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Due Diligence - Practical Advice for handlers of second hand goods

A guide for businesses covering the requirements of Trading Standards law and some suggestions to help your business avoid prosecution.

This guide has been prepared to help businesses meet the requirements of Trading Standards law. Although not exhaustive the guide seeks to cover the concepts of:

- Strict liability
- Reasonable precautions
- Due diligence

It is based on the best information currently available. Every effort has been made to ensure the accuracy of this guide, however in every instance it is the Courts which decide if the law has been broken. It is recommended that you take advice on what is likely to constitute due diligence in any particular situation.

Background.

Trading Standards or Consumer Protection legislation aims to create equity; a balance that ensures adequate protection for consumers, while promoting and maintaining a fair trading environment for legitimate business.

In many criminal cases, the prosecution also has to prove “mens rea” or guilty knowledge. They must show an intention to do something wrong.

HOWEVER some laws create a number of offences that simply contain an absolute prohibition against doing something. In such cases it does not matter that you did not intend to do wrong OR were ignorant of requirements, the fact that you have contravened the law is sufficient to allow a Court to convict.

Therefore to balance the scales of justice, Parliament has provided various defences and “let outs” and it is these provisions that this leaflet examines. This means that the law is recognising the efforts made by businesses to comply with its demands. This system of “let outs” includes the defence of reasonable precautions and due diligence.

To use these defences, a person must prove that he took all reasonable steps and exercised all due diligence to avoid committing the offence. If he can do so he is entitled to be acquitted. Whether or not a defence will be successful depends on the circumstances surrounding each case. What amounts to a successful due diligence defence has exercised the minds of many judges over many years and has resulted in a number of appeal cases which in themselves help us to understand more clearly what businesses have to do to avoid prosecution.

Reasonable Precautions and Due Diligence

The form of wording for this type of defence is common to most Consumer Protection laws.

It generally requires a business or person to:

- have taken all reasonable steps or precautions and
- have exercised all due diligence to avoid committing the offence

At its simplest, it means that you have looked at the way in which your business operates and put in place a series of checks to prevent any problems occurring. Once you have done this you must ensure that the system of checks is being carried out. If you have a system that nobody knows about, or cares about, the system is useless and any defence plea will usually fail.

None of the laws that provide a “due diligence” defence describe in any detail what systems will satisfy the defence. To establish this point you need to examine the past decisions of the courts and draw upon that experience, but before you can set up any systems you need to know what you can and cannot do.

Once you know what is prohibited you can build your defences.

To assist you in this task, some of the following themes have been extracted from past court decisions:

- Sitting back and doing nothing is unlikely to protect you
- The courts suggest that some form of positive action is necessary to satisfy the defence.
- In the past some businesses have tried to suggest that because past dealings in a particular area of commerce had raised no problems, or because they had no reason to suspect problems, that they could avoid prosecution. The Courts have been clear on this point; positive action is required, but the nature of that action will depend on the relevant circumstances.
- Businesses should check the terms and conditions of their contracts and the goods relating to those contracts whether they view them with suspicion or not.
- If a reasonable step or precaution is not taken any defence is likely to fail.

What is a reasonable step?

A classic case involved the sale of a watch described as “waterproof” and a “divers watch”. In court the judge asked why no checks had been carried out by the retailer, such as placing the watch in a bowl of water. This simple test would have revealed that the watch was not waterproof and could have avoided expensive litigation.

Taking reasonable steps is likely to involve setting up a system of control that has due regard to the risks and the law involved

One of the clearest messages from the courts about reasonable precautions and due diligence is that size does matter.

The size of the business and the amount of risk associated with the product are some of the factors that help to determine what are “reasonable steps”. For example, the absence of documented systems in larger companies might be fatal.

What will not be taken into account are factors like ignorance of the law, poor command of a language or a lack of common sense.

Due diligence means:

- Ensuring that your system of checks works and that you can prove it
- If you have developed a programme of checks, it must work.
- Having a system in place that nobody follows is as bad as having no system at all.
- This is something that demands periodic or even constant monitoring.
- In creating a system you must consider all aspects of your business, from the design stage through to after sales.
- Identify the risks, adopt appropriate controls and safeguards, record your actions and keep it under review.
- What is reasonable will depend upon particular circumstances

After 30 years of deliberation, the Courts have yet to come up with a simple scheme to answer the often asked question of what is reasonable? This is not surprising when you consider the diversity of consumer products and services in modern society. You may find some help on this subject area by reading publications on risk assessment, hazard analysis and quality assurance. There is also a vast body of case law (decided Court cases) relating to the due diligence concept available, although it is not often user friendly. Without doubt, one of the best sources of information available lies within Trading Standards. Officers are employed to assist local businesses as well as consumers and you are urged to seek their advice

A Good Practice Guide:

What follows are some pointers and examples of control techniques. They are not prescriptive and are intended to make you think about protecting yourself against legal action.

Assess the Risk

What could go wrong in your business that might mean a Court appearance? Buying and selling stolen goods, handling stolen goods for repair?

To assess the risk of such an incident, you should identify any weak links in the process chain. This requires you to analyse each stage of your operation and identify precautions. You should also know what is happening in your particular sector of industry and be aware of how and where your products are being used or marketed.

Establish What You're Going to do About It

Having analysed what could go wrong, you should put in place reasonable safeguards.

- Have you done all that the law requires?
- Are you meeting accepted industry standards?
- You should aim to control all risks by putting in place as many precautions as you think necessary.
- Your aim should be to either eliminate any chance of anything going wrong OR to control the risks so that errors will be detected early on and put right before too much damage is done.

- There is no general formula for creating a due diligence system, because each business is different.
- You will need to use your judgement in deciding what is necessary and feasible.

You should consider the following:

- Reliance on word of mouth assurances from suppliers is unlikely to be considered as adequate if a business has rejected or failed to take a reasonable precaution.
- What constitutes reasonable action depends on your business.
- It is recommended that all the activities of the business which may cause a breach of the law such as the handling of potentially stolen goods should be identified, controlled and checked by a system of working.

Any system that you devise must be appropriate to the size of your business. The bigger you are, the more the law will expect you to do.

The systems you create must be appropriate to the consequences of a failure e.g. if a stolen product was likely to be placed on the market, a thorough system of checks would be expected to be in place.

If sampling or testing is involved OR appropriate, the number of tests you do should reflect:

- the cost of getting it wrong to you and your business
- the amount of products potentially involved
- the size of the business

The points listed above are suggestions, when in doubt you should seek advice.

Write down your solution

- Write down your control system so that it can be followed.
- Unless you do so it will be difficult to claim any defence.
- Inform your employees of your actions and give training to those responsible for operating the system of checks.
- Documented records should be kept outlining procedures followed and the checks operated to validate these processes.
- These records should be kept safe for future reference.
- Operate your system
- In order to satisfy the defence you have to show that you created a control system, that it worked and that you operated that system.
- This may require you to audit your system of checks and keep records of that audit.
- You should put in place a system of corrective action if things are found wrong.
- The system should be amended if necessary.
- Review your system
- Your system should be regularly reviewed to ensure that it remains effective.
- The important thing is that the system is monitored and that failures are put right as soon as possible.



CheckMEND (www.checkmend.org)

- CheckMEND is an online system of checking stolen identifiable goods against the UK largest database of stolen property.
- Data is provided by the Police and other authorities in a similar manner to an HPI check on a second-hand car.
- The system keeps a complete audit trail of all the checks run and provides a certificate of check that can be printed out at any time from the checkers online account.
- In addition it has a change of status function that informs the checker if the items status changes at any point in the future.
- The system involves a positive step by the checker to ensure an item has been checked.
- The system has already been designed for the checker so requires no further design of the system by the Checker other than staff training and adherence to the checking procedure.
- The system is the largest in the UK and is supported by Police data.
- The system can be proven to work with an average of 5% of all checks on the system flagging up stolen goods which are subsequently not purchased by buyers.
- As a result CheckMEND conforms to the best practice guidance as set out by the courts and trading standards with a minimum of work by the potential buyer.
- Additionally items sold with a CheckMEND certificate are currently achieving a 6% premium on goods sold without.

Getting it right

Creating a system of checks is not easy. The policy of the Trading Standards Service is to help local businesses wherever possible.

These notes are for guidance only and do not represent an authoritative interpretation of the law which can only be given by the Courts.

Whilst every effort to ensure that the advice you have received is accurate, the author cannot accept any liability whatsoever for any claims arising under any statute or common law.