



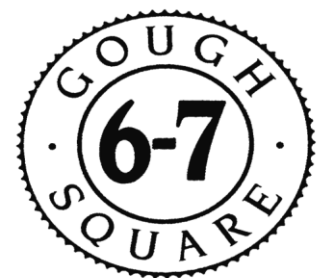
Expensive commercial practices

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GOUGH SQUARE CHAMBERS



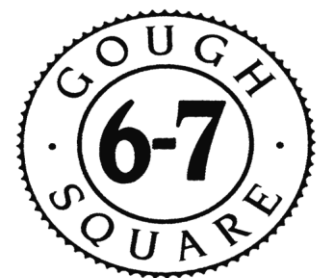
Why “expensive”?

- ▶ Three reasons
 - Consumer Rights Act 2015 changes to the Enterprise Act 2002
 - Section 85 Legal Aid, Sentencing and Punishment of Offenders Act 2012
 - New (draft) sentencing guidelines for H&S and food offences



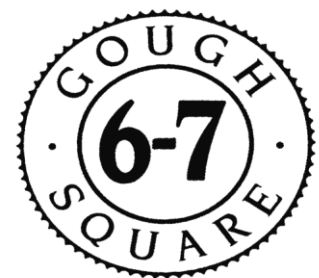
Enhanced consumer measures

- ▶ An additional element to EA 2002 and enforcement orders
 - Will apply to orders, court undertakings and undertakings given under s.219 to the enforcer
 - Directed at:
 - Redress
 - Compliance
 - Choice
 - Only such measures as are just, reasonable and proportionate may be included
 - Enforceable by the Court as part of an order or court undertaking



Redress – the most obvious expense

- ▶ Compensation is available in criminal cases, but not widely used
- ▶ Confiscation has no benefit for individual consumers
- ▶ Redress measures seek to fill that gap
- ▶ Only available in a “loss” case, i.e. where consumers have suffered a loss
- ▶ Types of order which may be made:
 - measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct
 - where the conduct referred to relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract,
 - where such consumers cannot be identified, or cannot be identified without disproportionate cost to the trader, measures intended to be in the collective interests of consumers

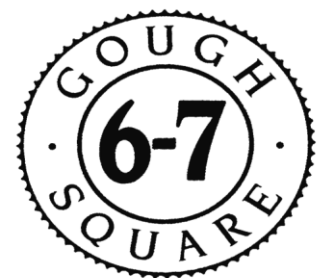


Compliance/ choice – an indirect expense

- ▶ Measures intended to:
 - prevent or reduce the risk of re-offending
 - improve effectiveness of the market by informing consumers about a trader's past performance

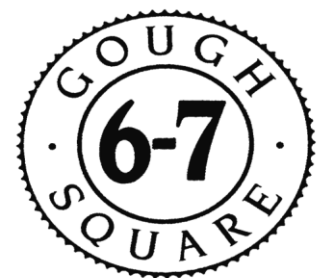
- ▶ Such as?
 - appointing a compliance officer;
 - introducing a complaints handling process;
 - improving their record keeping;
 - signing up to an established customer review / feedback site;
or
 - publicising details of the breach or potential breach, and what they have done to put the situation right in the local or national press or on social media.

- ▶ So naming and shaming now has a statutory footing



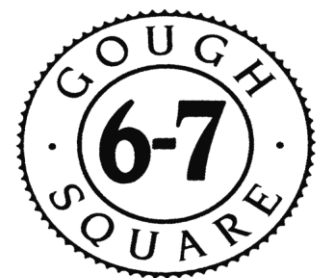
Sentencing for CPRs offences

- ▶ Some high profile examples
 - SSE Plc – £1.25m for misleading actions
 - Tesco – £300k for “half price” strawberries
- ▶ Probably not the norm historically, when the maximum in the mags was £5k!
- ▶ All change now – s.85 LASPO
- ▶ In general, the old £5k maximum has disappeared (but check SI 2015/664 for the detail)



So what will this mean for sentencing in the future

- ▶ Will sentences increase?
 - At least for footballers and sellers of alcohol to children (see Hansard debates)
 - Likely to be a general increase, perhaps gradually over time
- ▶ Impact of guidance in related areas
 - Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines (Sentencing Council consultation Nov 2014)



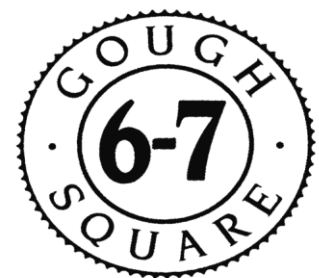
The draft Guidance

- ▶ Will cover H&S and food safety/ hygiene offences, so no direct application to TS offences, but likely to have at least some persuasive value
- ▶ Produced because of a lack of general guidance and “*frustration ... regarding the low level of sanctions following formal action by local authority enforcement officers in relation to food law offences*”
- ▶ Particular focus on whether fines for large organisations are appropriate



How the sentencing process would work

- ▶ Assess offence category
 - Consider harm and culpability
- ▶ Identify starting point and sentencing range
 - Bands of turnover to be considered at this stage
- ▶ Check proportionality of fine to means of offender
- ▶ Consider other factors which may impact
 - Eg effect on employees
- ▶ Go on to consider credit for plea etc.



The likely effect?

- ▶ *“the Council anticipates that its proposals will result in higher starting points for more serious offences committed by larger organisations than might otherwise have been anticipated.”* (p.62)
- ▶ Not intended to change the level of sentencing for less serious offences or for non-corporate offenders



So what is the message for businesses and enforcers?

- ▶ The cumulative effect of these changes is likely to increase the costs consequences of breaches of consumer protection legislation
- ▶ A greater incentive to ensure compliance and/or resolve issues without formal enforcement action?