

Health and Safety Executive		Operational Circular	
		OC 200/29	
Review Date	09/07/2014	Open Government Status	Fully Open
Version No & Date	1: 09/07/2004	Author Unit/Section	Solicitors Office

Target Audience:
All HSE Inspectors

Guidance on ‘JUNTTAN OY’ Ruling Section 6 HSWA –v- Supply of Machinery (Safety) Regulations 1992

This note provides guidance on the recent decision of the House of Lords in the case *Junttan Oy*, and advises Inspectors of action to be taken when considering prosecution for supply of machinery that is not safe, and which may come under section 6 of The Health and Safety at Work Act 1974 (HSWA) or the Supply of Machinery (Safety) Regulations 1992.

Summary of Action to be Taken

1 It is not necessarily wrong for HSE to prosecute a defendant under HSWA section 6 rather than under the Supply of Machinery (Safety) Regulations (SMSR) 1992 in relation to unsafe machinery. To minimise the possibility of a legal challenge, prosecutions relating to the supply of unsafe machinery (whether under SMSR or HSWA section 6) should always be brought, where possible, with reference to non-compliance with the essential health and safety requirements set out in Schedule 3 of the Supply of Machinery (Safety) Regulations 1992, instead of or as well as a general lack of safety. Where this is not possible, prosecutions can continue to be brought under the SMSR or HSWA section 6.

History of the Case

2 This case concerns an HSE prosecution of a Finnish company, Junttan Oy, in relation to a fatal accident in February 1999 in which it is alleged that a piling rig, imported and supplied by the defendant company, caused the death of a worker.

3 HSE brought a prosecution against Junttan Oy for a failure to discharge their duty under section 6 of the Health and Safety at Work etc Act 1974, i.e. failing to ensure, so far as was reasonably practicable, that the rig was so designed and constructed that it was safe and

without risks to health at all times, when it was being used by a person at work.

The Decision of the Magistrates Court

4 The defence argued at the magistrates' court, as a preliminary point, that the court had no jurisdiction to hear the charge under HSWA section 6 (i.e. that it was unlawful for HSE to prosecute under section 6). They argued that, since the Supply of Machinery (Safety) Regulations 1992, which implemented the EC machinery directive, dealt with the supply of machinery and the safe design and construction of such machinery, HSE was only entitled to prosecute under the Regulations and not under HSWA section 6 as there would otherwise be legal uncertainty as to the safety standard to be attained. It should be noted that the Regulations impose a lesser maximum financial penalty for a breach than HSWA section 6 and such a breach is only triable in the magistrates' court.

5 The magistrates' court rejected the defence's argument and the defence subsequently applied to judicially review the court's decision.

The Decision of the Divisional Court

6 On 27th March 2002, the Divisional Court ruled in favour of the defendant. The Lord Chief Justice stated that "it is inappropriate and wrong for the Health and Safety Executive to prosecute for an offence under section 6 of the 1974 Act where there is a specific statutory offence under the Regulations covering exactly the same ground as section 6 but in different language so that different issues can arise as to the standard of safety which is required, and imposing a different penalty. The offence under the Regulations is the offence, which gives effect to the Directive. In addition, the 1974 Act was there in the background. If there was an intention to prosecute for a different offence (not one covering exactly the same ground as the offence in the Regulations), I would take a different view. Partly as a matter of interpretation, and partly because it appears to me that it would be a form of misuse of the powers of the 1974 Act to rely on section 6, I have come to the conclusion that it was not open to the Executive to bring proceedings under section 6. They should have brought proceedings under the Regulations. It may be that the penalty under the Regulations is lower than it should be. If so, the Regulations should be amended. Indeed, I consider that attention should be given to the question of whether the penalties under the Regulations are sufficient. However, the person manufacturing the machinery to which the regime established by the Directive applies is entitled to have his conduct judged by the standards set out in the Directive. Those standards are reflected in the Regulations, but not precisely reproduced by section 6 of the 1974 Act."

7 In view of the importance of this issue, HSE appealed the decision of the Divisional Court to the House of Lords.

The Decision of the House of Lords

8 On 23rd October 2003, the House of Lords ruled (by a majority of 3 to 2), that the decision

of the Divisional Court was wrong and that HSE's appeal should be allowed.

9 The Lords decided that the Divisional Court was wrong to say that HSE could not prosecute under HSWA section 6, as a matter of statutory interpretation. Paragraph 7 of Schedule 6 of the Regulations provides that nothing in the Regulations shall be construed as preventing "the taking of any action" in respect of any relevant machinery under the provisions of the 1974 Act (known as 'the saving provision'). HSE argued that "any action" includes the action of prosecuting under section 6 of the 1974 Act and therefore the Regulations specifically permitted a prosecution under section 6 in circumstances where the Regulations also applied. The Divisional Court had decided that "any action" should be narrowly interpreted to include only administrative action (e.g. issuing a prohibition notice) but not prosecution. The House of Lords rejected this interpretation and ruled that "any action" includes the action of prosecuting under the provisions HSWA.

10 In light of the court's conclusion as to the saving provision, the question that arose was whether, as a matter of European law, a prosecution under HSWA section 6 was incompatible with the machinery directive so that HSE should be prevented from prosecuting under HSWA section 6 instead of under the Regulations. The majority of the Judges ruled that it was permissible for HSE to prosecute under section 6. It was clear that all of the 3 Judges who ruled in HSE's favour were of the opinion that there would be no legal difficulty with HSE prosecuting under HSWA section 6 if the failings alleged against the defendants were a failure to comply with essential health and safety requirements set out in Schedule 3 of SMSR.

11 A point that arises from this judgment is whether **any** prosecution relating to unsafe machinery (either under SMSR or HSWA section 6) must be phrased as a breach of the essential health and safety requirements i.e. is it possible, as a matter of European law, to prosecute either under HSWA s6 or the Regulations (e.g. non compliance with Reg 12(1) (e)) where the allegation is failing to comply with a free-standing requirement of safety (i.e. a general lack of safety, in that the relevant machinery was not in fact safe) but not including breaches of the essential health and safety requirements? On this point, the court did not reach any clear conclusion, meaning that, although the point would be more likely than not determined in HSE's favour, there is still room for argument.

Significance of This Case

12 The significance of this decision is:

- (a) There is no legal difficulty in prosecuting under HSWA s6 rather than under SMSR where the alleged breach is a failure to comply with the essential health and safety requirements set out in Schedule 3 of the Regulations;
- (b) Where the allegation is a failure to comply with a free standing safety requirement, (i.e. a general lack of safety, in that the relevant machinery was not in fact safe), that does not include a breach of the essential health and safety requirements, it may be arguable by the

defence that it is an infringement of European law to prosecute under HSWA section 6 or under the SMSR. It is therefore advisable, wherever possible, to frame prosecutions relating to unsafe machinery by reference to non-compliance with the essential health and safety requirements (para 1.1.2 of the requirements contains fairly general principles that appear to apply in many cases) instead of, or as well as, a general lack of safety. However, where this is not possible, prosecutions should continue to be brought relying on the free-standing safety requirements in HSWA s6 or SMSR;

(c) Where Regulations contain a saving provision so that HSE are not prevented from taking “any action” under the provisions of the 1974 Act, the words “any action” will include both administrative action (such as issuing a prohibition notice) and the action of prosecuting.

Possible Future Developments

13 It is intended to amend the SMSR to make offences triable either way, and to increase the penalties. If that happens it will usually be appropriate to proceed under the Regulations, unless there are good reasons for selecting section 6 as the appropriate charge instead.

Further Advice

14 Further information and advice on SMSR and supply issues can be obtained from HSE’s Safety Unit. Advice on general legal or enforcement issues can be obtained from your directorate Legal Liaison Point, who will consult HSE’s Solicitor’s Office if appropriate.

Date first issued: 09 July 2004

