S&R was not a victim - it was itself the fraudster. Therefore the maxim applied.

In respect of the second question, the Court of Appeal found that there was no previous judicial support for the argument that if the "very thing" from which a defendant owes a duty to save the claimant from, is, or includes, the commission of a criminal offence, the ex turpi causa principle will be overridden. There was no discretion for the court in the matter and the claim failed on the ex turpi causa maxim.

[1] *Moore Stephens (A firm) v Stone & Rolls Ltd (in liquidation)* [2008] EWCA Civ 644

Court refuses to order disclosure of defendant's insurance position

Despite the trend towards open litigation, Steel J found a defendant's insurance position did not support or adversely affect any party's case and therefore could not order its disclosure.[2]

The claim arose out of the Buncefield oil storage depot explosion. An application was made by Total for information and disclosure in respect of a third party's (TAV) insurance position. TAV were the designers, manufacturers or suppliers of the switch which, Total alleged, caused the explosion. Total advanced their application on the basis that:

(i) the material was relevant to the issues and/or,
(ii) the material was necessary from the perspective of efficient case management.

Steel J found that TAV's insurance position was not disclosable under CPR Part 31 as it neither supported or adversely affect any party's case, was not relevant to the issues, nor constituted documents which may lead to a train of enquiry enabling a party to advance his case or damage his opponents. Further, CPR 18 did not apply because disclosure of TAV's insurance position would not clarify any matter which was in dispute nor impact on a parties' ability to prepare its case. Accordingly, Steel J found that the court had no jurisdiction to require disclosure of TAV's insurance position.

As to the efficient case management point, whilst Steel J acknowledged that in modern litigation the trend is towards a "*cards on the table*" approach, to allow the disclosure of TAV's insurance position would require a change in law and practice.

Steel J acknowledged that his conclusion was contrary to another first instance case, *Harcourt v Griffin and Ors [2007]*. Insurers had been exposed to speculative "*deep pocket*" litigation as a result of the Harcourt decision and Insurers will take comfort from this contrary decision in Total.

[2] *West London Pipeline and Storage Ltd and Anor v Total UK Ltd and Ors* [2008] EWHC 1296 (Comm)

Stop Press

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Financial Reporting Council (FRC) Papers on Choice in the Audit Market

The FRC has published a discussion paper on the possible effects of changes to audit firm ownership rules and a consultation paper on the use of audit firms from more than one network.

The discussion paper addresses:

- ease of entry and the potential for mid-sized firms to gain market share
- the potential impact of the introduction of outside capital to audit firms on audit quality
- the impact of the introduction of outside capital on the supply of auditors with appropriate skills and personal qualities
- the possible decline in audit quality arising from conflicts of interest associated with a firm's ownership.

The consultation paper sets out draft guidance on circumstances that could influence a group's decision to use an audit network and lists factors audit committees might consider in assessing group audit arrangements.

The papers also provide an update on the Market Participant Group's (MPG) 15 recommendations including:

- the establishment of a working group to develop a code of best practice governance for firms that audit public interest entities
- the consultation on proposed changes to the Guidance for Audit Committees including new guidance that audit committees should explain to shareholders recommendations for the appointment and removal of external auditors
- new regulations and guidance to allow incoming auditors access to relevant information held by the outgoing auditor
- revised corporate governance policy and voting guidelines issued by the National Association of Pension Funds covering auditor selection
- the establishment of a working group to develop guidance on voluntary disclosure of the financial results of work on statutory audits.

EU Recommendation on Limitation of Liability

The European Commission has issued a Recommendation concerning the limitation of auditors' liability. It aims to encourage the growth of alternative audit firms in a competitive market and is a response to the increase in litigation against auditors and absence of sufficient insurance cover. It leaves individual Member States to decide on the appropriate method for limiting liability, but introduces a set of key principles to ensure that any limitation is fair to all interested parties. These include the disapplication of any limitation on liability where there has been intentional misconduct on the part of the auditor, the inclusion of third parties in the limitation and a right to fair compensation for 'damaged' parties.

FRC Guidance on Auditor Liability Limitation Agreements

The FRC has published guidance aimed primarily at companies and their directors on the use of auditor liability limitation agreements. The guidance explains what is and is not permitted under the Companies Act 2006, what should be covered in any agreement and the process by which companies can obtain shareholder approval to the limitation of auditor liability. It also contains sample wording for agreements and the necessary company resolutions and notices. In particular, it considers the requirement that agreements must be "fair and reasonable", a concept the courts will ultimately be required to define.

Update to Combined Code and FSA Policy Statement on Implementation of the EC 8th Company Law Directive

The FRC updated the Combined Code at the end of June 2008 to remove the restriction on an individual chairing more than one FTSE 100 company and to permit the chairman of a listed company below the FTSE 350 to be a member of but not chair of the audit committee provided he or she was considered independent on appointment.

The publication of the revised Combined Code coincided with that of new FSA Part 6 Rules implementing the EC 8th Company Law Directive which imposes new requirements relating to corporate governance statements and audit committees. In particular, listed firms must have an audit committee and include a corporate governance statement in their annual report.

The revised Code and new Rules will apply to accounting periods beginning on or after 29 June 2008.

RPC news

We are pleased to announce that Andrew Williamson and Sabina Dale are to join the Professional Risks group on completion of their training contracts this September. Both Sabina and Andrew have gained experience in the Accountants and Financial Services team and Andrew has spent six months in-house with BDO Stoy Hayward's Risk Management Unit.

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Accountancy Update is a summary of recent developments. It should not be regarded as a substitute for advice on how to act in any particular case. For further information please contact one of the editors.
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