Neutral Citation Number: [2005] EWHC 995 (Admin)

Case No: CO/2652/2004.CO/3403/2004

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2005

Before :

LORD JUSTICE MAURICE KAY
-and-
MR JUSTICE NEWMAN

- -

Between :

(1) INTERFACT LIMITED	**Appellants**
(2) PABO LIMITED	
- and -	
(1) LIVERPOOL CITY COUNCIL	**Respondent**

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- -

(1) David Pannick QC and Clair Dobbin (instructed by **Henri Brandman & Co**) for the **Appellant (1)**
(2) Robert Englehart QC (instructed by **Howrey Simon Arnold & White**) for the **Appellant (2)**
Neil Flewitt QC and Nicola Miles (instructed by **Graham Creer, City Solicitor, Liverpool City Council**) for the **Respondents (1)**

Hearing dates: 23/24 February 2005

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Judgment

Lord Justice Maurice Kay:

1. This is the judgment of the Court to which both members have contributed.

2. We have before us two appeals by case stated from Liverpool Magistrates' Court. The appellants are Pabo Limited (Pabo) and Interfact Limited (Interfact). The two companies are unconnected. They each operate licensed sex shops – Pabo at premises in Birmingham, Interfact at premises in Bexley. On 7 April 2004 Pabo was convicted of fifty-three offences under section 12(1) of the Video Recordings Act 1984 ("the 1984 Act"). On 27 April 2004 Interfact was convicted of forty-four offences under the same section. All the offences concern supplying or offering to supply video recordings which have been given "R18" certificates by the British Board of Film Classification (BBFC) pursuant to section 7(2)(c) of the 1984 Act. A classification under section 7(2)(c) comprises two statements, namely that the recording is not to be supplied to any person below eighteen years and that it can only be supplied in a licensed sex shop, being (although not part of the statement) premises, which only those aged eighteen or over may enter. The transactions giving rise to these prosecutions and convictions were effected with the appellants by Mr Allan Auty of Liverpool City Council Trading Standards Department. They were in the nature of test transactions. Mr Auty did not attend at the licensed sex shops in question. His actions were designed to lay the foundation for proceedings in which he could raise the issue whether the provisions of the 1984 Act rendered delivery of an R18 video, other than in a licensed sex shop, a criminal offence and, as a corollary, whether it was an offence to make an offer to effect delivery other than in a licensed sex shop. Currently orders are placed by mail, telephone or communicated electronically and the customer never attends the sex shop. He contends that a lawful supply can only take place when an adult customer is physically present in the licensed sex shop and that an offer to supply a video recording other than to a person physically present in a licensed sex shop is a criminal offence. As currently organised, customers are informed, in catalogues or by telephone, that delivery by post is available. District Judge Morris in the Pabo case and Deputy District Judge Curtis in the Interfact case decided the issues in favour of Mr Auty and convicted. Pabo was fined £2,500 in relation to one offence, no separate penalty being imposed in relation to any of the remaining fifty-two. It was also ordered to pay £22,314.29 in respect of prosecution costs. Interfact was fined £3,000 for one offence of supplying and £2,000 for one offence of offering to supply, with no separate penalty for the remaining forty-two. It was also ordered to pay £25,617.22 in respect of prosecution costs.

3. The issues arising on these appeals turn on the proper construction of section 7 (and subsection 2(c) in particular) and 12(1) and the definition of "supply" in section 1(4) of the 1984 Act. In addition, Pabo seeks to challenge the order for costs made by the District Judge.

The 1984 Act

4. The scheme of the 1984 Act ensures that a video recording cannot be supplied or offered to the public unless and until it has been classified by the BBFC. Classification certificates are issued pursuant to section 7 of the 1984 Act. A

classification certificate must contain the title assigned to the video work and one of the following:

(a) "a statement that the video work concerned is suitable for general viewing and unrestricted supply (with or without any advice as to the desirability of parental guidance with regard to the viewing of the work by young children or as to the particular suitability of the work for viewing by children or young children)"; or

(b) "a statement that the video work concerned is suitable for viewing only by persons who have attained the age (not being more than eighteen years) specified in the certificate and that no video recording containing that work is to be supplied to any person who has not attained the age so specified"; or

(c) "the statement mentioned in paragraph (b) above together with a statement that no video recording containing that work is to be supplied other than in a licensed sex shop".

5. Section 1(4) of the 1984 Act defines what is meant by 'supply'. It provides:

> "'Supply' means supply in any manner, whether or not for reward, and, therefore, includes supply by way of sale, letting on hire, exchange or loan; and references to a supply are to be interpreted accordingly."

6. Section 12(1) of the 1984 Act provides for enforcement of the restriction imposed by section 7(2)(c), as follows:

> "Where a classification certificate issued in respect of a video work states that no video recording containing that work is to be supplied other than in a licensed sex shop, a person who at any place other than in a sex shop for which a licence is in force under the relevant enactment –
>
> (a) supplies a video recording containing the work, or
>
> (b) offers to do so,
>
> is guilty of an offence unless the supply is, or would if it took place be, an exempted supply".

Section 11(1) provides for the enforcement of the restriction imposed by section 7(2)(b) in similar terms. In each case the starting point for interpreting the enforcement provisions is the classification process in section 7. In each case it can be noted that the classification certificate is concerned with the act of supply whereas the penal enforcement extends, in addition, to the act of offering to supply.

7. The "relevant enactment" is the Local Government (Miscellaneous Provisions) Act 1982 which governs the licensing of sex shops. We need not concern ourselves with "exempted supplies" which are essentially intermediate supplies in a commercial

chain which culminates in a licensed sex shop. The words of section 12(1) which are central to these appeals are "supplies", "offers to do so" and "other than in a licensed sex shop".

The facts

8. Before turning to the interesting submissions on the construction of section 12, it is appropriate to say a little more about the facts, as to which there was no dispute at either trial. So far as Interfact is concerned, at all material times it held a licence to operate a sex shop at 14, Bourne Road, Bexley. Mr Auty made his first test purchase from Interfact by posting an order for an R18 video to the shop. The video was posted and delivered to him at his office in Liverpool which, needless to say, is not a licensed sex shop. His subsequent purchases from Interfact were transacted by way of telephone calls to the sex shop, with deliveries again to the Liverpool office. Each time a video was delivered, a catalogue was enclosed. The catalogues gave rise to the charges of "offering to supply".

9. Pabo carries on business in the sale of erotic items and is the holder of a sex establishment licence under Schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982 in connection with a licensed sex shop at Unit 6, Roman Way, Coleshill, Birmingham. The terms of the licence restrict the use of the sex shop to mail order business. Although nothing turns on it, the terms and conditions in connection with supply offered an option of collection from Coleshill (see paragraph 11 below).

10. Mr Auty made purchases of explicit videos from Pabo in consequence of placing orders through Pabo's website and on one occasion by telephone. The videos were sent to Mr Auty's work address in Liverpool. On 3rd January 2003 Mr Auty received at his work address a catalogue which had been sent to him by Pabo. The catalogue formed the basis for the fifty-three charges, of which Pabo was found guilty. The fifty-three charges related to the fifty-three different videos advertised in the catalogue, not to the videos which were delivered and which, on any basis, were supplied.

11. The catalogue included with it an order form with printed terms and conditions. Under the heading 'Supply' the terms and conditions provided:-

> "There are 2 supply options: you may have your order sent by mail or you may collect it yourself. The most convenient option is to have your order delivered to your home address, in which case we will hand over your order, packaged to a carrier in your name for postal delivery to your home address, for which you will be required to contribute towards costs. If you wish to collect your order from our offices then kindly indicate this to us in writing on the last line of the order form. We will then inform you when the package is ready for you to pick up from the following address: Unit 6 The Courtyard, Roman Way, Coleshill, Birmingham B46 1HO. In all cases your order will be securely and discreetly packaged."

The condition under the heading 'Sale Agreement' stated:

> "A sale agreement exists once we accept your order communicated by telephone, in writing, by fax, or via the internet. We reserve the right to refuse an order without giving a reason or to attach extra conditions (for example, asking for advance payment). Any orders placed via our internet/website are accepted via our licensed premises at Unit 6, …".

The condition headed 'Point of Sale' provided:

> "When placing an order with PABO you certify that you are over 18 years old, that you purchase our products for your own personal use, and that you will not allow any videos, CDs, or magazines to be viewed by minors. You should fully understand that our products are sexually explicit and, as such, are only to be purchased via our licensed premises (which is PABO, Unit 6, The Courtyard, Roman Way, Coleshill, Birmingham, B46 1HO) for despatch directly from PABO BV. Walsoordensestraat 70, 4588 KD Walseoorden, Postbus 274 – 4560 AG Hulst, Netherlands.

The issues

12. The questions posed by the case stated in relation to Interfact are:

> "(1) Whether a licensed sex shop can supply R18 videos by way of mail or telephone order or whether supply can only be made to a person physically present in the licensed sex shop.
>
> (2) Whether a licensed sex shop may offer to supply R18 videos by way of mail order or telephone order."

The questions in the Pabo case are more complex and numerous but, in essence, they raise the same issues in relation to "offer to supply". They also raise the issue of the order for costs made against Pabo.

13. On behalf of Interfact, Mr Pannick QC submits that the supply of videos to Mr Auty took place in the licensed sex shop because that is where his orders were accepted and from where the videos were dispatched. He submits that the purpose of these provisions is met so long as the supply of an R18 video recording is derived from a transaction made with a licensed sex shop proprietor. He further submits that the catalogues were not "offers to supply" but were mere invitations to treat. Alternatively, he seeks to rely on a submission developed by Mr Englehart QC on behalf of Pabo to the effect that any offer to supply was made in the sex shop from which the catalogues were dispatched. Mr Pannick's submissions are made first on the basis of conventional statutory interpretation and secondly or alternatively by reference to section 3 of the Human Rights Act 1998 and Article 10 of the European Convention on Human Rights and Fundamental Freedoms. Mr Englehart's submissions naturally focus on the concept of "offer to supply" and the proper interpretation of section 12(1)(b). We propose to deal with the various issues under three headings: (1) supply; (2) offer to supply; and (3) the order for costs in the case of Pabo. We shall address Article 10 under the first heading.

(1) Supply other than in a licensed sex shop

14. The Deputy District Judge in the Interfact case concluded

> "The concept of supply as defined in section 1(4) of the Video Recordings Act 1984 is wider than (albeit it includes) the concept of sale. The distinction can be demonstrated by reference to criminal law. The best safeguard to ensure that R18 videos are not supplied to those under the age of 18 years is to limit supply in a restrictive and properly licensed way. The wording….is clear and unambiguous. Supply involves a transfer of physical possession."

Mr Pannick submits that this analysis is wrong. His first submission is that, whilst section 1(4) makes it clear that "supply" can take various forms, where, as here, it takes the form of a sale, the essential acts had all occurred before the goods left Interfact's premises. The sale had been concluded by the acceptance of Mr Auty's order. Accordingly, the sale – and therefore the supply – took place in a licensed sex shop. On behalf of the respondent, Mr Flewitt QC submits that, upon a true construction, the concept of "supply" under the 1984 Act is synonymous with a transfer of physical possession. In this regard, he replies upon on a number of authorities, in criminal law, which have arisen in the context of other statutes.

15. The word "supply" arises in the definition of offences under sections 4 and 5 of the Misuse of Drugs Act 1971. It does not receive an exhaustive statutory definition. Section 37(1) merely states that "supplying includes distributing". In *Delgado* [1984] 1 WLR 89, 92, Skinner J, giving the judgment of the Court of Appeal Criminal Division, said

> "Thus we are driven back to considering the word 'supply' in its context. The judge himself relied upon the dictionary definition, which is a fairly wide one. This court has been referred to the Shorter Oxford English Dictionary, which gives a large number of definitions of the word 'supply', but they have a common feature, viz.: that in the word 'supply' is inherent the furnishing or providing of something which is wanted. In the judgment of this court, the word 'supply' in section 5(3) of the Act of 1971 covers a similarly wide range of transactions. A feature common to all of those transactions is a transfer of physical control of a drug from one person to another. In our judgment questions of the transfer of ownership or legal possession of those drugs are irrelevant to the issue whether or not there was intent to supply. "

This approach was further developed in *Maginnis* [1987] 1 AC 303, in which the House of Lords held that supply connoted more than a mere transfer of physical control in that it is necessary that the transfer is for the purposes of the transferee. Lord Keith of Kinkel said at page 309B:

> "The word 'supply' in its ordinary natural meaning, conveys the idea of the furnishing or providing to another something

> which is wanted or required in order to meet the wants or requirements of that other."

16. In *Rees v. Munday* [1974] 1WLR 1284 the Divisional Court was concerned with the meaning of the word 'supplies' in section 1(1)(b) of the Trade Descriptions Act 1968. The case was concerned with time limits and the issue was whether a vehicle had been supplied when the contract was made or only upon subsequent delivery. The Divisional Court held that the supply occurred when the goods were delivered. Lord Widgery CJ said (at page 128E – G):

> "For my part I think that the proper construction of this Act requires supply to be treated here as the date of delivery. I can see that there are arguments which might be advanced for applying the Sale of Goods Act 1893 to this situation and saying that an article is supplied when the property passes by virtue of that Act. But I think…that that would be an unnecessary and undesirable complication to attach to this already somewhat difficult Act, and I think that the proper meaning of supply in this context is the delivery of the goods as delivered by the seller, or notification that they are available for delivery if they are to be collected by the buyer."

17. The word "supply" has also been considered in the context of Section 75 of the Road Traffic Act 1988 (as amended) which prescribes the offence of supplying a motor vehicle in an unroadworthy condition. Section 75(2) states:

> "In this section references to supply include –
>
> (a) sell,
>
> (b) offer to sell or supply, and
>
> (c) expose for sale."

The transaction under consideration was one whereby the repairer of a vehicle returned it to its owner, having failed to put it into a roadworthy condition. The Divisional Court held that the vehicle was supplied to its owner when the repairer returned it to him. Mr Justice Forbes said (at paragraph 17):

> "As Lord Keith said in *Maginnis* the word 'supply' involves no more than a transfer of physical control of a chattel from one person to the other in order to provide that other with something that that other wants or requires. In this case, the respondents transferred physical control of the car to Mr Williams and, in doing so, provided Mr Williams with that which Mr Williams desired and required, namely a motor vehicle which had been repaired and which had passed its MOT test."

18. Relying on these authorities, Mr Flewitt submits that it has been consistently held in the construction of criminal statutes that "supply" is not to be construed by reference

to principles of the law of contract but is to be given the wide meaning adopted in those authorities. There is no reason to depart from that construction in relation to section 12 of the 1984 Act. Mr Pannick submits that each statute has to be construed in its own context. In the Misuse of Drugs Act the word "supply" is not expressly defined in a way which includes "sale". It is immaterial whether drugs are sold or supplied gratuitously. Moreover, the 1984 Act is primarily concerned with the place at which the supply is carried out, which is an irrelevant consideration under the Misuse of Drugs Act. In the Trade Descriptions Act the word "supply" is undefined. The concept of "sale" is therefore is not proffered as an example of "supply". Moreover, once again the statute is not concerned with regulating the place at which the supply takes place. In the Road Traffic Act there is a partial definition of "supply" which includes a sale but again the location of the transaction is irrelevant in the commission of the offence.

19. We are wholly unpersuaded that the distinctions which Mr Pannick seeks to draw are appropriate or meaningful. The starting point must be section 7. It has not been in dispute that the principal purpose of the classification procedure is to guide parents and others in connection with what is suitable material for children to view and to control and thereby prevent viewing by children of video works, which are available by way of supply to adults, but which are not considered suitable to be viewed by children. The dispute, in truth, has been over the ambit of the restriction in section 7(2)(c). The purpose is to prevent children viewing unsuitable material and the ambit of the restriction on supply in section 7(2)(c) should be interpreted with a view to that purpose being achieved. It seems plain to us that the restriction, requiring that a video work is not to be supplied other than in a licensed sex shop, is designed to eliminate a range of circumstances carrying the risk that such material might come to be viewed by persons under 18, for which the certificate in section 7(2)(b) and enforcement under section 11(1) of the Act provides some, but limited protection. For a case illustrating some judicial consideration of the evasions of the protection which can occur, see *Tesco Stores Ltd v Brent LBC* (DC) [1993] 1 WLR 1037.

20. In our judgment, the requirement that the event of supply is to be confined to a licensed sex shop gives heightened protection, reducing the opportunity for the material to be viewed by children. Since section 12(1) is an enforcement provision in relation to section 7(2)(c), aimed at securing that the supply of a video work so classified is to be in a licensed shop, it falls to be interpreted according to the same purpose. For the above reasons and for those appearing in relation to the Pabo case below, we reject the submission that the aim and purpose of section 7(2)(c) and section 12 of the 1984 Act is limited to ensuring that such video material is only dealt with by persons licensed to run a sex establishment. The classification states:

> "Restricted. To be supplied only in licensed sex shop to persons of not less than 18 years".

The restriction is not directed simply to ensure a supply takes place "by" a licensed sex shop proprietor.

21. In our judgment the fact that the transaction in the present case is one of sale and the fact that sale is one of the examples of supply in the definition provided by section 1(4) does not alter the definition of the restricted act which is made an offence in section 12(1). The inclusion of sale in the examples of supply does not justify resort

to contractual principles for the purpose of establishing whether there has been a supply. To do so contradicts the plain meaning of supply as it is employed in the classification process. Moreover, we see no reason to depart from the consistent approach taken in relation to the construction of the other criminal statutes. The word "supply" has a wide meaning, being "supply in any manner". We have no doubt that the definition is apt to achieve the purpose of the scheme. Section 1(4) provides a non-exhaustive list of examples. The offence remains one of "supply". We derive no assistance from the fact that the other statutes are unconcerned with the location of the offence, whereas the 1984 Act is very much concerned with location. That seems to us to be consistent with the scheme. The purpose of the classification procedure and section 12 is to ensure that the supply of restricted material only takes place at licensed establishments because thereby an effective scheme for restricting the viewing to adults will be in place. The construction contended for by Mr Pannick would significantly reduce the effectiveness of that purpose. We have no doubt that one of the main reasons for the restriction is to ensure that the customer comes face to face with the supplier so that there is an opportunity for the supplier to assess the age of the customer. It is a disincentive to a visibly under age customer to seek out the forbidden material.

22. Mr Pannick next submits that, even if, on a conventional approach, the meaning of the word "supply" appears as we have suggested, it is nevertheless now incumbent upon us to give it the meaning for which he contends by reason of section 3 of the Human Rights Act. Section 3(1) provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The Convention right which Mr Pannick seeks to invoke is that contained in Article 10 which is in these terms:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, or the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The submission on behalf of Interfact is that a prohibition on the sale of R18 videos by mail order would be an unjustified interference with freedom of expression. It is

not "necessary in a democratic society" because there is not a convincingly established pressing social need for such a restriction. The objectives of the legislation are sufficiently attained by the restrictions in relation to the order being placed with a licensed sex shop proprietor and age of the customer. To the extent that the objective is the protection of young people, that is further provided for by section 11 of the Act which makes it a criminal offence to supply an R18 video to a person under the age of eighteen. Moreover, a prohibition on sales by mail order is disproportionate because it unreasonably impedes access by adults to material which has been recognised as suitable for viewing by adults. Reference is made to potential customers who do not live close to a licensed sex shop, to those too embarrassed to enter one and to disabled customers who may find access impossible. In addition, a prohibition on mail order within this country can be circumvented by importing by mail order from abroad, something which the evidence shows is countenanced by Her Majesty's Customs and Excise. Consequently, a domestic prohibition merely damages businesses in this country in favour of businesses in, say, France or the Netherlands. On the basis of all this, Mr Pannick submits that a domestic prohibition on mail order supply breaches Article 10 and that, as it is possible to interpret section 12 of the 1984 Act in a different way, this court should do so by reference to section 3 of The Human Rights Act. He refers us to *Ghaidan v. Godin-Mendoza* [2004] 3 WLR 113, [2004] UKHL 30, in which Lord Nicholls of Birkenhead said at (paragraph 29):

> "It is now generally accepted that the application of section 3 does not depend on the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation be given a different meaning….in the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament and using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation."

On the other hand, (paragraph 33):

> "Parliament ….. cannot have intended that in the discharge of this extended interpretive function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, go with the grain of the legislation. "

With that in mind, we turn to the logically prior question as to whether a prohibition on mail order constitutes a breach of Article 10. Mr Pannick refers to *Zana v. Turkey* 27 EHRR 667 for a statement of general principles in relation to Article 10.

23. In *Zana*, the Strasbourg Court emphasised that, subject to paragraph 2, Article 10:

> "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'." (para 51)

Although the context of *Zana* was political expression, we accept that the principle applies to sexually explicit material, subject again to paragraph 2. We also accept that *Zana* is authority for the proposition that the exceptions in paragraph 2 "must be construed strictly and the need for any restrictions must be established convincingly" (ibid).

24. Mr Flewitt concedes that Article 10 is engaged but submits that the restriction is "necessary in a democratic society…. for the protection of health or morals". He relies on statements by the Strasbourg Court in *Handyside v. UK* (1979-1980) 1 EHRR 737 and *Wingrove v. UK* (1997) 24 EHRR 1 which resonate with the issue in the present case. In *Handyside*, it said (at para 48):

> "….. it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The views taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."

And in *Wingrove* it said (at para 58):

> "Whereas there is little scope under Article 10 paragraph 2…. for restrictions on political speech or on debate of questions of public interest…. a wider margin of appreciation is generally available to the contracting states when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals."

25. In our judgment, these passages are of central importance in the present case. The policy of sections 7, 11 and 12 of the 1984 Act is to permit the supply of certain types of sexually explicit recordings but with restrictions as to the places at which they may be supplied and the minimum age of the persons to whom they may be supplied. It is no answer to say that the restrictions can be circumvented and so are not justified. Whilst they do not make it impossible for a determined minor to come into possession of an R18 video, they make it more difficult. We have no difficulty in coming to the conclusion that it has been convincingly established that the restrictions in question are lawful, necessary and proportionate by reference to Article 10.2. It follows that,

no breach of Article 10 rights having been established, no question arises of section 3 of the Human Rights Act requiring a different interpretation of section 12 of the 1984 Act from the one which we have held to be correct.

(2) "**Offer to Supply"**

26. The principal argument advanced by Mr Englehart, on behalf of Pabo, is that offences are committed either by making an actual supply of a video outside a licensed sex shop or by making an offer outside a licensed shop to supply the video. He submitted that it is the place of, respectively the supply or the offer which is critical. In our judgment this interpretation is plainly wrong so far as it relates to the place where the offer is made. It is not the place at which the offer is made with which the Act is concerned. The purpose of the provision is to enforce the terms of the certificate which relate to the supply which is not to be other than in a licensed sex shop. Thus, in our judgment, the words in section 12(1)(b) "offers to do so" refer to an offer to make a supply other than in a licensed sex shop. The words by way of qualification, "or would if it took place be an exempted supply", are there to ensure that the offence of offering to supply does not extend to an offer to supply an exempted supply where no supply has taken place. In our judgment, the meaning of section 12(1)(b) is that it is an offence in connection with a video recording to offer to make the supply, not to make the offer, other than in a licensed sex shop.

27. Mr Englehart, like Mr Pannick, relies upon a series of authorities in support of the submission that in criminal law a mere invitation to treat, where the offence is one of making an offer, will not be regarded as the making of an offer within the meaning of the criminal legislation. Mr Englehart criticises the District Judge in the instant case for concluding that the catalogue amounted to an invitation to treat, as well as an offer to supply. Contrary to his submission, the conclusions were not inconsistent. The critical issue for the Judge was not whether the catalogue amounted to an offer to sell the videos or an invitation to treat which, when acted upon, gave rise to an offer to buy by the recipient of the catalogue. The critical issue was whether the catalogue amounted to an offer to supply videos, namely to make the supply outside a licensed sex shop. In our judgment the submission is wrong because the Act expressly provides that there can be a supply where there has been no binding contract to supply. Section 1(4) of the Act provides that: 'supply' means "supply in any manner…". Supply, therefore, means the actual supply, and the underlying transaction, "by way" of which or which gives rise to the supply is of no import. The respondent submitted, in our judgment correctly, that the catalogue and the terms and conditions forming part of the catalogue amounted to an offer to the following effect: "Pabo will, after conclusion of the sale, deliver the video recording to your address". That offer to supply did not, in order to qualify as an offer to supply under section 1(4), need to be underpinned by a contract of sale or contractually binding relationship. Pabo was offering to supply the videos other than in a licensed sex shop. A gratuitous offer to supply without any consideration and therefore not made under a binding contract would equally be an offer to supply a video recording. Section 1(4) of the 1984 Act comprises a number of examples, by way of illustration, of the "manner" in which a supply or offer to supply can come about. We acknowledge that it can be said that section 1(4) does not state that "supply" means delivery, but the definition, "supply in any manner", achieves the same result.

28. The alternative argument advanced by Mr Englehart is to the effect that if the catalogue and the terms and conditions amounted to an offer to supply, then the time at which the supply takes place is when the video is despatched to the customer from the licensed sex shop. He submits that the supply will take place when the video is despatched by post or by courier from the licensed sex shop. Supply, he submits, could take place within the meaning of the Act, whenever delivery was effected to another person, not being an agent of Pabo, including when a video is despatched by post. The principle upon which he relies which is, of course, well established in the law of contract, has no application to "supply" under the 1984 Act. The underlying purpose of the classification process is to impose an obligation upon a supplier of a video recording to make the supply strictly in accordance with the terms of the classification. The purpose of protecting young children and preventing them coming into the possession of classified video recordings and thereafter being viewed by any young person or person under the age of 18, will be undermined if the supplier can be regarded as relieved of his obligation to fulfil the terms of the classification by making a supply in a way in which it can be contemplated that opportunities will exist for the video to come into the possession of those outside the terms of the classification before it has been supplied to the other party to the transaction. In practical terms, the supply of a video classified under section 7(2)(c) could take place in the same manner as a video classified under section 7(2)(b), despite the difference in the classification. Proper enforcement of the provisions requires that those who supply videos classified under 7(2)(c) should supply them in a licensed sex shop and thereby be in a position to ensure that they are not committing a breach of the classification and an offence under section 12(1).

(3) **Costs**

29. The judge was referred to the case of *R v Northallerton Magistrates' Court ex parte Dove* [2000] 1 Cr. App. R. (S) 136 and exercised his discretion in favour of making an order for costs in the sum claimed by the City Council, Trading Standards Department. The following points can be noted:

(1) It was not suggested (nor is now suggested) that the costs claimed were unreasonable or inordinate.

(2) It is not suggested that the appellant does not have the means to pay the sum claimed.

(3) The case involved a point of law touching the commercial interests of the appellant and an important point of principle in connection with the powers of enforcement of the Council.

(4) It was always anticipated that there would be an appeal.

(5) The level of costs is explained by the reasonable step, taken in the above circumstances, to instruct leading and junior counsel.

We are not persuaded that it has been demonstrated that the judge erred in the exercise of his discretion. The sum involved can be seen to be far greater than the fine which was imposed, but the level is explained by the circumstances of the case.

Conclusion

30. It follows from what we have said that, in our judgment, the Deputy District Judge in Interfact and the District Judge in Pabo correctly construed section 12. The answers posed by the cases stated are self-evident. We find no error in the making of the order for costs against Pabo. Accordingly, these appeals must be dismissed.