

Due Diligence Defence

Tuesday 16th May 2023

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Overview

- Introduction to CE, UKCA and UKNI Marking and other Health & Safety laws
- Due diligence
- Reasonable precautions
- Some cases
- Cumulative legislation

The CE Marking Legislation

- Electromagnetic Compatibility
- Machine Safety
- Mobile Machines and Lifting Equipment
- Low Voltage Equipment
- Pressure Equipment
- Simple Pressure Vessels
- Toy Safety
- Construction Products
- Personal Protective Equipment
- Non-Automatic Weighing Instruments
- Gas Appliances
- Medical Devices
- Radio Equipment and Telecommunications Terminal Equipment (RTTE)



Criminal Sanctions Offences: EMC example

- Supply of non - conforming or non - compliant equipment
- Taking into service non - conforming equipment
- Production of misleading records
- Wrongly affixing the "CE" marking
- Failure to affix the "CE" marking

Criminal Sanctions

- Penalties
 - prison for three months
 - fine of £5,000
- Liability of company
- Liability of director, manager or similar officer
 - fault attributable to
 - consent, connivance, neglect
- "Defence" of due diligence

Other Legislation containing the "due diligence" defence (1)

- Fair Trading Act 1973
- Consumer Credit Act 1994
- Prices Act 1974
- Estate Agents Act 1979
- Weights and Measures Act 1985
- Financial Services Act 1986
- Building Societies Act 1986
- Banking Act 1987
- Friendly Societies Act 1992
- Motor Cycle Noise Act 1987
- Food Safety Act 1990
- Property Misdescriptions Act 1991
- Timeshare Act 1992
- Charities Act 1992
- Video Recordings Act 1993
- Sunday Trading Act 1994



Other Legislation containing the "due diligence" defence (2)

- Trade Descriptions Act 1968
- Consumer Protection Act 1987
 - subsidiary safety regulations
- Pencil and Graphic Instruments (Safety) Regulations 1974
- General Product Safety Regulations 2005

The Nature of the "due diligence" defence (1)

- "took all reasonable precautions and exercised all due diligence to avoid commission of such an offence by himself or any person under his control"
- Two limbs
 - all reasonable precautions
 - exercised all due diligence

All Reasonable Precautions

- Setting up the system
 - To prevent offence occurring
- Steps taken before, during and after [production] to ensure compliance
- Reasonable in the particular circumstances
- What the ordinary person regards as reasonable is what matters
- An objective, subjective test

Setting up the System (1)

- Relevant Industry Codes of Practice
- Relevant Industry GMP
- Use of appropriate technology
 - Appropriate to size, type of business
 - Appropriate to the product
- Consideration of the consequences of the failure to reach the appropriate standard

Setting up the System (2)

- Special consequences or risks in the product
- Whether advice sought
- Available resource
 - Staff
 - Financial
 - Technical

Exercised due diligence (1)

- Ensuring the system works
- Not sufficient to have any system
- The system must be [the] right one in the circumstances
- There must be a series of check on the system
- The checks must be effective

Exercised due diligence (2)

- Documentary evidence of procedures
- Must include fault recovery actions
- What tasks were allocated and to whom
 - Employment criteria
 - Training given
- Activities and test results recorded
- Supervisory checks taken

Bibby-Cheshire -v- Golden Wonder Ltd

- Underweight crisps
- Modern equipment properly installed
- Regularly serviced
- Routine check undertaken
- Documentary evidence produced
- Defence made out
 - Offence occurred despite “best efforts”

Establishing the defence

- Only if the system was operating properly and the offence occurs is there a defence
- Each case on its own facts
- Converse of negligence
 - Must act without negligence

Reliance on others (1)

- Reliance on a regulatory requirement
 - Hurley -v- Martinez & Co Ltd
 - Carrick DC -v- Taunton Vale Meat Traders Ltd
- Supplier’s Assurances
 - Hicks -v- S D Sullam Ltd
 - Riley -v- Webb
 - Garrett -v- Boots the Chemist Ltd

Reliance on others (2)

- Checking with Suppliers
 - Westminster City Council -v- Pierglow Ltd
 - London Borough of Ealing Trading Standards -v- Kevin Taylor
 - Wandsworth -v- Bentley
- Reliance on Certificates
 - Suffolk CC -v- Rexmore Wholesale Services Ltd

Carrick DC -v- Taunton Vale Meat Traders Ltd

- Prosecution under Food Safety Act 1990
- Meat unfit for human consumption
- Carcasses inspected by inspector
- Certificate of fitness
- Defence

Hicks -v- Sullam Ltd

- Trade Descriptions Act 1968
- Electric light bulbs falsely described as "safe"
- Verbal assurances from
 - Taiwanese manufacturer
 - Hong Kong purchasing agent
- Defence

Riley -v- Webb

- Pencil and Graphic Instruments (Safety) Regulations 1974
- Assurance obtained from supplier
- Incorporated within the contract
- Defence

Garrett -v- Boots the Chemist Ltd

- Pencil and Graphic Instruments (Safety) Regulations 1974
- Defective crayons
- Circular letter sent 6 years before offence
- Verbal confirmation received
- Declaration received
- Defence

Suffolk CC -v- Rexmore Wholesale Services Ltd

- Furniture and Furnishings (Fire) (Safety) Regulations 1988
- Fire Safety certificate issued by supplier
 - Supplier believed to be reputable by defendant
- No fire safety test undertaken by defendant
- Defence

Bury MBC -v- United Norwest Co-Operatives Ltd

- Electrical Equipment (Safety) Regulations 1994
- Low Voltage Safety of lighting ceiling luminaires
- Warranty received but lost
- Supplier stated it had been prosecuted and that it accepted responsibility
- Letters were hearsay
- No witnesses from supplier
- Defence

Statistics

- Defendant must undertake statistically valid tests of samples
- *Garrett -v- Boots the Chemists*
- *Rotherham MBC -v- Raysun*
- *P&M Supplies (Essex) Ltd -v- Devon CC*
- *Sutton LBC -v- David Halsall plc*

Garrett -v- Boots the Chemists

- Pencil and Graphic Instruments (Safety) Regulations 1974
- "One obvious precaution to be taken was a random sample, whether statistically controlled or not"
- If no such testing, then "all reasonable precautions" will not have taken place
- BUT what might be reasonable for Boots might not be reasonable for the corner shop

Rotherham MBC -v- Raysun (U.K.) Ltd

- Trade Descriptions Act 1968
- Consumer Safety (Amendment) Act 1986
- Poisonous wax crayons
- Agents in Far East analysed samples
 - Only adverse reports were to be forwarded
 - None received
- Single batch of 7,000 - 10,000 dozen
 - One packet tested
- Defence

P&M Supplies (Essex) Ltd -v- Devon CC

- Toys (Safety) Regulations 1989
- Director visited China to ensure compliance
- Random sampling set up with TSO
- 18 toys tested externally
- 114 toys tested internally out of 22,744
- 378 toys tested internally out of 76,960
- Defence

Sutton LBC -v- David Halsall plc (1)

- Toys (Safety) Regulations 1989
- Flammability of Halloween capes
- Material previously tested to ensure compliance with British Standard
- Manufacturer assured supply with this material
- 28,000 capes in 4 shipments
- 5 samples taken per shipment

Sutton LBC -v- David Halsall plc (2)

- Tests undertaken were not to standard!
- In house tester believed tests good enough
- For first batch, 5 samples complied with appropriate standard
- Not so for other batches
- One sample was externally tested to BS
- Defence
- Court required to take product recall into account as a mitigating factor

Sutton LBC -v- David Halsall plc (3)

- Defence *may* be made out if :
- Supplier buys from established manufacturer
- Whom he has reason to trust
- Who is aware of purchaser's requirement (including legal safety requirements) ; and
- Supplier properly tests a sufficient number of random samples

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