

Consumer Protection from Unfair Trading Regulations 2008 – Review of Developments

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The Consumer Protection from Unfair Trading Regulations 2008 (“CPUT”) came into force in May 2008. Their impact cannot now be in doubt, particularly since the Court of Justice of the European Union (“CJEU”) has made decisions in four separate cases in the past year or so.

CPUT represented the biggest change in consumer law in the U.K. for 40 years and in one go swept away the well trodden path made by the Trade Descriptions Act 1968. It is legislation with which all businesses having any interface with consumers must comply without being at risk of enforcement action.

CPUT brought with it a plethora of new general clause based prohibitions such as contravening professional diligence, misleading actions, misleading omissions, aggressive commercial practices and certain automatically unfair practices. Together with concepts such as ‘commercial practice’, ‘trader’, ‘the average consumer’, and ‘transactional decision’ CPUT was going to take a little time for enforcer, businesses and consumers alike to get used to.

After a slow start some useful guidance on CPUT has been given by the higher courts since 2011. In *OFT v. Purely Creative and others* [2011] CTLC 45 Briggs J grappled with some key concepts and it is still a useful case on the meaning of the average consumer as being

‘those consumers who take reasonable care of themselves, rather than the ignorant, the careless or the overhasty consumer’

and the causation aspect of a transactional decision as being

‘whether, but for the relevant misleading act or omission .. the average consumer would have made a different decision from that made’.

In *Purely* it was also suggested that transactional decision meant ‘any decision with an economic consequence’. However, in the recent case of *Trento Sviuppo srl v Autorita Gurante delia Concorrenza e de Mercato* Dec 2013 Case C – 281/12 the CJEU decided that the concept of ‘transactional decision’ is broadly defined as ‘any decision taken by a consumer concerning whether, how and on what terms to purchase’. Accordingly, the CJEU decided that the concept covered not only

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the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter into the shop. This means that a trader could be guilty of an offence if a misleading sign or notice merely led a consumer into entering its premises without more. It demonstrates that the courts are deciding these cases purposively and in favour of the consumer.

In *R v. Scottish and Southern Energy* [2012] CTLC 1 the Court of Appeal, in construing ‘trader’ together with ‘commercial practice’, noted the wide definition of both in CPUT and held that a Plc was liable as trader for the acts of one of its subsidiary trading companies even though it was not involved in the day to day trading activity.

R v. X Limited [2013] CTLC 145, in the context of a CCTV system being installed otherwise than in accordance with a contract and thus allegedly ‘not fit for purpose’, decided that a

‘commercial practice can be derived from an isolated incident, but whether or not it does will depend on the facts of the particular case.’

This Court of Appeal decision effectively put paid to the argument that cases involving a single contract fall outside the scope of ‘commercial practice’. It is therefore very unlikely that a judge would now dismiss a case as happened in *R v Christopher Steele* at Snaresbrook Crown Court where misleading actions occurred in a single building contract.

Apart from the *Trento* case the CJEU has had a busy year in this area. In *Citroen Belux* July 2013 Case C-265-12 the court considered combined offers, in *CHS Tour services GmbH* Sept 2013 C-435/11 it considered the relationship between professional diligence and misleading actions and in *4Finance UAB* April 2014 Case C – 515/12 it dealt with the meaning of pyramid promotional schemes.

This level of activity by the CJEU demonstrates the importance of CPUT and reminds traders that they must be vigilant in ensuring that their businesses are compliant. This is even more important now because from 1st October 2014 amendments to CPUT will give consumers the right to civil redress for the first time. Consumers will have the right to bring a civil action against a trader for a commercial practice that is either a misleading action or an aggressive commercial practice. They will have a right to damages against a trader if they incur financial loss or alarm, distress or physical inconvenience which would not have been incurred in the absence of the prohibited practice.

It will be interesting to see how widely the civil right to redress is used, but in terms of criminal enforcement the anecdotal evidence suggests that local authorities are not afraid to use this legislation where appropriate.