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Albion Chambers REGULATORY NEWSLETTER

Brexit...

The end of 'transactional decisions' et al?

On 12 September 2016, I stood up in Court 3 at Bristol Crown Court to open a case involving a trader whose company had targeted elderly consumers with a cynical marketing campaign to sell burglar alarm systems. The campaign had many elements that were simply dishonest and a count of Fraudulent Trading was always merited. There were, however, other aspects that did not sit squarely under this banner, such as the high-pressure sales methods and, of course, there is always the possibility that the jury might take it upon themselves to conclude that the Defendant was not dishonest but merely an appalling businessman? Accordingly, it was always going to be necessary to have counts on the indictment under the Consumer Protection from Unfair Trading Regulations 2008. That stated, Misleading Actions, Misleading Omissions, Aggressive Commercial Practice and a breach of Professional Diligence do not make for a short document. Having heard the court clerk put the Defendant in the jury's charge, reading out the counts framed in accordance with the linguistically turgid Regulations, I wondered what was going through their minds. My best guess was "What a load of jibber-ish", and so it was that I took to my feet. I considered whether I should excuse my drafting by blaming the unnecessarily complex European Directive, thus adopting an entirely hypocritical pro-Brexit persona. The alternative was to seek to give the jury the benefit of my eight years' working with these Regulations to demonstrate how, if one cuts through the sea of words, the essence is simple (relatively!). I chose the latter path, and further assisted by a summing up and route to verdict that also demonstrated how the Regulations could be understood, the jury convicted in just over two hours, having heard evidence over seven days.

I was, nevertheless, left wondering about consumer law in the post-Brexit world; in particular, the Trading Standards world. Arguably, the origin of the lion's share of legal provisions, overseen and enforced by Trading Standards departments, is now found in European Community law - whether it is through directly applicable Regulations or Directives, the essence of which are enshrined in UK statutes and delegated legislation. Of course, it is this distinction that dictates that, whatever form our exit from the EU takes, its legacy and effect will endure for the foreseeable future. Although this article was inspired by my recent experience with the Consumer Protection from Unfair Trading Regulations, that put the UK law in line with the Unfair Commercial Practices Directive (2005/29/EC); in 2013 the Consumer Rights Directive (2011/83/EU) lead in the UK to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, replacing the existing rules policing doorstep and distance selling. Also, as recently as last year, the Consumer Rights Act, represented a root and branch overhaul of consumer protection and consumer law in general, to which UK businesses have had to adapt - a statute at least in part also shaped by European influences. So it is that, in my opinion, the UK Government will be slow to introduce new changes and challenges for UK businesses. Putting aside the obvious response that Brexit has created bigger issues for the Government than consumer protection legislation, whether we have 'Brexit lite' or 'Brexit heavy', ongoing trade with EU consumers must continue and playing by their rules is unlikely to be negotiable.

But whilst these UK laws, brought in to achieve EU harmonisation, will remain for the time being, once Brexit is achieved, one scenario at least leaves us with a vacuum left where once there were EU Regulations that were directly applicable. Ultimately, that possibility rests on the final shape of our departure, but even those most desperate to distance us from all matters European may have to concede that since 1972 our statute book has become so impregnated with European references that no true Brexit is achievable.

The immediate practical reality for trades in the UK is – business as usual – continuing to look to the current EU-based rulebooks and maintaining compliance. A comparable approach will also be required from Trading Standards enforcement officers. Beyond that, pondering on one possible Brexit scenario, membership of the European Economic Area (alongside the likes of Iceland, Norway etc.) will still require compliance with all EU consumer law.

Thus the test of whether unfair commercial practices are likely to cause the average consumer to take a transactional decision he would not have taken otherwise, looks destined to remain (at least for now). And so it is that this remain voter will with the next jury continue to steer a course that stays away from blaming European bureaucracy for the linguistic gymnastics and instead focus on the simple essence of what the regulations seek to achieve. Consumer protection is, I suspect, a vote winner, making it weaker - not so.

Alan Fuller

Occupational Health and Safety

Construction and beyond

It has been a year since the publication of the 'Occupational Health Risk Management in Construction' guidelines. Put together by CITB, the Construction Industry Advisory Committee (ConIAC) and the Institution of Occupational Safety and Health (IOSH), the guide aimed to help the sector manage health risks more effectively.

Yet practitioners advising clients are frequently reporting that, in stark contrast to the Sentencing Guidelines (that everyman and his dog seems to know about), these have largely gone unnoticed by the industry; ironic given that companies heeding the advice set out in the 20-page guide could avert enforcement action or, at the very least, provide powerful mitigation when trying to reduce the eye-watering fines that, since the Sentencing Guidelines, have become common place.

It seems to the author that a timely reminder would not go amiss. After all, prevention is better than cure and the guide is specifically aimed at the Employers/ Directors who will end up footing the bill if their company is prosecuted.

A good starting point is to remember that the catalyst for the guide was a misunderstanding within the construction sector as to the extent of their responsibilities; that is, the industry was too focused on managing the more familiar safety issues whilst less obvious yet equally serious health risks were ignored, perhaps because they were seen as harder to manage.

So whilst there have been undoubted and huge advances in improving safety in the construction sector over the past 10-15 years, the industry had not generated the same level of progress in improving the picture of occupational health. Tellingly, every week 100 people die from construction-related ill health in the UK and less than half of construction workers stay employed in the industry until they are 60.

It was against this backdrop that the guide defined Occupational Health as: *'…all health problems in the work environment. The term covers health problems workers bring to the workplace, as well as health issues caused or made worse by work. It covers serious and fatal diseases, physical effects on skin, breathing, hearing, mobility and functioning, and psychological effects on mental wellbeing. Effects may be immediate and visible, but are more often unseen and take a long time to develop, so vigilance and monitoring can be key to identifying problems. Some effects can be cured if diagnosed early; many can only be prevented from getting worse. Of course, some diseases are terminal.'*

In construction, key risks identified include:

- Exposure to asbestos, dusts including silica and lead, chemicals, sunlight and diesel engine exhaust emissions
- Frequent loud noise
- Frequent or excessive use of vibrating tools
- Frequent or excessive manual handling of loads
- Stress and fatigue.

And whilst these seem obvious – because they are – regrettably construction firms, particularly smaller ones, seem oblivious to the fact that construction bosses have a legal requirement to identify the specific hazards faced in the workplace and put in place systems to manage them.

To that end, the publication provides advice about:

- What "health risk management" means
- The roles in managing risks at work
- What might need to be done to comply with the law
- When an occupational health service provider might be needed and what can be expected from them
- The benefits to businesses and their workers of a well-managed, skilled occupational health service
- What health surveillance is and when it needs to be carried out
- What to do about restrictions on certain workers' exposures or tasks
- Worker involvement and consultation
- Health promotion and fitness-for-work programs.

The message is clear – figures show that construction workers are at least one hundred times more likely to die from a disease caused or made worse by their work as they are from a fatal accident, and the HSE now expects all involved in the workplace to take responsibility for both safety and health. Both must be uppermost in the minds of employers and as the recent trends in sentencing show, those who adopt a cowboy approach do so at their peril. One year in… companies can expect little by way of leniency if they are ignorant of this easily accessible guidance which, you can rest assured, will be brought to the attention of any sentencing court by the prosecution.

And we can expect that message to become even louder and clearer in the next 12 months with the publication of the world's first occupational health and safety international standard (which will not be limited to the Construction industry). The International Committee met again in October and the second draft of ISO45001 is expected to be published this winter with a view to the final standard being implemented in the second half of 2017. Whilst discussions are ongoing re-definitions of key terms such as 'worker', 'participation', 'awareness' and 'hazard', there can be no doubt that this standard will be introduced and it will be accompanied by as much fanfare as the Sentencing Guidelines, with prosecutors quick to jump on any perceived failings.

Have no doubt… the ambit of health and safety – or, more accurately, safety and health - regulation is about to increase dramatically. So will prosecutions.

Jason Taylor

Revvin' me, revenue... ah-ha!

New offences created for HMRC compliance

A Finance Bill was placed before Parliament on 26 March 2016 and became law on 15 September 2016. The Finance Act 2016 is the first legislative fruit of the "No More Safe Havens" consultations, which were conceived to eradicate various tax loopholes and hitherto legitimate tax avoidance techniques. Section 166 of the Act creates new criminal offences for those who have income or gains outside of the UK and fail to notify HMRC of the fact of taxable gains accurately. Section 166 inserts sections

106B to 106H into the Taxes Management Act 1970. The new sections criminalise any failure to give notice of liability to pay income or capital gains tax, any failure to provide a return or failure to submit an accurate return regarding offshore income, assets or activities. Importantly, these are offences of strict liability.

At present the offences apply to income tax and capital gains tax only, although the explanatory material accompanying the publication of the Act makes clear that HMRC intend to review the success of the new offences with a view to expanding the provisions to cover other forms of UK taxation in due course, and particularly international transactions which attract VAT.

Those convicted of one of the new offences will find themselves liable to a fine or custodial sentence of up to six months (on a date to be fixed the maximum will raise to 51 weeks). In determining the appropriate level of fines, courts are obliged to take into account the civil penalties which might be imposed so as to ensure that the civil sanctions are not disproportionate to criminal measures.

The new provisions are not retrospective but will first apply in respect of the tax year in which the offences are introduced. The government will shortly announce further criminal measures in this field through the Criminal Finances Bill. This Bill is likely to contain various provisions in relation to tax evasion including, amongst other things, a new corporate criminal offence of failure to prevent the facilitation of tax evasion.

The creation of these new offences is especially interesting given the Public Accounts Committee (PAC) report, published on 15 April, in which HMRC's prosecution policy was absolutely pilloried. Amongst other criticism, the PAC lamented the "woefully inadequate" numbers of prosecutions for off-shore evasion and "confusing performance reports based on poor data.

There are growing concerns from those who defend HMRC prosecutions that the pressure to be seen as tough on tax evasion is causing HMRC lawyers to interpret their criminal policies so as to justify prosecutions where they are not required. Infringements which would once have been deemed 'civil' in nature are now being pursued as criminal cases, despite the consequent cost and delay.

The PAC notes "an impression that the rich can get away with tax fraud", while HMRC promises to prosecute "100 wealthy corporates and individuals" in five years. This numerical target further highlights the apparent departure from the usual "public interest and evidential test" applicable to most prosecution authorities.

Similarly, the introduction of the new offence of failure to prevent tax evasion may have superficial attractions (e.g. holding a company to account for the actions of its "associated persons" abroad), but it fails to recognise the complexities of tax regulations and legislation in other jurisdictions. This will render any prosecutions inherently tricky and create issues of disclosure which can be exploited by potential defendants for serious tactical advantage.

Edward Hetherington

Regulatory crime — case update

Planes, trains and the millennium falcon

There can be little doubt that big regulatory criminal cases are taking people's attention more and more, and this recent period of cases includes several big names. In particular, the focus of this article will be upon the impact of the new Sentencing Guidelines for Health & Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences, which came into force on 1 February 2016, and the massive change they have wrought on the sentencing landscape.

The leading case in terms of monetary fines so far is, of course, Alton Towers. The facts of this case are well known. A carriage on Alton Towers' Smiler roller coaster collided at speed with a stationary car on the track. The result was that two young women suffered leg amputations and several others were severely injured. The investigation by HSE revealed that on the day of the crash engineers had overridden the Smiler's control system without having the knowledge and understanding with which to assess whether that was safe to do. There was no fault with the track, cars or control system, the fault lay with the "lack of detailed, robust arrangements for making safety critical decisions. The whole system, from training through to fixing faults, was not strong enough to stop a series of errors by staff when working with people on the ride." The result being that a series of unchecked mistakes led to the collision.

Merlin attractions pleaded guilty to the charges and were fined £5 million with costs of £69,955.40.

This sentence seems to be the highest fine so far reported under the new guidelines and demonstrates the massive increase in the sums which courts are now prepared and ready to levy against firms.

The record was also shortly held by Network Rail, which was fined £4 million in September, following the death of a pedestrian at a level crossing.

An Office of Road & Rail (ORR) investigation into the death of Olive McFarland, 82, found that Network Rail had failed to act on substantial evidence that pedestrians had poor visibility of trains when approaching the crossing, and were exposed to an increased risk of being struck by a train.

Network Rail pleaded guilty before the Ipswich Magistrates in June and was sentenced by Ipswich Crown Court on the 21 September. Despite arguing that a very large fine would have a significant impact upon the provision of its services, as in the authority of *R v Sellafield Ltd; R v Network Rail Infrastructure Ltd* [2014] EWCA Crim 49, HHJ Levett imposed the fine as he did not believe £4 million would have a large impact upon the delivery of safety in light of Network Rail's £6 billion turnover. He also ordered Network Rail to pay ORR's £35,000 costs.

In a similar vein, a more local prosecution by ORR involved train operator West Coast Railway Company Limited (WCRC). The prosecution followed an incident in March 2015 when a steam locomotive failed to stop at a danger signal near Royal Wootton Bassett, the train eventually coming to a stop almost 700 metres after the signal, athwart a busy rail junction. This just 44 seconds after a large passenger train had crossed its path. Following an investigation, the ORR found significant failings in the company's management: they had not implemented appropriate safety training and monitoring procedures, and that the driver in question, Mr Melvyn Cox, had in fact turned off an essential safety system designed to automatically apply an emergency brake, which would have stopped the train as soon as it passed the signal.

WCRC were fined £200,000, plus ordered to pay £64,000 in costs, Mr Cox received a 4-month custodial sentence,

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Call 2006

Alexander West
Call 2011

Alec Small
Call 2012

Robert Morgan-Jones
Call 2014

suspended for 18 months.

This prosecution followed WCRC's being prohibited from running trains on the mainline service until such time as ORR found their procedures had improved. Considering WCRC were the largest operator of Steam locomotives on the UK rail network, this incident had a profound impact upon steam railway charters in the UK, and (according to a surprisingly detailed Wikipedia page devoted to just this incident) presented "possibly the greatest challenge to [the steam locomotive] movement." According to *Steam Railway* magazine.

Finally, another high-profile prosecution concluded this year with the sentencing of Foodles Production (UK) Ltd following an incident which broke the leg of actor Harrison Ford on the Millennium Falcon set in 2014.

The facts were that during a rehearsal Mr Ford walked backwards and pressed the prop 'door close' button on the Falcon's entrance ramp hatch, believing that the operator would not do so as it was a rehearsal. In fact, the operator, believing it to be a full rehearsal, closed the steel door. The door was not designed with any safety cut-outs and the door knocked Mr Ford to the floor and pinned his leg. Fortunately, Mr Ford was not further injured due to the quick reaction of the operator.

The risk of the door causing injury had already been highlighted by the Health and Safety officers for the production company and Foodles should have built in an automatic safety stop, or constructed the door from different materials. The force and weight of the door could easily have killed someone had it hit them on the head.

After pleading guilty at Aylesbury Crown Court, Foodles were fined £1.6 million and ordered to pay £21,000 in costs.

All of these cases highlight just how much fines have ramped up under the new regime. The courts have extensive powers now and, as we can see, are not afraid to use them. Going forward, as fines increase, credit for guilty pleas is going to have a massive financial impact upon future cases, so we as lawyers are going to have to work even harder to ensure that we get all the material we need to advise the clients as early as possible in order to take advantage of full discounts where we can.

Looking ahead, we have had several high profile prosecutions announced recently which are worth keeping an eye on. The CPS announced that following an investigation by the Maritime and Coastguard Agency, the director of the yachting management company for The Cheeki Rafiki, Douglas Innes, has been charged with four counts of gross negligence manslaughter after the yacht capsized in May 2014 killing all four crew members The company, Stormforce Coaching Ltd has further been charged with a shipping offence.

Another high-profile prosecution is pending following HSE's decision to charge Martin Baker Aircraft Ltd following the death of RAF Flight Lieutenant Sean Cunningham in November 2011 at RAF Scampton. Flt Lt Cunningham was killed when the ejector seat in his Red Arrow Hawk T Mk1 initiated during his pre-flight checks whilst stationary on the ground. Martin Baker will shortly appear at Lincoln Magistrates court to face a section 3 charge under HASAW 1974.

Finally, another key area of regulatory growth in coming months and years is set to be the impact of commercially available Unmanned Aerial Vehicles or 'Drones'.

2016 has seen companies such as Amazon coming to an agreement with the UK Government to begin a pilot scheme for its drone delivery service, and the first conviction following a man attempting to use one to smuggle large quantities of drugs and mobile phones into HMP Pentonville.

The Government is currently considering whether to make 'geofencing' technology mandatory in all UAVs. This technology will use GPS to prevent UAVs flying into no-fly zones which can be demarked using the technology. However, at the moment this is only voluntary and there is no criminal sanction for entering one. However, there still exist civil options such as trespass, nuisance and breach of privacy (particularly if a camera is attached).

The House of Lords EU Committee recently published a report on the question and has recommended compulsory registration of UAVS. The aim is to achieve an air of accountability for pilots.

However, as it stands, nothing concrete has been announced, so lawyers are advised to watch this space.

Alec Small