

Case No. CO/6303/2010

Neutral Citation Number: [2010] EWHC 3089 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 5 November 2010

B e f o r e:

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF LONDON BOROUGH OF MERTON_
Claimant

v

SINCLAIR COLLIS LIMITED_

Defendant

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WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr Edward Jenkins QC and Mr Ben Douglas-jones (instructed by London Borough of Merton Legal Department) appeared on behalf of the **Claimant**
Miss Claire Andrews and Mr James Ross (instructed by Gregg Latchams LLP Bristol) appeared on behalf of the **Defendant**

J U D G M E N T

1. MR JUSTICE MITTING: Until 1908 it was lawful to sell tobacco products, including cigarettes, to children. Parliament intervened in part 3 of the Children Act 1908 to prohibit the sale of cigarettes or cigarette papers to a child, then meaning a person under the age of 14, or a young person under the age of 16. Part 3 also included an express provision dealing with machines which automatically sold cigarettes. The provisions were contained in Sections 39 and 41 of the 1908 Act. Similar provisions have remained in force up to the present time. They are now contained in amended form in subsections 7(1) and (2) of the Children and Young Persons Act 1933. In the course of this judgment I will have to examine the legislative history of these provisions to discern their meaning.
2. In 2008 the appellant local authority, the London Borough of Merton, caused eight test purchases to be made in public houses within the borough by children. The test purchases were made from machines, each situated in a different public house. The machines were owned by the respondent to this appeal, Sinclair Collis Limited, a subsidiary of Imperial Tobacco, and either the or one of the major operators of automatic cigarette vending machines in the United Kingdom.
3. The prosecution case was simple. Each of the children had been sold a packet of cigarettes from the machine. The sale had occurred without any human interaction beyond the child putting the price into the machine and retrieving the cigarettes from it. The prosecution's case was that that was a sale of cigarettes to a child and so an offence under subsection 7(1) of the 1933 Act. It was, on the prosecution case, a sale by the owner of the goods. It is common ground that the owner of the cigarettes was Sinclair Collis, the operator of the machine.
4. Sinclair Collis' case was that section 7(1) did not apply to purchases from a cigarette vending machine and that the statutory scheme to control the purchase of cigarettes from vending machines was exclusively contained in subsection 7(2).
5. The district judge accepted Sinclair Collis' contention. Her ruling is set out in paragraphs 14 to 16 of the stated case which underlies this appeal:

"14. I have been addressed at length about the meaning of 'person' under subsection (1) of the Children and Young Persons Act 1933 and the various uses of words used in the Acts setting out the requirement of Mens Rea for the offence of selling cigarettes to underage children and to debates in Parliament about the purpose of the legislation. However, my view was that I had to look at the primary legislation to determine whether the correct section had been used to bring the prosecution against the defendant and I found that it had not.

15. All the Acts dealing with sales of cigarettes to children since the Children Act 1908 had all retained a specific provision for the prosecution of sales by vending machines by way of complaint. This has never changed, even though, as the prosecution argued, the 'loophole' in Section 41 of the 1908 Act had been

debated by Parliament. However, I found that Parliament had ample opportunity to remove the specific section relating to the prosecution of vending machines by way of complaint and have never availed itself of the opportunity of doing so. Therefore, as far as I could see, it remained and was the correct section to use in the prosecutions. Common sense would so dictate.

16. Further, the penalty under subsections (1) and (2) of section 7 of the Children and Young Persons Act 1933 is exactly the same, indicating to me that the use of subsection (2) against vending machines is not supplementary to subsection (1) but the stand alone provision which should be used for prosecutions against vending machines."

6. As that passage demonstrates, the district judge reached a clear conclusion that the purchase of cigarettes from vending machines by children was exclusively dealt with under subsection 7(2) but did so for reasons that, on analysis, are not pellucid. It is not, however, part of my task to subject the district judge's judgment to minute textual analysis because, as will, I hope, be clear, the appeal raises a clear question upon which I have received helpful and erudite submissions which I can decide as matter of principle. The issue is one of statutory construction.

The current provision is as follows:

"7. Sale of tobacco and et cetera to persons under 18.

- (1) Any person who sells to a person under the age of 18 years any tobacco or cigarette papers, whether for his own use or not, shall be liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.
- (1)(A) It shall be a defence for a person charged with an offence under subsection (1) above to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (2) If on complaint to a Magistrates' Court it is proved to the satisfaction of the court that any automatic machine for the sale of tobacco kept on any premises has been used by any person under the age of 18 years, the court shall order the owner of the machine, or the person on whose premises the machine is kept, to take such precautions to prevent the machine being so used as may be specified in the order or, if necessary, to remove the machine, within such time as may be specified in the order, and if any person against whom such an order has been made fails to comply therewith, he shall be liable, on summary conviction, to a fine not exceeding level 4 on the standard scale."

Subsection (3) permits the seizure of tobacco and cigarette papers was from a person apparently under the age of 16 years in a street or public place. Subsection (4) contains an anachronistic saving for employees of tobacco manufacturers and dealers and uniformed boy messengers.

7. A number of arguments were advanced before the district judge and have been repeated before me, to the effect that where it first appears in subsection 1 the reference to a "person" is to an individual human being or that the sale referred to in the subsection requires the involvement of an individual human being to effect it. I can deal with both of those arguments shortly.
8. In 1908, as now, the Interpretation Act, then 1889, now 1978, defines "person" as including, "unless the contrary intention appears", "a body of persons corporate or unincorporate". The contrary intention obviously appears in relation to the second use of "person". A body of persons corporate or unincorporate cannot be under the age of 16/18. The person to whom the tobacco is sold, therefore, must be a real human being under the age of 16/18. It does not follow that the person referred to in the first instance must also be an individual. The draftsman in 1908 would have had in mind the express provision in the 1889 Act in section 2(1):

"In the construction of every enactment relating to an offence punishable on indictment or on summary conviction ... the expression 'person' shall, unless the contrary intention appears, include a body corporate."

Nothing could be clearer. Indeed, it is difficult to understand a policy reason why the draftsman or Parliament should have wished to exclude an incorporated body from those who might commit an offence under section 7(1). Had they done so then every tobacconist in the country who wished to continue selling cigarettes to children would have incorporated a company to carry on his business.

9. If the offence can be committed by a company then it is committed by a sale however made. The Parliamentary draftsman in 1908, as in 1933 and 1991, must have had in mind in using a common expression such as "sells" or "sale", the definition contained now in section 2 of the Sale of Goods Act 1979:

"(1) A contract of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price ...

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale."

It therefore follows that a sale can be achieved not merely by a face-to-face transaction but also by other means.

10. A legal analysis of the transaction conducted via a vending machine is as follows. The owner of the goods, the operator of the vending machine, puts packs of cigarettes into the machine and invites potential purchasers to buy them. The invitation is to put a specified sum of money into a slot whereupon the machine will dispense the cigarettes. That is a perfectly ordinary and absolutely classical means of effecting a sale of goods.

Accordingly, there is nothing in the wording of subsection 7(1) to prevent a sale by the owner or operator of a vending machine to a purchaser who pays the advertised price for the goods being a sale for the purpose of the subsection. Indeed, it is difficult to see how the transaction could be described otherwise than as a sale. Under the current wording of the legislation and subject to the due diligence defence a sale to a person who is, in fact, under the age of 18 years is an offence. Subject, therefore, to two arguments advanced by Miss Andrews for Sinclair Collis, I am satisfied that the test purchases here, provided that all of the other elements of the offence are established and subject to one proviso that I will refer to at the end of this judgment, were sales caught by subsection 7(1).

11. Miss Andrews' two arguments, which overlap and are mutually supportive, are as follows. First, subsection (2) provides, as the original Section 41 provided, the exclusive means by which Parliament intended that cigarette sales from machines should be regulated. Secondly, given the lack of opportunity for the operator of vending machines to exercise personal control over sales made by means of them, Parliament can be taken to have intended that subsection 7(1) should apply only to transactions where the seller effected or was able to effect some personal degree of control over the them.
12. To examine both propositions it is necessary to look at the legislative history. In its original form Sections 39 and 41(1) provided as follows:

"39 If any person sells to a person apparently under the age of 16 years any cigarettes or cigarette papers, whether for his own use or not, he shall be liable, on summary conviction...to a fine.

41(1) If on complaint to a court of summary jurisdiction it is proved to the satisfaction of the court that any automatic machine for the sale of cigarettes kept on any premises is being extensively used by children or young persons, the court may order the owner of the machine or the person on whose premises the machine is kept to take such precautions to prevent the machine being so used as may be specified in the order, or, if necessary, to remove the machine, within such time as may be specified within the order."

Failure to comply with such an order was, under subsection 2, an offence punishable by a fine greater than that which could be imposed for an infringement of Section 39. Part 3 of the 1908 Act also included the anachronistic provisions to which I have already referred.

13. Miss Andrews submits that by the use of the phrase "apparently under the age of 16" in Section 39, but not in Section 41, Parliament clearly intended to give the seller an opportunity to judge the age of the buyer of the cigarettes. It is common ground that "apparently" means such as would appear to an ordinary or reasonable person. The test is objective but it is correct that the original wording of the prohibition gave to the seller the opportunity of complying with the law. Plainly, the operator of a vending

machine whose direction was remote from the place at which the machine was stationed would have no such opportunity.

14. The hard answer to that apparent unfairness was, however, provided by Mr Jenkins QC: those who sell via machines without any personal control over them or opportunity to observe those who buy from them have deprived themselves of the opportunity of making a judgment about the age of the buyer. The fact that they do so does not remove them from the prohibition under then Section 39, now subsection 7(1).
15. I have been invited to look at the statement made on the second reading of the 1908 Bill by Mr Herbert Samuel, the Parliamentary Under-Secretary, Home Department, on the basis that the original provision was ambiguous. I have looked at it but declined to use it as an aid to interpretation. It provides interesting social background to the Bill but no more. My judgment is simply that the draftsman of Sections 39 and 41, in the light of the 1889 Interpretation Act and the 1893 Sale of Goods Act, can have been in no doubt about what was being prohibited.
16. Miss Andrews' submission that Section 41 / subsection 7(2), provides the sole means of dealing with vending machines rests upon the proposition that where Parliament has provided for a matter generally and then for a specific matter within the general specifically, the specific excludes the general. That proposition is based upon two passages in Bennion on Statutory Interpretation at page 1164:

"Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision."

The authority given for that is Vinos v Marks & Spencer plc [2001], 3 All ER 784 at paragraph 27, a case turning on the civil practice rules.

"Acts very often contain general provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation: it is presumed that the general words are intended to give way to the particular. This is because the more detailed a provision is, the more likely it is to have been tailored to fit the precise circumstances of a case falling within it."

17. One of the authorities cited for that provision is the R v J [2005] 1 AC, 562. Neither case fully supports the proposition set out in the text.
18. In any event, there is an answer which would have obtained in 1908 and still obtains now: that Section 41 / section 7(2) provides an alternative and different remedy for the vice of the sale of cigarettes to children by machines. It permits a Magistrates' Court to order the owner of premises where they are situated and the operator of the machine to take such precautions to prevent the machine being used for the sale of cigarettes to children or to remove it altogether upon pain of a fine.

19. There seems to me to be nothing illogical or internally contradictory in Parliament providing for two means by which the sale of cigarettes from machines to children can be controlled; first, by prohibiting it, by making it a criminal offence, and secondly, by permitting magistrates to order the means by which the sale is effected to be put under proper control or, in an appropriate case, removed altogether. Various practical problems were canvassed as to mounting concurrent proceedings for a criminal offence and a civil complaint. There is nothing in that. In modern times it is not unusual, in far more serious cases than these, for civil proceedings for the restraint or forfeiture of criminal assets and criminal prosecutions for money laundering and kindred offences to be mounted simultaneously.
20. The 1933 Act was a consolidating act but it did introduce a change in the wording of s.41 in subsection 7(2), which undermines Miss Andrews' argument about the force of the word "apparently" in Section 39 / subsection 7(1). It applied to any automatic machine for the sale of tobacco which was "being extensively used by persons apparently (my emphasis) under the age of 16 years".

Thus, the wording which she contends was intended to afford an opportunity to an individual seller of refusing to sell to someone who appeared to be a child was also included in the provision which dealt with sales from machines.

21. Subsequent statutory changes have produced a gradual tightening of the law. The Children and Young Persons (Protection from Tobacco) Act 1991 deleted the word "apparently" from both subsections 7(1) and (2). Subsection 7(2) was also made more stringent by replacing, as a requirement for the making of an order, extensive use by persons under the age of 16 with a single use by a person under the age of 16. The purpose of those changes seems to have been to make prosecution easier. At the same time, a statutory defence was introduced, that which is now found in section 7(1)(A), the all reasonable precautions and all due diligence defence. At the same time, Section 4 of the 1991 Act required that vending machines displayed a statement to the effect that the machine was only for the use of people aged 16 or over and required a notice in the premises in which the machine was situated to state that it is illegal to sell tobacco products to anyone under the age of 16. Subsequent changes have increased the age below which cigarettes may not be sold from 16 to 18.
22. Potentially draconian provisions were introduced by the Criminal Justice and Immigration Act 2008, which came into force on 1 April 2009. Under Section 12(A) restricted premises orders can be made in respect of premises where an offender has committed three tobacco offences within the space of two years. The effect is that for a period of up to one year those premises may not be used for the purpose of the sale of tobacco and tobacco products. Section 12(B) introduces restricted sales orders under which a person convicted of three tobacco offences in the space of two years can be prevented from effectively having anything to do with tobacco sales, including keeping any cigarette machine on any premises for a period of up to a year. These provisions are of obvious concern to Sinclair Collis because, by what may amount to no more than acts of carelessness on the part of their staff on three occasions, their whole business may be put in jeopardy.

23. Changes enacted but not yet brought into force in the Health Act 2009 will, if a judicial review challenge to the secondary legislation which gives effect to them fails, prohibit the sale of cigarettes from automatic vending machines altogether by the end of next year.
24. Nothing in the legislative history suggests that the current provision should be construed in any way more favourable to the operators of vending machines than the 1908 Act. If, as I am satisfied, the 1908 Act made it an offence to sell cigarettes to someone who was apparently a child or a young person under 16 by a machine, then those provisions in their re-enacted and amended form continue to have that effect.
25. There is, however, one proviso. I am told that on the machines from which the test purchases were made the statutory notice appeared. Sinclair Collis wish to contend that in consequence there could be no sale within the classical definition in section 2 of the Sale of Goods Act: because the transaction effected by the child test purchaser was in breach of the prohibition in the notice it was not the willing transfer of property in cigarettes to a buyer in consideration for payment of a price but, the taking by the child of something which he knew he was not entitled to take in return for something that did not amount to a price.

That is an argument which has been canvassed before me but did not form any part of the stated case. It would not be right for me to express any view upon it now, let alone to decide it. It is an argument which remains open.

26. All that I decide for present purposes is that the district judge was incorrect in law in deciding that section 7(2) provided the exclusive means of regulating the sale of cigarettes from a vending machine to prevent them from being sold to children. In response to the question posed by the case:

"Whether notwithstanding the Civil Complaint Procedure embodied in section 7(2) of the Children and Young Persons Act 1933, as amended, the sale of tobacco to a person under the age of 18 through a cigarette vending machine is capable of being an offence contrary to section 7(1) of the Children And Young Persons Act as amended", the answer is, yes, it is capable of being such an offence.

27. MR JENKINS: My Lord, firstly this: my scanning ability of names of acts was wrong. I detected an unknown act in my scanning area. Sections 12(A) (inaudible) were introduced by the Criminal Justice and Immigration Act 2008.
28. MR JUSTICE MITTING: Thank you.
29. MR JENKINS: So I apologise unreservedly for that. I think it being Friday afternoon my brain simply went out of gear, if I can put it like that.
30. My Lord, what I would ask your Lordship to do obviously in allowing the appeal is to remit the matter for rehearing by a differently constituted lower court.

31. MR JUSTICE MITTING: Why should it be a differently constituted court? The district judge had a question of law to decide, she decided it in a way that I have decided is wrong. It in no way disentitles her to continue the rest of the hearing.
32. MR JENKINS: My Lord, that is entirely correct. I was merely thinking that just out of fairness it would be correct to hear it in front of a different district judge. I do not press that point. Lastly costs.
33. MR JUSTICE MITTING: Miss Andrews?
34. MISS ANDREWS: May I deal with those two matters and a third one?
35. MR JUSTICE MITTING: Yes.
36. MISS ANDREWS: So far as remitting is concerned, of course, there were two arguments being heard before the district judge of which she made a decision in respect of one of them and did not make a decision in respect of the other one. Whether that complicates the question of whether it should be referred back to the same district judge or another district judge is a little difficult to say but from the point of view of this side of the court it is perhaps easier if one starts again because those arguments may have to be run again in front of a district judge. So it is perhaps easier to leave the matter remitted to any district judge as opposed to that specific district judge.
37. MR JUSTICE MITTING: I am simply going to remit it for further hearing to the Magistrates' Court but there is absolutely no prohibition on District Judge Tempia. I am not imposing any prohibition or suggestion that she should not continue to hear the case. It is entirely appropriate if it is convenient for her to do so for her to do so.
38. MISS ANDREWS: Indeed. I'm grateful. That is the first point. Secondly, in relation to costs. Obviously so far as the hearing here is concerned there are no submissions that I can make.
39. In respect of the matter below, of course, there was an order in favour of Sinclair Collis in relation to the Magistrates' Court hearing and that order related to all of the scope of those proceedings, including the argument that has not found its way here. So in respect of the argument that related to this appeal my submission is that any costs order there should be limited to that aspect.
40. MR JUSTICE MITTING: As I have at the moment only been asked to make provision for costs here and you accept that you should pay the costs of unsuccessful resistance to the appeal...
41. MISS ANDREWS: Yes, I do.
42. MR JUSTICE MITTING: Then I do so order that you should pay the costs of the appeal, to be the subject of detailed assessment if not agreed.
43. Mr Jenkins may want to make a further application in relation to costs below. He does not. In that case what happens to them? The order stands?

44. MR JENKINS: My Lord, the order for costs in the court below was costs from the central funds and I do not seek to disturb that.
45. MR JUSTICE MITTING: Right. Then the order for costs below remains undisturbed. Your third point?
46. MISS ANDREWS: My third point, my Lord, relates to whether or not your Lordship would be prepared to certify this as a matter of public importance and give permission. Obviously, your Lordship has already averted to the extensive concern that this issue may give rise to, not only so as far as my clients are concerned but so far as other tobacco companies are concerned. Sinclair Collis has a position in relation to 40 per cent of the market place but there are also other tobacco operators who will be affected on the one side. On the other side, obviously it is a matter of importance to the public to know whether tobacco machine operators can be prosecuted in the way that your Lordship has found they can be.
47. So far as the public importance aspect of it is concerned, I would invite your Lordship to certify that this is a matter of public importance.
48. So far as the formulation of the point of law is concerned, without having done so specifically plainly it goes to whether, on a proper construction of section 7, the owner of an automatic machine can be prosecuted under section 7(1), as your Lordship has found. It may be that some further consideration of the precise way that would be drafted should be addressed but I would invite your Lordship both to certify and give permission.
49. MR JUSTICE MITTING: If the matter had been of wider importance it is a bit surprising that it has taken 102 years to come before a court.
50. MISS ANDREWS: My Lord, it is precisely that that perhaps does make it of some importance. Because so far as Sinclair Collis is concerned they are not aware that there has ever previously been any prosecution before this matter became the subject of considerable interest in the lead-up to the investigations for the Health Act. When that occurred they caused the local authority body on regulatory affairs, I have not completely deconstructed the initials, but they have orchestrated throughout the country a series of test purchasing regimes such as that that your Lordship heard from my learned friend. It is not only here that test purchasing exercises have been carried out with a view to prosecutions, it is up and down the country as a whole. This is the first and the tip of the iceberg.
51. So, my Lord, there is a lot to follow and your Lordship has already identified the risks to which tobacco companies may be exposed by reason of the provisions of Section 12 as a consequence of convictions under this Act. To what extent those fall before any cut-off point or after any cut-off point one does not know because at the moment prosecuting authorities are free to carry on investigations and tobacco companies are at risk. They may be rightly at risk, if your Lordship's judgment is that they are rightly at risk, but if it were possible to come to a different conclusion then it may be that that risk would be improperly imposed upon the tobacco companies.

52. MR JUSTICE MITTING: I am afraid I do not think, as this is almost certain to be the end of the 100 year life of automatic vending machines for cigarettes, that this case deserves to be ventilated before the Supreme Court.

Thank you both for interesting arguments.

53. MISS ANDREWS: Thank you, my Lord.