



Neutral Citation Number: [2018] EWHC 3007 (Admin)

Case No: CO/2009/2018

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT IN BIRMINGHAM**  
**DIVISIONAL COURT**

Birmingham Civil Justice Centre  
Priory Courts, 33 Bull Street  
Birmingham B4 6DS

Date: 09/11/18

**Before :**

**LORD JUSTICE HICKINBOTTOM**  
**and**  
**MR JUSTICE JAY**

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**Between :**

**WARWICKSHIRE COUNTY COUNCIL**

**Appellant**

- and -

**HALFORDS AUTOCENTRES LIMITED**

**Respondent**

- and -

**COMPETITION AND MARKETS AUTHORITY**

**Intervener**

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**Tony Watkin** (instructed by **Warwickshire County Council Legal Services**)  
for the **Appellant**

**William Hibbert** (instructed by **Ms Kirsty Byrom, Head of Commercial Law,**  
**Halfords Group plc**) for the **Respondent**

**Ben Lask** (instructed by **CMA Legal, Competition and Markets Authority**)  
for the **Intervener**

Hearing date: 1 November 2018  
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**Approved Judgment**



**Lord Justice Hickinbottom :**

**Introduction**

1. The appeal raises issues of some importance in respect of the proper interpretation of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No 1277) (“the 2008 Regulations”) in the context of a test purchase of goods or services.
2. It is an appeal by way of case stated against the decision of Deputy District Judge (Magistrates’ Court) Noble on 14 February 2018 to dismiss an information laid by the Appellant trading standards authority (“the Council”) against the Respondent (“Halfords”) that, on 21 February 2017, it engaged in a commercial practice which was a misleading action in giving false information regarding a service, in that an invoice given to a trading standards officer employed by the Council to make a “test purchase” stated that a full service on a vehicle had been carried out which was untruthful, and that commercial practice caused or was likely to cause the average consumer to take a transactional decision he would not have taken otherwise, contrary to regulation 9 of the 2008 Regulations.
3. Before us, Tony Watkin of Counsel appeared for the Council, William Hibbert of Counsel for Halfords, and Ben Lask of Counsel for the Competition and Markets Authority by way of intervention. At the outset, I thank each of them for their helpful submissions.

**The Regulations**

4. The 2008 Regulations transpose the Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and Council (“the Directive”) into UK law. The purpose of the Directive, which is a maximum harmonisation directive, is “to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ interests” (article 1).
5. The Directive targets unfair commercial practices “which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors.... It neither covers nor affects the national laws on unfair commercial practices which harm only competitors’ economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so” (recital (6)).
6. The Directive thus applies to “unfair business-to-consumer commercial practices, as laid down by article 5, before, during and after a commercial transaction in relation to a product” (article 3(1)). Article 2(d) defines “business-to-consumer commercial practices” (or just “commercial practices”) as:  

“... any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.”

7. Article 5 prohibits “unfair commercial practices”, namely a commercial practice which is:

“(a) ... contrary to the requirements of professional diligence, and

(b) ... materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of an average member of the group when a commercial practice is directed to a particular group of consumers”.

8. Recital (13) to the Directive explains:

“... the single, common general prohibition established by this directive... covers unfair commercial practices distorting consumers’ economic behaviour. In order to support consumer confidence the general prohibition should apply to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution...”.

9. It is common ground that the 2008 Regulations faithfully transpose the Directive.

10. Halfords was prosecuted under regulation 9 of the 2008 Regulations, which (so far as relevant to this appeal) provides:

“A trader is guilty of an offence if he engages in a commercial practice which is a misleading action under regulation 5...”.

Regulations 17 and 18 provide due diligence and innocent publication defences to a charge under regulation 9.

11. Regulation 5 provides (again so far as relevant to this appeal):

(1) A commercial practice is a misleading action if it satisfies the conditions in... paragraph (2)....

(2) A commercial practice satisfies the conditions of this paragraph—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

...

(4) The matters referred to in paragraph (2)(a) are—

...;

(b) the main characteristics of the product (as defined in paragraph 5)...

(5) In paragraph (4)(b), the ‘main characteristics of the product’ include—

...

(d) execution of the product;...”

12. Regulation 2(1) defines various terms as used in the Regulations. “Product”, for these purposes, includes “a service” (regulation 2(1)). Other relevant definitions include the following:

“‘commercial practice’ means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product”. [This definition rolls together those in articles 2(d) and 3(1) of the Directive. It includes reference to promotion etc *from* consumers, as well as *to* consumers, which the Directive does not. However, this appeal concerns only promotion, sale or supply of a product *to* consumers.]

“‘consumer’ means an individual acting for purposes that are wholly or mainly outside that individual’s business”.

“‘business’ includes—

(a) a trade, craft or profession, and

(b) the activities of any government department or local or public authority”.

“Average consumer” is required to be construed in accordance with paragraphs (2) to (6) of regulation 2. Regulation 2(2) provides:

“In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well-informed, reasonably observant and circumspect.”

13. Article 11 of the Directive requires Member States to ensure that adequate and effective means of enforcement exist to combat unfair commercial practices in the interests of consumers. The provisions are extensive, but include a requirement that courts or administrative authorities can order the cessation of unfair commercial practices; and, if such a practice has not yet been carried out but is imminent, to order the prohibition of the practice, even without proof of actual loss or damage or of intention or negligence on the part of the trader. Making unfair commercial practices a criminal offence under Part 3 of the 2008 Regulations is part of the enforcement regime. Furthermore, under Part 8 of the Enterprise Act 2002, where an infringement of relevant EU law (including the Directive) “harms the collective interest of consumers”, an enforcer (which includes the CMA and the Council) may apply for an enforcement order directing the relevant person (amongst other things) not to continue or repeat the conduct (sections 215 and 217). Breach of such an order constitutes a contempt of court.
14. As originally enacted, regulation 20 of the 2008 Regulations provided for test purchases by an enforcement authority for the purposes of determining whether the 2008 Regulations were being complied with. Although that provision was repealed by paragraph 115 of Schedule 2 to the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015 No 1630), it was substantively replaced by paragraph 21 of Schedule 5 to the Consumer Rights Act 2015, which provides that an officer of an enforcer may make a purchase of a product or enter into an agreement to secure the provision of a product without giving notice.

### **The Facts**

15. The facts are not substantially in dispute.
16. Paul McCabe is a trading standards officer employed by the Council, which is the trading standards authority for its area.
17. On 20 February 2017, a Volkswagen Passat registration mark WN07 FSX was examined by an independent motor engineer who noted several faults on the vehicle and introduced others. The following day, under an assumed name, Mr McCabe booked the vehicle in for a full service at a garage at Stratford-upon-Avon owned and managed by Halfords. It was a “test purchase”, designed to assess the quality of the service facility offered by Halfords. Mr McCabe collected the vehicle that evening, and paid £210 for the service. He was given an invoice which indicated that a full service had been performed. The next day, the vehicle was examined again by the independent examiner, and various faults were noted as being neither rectified nor reported.
18. On 19 October 2017, an information was laid by the Council that, on 21 February 2017:

“... Halfords..., being a trader, engaged in a commercial practice which was a misleading action in that the said company gave false information in relation to a service carried out to a Volkswagen Passat Registration Mark WN07 FSX in that an invoice given to Paul McCabe stated that a full service had been carried out, which was untruthful in relation to the main characteristics of the product, in that various faults in the said

vehicle were not rectified or reported *to the consumer*, including the following... [There were then set out eleven faults.]

And that commercial practice caused or was likely to cause the average consumer to take a transactional decision he would not have taken otherwise

Contrary to Regulation 9 of the Consumer Protection from Unfair Trading Regulations 2008” (italics added).

A summons in these terms was issued the following day. At the hearing before the Deputy District Judge, the information was amended to remove the italicised words, “... to the consumer...”, from the charge.

19. On 3 November 2017, a solicitor employed by Halfords was interviewed under caution, and accepted that the service had been carried out by an apprentice, but his supervisor had not properly supervised him. By written admissions dated 16 January 2018, Halfords accepted that the service left eight defects in the vehicle neither repaired nor reported.
20. The matter came before Deputy District Judge (Magistrates’ Court) Noble sitting at Coventry Magistrates’ Court on 21 February 2018. At the close of the prosecution case, Halfords made an application of no case to answer, on the basis that (i) the “commercial practice” upon which the charge was based was restricted in the information to the giving of the invoice to Mr McCabe, (ii) he was not a “consumer” within the definition of the 2008 Regulations, and so (iii) the giving of the invoice to him was consequently not a prohibited “commercial practice” because it was not “directly connected with the promotion, sale or supply of a product to or from consumers”. In the circumstances of this case, the giving of the invoice thus fell outside the scope of the 2008 Regulations, and could not found a charge.
21. As set out in paragraph 19 of the case stated, the Deputy District Judge found:
  - i) The alleged offence set out in the charge information was the giving of the invoice to Mr McCabe.
  - ii) That invoice was misleading in that a full service had not been carried out and that this would mislead the average consumer.
  - iii) However, Mr McCabe was not a consumer and therefore the giving of the invoice to him was not a commercial practice in that it was not directly or indirectly concerned with the supply of a product to or from a consumer.
  - iv) The definition of a consumer in regulation 2(1) of the 2008 Regulations could not be interpreted to include a trading standards officer.
22. In the case stated, the judge has posed the following questions for this court:
  - 1) Was I correct to say the criminal behaviour alleged against Halfords in the information was the issuing of the misleading invoice to Paul McCabe?

- 2) Was I correct to say that the Trading Standards Officer Paul McCabe was not a consumer as defined by regulation 2(1) of the 2008 Regulations?
- 3) Was I correct to say that the giving of the invoice to Paul McCabe was not a commercial practice?

### Discussion

23. As before the Deputy District Judge, Mr Hibbert for Halfords submits that the information clearly and specifically identified and restricted the commercial practice of which complaint was made, namely the giving to Mr McCabe of the invoice which falsely stated that a full service had been carried out. However, Mr McCabe did not receive the invoice as “a consumer” for the purposes of the 2008 Regulations; and the presentation of the invoice to him was therefore not, directly or indeed indirectly, “connected with the promotion, sale or supply of a product” to a consumer. The misrepresentation in the invoice was given to Mr McCabe (a non-consumer), and only him; and no consumer could ever have had any actual or potential connection or involvement with it. The giving of the invoice did not therefore fall within the scope of “commercial practices” for the purposes of the 2008 Regulations; and therefore, as a matter of law, Halfords did not commit the offence as it had been charged.
24. However, I do not find those submissions persuasive, for the following reasons.
25. The submissions turn on the true meaning of “commercial practice”. Within that definition, it is uncontroversial that, at the relevant time, Halfords was a “trader” for these purposes. The Council and the CMA do not accept that, at the relevant time, Mr McCabe was not a consumer; but, for the purposes of this part of the discussion, I shall assume in Halfords’ favour that he was not. The giving of the invoice to Mr McCabe was clearly an “act”; and, following the findings of the Deputy District Judge (which Halfords does not seek to challenge), the invoice contained a misrepresentation that a full service had been performed; and that representation would have led an average consumer to pay the invoice for work that had not been done. The focus is therefore upon the true meaning of the phrase “directly connected with the promotion, sale or supply of a product to or from consumers”, and whether that act and that representation in all the circumstances fell within the scope of that phrase.
26. The terms of a provision of European Union law such as this, which makes no reference to the law of the Member States for the purpose of determining their meaning and scope, have to be given an independent and uniform interpretation throughout the European Union, which takes into account the context of the provision and the objective of the legislation (see, e.g., Omejc v Slovenia (16 June 2011) (Case No C-536/09) at [19]-[21]; and Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft [2015] 3 CMLR 25; [2015] Bus LR 946 (“UPC”) at [32]-[33]). As Briggs J (as he then was) put it in Office of Fair Trading v Purely Creative Limited [2011] EWHC 106 (Ch) at [40]:

“Domestic regulations designed to implement EU directives, and in particular maximum harmonisation directives, must be construed as far as possible so as to implement the purposes and provisions of the directive. The interpretation of words and phrases is neither a matter of grammars nor dictionaries, nor even

a matter of the use of those phrases (or of the underlying concepts) in national law.”

27. As I have described, the Directive seeks to provide a common high level of consumer protection by carrying out a complete harmonisation of the rules concerning unfair commercial practices which harm consumers’ economic interests, on the basis that, in relation to a trader, a consumer is in a weaker position. Thus, the provisions of the Directive are designed with the consumer as the *target*, as well as the victim, of unfair commercial practices in mind (see recital (6) quoted at paragraph 5 above; and BKK Mobil Oil Körperschaft des Öffentlichen Rechts v Zentrale zur Bekämpfung Unlauteren Wettbewerbs eV [2014] 2 CMLR 1 at [36]).
28. The Directive is directed at, not commercial *transactions* as such, but at commercial *practices*. However, it is clear from the language of the relevant provisions that a commercial practice within the meaning of the Directive and 2008 Regulations may be constituted by or derived from a single act, omission or representation. The wording is clearly intended to cover both isolated acts and repeated behaviour. As Leveson LJ (as he then was) put it in R v X Limited [2013] EWCA Crim 818; [2014] 1 WLR 591 (“X Ltd”) at [22]:

“... [I]t is clear that a commercial practice can be derived from a single incident. It will depend on the circumstances.”

See also UPC at [45]. That is accepted by Mr Hibbert: he concedes that, had Mr McCabe been acting as a member of the public and thus a consumer, giving him a false invoice in the other circumstances of this case would have been an unfair commercial practice.
29. Indeed, the use of the words “(if any)” in the definition of commercial practice, and recital (13) to the Directive quoted at paragraph 8 above, indicates that there need not be a commercial transaction at all. There is nothing in the legislative language that suggests that, for there to be a proven commercial practice, it is necessary for a particular consumer to be involved in a particular transaction. The concept of “commercial practice” is “concerned with systems rather than individual transactions” (X Ltd at [23]).
30. Mr Hibbert also accepts that proposition, to an extent. He concedes that, if (e.g.) a business advertises falsely, targeting consumers and intending consumers to see and be influenced by a false representation in the advert, then that advertisement would be a “commercial practice” even if it is in fact seen and reported by, not a consumer, but a trading standards officer. That is because, although a consumer might not in fact see and be influenced by it, the advertisement is targeted at consumers and consumers might potentially see and be influenced by it. But, he submits, the position is different when the representation is not so broadly made, but uniquely made to an individual, such as Mr McCabe, who is not a consumer: then no consumer is actually or potentially involved.
31. Indeed, in this case, Halfords had such promotional material online, “Car Servicing – What’s included?”, which set out the points that are checked in the course of a service; and in their garages, in the form of a service schedule which sets out “exactly what we check”. Mr Hibbert accepted that the circumstances of Mr McCabe’s service might

evidence the fact that that advertising was false, and that this was an unfair commercial practice; but, he submitted, that is not how the matter was charged against Halfords.

32. Mr Hibbert relied heavily on the “pleading” point that, reflecting article 6(3)(a) of the European Convention on Human Rights, Crim PR rule 7.3(1) provides that an information must contain “such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant”; and, here, the particulars of the offence limited the conduct complained of to the single act of the giving of the invoice with its misrepresentation to someone who was not a consumer, namely Mr McCabe. He submitted that it would be wrong effectively to extend the pleaded conduct to include an allegation involving false advertising generally and/or the negligent carrying out of services generally and/or providing false invoices to consumers generally, of which Halfords did not have fair notice (see R v Chargot Limited [2008] UKHL 73 at [23] per Lord Hope).
33. However, in my view, that submission does not assist Mr Hibbert’s cause. The particulars of the offence given in the information were perfectly clear, and adequate. Indeed, Mr Hibbert accepted that they would have been adequate if Mr McCabe had been a consumer. Whatever the true construction of article 2(d) of the Directive (and thus regulation 2(1) of the 2008 Regulations), Halfords has not suffered any unfairness by the information having been drafted as it was. It was perfectly able to mount any defence to the charge that was laid – as it did, relying upon a (as yet untested) due diligence defence. The real issue in this appeal is whether, in all the circumstances, the giving of the false invoice to Mr McCabe was an act and representation that was “directly connected with the promotion, sale or supply of a product to consumers” for the purposes of article 2(d) of the Directive.
34. In that regard, I am unconvinced that the distinction Mr Hibbert seeks to draw between a representation made broadly to the public or a section of it on the one hand, and a representation made uniquely to a non-consumer trading standards officer on the other, is valid.
35. In my view, it does not sit well with the wording of the provisions. The requirement that the act, omission or representation etc by a trader is “directly connected with the promotion, sale or supply of a product to consumers” has to be considered in the context of the Directive as a whole.
  - i) Elsewhere, where the regulatory scheme within the 2008 Regulations is concerned with circumstances which are dependent upon a consumer entering into some transaction with the trader, that is made expressly clear. For example, regulation 27A provides a consumer with a right of redress under Part 4A of the 2008 Regulations where the consumer has entered into a contract with (or made a payment in respect of the supply of a product to) a trader. The definition of “commercial practice” does not expressly require such a connection.
  - ii) It is noteworthy that regulation 20 of the 2008 Regulations (now replaced by paragraph 21 of Schedule 5 to the Consumer Rights Act 2015: see paragraph 14 above) gave an enforcement authority such as the council the power to make test purchases for the purposes of determining whether the 2008 Regulations were being complied with. It would be at least curious if, having provided a power to make test purchases in order to determine whether the 2008

Regulations were being complied with, the same legislation defined “commercial practice” in such a way as to preclude acts and representations within the context of a test purchase in themselves amounting to a breach of the Regulations.

- iii) As I have described, the focus of the Directive is not upon particular commercial transaction(s), but rather upon commercial practice(s); and the relevant requirement is that the relevant act, omission or representation be directly connected “with the promotion, sale or supply of a product to consumers” (rather than “a consumer”). Particularly when seen in the context of the Directive as a whole, this is clearly not intended to require a nexus with a particular commercial transaction, but rather to limit the scope of the regime to practices that bear a direct connection with consumers in the broad sense. Again, this appears to focus upon practices which are in a broad sense targeted at consumers, rather than practices that are necessarily connected to a particular consumer transaction.
- iv) As I have indicated (paragraph 10 above), there is a due diligence defence to a charge under regulation 9. Regulation 17(1) provides (so far as relevant):

“(1) In any proceedings against a person for an offence under regulation 9... it is a defence for that person to prove—

- (a) that the commission of the offence was due to—
  - (i) a mistake;
  - (ii) reliance on information supplied to him by another person;
  - (iii) the act or default of another person;
  - (iv) an accident; or
  - (v) another cause beyond his control; and
- (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.”

Such defences are often included in regulatory schemes in which criminal sanctions are directed at systemic defects. The availability of such a defence – upon which Halfords rely in this case – at least suggests and is consistent with the substantive provisions being aimed at systems.

- 36. Furthermore, in my view, the submission – that a commercial practice cannot be derived from a representation in the circumstances of this case, because Mr McCabe was not in fact a consumer – not only runs counter to the aims of the Directive but also has an air of unreality.

37. The fact that, on the construction proposed by Mr Hibbert (and subject to any defence it might have to the charge), Halfords is not guilty of an offence under regulation 9 simply because Mr McCabe was acting in his capacity of trading standards officer rather than consumer is entirely fortuitous. Mr McCabe was pretending to be a consumer; his test purchase strategy was designed to test Halfords' quality of service in a consumer context; and Halfords understood Mr McCabe to be, and treated him as, a consumer. It is difficult to see what policy purpose would be fulfilled if, in these circumstances, the Directive and 2008 Regulations denied that the misrepresentation in the invoice was a commercial practice that could found enforcement measures aimed at protecting consumers. That difficulty is compounded in the case of services such as those in this case, in respect of which the average consumer will not know whether the services have in fact been carried out. To ascertain whether a car service has been performed adequately requires an audit of the condition of the vehicle before and after the service. It is not only highly unlikely that a consumer would perform such an audit, but the service provided is designed to identify (and, then, report and/or repair) the very defects that such an audit would be designed to identify. The construction of the relevant provision proposed by Mr Hibbert therefore does serious harm to the principal aim of the Directive to "achieve a high level of consumer protection". In the field of car servicing, in which a failure to perform services adequately involves serious safety risks, the protection of consumers is particularly crucial.
38. The narrow interpretation of "commercial practice" suggested by Mr Hibbert also runs contrary to the generally wide interpretation of the phrase given in the authorities as part of the purposive approach required to be taken. The Directive has been said to be characterised by "a particularly wide scope *ratione materiae*"; and, within that context, the term "commercial practice" is intended to have "a very broad meaning" (UPC at [34]). In holding that it was "amply sufficient to cover involvement in or supervision or control of training, in appropriate circumstances, as being directly connected with the promotion or sale or supply of a product", it was emphasised in R (Surrey Trading Standards) v Scottish and Southern Energy plc [2012] EWCA Crim 539; [2012] CTLC 1 at [35] that the definition of "commercial practice" was "broadly framed".
39. One reason it is broadly framed is because the Directive is essentially "preventive in nature" (UPC at [49]): as Mr Lask submitted, it aims, where possible, to combat unfair practices that might impact upon consumers *before* consumers suffer any harm. Where such practices have already occurred, it seeks to secure their cessation and provide for the imposition of effective penalties.
40. Article 11 of the Directive requires Member States to ensure that adequate and effective means of enforcement exist to combat unfair commercial practices in the interests of consumers (see paragraph 13 above). Mr Lask submitted, with force, that the construction favoured by Mr Hibbert undermined – and, in certain circumstances, negated – effective enforcement. For example, if an enforcement order is made against a trader proscribing him from contravening the 2008 Regulations by issuing invoices which claimed a full service had been carried out when it had not, a further test purchase (or any number of further test purchases) could not be used in an application for breach of the order because test purchases would not be in contravention of the Regulations or (thus) the enforcement order. Breach proceedings could only be taken on the back of an actual consumer receiving a misleading invoice, detecting that his vehicle had not been serviced properly and then bringing that to an enforcer's attention.

## **Conclusion**

41. For those reasons, in my judgment, a commercial practice for the purposes of article 2(d) of the Directive (and thus regulation 2(1) of the 2008 Regulations) may be constituted by or derived from a test purchase made of a product (including a service) that is generally promoted to and intended for purchase by consumers, even where the purchaser may not himself be a consumer. Specifically, the giving to the test purchaser of an invoice or other document incorporating false information as to a main characteristic of the product (including the execution of a service) that would mislead the average consumer into paying for services that he has not received (which he would not otherwise have done) is a commercial practice which is a misleading action for the purposes of regulations 5 and 9 of the 2008 Regulations, being “directly connected with the promotion, sale or supply of a product to... consumers”.
42. I would therefore answer the questions posed by the Deputy District Judge as follows.
- 1) Was I correct to say the criminal behaviour alleged against Halfords in the information was the issuing of the misleading invoice to Paul McCabe? Yes.
  - 2) Was I correct to say that the Trading Standards Officer Paul McCabe was not a consumer as defined by regulation 2(1) of the 2008 Regulations? For the purposes of this appeal it is unnecessary to answer this question: I have assumed, in Halfords’ favour, that the Deputy District Judge was correct.
  - 3) Was I correct to say that the giving of the invoice to Paul McCabe was not a commercial practice? No: it was a commercial practice for the purposes of the Directive and 2008 Regulations.
43. I would consequently allow this appeal; and quash the order of the Deputy District Judge on 14 February 2018 dismissing the charge and his findings insofar as they are inconsistent with this judgment. I would remit the matter back to the Magistrates’ Court for the prosecution to continue.

## **Application for a Reference to the Court of Justice of the European Union**

44. In these circumstances, Mr Hibbert applies for a reference to the Court of Justice of the European Union under article 267 of the Treaty on the Functioning of the European Union, on the basis of the principles set out by Sir Thomas Bingham MR in R v International Stock Exchange of the United Kingdom and the Republic of Ireland Limited ex parte Else (1982) Limited [1993] QB 534 at page 545D-G, the facts having been found (as set out in the case stated) and the European law issue being critical and one which this court cannot resolve with complete confidence.
45. I would refuse the application. In my judgment, the construction of the phrase “directly connected with the promotion, sale and supply of a product to consumers” is clear, when a properly purposive approach is taken; and I have sufficient confidence in the interpretation I favour not to require any reference.

## **Mr Justice Jay:**

46. I agree.