



JUDICIARY OF
ENGLAND AND WALES

District Judge (MC) Gary Lucie

IN THE BARKINGSIDE MAGISTRATES' COURT
BETWEEN:

LONDON BOROUGH OF BARKING AND DAGENHAM

&

LONDON BOROUGH OF REDBRIDGE

Prosecution

-v-

B & M RETAIL LTD

Defendant

SENTENCING
REMARKS

Hearing: 31st August 2018

P: Mr McNally

D: Mr Jessop

The charges

1. B & M Retail Ltd (“B&M”) pleaded guilty at the first opportunity to 3 offences of selling knives to persons under 18 yrs of age contrary to s 141A(1) Criminal Justice Act 1988 (as amended). The offences are summary only and carry a maximum sentence of 6 mths imprisonment or an unlimited fine or both.

The facts

2. B&M, is a company with a very large turnover and operates over 500 stores across the UK. The charges relate to two separate retail premises operated by B&M in Goodmayes and Vicarage Fields on 3 separate dates. The dates of the offences and relevant store involved are as follows:
 - (a) 19 September 2017 - Goodmayes Store in Redbridge;
 - (b) 21 September 2017 - Vicarage Fields Store in Barking;
 - (c) 18 January 2018 - Vicarage Fields Store in Barking.
3. Both stores fall within the sphere of responsibility of the same area manager, Mr Shaun Nightingale.
4. The very detailed facts of the case are to be found in full in the “Sentencing Note” prepared by Mr McNally for the prosecution. There is no dispute about those and I need not, therefore, repeat them in full or make findings of fact I will summarise each below.

19th September 2017 (Goodmayes)

5. On 19th September 2017, at about 19:55 the store at Goodmayes Retail Park was visited as part of a planned test purchase inspection programme. The test was of the sale of knives to underage persons. The inspection was police-led owing to concerns about the availability of knives, and what they considered to be the prevalence of their use in crime locally.
6. The terms of deployment for these test purchase volunteers was that they were to tell the truth if asked their ages; but if asked for identification they were to say that they do not have any.
7. In this instance the two volunteers were a male aged 15 and a female aged 14. The male was 1m 90 tall, and the female 1m 55. The two underage volunteers went into the store for about 10 minutes. They passed through the store together and one purchased a set of knives and sweets. The transaction was observed by an undercover police officer and no inquiry was made as to their

age, nor was any request made for proof of age identification. The volunteers left and surrendered the knives they had bought. The knife set was seized.

8. I have seen photos of the knife set and it contains 4 very sharply pointed knives ranging in size from a small paring knife to a large carving knife and also a pair of scissors and the ticket price is £5.99.
9. The matters were investigated, and the company attended a PACE interview through Mr Shaun Nightingale, the area manager. Mr Nightingale explained his background with the company and the measures they take to avoid the commission of age-related sales offences. He identified:
 - (a) Challenge 25 (if someone looks under 25 they should be asked for ID);
 - (b) Till prompt (which must be answered yes or no by the cashier or the transaction does not progress);
 - (c) Challenge 25 signage on alcohol and in the kitchen aisle, a poster on the wall near the tills (it is supposed to be as close to the till a possible), and cards highlighting challenge on knives and blades around the store.
10. Mr Nightingale said that the company discussed its failings (and he did so in his meetings with store managers). He thought that sometimes people confused the age (18) with the age that the company should challenge to (25). Mr Nightingale was expressly conscious of the social need for such a policy stating:

“One of the things from my background, is about the understanding of confidence. I have two children myself, I have brothers that have children and what I always tell the staff is it’s about getting the reassurance from the public as well. So, mums and dads do have children coming in at 16-17 years old under the influence, especially in London we’ve got the knife crime etc and how would they feel under that situation and if you’re in the back of the queue how are you perceived if you’re not being ID’d, even if they are 21, even if you know them. I really influence my staff to ask every single person, if they know them or not.”
11. Mr Nightingale said that since the incident he had put up an additional POS and was getting the store manager to positively include it in the daily ‘huddle’ as well as reminding cashiers of Challenge 25 when assigning duties each day.

He thought it needed to be kept 'live' every day of every week even if they did the training every three months. Mr Nightingale was asked about the warning letter issued following a failed test purchase at that same store on 25 October 2016. He said that he was aware of it. He did not dispute it had happened. He stated that the Company knew the law relating to age-related sales.

21st September 2017, Vicarage Fields

12. A test-purchase was conducted at the Vicarage Fields by a sixteen-year-old male volunteer accompanied covertly by a Police Officer went into the store at about 16:15 that day. About three minutes later the volunteer exited having purchased a 3-piece knife set which was seized. (The packaging was dated and suggested an age restriction of 21 the stock may have been recycled for sale). Trading Standards Officers then entered the store and the matter was further investigated.
13. Again, I have seen photos of the knife set and it contains 3 very sharply pointed knives ranging in size from a small paring knife to a large chopping knife the ticket price is £5.99.
14. Mr Nightingale was formally interviewed in respect of this offence and he, again, set out B&M's procedures and identified what had gone wrong. He also described, in detail, how staff were trained. He also confirmed he was aware of an unlawful sale having taken place at this store in April 2016 (before he assumed responsibility for the area). The steps that were taken then would have been done by the then area manager. He (Mr Nightingale) had been a store manager and knew that the store manager needed to talk about it and reinforce the message increasing it around school holidays, around Christmas as these were the times you saw increases. He would try to keep it as 'live as possible'.

19th January 2018, Vicarage Fields

15. On 18 January 2018 a test purchase was undertaken by the London Borough of Barking and Dagenham. A 14-year-old male volunteer was deployed to conduct a test purchase of a knife. He did so at the Vicarage Fields B&M Home Store, witnessed by a plain-clothes Police Officer. During the transaction he noted that the till operator was talking to a person behind the volunteer and did not

pay him attention or ask for identification. A packet of three knives was sold to the volunteer. The knives were seized, and Trading Standards Officers entered the store shortly afterwards. It was noted that the knives bore a 'challenge 21' marking on the reverse (old stock). The knives were the same type as those bought on 29th September 2017.

16. As before, the matters were investigated and Mr Nightingale, on behalf of B&M was interviewed in February 2018. He confirmed upon sight of a picture that the volunteer appeared underage, and that the boy was in fact 14. He could produce training records etc. During this interview, Mr Nightingale was asked whether the use of secure cabinets for display of knives had been contemplated. He said it had been discussed but could not say that it was something they were looking to do. He was asked whether they had 'sale cards' (where the product is not displayed but the purchaser takes a card to the till and is given the product from behind the counter). He said no but confirmed some high value items, like fragrances, were kept in cabinets.
17. Mr Nightingale said that he was looking to improve the training programme and materials. He had also asked Head Office suggesting that they instigate a third-party test purchase programme. They had not got back to him.

Mitigation

18. Mr Jessop provided a detailed note regarding mitigation which he supplemented with submissions before me. I was also supplied with a written statement of Simon Arora who is the CEO of B&M, a position he has held since 2004, and a bundle of documents setting out the revised training material given to staff and amended packaging re-enforcing the "Challenge 25" policy. In that he explained that B&M has been trading since 1978 and there are now 569 stores the UK. The company sells 20,000 different products at any one time with 4 million shoppers served on average per week or 208 million shoppers per year.
19. Mr Arora says, "I am conscious about how serious an issue knife crime is at present, particularly in London and the South East". He goes on to explain the procedures in place to avoid underage sales including training, Challenge 25, signage, till prompts, daily huddles etc. He also explains how the company co-operates with local authorities and what subsequent action has been taken to

prevent underage sales. He highlights the fact that the company has passed other test-purchases in other areas (including in Northants in February 2018) and says the company is very regretful. Finally, he invites the court to conclude that, “...the issues identified were specific to these stores and not an indication of the position across the entire B&M estate.”)

20. I have, of course, taken into account Mr Jessop’s submissions and the statement of Mr Arora and bundle of materials in determining the sentence in this case.

Approach to sentence

21. There are no definitive guidelines for these offences. Nor are there any reported cases of any higher courts. P invited me to use the Health & Safety etc Guideline but B&M objected to this citing the case of ***Price v Cheshire East BC [2012] EWHC 2927 (Admin)*** in which it was held that where there were no definitive guidelines specific to the offence in question, it would only be appropriate to have regard to guidelines for other offences if they were truly analogous or of a similar level of seriousness. In this case, Mr Jessop pointed out that most of health and safety / food hygiene offences were “either way” whereas the instant offences are summary only.

22. Whilst I accept that I should not use the starting points set out in the guidelines both P and B&M agreed that I should adopt the same general *approach* in the guidelines to sentencing by reference to culpability, harm and the aims of sentencing set out within them.

23. Mr Jessop referred me to a number of first instance decisions where the highest fine imposed was £20,000 at Lavender Hill Mags Ct in March 2018. I indicated that they were clearly not binding on this court and I am not bound by them. I do not have the reasoning of any of those courts in any event. The LCJ in ***R v Kenneth Thelwall [2016] EWCA Crim 1755*** said it was impermissible for advocates to refer to newspaper or other media reports dealing with similar cases at first instance. I have not, therefore, taken any of those cases into account in setting the fines in this case.

Culpability

24. By reference to the guideline P submits that the appropriate category is “medium” culpability whereas B&M submits that culpability is at the “lower end of the spectrum”.
25. I have decided that culpability is properly assessed as the top end of medium. Clearly, these offences were not deliberate nor were there serious or systemic failures within the organisation regarding the underage sales of knives. However, it appears to me that whilst systems were in place they were deficient and not sufficiently adhered to or implemented at these stores. The volunteers were as young as 14 which is a long way short of 18 and substantially less than B&M’s own Challenge 25 policy. In each case there were inadequacies in the training and refresher training of staff and other faults with labelling and signage.
26. One of the most concerning failures is that B&M did not consider and implement further measures for these stores in what it accepts are high risk areas. These could have involved putting knives in cabinets and/or using a card system of the type described above. This puts the knives beyond the reach of anyone and, in my view, (and that of P) make the process of challenging age much more effective. If it can be done for expensive items such as perfume it can equally be done for knives. I asked why this was what not done at these stores and was told that this would now be considered.
27. Furthermore, these failings could not be properly considered as minor nor isolated – there were 3 offences in a 5-month period at 2 different stores. There had also been a sale at the of a knife to an under 18 at the Vicarage Fields Store relatively recently on 24th April 2016 for which B&M was cautioned. I consider B&M fell short of the appropriate standard in a way that falls between low and high culpability and, as I stated above, I have therefore concluded that culpability is at the top end of medium.

Harm

28. The assessment of risk is more difficult and does not fall neatly within the guideline. P and B&M submit that the connection between the offence and the risk of harm is more remote than in health & safety cases. B&M points out that all the sales were to test purchasers and so the actual risk was very low (in fact it was zero). That, however, ignores the fact that sales were made to underage

buyers and B&M's employees clearly had no idea that this was a test purchase. Whilst there is no direct evidence of sales of knives to genuine purchasers, the real question is, what if they had been? What was the risk of harm if these were not test-purchasers?

29. The stark fact is that knife crime is at record levels across the country, particularly in London. A briefing paper by the House of Commons Library entitled, "Knife crime in England and Wales" (number SN4304, 25 June 2018) provides a summary of widely available and uncontroversial statistics regarding crimes recorded involving the use of a knife or other blade. The summary is sobering:

- (a) Recorded crime: In the year ending March 2017 there were 34,700 (selected) offences involving a knife or sharp instrument in E & W. The highest in 7 yrs. [Note: The Office for National Statistics published the most recent data showing that in the year ending March 2018 this figure had risen to 40,147 a further rise of 16%];
- (b) Homicide: In 2016/17 there were 215 homicides currently recorded using a sharp instrument, including knives and broken bottles, accounting for 30% of all homicides;
- (c) Knife crime by police force: London recorded the highest rate of 137 offences involving a knife per 100,000 population in 2016/17, an increase of 23 offences from 2015/16. Surrey had the lowest rate at 4 offences per 100,000 individuals (down 2 from 2015/16). [Later in the report, at Tab A4b, Redbridge is shown as having the 15th highest rate of knife crime of the London Boroughs (32 in all) and Barking and Dagenham as the 17th in 2016/17];
- (d) Proven offences and offenders: In the year ending March 2018, there were 21,044 disposals given for the possession of a knife or other offensive weapon. Juveniles (ages 10-17) accounted for 21% of cases;
- (e) Hospital admissions: There were 4,434 finished consultant episodes recorded in English hospitals in 2016/17 due to assault by a sharp object. An increase of 7.6% compared to 2015/16 and 21.7% higher than 2014/15.

30. Whilst B&M cannot, of course, be held responsible for those offences the statistics reinforce the policy behind the prohibition of sales to persons under 18. Whilst it might be argued that offenders can obtain knives easily (e.g. from the kitchen drawer at home) that, in my view, is not to the point. Retail premises are a source of knives to which Parliament clearly intended juveniles should not have access. Further, it made the punishment for the offence serious by making it both imprisonable and/or attracting an unlimited fine.
31. The offences are, in my view, very serious. The gravamen of the offence appears to me to be that the sale of knives to under 18s facilitates the commission of offences by them. Not just the obvious offences regarding the use or threatened use of the knife but also if a juvenile buys a knife for an unlawful purpose then the moment he leaves the shop he commits an offence under s139(1) of the Criminal Justice Act 1988 exposing him to a maximum penalty in the Youth Court of up to 2 years detention and training (4 yrs for an adult). The starting point for a youth aged 15 in these circumstances is a “custodial sentence” (in reality, a minimum sentence of a 4 mths detention - see Bladed Articles and Offensive Weapons Definitive Guideline).
32. The potential “harm” is therefore not just the risk that the knife would be used in a crime but to the young purchaser of a knife who will be at risk of a custodial sentence having left the shop unless he could prove he had the knife with him for a “good reason or with lawful authority”. Young people themselves are particularly vulnerable and should simply not have access to knives from shops, not just for the protection and safety of society at large but for their own.
33. For these reasons, I take the view that the selling of a knife to a juvenile will inevitably involve a high risk of harm.

Starting point

34. Without a definitive guideline it is necessary to apply some basic principles when approaching the starting point for a fine in a case like this. S 164 Criminal Justice Act 2003 requires the court, when fixing the amount of a fine, to:
- (a) Enquire into the financial circumstances of the offender;
 - (b) Consider the seriousness of the offence;

- (c) Take into account the financial circumstances of the offender in deciding whether to increase or reduce the amount of the fine.
35. The fine must also meet the objectives of punishment, the reduction of offending through deterrence and removal of gain derived through the commission of the offence. In relation to an organisation the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to operate within the law.
36. I was provided with accounts covering 2015 to 2017. I am somewhat surprised that the most recent accounts filed on 2nd August 2018 were not brought to my attention at the sentencing hearing. No doubt this was inadvertent but as they are public documents I have had regard to the latest accounts in assessing the financial means of B&M.
37. In those accounts, to 31 March 2018, the revenue of the company (turnover) was just over £2.6 billion with profit for the period being approx. £195 million. The total comprehensive income for the period was just over £181 million (a weekly net profit of £3.48 million). Healthy dividends were paid in March 2018 of £55 million and in November 2017 of £23 million. All figures were up on the year ending March 2017.
38. If I were applying the definitive guideline B&M would be a “very large organisation” because it’s turnover very greatly exceeds the threshold for large organisations (£50 million) and it “may be necessary to move outside the suggested range to achieve a proportionate sentence”.
39. Mr Jessop urged me not to focus too heavily on the finances of the company but to bear in mind that I am required to consider seriousness and proportionality in setting the fines. Whilst I accept those submissions, I take the view that these are serious offences and I must also have regard to the other aims of sentencing that are particularly relevant to organisations. The fine must bring home to this company and others that they must ensure that the systems they have in place are robust and effective. The “weakest link” in any system is clearly the person who ultimately sells the knife at the till. It is, therefore, incumbent on companies to ensure that they do everything possible to train and assist those staff to recognise the issue and to be confident about asking for identification and refusing sales where necessary. That was clearly

what went wrong on these 3 occasions. The use of cabinets or display cards are measures that may well have helped prevent these sales.

40. I must have regard to the fact that these offences are summary only. However, it seems to me that I should set fines that will bring home to the management and shareholders of B&M of the need to comply with the law and to ensure that there is no recurrence. On one analysis, I could consider a Band C fine (150% of relevant weekly income). That would produce a fine of over £5 million but this is clearly not how the Sentencing Guidelines Council has approached the sentencing of organisations.
41. Whilst I cannot use the definitive guidelines I think I am entitled to look at the range of sentences within them to get a steer on what might be an appropriate starting point. The food safety guideline seems more appropriate in terms of being more akin to these offences. In which case, for a medium culpability offence for a large company, the starting point for harm category 1 would be £200k. That would require an appropriate uplift to reflect the fact that B&M is a very large organisation by moving to the top of the range (£500k) or beyond.
42. In my view, an appropriate starting point for each offence, considering the very large size of the organisation, top end of medium culpability, high risk of harm and so as to ensure that it fulfils the objectives of sentencing is £300k. That is just a starting figure and must be adjusted to take account of the aggravating and mitigating features identified below.
43. The following factors amount to aggravating features:
 - (a) Previous relevant conviction albeit of some age: Aug 2008 – Knowsley Mags Ct – sale of knife to juvenile - fined £1000 with £500 costs (note prior to 12th March 2015 the maximum sentence was £5000);
 - (b) Formal caution for selling knife to juvenile at Vicarage Fields store on 24th April 2016;
 - (c) Not isolated incident. 3 offences within 5 months, 2 at the same store, all within East London (although in terms of the national picture the number of proven failures is low).

44. The following matters reduce seriousness or reflect mitigation:

- (a) Significant procedures in place to prevent the sale of underage sales;
- (b) Proactive response and the taking of steps to prevent further underage sales occurring. Not a case of a company ignoring or failing to respond;
- (c) Full and active co-operation with P including voluntary attendance at PACE interviews;
- (d) Review of existing procedures at Board level.
- (e) Remorse in the way of an acceptance of and apology for the offending;
- (f) Evidence of successfully passing test-purchases at other stores.

The appropriate fines

45. Applying the Offences Taken into Consideration and Totality Definitive Guideline it appears to me that this is a case where consecutive fines ought to be imposed because the offences took place at separate times, at different stores and because of different failings at each store. Taking account of the aggravating and mitigating features identified above the appropriate fines are:

- (a) 19th September 2017 at Goodmayes – £200k - to reflect the substantial mitigation but also to reflect the previous conviction and more recent caution;
- (b) 21st September 2017 at Vicarage Fields – £220k – increased to reflect that this was committed only two days after the offence at Goodmayes and B&M should have been acutely alert to the issue but also reflecting that B&M had little chance to change systemic procedures during that time;
- (c) 18th January 2018 at Vicarage Fields – £300k - this offence is substantially aggravated by the commission of the previous two offences and has been increased accordingly to reflect that B&M had time to reflect and consider other options, including the use of cabinets or cards by the time this offence had been committed.

Guilty pleas

46. The guilty pleas were entered at the very first opportunity and B&M is entitled to full credit of 1/3rd and so the total fine will be reduced from a total of £720k to £480k.

Totality

47. I am obliged to consider totality. That is, whether the total sentence is one that is just and proportionate to the offending in accordance with the Offences Taken into Consideration and Totality Definitive Guideline. I am satisfied that the overall fine of £480k is just and proportionate in the circumstances. Whilst the overall fine may seem high it is well within B&M's ability to pay it and meets the seriousness of the case and the sentencing objectives set out above. It is approx. 1 days net profit for the company and as I have said, is well within its ability to pay it.

48. I hope that this fine will bring home to the management and shareholders of B&M and other retailers of knives of the need to ensure that none of their premises sell knives to youths. Had it not been for the substantial mitigation in this case, the relatively good record of the company and the early guilty pleas the fines would have been very much greater.

Costs

49. B&M indicated that it would not oppose the making of an order for costs in favour of P in the sum of £12,428.53.

Total financial penalty

50. I must apply the statutory surcharge of £170 and so the total financial penalty is, therefore, £492,598.53.

Application for criminal behaviour order

51. P applied for a criminal behaviour order and set out the reasons in its opening note (**paras 93 – 104**). This application was opposed by B&M for the reasons set out in the Mitigation Note (**paras 45 – 51**). I prefer the arguments of B&M.

On the evidence before me I cannot be satisfied beyond reasonable doubt that B&M has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person. I am not satisfied that P have identified any person that was caused or was likely to be caused harassment etc. The suggestion that the Area Manager could be such a person because of what he said in interview cannot, in my view, be used to support the application, it is far too remote. The first condition is not satisfied and so I refuse to make a CBO.

52. Even if I took the view that the first condition was satisfied I would not consider that the making of the order would help the offender from engaging in such behaviour. These are strict liability offences (subject to the statutory defence) and B&M has shown it is aware of its responsibilities under the law, has procedures in place and is considering adopting further measures sought voluntarily at these stores.
53. I decline, therefore, to impose a CBO in the terms sought or at all.

**District Judge (MC) Lucie
21st September 2018**