



TRADING LAW BULLETIN

ISSUE NO. 44 MARCH 2005

Gough Square Chambers
6-7 Gough Square
London EC4A 3DE
Telephone: 020-7353 0924
Fax: 020-7353 2221
DX: 476 London
Email: gsc@goughsq.co.uk

CONSUMER CREDIT

Pawnbrokers. A pawnbroker appealed to the Court of Appeal following a finding that a number of regulated agreements in a series of transactions were unenforceable. The Court of Appeal held that the requirement to repay any amount received by the creditor on realisation of the security includes a receipt of payment from the debtor as well as sale by the creditor (*Wilson v. Howard Pawnbrokers*, 4th February 2005).

FOOD

Time limits. Observation was carried out on a business suspected of operating a slaughterhouse without a licence under the Fresh Meat Regulations. Some days later officers entered the premises and found sheep carcasses and materials for making smokies. Informations were laid against a number of the individuals involved. The informations were laid a year after the officers entered the premises. The defendants were convicted. On appeal to the Court of Appeal it was argued that there was sufficient information for the purpose of the discovery of the offence in the days leading up to the entry to the premises and the informations were therefore out of time. The Court of Appeal rejected the argument. Whatever may have been the position on the earlier dates, there was clear evidence of an offence on the day in question and the prosecution was in time (*R v. Gale* (2005) 169 JP 166).

Smoke flavourings. The Smoke Flavourings (England) Regulations 2005 come into force on 1st April 2005. They provide for the enforcement of Regulation (EC) No.2065/2003.

Kava-kava. Regulations were made under the Food Safety Act and under Medicines Legislation prohibiting the sale of kava-kava. The Court of Appeal Civil Division rejected an allegation that there had been insufficient consultation. The knowledge of civil servants could not be imputed to the Minister but, although further information

could have been put before the Minister, there was enough to make an informed judgment (*R (National Association of Health Stores) v. Department of Health*, 23rd February 2005).

FIRE PRECAUTIONS

Sentence. Two people died in a fire at a hotel. The fire had been started by arson. The Court of Appeal said that the level of penalty for breaches of the Health and Safety Legislation had to take account of the degree of risk, the scope of the risk and the degree of culpability. Total fines of £400,000 were reduced to £200,000 (*R v. ESB Hotels Limited* (2005) 149 SJ 117).

HEALTH & SAFETY

Improvement notices. An improvement notice was issued requiring the provision of mechanical lifting aids or "any other equally effective means". At an appeal to the Employment Tribunal the Inspector accepted that it was not reasonable for mechanical lifting aids to be provided. The Tribunal held that the phrase relating to other equally effective measures included training and supervision and amended the notice to add such a requirement. The High Court held that the amendment should not have been made and the notice should have been cancelled. When it was issued it was not sufficiently clear so as to enable the business to know what was wrong and how to correct it (*BT Fleet Limited v. McKenna*, 17th March 2005).

CONSUMER PROTECTION

Cross-border enforcement. The OFT obtained an injunction in the Brussels Commercial Court preventing the distribution of catalogues to consumers in the UK. The complaint was that the mailings indicated that the recipient had won a large cash prize (Fair Trading Issue 40, March 2005).

UNDER-AGE SALES

Due diligence. A store manager and the regional manager of the store were prosecuted in respect of

an under-age sale as joint licensees. A conviction by the Magistrates was quashed by the High Court following an appeal by case stated. Having reviewed the procedures put in place by the company which was not referred in the case stated the Divisional Court found in favour of the appellant (*Davies v. Carmarthonsire County Council*, 3rd March 2005).

TRADING STAMPS

Regulatory reform. The Regulatory Reform (Trading Stamps) Order 2005 comes into force on 6th April 2005. It repeals the Trading Stamps Act 1964 with certain savings for ancillary legislation.

ANIMALS

Particulars. The appellant was convicted of causing unnecessary suffering to 75 cats. On appeal to the Crown Court objections were made to the information in that it was duplicitous and lacking in particularity. On further appeal by case stated the High Court declined to rule on the duplicity point because it had not been pressed before the Crown Court. The High Court did agree that the information had not provided the necessary particulars but that did not render the proceedings a nullity or the conviction unsafe because the requisite information had been given to the appellant (*Nash v. Birmingham Crown Court* (2005) 169 JP 157).

DISTANCE SELLING

Amendment Regulations. The Consumer Protection (Distance Selling) (Amendment) Regulations 2005 come into force on 6th April 2005. The amendments primarily relate to supplies of services.

Car hire. The English High Court referred to the European Court of Justice a question concerning short-term car hire and the application of the distance selling legislation. The OFT argued that the transaction was a contract of hire and could not be the provision of transport which would take the contract outside of much of the directive. The ECJ held that "transport" refers not only to the action of moving persons or goods from one place to another but also to the mode of transport and the means used. Making a means of transport available to a consumer is thus one of the services involved in the transport sector (*easyCar (UK) Limited v. Office of Fair Trading*, The Times, 15th March 2005).

SALE OF GOODS

Examination by buyers. In a dispute about the purchase of a mobile home it was alleged that the vehicle was in excess of the width permitted by the Construction and Use Regulations. The Court of Appeal upheld the Judge's decision that this was correct but said that there was ample evidence on which the Judge could also conclude that the authorities had turned a blind eye to widespread breaches of the Regulations and this was known to those enthusiasts for such vehicles. In addition the vehicle had been sold "as seen" (*Brambill v. Edwards* [2004] 2 Lloyd's L.Rep 653).

UNFAIR TERMS

Real property. A dispute arose about the sale and purchase of two flats. The Technology and Construction Court considered whether, if an adjudicator's decision had been enforceable, the contractual provision binding the consumer to an adjudication would have been an unfair term. The Judge said it would be an unusual case, if one could be found at all, in which it was not a complete answer to any suggestion that a building contractor had acted in bad faith in letting a consumer choose a particular standard form of contract that the consumer made his own decision (*Bryen & Langley Limited v. Boston*, 4th November 2004).

UNSOLICITED GOODS

Electronic commerce. The Unsolicited Goods and Services Act 1971 (Electronic Commerce) (Amendment) Regulations 2005 come into force on 6th April 2005. They make amendments to the 1971 Act concerning electronic communications.

TRADEMARKS

Strict liability. The appellant was a market trader and was prosecuted in respect of a large quantity of clothing and accessories. When she was interviewed by Trading Standards Officers she said she did not know what a trademark was but thought the goods were genuine. The Court of Appeal held that a defendant must have addressed his mind to the existence of the trademark. Section 92(5) does not provide a general defence of good faith. Section 92 constitutes a rigorous statutory code involving offences initially of strict liability. Ignorance of the law and of registered trademarks cannot be a defence (*R v. McCrudden*, 21st February 2005).