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Don't get into a flap about seagulls

The Daily Mail recently reported 'Gulls responsible for a slew of pet deaths and human injuries last month'. Whether the nation is truly under threat by seagulls to the dramatic extent suggested is perhaps questionable but, as has been reported in the media this summer, the number of gull 'attacks' seems to be on the rise and seems to be linked to an increase in numbers and to the birds becoming more bold in their interactions with humans and urban settings. Indeed, the perceived extent of the problem is such that even the prime minister, in a recent radio interview, called for a 'big conversation' on the subject of legal protection of seagulls. This got your columnist thinking!

It may well seem that in the grand scheme of issues with which lawyers have to grapple, the law surrounding seagull control and protection comes pretty low in the pecking order (sorry, I couldn't resist that!). The reality however is that for many local authorities, councils, businesses and individuals, seagulls can, and do, present a real problem in terms of public health and safety as well as damage to business and general nuisance. In many quarters there is a common perception that as wild animals it is simply not possible, within the law, to do anything about the problem. In reality though, the law provides more options then many might think.

The basic position provided by Section 1 of the Wildlife and Countryside Act 1981 is that if any person intentionally kills, injures or takes any wild bird; takes, damages or destroys the nest of a wild bird included in Schedule ZA1of the Act; takes, damages or destroys the nest of any wild bird while that nest is in use or being built; or takes or destroys an egg of any wild bird, he shall be guilty of an offence. However, s.16(1) of that Act provides that s.1 (and some other sections also) do not apply to anything done for any one of a number of specified purposes, of which 'preserving public health or public or air safety' is one, if it is done under and in accordance with the terms of a licence granted by the appropriate authority which, for present purposes, is Natural England.

As you might expect, the Act restricts the power to issue such licenses, with s.16(1A) providing that the appropriate authority shall not grant a licence on the grounds of purposes such as preservation of public health or public or air safety for any of the purposes mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution. Satisfying this test clearly has the potential to be very difficult indeed. If Natural England chose to be cautious and conservative in its consideration of applications for licenses it would be very easy, one might think, for them to continually refuse applications and point out that other 'solutions' could be satisfactory. When one bears in mind that the 'general purpose' of Natural England, as provided by the Natural Environment and Rural Communities Act 2006, is to 'ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development' it is easy to imagine that it might indeed adopt such an approach. Equally, with the question of whether any 'other solution' being so easy so answer in the negative but at the same time being so subjective, the prospect of successful judicial review of any refusal of an application may not seem signficant.

In fact, however, while the official position may, until fairly recently, have seemed to be of the cautious type described above, recent trends suggest a marked change in attitude. Perhaps the most striking example of this is the 'general licence to kill or take certain birds to preserve public health or public safety' which was issued by Natural England and which is valid for the period 9 January 2015 to 31 December 2015. This remarkably wide-ranging licence, which is available to download online, does not require registration and is of general application to 'authorised persons' which, by virtue of s.27 of the Act includes owners and occupiers of land, anyone authorised by such an owner or occupier, and anyone authorised in writing by the Local Authority for the area in question. While the terms of the licence are too numerous and detailed to list here, it effectively allows the taking and killing of a number of birds by a number of prescribed methods. The list of birds includes crows, magpies, various types of pigeon/dove and the lesser black-backed gull. It is important to note though that this general licence does not permit the killing or taking of herring gull (the bird which most would identify commonly as the seagull) but does permit the taking and destruction of its nests and eggs. However, earlier this year Natural England did issue a specific licence permitting the taking and killing of the herring gull in Scarborough after an application based on the particular problem in that town.

It is quite clear therefore that Natural England is taking an increasingly open-minded and sympathetic view to applications they receive in relation to seagull problems. Stories this year of pet dogs and tortoises being killed by gulls, and children and the elderly being injured must surely have influenced this. In areas where problems exist but nothing is being done the reality may in fact be that local authorities, businesses and individuals simply don't know that there is something which can be

done about it. Moreover, in the case of local authorities, particularly those in urban costal areas, it may be that they are doing a disservice to residents, businesses and visitors by not making use of the options which the law already gives them.

That having been said, a cautionary note must be sounded. The general licence issued this year does not extend into 2016. While there would seem to be little reason for that not to be renewed to cover the next season, it cannot be assumed. In any event, care must be taken in its application. The distinction between what can be done in respect of different types of gull is something which clearly has to be considered carefully and might well necessitate expert advice and involvement. Further, a condition of the licence is that it can only be relied on 'in circumstances where the authorised person is satisfied that appropriate legal methods of resolving the problem such as scaring and proofing are either ineffective or impracticable'. A pedant such as your columnist might observe that this condition so closely resembles the precondition for the issuing of issuing a licence as provided in s.16(1A) that the general licence should not have been issued unless this condition applies and that in reality it does little more than pass the buck to those who might wish to make use of the licence. By so doing, the possibility of it being said retrospectively that there was more which could have been done before resorting to lethal or destructive methods is obvious. If such an objection were pursued then prosecution could ensue.

In respect of an application for a specific licence in a particular area, there would clearly need to be evidence of what other 'solutions' had been considered and tried beforehand and how they were inappropriate or failed. Overcoming this hurdle would undoubtedly require careful collation and presentation of the relevant information, as was clearly achieved in the Scarborough example.

In conclusion, there can be little doubt that any perception that nothing can be done about seagull problems due to their protected status is misplaced. Although time and care should be taken, and those concerned would be well advised to seek expert advice on the matter, the law as it stands provides real and practical options for those affected.

Derek Perry

Listed Building Offences

A sentencing guide

Members of Albion's Regulatory Team are frequently instructed in planning and listed-building-type criminal prosecutions. One of the central issues that would appear to cause our clients (whether lay or professional) the most concern stems from the singular lack of structured guidance as to punishment; how much will this cost me?

In this article the writer will try to draw together the strings of case law, to garner such guidance as may exist in order to produce a helpful, one-stop-shop resource for advising our clients on these issues.

Sentencing guidelines?

The first thing to highlight is that there are no sentencing guidelines covering this area. A number of first instance and court of appeal authorities touch upon sentencing guidelines in other areas, to try and divine some assistance, but this approach is far from satisfactory.

As the higher courts have stated many times, attempting to graft one set of guidelines, covering one area, onto a neighbouring field is fraught with difficulty and danger.

The leading cases

Therefore it is necessary to dig a little deeper into the case law, to try and discern any patterns that collectively, become apparent. The first step in this exploration is *R v Johnson* (2012) (and for the sake of completeness *R v Rance* (2012) which undertook a similar analysis). In this/these case(s) the court undertook a review of sentences handed down for these types of offences, noting at paragraph 26 of the judgment:

"...of the 150 fines recorded on the [Historic Buildings Conservation Trust] database, all but 19 are below £15,000. Secondly, of those 19, listed buildings account for 15; and the highest fine relating to an unlisted building in a conservation area is £15,000 (imposed in 2005 for the demolition, acknowledged to be in good faith, of two adjoining properties by a very substantial developer)..."

In Johnson the first instance court handed down a fine of £80,000 (the defendant was an experienced, large property developer), this was appealed and the fine was reduced to £33,000.

To put this in context, the maximum sentence in the Magistrates Courts for this type of offence is £20,000, as usual, unlimited in the Crown Court. However, it is interesting to note that the 150 offences cited in Johnson (and Rance) span both Magistrates and Crown Courts but nevertheless, the Magistrates ceiling of £20,000 seems to have been an effective tether even in the Crown Court.

The devil in the detail

Moreover, the difficulty with bold statistics is an inevitable tendency towards an overly simple application of them can cause an advisor to miss the point, the bold statistics hide the individual courts' analysis into each of the cases.

As an example, post-dating Johnson, the case of *R v Hussain* (2014) handed down a sentence of a £20,000 fine where a person of good character wilfully ignored planning enforcement notices related the unlawful use of a property as flats, over many years. The devil, as always, is in the detail. The sentence was handed down in the Magistrates Court and upheld on appeal, but it should be remembered that the defendant was also required to pay almost £40,000 in costs too. The Court of Appeal stated that this sentence fell at the top end of what was acceptable.

A useful summary

In 2015, another Magistrates Court case of *R v Sanger* (2015) was adjudicated upon in the Crown Court for sentence, the Magistrates Court having to commit the case to the Crown Court due to the operation of PoCA. The facts of the case itself, alongside the process by which it went through the courts (two visits to the Divisional Court no less) are complicated but it is right to highlight that the circumstances were unusual; in the end four silks became involved.

In this case, again involving defendants of good character, sentences of £8,000 in fines were handed down against each defendant. The sting(s) in the tail were costs of approximately £85,000 and PoCA of £80,000.

Unusually, the judgment of HHJ Rowe

QC, dealing with the interaction of fines, PoCA and costs can be found online with a little e-digging, despite the judgment not being an appellate authority. It serves as a useful guide.

Conclusions

It would appear that Johnson is the closest we have in an authoritative judgment in this area. The usual mitigating and aggravating features apply, where a well-resourced developer, callous in its execution, infringes listed building regulations, they are likely to be punished and punished severely.

However, for the jobbing, amateurish purchaser of a listing building, without malice or intentional offence, the reality of any sentencing exercise is like to be in the four, rather than five digits. But if all else fails, advice that the sentence should be less than the Magistrates Court limit is probably a fair bet.

Richard Shepherd

The safer lorry scheme

In 2013 HGVs were involved in nine out of 14 incidents leading to cyclist fatalities in London alone. Last year Boris Johnson, in accordance with his stated aim of prioritising the safety of the most vulnerable road users, commissioned a feasibility study into how best to achieve this. Following recommendation and subsequent statutory consultation on the Traffic Regulation Orders, Transport for London has implemented what has been described as a ‘blunt regulatory tool’ to improve the safety of Cyclists in the capital. The Transport for London GLA 2015 No 11 The GLA Roads and GLA side roads (London Safer Lorry Scheme) (Restriction of Goods Vehicles) Traffic Order 2015 was drawn up on 29 January of this year and in force as of 1 September 2015.

The effect of this is that lorries and HGV vehicles which are not fitted with safety equipment to protect cyclists and pedestrians are to be banned from the capital. All roads in Greater London’s 32 boroughs and the City of London (except motorways) will be covered by the scheme. In summary, the scheme will require vehicles of more than 3.5 tonnes to be fitted with side guards to protect cyclists from being dragged under the wheels in the event of a collision, along with class V mirrors (close proximity exterior) and class VI mirrors (front) giving the driver a better view of cyclists and pedestrians around their vehicles.

The regulations will be enforced by the Metropolitan Police Service, City of London Police and the Driver and Vehicle Standards Agency and the Industrial HGV Taskforce body. The scheme is in operation 24 hours a day and seven days a week in the capital. Drivers found to be non-compliant may face the following sanctions: £50 Fixed Penalty Notice, charged with an offence that carries a potential fine of £1,000 in the Magistrate’s courts. Additionally those found breaching the ban may also be referred for consideration to the Traffic Commissioner. This is highly significant, the Transport Commissioner is responsible for the licensing and regulation of HGV operators which means that repeat offenders risk losing their operating licence.

On the first morning of the scheme, the metropolitan police set up cordons in order to enforce the new regulations and reported 75%-80% of the vehicles they checked breached the ban.

That said, reports appear to indicate that that the majority of operators have now cooperated with the scheme and that most have outlaid the relatively modest cost of attaching the relevant safety equipment to their vehicles. The cost of fitting the side guards is in the region of £1000 and the mirrors, £300. However the cost of adapting to anticipated further regulation is set to significantly increase as this initiative is highly likely to foreshadow further regulations demanding modifications to all HGVs in London, including the retrofitting of bigger side windows to the lower panel of cab doors to further reduce the driver blind spots that represent a significant contribution to the risk to of injury or death to cyclists. Substantial further funding has also been put aside to roll out trials on a variety of electronic sensors for lorries, aiming to alert drivers to cyclists presence.

The ramifications of non-compliance in terms of civil and criminal liability are obvious. Non-compliance may of course also result in insurance being declared void. The new regulations have had an immediate impact on national haulage. The publicity behind the scheme has undoubtedly been effective and a number of companies are seemingly generating revenue by offering a fitting service.

The Fleet Operator Recognition Scheme, a voluntary industry-led scheme that aims to promote safe working practices and legal compliance stipulate an alignment to the scheme as a one of its condition of accreditation. Within its rights to suspend or terminate membership they have withdrawn accreditation for one company already following a financial penalty being imposed for breach of the new regulations since its inception. The scheme will have an impact on a wide variety of activities. Even a visit with a horse to Olympia for example would require the necessary adaption. Fortunately most horseboxes are already fitted with side protection.

Although the regulations apply to London alone, the consequence has already been national. There is little doubt that other areas will follow. Bristol’s mayoral office has shown support for the project from the beginning of last year.

It will be extremely interesting to see how the haulage industry reacts to the scheme. Opinions do appear to be divided as to whether the scheme will meet its stated aim. The actual presence of the mirrors themselves on the lower vehicle have been described within the industry as a potential hazard to those that they are designed to protect. Others subscribe to the view that lorry safety regulations have for far too long been vulnerable to a number of loopholes and that strict regulation is required to address a significant health and safety problem.

The ambition is of course a noble one and there is no doubt that, in particular, vehicles used in the course of construction work have represented the greatest threat to exposed road users. The importance of the use of such vehicles is of course essential to the economic strength of London. The only other alternatives could include a stricter division of road use. Although these regulations have been implemented alongside plans to reconfigure 33 of the capital’s most dangerous junctions and proving a network of ‘Quietways’ and segregated cycle routes a restriction to certain routes for construction work for specified time periods has not been ruled out.

Either way compliance with the new regulations will be a central concern to any reputable business in this area. The wording of the legislation is clear and there is really very little scope for misinterpretation.

Giles Nelson

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Trade mark offences

The law on Trade Marks can seem a bit harsh sometimes. For offences under section 92 of the Trade Marks Act 1994 (referred to by the House of Lords as offences of 'near strict liability'), the prosecution generally only have to prove that a sale of counterfeit items took place, not that there was any knowledge on the part of a defendant. For a shop worker who simply does what they're told and sells what they're told to sell, there doesn't seem to be much of a way out.

It is perhaps for this reason that some defence solicitors have recently been looking at the wording of section 92, and in particular the words 'with a view to gain for himself or another'. Were this to provide some additional hurdle for the prosecution, the shop worker who was selling on instruction would certainly have a better chance of obtaining an acquittal.

The mental element of the offence was considered in *R v Zaman* [2002] EWCA Crim 1862. The defendant in that case had been found in possession of a large quantity of imitation designer jeans. The circumstances were that he had initially sold the jeans to a third party, who had only paid half the sum due and had returned most of the jeans to the defendant with designer labels. The defendant had said that he was holding the jeans as security for the remainder of the debt, and wasn't intending to sell them.

The court in *Zaman* held that 'with a view to' was something less than 'with intent to'. They approved the trial judge's direction that the sale of the jeans must have been 'in his mind a real possibility, something that might realistically happen'.

When we apply this to the circumstances of the shop worker selling counterfeit goods, *Zaman* seems to suggest that the prosecution must prove that a gain for himself or another was a real possibility in his mind, or something that might realistically happen. Now if you're a shop worker doing what you're told and working in the store, you're probably more focused on what time you finish work than whether or not your activities are making a profit.

So is there a potential escape route for our hapless store operative? Well, it seems not. The meaning of 'gain' is borrowed from the Theft Act 1968, which defines it at section 34 as 'keeping what one has, as well as getting what one has not'. So, when the shop worker argues that if he didn't sell the counterfeit goods he would have lost his job, arguably he's still selling the goods with a view to gain, because he's doing it to keep what he already has.

Of course, even if this wasn't the case, he would be selling the goods for money, and presumably receiving a wage for doing so. When one looks at 'a view to gain for himself or another', it really creates such an irresistible presumption in favour of the prosecution that, in effect, they don't have anything additional to prove.

The issue has arisen recently in the light of a series of Trading Standards prosecutions concerning the sale of illegal tobacco. Some of the tobacco is sold contrary to the Consumer Protection Act 1987, whereby only the principal (i.e. the shop owner) is liable for the sale, and some of the tobacco is sold contrary to the Trade Marks Act 1994, under which the shop worker can also be prosecuted.

Whilst initially those shop workers prosecuted under the Trade Marks Act 1994 had sought to argue they didn't have a 'view to gain' when selling the goods, an analysis of the statute and case law highlighted the irresistible presumption created by the fact of a sale, and the argument was quickly abandoned.

The message to hapless shop workers? If you're selling fraudulent goods, then you're almost certainly doing so with a view to gain, and you will need to go a long way in order to demonstrate that you were justified in doing so. Harsh perhaps, but ultimately fair.

Alexander West