Trading Standards Law and Practice

Second Edition

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FOREWORD

In the 21st century trading standards professionals operate within a kaleidoscope of complex statutory law and self-regulatory rules and practices. Governments and Parliaments of the UK, Europe and throughout the world search for the holy grail of economic growth based on a reduced and minimal legislative burden.

Members of our 130 years young Trading Standards Institute and their colleagues, whether practising in the public, private or third sectors, are at the front line in the endeavour to secure fair play and justice for people and enterprise alike. They are a touchstone for our consumers, our communities and our economies.

The levels of skill and legal understanding that are demanded of the modern day trading standards practitioner go far beyond any previous expectations. Globalism now triumphs in a world where trade knows no barriers and the internet increasingly dictates consumer access and behaviour. Trading standards straddle it all.

It is against the background of these growing challenges and rapid changes that trading standards practitioners must respond and deliver. Their track record is impressive and they will. To do so however they will be hungry for the advice, information, knowledge and instruction given to them by this second edition of 'Trading Standards: Law and Practice'. The unique combination of Bryan Lewin MBE and Jonathan Kirk QC is a fitting complement to the uniqueness of the UK trading standards profession. The UK we now know is a blend of partner nations each with their own historical or growing legal vires and to see this edition encompassing Scottish Law is testament to that.

The TSI warmly congratulates and thanks all concerned in the publication of this important text.

Ron Gainsford OBE, FTSI
Chief Executive, Trading Standards Institute

PREFACE

Over the last decade consumer law has undergone a revolution of a distinctly European type. The bedrock of trading law for 40 years, the Trade Descriptions Act 1968, has passed; to be replaced with shiny new regulation in the form of the CPUTR. Very soon the vast majority of UK trading law will have its origin in Brussels and Luxembourg. This will inevitably require domestic consumer law practitioners to understand and embrace the new concepts a European dimension brings. We hope that in completing our Second Edition we have gone some way to assisting practitioners to meet this new challenge.

In this edition we have introduced new chapters on product safety, food safety, the environment and animal welfare. We welcome Neil Coltart as our Scotland editor, which has enabled us to extend the geographical coverage of the book North of the Border. We are also immensely grateful to our team of contributing editors who have each brought to us their specialist knowledge and experience.

The Editors would also like to express thanks to David Hedger, Angus Mackay, Samantha Diamond, Paul Maylunn, Carol Gamble (from Northamptonshire County Council TS) and Jenny Mainwaring (from Birmingham City Council TS) for their assistance in reviewing the text.

If an explanation is sought for why the cover of this book is bright pink, we can only thank Jonathan's two daughters, Lucy Florence and Sophie Matilda Kirk, for their advice. Occasionally even experienced barristers don't quite get the answers they want from the questions that they ask!

We have agreed that all royalties from the publication of Trading Standards: Law and Practice (Second Edition) will be donated to the Meningitis Trust (a charity that Bryan's family has actively supported since the death of his 17 year-old niece Stacey) and the British Heart Foundation.

We would finally like to dedicate the book to our families. Bryan would particularly like to give credit to his four grandchildren – Finbar, Orla, Joseph and Elsa – whose own academic achievements have provided a constant source of inspiration.

The law is stated as at 1 June 2011.

Bryan and Jonathan

CHAPTER 1

INTRODUCTION AND GENERAL MATTERS

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1.1 INTRODUCTION

The ethos of modern-day trading standards services has objectives that are focused on consumer protection and fair-trading. This stems from a historical background of weights and measures. The Magna Carta referred to the need for uniformity:

> 'Let there be one measure of wine throughout the whole kingdom, and one measure of ale; and one measure of corn; and one width of cloth.'

The origins of Inspectors of Weights and Measures in the United Kingdom can be traced to William the Conqueror. However, even before the 'consumerism' period which brought in the Trade Descriptions Act 1968, the Fair Trading Act 1973, the Consumer Credit Act 1974 and a host of similar legislative developments, the role of many local authority weights and measures departments had already been extended into administering a myriad of laws regulating such diverse areas as transactions in food, fertilisers, feeding stuffs and poisons.

1.1.1 The law in Scotland

Although the majority of offences in Scotland are common law (for example there is no Theft Act) most of the offences reported to trading standards services have a statutory basis. Many of these offences derive from legislation that applies across the United Kingdom however it is important to note that the processes and evidential rules are quite different in Scotland. An illustration of this can be seen in a passage from *Hamilton v HMA*[1] in relation to the Trade Descriptions Act 1968 ('TDA'):

> 'No analogy can usefully be drawn as to what may be the correct application of the wording of section 19(1) to Scottish procedure for what may happen South of the border.'

Perhaps the best known evidential rule in Scotland is the requirement for corroboration, this requirement was classically set out in *Morton v HMA*:[2]

> 'No person can be convicted of a crime or a statutory offence except where the legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged. This rule has proved an invaluable safeguard in the practice of our criminal courts against unjust convictions and it is a rule from which the courts ought not to depart.'

Nowadays this statement might perhaps be better read as 'at least two independent sources' given the development of forensic science and the reliance on documentary evidence in many cases. The consequence of this

[1] 1997 SLT 31 per Lord Justice General Hope at pp 34G–34H.
[2] 1938 JC 50 per Lord Justice Clerk Aitchison.

evidential rule is that not only the offence but every essential fact in relation to it requires to be corroborated.

The successful prosecution of an accused will always rely on the care with which the investigation is carried out and the subsequent report to the Procurator Fiscal. This means that anyone investigating offences must be sure that they have followed the correct procedures and recorded their compliance.

Some investigations may require the use of covert surveillance techniques such as directed surveillance or the use of covert human intelligence sources, the proper use of these is regulated by the Regulation of Investigatory Powers (Scotland) Act 2000. The Act requires that these techniques are only used when it is proportionate and necessary for the purposes of; preventing or detecting crime or preventing disorder, in the interests of public safety or for the purpose of protecting public health.

Each local authority will have adopted processes that allow for these covert techniques to be considered and if appropriate authorised. The admissibility of any evidence gathered using these covert techniques relies on the investigating officer following these procedures so it is vital that they are followed and compliance with them properly recorded. If the investigation requires it the Regulation of Investigatory Powers Act 2000 (Chapter 2) outlines the requirements for acquiring communications data.

Another significant difference in the criminal justice process is the fact that all prosecutions in Scotland are dealt with through the Crown Office and Procurator Fiscal's Service. The majority of trading standards cases are prosecuted by Procurators Fiscal, for the area in which the offence has allegedly taken place, although cases heard in the High Court of Justiciary will be prosecuted by Advocates Depute.

Once a report, alleging that offence/s have been committed, has been submitted for consideration by the Procurator Fiscal, they determine whether or not the report should be accepted and if so in which court and whether under summary or solemn procedure. In a formal sense it is the Procurator Fiscal who directs investigations although in most cases that are dealt with by trading standards services the investigating officer will have presented a report covering all the necessary evidential elements.

In assessing whether or not to proceed to prosecution the Procurator Fiscal will consider a number of matters, most obviously is whether the alleged offence known in the law of Scotland, is there sufficient evidence to prove a crime has taken place and who committed it, is there a reasonable prospect of securing a conviction and most importantly is the prosecution in the public interest?

The Criminal Procedure (Scotland) Act 1995 covers a large number of procedural matters including the submission of documentary evidence, however in most instances a witness will be required to speak to any evidence that is being led and indeed except in the instance of expert evidence, two witnesses will be required.

Although the majority of the offences reported to the Procurator Fiscal by trading standards services will be tried under summary procedure, where they are conducted under solemn procedure the jury will consist of 15 members.

There are a number of other differences in Scotland, including the vocabulary of the criminal justice process and perhaps, most famously, there are three verdicts in Scottish Courts including 'not proven'.

1.1.2 European principles of construction

In the first edition of Trading Standards: Law and Practice in 2001 fewer than a quarter of the legislative provisions had a basis in European Community law. In this edition more than half were implemented in accordance with European treaty obligations. In particular, the cornerstone of trading standards law for 40 years, the Trade Descriptions Act 1968 ('TDA'), has been replaced by a European successor in the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 ('CPUTR').

In the first case to consider the CPUTR in any detail, *OFT v Purely Creative*[3] the High Court reminded practitioners that it is the canons of construction of European law that are of paramount importance when interpreting legislation with a European basis; this is of particular significance when the provision has implemented a Directive that is expressly designed to harmonise laws throughout the members states (such as the Unfair Commercial Practices Directive that led to the CPUTR in the UK).

In construing the language used in implemented provisions it will be critical to consider relevant judgments of the European Court of Justice (since 2009 the Court of Justice of the European Union) and definitions given in other European Regulations and Directives.[4] The approach to interpretation of legislation by the ECJ has consistently demonstrated a reliance on the context and purpose of a legislative provision. The traditional common law approach, with its focus on the exact wording of a measure (literal interpretation) or the presumed intention of the legislature, is unattractive when there are so many languages and national perspectives to consider.

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3 [2011] EWHC 106 (Ch).

4 Section 3(1) of the European Community Act 1972 expressly requires Community law to be construed in accordance with the principles and decisions of the European Court.

It was never intended that European law would be interpreted differently in different member states. Therefore the way that another member state has implemented a particular provision may not be of great weight in construing a provision domestically when there is an original European text. When considering a particular linguistic version of a European law text it should also be remembered that there is no hierarchy of language. European law texts are published in several languages, each of which is equally authentic.

1.1.3 Local weights and measures authorities

There is now a wide variety of criminal offences which apply across the spectrum of commercial practices. Although the legislation is principally concerned with the protection of consumers, some of the statutes enshrine the rights and interests of traders and their intellectual property. The responsibility for enforcing this criminal legislation is usually the statutory duty of 'local weights and measures authorities' through their trading standards service.

'Local weights and measures authorities' are defined in s 69 of the Weights and Measures Act 1985:

> **69 Local weights and measures authorities**
>
> (1) In England, the local weights and measures authority shall be –
>
> (a) for each non-metropolitan county, metropolitan district and London borough, the council of that county, district or borough,
> (b) for the City of London and the Inner and Middle Temples, the Common Council of the City of London, and
> (c) for the Isles of Scilly, the Council of the Isles of Scilly.
>
> (2) In Wales, the local weights and measures authority for each county shall be the county council and for each county borough shall be the county borough council.
>
> (3) In Scotland, the local weights and measures authority for the area of each council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 shall be the council for that area.

There are now over 200 local authorities exercising trading standards functions. They have duties and responsibilities for enforcing a wide range of national and European laws through both criminal and civil law processes. In addition to regulatory activities, most services provide advice, information and education to consumers and businesses in order to make them aware of their rights and obligations – although there are no powers, as such, to intervene or negotiate on behalf of consumers in disputes.

1.2 EVIDENCE GATHERING

In England and Wales, the provisions of the Criminal Procedure and Investigations Act 1996, and the Code of Practice made under it in 2005, are applicable to local authority officers (whether investigators, officers in charge of investigations or disclosure officers). Such officers must at all times:

> 'have regard to any relevant provision of a code which would apply if the investigation were conducted by police officers.'

In particular, responsibilities for recording and retaining material are important. Officers must record any information which they consider may be relevant to an investigation, ie that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case. In *Leatherland v Powys County Council*[5] the Divisional Court quashed convictions when trading standards officers were found to be in breach of their obligations under the Act and the Code of Practice in an animal welfare investigation.

Local authority enforcement officers in England and Wales should also, 'have regard to any relevant provision' of Codes of Practice made under s 67(9) of the Police and Criminal Evidence Act 1984 ('PACE') because they are 'Persons other than police officers who are charged with the duty of investigating offences'.

The exercise of investigatory powers by local authorities remains contentious. Lord Judge, the Lord Chief Justice, at a Mansion House speech in July 2010 said:

> 'I am, I suspect, not the only member of the judiciary who is troubled by the extent of the powers granted to council officials to enter people's homes without a warrant.'

The 2009 consumer White Paper: *A Better Deal for Consumers: Delivering Real Help Now and Change for the Future* contained a commitment towards 'modernising trading standards powers to help them deal more effectively with modern trading conditions'. One proposal for reform is a single code on powers of entry for non-police officers.[6]

There are few reported cases that feature proven abuse of statutory powers by local authority employees. In *Lancashire CC v Buchanan*[7] the defendant had been charged under the Property Misdescriptions Act 1991

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5 [2007] EWHC 148 (Admin).

6 Potentially as part of the Powers of Entry Review by the Home Office in conjunction with the review of the Police and Criminal Evidence Act 1984.

7 [2007] EWHC 3194 (Admin).

with intentionally obstructing an officer. However, the offence requires (as a precondition) that the officer 'had reasonable grounds for suspecting that an offence' under that Act had been committed. On appeal the Divisional Court affirmed the District Judge's conclusion, 'that there were no reasonable grounds for suspicion and that accordingly the respondent was not guilty.'

1.2.1 Covert surveillance

The use of covert surveillance for test purchasing or other functions was not regulated by statute before the enactment of Human Rights Act 1998 and the Regulation of Investigatory Powers Act 2000 ('RIPA'). In Scotland the use of covert surveillance now falls under the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIPSA').

However, abuse of process principles had developed at common law and evidential rules under the general exclusionary provision in s 78 of PACE.

The House of Lords considered many of these authorities in *R v Looseley* and *Attorney General's Reference (No 3 of 2000)*.[8] Several general principles can be distilled from the case law:

- there is no defence of entrapment known to English law but it may be ground for mitigating sentence;
- the courts have to perform a balancing exercise and, if they conclude that the conduct of an undercover officer was so unworthy or shameful that it was an affront to the public conscience to allow a trial to proceed, or if it rendered a fair trial impossible, they will stay the proceedings;
- it would be unfair and an abuse of process if a person had been incited or pressurised by an undercover officer into committing a crime that he would not otherwise have committed;
- it would not be objectionable if an undercover officer, behaving as an ordinary member of the public would, gave a person an unexceptional opportunity to commit a crime, and that person freely took advantage of the opportunity;
- when exercising the judicial discretion of whether to exclude evidence of an undercover officer, some (but not an exhaustive list) of the factors to be taken into account are:

[8] [2001] UKHL 53.

- Was the officer acting as agent provocateur in the sense that he was enticing the defendant to commit an offence that he would not otherwise have committed?
- What was the nature of any entrapment?
- Does the evidence consist of admissions to a completed offence, or does it consist of the actual commission of an offence?
- How active or passive was the officer's role in obtaining the evidence?
- Is there an unassailable record of what happened, or is it strongly corroborated?
- Has the officer abused his undercover role to ask questions which ought properly to have been asked in accordance with the PACE Codes of Practice (in Scotland the question is one of fairness to the accused and not one governed by PACE)?

RIPA regulates the use of a number of covert investigatory techniques, not all of which are available to local authorities. The three types of technique available to local authorities are:

(a) the acquisition and disclosure of communications data (such as telephone billing information or subscriber details);

(b) directed surveillance (covert surveillance of individuals in public places); and

(c) covert human intelligence sources (such as the deployment of undercover officers).

In Scotland RIPSA regulates this conduct – except for the acquisition and disclosure of communications data in which case RIPA applies.

In July 2010 the Home Secretary announced a review of investigatory powers conducted by Lord MacDonald. On the use of RIPA by local authorities the review concluded:

> 'On RIPA, the government will deliver the Coalition commitment to prevent local authorities from using these powers unless it is to prevent serious crime and has been authorised by a magistrate.'

The MacDonald review concluded that the use of directed surveillance powers by local authorities should be subject to a seriousness threshold and that the use of all three techniques by local authorities should be subject to a magistrate's approval mechanism. These provisions were contained in the Protection of Freedoms Bill that was introduced in the House of Commons on 11 February 2011 by inserting new ss 32A and 32B into RIPA to provide a procedure by which local authority authorisations can only come into effect if also approved by a relevant

judicial authority. The 6 months 'seriousness' threshold will be introduced through an order made under s 30(3)(b) of RIPA. It is worth noting that the regime in Scotland, with the exception of access to communications data, will not change.

1.2.2 Test purchasing

'Covert' sampling techniques (or test purchasing), have been part of the tools used to determine compliance with food and weights and measures laws for nearly 150 years. As Lord Nicholls said in *R v Looseley* and *Attorney General's Reference (No 3 of 2000)*:[9]

> 'Indeed, conduct of this nature by officials is sometimes expressly authorised by Act of Parliament. The statute creating an offence may authorise officials to make test purchases, as in section 27 of the Trade Descriptions Act 1968.'

In April 2006 the *LACORS Practical Guide to Test Purchasing* was published and it has been since updated on a number of occasions, most recently (March 2010) to take account of new Orders made under RIPA and the Office of Surveillance Commissioners' Procedures and Guidance document (which was itself updated in September 2010).

> **Selected extracts from the LACORS Guide:**
>
> In LACORS' view, the RIPA policy, which should be set annually by elected members, should make specific reference to test purchasing (having regard to legislative provisions, statutory codes and other authoritative guidance).
>
> Officers responsible for the management of test purchasing exercises should consider – in association with the local authority's policy and the views of the authorising officer – the provisions of section 26(2) RIPA [*section1(2)(b) RIPSA*] (in particular, whether the activity is likely to result in the obtaining of private information about any person) and section 26(8) RIPA [*section 1(8)(b) RIPSA*] (in particular, whether the test purchaser establishes or maintains a personal or other relationship with the seller).
>
> Clearly, in test purchasing operations, where it is the view of the manager and authorising officer that it is not likely to result in the obtaining of private information and no relationship will be established then RIPA authorisation is not required.
>
> In circumstances where the exercise is considered to fall outside the scope of RIPA, it is good practice, in LACORS' view, to record the reasons for this decision.
>
> … any use of persons aged under 18 to make test purchases must nonetheless be subject to risk assessment and must take account of the safety and welfare of the child – (see the Regulation of Investigatory Powers

[9] [2001] UKHL 53.

(Juveniles) Order 2000 – in Scotland the equivalent provisions are contained in the Regulation of Investigatory Powers (Juveniles) (Scotland) Order 2002).

It should be emphasised that

(i) ultimately only the courts can interpret legislation with any authority; and

(ii) the responsibility for authorising (or not authorising) an operation always remains with the Authorising Officer (AO), and the AO must document carefully the reasons behind that decision.

Children used in test purchases

In *London Borough of Ealing v Woolworths,*[10] the Divisional Court considered a case involving the use of children to make test purchases. An 11 year old boy had been used in a trading standards test purchase of an 18 category video film at the Respondent's shop.[11] The boy had simply bought the video and the sales assistant had made no inquiry of his age. The justices hearing the case at first instance accepted a submission that the evidence be excluded for entrapment under s. 78 (of PACE) because defendant had been induced to make the sale when otherwise no such sale would take place. The Divisional Court robustly overturned that decision:[12]

> 'If the [test purchase] process employed were to fall foul of section 78 it would emasculate the enforcement of a sensible piece of legislation which was passed for the express purpose of protecting young people such as the boy employed for the test purchase being exposed to undesirable influences. What happened was not entrapment of the respondents; the boy did not act as an agent provocateur.'

1.3 CRIMINAL PROSECUTIONS

Although there are various methods by which legislation can be enforced, the duty of enforcement frequently entails the prosecution of offences through the criminal courts. In Scotland all criminal prosecutions are conducted through the Crown Office and Procurators Fiscal Office.

The Hampton Review, *Reducing administrative burdens effective inspection and enforcement*, found that regulatory penalty regimes are often cumbersome and ineffective. In consequence, the *Macrory Review of Regulatory Penalties* made recommendations around an expanded 'toolkit' of sanctions since it found, as a central and fundamental criticism, that there was heavy reliance placed on criminal prosecution by Regulators as the core sanctioning tool. Albeit that prosecutions remain

[10] [1995] Crim L R 58.

[11] Section 11(1) of the Video Recordings Act 1984 made it an offence to supply the video to a person under the age of 18.

[12] This is a quotation from the report of the case rather than the verbatim judgment.

appropriate '… for serious breaches where there was evidence of intentional or reckless flouting of the law, whether by an individual or a business'.

The prosecution of offenders has always been part of the infringement policies of trading standards services, however the number of prosecutions has in fact reduced year by year. Prosecutions under the TDA, the cornerstone of regulatory legislation for nearly four decades, hovered around 1,500 in the late 1990s, the total number last reported by the Office of Fair Trading was reduced to just 259.

Part 8 of the Enterprise Act 2002 introduced a new civil law enforcement alternative to prosecution. Trading standards, the Office of Fair Trading and other bodies responsible for consumer law enforcement have stronger powers to seek court orders against businesses who breach certain consumer protection laws (see chapter 2).

There was once thought to be a potential difficulty with an enforcement authority prosecuting cases in which there had been police involvement: *R v Ealing Justices ex parte Dixon.*[13] However the case of *R v Croydon Justices ex p Holmberg*[14] approved such a course after an operation involving collaboration between a trading standards department and the police.

1.3.1 Crown immunity

No statute binds the Crown unless its provisions specifically state that this is the case. The Post Office, the few remaining nationalised industries, and local authorities[15] do not enjoy this immunity. Hospitals have been held to benefit from crown immunity[16] but the applicability of those decisions to today's more devolved management structure may be questioned.

1.3.2 Private clubs

It is frequently a requirement of trading standards offences with that the wrongdoing should have taken place in the course of a 'trade or business'. Such offences will not apply to transactions between private clubs and their members. In *John v Matthews*[17] Lord Parker CJ said:

> 'The object of the 1968 Act surely is to protect the public, not a husband from his wife or a club from a member of the club.'

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13 [1990] 2 QB 91, DC.

14 (1992) 157 JP 277, CO/1391/1, QBD.

15 *Re M* [1994] 1 AC, 377, per Lord Templeman at 395.

16 *Nottingham Area No 1 Hospital Management Committee v Owen* [1958] 1 QB 50, [1957] 3 All ER 358; *Pfizer Corporation v Ministry of Health* [1965] AC 512, [1965] 1 All ER 450.

17 [1970] 2 QB 443, [1970] 2 All ER 643.

The mere use of the word 'club' in respect of a person or body having none of the features of a club will not prevent the application of the terms of the Act.[18]

1.3.3 Companies

Where a statute creates an offence for a 'person', that expression includes companies.[19] Where a corporation is charged with a criminal offence, different rules apply in relation to its representation and the procedure by which it can enter a plea. In the magistrates' court procedure is governed by s 46 and Sch 3 if the Magistrates Court Act 1980.[20] The procedure for entering a plea on behalf of a company in the Crown Court is set out in s 33 of the Criminal Justice Act 1925.

Companies in liquidation

Before a court proceeds in the absence of a plea entered by a corporation it is important to ascertain whether the company is in liquidation, because the leave of the High Court will be needed. In *R v Dickson*,[21] a company in liquidation was prosecuted to conviction without the leave of the High Court.[22] However the argument that this invalidated the conviction of the director under the director's liability provision of the TDA (s 20) was rejected. If this were not the case, an unscrupulous trader could avoid liability by closing down 'his' transgressing company as a matter of routine and then recommence business shortly afterwards in the guise of another company.[23]

Corporate liability for personal acts

The circumstances in which a company is liable for the acts of its employees will depend upon the nature of the offence. A distinction can be drawn, however between offences that require a *mens rea* (a particular mental state) to be proven and those that do not.

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18 *Cahane v London Borough Council* (1985) 149 JP 561.

19 Interpretation Act 1978, Sch 1, '"Person" includes a body of persons corporate or unincorporate'.

20 A representative of the company is defined by reference to s 33(6) of the Criminal Justice Act 1925.

21 [1991] BCC 719.

22 The Insolvency Act 1986 requires leave to be given before proceedings are commenced against a company in administration, or which is the subject of a winding up order or where a provisional liquidator has been appointed.

23 In *R v Hadfield* (unreported, 1995, Crown Court), Alan Hadfield was prosecuted by North Yorkshire County Council for offences relating to falsely described slimming tablets. Hadfield had previous convictions for marketing 'slimming tea', which was, in fact, re-packaged ordinary tea. In both instances, the marketing companies set up by Hadfield, of which he was a director, went into liquidation before court hearings and he was, therefore, prosecuted – successfully – in his personal capacity.

Strict liability offences

For a *strict liability* offence, a company will be criminally liable when the *actus reus* of the offence can properly be attributed to it. In *Mousell Bros v London and North Western Railway*,[24] Lord Atkin stated:

> 'I think that the authorities … make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed … When a penalty is imposed for the breach of the duty, it is reasonable to infer that the penalty is imposed for a default of the person by whom the duty would ordinarily be performed.'

In construing a statute to ascertain whether it creates vicarious liability for a company, the verb used to create the offence will usually be significant. For example 'selling' or 'supplying' goods is an activity that can reasonably be attributed to a company, even though actually undertaken by its employees.[25] In the trading standards offences of strict liability it will rarely be difficult to attribute to a company criminal liability for the acts of its employees.

Mens rea offences

Corporate liability for offences that involve proof of a *mens rea* was discussed in *Tesco Supermarkets Ltd v Nattrass*.[26] Lord Reid considered the nature of a corporate 'personality' stating:[27]

> 'A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind, which directs his acts, is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be

[24] [1917] 2 KB 836, DC at pp 845–846.
[25] See for example *Coppen v Moore (No 2)* [1898] 2 QB 306.
[26] [1971] 2 All ER 127, [1972] AC 153.
[27] At pp 131–132.

> regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability …
>
> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company.'

A company will only be guilty of an offence requiring proof of a *mens rea*, if the *mens rea* can be attributed to someone who thinks and speaks for the company, an embodiment of the company.[28]

There is limited authority that a company may be liable for an offence requiring *mens rea*, even when the *mens rea* cannot be attributed to it. In *Linnett v Metropolitan Police Commissioner*,[29] the conviction of a licensee for 'knowingly permitting disorderly conduct' was upheld, despite him being unaware of it. The rationale of the decision is that the licensee had a special statutory duty to keep an orderly public house which he had delegated to his servant. In those circumstances, the knowledge required by the offence would be imputed to him. It is unlikely that *Linnett* is authority for a general proposition of law and is probably confined to offences under the Licensing Acts.[30]

Personal liability for corporate acts

Trading standards offences are often based upon individual transactions and consequently the conduct (*actus reus*) that constitutes the offence will be committed by a junior employee within a business. In many cases it is unsatisfactory that those truly responsible for the wrongdoing can hide behind the company 'corporate veil' and most trading standards offences also provide a penal sanction against those persons, charged with functions of management, who can be shown to have been responsible for the commission of a relevant offence by the corporate body (director's liability).

In a prosecution using a director's liability provision it is normal and desirable (although not a mandatory requirement) for the company to be a defendant in the same proceedings. If the company is not also prosecuted it will still be necessary for the prosecution to prove that the company would have been found guilty of the offence.

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[28] The concept is captured by the test of whether the individual has a controlling interest in the business.

[29] [1946] KB 290, DC.

[30] In *Vane v Yiannopoullos* [1965] AC 486, the House of Lords doubted any general application of the doctrine. However in relation to licensing offences, however it has since been applied in *R v Winson* [1969] 1 QB 371 and *Howker v Robinson* [1973] 1 QB 178, DC.

The provision that has generated most case law is s 20(1) TDA which has now been largely replaced by the Consumer Protection from Unfair Trading Regulations 2008 ('CPUTR').[31]

> **CPUTR, reg 15**
>
> **Offences committed by bodies of persons**
>
> **15** (1) Where an offence under these Regulations committed by a body corporate is proved –
>
> (a) to have been committed with the consent or connivance of an officer of the body, or
> (b) to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
>
> (2) In paragraph (1) a reference to an officer of a body corporate includes a reference to –
>
> (a) a director, manager, secretary or other similar officer; and
> (b) a person purporting to act as a director, manager, secretary or other similar officer.
>
> (3) Where an offence under these Regulations committed by a Scottish partnership is proved –
>
> (a) to have been committed with the consent or connivance of a partner, or
> (b) to be attributable to any neglect on his part, the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.
>
> (4) In paragraph (3) a reference to a partner includes a person purporting to act as a partner.

Director's liability provisions can also be found through trading legislation[32] including:

- section 169 of the Consumer Credit Act 1974;
- section 82 of the Weights and Measures Act 1985;
- section 40(2) of the Consumer Protection Act 1987;
- section 36 of the Food Safety Act 1990;
- section 101(5) of the Trade Marks Act 1994;
- section 110 of the Copyrights, Designs and Patents Act 1988;

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31 SI 2008/1277.

32 If the CA 2006 is a precedent for future legislation these provisions may be simplified. Section 1255 CA 2006 merely refers to '… an officer of the body, or a person purporting to act in any such capacity'.

- section 57 of the Animal Welfare Act 2006;
- regulation 12 of the Packaging (Essential Requirements) Regulations 2003.[33]

The burden of proving the liability of a director or manager under these provisions is upon the prosecution to the criminal standard. The definition of a company director or company secretary is now governed by the Companies Act 2006 ('CA 2006') and will usually be a matter of public record.

The scope of this type of provision in relation to managerial roles that are less formally defined was considered in *R v Boal*[34] where an assistant general manager was in charge of a well-known London bookshop whilst the manager was on holiday. He had been given no training in management and was prosecuted under s 23 of the Fire Precautions Act 1971. In quashing his conviction the Divisional Court reviewed a number of previous decisions and concluded that the defendant would only fall within the provision if he had, 'the management of the whole affairs of the company', and was 'entrusted with power to transact the whole affairs of the company' and was 'managing in a governing role the affairs of the company itself'. Simon Brown J went on to say:

> 'The intended scope of section 23 is, we accept, to fix with criminal liability only those who are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place, it is not meant to strike at underlings.'

The phrase 'any person who was purporting to act in any such capacity' overcomes the difficulty experienced in *Dean v Hiesler*[35] where the defendant was not a validly-appointed director in accordance with the provisions of the Companies Act 1929 but performed some of the duties of a director and even described himself as a director.

Consent or connivance

In considering 'consent' or 'connivance' it should be appreciated that 'neglect' requires a lower level of *mens rea* and therefore proof of 'consent' or 'connivance' will often be an unnecessary hurdle. Idiosyncratically the director's liability provision that has been considered most by the courts (s 20 TDA) refers to 'consent ***and*** connivance'[36] in contrast to most other legislative provisions (including reg 15 of the CPUTR) that refer to them in the alternative, 'consent **or** connivance'.

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[33] SI 2003/1941.
[34] [1992] 1 QB.
[35] [1942] 2 All ER 340.
[36] This is widely considered to have been a draftsman's error.

Both words were considered in *Huckerby v Elliott*[37] in proceedings concerning a similar statutory provision.[38] It was stated that:

> 'The learned stipendiary … dealt with consent and said: "It would seem that where a director consents to the commission of an offence by his company, he is well aware of what is going on and agrees to it." I agree with the stipendiary … The stipendiary went on: "Where he connives at the offence committed by the company he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it." … I do not disagree with that.'

It is likely that both 'consent' and 'connivance' each require the prosecution to prove the actual knowledge of the director, manager etc.[39] On that basis there would appear to be very little to distinguish a director's liability provision (if neglect is not used) from the general principles of secondary liability in criminal law.

Neglect

In *Re Hughes, Rea & Black*[40] it was said that '… neglect, in its legal connotation, implies failure to perform a duty of which the person knows or ought to know'.

There is support for the contention that a director of a company cannot be said to be neglectful if he fails to enquire about certain matters which are dealt with by a fellow director or senior manager. In *Huckerby v Elliott*[41] it was stated:

> ' … amongst other things it is perfectly proper for a director to leave matters to another director or to an official of the company, and that he is under no obligation to test the accuracy of anything that he is told by such a person, or even to make certain that he is complying with the law. It was pointed out that business cannot be conducted otherwise than on principles of trust, and accordingly as it seems to me … the appellant left matters concerning the licences to her co-director … who was the secretary of the company and fully acquainted with the business. One asks oneself this: Has she any reason to distrust [him] or to feel that he was not carrying out his duty? One finds that she had on the evidence produced no reason to distrust him.'

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37 [1970] 1 All ER 189.

38 Section 305(3) of the Customs and Excise Act 1952.

39 For example *Lamb v Wright & Co* [1924] 1 KB 857 at 864, [1924] All ER 220 at 223. Cf *James & Sons v Smee* [1955] 1 QB 78 at 91, [1954] 3 All ER 273 at 278; *Mallon v Allon* [1964] 1 QB 385 at 394, [1963] 3 All ER 843 at 847.

40 [1943] Ch 296.

41 Following Romer J in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 which related the provision of gaming premises without an appropriate licence and an offence under s 305(3) of the Customs and Excise Act 1952.

In *Lewin v Bland*[42] the managing director of a car selling company wrote to a customer enclosing a falsely-compiled replacement service book. He had not looked at the book before sending it out, but relied on a senior employee to have completed it correctly. He was subsequently acquitted of the offence of applying a false trade description, committed by the company on the basis of his neglect. In rejecting the prosecutor's appeal the Divisional Court said:

> 'There is nothing peculiar about the circumstances of this case which would mean that the managing director of what cannot be a small company should check the work of his senior staff… He was entitled to delegate work to his senior staff and could expect that work to be completed in accordance with the instructions given.'

In *R v E*[43] neglect was considered in the context of a Health and Safety prosecution of a company director. Latham LJ observed:

> 'the question, at the end of the day, will always be, where there is no actual knowledge of the state of facts, whether nonetheless the officer in question of the company should have, by reason of the surrounding circumstances, been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate safety procedures were in place.'[44]

In *Hirschler v Birch*[45] the defendant, a director of a vehicle parts company, purchasing high level brake lights on the continent, was warned that they were no longer lawful in some countries and likely soon to be banned in others. A fellow director, who was understood by the defendant to be carrying out inquiries on the subject, told the defendant that they were legal in the UK. This was incorrect and the fellow director had not made diligent inquiries on the point. The lights were then imported and sold under the false description that they were fit for use in Britain. Charged with neglect, the defendant was convicted by the magistrates on the basis that he had failed to ensure that an authoritative answer on the lawfulness of the lights had been obtained. The Divisional Court upheld this verdict on the basis that the issue of neglect was one of fact and that there was evidence on which the magistrates were entitled to find neglect because the defendant was on notice as to the question of the legality of the lights.[46]

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42 (1984) 148 JP 69.

43 [2007] EWCA Crim 1937.

44 See also *Wotherspoon v HM Advocate* [1978] AC 74.

45 [1988] BTLC 27, (1986) 151 JP 396.

46 For a further case where an offence was held to be attributable to neglect on the part of a director see *Crickitt v Kursaal Casino Ltd (No 2)* [1968] 1 All ER 189, (1969) 113 Sol Jo 1001.

Duplicity

In *R v T*[47] The Court of Appeal considered the quashing of counts under the directors liability provision of the TDA (s 20) on the grounds of duplicity. The judge at first instance had quashed a charge on the basis that it was bad for duplicity because it contained both an offence against the company and another against the director.[48] The charges were not duplicitous. Indeed, under the director's liability provision, it was necessary to prove that the company was itself guilty of the offence.

It is unlikely that charging, 'consent, connivance or neglect' in a single charge would make a count bad for duplicity. It is likely that the three elements (principally relating to *mens rea*) are merely different modes through which one offence is committed.[49] In *Southend Borough Council v White*, the Divisional Court observed that a remedy, where there was insufficient proof of the director's neglect, would have been '… for the justices to allow the amendment of the information so as to include consent or connivance'.[50]

1.3.4 Reverse burdens

Trading standards offences often include statutory defences (for example due diligence) where the burden of proof is expressly upon the defendant. These reverse burdens had always been construed as imposing a legal (or persuasive) burden upon the defendant, which could be discharged if the factual elements of the defence were proven to the civil standard (the balance of probabilities).

Reverse burdens must now be considered with regard to Art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') (the presumption of innocence) which has been used by the domestic courts to 'read down' some statutory reverse burdens so as to impose an 'evidential' burden upon a defendant. An evidential burden is one that only requires the defendant to adduce sufficient evidence fit for the consideration of a jury. In practical

47 [2005] EWCA Crim 3511.

48 The indictment was worded: 'Statement of offence. Applying a false trade description to goods contrary to s 1(1)(a) and s 20 of the Trade Descriptions Act 1968 Particulars of offence. [TL] Limited on or before 23 August 2003 in the course of a trade or business applied to goods, namely a BMW motor vehicle registration mark V38 MGJ, a false trade description by means of the vehicle odometer reading of 66066 miles, whereas the said vehicle had travelled not less than 127000 miles. The said offence was committed with the consent and connivance of or was attributable to the neglect of [MJT] a Director of the said Company who, by virtue of s 20 of the Trade Descriptions Act 1968, is guilty of the said offence'.

49 In the way that 'knowledge or suspicion' in money laundering charges under the Proceeds of Crime Act 2002 is simply the *mens rea* of the single offence.

50 Similarly in *R v E*, the information which alleged that the director's offence was due to his 'consent and/or, connivance and/or neglect' was not challenged despite the court's focus on the difference between consent or connivance and neglect.

application an evidential burden is a *de minimis* test of the evidence at the close of the prosecution case. It has been described as evidence sufficient to raise a *prima facie* case, if accepted.[51]

It follows that the difference between a legal burden and an evidential burden is highly significant. If a defendant satisfies the evidential burden demanded, the prosecutor must then disprove the defence to the criminal standard.[52]

The status of statutory reverse burden provisions was considered by the House of Lords shortly after the enactment of the Human Rights Act 1998 in *R v DPP ex parte Kebilene*.[53] The judgment in *Kebilene* relies in part on ECHR case law, which suggests that Art 6(2) is not a blanket ban against reverse burdens for criminal charges but rules that they must be confined within reasonable limits.[54] The overall burden of proving guilt must remain upon the prosecution.[55]

The judgment of Lord Hope in *Kebilene* suggested that, in determining whether a presumption was confined within reasonable limits, the court might usefully ask itself three questions:

(1) What do the prosecution have to prove in order to transfer the onus to the defence?

(2) Does the burden imposed on the accused relate to something that is likely to be difficult to prove or does it relate to something which is likely to be within his knowledge or to which he has ready access?

(3) What is the nature of the threat faced by society which the provision is designed to combat?[56]

Provisions 'read down' as evidential burdens

Article 6(2) has been used since *Kebilene* to 'read down' several legal burdens imposed on defendants in criminal charges and replace them with evidential burdens.[57] In *Sheldrake v DPP*[58] the court considered two

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51 *R v Bonnick* 66 Cr App R 266.

52 See for example the judgment of Judge LJ at paras 5 and 6 of *AG's Ref (No 1 of 2004)* [2004] 1 WLR 2111, [2005] 4 All ER 457, [2004] 2 Cr App R 27.

53 [2000] 2 AC 326, HL.

54 *Salabiaku v France* 13 EHHR 379.

55 *Lingens and Leitgens v Austria* 4 EHRR 373.

56 In *McIntosh v Lord Advocate* [2003] 1 AC 1078 Lord Hope emphasised that these three questions did not amount to a set of rules, but were no more than an approach that might be considered when balancing the interests of the individual against those of society.

57 See *R v Lambert* [2002] 2 AC 545, HL (the knowledge burden in ss 28(2) and (3) of the Misuse of Drugs Act 1971); *R v Webster* [2010] EWCA Crim 2819 (Corruption Acts

separate appeals concerning very different statutory reverse burdens.[59] The first Appellant was charged with an offence of being in charge of a motor vehicle with excess alcohol, for which there is a defence under s 5(2) of the Road Traffic Act 1988 if the defendant proves that there was no likelihood of him driving while over the limit. The second Appellant had been charged under s 11(1) Terrorism Act 2000 with member of a proscribed organisation (Hamas). Section 11(2) provides:

> (2) It is a defence for a person charged with an offence under subsection (1) to prove that he has not taken part in the activities of the organisation at any time while it was proscribed.

The House of Lords ruled that the ECHR did not outlaw presumptions of fact or law but required that they were kept within reasonable limits and should not be arbitrary. Governments were entitled to pass laws defining criminal offences excluding any requirements of *mens rea* (ie strict liability) but again these must be proportionate and reasonable. Lord Bingham stated:

> 'The task of the court is never to decide whether a reverse burden should be placed on a defendant, but always to assess whether a burden enacted by parliament unjustifiably infringes the presumption of innocence.'

Questions about reverse burdens should be decided on a statute-by-statute basis. Lord Bingham said:

> 'The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.'

Therefore, when confronted with a reverse burden provision it is helpful to ask two questions:

(1) Conventionally construed does the provision impose a legal or evidential burden upon the defence? If only an evidential burden then no sustainable argument exists. If a conventional construction reveals a legal burden then consider question 2:

(2) Is the imposition of a legal burden compatible with the Art 6 right to a fair trial; ie is a legal burden reasonable, justified and proportionate?

On the rationale of *Sheldrake*, a court ought to consider the following factors when analysing the questions of justification and proportionality:

1889 and 1916); *DPP v Wright; R (Scott, Heard and Summersgill) v Taunton Deane Magistrates' Court* [2009] EWHC 105 (Admin) (s 1 of the Hunting Act 2004).

58 *Sheldrake v DPP; AG's Ref (No 4 of 2000)* [2005] 1 AC 264, HL.

59 See also *R v Keogh* [2007] WLR 1500 where the courts read down ss 2 and 3 of the Official Secrets Act 1989 as imposing only an evidential burden.

- What is maximum sentence for the offence?
- In the event of conviction will the offence have great impact upon defendant over and above the sentence itself? Will he be met with opprobrium and disapproval from the community or society at large?
- Does the presumption relate to an issue peculiarly within the knowledge of the defendant?
- What is the opportunity or ability of the defendant to prove the issue in his favour?
- In the absence of a legal presumption how easy is it for Crown to prove issue in their favour?
- In the absence of a legal presumption how workable or effective is the statute?
- What mischief is the Act directed at?
- Is the presumption directed at an issue that is commonly an ingredient in a criminal offence (ie *mens rea*)?

In *Sheldrake* the House of Lords ruled differently in each of the two cases it was considering. The burden imposed by s 5(2) of the Road Traffic Act was a legal one. An accused would have to prove on a balance of probabilities that he would not have driven whilst unfit. This burden was justified principally because it related to a matter closely associated with the accused's own knowledge. The imposition of such a burden did not go beyond what was necessary and reasonable and it was directed at a legitimate objective namely preventing serious injury and death on the roads.

In relation to the Terrorism Act the House of Lords held that Parliament had intended to impose a legal burden on the accused but that amounted to a clear breach of the presumption of innocence. It was not a proportionate and justifiable legislative response to the threat of terrorism. Therefore despite the clear intention of parliament the section was to be read down to impose an evidential burden only.

Provisions imposing legal (persuasive) burdens

There are other cases where the courts have been robust in maintaining reverse onus provisions as creating legal rather than evidential burdens.[60]

[60] *L v DPP* [2002] 1 Cr App R 32 (s 139 of the Criminal Justice Act 1991 – having an

The leading case in trading standards law is *R v Johnstone*[61] where the House of Lords[62] considered s 92(5) of the Trade Marks Act 1994, which states:

> (2) It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.

The House of Lords gave an obiter[63] opinion that a legal burden was imposed by s 92(5) TMA and this was both justified and proportionate. This was based principally on the urgent international pressure, in the interests of consumers and traders, to restrain the widespread fraudulent trading in counterfeit goods. The reliance in the defence on matters within the defendant's own knowledge and the legal burden was needed to ensure that those committing these offences could effectively be brought to book. Lord Nicholls stated:

> 'A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused … This consequence of a reverse burden of proof should colour one's approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.
>
> The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty.

article with a blade or point in a public place); *R v Drummond* [2002] 2 Cr App R 25 (s 15(3) of the Road Traffic Act 1988); *R v Davies* [2003] 1 Archbold News 3, CA (s 40 of the Health and Safety at Work Act 1974).

61 [2003] 1 WLR 1736; The court in *Johnstone* considered another TMA case on reverse burdens *R v S (Trade mark defence)* [2002] EWCA Crim 25584.

62 See also *Attorney General Reference (No 1 of 2004)* [2004] EWCA Crim 1025 where it was stated that the, 'Courts should strongly discourage the citation of authority to them other than the decision of the House of Lords in Johnstone and this guidance. Johnstone is at present the latest word on the subject'.

63 The opinion was expressly stated to be unnecessary to decide the appeal. But there had been conflicting statements in the Court of Appeal. Lord Nichols stated: 'In the events which have happened this issue does not call for decision in the present case. But the House should not leave the law on this point in its present state, with differing views expressed by the Court of Appeal.'

(1) Counterfeiting is fraudulent trading. It is a serious contemporary problem. Counterfeiting has adverse economic effects on genuine trade. It also has adverse effects on consumers, in terms of quality of goods and, sometimes, on the health or safety of consumers. The Commission of the European Communities has noted the scale of this "widespread phenomenon with a global impact" … Protection of consumers and honest manufacturers and traders from counterfeiting is an important policy consideration.

(2) The offences created by section 92 have rightly been described as offences of "near absolute liability". The prosecution is not required to prove intent to infringe a registered trade mark.

(3) The offences attract a serious level of punishment: a maximum penalty on indictment of an unlimited fine or imprisonment for up to ten years or both, together with the possibility of confiscation and deprivation orders.

(4) Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not.

(5) The section 92(5) defence relates to facts within the accused person's own knowledge: his state of mind, and the reasons why he held the belief in question. His sources of supply are known to him.

(6) Conversely, by and large it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be cooperative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.'

The rationale of *Johnstone* was repeated by a five judge Court of Appeal in *Attorney General's Reference (No 1 of 2004)*.[64] Reacting to the growing volume of submissions in relation to reverse burdens, the court gave general guidance to the Crown Court and magistrates' court in the following terms:

'The General Guidance

(A) Courts should strongly discourage the citation of authority to them other than the decision of the House of Lords in Johnstone and this guidance. Johnstone is at present the latest word on the subject.

(B) The common law (the golden thread) and the language of Article 6(2) have the same effect. Both permit legal reverse burdens of proof or presumptions in the appropriate circumstances.

(C) Reverse legal burdens are probably justified if the overall burden of proof is on the prosecution i.e., the prosecution has to prove the essential ingredients of the offence, but there is a situation where there are significant reasons why it is fair and reasonable to deny the accused the general protection normally guaranteed by the presumption of innocence.

(D) Where the exception goes no further than is reasonably necessary to achieve the objective of the reverse burden (i.e. it is proportionate), it is

[64] [2004] 1 WLR 2111, [2005] 4 All ER 457, [2004] 2 Cr App R 27.

sufficient if the exception is reasonably necessary in all the circumstances. The assumption should be that Parliament would not have made an exception without good reason. While the judge must make his own decision as to whether there is a contravention of Article 6, the task of a judge is to "review" Parliament's approach, as Lord Nicholls indicates.

(E) If only an evidential burden is placed on the defendant there will be no risk of contravention of Article 6(2).

(F) When ascertaining whether an exception is justified, the court must construe the provision to ascertain what will be the realistic effects of the reverse burden. In doing this the courts should be more concerned with substance than form. If the proper interpretation is that the statutory provision creates an offence plus an exception that will in itself be a strong indication that there is no contravention of Article 6(2).

(G) The easier it is for the accused to discharge the burden the more likely it is that the reverse burden is justified. This will be the case where the facts are within the defendant's own knowledge. How difficult it would be for the prosecution to establish the facts is also indicative of whether a reverse legal burden is justified.

(H) The ultimate question is: would the exception prevent a fair trial? If it would, it must either be read down if this is possible; otherwise it should be declared incompatible.

(I) Caution must be exercised when considering the seriousness of the offence and the power of punishment. The need for a reverse burden is not necessarily reflected by the gravity of the offence, though, from a defendant's point of view, the more serious the offence, the more important it is that there is no interference with the presumption of innocence.

(J) If guidance is needed as to the approach of the European Court of Human Rights, that is provided by the Salabiaku case at para 28 of the judgment where it is stated that "Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence".'

The guidance provided by this judgment is essentially of practical importance in the lower courts. It was given at a time that many defence applications were being made in relation to reverse burdens and its overarching theme was to stem the flow of those applications and ensure that evidential burdens (considered to be rather weak) did not become the norm.

The court was anxious to prevent extensive citation of authority. However, the guidance that *Johnstone* should be the only authority cited in the lower courts seems rather difficult to justify when there are other House of Lords authorities (in particular *Sheldrake* and *Kebilene*) that were not disapproved in *Johnstone* and which also deal with different types of reverse burden defences. *Johnstone* is, after all, an *obiter*

judgment and it cannot be the place of the Court of Appeal to restrict the application of other relevant judgments of a superior court.

Is the rationale of Johnstone applicable to due diligence defences?

The due diligence defence that is common to many trading standards offences, for example reg 17 of the CPUTR, presents a different issue to the one confronting the House of Lords in *Johnstone*. Although trade marks offences share a similar strict liability character, in J*ohnstone* the reverse burden related only to proof of a state of mind (*mens rea)*. The due diligence defence has various components some of which potentially relate to provable conduct, for example 'the act or default of another person', 'accident' or 'another cause beyond his control.'

It can plainly be argued that these matters are peculiarly within the knowledge of the accused. However, once an issue has been fairly raised by a defendant (for example in interview under caution) is it compatible with the presumption of innocence for a prosecutor to investigate no further and simply rely upon the statutory burden?

In many cases the matters relied upon by an accused will not be easily susceptible to investigation by the prosecution but can readily be addressed by a defendant, for example a defence based solely on the defendant's own business records. In such circumstances, it will be easier for the courts to find the balance in favour of imposing a legal burden. Where the issue is difficult for a defendant to deal with evidentially, such as a complex or expensive technical issue, the courts may well find the balance in favour of imposing only an evidential burden.

The observation of the House of Lords in *Sheldrake* that there should be an, 'examination of all the facts and circumstances of the particular provision as applied in the particular case' may be of particular importance for the due diligence defence because each limb is very different and may be susceptible to different types of evidential proof.

The context of the offence is also likely to be a relevant factor. The sheer scale of the counterfeiting problem was plainly important in *Johnstone*. However, provisions such as the CPUTR are capable of applying in many different scenarios across the consumer protection spectrum; from purely technical offences to serious rogue trading. Ultimately, the nature of the offending and the pressing need to protect consumers will be relevant in determining whether the reverse burden in justified.

1.3.5 Post-conviction orders

This section is not relevant to procedures in Scotland.

The Code for Crown Prosecutors (February 2010), in relation to the selection of charges, states that prosecutors should select charges, *inter alia*, which give the court adequate powers to sentence and impose appropriate post-conviction orders. Further the Code states:

> 'It is the duty of the prosecutor to apply for compensation and ancillary orders, such as anti-social behaviour orders and confiscation orders, in all appropriate cases.'

Essentially the types of order that will be relevant to trading standards cases fall into three area:

- relating to financial matters – such as compensation, confiscation, costs;
- relating to property – such as deprivation, forfeiture;
- relating to the offender – such as anti-social behaviour orders, driving bans and company director disqualifications.

Financial orders

Section 13 of the Proceeds of Crime Act 2002 ('POCA 2002') requires the court to have regard to the confiscation order before imposing a fine or other order involving payment on the defendant, except for a compensation order.

Compensation

Sections 130–134 of the Powers of Criminal Courts (Sentencing) Act 2000 ('PCCSA 2000') provide for a court to make a compensation order, requiring the convicted person to pay compensation for any personal injury, loss or damage resulting from the offence that the person was convicted for, or any other offence which is taken into consideration by the court in determining sentence, instead of or in addition to dealing with him in any other way. An order should only be made where 'the sum claimed by way of compensation is either agreed or proved'. Section 40(1) of the Magistrates Courts Act 1980 prescribes the maximum amount that a magistrates' court can order – currently £5,000 per charge. The Crown Court has unlimited powers, but should have regard to the means of the offender. The court may make the order whether or not the prosecution apply for it but must give its reasons if it does not do so (but presumably only when an application is made).

In Scotland ss 249–253 of the Criminal Procedure (Scotland) Act 1995 provide for the granting of compensation orders, how they will be

determined and enforced. In summary proceedings the Sheriff may make an order up to the prescribed sum and in solemn proceedings the level of compensation is unlimited.

Confiscation

Confiscation orders are now made under POCA 2002, which applies to all offences committed after March 23 2003. A person may be committed to the Crown Court for confiscation proceedings following a conviction of any offence, indictable or summary, in the magistrates' court. Where the prosecutor asks the magistrates' court to do so, the court must commit the defendant to the Crown Court. Where a person is committed to the Crown Court for confiscation proceedings, the Crown Court will also assume responsibility for the sentencing process. In Scotland a court may order confiscation under Part 3 of the Act.

The question of whether a person has a criminal lifestyle is central to the operation of POCA 2002. An offender falling outside the criminal lifestyle provisions is liable to particular conduct confiscation relating only to the benefit from the particular offences[65] convicted. A defendant with a 'criminal lifestyle' is subject to rebuttable assumptions[66] that his income and expenditure for the preceding 6 years were all the proceeds of crime. The criminal lifestyle provisions are triggered (under s 75) in three ways; by a conviction of a Sch 2 offence; by a combination of offences of benefit or previous convictions; or by an offence of benefit committed for at least 6 months.[67] For Scotland the lifestyle offences are in Sch 4.

Confiscation orders have been increasingly sought in trading standards cases. Offences under the Copyright, Designs and Patents Act 1988 and the Trade Marks Act 1994 are Sch 2 offences; such that a defendant is deemed to have a criminal lifestyle when convicted. Offences under the CPUTR are not listed in Sch 2, however, if they generate a benefit of at least £5,000 they may generate a criminal lifestyle by their combination or duration.

Costs

Under s 18 of the Prosecution of Offences Act 1985 – which does not apply to Scotland – where a person is convicted of an offence before a Crown Court or magistrates' court, the court may make such order as to the costs to be paid by the accused to the prosecutor as it considers just and reasonable.

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65 Including those taken into consideration.
66 Section 10.
67 There is a threshold of £5,000 benefit for each of the two offences of benefit triggers.

Post-conviction orders relating to property

Deprivation

The following provision does not apply in Scotland.

Section 143 of the PCCSA 2000 contains the following:

> **143 Powers to deprive offender of property used etc for purposes of crime**
>
> (1) Where a person is convicted of an offence and the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him, or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued –
>
> (a) has been used for the purpose of committing, or facilitating the commission of, any offence, or
> (b) was intended by him to be used for that purpose,
>
> the court may (subject to subsection (5) below) make an order under this section in respect of that property.
>
> …
>
> (5) In considering whether to make an order under this section in respect of any property, a court shall have regard –
>
> (a) to the value of the property; and
> (b) to the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making).

Forfeiture

Specific provisions exist under trade mark, copyright, video recordings and weights and measures legislation for the forfeiture of items and reference should be made to those sections of this book for details of the relevant provisions.

Post-conviction orders relating to the offender

In Scotland there are different provisions and applications would be a matter for the Procurators Fiscal/Crown Office.

Anti-social behaviour orders

Anti-Social Behaviour Orders ('ASBO') are made under the Crime and Disorder Act 1998 (since modified by the Police Reform Act 2002 and the Anti-Social Behaviour Act 2003). Since December 2002, local authorities have had the power to apply to the court for an order on conviction, allowing the court to impose strict conditions, similar to a conventional ASBO. The application process for an order requires evidence to be given

to the civil standard and hearsay evidence is admissible. An order can be for an unlimited period, but has to last a minimum of 2 years. The maximum penalty for breach of an order under s 1C is 5 years imprisonment.

Since the first trading standards case to feature an ASBO – rogue builder David Flaherty was jailed for 3½ years in 2005 and served with an ASBO which prevented him from running a construction business for a further 5 years after his release from prison – there have been a number of other cases involving a variety of offences. (Steven Harrison, an ice cream man who admitted selling lager from his van outside a school, was given a 10 year ASBO which prevents him from selling alcohol from any vehicle that sells food and drink during that time).

The ASBO imposed on the defendant in *Lewis Thomas Gilbertson*[68] prohibited him from:

> 'Making unsolicited calls to private dwelling houses (in person or through anyone else) by telephone for the purpose of obtaining building work (including repair and maintenance work) or gardening work and, secondly, from encouraging or employing others to engage in like behaviour.'

Allowing the appeal against its imposition and quashing the ASBO – '… this particular order offended both the principles of practicality and necessity' – the Court of Appeal also adversely commented on the appropriateness of its wording (it related to the making of unsolicited telephone calls, whereas the offences he committed related to cold-calling in person) and the fact that application was made by the prosecution without, it seems, any prior notice either to the defendant or to the court.(Moses LJ said in *R v Jones*:[69] '… any court must give counsel, both for the Crown and the defence, proper opportunity to obtain all the relevant authorities before making it and giving them full opportunity to make submissions about the considerable learning there is now on the subject.')

Disqualification from driving

A court by or before which a person is convicted of an offence may, instead of or in addition to dealing with him in any other way, order him to be disqualified, for such period as it thinks fit, for holding or obtaining a driving licence (s 146 PCCSA 2000).

Although the power to disqualify an offender from driving is not limited to any particular offence and it was not necessary that the conviction should be connected in any way with the use of a motor vehicle, the court

[68] [2009] EWCA Crim 1715.
[69] [2006] EWCA Crim 2942.

cannot impose a period of disqualification arbitrarily and there must be a sufficient reason for the disqualification – *R v Cliff*.[70]

In *R v Taylor*[71] the defendant was sentenced to 18 months' imprisonment in respect of offences involving counterfeit CDs, DVDs and MP3 discs. He was also disqualified from driving for 18 months under s 146 PCCSA 2000. The Court of Appeal did not think it appropriate to interfere with the sentence of imprisonment but were '… more troubled by the order for disqualification from driving. Since the appellant was in the habit of travelling to car boot fairs to sell these goods we can understand why the judge took that step, but the effect of the order will be to prevent him from driving for a period of 9 months after his release from prison and that will seriously interfere with his ability to earn his living and rehabilitate himself. In our view an order for disqualification was inappropriate in this case.'

Company director disqualification

Under the Company Directors Disqualification Act 1986 ('CDDA 1986') the court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, *management,* liquidation or striking off of a company, or with the receivership of a company's property or with his being an administrative receiver of a company. The maximum period of disqualification is 15 years in the Crown Court and 5 years when imposed in the magistrates' courts.

As amended by the Insolvency Act 2000, the CDDA 1986 gives the Secretary of State power to accept an undertaking from any person that, for a specified period, that person must not:

(a) without the leave of the court, be a director of a company, act as a receiver of a company's property or in any way take part in the promotion, formation or management of a company; and

(b) act as an insolvency practitioner.

In *R v Rafi Asghar Sheikh* and *Sami Asghar Sheikh*[72] the defendants were convicted of intellectual property crimes and sentenced to 6 years' imprisonment. In each case the judge made a disqualification order under CDDA 1986 for a period of 10 years. (The brothers were tried alongside their father, Khalid Asghar Sheikh, who was convicted of conspiracy to acquire criminal property and sentenced to 4 years' imprisonment, was also disqualified for a period of 10 years). The defendants appealed (only) against the disqualification order. Treacy J stated:

[70] [2004] EWCA Crim 3139.
[71] [2006] EWCA Crim 2503.
[72] [2010] EWCA Crim 921.

'Given all the circumstances, we are not persuaded that the judge fell into error … The term of disqualification imposed was severe but, in our judgment, deservedly so.'

1.4 DISCLOSURE OF INFORMATION

The Enterprise Act 2002 ('EA 2002') repealed a number of specific provisions which permitted trading standards officers to disclose information to other persons and replaced them with a new general framework.

EA 2002 provides for a general restriction on the disclosure of specified information (information which 'comes to a public authority in connection with the exercise of any function it has under or by virtue of' certain legislative provisions) during the lifetime of the individual or during the existence of the undertaking unless that disclosure is within one of the permitted gateways or the information had previously been legitimately made public.

The permitted gateways, in summary, are that the disclosure can be lawfully made:

- to the disclosing authority to facilitate the exercise of its own statutory functions under EA 2002 or any other legislation. If information disclosed for this purpose is not made available to the public, there are restrictions on the recipient making further disclosure;

- to another public authority to facilitate the exercise of the recipient's statutory functions it has by virtue of the EA 2002 or as specified in Sch 15 EA 2002. Information disclosed in this way (that is not made available to the public) may not be used for any purposes other than that for which it was disclosed, and there are restrictions on further disclosure by the authority receiving the information;

- to any person:

  '(a) in connection with the investigation of any criminal offence in any part of the United Kingdom;
  (b) for the purpose of any criminal proceedings there;
  (c) for the purpose of any decision whether to start or bring to an end such an investigation or proceedings.'

  The disclosing authority must be satisfied that disclosure is proportionate in the circumstances and the recipient may only use the information for the specific purpose of the disclosure;

- to overseas authorities in accordance with the rules set out in s 243 EA 2002.

Sections 239 and 240 EA 2002 also permit disclosure of (any) information held by a public authority where:

- the disclosure is made with the consent of the individual or undertaking to which the information relates and, if different, the lawful holder of the information (if that person's identity is known to the authority);

- the disclosure is required under European Community law.

Disclosure for the purpose of civil proceedings is provided by s 241A EA 2002 (inserted by the Companies Act 2006):

> **241A Civil proceedings**
>
> (1) A public authority which holds prescribed information to which section 237 applies ['specified information'] may disclose that information to any person –
>
> (a) for the purposes of, or in connection with, prescribed civil proceedings (including prospective proceedings) in the United Kingdom or elsewhere, or
> (b) for the purposes of obtaining legal advice in relation to such proceedings, or
> (c) otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings.
> [(b) for the purpose of any decision whether to bring such proceedings]
>
> [*Subsection (2) provides that subsection (1) does not apply to competition information*]
>
> (3) In subsection (1) "prescribed" means prescribed by order of the Secretary of State.
>
> [*Subsection (4) provides for order-making powers*]
>
> (5) Information disclosed under this section must not be used by the person to whom it is disclosed for any purpose other than those specified in subsection (1).

The Enterprise Act 2002 (Disclosure of Information for Civil Proceedings etc) Order 2007[73] came into effect on 1 October 2007. A guide to the changes to Part 9 of the Enterprise Act 2002 to allow information to be disclosed for the purpose of civil proceeding has been published by the Department for Business.

[73] SI 2007/2193.

1.5 CIVIL SANCTIONS

The Regulatory Enforcement and Sanctions Act 2008 ('RESA') implements the key recommendations contained in the Hampton Review and the Macrory Review[74] by introducing civil sanctions for trading standards offences.

1.5.1 The Local Better Regulation Office ('LBRO')

Part 1 RESA provides for the establishment of the Local Better Regulation Office ('LBRO') and makes provision about its objectives and functions.

LBRO was initially set up as a private company limited by guarantee and became an executive non-departmental public body with statutory powers, accountable to the Department for Business, Innovation and Skills ('BIS'), in October 2008. LBRO's area of responsibility covers environmental health, trading standards, fire safety and licensing.

In February 2011, the Government announced that, subject to Parliamentary approval and the outcome of a consultation on plans for streamlined regulation, LBRO will be replaced by a new organisation within BIS.

LBRO in Scotland

LBRO's functions under Part 1 do not apply in Scotland – Parts 2, 3 and 4 apply in Scotland in respect of matters that are reserved. Where LBRO exercises its functions in relation to matters which are the responsibility of Welsh Ministers, provision is made for LBRO to consult or seek the consent of Welsh Ministers – similarly, there are also specific procedures in Parts 2, 3 and 4 in respect of matters which the Welsh Ministers exercise functions.

1.5.2 Co-ordination of regulatory enforcement

Part 2 of RESA establishes a Primary Authority scheme for any business that trades across council boundaries with the aim of securing coordination and consistency of regulatory enforcement by local authorities. Theoretically, the scheme was introduced to address many of the concerns expressed regarding local authority regulatory enforcement, including inconsistent advice, wasted resources, duplication of effort and the absence of an effective dispute resolution mechanism when two local authorities cannot agree on a regulatory approach.

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[74] *Reducing Administrative Burdens: Effective Inspection and Enforcement* ('the Hampton Review') and the Macrory Review, *Regulatory Justice: Making Sanctions Effective*, ('the Macrory Review').

The Primary Authority is a local authority registered by LBRO as having responsibility for giving specialist advice and guidance on trading standards, environmental health, and some fire safety functions to a particular business that is subject to regulation by more than one local authority. (Future administration of the Primary Authority scheme will be brought into the new organisation within BIS).

Where LBRO has registered a Primary Authority, any other local authority (known as an 'enforcing authority' for the purposes of the scheme) that proposes to take enforcement action against the business must contact the Primary Authority first (it should be noted that the enforcing authority does not have to obtain the *consent* of the Primary Authority). However, if the Primary Authority believes that the proposed action is inconsistent with advice or guidance that it has previously given, it can prevent the action being taken. LBRO provides a referrals system to resolve differences of opinion between an enforcing authority and a Primary Authority over a proposed enforcement action.

The Primary Authority scheme only applies to local authority functions which relate to matters which are devolved or not transferred. The Co-ordination of Regulatory Enforcement (Regulatory Functions in Scotland and Northern Ireland) Order 2009[75] specifies regulatory functions exercisable by local authorities in Scotland and Northern Ireland to which Part 2 applies.

The Co-ordination of Regulatory Enforcement (Enforcement Action) Order 2009[76] specifies the actions which are – and are not – to be regarded as enforcement action for the purposes of the primary authority scheme. The Order also prescribes circumstances in which the enforcing authority does not have to notify the primary authority before it takes enforcement action, and cannot be directed not to take that action. The Co-ordination of Regulatory Enforcement (Procedure for References to LBRO) Order 2009[77] prescribes that applications for consent to a reference and any representations made to LBRO in relation to a reference must be made in writing. The Order also prescribes a number of associated administrative matters.

When exercising a regulatory function specified by the Legislative and Regulatory Reform (Regulatory Functions) Order 2007,[78] local authorities – and their officers – must also have regard to the Principles of Good Regulation and the Regulators' Compliance Code. Section 21 of the Legislative and Regulatory Reform Act 2006 sets out the five principles –

[75] SI 2009/669.
[76] SI 2009/665.
[77] SI 2009/670.
[78] SI 2007/3354.

regulatory activities should be carried out in a way that is transparent, accountable, proportionate, and consistent and should be targeted only at cases in which action is needed.

Section 22 of the Legislative and Regulatory Reform Act 2006 provides for the issuing of a code of practice. The Legislative and Regulatory Reform (Regulatory Functions) (Amendment) Order 2009 extends the duty to have regard to the Regulator's Compliance Code to local authorities in Scotland, Wales and Northern Ireland in respect of specified functions which are reserved, not devolved or not transferred. In addition, it extends the duty to have regard to the Code to regulators which regulate private businesses and third sector operators carrying out 'public sector' functions for or on behalf of the public sector.

1.5.3 Civil sanctions

The reforms proposed by the *Macrory Review of Regulatory Penalties* were '… designed to modernise sanctioning toolkits across the regulatory system, reflecting the risk-based approach to regulation and the broader regulatory reform agenda …'.

The *Review* concluded that the current sanctioning regime was ineffective, over reliant on criminal prosecution and lacking in flexibility; it made recommendations aimed at ensuring that regulators have access to a flexible set of sanctioning tools that are consistent with the risk-based approach to enforcement outlined in the Hampton Review. The impact of the recommendations being implemented would lead to an estimated 9,000 fewer regulatory cases taken to court (crown and magistrates') each year.

Part 3 of RESA provides for the introduction of a new expanded framework for regulatory sanctions by enabling Ministers to confer civil sanctioning powers on regulators in relation to specific offences. It should be noted, however, that Part 3 does not include the full range of sanctions recommended by the *Macrory Review* (which might be relevant to companies) such as profit orders, corporate rehabilitation orders and publicity orders.

The Environmental Civil Sanctions (England) Order 2010[79] – which came into force on 6 April 2010 – was the first example of an Order made under Part 3 of the Regulatory Enforcement and Sanctions Act 2008. It permits the Environment Agency and Natural England to impose civil sanctions in relation to the offences specified in Sch 5 to the Order. Appeals against the new civil sanctions will be made to the General Regulatory Chamber of the First-tier Tribunal. The civil sanctions are fixed monetary penalties,

[79] SI 2010/1157.

variable monetary penalties, compliance notices, restoration notices and stop notices, and the acceptance of third party undertakings and enforcement undertakings.

The sanctioning powers may be conferred in respect of particular criminal offences on specified regulators or those who enforce offences contained in any enactment listed in Sch 6 and those who enforce offences in secondary legislation made under enactments listed in Sch 7.

In summary the RESA Part 3 sanctions are:

(a) **Fixed monetary penalties** (served by a notice and subject to an appeals process – much like parking tickets). These are intended for low-level instances of non-compliance 'where the regulator is satisfied beyond reasonable doubt that the person has committed the relevant offence'. The money (if paid) is not income for the regulator – it goes to the Treasury's Consolidated Fund (in Scotland the monies will be paid to the Scottish consolidated Fund).

(b) **Discretionary requirements** (which may be used singly or in any combination) – may be imposed, as with fixed monetary penalties, in cases 'where the regulator is satisfied beyond reasonable doubt that the person has committed a relevant offence'. Discretionary requirements consist of variable monetary penalties (the amount is determined by the regulator in accordance with a formula, in the same way as the 'fines' imposed by the Financial Services Authority), compliance notices (a requirement to take such steps as the regulator may specify to bring the offender back into compliance, to prevent continuance or re-occurrence) and restoration notices (a requirement to take such steps as the regulator may specify to restore the status quo caused by the contravention). Discretionary requirements are subject to the opportunity for the defaulter to make representations before service of the final notice imposing the sanction.

(c) **Stop notices** – which may be temporary or permanent – can be imposed where the regulator reasonably believes that the activity is causing serious harm or presents a significant risk of causing serious harm and has given rise, or is likely to give rise, to regulatory non-compliance in relation to any of the following matters:

  (i) human health,
  (ii) the environment (including the health of animals and plants), and
  (iii) the financial interests of consumers.

  Stop notices are subject to an appeals process.

(d) **Enforcement undertakings** – a voluntary agreement offered by the defaulter to a regulator who has reasonable grounds to suspect that

the person has committed a relevant offence. The person may offer to take various types of action as part of its undertakings. A regulator cannot impose enforcement undertakings.

A regulator cannot be granted power to impose:

- both a fixed monetary penalty and a discretionary requirement; or
- both a fixed monetary penalty and a stop notice;

in relation to the same offence.

An order under Part 3 may not, except for consequential purposes, make any provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament. If a Minister proposes to make an order that affects the prosecution of any offence in Scotland, he is required to obtain the agreement of the Lord Advocate. If a Minister proposes to make an order that affects the powers of a regulator that is a local authority in Scotland, then he will be required to consult with Scottish Ministers because they will have an interest in the functions of local authorities in Scotland.

A 2010 Government consultation set out proposals for a two-year pilot operation of civil sanction powers for consumer law enforcers. However, in 2011, the pilot was suspended and it is not clear when or if it will be commenced.

It is also worth noting that the Law Commission's paper, *Criminal Liability in Regulatory Contexts* – published in August 2010 – proposes that:

- regulatory authorities should make more use of cost-effective, efficient and fairer civil measures to govern standards of behaviour, such as 'stop' notices, enforcement undertakings and fixed penalties;
- a set of common principles should be established to help agencies consider when and how to use the criminal law to tackle serious wrongdoing, and
- existing low-level criminal offences should be repealed where civil penalties could be as effective.

1.5.4 Regulatory burdens

Part 4 RESA creates a duty that requires regulators to review their functions, not to impose unnecessary burdens, and unless disproportionate or impracticable, to remove burdens that are found to be unnecessary. Regulators that are subject to the duty must report on progress annually.

The duty applies to the regulatory functions – other than any function exercised under competition law – exercised by:

(a) the Gas and Electricity Markets Authority;

(b) the Office of Fair Trading;

(c) the Office of Rail Regulation;

(d) the Postal Services Commission; and

(e) the Water Services Regulation Authority.

Ministers can apply the duty to other regulatory functions by Order.

1.6 CAUTIONS

This section is not applicable to Scotland.

The 2010 Code for Crown Prosecutors states:

> 'Prosecutors must be satisfied that the Full Code Test is met and that there is a clear admission of guilt by the offender in any case in which they authorise or direct a simple caution to be offered by the police … The acceptance of a simple caution or other out-of-court disposal which is complied with takes the place of a prosecution. If the offer of a simple caution is refused, a prosecution must follow for the original offence. If any other out-of-court disposal is not accepted, prosecutors will apply the Full Code Test, upon receipt of the case from the police or other investigators, and decide whether to prosecute the offender.'

The cautioning of offenders is not a recent practice. In *R v Durham Constabulary and another ex parte R*[80] Lord Bingham of Cornhill commented that:

> '… counsel did not attempt to trace the source of the caution as a procedure applied to young offenders … From 1978 at the latest the procedure for cautioning young offenders was guided by a series of Home Office Circulars, and the House was referred to Circulars 14/1985, 59/1990 and 18/1994.'

This is partially true – but, since the title of each Home Office circular was 'The Cautioning of Offenders', 'formal cautions', as they became known, applied equally to adults and juveniles.

Reprimands and final warnings, replacing cautions for offenders aged 17 and under, were created by ss 65–66 of the Crime and Disorder Act 1998 as a statutory disposal, and, in June 2005, Part 1 of Home Office circular

[80] [2005] UKHL 21.

30/2005 ('Cautioning of Adult Offenders') replaced circular 18/1994. It used the term 'Simple Caution' for the first time – 'to distinguish it from a Conditional Caution', which was to have been the subject for Part 2 of this circular. The current Home Office circular, dealing with 'Simple Cautioning of Adult Offenders', is 16/2008. It was issued on 10 July 2008, and is applicable to all decisions relating to simple cautions from the date of publication '… regardless of when the offence was committed'.

The principal aims of a simple caution, that are relevant to local authorities, are to deal quickly and simply with less serious offences, where the offender has admitted the offence, and to record an individual's criminal conduct for possible reference in future criminal proceedings. Account should be taken of aggravating or mitigating factors when assessing seriousness.

When deciding if a simple caution is appropriate, the following criteria must be satisfied –

- the person must have made a clear, reliable and PACE-compliant admission of the offence, either verbally or in writing. In *R (on the application of Rupert Wyman) v The Chief Constable of Hampshire Constabulary*[81] it was held that there was no admission which would justify the claimant being formally cautioned for the alleged offence and the caution was ordered to be quashed. Under no circumstances should suspects be pressed, or induced in any way to admit offences in order to receive a simple caution as an alternative to being charged – see *R v Commissioner of Police of the Metropolis ex p Thompson*;[82]

- there must be a realistic prospect of conviction if the person were to be prosecuted;

- it must be in the public interest to use a simple caution as the means of disposal;

- a simple caution must be appropriate to the offence and the offender.

A simple caution will not be appropriate where a person has raised a defence or if has refused to accept it. The significance of the admission of guilt in agreeing to accept a simple caution must be fully and clearly explained to the offender before they are cautioned.

Repeat cautioning may be acceptable in circumstances where there has been a sufficient lapse of time to suggest that a previous caution has had a

[81] [2006] EWHC 1904 (Admin).
[82] [1996] 1 WLR 1519.

significant deterrent effect (2 years or more) and if the current offence is trivial or unrelated to any previous offences, or as part of a mixed disposal.

Offenders and their legal representatives may be entitled to seek and have disclosure of the evidence before the offender agrees to accept a caution. In *DPP v Ara*,[83] it was held, on the facts, that disclosure of an interview to a defendant's solicitor was necessary in order to enable informed advice to be given as to whether a caution was agreed. However, Rose LJ made it clear '… that this does not mean that there is a general obligation on the police to disclose material prior to charge.'

The question as to whether the simple cautioning procedure is suitable and appropriate for regulatory offences has never been the subject of judicial scrutiny and LACORS have continued to revise and update the guidance for local authority regulatory services that LACOTS originally produced in January 1990. The most recent version came out in January 2008. Certainly, there was no issue raised in *R (on the application of Stoddard and others) v Oxford Magistrates' Court*[84] – a case involving the sale of alcohol to an under-age purchaser in which it was held that the defendants were entitled to costs order in their favour where, in the course of the pre-trial hearing, the prosecution indicated that it was prepared to conclude the proceedings by way of formal caution and, as a result, it was agreed by both parties that the matter should be dealt with in this manner.

Part 3 of the Criminal Justice Act 2003 makes provision for conditional cautions to be available as a means of dealing with offenders in certain circumstances, as an alternative to prosecution. Conditional cautions may only be given by an authorised person, defined as a constable; a person designated as an investigating officer under s 38 of the Police Reform Act 2002; or a person authorised for the purpose by a relevant Prosecutor. This does not include local authorities.

[83] [2001] 4 All ER 559.
[84] [2005] EWHC 2733 (Admin), 169 JP 683.