Trading standards

Maintaining standards

Dermot Keating & **Monica Stevenson** consider how unfair commercial practices are prosecuted

IN BRIEF

- How does the local authority Trading Standards Services use the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) to prosecute unfair commercial practices?

In May of this year, it was four years since the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (the regulations) came into force and in this time lawyers and trading standards officers alike have grappled with a piece of legislation most notable for its prolixity and complexity.

The regulations implemented an EU Directive (Unfair Commercial Practices Directive [2005/29/EC]) which sought to harmonise the approach of member states towards unfair commercial practices. Many critics have attributed their complexity to the fact that the regulations incorporated, virtually wholesale, the wording of the Directive. Recent case law shows some of the difficulties encountered by the UK courts when interpreting seemingly simple statutory terms (see for example *R (on the application of Surrey Trading Standards) v Southern & Scottish Energy plc* [2012] EWCA Crim 539, [2012] All ER (D) 164 (Mar), which saw the Court of Appeal consider who qualifies as a "trader" for the purpose of the regulations).

To date, there is a distinct shortage of appellate decisions on the regulations which may be explained in part by their age but could also point to their underuse. Whatever the reason Pt 4 of the regulations imposes a positive duty on trading standards officers to ensure that they are complied with (through, for example, the conduct of test purchase operations) and it follows that such prosecutions can only increase with time.

Legal framework

The regulations create a number of criminal offences, all of which involve behaviour that is characterised as an unfair commercial practice (UCP). There are a number of terms such as "average consumer", "transactional decision" and "product" which are set out in detail at reg 2.

Unfair commercial practices

- There is a general prohibition of *unfair* commercial practices [reg 3]. A commercial practice is unfair if:
  - It is not professionally diligent; and
  - It materially distorts, or is likely to materially distort the economic behaviour of the average consumer ("the transactional decision").

- To examine this further, a practitioner, trader or consumer needs to consider practices which are banned (Sch 1) or in certain circumstances could be unlawful.
- Schedule 1 of the regulations identifies 31 specific commercial practices which are deemed in all circumstances to be unfair (for example, displaying a quality/kite mark without the necessary authorisation). When considering conduct, it is imperative to check whether it falls within this Schedule. If not, the next task is to assess the conduct to determine whether it is unfair, ie it causes a consumer to take a different decision).
- Conduct qualifies as a UCP if it can be said to be one of the following:
  - misleading by way of action or omission [regs 5 & 6];
  - aggressive or undue influence [reg 7];
  - contravenes the requirements of "professional diligence".
- "Professional diligence" refers to the standard of special skill and care which a trader might reasonably be expected to exercise towards a consumer commensurate with honest market practice in the field. At first blush this is a simple test but in practice it is one which may be difficult to evidence without the input of a specialist in the relevant field.
- It is important then to assess the effect (contrary to regs 3, 5-7) on the transactional decision.
- The ambit of the regulations is not restricted by the date of a contract. The regulations apply to commercial practices before, during and after a contract is made.

No dishonesty required

A UCP might best be described as a "dereliction of duty" on the part of a businessman or trader. The required state of mind is knowledge or recklessness as to the practice in question.

None of the offences created by the regulations imports the ingredient of dishonesty, despite the fact that many of the practices regulations might well be regarded as such by the consumer, eg reg 5—misleading practices).

Defence of "due diligence"

Where a body corporate commits an offence with the consent or connivance of an officer of that body, both the officer and the body corporate can be

prosecuted and punished (regs 9–12). The same applies if the offence is attributable to negligence.

In those circumstances, reg 17 provides for the defence of due diligence. This is available for offences under regs 9, 10, 11 and 12. The burden of proof is on the defendant and to the standard of a balance of probabilities.

The defence of due diligence will succeed if a defendant can show that the alleged offence was due to a mistake, accident, act or default of another person or another cause beyond his control and that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

The due diligence defence is not available for a commercial practice which is said to be in contravention of professional diligence (reg 8). Furthermore, a trader who engages in a commercial practice without regard as to whether it contravenes the requirements of professional diligence will be deemed recklessly to have engaged in the practice.

Of note is the fact that a defendant would have to particularise in writing this defence and serve on the prosecution within seven days of the trial. It is likely when considering the requirements of the Criminal Procedure and Investigations Act 1996 that there would be pressure to incorporate this within a defence statement and serve far earlier in the proceedings.

Enforcement & penalties

The local authority Trading Standards Services (TSS) are provided with a discretion as to enforcement. It is not inevitable upon every infringement; and advice or guidance can be provided in certain circumstances. For more serious infringements, both civil and criminal enforcement is available. For the latter, the maximum sentence for any offence under the regulations is two years on indictment [reg 13].

The regulations & their relationship with fraud offences

While a local authority TSS has a duty to enforce the regulations, they can and still do opt for prosecutions under mainstream criminal legislation, most notably the Fraud Act 2006 (FrA 2006).

Offences under both sets of legislation carry the risk of a "directors' disqualification", but the advantage for a defendant in admitting a regulatory offence is the absence of any dishonesty. In the world of business, where reputation is everything, a prosecution under the regulations will arguably prove less damaging than a finding of fraud.

The sentencing guidelines for fraud offences can also generate significantly longer terms of imprisonment than regulatory offences. While many trading standard prosecutions will involve an overlap between the two regimes, judges sentencing under the regulations alone should resist the temptation to characterise such offences as dishonest (see *R v Stone (Rodney)* [2012] EWCA Crim 186 where the Court of Appeal said a judge had erred in treating the offences as dishonest when they involved "only a neglect of duty". The sentence passed was accordingly reduced).

> **"The regulations are quite wide-ranging & provide the capacity for greater protection for the consumer"**

Trading standards prosecutions

Choice of regulatory offence

Practitioners should consider the proposed indictment with care and bear in mind that the regulations provide for prosecutorial flexibility. For instance, a full and particularised defence statement can sometimes work to the defendant's disadvantage by prompting the prosecution to seek to switch tack and prefer charges under a different regulation. This may be so where the defendant has a strong defence to allegations of specific misleading actions or omissions but he is on weaker ground when it comes to the general standard of his work and the requirements of professional diligence

Media interest

Investigations and subsequent prosecutions can be triggered by multiple complaints. The case in which both authors recently acted stemmed from a lengthy investigation which encompassed a growing body of customer complaints. This triggered the defendant's arrest and eventual charge. By the time the case came to court it emerged that some of the witnesses had made contact with each other and several had participated in filming for Channel 5.

Large scale prosecutions brought under the regulations are likely to generate significant media interest. Practitioners should keep a close eye on consumer forums in the media or on the internet which might impact adversely on the fairness of a trial or raise disclosure issues as the case progresses. In this case it came to light inadvertently that Channel 5 was scheduled to air its piece during the trial period itself. Intervention by both the defence and prosecution led to its postponement.

Disclosure

Cases can generate large amounts of paperwork, involving as they often do articles of business such as contracts, invoices and receipts. In terms of unused material, practitioners should ensure that trading standards operate within the terms of the disclosure regime, serving clear and specified schedules of unused material which are updated as the case progresses.

Conclusion

The regulations are quite wide-ranging and provide the capacity for greater protection for the consumer. They provide trading standard services (TSS) with greater flexibility in the regulatory offences that they may choose to proceed upon. The corollary of this is that traders are now arguably at greater risk of prosecution. In particular, a director or employer could be criminally liable for the actions of an employee. The need for awareness and demonstrable due diligence is of paramount importance. Defending such allegations can involve the need for a more proactive approach in terms of particularisation of the defence case pre-trial and the presentation of defence case at trial. NLJ

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