# Regulatory Breach

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# Welcome..

In this edition we take a close look at the new Regulatory Enforcement and Sanctions Bill 2008 which follows in full the findings of Professor Richard Macrory Q.C. in his 2006 report,Regulatory Justice, Making Sanctions Effective. The report followed the 2005 Hampton review which stated that penalty regimes were cumbersome and ineffective. Professor Macrory feels initial steps have already been taken by a number of central government regulators but believes there must be a 'change of culture' in order to become more transparent and accountable in their use of sanctions.

He believes that the criminal courts effectiveness needs to be improved and that access to more imaginative sentencing options should be available, rather than rely on the simple imposition of fines.The main departure to be introduced is the establishment of Civil Tribunals which will govern appeals from the new range of civil sanctions, clearly an improvement on present arrangements in the magistrates courts.

We also look at website information required by AIM listed companies, an interesting view on the forfeiture and destruction provisions for fireworks that have been seized under the Explosives Act, and a report of a decision in a recent fatal accident case where the Defendant was fined £2 as it had gone into receivership prior to the hearing.

The Regulatory team at St Pauls has recently delivered seminars both in chambers for a number of Trading Standards officers and at solicitors offices. We are happy to look at any regulatory or environmental issues, please contact the Clerks to make arrangements.

**Jeremy Barnett**

# Website Warnings

WALKER MORRIS

Sarah Hewson

**AIM Disciplines Companies for Failing to Comply With Rule 26**

AIM Rule 26 was introduced in February 2007 with the deadline for compliance set as 20 August 2007. It requires companies, from the time they are admitted to AIM, to maintain a website containing key corporate information.

Reach article Changes to AIM Rules – Companies of 19 March 2007 sets out what information must be available on the website free of charge (see Links).

On 10 January 2008, the London Stock Exchange (LSE) published AIM Notice 29 (AIM29) reminding AIM companies of their obligations under Rule 26 and referring to disciplinary action taken by the LSE in September 2007 against nine AIM companies for failing to comply fully with Rule 26, resulting in a fine totalling £95,000. Seven warning notices were also issued by the LSE for less serious breaches of Rule 26. In AIM29, the LSE states its belief that all AIM issuers across the market are now complying with Rule 26.

To assist AIM companies in complying with Rule 26, the LSE published IR (Investor Relations) Website Best Practice Guide in July 2007, which contains a section on how to comply with Rule 26. The Quoted Companies Alliance (QCA) has also published an AIM guide to Rule 26, which can be ordered from the QCA.

**Checks on Retail Websites High on OFT Agenda**

The Office of Fair Trading (OFT), alongside local authority trading standards services, checked the UK's top 600 ecommerce sites during December to ensure they complied with key requirements of the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (the Regulations), such as whether sites provided shoppers with the contact details required as well as correct information on their right to cancel, though they did not check every aspect of legal compliance.

This investigation is a result of the OFT's internet shopping market study, published in June 2007, where the OFT found that 28 per cent of the online traders it surveyed were either unaware or only slightly aware of the laws applying to internet shopping and 66 per cent had never sought advice on them. More than 20 per cent of sites did not provide an email address as required by the Regulations and 16 per cent did not tell shoppers that they had a an unconditional right to cancel within seven working days of receiving the purchase without giving a reason. More shocking is the fact that 59 per cent of sites appeared to impose conditions that could prevent, or at least deter, consumers from exercising such cancellation rights. In September, the European Commission led the first investigation into breaches under the Consumer Protection Co-operation Regulation, which came into force at the end of 2006. Its investigation into websites selling airline tickets highlighted numerous consumer law breaches. Of 447 sites examined, 226 revealed 'irregularities' with regard to clarity of pricing, indications of availability and/or fairness of contract terms and potential breaches of numerous consumer rules. In some cases these matters will be followed up by the new Consumer Protection Co-operation Network, while the majority will be followed up by the relevant national regulators. The Commission gave the websites from November, when they announced their findings, until January to make their practices compliant. Any websites that fail to do so will face enforcement action. Owners of ecommerce businesses must be vigilant. The Commission is continuing to review consumer legislation and its enforcement and their recent actions show that they will not sit still when they become aware of potential breaches. Ecommerce businesses need to keep an eye on the Commissions proposals, which may emerge during the course of 2008.

## Credit Card Cover Applies To Overseas Transactions

On 31 October 2007 the OFT announced that the House of Lords has held that section 75 of the Consumer Credit Act 1974 (the Act) does in fact apply to overseas transactions as well as domestic ones.

Section 75 of the Act relates to the liability of the creditor for breaches by the supplier. It enables a purchaser to make a claim against the supplier and/or the credit card issuer where there is a misrepresentation or breach of contract relating to goods or services bought with a credit card. This is restricted in that the transaction must not be less than £100 nor more than £30,000.

The section has always been applied to domestic transactions but its applicability to overseas transactions was uncertain. The Court of Appeal had ruled that section 75 did apply to overseas transactions; that decision has now been upheld by the House of Lords.

The card companies argued that applying section 75 abroad would unfairly and impracticably render them "the insurers of 29 million foreign suppliers", most of whom they had never heard of. Similarly, they argued that they would "become the insurer, for no premium, of the performance of most of the hotels in the world" where bills are paid by credit card. The internet poses an enhanced risk by facilitating access to overseas traders to consumers who never leave their home.

However, the Lords were unconvinced. The Lords held that there was "nothing in the language of section 75 to exclude foreign transactions". The section was not to be restricted to domestic transactions and there was no territorial limitation on credit card issuers. The Lords added that there was a complete absence of any intention that the section should not apply to foreign transactions.

**Points to consider:**

The OFT has heralded the House of Lords decision as a victory for consumer protection. Lenders are left counting the costs of their exposure and will need to put measures in place to cover any potential claims that might arise from overseas transactions. Ultimately, of course, the burden will be passed on to the consumer in the form of higher charges

# Forfeiture and Destruction of Fireworks

**Danielle Graham, St Pauls Chambers**

Fireworks are often seized during the course of investigations into other matters. If individuals are prosecuted for firework related offences it is usually under the provisions of the Health and Safety at Work Act 1974. This article examines the forfeiture and destruction laws applicable to such seizures.

Various statutes provide provision for the forfeiture of items which are the subject of criminal activity. Examples of these are found in the Forgery and Counterfeiting Act 1981, CEEMA 1979, the Misuse of Drugs Act 1971, the Firearms Act 1968, Immigration Act 1971, Protection of Children Act 1978 – relating to obscene photographs, The Knives Act 1997, The Public Order Act 1986– concerning racially inflammatory material and the Sexual Offences Act 2003 (concerning the forfeiture of vehicles used for trafficking people for sexual exploitation).

There are no forfeiture powers under the Health and Safety at Work Act 1974, the closest statutory power is found in s. 4(1) of the Explosives Act 1883 which states:
*'Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of [an offence] and liable to imprisonment for a term not exceeding fourteen years, and the explosive substance shall be forfeited.'*
This provision is not applicable in most seizure cases. Whilst there is an explosive content within fireworks themselves, there is generally no suggestion that a Defendant would use the goods as weapons.

**Use of Deprivations Orders**

The deprivation order is most appropriate in cases of organised crime where the Defendant indicates the goods do not belong to him but no-one comes forward to reclaim the goods. In such circumstances the commodities are taken out of circulation and this type of criminal activity is disrupted.

It is important to note that the power is subject to the constraints of s.6 of the act which suggests that, when considering whether to impose such an order, the court should have regard to the value of the items seized and the effect this would have on any other orders a court may make. Thus, in a scenario where this type of order is made against a shopkeeper who has had £20,000 worth of fireworks seized from him, the court could justifiably offset this amount against any fine imposed. Alternatively, they could not make a deprivation order but impose a more onerous fine on a Defendant.

## Corus fined £200,000 over fatal crane drop incident

A machine operator employed by steel giant Corus died after a 260kg block fell on to him from a height of seven metres as he worked underneath a crane.

Sheffield Crown Court heard on 29 April that a mobile overhead crane operated by remote control was being moved down tracks at the firm's Rotherham factory, where steel strip is produced, on 2 July 2003. The crane block was hoisted up too far because the limit switch fitted to it was defective and failed to operate.

"If the switch had been operating correctly, it would have killed the power to the hoist mechanism and stopped the hoist block being lifted any further," David Bradley, the HSE inspector who investigated the case, told SHP. "But the motor kept lifting the block, driving it into the underside of the crane and stretching the hoist rope to such a point that it snapped, causing the block to fall to the ground. Unfortunately, Operator Shane Eastwood was in the wrong place at the wrong time and was pronounced dead at the scene."

Corus has since made changes to its safety systems and operating practices at the site to prevent a recurrence of the incident, to the satisfaction of the HSE. Ian Fretwell, Director of Corus Engineering Steels, said: "I would like to express my sincere sympathy to Shane Eastwood's family on behalf of everyone at Corus. Shane worked for us for 16 years. He was well liked and respected by his colleagues, and he has been sorely missed. Safety is our number-one priority throughout Corus".

Corus was fined £170,000 and ordered to pay a contribution of £30,000 towards the HSE'S costs after pleading guilty to breaching s2(1) of HSWA 1974 by failing to ensure the safety of Mr Eastwood.

# New Guidance on the Regulatory Enforcement and Sanctions Bill

**Jeremy Barnett, St Pauls Chambers**

A new guide to the Regulatory Enforcement and Sanctions Bill 2008 was published in May. It is divided into three sections and is aimed at parliamentarians, businesses and regulators who will have to come to terms with the new reforms, which are aimed at introducing 'light touch' regulation, in a cost effective manner, rationalising inspection and enforcement while maintaining compliance on businesses which regularly flout their regulatory responsibilities.

The Bill establishes a Local, Better Regulation Office [LBRO], to promote consistency amongst local authorities, the establishment of a Primary Authority Scheme to ensure coordination, an expanded 'toolkit' of alternative civil responses, and a duty on Regulators to review their functions and remove unnecessary burdens.

**The Better Regulation Office.**

The LBRO was established in 2007 as a Government owned company. It will have a range of statutory duties and powers to allow it to achieve its objectives. The LBRO will: issue guidlines and guidance to local authorites, encourage best practice and consistency in approach of regulators. It will encourage the 5 principles of Good Regulation, Regulatory Activities should be carried out in a way which is Proportionate, Accountable, Consistent, Transparent and Targeted only at cases where action is needed.The Bill establishes a statutory Primary Authority Partnership [PAP] in place of existing voluntary Home Authority and Lead Authority agreements. The LBRO will agree or nominate an authority to be the PAP, which will give advice and guidance to the partner and other interested authorities. An interesting new power is to arbitrate where differences of opinion occur between different regulators, a situation which has occurred in a number of cases known to the author. Inspection plans can be agreed for other regulators to follow, and any action taken must be cleared with the PAP before hand.

**The Expanded Toolkit of Regulatory Sanctions.**

Following the recommendations of the 2006 Macrory report Regulatory Justice:  Making Sanctions Effective, the Bill provides for four new civil sanctions.:

> ***Fixed Monetary Penalty notices*** which will usually be capped at £5000. There will be a right to make representations and objections, and early payment discounts.
> ***Discretionary Requirements*** including Variable Monetary Penalties, Compliance Notices and Restoration Notices. Again appeals will be to a Tribunal. Aggravating and Mitigating factors are set out in detail.
> ***Stop Notices*** in cases where there is a risk human heath, the environment and the financial interests of consumers. Compensation is payable in cases where the notice was wrongly issued.
> ***Enforcement undertakings.***

The governance of the use of powers is dealt with in detail. The Minister has a residual power to suspend the use of sanctions where a regulator is found to be persistently misusing those powers.

Appeals will be to a First Tier Tribunal, established under the Tribunals, Courts and Enforcement Act 2007( or existing Tribunals such as employment tribunals which conduct health and safety cases). These Tribunals will be divided into 'Chambers' and will be before a single Tribunal Judge sitting alone or with one or two expert lay members. Costs can be awarded to either party, unlike the new Tribunals established under the General Product Safety Directive which only allow for costs to be paid by the defendant companies.

**The requirement to remove unnecessary regulatory burdens.**

This initiative encourages a number of devices such as one form for all applications, reduction of safety inspections etc. An unnecessary burden is one which is disproportionate, targeted at situations where action is not required, or imposed in circumstances where it is possible to achieve the desired outcome in a less burdensome way.

**Conclusion.**

The Bill has adopted in full the recommendations of both Macrory and Hampton. The intention is that the desired 'policy outcome' can be achieved in a manner which is cheaper for business and proportionate to the savings. Although a new dawn in enforcement is promised, recent discussions with Trading Standards Officers suggests that a 'business as usual' approach may be taken on the ground, with the only real difference being the removal of civil jurisdiction from the Magistrates Courts to the new Tribunals, which can only be a positive step for those involved in such hybrid hearings at present.

# UK Licence Required for full-time Road Haulage

**Court of Appeal   Judgement May 16 2008**

The Court of Appeal recently dismissed an appeal against a judgement of the Transport Tribunal,which had refused to sanction the return of seven vehicles and eight trailers which had been impounded on suspicion of being operated in the UK without an operators licence, contrary to section 2(1) of theGoods Vehicles ( Licencing of Operators ) Act 1995.

A Belgian road haulier had originally held UK licences which had been revoked for breach of their conditions. They had Belgian licences and authorisations which permitted them to carry out 'cabotage'  ie temporary operation of road services for hire in another member state.

Lord Justice Longmore however held that if the vehicle in question was not performing cabotage at all, but was in truth operating full - time in a member state where the domestic authority had revoked the authority to operate, this was not what those who had drafted the legislation had anticipatedand the unlicenced activity could not be permitted to continue.

# Insolvency of firms facing fatal accident prosecutions.

Jeremy Barnett, St Pauls Chambers

On 8th June 2008, Judge Graham Morrow fined an Aintree based company, North West Aerosols Ltd the sum of £3 over an explosion in which one of its employees was killed and 3 others were seriously injured. The Judge made it clear that he would have imposed a fine in the region of £250,000 had the company not gone into voluntary liquidation after the incident in December 2005.
The accident occurred at 7.45 am when a release of liquid petroleum gas ignited and caused a fireball . Other aerosol containers exploded in the fire that extended from the factory into the adjacent road. There was a breakdown in the system of storage as pipes were left open ended without mechanical or automatic valves being installed to prevent a release.
The accident was caused as a trainee inadvertently opened the wrong valve, causing a release of LPG.
The Company was not represented in court as it had gone into liquidation and was fined £2 with £1 costs because of its liquidation status. The HSE later said that the case was important as it shows that they will peruse companies that become insolvent in important cases.
The question of insolvency is often considered by Defendants in fatal accident cases, where the level of fines and costs can often be the cause of insolvency. It is recommended that Directors of companies facing prosecution take financial advice as to the likely level of punishment including costs, and the effect upon the solvency of the company at the outset of proceedings. Severe financial difficulty can be a substantial mitigating feature, provided it is properly documented and dealt with appropriately by the Directors. Permission to take steps to protect the creditors must be approved both by the Prosecution and the Court to avoid personal liability of the Directors in these circumstances.

# Recent Case Law

Danielle Graham, St Pauls Chambers

**Bryant & Bench v Law Society [2007] EWCH 3043 (Admin)**

Both Appellants were qualified Solicitors who appealed against conviction and sentence passed by the Solicitors' Disciplinary Tribunal. They faced allegations of professional misconduct involving dishonesty relating to the failure to account, record and protect third party funds; and acting or continuing to act for clients involved in dubious or fraudulent transactions that bore the hallmarks of fraudulent investment schemes. Bryant was found to have acted dishonestly and all allegations against him were found to be substantiated. Bench's role was less significant. He was deemed not to have acted dishonestly but all save one of the allegations in his case was found proved. Bryant was ordered to be struck off the Roll of Solicitors. Bench was suspended from practice for three years.

The Grounds of Appeal were threefold:
*The tribunal did not apply the correct legal test for dishonesty.*
*The tribunal had been wrong in its refusal to consider character references when determining both the issue of professional misconduct and dishonesty.*
*With the exception of part of allegation 5, the Tribunal had been wrong to find the allegations proved.*

The Court of Appeal ruled that in this type of case the test for dishonesty is "has the party acted dishonestly by the standards of reasonable and honest people and if so was he aware that by those standards he was acting dishonestly?" Cases of Bultitude v Law Society [2004] EWCA Civ 1853 & Twinsectra Ltd v Yardley & Othrs [2002] UKHL 12 [2002] 2 AC 164 approved.

In this instance, character references are more than mere mitigation. They are relevant to both propensity and credibility and should be considered at the same time as dishonesty. Donkin v Law Society [2007] EWHC 414 (Admin) approved. As the Tribunal had made no findings that Bryant had been subjectively dishonest and had failed to take into account his character references then the finding of dishonesty could not stand.

The allegation relating to continuing to act for clients involved in dubious or fraudulent transactions was the most serious of the allegations in this case. The Tribunal had not found the transactions were fraudulent per se or were fraudulent investment schemes. At its highest therefore, the allegation would have to have been involvement in dubious transactions. However, to make such a finding of participation there was a requirement of knowledge. The Tribunal had made no such findings therefore all that could be said of the Appellants was that they were incompetent to a high degree. The remaining allegations were, in the main, made out. Although they were less serious, they related to funds held by a solicitor for the account of another and are more than trivial.

In the case of Mr Bryant the incompetence was considerable and continued for approximately 1 year. In the case of Bench his culpability was less but significant. The order to strike Bryant off the Roll would be quashed. Sentences reduced. Bryant would be suspended from practice for 2 years, Bench for 9 months.

# Recent Case Law

**Jeremy Barnett, St Pauls Chambers**

**R v Porter; [2008] WLR (D) 167**

CA: Moses LJ, Openshaw J and Sir Richard Curtis: 19 May 2008
In this case the Defendant was the headmaster of a private school for children aged 3 to 16. There were two playgrounds with steps between the two and a teacher on duty when a 4 year old boy fell down, hitting his head. He was taken to hospital and later contracted MRSA and died.
There was no obligation upon an employer in the conduct of his undertaking to guard against those risks which were merely fanciful. The fact that risk was part of everyday life went to the issue whether an injured person had been exposed to real risk by the conduct of the operation in question. There was no objective standard which applied in every case but there would be important factors which would indicate one way or the other whether there was such a risk.

The Court of Appeal, Criminal Division allowed an appeal by James Godfrey Joseph Porter against his conviction on 31 July 2007 at the Crown Court at Mold (Judge John Rogers and a jury), of failing to ensure the health and safety of persons not in his employment, contrary to s 3(1) of the Health and Safety at Work etc Act 1974, for which he was fined £12,500 and ordered to pay £7,500 towards the costs of the prosecution.
It was not necessary to provide any paraphrase of the statutory concept of risk even though judges had in the past found it necessary to do so: see R v Board of Trustees of the Science Museum [1993] 1 WLR 1171, 1177. What was important was that the risk which the prosecution had to prove was a real risk as opposed to a fanciful or hypothetical risk: see R v Chargot Ltd [2008] ICR 517, para 26. There was no obligation to guard against those risks which were merely fanciful. How was the line to be drawn? There was no objective standard which applied to every case but one way or the other there would be important indicia or factors none of which might be determinative but many might be of importance, e g evidence of any previous accident in similar daily circumstances.
Here there was nothing wrong with the steps and there had been no previous accident. The fact that risk was a part of everyday life did go to the issue whether the injured person was exposed to the risk by the conduct of the operation in question. Unless it could be said that this child was exposed to a real risk by the conduct of the school, no question as to the reasonably practicable measures taken to meet risk arose. The conviction was unsafe and the appeal would be allowed.

## www.regulatorybreach.com

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Regulatory Breach invites submissions that you feel will be of interest to our readers if you are interested in producing an article for our next issue please contact;

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