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FISHER v BELL REVISITED: MISJUDGING THE LEGISLATIVE CRAFT

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1. THE DIVISIONAL COURT'S DECISION IN *FISHER v BELL*

As students of the Law of Contract learn to their bemusement, in *Fisher v Bell*,[1] although caught by a member of the constabulary in the most compromising circumstances, the owner of Bell's Music Shop, situate in the handsome Victorian shopping Arcade in the bustling Broadmead area of Bristol, was unsuccessfully prosecuted for offering for sale a flick knife contrary to s.1(1) of the Restriction of Offensive Weapons Act 1959. The statute penalised "any person who manufactures, sells or hires or *offers for sale* or hire, or lends or gives to any other person" a flick knife. Mr Bell had done all in his power to make a sale. The switchblade had been displayed in his shop window with a label that read, "Ejector knife—4s". The police officer, who spotted the display and then took the knife away to show to his superintendent, was told by the shopkeeper that he had had other policemen in the shop inquiring about the knives. When the officer returned to tell Mr Bell that he would be prosecuted, the latter simply retorted "Fair enough."

Subsequent events were to vindicate Mr Bell's insouciance. Lord Parker C.J., presiding over a strong court consisting of Ashworth and Elwes JJ., upheld the Bristol justices' decision that no offence had been committed. More specifically, the Divisional Court ruled that in the absence of a statutory definition of the expression "offer for sale", the phrase had to be attributed its customary meaning in the Law of Contract. There, since a display of goods in a shop window, even accompanied by a price ticket, had for long been held not to constitute a contractual offer but only an invitation to treat,[2] Mr Bell had committed no offence when he placed a flick knife in the window of his music shop in the earnest hope that someone would happen along and buy it.

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[1] [1961] 1 Q.B. 394; (1961) 125 J.P. 101.

[2] *Timothy v Simpson* (1834) 6 C. & P. 499.

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Lord Parker C.J. confessed:

> Most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. … [I]t sounds absurd that knives of this sort cannot be manufactured, sold, hired, lent, or given, but apparently they can be displayed in shop windows.[3]

What carried the day, however, was the notion that a statutory provision must be viewed against the backdrop of the general law; which Parliament, of course, has to be taken to know when enacting the statute.

2. The aftermath of *Fisher v Bell*

The analysis adopted by the Divisional Court in *Fisher v Bell* was subsequently applied in an assortment of situations. In *Mella v Monaghan*[4] a shop displaying packs of pornographic photographs with a price attached was held not to have offered them for sale contrary to s. 2(1) of the Obscene Publications Act 1959. In *British Car Auctions Ltd. v Wright*[5] an auctioneer was held technically not to have offered goods for sale, consonant with orthodox contractual principles. As Melford Stephenson J. said, in a reluctant concurring judgment:

> I would eagerly embrace any opportunity of escaping from the strict legal meaning of "offer for sale" in this context in this Act, but I am satisfied that if we did we should in effect be adding a definition in the statute which is not there, and that we cannot do. We are bound by the fetters of the earlier authorities ….'"[6]

In *Norgren Co. (CA) v Technomarketing*[7] a defendant who gave an undertaking in a copyright action "not to offer or sell" goods was not acting in breach of the undertaking by sending out a price list including those goods.[8] In the absence of any contrary statutory intention, the contractual phrase "offer to sell", therefore, was presumed to bear its conventional contractual meaning in a range of different contexts.

[3] [1961] 1 Q.B. 394, 399–400. The Divisional Court's decision caused consternation and within weeks Lord Morris of Kenwood was introducing a Restriction of Offensive Weapons Act 1959 (Amendment) Bill in the House of Lords "to rectify this omission" whereby "an article with a price on it in a shop window is merely an invitation to trade [*sic*] and not an offer for sale": H.L. Deb. 9 May 1961, vol. 231, col. 121. The proposed Bill was also intended to close another loophole in the 1959 legislation. It was noticed that the Act, which had been intended to curb imports of flick knives, did not apply to Northern Ireland. Therefore, weapons whose importation was prohibited elsewhere in the United Kingdom could be legitimately brought into the realm via the Hibernian route.

[4] [1961] Crim. L.R. 175.

[5] [1972] 1 W.L.R. 1519.

[6] Ibid., pp. 1525–6.

[7] (1983) 1 January, unreported.

[8] Cf. *Grainger & Sons v. Gough* [1896] A.C. 325.

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Most famously, in *Partridge v Crittenden*[9] P was charged with offering bramblings for sale contrary to s. 6(1)(a) of the Protection of Birds Act 1954. P had placed an advertisement in the birdfanciers' weekly magazine, *Cage and Aviary Birds*, which began publication in 1902 and is still going strong: "Quality British ABCR[10] … bramblefinch cocks, bramblefinch hens, 25s each." A reader duly wrote to P ordering a brambling hen and enclosing a cheque. The hen was dispatched and the parcel opened by the purchaser in the presence of the prosecutor, C. The ensuing prosecution was a fiasco. The 1954 Act created an offence wherever "any person sells, offers for sale or has in his possession for sale" certain wild birds, unless close-ringed specimens bred in captivity. Clearly, having both (i) sold and (ii) had in his possession a bird for sale, P satisfied each of the first and third statutory criteria. The prosecutor, therefore, opted to proceed on the basis of the second. Having referred to *Fisher v Bell*, a decision in which he had participated seven years earlier, Ashworth J. declared:

> The words are the same here "offer for sale", … the law of the country is equally plain as it was in regard to articles in a shop window, namely that the insertion of an advertisement in the form adopted here under the title "Classified Advertisements" is simply an invitation to treat.[11]

Lord Parker C.J., who, it will be recalled, had delivered the leading judgment in *Fisher v Bell*, concurred with Ashworth J. "with less reluctance than in *Fisher v Bell* and *Mella v Monaghan*". He considered that in the case of advertisements and circulars, "there is business sense in their being construed as invitations to treat and not offers for sale." In short, he was completely sold on the contractual analogy, actually saying of the quashing of P's conviction: "It seems to me accordingly that not only is it the law but common sense supports it."[12]

Obviously, argument was addressed to the court urging that a purposive interpretation be given to these pieces of legislation. Both Lord Parker C.J. in *Fisher v Bell*[13] and Ashworth J. in *Partridge v Crittenden*,[14] however, aligned themselves with Lord Simonds' declaration in *Magor & St Mellons RDC v Newport Corp.*, in which Denning L.J. had been reproved for his temerity in advocating that having once discovered the true intention of Parliament it was a judge's duty to fill in any gaps left by the legislature: such a proceeding appeared to Lord Simonds "a naked usurpation of the legislative function under

[9] [1968] 1 W.L.R. 1204.
[10] "ABCR": aviary bred, close-ringed.
[11] Ibid., p. 1209.
[12] Ibid. loc. cit.
[13] [1961] 1 Q.B. 394, 400.
[14] [1968] 1 W.L.R. 1204, 1209.

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the thin disguise of interpretation".[15] With these fulminations fresh in their minds, judges of the Divisional Court were unlikely to risk Lord Simonds' wrath.

3. The true rationale of *Fisher v Bell*

Over the years *Fisher v Bell* has been characterised in different ways. Some commentators have claimed that it exemplifies the literal method of statutory interpretation.[16] This seems an over-simplification. Sir Rupert Cross put a different slant on the case.[17] At first, he argued that where a statute is passed with reference to a particular calling – in this case, improbably the enactment was suggested primarily to be directed towards shopkeepers[18] – and within that profession certain expressions possess a specific meaning, "then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."[19] Thus, shopkeepers might grasp more readily the technical meaning of "offer for sale" in the Law of Contract rather than sharing the man in the street's understanding of the expression. Cross, however, then switches horses abruptly, commenting: "but the decision is best regarded as an example of the presumption that penal statutes should be strictly construed in favour of the accused".[20] Neither explanation is satisfactory: no member of the court refers to either principle. Indeed, close reading of the case reveals a quite different landscape.

Criminal lawyers have viewed the line of decisions sired by *Fisher v Bell* with considerable misgivings, and *Fisher* in particular has met with a barrage of criticism. Notably, it is said that the Criminal Law may properly diverge from the Law of Contract in its interpretation of the relevant language and, more particularly, that the courts can properly take account of the mischief to which a statute is directed. Whereas the contractual rules are intended to regulate the mating ritual of offer and acceptance – often, it is said, because "the shopkeeper impliedly reserves to himself a right of selecting his customer. A shop is a place for

[15] [1952] A.C. 189, 191.
[16] E.g. C. Elliott and F. Quinn, *English Legal System*, 12th ed. (London 2011), p. 53; G. Slapper and D. Kelly, *English Law*, 2nd ed. (Abingdon 2006), p. 51.
[17] *Statutory Interpretation* (London, 1976), 65. See now 3rd ed. by Bell and Engle (Oxford 1995), 73.
[18] Since the statute includes manufacturers, hirers and lenders of flick knives, the argument is problematical. *Bennion on Statutory Interpretation: A Code*, 5th ed. (London 2008), § 368, pp. 1206–7 and P. Smith, S. Bailey and M. Gunn, *The Modern English Legal System* 5th ed. (London 2007), § 6.013 both see the statute as possibly using technical language that needs to be construed technically without claiming that the legislation was aimed at any particular constituency.
[19] *Unwin v. Hanson* [1891] 2 Q.B. 115, 119 *per* Lord Esher M.R. He continued: "For instance, the 'waist' or the 'skin' are well-known terms as applied to a ship, and nobody would think of their meaning the waist or the skin of a person when they are used in an Act of Parliament dealing with ships."
[20] See below footnote 48.

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bargaining, not for compulsory sales …",[21] the aim of the Criminal Law is to outlaw certain categories of transaction. As was pointed out in an annotation in the *Criminal Law Review*, in the two principal cases under review the object of the statutes was variously to prohibit the trade in flick knives and to punish the act of trafficking in protected species of wild bird.[22] In *Partridge v Crittenden* Ashworth J. referred to this annotation, but rejected the analysis, saying that that point was "met entirely by the quotation which appears in Lord Parker's judgment in *Fisher v Bell*, that 'It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation.' "

Can the decision in *Fisher v Bell* actually be justified? Was the court simply mesmerised by the technical, contractual terminology employed in the Restriction of Offensive Weapons Act 1959? I think not. Whilst I have no quarrel with the notion that Criminal Law and the Law of Contract pursue different objectives, those who simply argue that these decisions do not respect the purposes behind the relevant criminal statutes fail to engage with the true interpretational rationale underlying *Fisher v Bell* and its similarly reviled scions.

Whilst Lord Parker C.J. and his colleagues embraced the contractual analogy, that judge also noted that in order to achieve their objective of proscribing certain forms of behaviour similar statutes operating in other areas employed markedly different language. It would be wearisome to deploy an exhaustive list. Nevertheless, it is clear that many other statutes deliberately used expressions like "expose for sale" or "offer or expose for sale" in order to avoid the very difficulty the Crown encountered in *Fisher v Bell*. When one surveys the legislation of the day affecting offences triable in magistrates' courts, it is striking just how frequently the legislature adopted either the phrase "to sell or expose for sale"[23], or "offers or exposes for sale"[24] or "sells or offers or exposes for sale."[25] The draughtsman's established discourse displayed a plain aversion to the concept of offers for sale in statutes criminalising various conducts. Therefore, when a court encountered a statute which provided that anyone who "offers for sale" a flick-knife was to be guilty of an offence, the obvious inference was that it was intended that, despite the fact that such a construction might diminish the effectiveness of the statute, this expression, unusual in the criminal context, was meant to bear its technical, contractual meaning.

[21] P. Winfield, "Some Aspects of Offer and Acceptance" (1939) 55 L.Q.R. 499.
[22] [1961] Crim. L.R. 181.
[23] E.g. Agricultural Produce (Grading and Marking) Act 1928, ss.3 and 4(2)(d); Hares Preservation Act 1892, s. 2; Markets and Fairs Clauses Act 1847, s. 13; Stamp Duties Management Act 1891, s. 13(8).
[24] E.g. Copyright Act 1956, ss. 5(3)(a), 16. 21 and 43.
[25] E.g. Game Act 1831, s. 3A; Protection of Animals Act 1911, s. 8(a); Public Health Act 1961, s. 37(1)(b).

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According to one annotator this afforded "a more convincing ground for the decision, though not a decisive one".[26]

Indeed, such an interpretation was reinforced by the court's taking cognisance of the fact that

> Parliament, when it desires to enlarge the ordinary meaning of those words, includes a definition section enlarging the ordinary meaning of "offer for sale" to cover other matters including, be it observed, exposure of goods for sale with the price attached.[27]

This procedure had been adopted in other criminal statutes. Thus, s. 20 of the Prices of Goods Act 1939 statute provided:

> In this Act references to an offer to sell goods shall be construed as including a reference to a notification by a person of the price proposed by him for a sale of goods, made by the publication of a price list, by exposing the goods for sale in association with a mark indicating price, ….

Similarly, s. 20(4) of the Goods and Services (Price Control) Act 1941 stated:

> In this Act …, references to an offer to sell goods include references to a notification by a person (*a*) of the price proposed by him for a sale of goods, whether made by the publication of a price list, by exposing the goods for sale in association with a mark indicating price, ….

In short, conscious of the restrictive contractual ramifications of the expression "offer to sell", whenever the legislature wished to criminalise conduct that in civil-law terms would normally be considered an invitation to treat, it had consistently spelled out that the words were intended to bear a more extensive meaning. The technical arguments in favour of the Divisional Court's reading of the various statutes in cases like *Fisher v Bell*, then, are formidable.

Nor are they necessarily diminished when one considers modern drafting habitudes. Not surprisingly perhaps, in view of settled parliamentary usage – and now, in view of *Fisher v Bell*, too – it remains customary to amplify the notion of offering for sale. Thus, the Deer Act 1991, s. 10 refers to anyone who "sells or offers or exposes for sale, or has in his possession for sale … any venison … ." Section 14(1)(a) of the Agriculture and Horticulture Act 1964 refers to anyone who unlawfully "offers or exposes [regulated] produce for sale," whilst the City of Westminster Act 1999, s. 9 applies similar language in relation to street trading licences. The Copyright, Designs and Patents

[26] [1961] Crim. L.R. at p. 182.
[27] [1961] 1 Q.B. 394, 399 *per* Lord Parker, C.J.

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Act 1988 is littered with references to sale and exposure for sale.[28] Even the infamous, loosely drafted Dangerous Dogs Act 1991, s. 1(2)(b) provides: "No person shall … sell or exchange [a dog to which this section applies] or offer, advertise or expose such a dog for sale or exchange." Again, in para 1 of schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982, Schedule 4, para. 1 "street trading" is defined as "the selling or exposing or offering for sale of any article … in a street; …."[29] Most telling of all, mindful of the fruitless prosecution in *Fisher v Bell*, s. 141(1) of the Criminal Justice Act 1988 currently lays down:

> Any person who manufactures, sells or hires or offers for sale or hire, *exposes or has in his possession for the purpose of sale* or hire … a weapon to which this section applies shall be guilty of an offence ….

This provision could be seen as a capitulation on the part the legislature, which now concedes that even in a Criminal-Law context an offer for sale bears the technical meaning it conventionally possesses in the contractual sphere.

4. *Fisher v Bell redivivus: W.M. Morrisons Supermarkets plc v Reading B.C.*

For some, this analysis, habitually overlooked, may well come across as arid. Any such impression is wildly mistaken. Proper technical analysis of enactments, viewed in their broader statutory context, ought not to be overlooked simply because a court might feel uncomfortable interpreting legislation narrowly. As can be seen in the preceding section, drafting may fall into distinct behavioural patterns and individual Acts may require to be construed against the backdrop of any consistent, surrounding *corpus* of legislation.

The question remains, of course: how might a court today approach this variety of interpretative problem? *W.M. Morrisons Supermarkets plc v Reading B.C.*[30] affords a clue. It is to be regretted that in this case the Court improvidently omitted to consider those very factors which, it has been argued, truly underpin *Fisher v Bell* and its descendants.

[28] See ss. 23, 24, 83, 107, 184, 188, 198, 205H, 227, 296, 296ZB, 297A, and 298, some of which were amended as recently as 2003: Copyright and Related Rights Regulations 2003 (SI 2003/2498).

[29] See *Jones v. Bath & N.E. Somerset Council* [2012] EWHC 1361 (Admin), (2012) 176 J.P. 530. Just as the term pedlar, as used in the Pedlars Act 1871, s. 3 refers to any "hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot and goes from town to town or to other men's houses, *carrying to sell or exposing for sale* any goods, wares, or merchandise, *or procuring orders* for goods, wares, or merchandise immediately to be delivered, *or selling or offering for sale* his skill in handicraft.'

[30] (2012) 176 J.P. 388, [2012] EWHC 1358 (Admin).

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As will be seen, once one looks at the relevant legislation in this panoramic manner, troubling features come into focus.

Acting on the instructions of council officials, a 15-year-old boy made a successful test purchase of a packet of ten Benson & Hedges cigarettes from a supermarket's sales kiosk. The retailer was subsequently convicted of selling tobacco to a person under the age of 18 years contrary to s. 7(1) of the Children and Young Persons Act 1933, which provides:

> Any person *who sells* to a person under the age of eighteen years any tobacco or cigarette papers, whether for his own use or not, shall be liable … (emphasis added)

On appeal, it was contended that, in the absence of a definition in the 1933 Act, on the authority of *Fisher v Bell* and other "cases in which the analysis of the transaction in terms of civil law was decisive",[31] the word "sells" must be given its technical legal meaning. In other words, the meaning given in the ordinary Law of Contract must prevail unless a different statutory meaning can be found by looking at other provisions of the statute.

Before the magistrates, the supermarket had argued, unsuccessfully, that the test purchase made by the boy was not a "sale" for the purposes of the Sale of Goods Act 1979 because he acquired no rights in or ownership of the cigarettes, having acted at all times on behalf of Reading Borough Council. From this, it necessarily followed that there had been no sale for the purposes of the 1933 Act. On appeal to the Divisional Court, the argument was renewed that the supermarket had not "sold" tobacco to the young person because he was acting as the agent of the Council; rather, in accordance with principles of the Law of Agency, the "sale" was to the Council. In the absence of any expanded definition of the word "sells" or "sale" – and absent any provision conferring investigative powers or a power to carry out test purchases under the 1933 Act – it would be wrong to read the term "sell" as though it meant "supply". Therefore, after the manner of *Fisher v Bell* and *Partridge v Crittenden*, the word "sells" in s. 7(1) had to be given the technical legal meaning which it bore in the context of the law of sale of goods. Analysis of the transaction in terms of civil law had to be decisive.

A number of provisions of the Sale of Goods Act were claimed to be in point: s. 2(1), which defines a contract of sale as "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"; s. 2(4), which says that "where under a contract of sale the property in the goods is

[31] Ibid. at [14].

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transferred from the seller to the buyer the contract is called a sale"; and s. 2(5) which provides:

> Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

The key civil-law principles engaged, however, derived from the Law of Agency. It was accepted that if, when purchasing the cigarettes, the 15-year-old boy was acting as an agent on behalf of the Council, he was acting as agent for an undisclosed principal.[32] As is well-known, until the principal intervenes on the agent's contract and is revealed as the true contracting party, the contract is made with the agent; and the latter is personally liable and entitled under the contract.[33] No question of incapacity or illegality arose. The supermarket, however, contended that the property itself did not pass under the contract to the young person as purchaser and therefore the tobacco had not been "sold" to him.

Lloyd Jones J., in the absence of argument, was prepared to concede that "difficult questions could arise as to whether property passes to the agent or directly to the undisclosed principal"[34]. It is not immediately apparent what these questions might be, but the judge was content with a general assertion that it was "clear that property would pass from the seller either to the young person or to his undisclosed principal as a result of entering into this transaction."[35] Although *Fisher v Bell* and the other cases discussed above possibly predicate that criminal liability could turn on this nice analysis of the transaction in civil law, Lloyd Jones J. considered such a situation "undesirable." Nor was it necessary to read the Act in this way. The judge asserted:

> Parliament did not intend to limit the application of this provision to a case where a child or young person acts as principal and therefore property passes to him. On the contrary, … s. 7 applies where a child or young person enters into a transaction of sale, whether as a principal or on behalf of someone else, whether disclosed or undisclosed and whether or not property passes to him.[36]

[32] Conceivably, on the facts it may alternatively have been a case of sale to the boy, followed by resale to the council. In which case, *a fortiori* the appellant's arguments fell away. Of course, had the boy informed the employee in the sales kiosk, "I am a youth making a test purchase on behalf of Reading Borough Council", the defendant's argument would have had greater force since, absent special circumstances, the Law of Agency decrees that when the agent acts for a disclosed principal the contract is made between the third party and the principal, the agent acquiring neither rights nor liabilities under the contract. Because the Children and Young Persons Act 1933, s. 7(1) refers to a "person who sells to a person under the age of eighteen years", in this unlikely situation it is easier to imagine a court holding that no offence had been committed.

[33] *Bowstead & Reynolds on Agency*, 19th ed., by Peter Watts (London 2010), § 9.012; Roderick Munday, *Agency: Law and Principles* (Oxford 2010), § 10.27.

[34] (2012) 176 J.P. 388 at [19].

[35] *Ibid.* loc. cit.

[36] Ibid. at [20].

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Lloyd Jones J. advanced three reasons for thinking that s. 7 of the 1933 Act should be read in this way. *First*, it was significant that s. 7(1) refers to a person under 18 years of age purchasing tobacco or cigarette papers "whether for his own use or not." Since the child or young person is likely in many cases to be buying tobacco for the use of another, and in that sense is acting as agent for that other party, it seems logical that the Act should have been drafted in such a way as to preclude the vendor from relying on the defence that the purchaser was buying the tobacco for an adult. The inclusion of these words was "a strong indication" that Parliament meant for the offence to be committed, whether the child or young person was acting as principal or as agent.[37] *Secondly*, a further indication of the legislature's intention could be discerned in s. 7(4), which provides:

> Nothing in this section shall make it an offence to sell tobacco … [to] any person who is at the time employed by a manufacturer of or dealer in tobacco, either wholesale or retail, for the purposes of his business, or is a boy messenger in uniform in the employment of a messenger company and employed as such at the time.

The subsection clearly points to situations where the young person will be acting as an agent for a manufacturer, a dealer in tobacco or (rather quaintly) a messenger company. In the judge's view, "the creation of this exception points strongly to the conclusion that the offence contrary to subs. (1) is committed whether or not the young purchaser acts as principal or agent."[38] *Thirdly*, and most significantly, Lloyd Jones J. took the point, which had been considered impermissible in *Fisher v Bell* and subsequent decisions: namely, the mischief at which the section was directed. This was identified as the failure to exercise careful judgment regarding the age of a would-be purchaser of tobacco products in the face-to-face transaction. This being so,

> it is irrelevant whether property passes to the young person or as a result of his entering into the transaction to someone else. What matters is that the child or young person enters into a contract for the sale of tobacco and that property passes under that contract.[39]

[37] Ibid. at [21].
[38] Ibid. at [22].
[39] Ibid. at [23]. The court made no reference to the gravity of a conviction of this offence. Section 143(2) of the Criminal Justice and Immigration Act 2008 added s. 12B to the 1933 Act, empowering the court to issue a 'restricted sales order', *inter alia* "prohibiting the person to whom it relates from selling any tobacco or cigarette papers to any person", etc. (s. 12B(3)(a)) – i.e., putting the hapless vendor out of business for up to a year if "satisfied that, on at least two occasions within the period of two years ending with the date on which the relevant offence was committed, the offender has committed other tobacco offences" (s. 12B(5)).

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Hooper L.J. agreed in a short concurring judgment, noting that were "any person who sells" to be construed in terms of the passing of property

> a shop could drive a coach and horses through this legislation by having a sign, drawn to the attention of the purchaser, to the effect that the property did not pass if the purchaser was under the age of 18.[40]

His Lordship endorsed Lloyd Jones J's third point, indicating that the approach to the interpretation of the expression "offer for sale" adopted in *Fisher v Bell* and *Partridge v Crittenden*, might not be taken in future "given the modern practice to look at, as Lloyd Jones J. has done, the mischief sought to be avoided."[41]

5. *Vale, Fisher v Bell?*

Putting aside for a moment the two judges' suggestion that s. 7(1) of the Children and Young Persons Act 1933, along with similar provisions, might require in the future to be read purposively, Lloyd Jones J. makes two perfectly valid construction points in his judgment. Read in isolation, the statute's provisions might indeed indicate that Parliament's intention was that commission of the section 7(1) offence was independent of the question of whether the purchaser was acting as "agent" or "principal". But if one reverts to the dichotomy explored above, which underpinned *Fisher v Bell* and succeeding authorities – between panoptic, technical interpretation of legislation that takes account of settled drafting conventions, on the one hand, and the temptation to fall back on a "purposive" approach to interpretation of a statute that might achieve what is perceived to be the desirable outcome, on the other – Lloyd Jones J.'s judgment provokes another, far more radical reflection.

Whilst the judge was undoubtedly correct to underline that s. 7(1) applies whether or not the tobacco and cigarette papers purchased are for the use of the child or young person, it does look odd that the section is assumed to cover cases where the purchase of tobacco or cigarette papers is made by a child or young person working undercover – as it were, sleuthing for the local authority. It is striking that when one looks at what might be generally termed other "trading offences", "test purchases" normally have to be properly authorised under the relevant legislation,[42] and then often must be made observing

[40] Ibid. at [26].
[41] Ibid. at [28].
[42] E.g. Agricultural or Forestry Tractors (Emission of Gaseous and Particulate Pollutants) Regulations (SI 2002/1891) reg. 7; Noise Emission in the Environment by Equipment for use Outdoors Regulations (SI 2001/1701) reg. 2; Construction Products Regulations (SI 1991/1620) reg. 16; *et al*. There is Divisional Court authority that test purchases properly conducted do not

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procedures that are spelled out – sometimes, in considerable detail – in statute. Thus, to check whether sellers of goods and provides of services are acting in compliance with the Consumer Credit Act 1974, test purchases and procurements have to be effected under the terms of s. 164. Moreover, if a person is so authorised, under s. 164(2) he bears a personal responsibility since "any act done … shall be treated … as done by him as an individual on his own behalf." Section 28 of the Consumer Protection Act 1987 regulates test purchases made by officers of enforcement authorities under that Act. The regime set up under the 1987 Act has since been extended to the detection of offences under the Fireworks Act 2003.[43] The test purchases made by weights and measures authorities under ss. 107(A) and 198(A) of the Copyright, Designs and Patents Act 1988 are regulated by detailed rules laid down in ss. 27, 28, 29, and 33 of the Trade Descriptions Act 1968. Similar provision has also been made for enforcement of the Video Recordings Act 1984 by s. 16A of the Criminal Justice Act 1988, for the detection of hallmarking offences under the Hallmarking Act 1973 and, to strike a topical note, by the Olympic Symbol etc. (Protection) Act 1995.[44] Such examples could be multiplied practically *ad nauseam*. But possibly the most telling case is to be found in the Crossbows Act 1987, a statute which has broadly similar prohibitory purposes to s. 7(1) of the Children and Young Persons Act 1933, and to the statute brought into play in *Fisher v Bell*. The Crossbows Act prohibits the sale and hire of crossbows to persons under 18. It also provides for test purchases by those under 18. Section 3A, which entered into force in March 2011, includes a provision absolving a person under 18 who buys or hires, or attempts either activity, from criminal liability under s. 2 or s. 3 of the Act "if … authorised to do so by the chief constable for the purpose of determining whether an offence is being committed …." Under s. 3A(2),

> A chief constable may authorise a person under the age of 18 to buy or hire, or attempt to buy or hire, a crossbow or a part of a crossbow only if satisfied that all reasonable steps have been or will be taken to—
>
> (a) ensure the person's safety, and
> (b) avoid any risk to the person's welfare.

Coupled with the evidence of the mass of legislation discussed above, the Crossbows Act 1987 does provoke the thought that it may

amount to entrapment and that volunteers employed by Trading Standards and suchlike are not *agents provocateurs*: *London Borough of Ealing v Woolworths* [1995] Crim. L.R. 58 (an 11-year old boy had purchased an 18-category video film contrary to the Video Recordings Act 1984, s. 11(1)).

[43] See Fireworks Act 2003, s. 12.

[44] See Olympic Symbol etc. (Protection) Act 1995, s. 8A (improbably, this is its correct title: see s. 19); London Olympic Games and Paralympic Games Act 2006, Sched. 3, para 12.

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just be that cloak-and-dagger "test purchases" of tobacco and cigarette papers by children cannot be assumed to be authorised at all under s.7(1) of the Children and Young Persons Act 1933. Section 7(1) makes no reference to such clandestine activities, and certainly does nothing to regulate them. It may well be that the use of children as local council lures to police the retail tobacco trade is now a hallowed practice.[45] However, does it not seem unlikely that s. 7(1) of the 1933 Act even contemplated the use of children as covert jailbait for unwary tobacconists? After all, if one considers, for example, s. 3 of that selfsame Act – which makes it an offence to allow a child of between 4 and 16 years of age to reside in or frequent a brothel, or s. 5 which creates the offence of giving alcohol to a child under five years of age, or s. 23 under which it is an offence to cause or procure persons under sixteen to take part in performances endangering life or limb, or the offence of failing to provide for the safety of children at entertainments contrary to s. 12 – the use of infant tempters and temptresses as *agents provocateurs* would be unthinkable.[46]

[45] It would seem that such is by no means universally the case. Not all such prohibitions amount to criminal offences carrying criminal sanctions or penalties. Lottery tickets, for example, may neither be sold to nor be sold by persons under 16 years of age. These prohibitions in the National Lottery Regulations 1994, reg. 3 merely provide grounds for Camelot to revoke a ticket vendor's licence in case of infringement. No provision exists for prosecution in cases of breach of reg. 3. Camelot, interestingly, has adopted a self-imposed policy of not employing under-age stooges to make test purchases. In consultation with the National Lottery Commission, Camelot devised its own test-purchasing programme, "Operation Child". "Operation Child" involves test purchases conducted by young people who are aged 16, but look younger. (Local councils, it might be noted, advertise to recruit such young people, who look younger than their years, in order to police other enactments that do carry criminal sanctions; service may even contribute to those volunteers' Duke of Edinburgh awards.) Camelot operates a policy of three strikes and you are out: retailers who sell on three separate occasions to test purchasers who are under age in appearance face the sanction of having their terminal removed. The odd upshot is that the regulation has not actually been infringed at all, but the seller is "penalised". Local Government Regulation publishes guidelines on test purchasing, *A Practical Guide to Test Purchasing* (March 2010, Lacors): see notably, para 3.2(c), which ordains that "the young person must be younger than the age stated for the purchase of the particular product."

[46] Further faint confirmation may be found in s. 7(3), which provides: "[i]t shall be *the duty* of a constable and of a park-keeper being in uniform to seize any tobacco or cigarette papers in the possession of any person *apparently under the age of 16 years* whom he finds smoking in any street or public place, …." If the sight of anyone out and about who looks to be under 16 enjoying a crafty fag is sufficient, without more ado, to justify a seizure of property, one would anticipate that the statute ought to be regulating any circumstances in which youngsters under the age of 18 – which, in order to avert accusations of entrapment, as in the *Morrisons* case is likely to include the very young – were going to find themselves in possession of such malignant substances as tobacco products and cigarette papers.

There is another point. The Act's antiquated concepts both of "boy messengers in uniform" (s. 7(1)) – not girls, it might be noted – and of "a park-keeper being in uniform" (s. 7(3)) reek of a bygone era. They add to the sense that even if the legislature had contemplated the surreptitious purchases by children working undercover as a standard means of enforcing the prohibition on tobacco sales to the young – and there is absolutely no statutory evidence that it did, the procedure needs to be reviewed in the light of modern legislative practice.

Additionally, one is bound to wonder whether, under s. 7(3), a constable seizing tobacco products actually requires to be in uniform.

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6. Resort to statutory purpose and established patterns of lawmaking

So, what can we conclude from pondering this case law? It is suggested, tentatively, that one salutary lesson can yet be learned from Lord Parker C.J.'s generally disparaged judgment in *Fisher v Bell*. The contention that provisions like the now repealed s. 1(1) of the Restriction of Offensive Weapons Act 1959 and the extant s. 7(1) of the Children and Young Persons Act 1933 ought to be read purposively in situations in which the court feels that the righteous legislative design is thwarted by some perceived technicality, needs to be treated with caution. A purposive reading of a criminal statute, we know, may lead one into all manner of dangerous terrain, where courts can variously be accused of creating criminal offences where none existed before,[47] of failing to construe penal statutes strictly – i.e. by granting the defendant the benefit of any doubts should the meaning of the provision be uncertain,[48] or of reducing the knowability of the Criminal Law.

Rather like the dog that did not bark in the night,[49] in the case of *Fisher v Bell* examination of many allied enactments strongly suggests that Parliament may have deliberately eschewed the traditional legislative formulae that at that time were part of the draughtsman's established vernacular – an impression reinforced by the language adopted in a considerable body of subsequent regulatory legislation.[50] In the *Morrisons* case, apart from vague indications from the judges that a purposive construction might provide a helpful way forward, this type of ranging analysis was lacking. In consequence, a trick may have been missed. The aberrant procedure of employing youthful lures and loreleis, without specific parliamentary authorisation, to tempt tobacco vendors into outlawed sales to young persons seems not to have been questioned.

As the showcased decisions demonstrate, it may prove perilous to rule out the assumption that the legislature knows the general law and

[47] Although the offences were said to be offences that existed at common law, it does no harm to recall the furore kindled by the House of Lords' decision in *Shaw v D.P.P.* [1962] A.C. 220, from which a decade later the House retreated in some disarray in *Knuller (Publishing, Printing and Promotions) Ltd. v D.P.P.* [1973] A.C. 435.

[48] This principle, widely known across the Atlantic as the principle of lenity, is frequently invoked in legal argument, but certainly not uniformly applied. Whereas Blackstone stated this to be a general canon of statutory construction ("Penal statutes must be construed strictly": *Commentaries on the Laws of England*, I.88), Justice Scalia included it in his discussion of "Assorted Canards of Contemporary Legal Analysis", 40 Case Western Reserve L. Rev. (1989–90). For interesting discussion, see further Sarah Newland, "The Mercy of Scalia: Statutory Construction and the Rule of Lenity", 29 Harv. C.R.–C.L. L. Rev. 197 (1994); Lawrence M. Solan, "Law, Language and Lenity", 40 Wm & Mary L. Rev. 57 (1998–1999).

[49] See Sir Arthur Conan Doyle, 'Silver Blaze' in *The Memoirs of Sherlock Holmes* (London 1894).

[50] A not dissimilar argument has been used to show the high unlikelihood that, in employing the term "person" in s. 100(1) of the Criminal Justice Act 2003, the legislature intended to refer to the dead: Roderick Munday, "The Quick and the Dead: Who Counts as a 'Person' under Section 100 of the Criminal Justice Act 2003?" [2007] J. Crim. Law 238.

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apprehends the technical significance of given words and phrases. Account has to be taken of the fact that both draughtsman and legislature observe cemented conventions when enacting statutes.[51] This point is sometimes overlooked by both courts and commentators. These conventions or patterns in legislative drafting nevertheless can make a decisive contribution to the meaning of the statute. Recourse perhaps should only be had to so-called purposive interpretation – assuming that a given provision's correct purpose can be confidently identified – in cases where no strong, countervailing drafting conventions obtain.

[51] Although the drafting of s. 1(1) of the Restriction of Offensive Weapons Act 1959, had it been drawn to ministerial attention, might immediately have been seen to be defective, almost certainly this would not have been a suitable case for invoking the doctrine clarified by the House of Lords in *Inco Europe Ltd. v First Choice Distribution* [2000] 1 W.L.R. 586, whereby exceptionally a court may read words into an enactment to correct an obvious drafting error and to give effect to the legislature's undoubted intention. As Lord Nicholls noted in *Inco*, "the courts exercise considerable caution before adding or omitting or substituting words" (ibid., p. 592. See also *R (W) v Leeds Crown Court* [2012] 1 W.L.R. 2786 at [46]–[47] *per* Sir Anthony May P.) Lord Nicholls stipulated that, before exercising this power, a court had to be "abundantly sure" of three matters: (i) the intended purpose of the relevant provision; (ii) the fact that, through inadvertence, the draftsman had failed to give effect to the intended purpose of that provision; and (iii) "the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed." The presence of a united body of authority, consisting of statute and case law, indicating that the phrase "offer for sale" has an established technical meaning, which the legislature must be taken to know, would militate against such a course – even if the courts today appear more willing to step in to rectify perceived Parliamentary oversights: see further, Roderick Munday, "Appealing Contempt of Court: Parliament's Homeric Nod" [2012] Stat. L.R. 345, 359–61.

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