

Unreasonable demands?

Threatened civil recovery against those accused of shoplifting or employee theft

Summary

Citizens Advice Bureaux report dealing with a growing number of cases of threatened civil recovery against those accused of shoplifting or employee theft. The vast majority of these reported cases involve “dedicated civil litigators” Retail Loss Prevention (RLP), who claim to have recovered millions of pounds on behalf of many high street retailers such as Boots, Tesco and TK Maxx. The remainder all involve the retailer Asda, which conducts its own claims through law firm Drydens Lawyers.

In the vast majority of these CAB-reported cases, the value of the goods or cash allegedly stolen is relatively small – often just a few pounds. But letters from RLP and Drydens demand substantial sums as compensation for “the loss and damage caused by your wrongful actions” (RLP) or “the security costs incurred as a result of your actions” (Drydens), and threaten county court proceedings if prompt payment is not made. Some letters from RLP have also stated that “the personal information we hold [on you]” will “now be held on a national database of incidents of dishonesty”.

Most of the CAB clients concerned are young – one in six of those who received a letter from RLP were under 17 at the time – and many are sufficiently ashamed and/or intimidated by the threat of court action and escalating costs to pay up without challenge. However, both RLP and Drydens have failed to provide clear evidence that the civil courts have consistently and explicitly supported, at contested trials, the recoverability of the sort of sums they routinely demand in cases involving a relatively minor, low-value and one-off alleged offence. In the absence of such evidence, Citizens Advice considers such claims letters, and their threat of escalating costs, to constitute ‘deceitful’, ‘unfair’ and ‘improper’ business practice, as defined by the Office of Fair Trading.

Citizens Advice does not condone crime of any kind or level, and does not underestimate the monetary and other costs of retail crime. However, the ends of deterring crime or recovering its cost do not justify any means. If retailers, dissatisfied with the level of governmental action against retail crime, are to seek civil redress, they must do so using means that are transparently fair and proper. *Unreasonable demands?* sets out recommendations to the Ministry of Justice, the Home Office, the British Retail Consortium and others that civil recovery be limited to cases involving serious, determined or persistent offences for which there has been a criminal conviction.

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Introduction

Lisa, a 17-year-old school student, was dismissed from her weekend job with the high street chemist Boots in March 2008.¹ She had worked at the store for 18 months, and was sufficiently well-regarded by managers to be routinely entrusted with the keys for the safe. But two days earlier, when buying some perfume and also her lunch at a till in the store, so as to receive and immediately redeem a £5 discount voucher for the perfume, Lisa had somehow ended up with £1.22 too much change to qualify for the discount voucher.² For this, Lisa was dismissed. On the advice of her parents, Lisa appealed against her dismissal under Boots' internal disciplinary process, despite having to attend an appeal hearing on the same day she sat exams. The appeal was dismissed.

Lisa paid what many people might consider a high price for a first, minor, and seemingly unintended offence. But the loss of her job, and the shame of dismissal, was not the end of Lisa's ordeal. A few weeks later she received a legalistically-worded letter from a company called Retail Loss Prevention, acting on behalf of Boots and demanding £663 as compensation for "the costs of investigating and mitigating your wrongful actions", broken down as: £5 for the value of "the goods or cash stolen"; £229 for "[Boots'] staff and management time"; and £429 for "administration costs".

Lisa's parents sought advice from their local CAB, which wrote to Retail Loss Prevention to challenge the 'claim'. In May 2008, the company responded, describing its 'claim' as "properly maintainable for the costs of investigating [Lisa's] wrongful actions together with a contribution towards our client's loss prevention measures" and citing, in support of this, a High Court case involving serious, high-value criminal conspiracy.³ By now, Lisa was so distressed that she was unable to sit her AS level exams. The CAB then wrote to the chief executive of Boots, asking that the

'claim' be dropped, and noting also that Lisa was still owed some £100 in unpaid wages.

In early September 2008, Boots notified her parents that they had instructed Retail Loss Prevention to drop the 'claim', and would be paying Lisa the unpaid wages. However, two weeks later, the CAB received yet another letter from Retail Loss Prevention, stating "we still believe that [Boots] have a strong claim against your client" and demanding £187.50. Once again, Lisa's parents contacted Boots, who indicated they would investigate why Retail Loss Prevention was still demanding money from Lisa.

In recent years Citizens Advice has received a steady stream of reports from Citizens Advice Bureaux of cases involving such threatened use of civil recovery against both (dismissed) employees accused of theft during the course of their employment, and those accused of shoplifting. The vast majority (nine out of ten) of these reported cases involve self-proclaimed "civil recovery specialists" and "dedicated civil litigators" Retail Loss Prevention, who in 2007 claimed to have recovered more than £3 million on behalf of many well-known retailers since starting operations in 1998. The remainder all involve the retailer Asda, which conducts its own civil recovery claims through a Bradford-based law firm, Drydens Lawyers.

In some of these reported cases, the individual has also been cautioned or issued with a fixed penalty notice by the police, and in a few he or she has been charged and prosecuted in the criminal courts for the offence(s) to which the claims letter from Retail Loss Prevention relates, but in the vast majority there has been no such criminal prosecution, and in many there has been no police action of any kind.⁴

Emma, aged 18, was dismissed from her full-time job with Boots in October 2007, for the alleged offence of fraudulently putting £5.08 worth of points on her Boots loyalty card; she subsequently received a letter from Retail

Loss Prevention demanding £578.88, broken down as: £5.08 for the value of "the goods or cash stolen", £235.00 for "staff and management time", £138.80 for "administration costs", and £200.00 for "apportioned security and surveillance costs".⁵

Sam, aged 19, was dismissed from his job with Tesco in July 2008, for the alleged theft of £4.00 cash from a till; he subsequently received a letter from Retail Loss Prevention demanding £191.50, broken down as: £4.00 for the value of "the goods or cash stolen", £112.50 for "staff and management time", £33.75 for "administration costs", and £41.25 for "security and surveillance costs".

Kath, aged 17, resigned from her part-time job with the now defunct Woolworths in April 2008, after being accused – falsely, she contends – of the attempted theft of a children's nursery rhyme CD worth £2.00 by "conceal[ing] the said item in your locker". Kath contends that she intended to pay for the CD at the end of her shift, and had indicated this to several colleagues. The police were not called, and the CD was recovered intact, but a few weeks later Kath received a letter from Retail Loss Prevention demanding £187.50, including 'nil' for the value of "the goods or cash stolen" and £112.50 for "staff and management time".

In about one-third of the civil recovery cases reported by Citizens Advice Bureaux, the client had, as in the four cases above, been dismissed by their employer on account of an alleged theft. In the remainder, the client had been apprehended, usually by store security staff, for alleged shoplifting. As with most of the employee theft cases, in the vast majority of these shoplifting cases the value of the goods in question was relatively small, the offence appears to have been a one-off, and in some cases there is some doubt as to whether there was any criminal intent.

For example, in March 2009, Nina, a disabled woman in her 50s living on benefits, was shopping at the local branch of Tesco where she has shopped nearly every day for several years. On this occasion, Nina later told her CAB, she was also doing some shopping on behalf of a friend, and so divided the goods in her trolley into two separate piles, separated by her handbag. Nina contends that she passed through the till, paying for her own shopping, but on reaching the exit realised she had forgotten to pay for her friend's shopping. Seeing a Tesco staff member nearby, Nina asked what she should do, and contends that she was told simply to return to the till through which she had passed, and pay for her friend's goods.

However, as Nina was making her way back to the till, she was intercepted by the store's security staff, and taken to a back room. The police were called, and some time later Nina was taken to the local police station. Eventually, however, the police decided that there was no charge to answer, and took Nina home in a police car. But a few days later, Nina received a letter from Retail Loss Prevention demanding £137.50, broken down as: 'nil' for "the goods or cash stolen"; £82.50 for "staff and management time"; £24.75 for "administration costs"; and £30.25 for "security and surveillance costs".

Nina suffers from (and takes medication for) depression, and has in the past complained to her doctor about forgetfulness. She sought advice from her local CAB, which reports that she has been traumatised by this experience. The CAB wrote to Retail Loss Prevention, challenging the legal basis for the 'claim' and enclosing evidence from Nina's GP about her mental health problems, and a few weeks later the 'claim' was dropped.

Similarly, Alison, a 23-year-old mother of two young children, was shopping in Boots in July 2009 when (she contends) her two-year-old child took a drink from a shelf and opened it. Alison was then

detained by store security staff, who refused her offer to pay for the drink, but the police were not called and Alison was allowed to leave. Two weeks later, Alison received a letter from Retail Loss Prevention, demanding £87.50, broken down as 'nil' for "the value of the goods or cash stolen", £52.50 for "staff and management time", £15.75 for "administration costs", and £19.25 for "apportioned security and surveillance costs".

The letter continued: "We would advise you that in any civil dispute the parties are under an obligation to consider whether some form of alternative dispute resolution would be more suitable than litigation. Accordingly, though our client's claim is for £87.50, on an entirely 'without prejudice' basis we confirm that our client [Boots] would be prepared to accept £70.00 in full and final settlement of this claim against you, provided that payment is made in full within 21 days. Failure to respond within 21 days from the date of this letter will result in our offer of settlement being withdrawn and the full amount will be sought". Despite seeking advice from her local CAB, Alison decided to pay the reduced sum demanded (£70), as she found the letter "threatening and frightening".

Civil recovery, as practised by Retail Loss Prevention

Retail Loss Prevention was founded in 1998 by Joshua Bamfield, Director (since 1994) of the Nottingham-based Centre for Retail Research, which publishes an annual *Global Retail Theft Barometer*.⁶ However, Professor Bamfield ended his involvement with Retail Loss Prevention in 2003, when he sold the company. The company's current owner and Managing Director is Jackie Lambert, and its registered office is a Nottingham-based law

firm, Actons Solicitors. Ms Lambert has been quoted as saying that Retail Loss Prevention is "passionate in our belief that we are helping the community by going after the 'soft' criminals who are often seen as lower priority by the police".⁷ In May 2009 the company applied to the Office of Fair Trading for a consumer credit licence (for 'debt collecting').⁸

As well as the retailers already mentioned, above, Retail Loss Prevention's extensive list of clients includes many household names such as: Argos, B&Q, Co-op, Debenhams, Halfords, Harvey Nichols, Iceland, IKEA, Lidl, Morrisons, Mothercare, Netto, Selfridges, Somerfield, Waitrose, and WH Smith (see Appendix for a full list of client retailers). The company's legalistically-worded template claims letters seek "redress for the loss and damage caused by your wrongful actions", and threaten the "use of all civil law remedies", including commencement of county court proceedings, if prompt payment is not made. In June 2007, the company's website claimed that it handled "in excess of 60,000" such cases on behalf of its client retailers in 2006.⁹

In correspondence with Citizens Advice, Retail Loss Prevention has repeatedly declined to provide any more up-to-date information on the number of cases it handles each year, and the amount of money it has recovered on behalf of its client retailers. However, it seems reasonable to assume that the number of cases it handles each year has grown since 2006, and the following statement from its website (as at September 2009) suggests that the company sees scope for further growth in its business:

"Companies are at ever growing risk to losses due to changes within the economic and social environment within the UK. There is a higher volume of crime at all levels. High unemployment and decreased desire to work increases risk. There is much greater influx of people coming to Britain from a wide

variety of backgrounds with different needs and requirements. Growing debt levels, gambling and those aspiring to higher lifestyles out with their means are increasing dramatically the number of employees stealing from their employers".¹⁰

The total amount demanded by Retail Loss Prevention varies considerably – from as little as £87.50 to several thousand pounds – according to the circumstances of the case but, as in the cases described above, is usually made up of separate amounts for:

- "the value of the goods or cash stolen, if not recovered or unfit for resale, or value of the service not paid for" (which in many cases, like some of those above, is given as 'nil' or '£0.00')
- "[our client's] staff and management time spent in investigating and/or dealing with your wrongful actions"
- "our client's administration costs resulting from your wrongful actions"
- "apportioned security and surveillance costs".

The claims letters give no indication of how the amounts for 'staff and management time', 'administration costs' and 'apportioned security and surveillance costs' have been arrived at in each case. But in some of the cases reported by Citizens Advice Bureaux, the CAB has sought and received a more detailed breakdown of the total amount demanded. For example, in the case of Lisa, above, the total claimed 'administration costs' of £429 included: £212 for "travel expenses (530 miles @ 40p/mile)"; £123 for "overnight accommodation"; £73 for "parking"; and £21 for "refreshments".

Many claims letters from Retail Loss Prevention seen by Citizens Advice have also stated that "the personal information we hold [on you]" will "now be held on a national database of incidents of dishonesty" and "may be used in

the prevention of crime and detection of offenders including verifying details on financial and employment application forms".¹¹ Other claims letters have stated that "this information is available to companies with a legitimate interest to screen an individual's integrity in relation to employment decisions", while the 'Notice of Intended Civil Recovery', issued by the retailer on Retail Loss Prevention's behalf at the time of the alleged offence, states that this "[screening] scheme has been approved by the Office of the Information Commissioner". And, until June 2009, the company's website declared that it has "the largest database of dishonest people, outside of the Police Force".¹²

In correspondence with Citizens Advice, Retail Loss Prevention has stated that it does "not operate a 'database of dishonesty' to obtain payment of claims". However, from the cases reported to Citizens Advice, it is clear that the claimed existence and use of this database is often a key factor in any decision to pay the sum demanded, especially in those cases where the claims letter is issued to a teenager.

For example, Bethan, a school student aged 16, was apprehended, along with a friend, by security staff in Boots in February 2009, after they jointly attempted to steal some cosmetics. The police attended, but no police action was taken against Bethan or her friend and the cosmetics were recovered intact. A few days later, Bethan and her friend each received a letter from Retail Loss Prevention demanding £137.50, including 'nil' for the 'value of the goods or cash stolen'.

After three months of correspondence with Retail Loss Prevention, Bethan's parents decided to offer to pay £60, as they found the letters "extremely frightening and menacing" and were deeply anxious about the potential consequences for Bethan of her name being included on Retail Loss

Prevention's 'national database of incidents of dishonesty'. Retail Loss Prevention subsequently accepted this offer.

Information aimed at recipients of its claims letters on Retail Loss Prevention's website states (as at mid-November 2009): "if you fail to pay the compensation sought, our client [the retailer] reserves the right to commence legal proceedings to recover all of their financial losses, together with costs and interest. If a court judgment/decree is obtained, this is likely to affect, adversely, your ability to obtain credit in the future. Bankruptcy proceedings may also be instigated". In fact, bankruptcy proceedings can only be instigated in relation to a debt of more than £750 (England & Wales) or £1,500 (Scotland).

The website information then continues: "If you intend to deny liability, please provide a detailed letter of response within 21 days, stating your reasons – these must have a legal basis. Under civil law, if liability is established, damages will be awarded and judgment/decree entered. These damages will be assessed in accordance with established civil law principles, and will not be reduced because of any 'mitigating circumstances'. [If you disagree that you are liable] your letter must, therefore, clearly make reference to the specific areas of dispute and your defence MUST have a basis in law."

If the amount demanded is not paid within 21 days, follow-up letters state that Retail Loss Prevention and its client retailer are "determined to make full use of civil law remedies including court action if necessary", and that "where [court] proceedings are issued then the court will be asked to consider any failure to respond to [our] letters where they make orders for costs and interest. To avoid this action and further increased costs, you must deal with this claim within 14 days from the date of this letter".

Some follow-up letters seen by Citizens Advice have also stated: "Should this case proceed to the civil Court and we have to issue a claim for Summary (Judgment) (Decree), based on the fact your defence has no legal basis and therefore no likelihood of success, we shall add the costs incurred onto the amount claimed from you which will increase the amount outstanding considerably". Others have stated: "It is in your interests to settle this matter now, before any additional action, such as Court, incurs further costs. You are advised that whilst this debt [sic] remains unpaid it is accruing interest on a daily basis at the rate of 8 per cent per annum."

However, as the following case illustrates, the consequences of non-payment are often somewhat different to those threatened by Retail Loss Prevention.

Gail, a school student aged 16, was apprehended by security staff in Debenhams in April 2008 on suspicion of attempting to steal some cosmetics. The police were called, and attended the store, but no police action was taken against Gail. A few days later, Gail received a letter from Retail Loss Prevention demanding £187.50, including '£0.00' for the 'value of the goods or cash stolen'.

Gail did not pay any money to Retail Loss Prevention. A few weeks later, she received a further letter from Retail Loss Prevention, stating that "whilst this debt remains unpaid it is accruing interest on a daily basis at the rate of 8 per cent per annum". Two weeks later, in mid-May 2008, Gail received a further letter from Retail Loss Prevention, stating "failure to make payment within [seven days] will result in your case file being passed to our Debt Recovery Department for further Civil Recovery action to be taken without further notice".

Gail still did not pay any money to Retail Loss Prevention. In early July, she received a letter from a Glasgow-based debt recovery agency, JB Debt Recovery, stating “our clients [Retail Loss Prevention] have instructed us to recover the outstanding debt [of £187.50] as you have ignored all previous correspondence. Should we not hear from you within seven days of receipt of this letter, then our client will have no alternative than to consider legal action”. One month later, Gail received a further letter from JB Debt Recovery, stating: “we are writing to offer you a final opportunity to resolve this debt. In an attempt to avoid additional legal costs our client is prepared to offer a settlement of 80 per cent of the outstanding balance [of £187.50]. Failure to contact ourselves with regards to this offer may result in our client referring the matter for legal action”.

Gail did not respond to these letters. In late November 2008, she received a letter from a second Glasgow-based debt recovery agency, Asset Collection & Investigation Ltd, stating “we have been instructed by our client [Retail Loss Prevention] in connection with your outstanding debt of £187.50. Our client has instructed us to carry out a pre-sue report in the anticipation of pending legal action; however, they have given us a short period of time to negotiate a settlement with you. If you are able to make a one-off payment to settle your debt, we are authorised to offer a substantial discount to the balance owing. To accept this offer, please contact us immediately [by telephone]. If you are unable to offer a one-off payment you could still suspend Legal Action by making a payment arrangement with us to clear the balance by instalments”.

Gail did not respond to this letter. In early May 2009, she received a letter from a Truro-based debt collection agency, MIL Collections, stating “we have received instructions from [Retail Loss Prevention] to initiate formal debt collection proceedings for the unpaid civil claim [of £187.50]. Unless you make arrangements to settle the account within 72 hours our agent may be instructed to attend your premises to establish your residency and reason for non-payment. Please do not underestimate the seriousness of this matter and attend to this notice immediately as this will be your final opportunity”.

Gail did not respond to this letter. In early July 2009, she received a further letter from MIL Collections, stating “your details may now be passed to our field agent co-ordinator. The purpose of the visit will be to establish your residency and reason for continued non-payment. Details of your assets, such as vehicles and other property may be recorded during the visit to determine your ability to repay this debt”.

Retail Loss Prevention and the police

In a section of its website headed ‘Police’, illustrated with a photograph of a uniformed police officer, Retail Loss Prevention has stated (until mid-November 2009) that the company has “established operating procedures for Civil Recovery, and there are agreed guidelines in place with the Association of Chief Police Officers (ACPO) and Association of Chief Police Officers Scotland (ACPOS). We are working with Criminal Justice Development Department in Northern Ireland to establish protocols for Civil Recovery with the [Police Service of Northern Ireland]. ACPO has paid close attention to civil recovery from the

programme's inception in 1998 and protocols have been agreed with retailers and Retail Loss Prevention".¹³

The final sentence of this statement appears to be a direct quotation from an *undated* letter, prominently displayed on the same page of the website (as at mid-November 2009), addressed to 'Whom it may concern', from the then Deputy Chief Constable of Staffordshire Police, David Swift, seemingly acting in his ACPO capacity. This letter appears to have been written by David Swift before March 2006, when he was appointed Chief Constable of Staffordshire Police. Mr Swift retired from the police service in 2007.

Until mid-November 2009, the same page of Retail Loss Prevention's website prominently displayed a set of civil recovery "operating principles and guidance" issued by ACPOS. As well as guidance on 'management and security of information', 'indemnity', and 'procedure for providing/confirming personal data', this guidance states that "any civil recovery scheme or partnership needs to be run effectively and to the highest ethical standards and to conform to Data Protection Legislation". However, in recent correspondence with Citizens Advice, ACPOS has stated:

"ACPOS welcomes every opportunity to engage with partners in preventing crime. In this regard police involvement is to assist partners in targeting prolific and organised criminality which can have a huge detrimental financial impact on retailers and our communities. All agreements entered into by ACPOS on behalf of the Scottish Police Service are subject to review and [the agreement with Retail Loss Prevention], which was signed in 2004, is no different. ACPOS will be writing to Retail Loss Prevention to ask them to withdraw the current agreement displayed on their website".¹⁴

Furthermore, the Criminal Justice Department of the Police Service of Northern Ireland (PSNI) has recently confirmed to Citizens Advice that "while the PSNI did take part in an exploratory meeting with Retail Loss Prevention some two years ago it is not currently involved in any formal discussions with them or any other civil recovery agents", and that the PSNI has "contacted [Retail Loss Prevention] regarding the statement on their web-site pertaining to PSNI as it is accepted that this may be misleading".¹⁵

On or about 17 November 2009, Retail Loss Prevention revised this section of its website, removing the ACPOS 'operating principles and guidance' and revising the reference to the PSNI so that it now reads: "We have worked with the Criminal Justice Development [*sic*] Department of the PSNI to establish civil recovery in Northern Ireland".

Furthermore, on 2 December, the ACPO business crime lead, Assistant Chief Constable Allyn Thomas of Kent Police, wrote to Retail Loss Prevention, stating: "I am concerned that the agreement written by DCC Swift displayed on your website is not current, having been written in 2004, indeed this was superseded in 2007 by a further update from DCC Andy Parker. It is clear from correspondence I have received from various partners, including Citizens Advice, that this agreement needs to be reviewed. I would therefore ask that you remove the guidance and subsequent link from your website with immediate effect."

Civil recovery, as practised by Drydens Lawyers

As noted above, nine out of ten of the civil recovery cases reported to Citizens Advice in recent years involved a civil recovery 'claim' by Retail Loss Prevention, acting on behalf of one of its extensive list of retailer clients. The remainder all involved the retailer Asda, which conducts its own civil recovery 'claims' through a Bradford-based law firm, Drydens

Lawyers, which has also issued civil recovery claims on behalf of Marks & Spencer, Next and Sainsbury's. Again, in some of these reported cases the 'claim' related to alleged employee theft, but in most it related to alleged shoplifting.

For example, in July 2007, Sarah, a woman in her 40s with serious mental and physical health problems, was shopping in her local Asda store. Sarah contends that, after passing through the till, she was apprehended by security staff and accused of opening and not paying for a packet of balloons, worth 60 pence. Sarah was detained by the security staff for 90 minutes, during which she was asked to sign a document of which she was not given a copy, but the police were not called, and eventually – after paying 60 pence for the balloons – Sarah was allowed to leave to pick up her son from school.

A few days later, Sarah received a letter from Drydens Lawyers, acting on behalf of Asda and demanding £150 "which you owe to Asda Stores Ltd as a result of an incident of theft by you", made up of £0.00 for the "costs of goods stolen or damaged" and £150 for "security costs". Stating that "you must make payment within the next seven days to avoid further action", the letter listed the following consequences of non-payment:

- "The debt [sic] will increase by between £80.00 - £150.00 to cover court fees".
- "You may have a County Court Judgment awarded against you".
- "A bailiff may attend your house to remove goods to the value owed".
- "We may seek a deduction of this amount from any earnings with your current employer".

Three weeks later, Sarah received a further letter from Drydens Lawyers and, deeply anxious about possible court action and escalating costs, she agreed to pay the sum

demanded in monthly instalments of £10 per month.

Similarly, Moira was apprehended by security staff in Asda in September 2008, after stealing (and eating) a sandwich priced £2.50. The police were not called, but a few days later Moira received a letter from Drydens Lawyers, demanding £152.50, made up of £2.50 for the "costs of goods stolen or damaged" and £150 for "security costs". After seeking advice from her local CAB, and fearful of court action and escalating costs, Moira – who is already deeply in debt – offered to pay the sum demanded in monthly instalments of £1 per month. This offer was accepted by Drydens Lawyers.

In correspondence with Citizens Advice, Drydens Lawyers has declined to confirm how many such civil recovery cases it has handled in total on behalf of Asda and its other retailer clients, including Marks & Spencer, Next and Sainsbury's, stating that it is unable to do so for reasons of "client confidentiality".¹⁶ However, Asda has stated that it is its policy not to issue claims letters to "offenders under 16 and over 65 or the mentally disturbed", to "offenders who steal goods to the value of less than £3", or "where there is any reasonable doubt as to whether the individuals had committed the offence".¹⁷ And Drydens Lawyers has stated that it only issues claims letters in "appropriate" cases, namely those where "we have no information to lead us to believe that the individual is mentally ill, infirm, vulnerable or would suffer inordinate financial hardship if we pursued legal action".¹⁸

Civil recovery: the legal framework

The principle of 'civil recovery' is established in law, and indeed forms the legal basis for the work of the Serious Organised Crime Agency in seeking to recover, under the Proceeds of

Crime Act 2002, the profits made from serious crime such as drug trafficking. During 2009, the Justice Secretary, Jack Straw MP, has legislated for a further governmental civil recovery scheme, to prevent *convicted* criminals profiting from memoirs or published accounts of their crimes.¹⁹ And, over the past ten years or so, a number of civil recovery actions against individuals convicted of serious, determined and/or persistent criminal activity (for example, so-called professional shoplifters) have been successfully litigated in the civil courts by retailers and/or their trade associations.

For example, in 2004 a consortium of book retailers, led by the Booksellers Association, successfully undertook a High Court action to recover over £320,000 from the assets of market trader Ronald Jordan, who in January 2004 was convicted and given a 30-month prison sentence for conspiracy to steal and handling stolen goods. For more than five years, Jordan had run a 15-strong gang conducting “the biggest book-stealing operation Britain has ever seen”, in which some 35,000 books a year were stolen from book shops in central London and elsewhere, and then sold by Jordan from his market stalls in the City and at Waterloo station. When arrested by police in July 2003, Jordan was found to have over £600,000 – the profits of his crime – in various bank accounts.²⁰

Such civil recovery may be appropriate in cases involving serious, determined or persistent criminal activity. But it is not at all clear whether the county courts have consistently and explicitly supported – through determinations at contested trials – the recoverability of the sort of sums routinely demanded by Retail Loss Prevention and Drydens Lawyers in cases, such as those described in this report, involving a relatively minor, low-value and one-off offence for which there has been no criminal trial and conviction. It is certainly not an issue that has received wide consideration in the county courts, or indeed the High Court, and this lack

of clear judicial authority creates unsatisfactory uncertainty.

In correspondence with Citizens Advice, Retail Loss Prevention has asserted that the sums set out in its claims letters are legally recoverable and are an “accurate representation of the loss suffered” by its clients. And the company’s website has stated (as at September 2009) that “it is settled law that, as part of the civil recovery process, a company may seek to recover all of its consequential losses. Retail Loss Prevention has tested these principles by successfully taking wrongdoers to court on behalf of our clients to create precedent test cases [sic] and recover compensation”. However, from the cases reported by Citizens Advice Bureaux, it would appear that, notwithstanding its self-description as “dedicated civil litigators”, Retail Loss Prevention is not confident of its (or its clients’) ability to successfully litigate in all cases, and especially in cases involving a relatively minor, low-value and one-off offence.

In correspondence with Citizens Advice, Retail Loss Prevention has repeatedly declined to give details of (or full citations for) any of the cases it claims to have successfully litigated on behalf of its clients. But on its website, and in some claims letters seen by Citizens Advice, the company has consistently referred to only three county court cases, all of which appear to have been litigated in Nottingham County Court in the late 1990s and/or 2000: *Tesco v Kular*; *HMV v Plummer*; and *Littlewoods v Ishfaq*.

Retail Loss Prevention has repeatedly declined to provide Citizens Advice with copies of these three Nottingham County Court judgments/orders. However, in all three cases the county court action followed a criminal trial and conviction for determined and/or persistent offences. For example, the case of *HMV v Plummer* involved a “lifestyle, habitual shop thief for whom criminal sanctions had no impact on his activities”.²¹ And the

(employee theft) case of *Littlewoods v Ishfaq* involved no fewer than 30 counts of theft, totalling over £3,000, over six months.²²

Furthermore, contrary to what Retail Loss Prevention states on its website, county court judgments/orders do *not* create formal legal precedent. They can provide authority which may or may not be persuasive in subsequent cases, but of course this is only relevant where a subsequent case is actually litigated in court. And Citizens Advice is not aware of any more recent civil actions in which a county court has explicitly approved – by means of a determination at a contested trial – the recoverability of the sort of sums routinely demanded by Retail Loss Prevention in cases, such as those described in this report, involving a relatively minor, low-value and one-off offence for which there has been no criminal conviction (but see below). Again, Retail Loss Prevention has repeatedly declined to provide Citizens Advice with details of any such county court judgments/orders, and has declined to clarify how many (or what proportion) of its ‘claims’ eventually result in county court action (successful or otherwise). In the absence of any evidence to the contrary, it seems reasonable to conclude that the number of cases successfully litigated by Retail Loss Prevention (or its client retailers) at contested trials in the county courts is, at most, extremely small.

In terms of the size of the sums demanded by Retail Loss Prevention, the company has also stated (in claims letters seen by Citizens Advice) that, following the agreement, in 1998, of a “protocol” between “national retailers” and the Association of Chief Police Officers (ACPO), the “national retailers compiled the average cost per incident creating fixed rates which have subsequently been tested through the civil Courts, which have established the figures to be fair and reasonable”. Again, however, Retail Loss Prevention and its retailer clients have repeatedly failed to provide Citizens Advice with details of any such court judgments.

In addition to the three Nottingham County Court cases described above, many of Retail Loss Prevention’s claims letters (and also its website) refer to two High Court cases: *British Motor Trade Association v Salvadori* [1949]; and *R&V Versicherung AG v Risk Insurance* [2006].²³ Some claims letters state that “these cases are authority for the proposition that both the cost of loss prevention measures and the cost of internal staff time spent in investigating and/or mitigating your wrongful actions are claimable in cases of this nature without the need to prove loss of profit or revenue”.

However, both of these cases involved serious, high-value criminal conspiracy, so it is at least questionable whether they provide the legal authority asserted by Retail Loss Prevention for ‘claims’ relating to a relatively minor, low-value and one-off offence for which there has been no criminal conviction. But even if they *do* provide such legal authority, again this is only relevant if litigation is brought in the civil courts. And, as discussed above, in extensive correspondence with Citizens Advice, Retail Loss Prevention has declined to clarify the extent to which it pursues small-value civil recovery ‘claims’ through litigation in the county courts.

Similarly, in extensive correspondence with Citizens Advice, both Drydens Lawyers and Asda have failed to provide clear evidence that the county courts have routinely and consistently supported – by means of a determination at a contested trial – the recoverability of the sort of sum (usually £150) demanded as “security costs” by Drydens Lawyers on Asda’s behalf in cases involving a relatively minor, low-value and one-off offence for which there has been no criminal conviction. Unlike Retail Loss Prevention, however, both Drydens Lawyers and Asda have provided Citizens Advice with basic details of their civil recovery cases in which a county court claim has been issued (that is, the very first stage of county court proceedings). As at late October 2009,

Drydens Lawyers had issued 687 county court claims in civil recovery cases since 2002, including 268 such claims issued on behalf of Asda in Bradford County Court since 2004.²⁴

However, Drydens Lawyers has stated that, of these 687 county court claims, only 29 were defended. This is significant, as only defended cases can proceed to be determined in full by a judge at a contested trial; the remainder, if not discontinued by the claimant, admitted in full by the defendant, or settled, may result in a default judgment, which is a purely administrative procedure and provides no subsequent legal authority. And, of these 29 defended cases, six were discontinued by the retailer client of Drydens Lawyers, two were settled or admitted by the defendant, one was dismissed by a judge, and 12 are "ongoing". Only in eight cases (one per cent of the 687 claims) has a judgment/order been granted in favour of Drydens Lawyers' retailer client.²⁵ Whilst Drydens Lawyers has repeatedly declined to confirm how many claims letters it has sent out since 2002, from these figures it is clear that the proportion of all such claims successfully litigated in the county courts by means of a contested trial is extremely small – a fraction of one per cent.

Drydens Lawyers has stated that these eight, successfully litigated, contested cases are: *Marks & Spencer v El-Khider* (Brentford CC); *Asda v McLoughlin* (Birmingham CC); *Sainsbury's v Browne* (Medway CC); *Sainsbury's v Parry* (Rhyl CC); *Sainsbury's v Lunat* (Clerkenwell & Shoreditch CC); *Next v Hope* (Colchester CC); *Asda v Smith* (Bradford CC); and *Asda v Wood* (Bradford CC). In correspondence with Citizens Advice, Drydens Lawyers has declined to provide copies of these eight judgments/orders, or any information about the background to the claim in each case, citing client confidentiality. And both Asda and Sainsbury's have declined to provide any information about the claim in the six cases in which a judgment/order was granted in their favour.²⁶

However, copies of the orders and other information obtained by Citizens Advice from the county courts in question indicates not only that most of these cases involved claims for considerably greater sums than the £150 "security costs" routinely demanded in cases such as those of Sarah and Moira, above, but also that in at least three cases the order did not, as suggested by Drydens Lawyers, follow a full, contested trial.

For example, in the case of *Next v Hope*, which concluded in October 2009, the sum claimed for was £2,379.17 (plus £187.00 costs) and this was in fact a *default* judgment only. Similarly, in the case of *Asda v Smith*, which concluded in October 2009, the order that £1,233.05 be paid to the claimant was a default judgment only. In the case of *Asda v Wood*, which concluded in August 2009, the order was a 'judgment after determination' only, the defendant having admitted the claim but offered a rate of payment (by instalments) that was unacceptable to Asda; the order, made by a court official, not a judge, was that the defendant pay £1,210.34 plus £195.00 costs in instalments of £15 per month. And Drydens Lawyers has confirmed that, in the case of *Marks & Spencer v El-Khider*, a default judgment was entered after the defence was struck out when the defendant failed to file an allocation questionnaire.

Of the eight cases cited by Drydens, therefore, it seems that only four were concluded at a *contested* trial. But it is not clear that any of these four cases involved a relatively minor, low-value and one-off alleged offence. In the case of *Sainsbury's v Lunat*, which concluded in December 2008, the sum claimed for was £4,197.59 (plus £3,202.70 costs), and in the case of *Asda v McLoughlin*, which concluded in November 2005, it was £4,200.38 (plus £300 costs). The sums claimed in these two cases indicate that they are unlikely to have involved a relatively minor, low-value and one-off alleged offence.

In *Sainsbury's v Browne* the sum claimed was £361.48 plus costs and interest, and in *Sainsbury's v Parry* the sum claimed was £580.13 plus costs and interest. It is not clear how the amounts claimed in these cases were calculated, and what the nature of the offence(s) was. However, these are the only two cases of which Citizens Advice is aware in which county courts have (according to Drydens Lawyers) awarded their retailer clients "security costs", which *may* come within the category of 'a relatively minor, low-value and one-off alleged offence'. Indeed, Drydens Lawyers has stated to Citizens Advice: "we have not obtained a specific judgment by determination for £150 only [but] this does not in any way mean that we are unable to do so. The nature of this type of civil litigation is no different to any other type of civil litigation in that in a large proportion of cases a judgment is achieved by default and not by adjudication and there is nothing sinister in this".²⁷

In short, both Retail Loss Prevention and Drydens Lawyers have failed to provide clear evidence that the civil courts have routinely, consistently and *explicitly* supported – at contested trials – the recoverability of the sort of sums they demand in cases involving a relatively minor, low-value and one-off offence for which there has been no criminal conviction. Accordingly, Citizens Advice believes that the recoverability of such sums in such cases has yet to be clearly established, either by the courts or by Parliament.

Threatened civil recovery in practice

The experience of Citizens Advice Bureaux suggests that many recipients of a claims letter from Retail Loss Prevention or Drydens Lawyers are sufficiently ashamed and/or intimidated by the threat of county court action, escalating costs and/or the inclusion of their name on Retail Loss Prevention's 'national database of incidents of dishonesty'

to pay the sum demanded, without effective challenge. Most are young – among the cases reported by Citizens Advice Bureaux to date, more than half of the clients involved were under the age of 25, and one in six of those who received a claims letter from Retail Loss Prevention were under the age of 17 at the time; the youngest (who received a letter from Retail Loss Prevention demanding £160.50) was just 14 years old. Retail Loss Prevention's website states (as at December 2009): "The law states that, by the age of 14, juveniles should know the difference between right and wrong and be responsible for their actions. They may be sued in the civil courts, although they will usually have to be represented by a 'litigation friend'." In correspondence with Citizens Advice, the company has stated that it "does not issue claims against 14-16 year olds other than in very limited specific circumstances and the claimed amount is greatly reduced by an open offer of settlement of [£35]".²⁸ And some, like Nina and Sarah (above) and Varsha (below), have significant mental and/or physical health problems. But many are living on benefits or otherwise on a low income, so can ill-afford the sort of sum demanded without considerable financial hardship, and/or without getting into (or *further* into) debt.

In some of the cases reported by Citizens Advice Bureaux, by definition those in which the recipient of the claims letter has overcome any sense of shame to seek face-to-face advice, the client has, as in the case of Alison, above, decided to pay the amount demanded, sometimes in monthly instalments, so as to 'put an end to the matter'. And in many of these cases, the client's decision was due entirely to the fear and anxiety caused by a series of letters from Retail Loss Prevention (and later, in some cases, from one or more debt collection agencies), all threatening court action and escalating costs.²⁹

For example, Sonia, a 26-year-old mother of two young children, was shopping in Wilkinson (a hardware store)

in November 2008. Sonia contends that her son was bored, and continually throwing his blanket out of his push chair. Sonia went through the check out, paying for over £27 worth of goods, but failed to pay for an item worth £2.44 that (she contends) had inadvertently become covered by her son's blanket after she had retrieved it from the floor and placed it on the hood of the push chair. On the way out of the store, Sonia was apprehended by security staff and taken to a back room. The police were called and, despite her protestations that it was a genuine mistake, Sonia was issued with a fixed penalty notice of £80. Sonia contends that the police officer told her that he accepted that it was not a genuine case of shoplifting, and that Wilkinson were wasting his time, but that he had no option but to issue the fixed penalty notice.³⁰

Two days later, Sonia received a letter from Retail Loss Prevention, demanding £87.50, including 'nil' for "the value of the goods or cash stolen", and £15.75 for "administration costs". Sonia sought advice from her local CAB and, feeling that she had made a genuine mistake which had caused inconvenience to the store, decided to offer to pay £15.75 (that is, the 'administration costs' set out in the claims letter). The CAB then wrote to Retail Loss Prevention on Sonia's behalf, setting out Sonia's explanation of the incident and enclosing a postal order for £15.75.

However, in late December, Retail Loss Prevention replied, stating that "after considering your client's mitigation provided we would advise that it does not amount to a defence of this claim, nor does it negate the fact that our client has suffered loss as a result of your client's wrongful actions", returning the postal order, and threatening "next stage action" if the full £87.50 were not

paid within 21 days. By now very distressed, and fearful of escalating costs, Sonia decided to pay the sum demanded in four monthly instalments which, with the addition of Retail Loss Prevention's administration charges, totalled £95.

Vicky, a school student aged 15, was apprehended by security staff in Boots in March 2009, after attempting to steal cosmetics. The police were not called, the cosmetics were recovered intact, and Vicky's mother thought the matter closed, but a few days later Vicky received a letter from Retail Loss Prevention demanding £137.50, including 'nil' for "the goods or cash stolen". After several months of letters to Vicky from both Retail Loss Prevention and then a Glasgow-based debt recovery agency, Opos, all threatening court action and escalating costs, Vicky's parents eventually decided to pay the full amount demanded (£137.50) as the repeated demands were making the family's life "a nightmare", and they were deeply anxious about the potential consequences for Vicky of her name being included on Retail Loss Prevention's 'national database of incidents of dishonesty'.

But in the great majority of these reported cases, the 'claim' was eventually dropped (or, at least, no further letters were received from Retail Loss Prevention) after being challenged robustly by the CAB and/or the client, or after simply being ignored. Indeed, Citizens Advice has yet to receive a single report from a CAB of a low-value 'claim' from Retail Loss Prevention proceeding as far as county court proceedings, let alone a county court judgment in favour of the retailer concerned.

In correspondence with Citizens Advice, Retail Loss Prevention has stated: "As major high street brands our clients have policies (as we do) which are intended not to cause undue

hardship to individuals with mitigating circumstances. A large number of cases that end up being dealt with by [Citizens Advice Bureaux] are closed for this reason and this includes the [cases of Lisa and Emma].”³¹ However, in some of the cases studied by Citizens Advice, it appears that it was only the intervention of the CAB, and in particular its promise to challenge the ‘claim’ in court if needs be, not Retail Loss Prevention’s consideration of any mitigating circumstances, that led to the ‘claim’ being dropped without any issuing of county court proceedings.

For example, Varsha, a 25-year-old single mother of two young children, was apprehended by security staff in TK Maxx in June 2009. Varsha had paid at the till for one item of clothing, but had not paid for a second item. Varsha contends that she was extremely stressed and distracted at the time, having earlier that day attended a hospital consultation about her serious, long-term health problems. The police were not called, and eventually Varsha was allowed to leave the store.

Varsha thought that was the end of the matter, but a few days later she received a letter from Retail Loss Prevention demanding £137.50, including ‘£0.00’ for the “value of the goods or cash stolen”. She sought advice from her local CAB, which drafted a letter for her to send to Retail Loss Prevention, setting out the ‘mitigating circumstances’ of the alleged theft (which Varsha denies), enclosing supportive evidence from Varsha’s GP, and asking that the ‘claim’ be dropped.

However, in August, Varsha received a further letter from Retail Loss Prevention, stating: “we have considered the mitigating features of your case and respectfully suggest that these neither amount to a defence to this claim nor change the fact that [TK Maxx] has

suffered losses consequential to your wrongful actions” and threatening “next stage action being taken against you” should the full amount of £137.50 not be paid within 21 days.

Varsha then sought further advice and assistance from the CAB, which wrote to Retail Loss Prevention on Varsha’s behalf, challenging the legal basis for the ‘claim’ and noting that Varsha would “strongly defend” any civil court action brought against her. Ten days later, the CAB received a letter from Retail Loss Prevention stating that, “following a review of the case file” the ‘claim’ against Varsha had now been “concluded” (that is, dropped), and that “no further correspondence will be entered into regarding the matter”.

Such cases suggest to Citizens Advice that it is in fact the prospect of having its ‘claim’ robustly challenged in court (should any court proceedings be issued), rather than any consideration of mitigating circumstances, that leads Retail Loss Prevention to drop some ‘claims’. And we can only wonder what happens in those cases where the recipient of the claims letter does not seek independent advice. In the words of one of the CAB advisers who handled the case of Nina, above, in cases such as those described in this report “civil recovery, as practised by Retail Loss Prevention, appears to depend in large part for its effectiveness on the fear and shame of vulnerable people”.

Conclusions and recommendations

Retail crime is a serious and complex problem – the British Retail Consortium puts the total cost of crime to the retail sector at over £1 billion per year³² – and it has been suggested that “with the downturn in the economy, acquisitive crime and retail crime in particular are on the rise”.³³ In August 2009,

the Home Office announced a new retail crime Action Plan, drawn up in partnership with leading retailers, the British Retail Consortium, the Association of Chief Police Officers (ACPO), and the shop workers' union USDAW, to "help small businesses prevent crime".³⁴ This includes the establishment of a £5 million fund for small retailers in 50 priority areas to "buy security equipment to reduce crime", and to identify "creative and effective means to tackle crime against small retailers which can be shared more widely with the business community". And in July 2009, in response to retailers' concerns, the Ministry of Justice issued "strengthened revised operational guidance" to police forces (restricting the use of fixed penalty notices in shoplifting cases to first-time offenders).³⁵

Against this background, it is entirely proper for retailers (both large and small) to take reasonable steps to try and reduce the incidence of shoplifting, employee theft and other retail crime (such as violence against staff). However, in the absence of clear evidence that the civil courts have consistently and explicitly supported – at contested trials – the recoverability of the sort of sums routinely demanded by Retail Loss Prevention and Drydens Lawyers in cases involving a relatively minor, low-value and one-off alleged offence for which there has been no criminal conviction, Citizens Advice considers the issuing of such claims letters – and their threat of escalating costs – in such cases to constitute 'deceitful', 'unfair' and 'improper' business practice, as defined by the Office of Fair Trading's *Debt Collection Guidance: Final Guidance on Unfair Business Practices*.³⁶

This *Guidance* applies to all consumer credit licence holders and applicants (that is, including Retail Loss Prevention, which applied for a licence in May 2009), who are expected to "abide by the spirit as well as the letter" of the *Guidance*. The Office of Fair Trading (OFT) has a duty under the Consumer Credit Act 1974 to ensure that such licences are only given to and retained by those who are fit to

hold them. The 1974 Act provides that the OFT take into account "any circumstances which appear to be relevant" and in particular any evidence that a licence holder or applicant has "engaged in business practices appearing to [the OFT] to be deceitful, oppressive or otherwise unfair or improper (whether unlawful or not)".

The OFT's *Debt Collection Guidance* sets out examples of "the *type* of behaviour the OFT considers to fall within the category of unfair business practices which will call into question fitness to retain or be given a licence", but "is not intended to be a *comprehensive* checklist of [such] behaviour". For example, the *Guidance* provides that "those contacting debtors must not be deceitful by misrepresenting their authority and or the correct legal position", must not communicate in "an unclear, inaccurate or misleading manner", and must not leave out or present "information in such a way that it creates a false or misleading impression or exploits debtors' lack of knowledge".

The claims letters of Retail Loss Prevention and Drydens Lawyers do not make it clear that most of the consequences of non-payment to which they refer – such as the possible addition of interest, court fees and other costs, the possible involvement of bailiffs, or deductions from earnings – are subject to Retail Loss Prevention, Drydens Lawyers or their retailer client first obtaining a favourable county court judgment. And recipients of these claims letters would not know, from the content, that Retail Loss Prevention, Drydens Lawyers or their retailer clients have rarely, if ever, obtained such a court order relating to a relatively minor, low-value and one-off alleged offence where the claim is defended at trial. We note, for example, that in February 2009 the Office of Fair Trading took action against 1st Credit Ltd, including imposing a requirement that the company "must not discuss legal action with consumers unless it is likely that such action will be taken".³⁷

Despite the recent governmental initiatives referred to above, some retailers continue to assert that “retail crime is treated by the Police, courts and other enforcing authorities as a low priority”, and to cite this alleged inadequacy of official action as justification for their use of threatened civil recovery.³⁸ And the British Retail Consortium confirms that “retailers feel strongly that the current response to retail crime by the Government, the police and the judiciary is inadequate”.³⁹

In doing so, these retailers also suggest that civil recovery, as practised by Retail Loss Prevention and others on their behalf, acts as an effective deterrent to shoplifting and employee theft. For example, Iceland, a client of Retail Loss Prevention since 2006, states: “[we] primarily use civil recovery for its deterrent factor on crime and to curtail repeat occurrences”.⁴⁰ Waitrose, the supermarket arm of the John Lewis Partnership and a client of Retail Loss Prevention since at least 2000, states: “With Retail Loss Prevention’s knowledge and dedication, civil recovery will continue to be a deterrent against crime in Waitrose and the retail sector as a whole”.⁴¹ And Asda states: “We view civil recovery as an important part of our programme of reducing shop theft and crime in our stores ... and make no apology for using it”.⁴²

However, if retailers, dissatisfied with the level of governmental action against retail crime, are to seek civil redress and/or establish deterrents to shoplifting and employee theft, they must do so using means that are transparently fair, proper, and not oppressive. Neither Parliament nor society at large has debated, let alone sanctioned, the widespread use of threatened civil recovery as a deterrent against retail crime. Indeed, the practice is not even referred to in the Government’s new retail crime Action Plan, even though the National Retail Crime Steering Group which drew up the plan includes two retailer clients of Retail Loss Prevention (the Co-operative Group and Tesco) and the British Retail Consortium, which has claimed to “work

closely with organisations such as Retail Loss Prevention”.⁴³

Other retailers have sought to defend their use of threatened civil recovery in the sort of cases described in this report by reference to its value as a cost-recovery exercise. For example, in correspondence with Citizens Advice, Argos has stated that it has “pursued civil recovery via Retail Loss Prevention for a number of years to recover some of the considerable cost to the business caused by internal crime and its subsequent investigation”.⁴⁴ And the high-street chemist Boots has stated:

“In terms of internal crime, employment legislation demands a full investigation when employee actions are identified which could result in disciplinary action – this investigation adds cost to our business, in addition to the initial losses. Police prosecutions are few and those more serious matters that do reach criminal court invariably result in no compensation being awarded to the business, who is the victim. This is why the loss and the cost of loss is pursued via the civil route. We wish that it was not necessary for us to take measures such as employing security guards, using CCTV, and pursuing civil recovery. However, it is a sad reflection of the times in which we live and work that it is necessary”.⁴⁵

Citizens Advice does not condone or excuse crime of any kind or level, and does not underestimate the monetary and other costs of retail crime. However, the ends of deterring crime or recovering its cost do not justify any means. Citizens Advice questions whether it is morally right for high street retailers to seek to recover their management, administration, security and surveillance costs through the issuing of letters threatening civil recovery in relation to a relatively minor, low-value and one-off offence, in the knowledge that many of the recipients will – out of shame,

ignorance of the law and/or fear of escalating costs and other consequences – simply pay up without effective challenge.

A further disturbing aspect of this practice is that recipients of a civil recovery claims letter who deny the alleged offence are effectively faced with the prospect of a 'trial' for a *criminal* offence, but at the (lower) civil burden of proof ('on the balance of probabilities') and without all of the attendant legal rights that would accompany a criminal prosecution. As already noted, above, in many of the cases reported by Citizens Advice Bureaux, the circumstances of the alleged 'offence' are disputed, and in some of these cases it is not at all clear that there was any criminal intent. In such circumstances, it is the role of the police, the prosecuting authorities and the criminal courts to establish liability for the alleged offence, to the *criminal* burden of proof ('beyond reasonable doubt'). And such criminal prosecutions are subject to a range of legal safeguards, including access of the defendant to publicly-funded legal representation (under the Criminal Defence Service scheme) at any court hearing.

For example, Alan was dismissed from his job with Tesco in March 2008, five days after being accused of the theft of "three books, one magazine and one aftershave" worth approximately £20 in total. At the time of the alleged incident, the police were called and, after being arrested, Alan was issued with a caution, the police having decided that the alleged incident was 'out of character'. Then, some 12 months later – in March 2009 – Alan received a letter from Retail Loss Prevention demanding £187.50, including '£0.00' for the value of 'the goods or cash stolen'.

At the time of the alleged incident, Alan was suffering from depression – a fact confirmed by his GP – and he contends that he did not intend to steal the goods in question (or, indeed, any other

goods). After receiving the claims letter from Retail Loss Prevention, Alan sought advice from his local CAB, which wrote to ask that the 'claim' be dropped. The CAB also wrote to Alan's local MP, seeking his intervention on Alan's behalf; the MP then also wrote to Retail Loss Prevention.

In its responses to the CAB and (later) to the MP, Retail Loss Prevention stated that "Tesco instructed us to pursue a civil county court claim for compensation against this individual" and that "[Tesco] has provided evidence, which they are prepared to put into a witness statement at the appropriate time and subsequently confirm in [the civil] court". Retail Loss Prevention also stated to the CAB that "failure to settle the claim or respond within 21 days will result in next stage action being taken against your client without further notice"

Deeply anxious about possible court action and escalating costs, which he could ill-afford as he and his wife live on benefits, Alan decided to offer to pay the amount demanded in instalments of £1 per month. However, Retail Loss Prevention rejected this offer, on the basis that "this would generate additional administration charges of £703.50", and stated that "the minimum payment we would be able to accept on a monthly basis would be £10.00". At the same time, Retail Loss Prevention stated that "due to [Alan's] current financial circumstances, we confirm that this case will be placed on hold for six months. At the end of this period [18 December 2009] we require your client's proposals for settlement of this civil claim for compensation".

Alan is clearly a very vulnerable man: he is unemployed, lives on a very low income, and suffers from mental illness. It is simply not possible for Citizens Advice to determine the

circumstances which led to the accusation of theft against him in February 2008. But Alan continues to maintain that he had no intention to steal, and indeed that he has no recollection of attempting to steal any goods. The evidence which Tesco claims to have has not been subject to the criminal burden of proof in a court of law – but it is not impossible that, upon such examination, the evidence would prove to be flawed.

Parliament has provided that, for this and other reasons, such matters should be properly determined by the criminal justice system – that is, the police, the prosecuting authorities and the criminal courts. If the legal provisions under which the criminal courts can order compensation to be paid to the victim of a crime are considered to be inadequate by the retailer clients of Retail Loss Prevention and Drydens Lawyers, then it is open to those retailers, and their trade associations, to press for appropriate reform of those legal provisions.

We believe that such practice – of threatened (or actual) civil recovery against those accused of a relatively minor, low-value and one-off alleged offence – must end, and that the use of civil recovery should be limited to cases involving serious, determined or persistent criminal activity for which there has been a criminal trial and conviction. This would not cause unsustainable damage to the retail sector. For the total amount recovered by Retail Loss Prevention and Drydens Lawyers for their retailer clients, after deducting their fees or own share of the money recovered, seems unlikely to be much more than £3 million per year – that is, less than 0.3 per cent of the more than £1 billion that the British Retail Consortium says crime costs the retail sector.⁴⁶ And, as already noted, the crime involved can be addressed by other means.

We therefore recommend:

- The Ministry of Justice should undertake an urgent review of the law relating to civil recovery, with a view to ensuring – by legislative means if necessary – that civil recovery is limited to cases involving serious, determined or persistent criminal activity *for which there has been a criminal trial and conviction*.
- The Home Office and the Department for Business, Innovation and Skills should work with retailers, the Police, Crime and Disorder Reduction Partnerships, Community Safety Partnerships, the British Retail Consortium and others to identify and develop a range of transparently fair and proper alternatives to civil recovery aimed at reducing the incidence and cost of retail crime, and in particular that committed by determined and persistent offenders. We note that both the Government's Retail Crime Action Plan and the Retail Crime Commission's report to the Conservative Party describe, and commend, a range of existing projects and pilots of 'restorative justice' and other deterrents against retail crime. The Government should give a considerably greater priority to this programme of work than it appears to have done to date.

As these recommendations are likely to take some time to implement, we further recommend that, in the interim:

- The Ministry of Justice should, as a matter of urgency, prepare and disseminate public information and advice on civil recovery and, in particular, the options available to those who might receive a civil recovery claims letter from Retail Loss Prevention, Drydens Lawyers or other civil recovery agent. Such information should be disseminated through the Government's public information website, Directgov, and through Citizens Advice Bureaux and other advice outlets.

- The Information Commissioner should, as a matter of urgency, review whether Retail Loss Prevention's use of its 'national database of incidents of dishonesty' is consistent with the Data Protection Act 1998 and the data protection Principles.
- The Office of Fair Trading should prioritise its consideration of Retail Loss Prevention's application for a consumer credit licence, taking into account the information set out in this report.
- The Association of Chief Police Officers (ACPO) and the Association of Chief Police Officers in Scotland (ACPOS) should, as a matter of urgency, review their relationship with Retail Loss Prevention (and other civil recovery agents). In making this recommendation, we note the statement to Citizens Advice by Professor Joshua Bamfield, who established Retail Loss Prevention in 1998 but ended his involvement with the company in 2003, that "the problem cases [cited in your report] would not have been permitted under the original basis of the scheme which I set up and do not sit easily with the terms of the agreements I signed with ACPO and ACPOS".⁴⁷
- The British Retail Consortium should, as a matter of urgency, revise and re-issue its *Civil Recovery Code of Practice*, making clear that civil recovery should only be considered in relation to cases involving serious, determined or persistent criminal activity for which there has been a criminal trial and conviction.
- The Solicitors Regulation Authority should, as a matter of urgency, consider whether it needs to issue specific guidance to solicitors on ensuring that any action taken in relation to civil recovery is consistent with the Solicitors Code of Conduct, and in particular with Rules 1.02, 1.06 and 10.01, which respectively provide that solicitors must "act with integrity" must not "behave in a way that is likely to diminish the trust the public places in you or the legal profession", and "must not use your position to take unfair advantage of anyone either for your own benefit or for another person's benefit". We note that Guidance note 2 to Rule 10 provides that: "Particular care should be taken when you are dealing with a person who does not have legal representation. You need to find a balance between fulfilling your obligations to your client and not taking unfair advantage of another person. To an extent, therefore, 10.01 limits your duty to act in the best interests of your client."

Endnotes

- 1 All names of CAB clients have been changed.
- 2 In correspondence with Citizens Advice, Retail Loss Prevention has stated that “when ‘Lisa’ purchased the goods, she stood at the till, produced her staff discount card and handed this to her fellow employee. She then leant over the counter and took the discount voucher and her change. This was clearly visible on our client’s covert camera footage. As per their internal policy our client installs a covert camera when multiple losses over a certain value have occurred from a store, to ascertain the cause (or causes) of those losses”. This appears to Citizens Advice to be an attempt to imply that Lisa committed further offences. However, as described above, the only ‘claim’ that Lisa received from Retail Loss Prevention gave the value of the ‘goods or cash stolen’ as £5.00. Furthermore, Citizens Advice understands that the covert camera in question had been installed in order to investigate the cashier from whom Lisa made her purchases, who was suspected of being responsible for the multiple losses in question. And, at the time, in correspondence with the CAB that was advising Lisa, Retail Loss Prevention stated only that Lisa had “used a [discount] voucher in circumstances where the use was prohibited”.
- 3 *R & V Versicherung AG v Risk Insurance and Reinsurance Solutions SA and others* [2006] EWHC 42 (Comm).
- 4 In correspondence with Citizens Advice, Retail Loss Prevention has stated that, including arrests, cautions and fixed penalty notices as well as actual criminal court proceedings, there was police action “in excess of 60 per cent” of all the cases it has handled to date. This implies that there was no police action of any kind in up to 40 per cent of all such cases.
- 5 In correspondence with Citizens Advice, Retail Loss Prevention has sought to justify its letter of claim in this case by alleging that, in addition to the £5.08 worth of loyalty card points, Emma “stole in excess of £80”. However, as described above, the only ‘claim’ that Emma received from Retail Loss Prevention gave the value of the ‘goods or cash stolen’ as £5.08. Retail Loss Prevention has not provided any evidence to support its allegation that Emma committed further offences.
- 6 www.retailresearch.org
- 7 Jackie Lambert, Managing Director, quoted (as at October 2009) in: “GNP World Class Service – case study: Retail Loss Prevention Ltd”, MCCR & Associates, at www.mccrassociates.biz/Case_Studies.htm. RLP states that this quotation is “incorrect”, and that it has asked MCCR & Associates to remove it.
- 8 Application number 628437, received by the OFT on 15 May 2009. RLP states it held a consumer credit licence from 1998 to 2008.
- 9 www.lossprevention.co.uk
- 10 In correspondence with Citizens Advice, Retail Loss Prevention has declined to provide any evidence for its implication that an ‘influx’ of migrants is one of the economic and social changes contributing to the growing risk of company losses due to crime. However, in October 2009, after the Equality and Human Rights Commission wrote to RLP, asking the company to “remove or alter” this sentence on the basis that it “is offensive to the migrant worker population and does not appear to be based on any evidence”, the sentence was removed from the website.
- 11 The database is ‘operated’ by Cireco Limited, a subsidiary of Retail Loss Prevention Ltd established in 2005. See: www.integrityscreening.co.uk
- 12 Subsequent to its receipt of an early draft of this report in June 2009, RLP revised its website; it now refers to “the largest database of civil recovery defendants in the UK”.
- 13 See: www.lossprevention.co.uk/police.aspx
- 14 Letter, dated 10 November 2009, from ACC Caroline Scott, ACPOS General Secretary.
- 15 Letter dated 16 November 2009, from A/ACC Nigel Grimshaw, Criminal Justice Department, Police Service of Northern Ireland.
- 16 Email dated 28 October 2009, and letter dated 11 November 2009, from Drydens.
- 17 Email, dated 9 October 2009, from Asda Stores Ltd.

- ¹⁸ Letter dated 7 October 2009, and email dated 16 October 2009 from Drydens.
- ¹⁹ Part 7 of the Coroners and Justice Bill, introduced in the House of Commons in January 2009. Following agreement by both Houses on the text of the Bill, it received Royal Assent on 12 November 2009. See also: *Making sure that crime doesn't pay: proposals for a new measure to prevent convicted criminals profiting from published accounts of their crimes*, Home Office/Scottish Executive/Northern Ireland Office, 2006.
- ²⁰ "Brought to book", *The Independent*, 9 March 2004; Booksellers Association press release, dated 2 November 2004; and BBC news, 3 March 2005.
- ²¹ Letter dated 7 July 2009, from HMV UK Ltd.
- ²² Ringin, R. (2002) *Report of a Churchill Fellowship study of retail civil recovery programs and legislation*, Winston Churchill Memorial Trust of Australia; and RLP's website (as at June 2007).
- ²³ *British Motor Trade Association v Salvadori* [1949] Ch 556; and *R & V Versicherung AG v Risk Insurance and Reinsurance Solutions SA and others* [2006] EWHC 42 (Comm).
- ²⁴ In correspondence with Citizens Advice, Drydens has stated that, of these 687 claims, 11 were issued in 2002, 47 in 2003, 97 in 2004, 118 in 2005, 86 in 2007, 39 in 2008, and 209 in 2009.
- ²⁵ Email, dated 27 October 2009, from Drydens.
- ²⁶ Emails dated 26 and 30 October 2009 from Asda Stores Ltd, and letter dated 12 November 2009 from J Sainsbury Plc.
- ²⁷ Email, dated 30 November 2009, from Drydens.
- ²⁸ Letter, dated 27 November 2009, from RLP.
- ²⁹ In correspondence with Citizens Advice, RLP has stated that it "sends a limited number of letters to negotiate a settlement for the claim spaced at least 21 days apart".
- ³⁰ Under provisions of the Criminal Justice and Police Act 2001, the police can issue fixed penalty notices of £80 for minor retail theft (as well as for criminal damage and cannabis possession). Recipients have 21 days in which either to pay the penalty or elect to have their case heard in court. If no action is taken a fine of £120 is registered against the offender by the magistrates' court. Under revised guidance issued by the Justice Secretary in July 2009, the issuing of such notices is restricted to cases in which the goods are recovered and fit for re-sale.
- ³¹ Letter, dated 7 August 2009. In subsequent correspondence with Citizens Advice, RLP has declined to provide copies of, or any further information on, these policies.
- ³² *Crime Survey 2008*, British Retail Consortium.
- ³³ Retail Crime Commission Report to the Conservative Party, September 2009.
- ³⁴ *Action Plan*, National Retail Crime Steering Group, Home Office, August 2009.
- ³⁵ Ministry of Justice circular 2009/04: penalty notice for disorder – police operational guidance.
- ³⁶ Available at: www.ofc.gov.uk.
- ³⁷ See: www.ofc.gov.uk/news/press/2009/20-09
- ³⁸ Letter, dated 17 September 2009, from Iceland Foods Ltd.
- ³⁹ Letter, dated 8 October 2009, from the Head of Crime Policy, British Retail Consortium.
- ⁴⁰ *Ibid.*
- ⁴¹ Testimonial on RLP's website (as of November 2009) by Waitrose Ltd.
- ⁴² Email, dated 9 October 2009, from Asda Stores Ltd.
- ⁴³ "First regional retail crime figures", BRC News Release, October 2005.
- ⁴⁴ Letter, dated 10 July 2009, from Argos Ltd.
- ⁴⁵ Letter, dated 17 July 2009, from Boots UK Ltd.
- ⁴⁶ Assumes: (1) 75,000 cases passed by retailers to RLP and Drydens, of which 90% result in a claims letter being sent out; (2) 50% of claims letters result in payment, at an average of £150 per case; (3) RLP retains 40% of all money recovered.
- ⁴⁷ Email, dated 16 October 2009, from Professor Joshua Bamfield.

Appendix: Retail Loss Prevention's retailer clients

The following list of Retail Loss Prevention's retailer clients is drawn from the letterhead of Retail Loss Prevention's most recent letter to Citizens Advice, dated 9 November 2009, and a claims letter issued by the company, dated 3 November 2009. In August 2009, after having sight of an early draft of this report, Retail Loss Prevention removed a list of its retailer clients from its website.

Arcadia Group Ltd	Leisure Link
Argos Ltd	Lidl Ltd
B&Q plc	Lloyds Pharmacy
Beaverbrooks The Jewellers Ltd	Makro Ltd
BHS Ltd	Matalan Ltd
Booker Ltd	Merlin Entertainment Group
Boots the Chemists Ltd	Mothercare plc
British Oil Securities Syndicate Ltd	Netto Foodstores Ltd
City Link	Republic Ltd
Claire's Accessories Ltd	Roadchef
Co-operative Societies	Savers Health & Beauty Ltd
Debenhams Retail plc	Selfridges & Co. Ltd
DHL	Somerfield Stores Ltd
DSG Group Ltd	Superdrug Stores Ltd
Dunelm (Soft Furnishings) Ltd	TK Maxx Group Ltd
Game Stores Group Ltd	Tesco plc
Geopost UK Ltd	USC Group Ltd
Halfords Ltd	Waitrose Ltd
Harrods Ltd	WH Smith plc
Harvey Nichols & Co. Ltd	Wilkinson Group
Iceland Foods Ltd	Wm Morrison Supermarkets plc
IKEA Ltd	Wyevale Garden Centres Ltd*
JJB Sports plc	"Plus many others"

* In a letter to Citizens Advice, dated 23 September 2009, The Garden Centre Group Trading Ltd, to which Wyevale Garden Centres Ltd changed its name in 2007, has stated: "Since [2007] we have not used Retail Loss Prevention ... we have not and are not actively using Retail Loss Prevention today and currently have no intention to do so in the future".

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