[2014] UKUT 0398 (TCC)
Appeal number FTC/69/2013

VAT – Exemption in Group 4 of Schedule 5 to Finance Act 1972 – Playing games of chance – Whether "Spot the Ball" competition is a "game" – Whether entrants are "playing" a game"
Appeal Allowed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

- and -

1. **IFX INVESTMENT COMPANY LIMITED**
2. **IFX COMPETITIONS LIMITED**
3. **TOWN AND COUNTY FACTORS LIMITED**
4. **VERNONS COMPETITION COMPANY**
5. **SPORTECH PLC**
6. **THE SPOTTING THE BALL PARTNERSHIP**
7. **THE FOOTBALL POOLS LIMITED**
8. **FOOTBALL POOLS GAMES LIMITED**
9. **THE LITTLEWOODS/ZETTERS PARTNERSHIP**
10. **FOOTBALL POOLS COMPETITION COMPANY LIMITED**

Respondents

TRIBUNAL: Mr Justice Norris

Sitting in public at The Rolls Building, Fetter Lane, EC4A 1NL on 29, 30 April 2014 & 2 May 2014

Mr Andrew Macnab, instructed by the General Counsel and Solicitor to HMRC for the Appellants

Mr Jonathan Peacock QC, instructed by Deloitte LLP, for the Respondents

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DECISION

5 1. From 1978 operators who ran "Spot the Ball" activities were regulated and taxed as if they ran competitions for which entrants paid a fee and in which there were winning entrants who were awarded prizes. In March 2009 the operators said that they were in fact offering "games of chance" in which players put up money and were sometimes lucky enough to win. The distinction is important for the purposes of VAT.

10 2. Gambling is not an activity that readily lends itself to the application of VAT. So Article 13 B(f) of the Sixth Directive (77/388) provided for an exemption from VAT for:

> "Betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each member state".

15 In England and Wales the exemption of "betting, lotteries and other forms of gambling" from VAT was effected in Schedule 5 to the Finance Act 1972 where (under Group 4) there was made exempt:

> "The provision of any facilities for the placing of bets or the playing of any games of chance [and] the granting of a right to
> 20 take part in a lottery."

I will call this "the Exemption".

3. The operators of "Spot the Ball" made "voluntary disclosures" relating (a) to the period 23 April 1979 to 30 April 1997 and (b) to the period 1 May 1997 to 31 December 2006 in which they sought the recovery of VAT paid during
25 those periods. On this appeal it is to be assumed that they were procedurally

entitled to make these voluntary disclosures. This repayment claim was rejected by HMRC. The operators appealed against that decision to the First Tier Tribunal ("FTT") (Judge Kevin Poole and Shahwar Sadeque) who, on 5 March 2013, decided as a preliminary issue that "Spot the Ball" was indeed a "game of chance".

4. The question for me on this appeal is whether the FTT made an error of law in reaching that conclusion: or to put the matter another way, whether the conclusion reached was open to the FTT on a proper understanding of the law.

5. As I approach that task I make two general points. First, I bear in mind the observations made by Jacob LJ in Proctor & Gamble v HMRC [2009] EWCA Civ 407 at paragraph [7] in these terms:-

> "… It is the tribunal which is the primary fact finder. It is also the primary maker of a value judgment based on those primary facts. Unless it has made a legal error in that in so doing (e.g. reached a perverse finding or failed to make a relevant finding or has misconstrued the statutory test) it is not for an appeal court to interfere".

Second, although the argument before the FTT and before me focussed on the meaning of the word "game" and the meaning of the word "chance", the real task is to construe the composite phrase "the playing of any games of chance" and to do so bearing in mind that its precise context was the implementation of an exemption granted for "betting, lotteries or other forms of gambling". That is important because, whilst there may be all sorts of uncertainties about the limits of the concept of "game" and the role of "chance" it may be quite clear that a particular activity is not "playing a game of chance".

6. It is common ground that the FTT's description of the "Spot the Ball" activity is accurate:-

> "[2] In all versions of STB, a photograph is taken of a football match. The football is removed from that photograph (along with much of the rest of the background). The doctored photograph (which therefore includes the players, some part of the original background and a great deal of white space) is published on a printed coupon. Participants paid to submit a coupon with a number of crosses placed on it by them, each of which usually represents an attempt to identify as accurately as they can the most logical location of the centre of the missing football.
>
> [3] In the "panel" version of STB, the participants' efforts are not compared with the actual position of the ball on the original photograph. Instead, there is a panel of football experts appointed by the promoter, comprised of former professional footballers and/or others involved in the administration of the game. After all the participants have submitted their coupons, the panel meets and decides where, in their opinion, is the most logical position for the centre of the missing ball. They do not see the original "un-doctored" photograph until after they have done so. All the participants' coupons which had been submitted are checked to see which of them include crosses closest to the position selected by the panel. Cash or other prizes are awarded to the participants who have placed their crosses closest to that position.
>
> [4] The reason for involving the panel was in order to structure the activity in a way which, it was believed, would avoid a particular part of the gaming regulatory legislation; it was not to do with VAT or other taxes".

7. The FTT identified the question for their decision in these terms (at paragraph [7]):-

> "The point of principle to be determined is whether this version of STB is a "game" and, if so, whether it is a game of chance or a game of skill; for this purpose a game of chance and skill combined (or game that involves both an element of chance and an element of skill) is treated as a game of chance".

The last part of that formulation requires some explanation.

8. Until 31 October 2006 the Exemption was to be found in Group 4 of Schedule 5 to the Finance Act 1972. The Notes to Group 4 explained that "game of chance" had the same meaning as in the Gaming Act 1968. That expression is not comprehensively defined in the 1968 Act: it said that save where the context otherwise required the words "game of chance" excluded some things and included others. Section 52(2) of the Gaming Act 1968 provided that (save insofar as the context otherwise required):-

> "…"game of chance" does not include any athletic game or sport, but, with that exception, and subject to subsection (6) of this section, includes a game of chance and skill combined and a pretended game of chance or of chance and skill combined…."

Section 52(6) of the Gaming Act 1968 provided:-

> "In determining for the purposes of this Act whether a game, which is played otherwise than against one or more players, is a game of chance and skill combined, the possibility of superlative skill eliminating the element of chance shall be disregarded".

9. From 1 November 2006 the Notes to Group 4 were amended to provide:-

> "…. "game of chance"… includes (i) a game that involves both an element of chance and an element of skill (ii) a game that involves an element of chance that can be eliminated by superlative skill (iii) a game that is presented as involving an element of chance"

and also

> "a person plays a game of chance if he participates in a game of chance (a) whether or not there are other participants in the game, and (b) whether or not a computer generates images and data taken to represent the actions of other participants in the game".

10. What is “a game” and what is “a game of chance” are very vexed questions which arise in a number of regulatory and fiscal contexts. A stray word here or there in this judgment may give rise to arguments about other activities conducted in very different circumstances from those that I must address in this appeal. I therefore propose to say only what is necessary to explain the ground of my decision about the applicability of the Exemption, for that is my central concern (though the reference in the Notes to Group 4 to the Gaming Act 1968 inevitably involves wider considerations).

11. These are the key facts found by FTT. A typical coupon for “Spot the Ball” would invite a participant to use “skill and judgment” to decide on the information contained in each picture the spot where the participant thought the centre of the ball was most likely to be, and to indicate that spot by making a cross. The rules made clear that the winner would be decided not by reference to the actual position of the ball, but by reference to the opinion of the panel of experts as to which entry was the most skilful.

12. The decision of the panel as to what was the most logical position for the ball was made by taking the competition picture and making pinhole in it to mark the place. This was then covered by a dot, and the centre of the dot was measured using a pre-printed grid by a device capable of fine adjustment with a small joystick (“the Final Mark Machine”). A hairline cross was marked by the operator at what he judged to be the exact centre of the panel’s chosen spot, and the machine generated precise coordinates.

13. At the peak of this activity 1.6 million coupons were submitted in the weekly competition, generating an annual revenue of £65 million. Originally these entries were assessed using a "sifting mask" (a sheet with a hole cut in it at the panel's chosen spot) to eliminate the most distant entries, an exercise that was repeated with successive reductions in the size of the hole. When a sufficiently small number of coupons had been identified each of them was then submitted to the Final Mark Machine which would calculate the deviation between the location selected by the panel and the centre of the participant's cross. The deviation would then be re-measured, and the coupons ranked in order of deviation. Subject to human error, the process was accurate to within one thousandth of an inch. The panel never strayed from the simple path of treating a "closer" cross as beating a more distant one.

14. After 2002 the "sifting" process was replaced by computer scanning and calculation. The digitisation of the coupon (to produce 31.5 million unique spots) might produce an error of as much as 3 pixels in relation to the centre point of the cross. The software would then determine "x" and "y" co-ordinates for the location of the centre point of the participant's cross, and then the system would calculate the distance between that location and the centre of the panel's cross. The top coupons would then be ranked. This method eliminated the possibility of human error, but at the cost of an overall reduction in accuracy.

15. The rules did not therefore tell an entrant how to go about marking the centre of the ball, beyond the invitation to use "skill and judgment". An entrant who

chose to select the spot by throwing a dart at the coupon and marking with a cross where the dart landed would submit an entry that was just as valid as that of an entrant who made the most minute scrutiny and, drawing upon years of experience as a player and spectator, conducted a painstaking analysis of the available information. Nor did the rules say anything about one entrant's relationship with any other: they simply dealt with how to become an entrant. The concern of the rules was with identifying when and how the panel should make its judgment and with how the process of selecting the closest entry was to be conducted.

16. The FTT addressed those facts by applying the following principles:-

   i. Case law did not provide a great deal of assistance (para.[117]):

   ii. The decisions in DPP v Regional Pool Promotions [1964] 2 QB 244 and Adcock v Wilson [1969] 2 AC 326 established little more than that some degree of active participation is inherent in the concept of a "game" (para. [79]);

   iii. Regional Pool Promotions (*supra*), Armstrong v DPP [1965] AC 1262 and Adcock (*supra*) were in any event decided at a time when s.52(6) of the Gaming Act 1968 was not in force, and that section specifically contemplates that a game may be played "otherwise than against one or more other players" (para. [111]);

iv. There was no necessity that an activity must involve more than one person in some kind of interaction before it can be "a game" (para. [114]);

v. According to observations in Oasis Technologies (UK) Ltd v HMRC [2010] UKFTT 292 (TC) at para. [65] the term "game" does not have a statutory definition, so it must be given its ordinary meaning, which is wide and is derived from its context (para.[116]);

vi. As a matter of objective fact "Spot the Ball" involves a significant element of chance such that skill would only take a participant so far in the sense recognised in R v Kelly [2008] EWCA Crim 137 (paras. [121] and [123]);

vii. In the language of News of the World v Friend [1973] 1 WLR 248 the reality of the competition is that the most that skill and judgment can do is to estimate the approximate position from which point chance almost entirely takes over (para.[124]).

17. The heart of the decision is in paragraph [117] which states:-

> "In the light of all the above, and adopting the approach of the First-tier Tribunal in Oasis, when considered in the context of section 52(1) Gaming Act 1968 or of Note (3) to Group 4, Schedule 9 Value Added Tax Act 1994, we consider it perfectly apt to refer to the activity of STB as a "game"…"

It is not easy to see how the necessity for a degree of active participation coupled with the fact that a game can be played otherwise than against one or

more other players leads to the conclusion that “Spot the Ball” falls within the ordinary wide meaning of the word “game”. But I recognise that it is sometimes difficult to articulate what seems to be obvious.

18. Even allowing that the question of whether an activity constitutes a game is
5 primarily one of fact, in my judgment the conclusion of the FTT was not one that was open to it on a proper understanding of the law. I think that the FTT’s view that the cases did not help and that they were simply left to apply words with a broad dictionary meaning to the facts as they found them led them to misapply the law.

10 19. As I have said, the true task is to construe the composite phrase “the playing of any games of chance”; and it must be remembered both that the phrase occurs in a provision that exempts from tax “betting, lotteries and other forms of gambling” and that the Notes refer to the use of the expression in an Act to do with “gaming”. The composite phrase is important because the concepts of
15 “play” “game” and “chance” interact with one another. The setting is important because of the vagueness of some of the concepts and the wide variety of circumstances in which the terms can be used. Whatever other meanings may attach to the phrase “the playing of any game” (on which, for the purposes of this judgement I will concentrate) the activity in view for the
20 purposes of the Exemption is the sort of thing one would encounter in “gaming”.

20. It is impossible to provide an all embracing definition of “game” against which one can measure “Spot the Ball”. But it is possible to identify some

essential elements. This my understanding of the concepts in play in relation to the question at issue, derived from the authorities and the dictionary.

21. A game is an activity which ordinarily is an end in itself, conducted under rules which provide a specific outcome such that it can be said that a player has won or lost (or, where there is more than one player, drawn). Part of the objective of a game is to "win": and the game itself represents some form of contest. In a commercial game (i.e. one that a participant pays to play) the rules will be set out or referred to in the governing contract. Otherwise they are to be found in the external rules to which a participant submits or (in games with more than one player) to which the parties agree to submit.

22. "Playing" a game involves (a) the player doing something which causes a change in existing circumstances and (b) the player thereafter interacting with the changed circumstance or responding to another player's interaction with the changed circumstance. Classically where a game involves more than one player (whether the other player is an individual competitor or an "institutional" participant, like a "bank" or the "house", or is a machine) it will involve move and counter-move: ready examples are chess and other board games, multiple-handed card games, noughts-and-crosses. Classically where the game is a solo one it involves move and response, or a succession of related moves. An example of the former is all forms of patience, where the act of turning over a card from the pack requires an assessment by the player of the displayed cards, possibly "playing" the exposed card, possibly rearranging others in consequence of that "play" and displaying new cards,

and then turning over another card from the pack and repeating the process. Examples of the latter are harder to bring to mind, but perhaps solo darts or solo golf where the "player" is playing himself to try and beat his own last highest score or to match par. Here the act which constitutes the "play" is
5 related to some prior act (such as the setting of a target) or some subsequent act (such as the aggregation of scores). Throwing a single dart at a board generally or a simply hitting a ball and then starting again or simply turning over a card to see what it is and then starting again would hardly constitute "a game" though it might qualify as pastime.

10 23. In ordinary language this is the way "a game of chance" is "played". In a typical "game of chance" (this is neither a definition nor a comprehensive description) (a) the rules provide for some event occurring after the start of the game randomly to influence its outcome to a significant degree (in the same way as a bet or a gamble turns on the occurrence of an uncertain event, being
15 what the Gaming Act 1968 called "the chances in the game"); and (b) the effect produced by the uncertain outcome of the random element is one of the purposes of the game. Classically in a game involving more than one "move" or "round" (whether the players are more than one or solo) the effect produced will be the deployment of skill in an attempt to overcome or limit the random
20 element (as the poker player assesses the odds and responds, perhaps in the light of the responses or anticipated responses of other players, or as the fruit machine player uses the "nudge" button). Classically in a game which might be thought to consist of only one "move" or "round" the point of the game will be the effect produced by the action, such as excitement or suspense awaiting

the outcome (as the drums on a fruit machine spin, or a roulette wheel turns after bets are placed, or as each player in turn throws the dice). A participant who did the physical act necessary to constitute a “move” or a “round” within the rules of the game (pull a lever, choose a number, turn over a card) but who had not earlier placed a bet or who then left the room and simply had no regard to the consequences and made no response to those consequences would not normally be thought of as “playing”. “Playing” involves some sort of engagement with other “players” (individual or institutional) or (if there are no other participants) with a machine or a pack of cards (or whatever other means or used to “play” the “game”) or some prior or subsequent action or “move” or “round” undertaken by the solo player.

24. This understanding of the nature of “the playing of any game” is grounded in the authorities.

25. The decision in Adcock v Wilson [1967] 2 QB 683 provides an insight into the nature of a game as commonly understood, Widgery J saying (at p.702):-

> “ I think that an ordinary man, when talking of playing a game, is talking of something which involves entertainment, he is talking of something that involves excitement and fun in the common pursuit by a number of competitors of a similar and known object, and it seems to me exceedingly difficult to produce those elements which the common man would ascribe to a game if you have the participants in separate places with no communication between them whilst the activity is going on, and thus no sort of opportunity of seeing how their competitors are progressing, and I would have thought none of the excitement and entertainment which any true game can provide”.

Those are words spoken in their time and were never intended to be comprehensive or to be treated as if they had been enacted. Games played with machines, or computer or video games may require the significance of the element of "common pursuit by a number of competitors of a similar and known object" to be re-assessed (though many such games do display that characteristic): but the elements of entertainment, excitement and fun remain, I think, the elements of a true game. But though such engagement and involvement are necessary, they are plainly not of themselves sufficient.

26. Earl of Ellesmere v Wallace [1929] 2 Ch 1 helps one work out what "the game" is, who are the players and what are the rules. It establishes (at p. 29) that in a game which entrants pay to enter one must identify the parties to any contract and then look at the contracts to understand the nature of the activity for which they provide "and not go outside them to alter or mitigate their terms or effect". By the contract in that case the Jockey Club bound itself to hold the race and to allow the defendant to run his horse under the conditions advertised against any other horse that might be raced. The Jockey Club was bound to pay the prize money to whichever horse won, and it was a matter of indifference to the Jockey Club which horse won. From the defendant's point of view he was participating in a Sweepstake at £5 (with £2 forfeit) and with £200 added money to the winner: but this addressed his relationship with other owners who entered horses, and not with the Jockey Club. The owners of the starting horses may in some sense have played together at the game of horse racing for money under the Rules of the Jockey Club. But the defendant's

contract was with the Jockey Club: and the Jockey Club was not playing the defendant at the game of horse racing (for money or otherwise).

27. DPP v Regional Pools Promotions [1964] 2QB 244 establishes that playing a game of chance involves some active participation. It is impossible for a player to play a game without doing something by way of some degree of skill or some physical act or by exercising some choice. In Rosenbaum v Burgoyne [1965] AC 430 the House of Lords held that in the context of s.17 of the Betting and Gaming Act 1960 the pulling of a lever would suffice to "play" a "game" on a gaming machine, though it is prudent to note that at p. 439 Lord Reid (with whom Lord Evershed and Lord Pearce agreed) observed that "gaming" was often used to denote gambling activities where there was no "game" in any ordinary sense and that within the Act "game" was used in an unusually wide sense. So not too great a structure can be built upon the single act of pulling a lever as of itself constituting "a game". The fact that by common usage a particular activity has come to be regarded as "gaming" and so involving a "game" does not mean that similar activities not commonly so regarded must henceforth be regarded as involving "a game" simply because they are similar.

28. Once again, a physical act is a necessary, but not a sufficient condition. This point was made in Armstrong v DPP [1965] AC 1263, a case concerning postal bingo. In the Divisional Court Lord Parker CJ held:-

> "It seems to me that one must look at the whole circumstances in any particular case to say whether some activity is not only a lottery but is also a game of chance. There is, I venture to think,

> no conclusive test of the matter;……I am quite satisfied in my own mind that while in the Regional Pool Promotions case it was sufficient to say that *some degree of active participation was necessary, yet even if there is some degree in the present case, it is certainly not sufficient to make the activity the playing of a game..* " (Emphasis supplied).

29. This conclusion was upheld in the House of Lords. The main ground for the decision was that a participant did nothing other than choose whether to enter: but the House observed

> "…the fact that there is no assembly of players, and that the alleged players are not in each other's presence, nor in communication with each other, may well have considerable weight in any case as evidence in favour of a more general argument that there is no playing of a game"

30. That is illustrated by the further appeal in Adcock v Wilson [1969] 2AC 326 in which the House of Lords considered "the National Golden Scoop Game". Five hundred bingo clubs affiliated themselves to the National Golden Scoop Game. A player in an affiliated club bought a ticket where half the stake money provided a stake in the house game in the club and half in the national game. The house game was then played in the 500 affiliated clubs in the normal way. The results of the house games were then reported to the national Golden Scoop and the Golden Scoop stake money was distributed as prizes having regard to the number of calls needed to win the individual club games. The House determined as follows:-

> "In 500 separate clubs a large number of people ...were variously taking part in separate games of bingo. Each person was playing a game but in no sense were they all playing the same game. It could not rationally be said that they were playing a game of bingo with each other. In some circumstances arrangements can be made so that people who are geographically separated from each other can play a game

> with each other. But nothing of the sort was arranged or was happening on the night in question. ..Nothing can be formulated or described which can be recognised as a game or as having the features and normal characteristic of a game. Nothing was taking place beyond the playing of the various separate bingo games. Those in one bingo club were not "players" in relation to those in other bingo clubs…. "

31. In applying those principles to the facts found it is necessary to dissociate "playing" "Spot the Ball" from the true game of football that provides its context. "Spot the Ball" is "played" by putting a cross where the centre of an object is deduced to be. The object happens to be a ball and the deductions are grounded in the rules of and knowledge about the game of football as known to the participant and the panel. But the "game" would be the same if it was "played" with a doctored photograph of the night sky, the object was a star such as Proxima Centauri, the deductions were grounded in the rules of astro-physics and the knowledge of astronomy, and the winner was the entrant the co-ordinates of whose cross were closest to where a panel of astronomers thought Proxima Centauri would be at the location of the photograph on that night. I will call this game "Spot the Star".

32. Who would be the "players" in "Spot the Star"? Who are the players and what are the rules are to be found in the coupon and in the published terms.

33. Although it was suggested that the "players" were the other 1.6 million people, I do not think the "players" can be other entrants who posted coupons. An entrant who pays the fee creates a contract between himself and the operator. He is not in a contractual relationship with any of the other entrants; he does not know that they exist and the rules do not provide for any relevant

relationship with them. Indeed, other entrants (or "players") are not essential. If only one coupon was submitted the rules of "Spot the Star" would still provide for a winner: the only entrant would inevitably be the closest. If there are others who post coupons then the rules of the "game" do not provide for
5 any interaction at all between those submitting them. In essence the "game" is "played" in solitary isolation. It consists of reviewing given data and using it to arrive at a solution. The data happens to be visual and not numerical or literary, but the activity involved in "Spot the Star" is essentially the same as that involved in solving a number puzzle or a crossword. Whether there are
10 other people, and what they are doing, does not matter and is not part of the "game". Each participant is making his own selection, and that selection will later be compared with another (benchmark) selection.

34. Nor do I think that a "player" of "Spot the Star" would be "playing" against the panel. The person who submits a coupon operates in one silo and the panel
15 of experts in another. When the "player" makes his "move" the panel has not even met and there is no "answer" in existence. When the panel does meet it does not know about the coupons that have been submitted and obviously does not take them into account. There is no relationship between putative players: simply two participants each making separate selections that will later be
20 compared.

35. Nor do I think that a "player" of "Spot the Star" would be "playing" against the operator. Like the Jockey Club in The Earl of Ellesmere's Case the operator binds itself to pay the prize money to the entrant if his cross is closest

to the final mark. If he is the only entrant he is bound to win. But if there is more than one entry it is a matter of indifference to the operator whether the winner is one entrant or another: the operator is bound to pay over the prize money to someone. In either event there is no element of contest between the "player" and the operator.

36. As it was put by Lord Morris in Adcock (*supra*) at 335C, nothing can be formulated that can be recognised as "a game" or as having the normal characteristics of "a game".

37. Further, I do not consider that the activity of the participant can properly be regarded as "playing". The actual activity is looking at a picture and then posting a coupon marked with an "x". Posting a coupon is merely entering upon the enterprise. Marking the "x" is the necessary physical activity. The rules say nothing about how that single act is to be done (though it was accepted by the House of Lords in Friend (*post*) that most participants would exercise general skill and judgment). A spot selected at random would form a valid entry. But the rules do say a lot about how the result of that single act is to be adjudged. This is the characteristic of a competition but not of a game. Classically the rules of a game will say a great deal about *how* it is played, particularly if the "game" consists of action by a solo "player". "Mark a cross on a photograph and post it" is not recognisably the rule of a game. Marking a cross is not "playing" any more than throwing a single dart anywhere on a dart board is "playing" darts. Nor does it become a "play" because after you have completed the throw someone tells you that the place to aim was "double 17".

As was said in Armstrong v DPP (*supra*) in the Divisional Court, the necessary physical action must have some sufficient quality that makes it recognisably "playing".

38. I consider that the authorities do say something of value about the characteristics of "playing of …games [of chance]", and that (whilst according deserved respect to the decision of the FTT) the conclusion of the FTT that "Spot the Ball" was "a game of chance" was one that was not open to it if proper weight had been given to those authorities.

39. The FTT did not entirely ignore authority. It was significantly influenced by observations made in the House of Lords in News of the World v Friend [1973] 1 WLR 248 about "Spot the Ball" promotions. What was at issue in the case was whether a "Spot the Ball" competition was "[a] competition in which prizes are offered for forecasts of the result of a …future event". Such competitions were unlawful under s.47(1)(a) of the Betting Gaming and Lotteries Act 1963. The newspaper had been convicted of running "Spot the Ball" as such an unlawful competition because (it was said) entrants were invited to "forecast" where the panel would decide (a "future event") was the most logical position for the ball. It was held that the reality of the offer and the competition was that a competitor was being asked to apply his reasoning faculties to a puzzle picture. Lord Reid thought that there was no relevant difference between "Spot the Ball"

> "…and competitions which regularly appear in many newspapers inviting readers to send in entries giving their opinions as to the best solution of various problems. For

> example, readers may be invited to say what they think would be the best bid on various bridge hands and to abide by the decision of one or more experts. In each case what each competitor is invited to do …..is to make up his mind as to the best solution, and hope that the experts are of the same opinion so that he may get the prize..."

40. "Spot the Ball" was clearly "a competition". Whether the competition was also a "game" and, if so, was a "game of chance" was not in issue. The observations about "chance" which the FTT found so compelling were not part of the ratio and do not appear to have arisen out of anything that was argued or examined. One has, I think, to be cautious in applying tentative observations about possible prosecution under other limbs of s.47 of the 1963 Act to the availability of the Exemption in the instant case.

41. The FTT appear also to have thought that the enactment of s.52(6) of the Gaming Act 1968 somehow effected a fundamental revision to the concept of "game" such that any solo activity could be a "game" whatever other elements of "a game of chance" had been identified in the authorities, and rendered the authorities of little assistance.

42. A fundamental change in the law of gaming *had* occurred in the Betting and Gaming Act 1960, which rendered gaming lawful, and pre-1960 decisions about "gaming" of little value. Section 17 of the 1960 Act recognised that "a game" did not necessarily require more than one player, because it covered "gaming machines", a term which meant

> "a machine for playing a game of chance, being a game which requires no action by any player other than the actuation or manipulation of the machine".

So this was the state of the law at the time of the decisions in Regional Pool Promotions, Armstrong and Adcock to which I have referred. It was possible to "play" a "game of chance" where one person manipulated a machine.

43. Thus section 52(6) of the Gaming Act 1968 did not introduce the revolutionary concept of the "game" with one player. Its object was to bring within the scope of the terms "game of chance and skill combined" games played against the bank or otherwise than against one or more players (as where gaming machines are used): see R v Kelly [2009] 1 WLR 701 at 711H and 712B.

44. For these reasons I would allow the appeal. Operators of "Spot the Ball" competitions are not providing facilities for the playing of games of chance so as to fall within the Exemption. There is no "game": and completing and posting a coupon is not "playing".

TRIBUNAL JUDGE: Mr Justice Norris

RELEASE DATE: 16 September 2014