

## Ensuring compliance with Trading Standards law

Trading Standards legislation aims to achieve protection for consumers while creating a fair trading environment for legitimate business. The Trading Standards Service provides information and advice to businesses to help them comply. Where a breach of the law is identified an investigation will be carried out. Depending upon the circumstances, Trading Standards Officers will decide whether advice is sufficient, or enforcement action such as a caution or even prosecution is necessary. Such decisions are made in line with the Department's published Enforcement Policy (copies of which are available on request).

Nearly all Trading Standards legislation contains 'strict liability' offences where a criminal offence may be committed even though it was not intended.

To balance this, the law recognises genuine efforts made to comply with the legislation by including a defence to avoid conviction. This is commonly known as a 'due diligence' defence. A business or person will have a defence to any charge if they can prove that:

**they have taken all reasonable precautions or steps  
AND  
exercised all due diligence to avoid the commission of the offence.**

This means that the person must prove that they have a system to ensure compliance with the law (reasonable

precautions or steps) and a method to ensure that the system is followed correctly (due diligence).

**Both parts** of the defence must be proved to be successful. Trading Standards Officers investigating an offence will also consider these aspects, which will affect any decision whether to prosecute.

### General guidance

None of the laws which provide 'due diligence' defences describe in detail what systems will satisfy the defence. Ultimately a court of law will decide on the facts in each case. (See further in this factsheet for examples of previous court cases showing the level of care expected in particular circumstances.) City of Nottingham Trading Standards offers the following general points as guidance.

1. Where it is reasonable to take a particular precaution then it must be carried out.
2. Positive action is necessary - doing nothing will not provide a defence.
3. It is necessary for a business to be aware of the law and the requirements which are relevant to them.
4. All the activities of the business which may cause a breach of the law should be identified controlled and checked by a system of working. For example:
  - a. selection of appropriate raw materials and components;

### For help and advice on complying with consumer protection laws

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- b. staff experience and training;
  - c. suitability of premises and equipment;
  - d. specifications (including orders) having regard to legal requirements;
  - e. production or service delivery processes;
  - f. storage, delivery and packaging methods;
  - g. labelling, instructions, brochures and advertising.
5. The procedures employed must ensure that the system is being followed correctly.
  6. The system should include provision for proposing and carrying out effective remedial action where things are found to be wrong.
  7. The systems must be appropriate to the size of the business and its position in the supply chain. That is - importers, manufacturers and other large companies will be expected to implement more thorough systems than small retailers.
  8. The systems must be appropriate to the possible consequences of non-compliance. That is - more thorough systems will be needed where serious or widespread consequences are possible.
  9. Records should be kept of procedures followed and checks carried out to demonstrate that the system is operating correctly.
  10. The operation of the system must be reviewed regularly and amended if necessary to ensure it is still appropriate and effective.
  11. Simple and commonsense ways of examining and/ or testing goods and services to determine compliance should be used whenever possible.
  12. Where batch sampling and/or testing is involved an appropriate number of items examined or tested should be decided with reference to the:
    - a. seriousness of the consequences of non-compliance or failure;
    - b. volume of product supplied;
    - c. complexity of product;

- d. cost of each item;
- e. size of batch;
- f. frequency of testing;
- g. size of business;
- h. previous test results;
- i. cost of testing.

13. Steps should be taken to ensure awareness of complaints and any other information about problems with goods or services and this should feed into a remedial action process.

### **Liability of others**

Where a business or person commits an offence usually any other person whose action or inaction (act or default) led to the offence being committed can also be prosecuted, whether or not the first person is prosecuted. When a person claims that an offence they have committed was someone else's fault, they must identify that person AND still show they exercised 'due diligence' if they are to have a defence.

### **Quality Management Systems**

Many of the principles and procedures involved in establishing a defence of 'reasonable precautions and due diligence' are similar to those in a Quality Management System (QMS). Trading Standards would encourage businesses to adopt a documented QMS, whether or not it ultimately seeks third party certification of the system.

Care should be taken to ensure that any QMS includes reference to and implements controls to ensure compliance with legislative requirements.

The establishment of a QMS (even if certificated to BS EN ISO 9000) which does not refer to legal requirements will not provide a defence.

### **'Due Diligence' defence case law**

The following cases provide some guidelines on how the courts have decided on the particular facts in each case. It is important not to rely on any single decision but to look at the common principles they provide.

### **1. Tesco Supermarkets Ltd v Natrass (1972)**

a) This is a leading case on the Trade Descriptions Act 1968, where Tesco relied upon the defence of the 'act or omission of another person' that is their store manager, to show that they had taken all reasonable precautions and all due diligence.

b) Tesco had a special offer on washing powder, with a poster relating to the offer displayed in the store. They ran out of the specially marked low price packets but failed to remove the poster when higher priced stock was put on the shelves and someone was overcharged

c) Tesco said that their system was that the store manager should check the pricing and on this occasion he failed to follow their instructions.

d) In the House of Lords Tesco were successful with their defence showing that:

- a store manager was classed as 'another person'
- a system of delegating responsibility to that person was performance of due diligence, not avoidance of it

### **2. Westminster City Council v Turner Gow (1984)**

a) This case concerns prosecutions under the Weights & Measures Act for short weight delivery of coal. The offences were due to the act of the driver who was convicted separately.

b) The company was also prosecuted and relied on a defence that:

- written instructions were prepared for all drivers
- copies were displayed in the weighbridge office and given to each driver
- a system of checks at the weighbridge was in operation.

c) The Divisional Court held that the defence was successful – that is, the precautions were adequate. It was the driver who had deliberately disobeyed clear orders which he knew about.

### **3. Lewin v Rothersthorpe Road Garage Ltd (1984)**

a) A used car salesman applied a false trade description relating to the mileage reading on a car odometer and the company was prosecuted under the Trade Descriptions Act 1968.

b) The company relied on a defence that:

- they adopted a generally recognised and authoritative Code of Practice which had been drawn up in consultation with the Office of Fair Trading
- all salesmen were instructed in the operation of the Code
- regular meetings of the salesmen reinforced the instruction by emphasising the importance of the Code.

c) The court held that the defence was successful.

### **4. Bibby-Cheshire v Golden Wonder (1972)**

a) A manufacturer was prosecuted under the Weights & Measures Act for selling underweight bags of crisps.

b) The company relied on a defence that:

- the bags of crisps were filled by machines which were the best type available but no machine could ensure that absolutely no underweight bags were produced
- it was economically impossible to individually weigh 20 million bags every week
- an efficient system of random checks ensured none of the machines consistently produced underweight bags.

c) The court held that the systems were sufficient to provide a defence.

### **5. David Taylor v Lawrence Fraser (Bristol) Ltd (1977)**

a) This case concerns the Toys (Safety) Regulations 1974. The defendant wholesalers supplied toys painted with a substance containing excess lead.

b) Their defence was that the manufacturers had given them a written

undertaking that the goods complied with the Regulations and that the local Trading Standards Officers had an open invitation to visit them and take samples at any time for analysis.

c) The Divisional Court decided that there was no effective defence as:

- the defendants could have had the paint analysed but failed to do so
- they could not delegate responsibility to a Trading Standards department

## **6. Riley v Webb (1987)**

a) The defendants were wholesalers of fancy goods and toys and were prosecuted under the Consumer Protection Act 1961 for the supply of 'secretary sets' which contravened the Pencils and Graphic Instruments (Safety) Regulations 1974.

b) They claimed a statutory defence on the basis that:

- their order forms to suppliers contained a general condition that 'all goods should meet any relevant statutory requirements'
- they had dealt with the supplier for 15 years
- they had a small staff and a large number of lines so it would be unreasonable to carry out random sampling.

c) The Divisional Court decided there was no defence as they could have obtained a specific statement from the suppliers about the goods in question or imposed terms in their contract requiring compliance with the specifically named regulations.

## **7. Geoffrey Garret v Boots Chemist Ltd (1980)**

a) The defendants were retailers who were prosecuted under the Pencils and Graphic Instruments (Safety) Regulations 1974 for selling pencils with excess heavy metal content

b) The defendants pleaded that they had used 'all reasonable precautions' having:

- informed the suppliers of the existence of the regulations

- made it a condition of their contract with the suppliers that the pencils must comply with these regulations.

c) On appeal the Divisional Court distinguished between large shops and small shops. What might be reasonable for a large retailer like Boots might not be reasonable for a small village shop. However in these circumstances Boots could have done random sampling, whether statistically controlled or not. This sampling may or may not have detected the problem, but it should reasonably have been undertaken and the failure to do so meant Boots could not establish the defence.

## **8. Sherratt v Gerald's the American Jewellers Ltd (1970)**

a) The defendants were retailers who were prosecuted under the Trade Descriptions Act 1968 for selling a 'waterproof' watch which filled with water after immersion in a bowl of water for one hour.

b) The defendants claimed the statutory defence saying they relied on the reputation and experience of the wholesaler.

c) Their defence was unsuccessful as they had failed to take the simple precaution of putting a watch in a glass of water, which would have shown it was not waterproof.

## **9. Sutton LBC v Perry Sanger & Co Ltd (1971)**

a) The defendants were prosecuted under the Trade Descriptions Act 1968 for falsely describing a dog as a Sheltie, when it was in fact a cross-breed. They were dog dealers, not breeders and were not experts in Shelties.

b) They pleaded a defence of due diligence claiming they relied on:

- the description given by the supplier
- an unsigned pedigree document
- a visit to a vet who had not pointed out that the dog was not a Sheltie (although he had not been specifically asked).

c) The Divisional Court rejected the defence stating that greater precautions were required because they were dealers

and inexpert in this area. They had taken no precautions and therefore no due diligence was exercised.

### **10. Rotherham MBC v Raysun (UK) Ltd (1988)**

a) In this case the defendant Raysun (UK) Ltd were large scale importers of goods manufactured in the Far East. They imported crayons bearing a false trade description ('poisonless') which contravened the Pencils and Graphic Instruments (Safety) Regulations 1974.

b) When prosecuted the defendant claimed the defence of reasonable precautions and due diligence:

- they had provided the manufacturer in Hong Kong with details of the UK requirements and dealt with them through agents requesting only to hear about adverse test reports. None were received
- crayons were imported yearly in a single batch of between 7000-10,000 dozen packets. From the batch one packet was chosen for analysis and this was satisfactory.

c) On appeal, this defence was not successful as:

- the method of only reporting back adverse analysis did not show that any tests occurred
- sampling of one packet in the UK from such a large consignment was insufficient
- telling the manufacturer to follow general requirements did not ensure compliance with the defence (referring to Riley v Webb above).

### **11 P M Supplies (Essex) Ltd v Devon County Council (1991)**

a) This concerned unsafe toys manufactured in China and imported by the appellant which were found to have detachable eyes which contravened the Toys (Safety) Regulations 1989.

b) A due diligence defence was claimed as:

- a director of the company had visited the factory in China to check the methods of production and compliance with regulations

- testing was undertaken in-house and by the public analyst but it was very limited.

c) The court found that the defendant had failed to prove an adequate level of sampling and testing by only inspecting 114 and only testing 18 of a batch of 80,000. It was for the company to prove that the level of sampling was statistically adequate.

### **12. Balding v Lew Ways Ltd (1995)**

a) This was the case of a toy tricycle which did not comply with the Toys Safety Regulations due to a protrusion which could have caused injury.

b) The company claimed a defence, relying on a test report indicating compliance with the relevant British/European Standard

c) The court held that no defence was established as:

- the company had not asked if the product complied with the 'Essential Safety Requirements' of the regulations
- it cannot be assumed that compliance with a published standard shows compliance with the law.