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INTRODUCTION

Much ink has been spilled on the merits and effectiveness of the UK's criminal cartel regime in the years since its introduction in 2003, but for many the jury had been out pending the results of the Office of Fair Trading's (OFT) first contested criminal prosecution.[2] Following the spectacular collapse of the first such trial, the BA/Virgin passenger fuel surcharges case involving four BA executives on 10 May 2010, the question arises as to what lessons that trial and the broader experience of the criminal regime to date have for the future of that regime and, in particular given the issues which arose in the case, of the interaction of criminal and civil cartel enforcement.

The OFT's view as set out in its press release on 10 May 2010 was that the collapse of the case was the result of an 'oversight, which occurred at a time when the UK criminal cartel regime was still relatively new and the OFT's approach to the handling of leniency applications in the context of parallel criminal and civil investigations was still evolving'.[3]

The OFT said that it had since improved its procedures and had made a number of appointments to strengthen its criminal investigation and prosecution functions with the implication being that oversights of this kind would be less likely to arise in the future.[4] While the OFT acknowledged that the case raised issues about the relationship between leniency and criminal prosecutions and saw the need to 'reflect further on [its] revised guidance and any other lessons arising from this case', for example, the way in which the OFT interacts with leniency applicants and their advisers,[5] the impression left by its press release was that in its view the failure of the case was the result of teething problems with the first test of the new regime and that in large part these problems had already been addressed.

In our view, however, the BA case provides a striking illustration of the tensions that are inherent in the UK cartel enforcement regime, in particular, stemming from the interaction between civil leniency and settlement procedures relating to corporate defendants and criminal enforcement against individuals. These issues are structural, and flow from the decision to accord responsibility for both civil enforcement and criminal investigation to one administrative body. As a result, improving the quality of the OFT's criminal enforcement team and investigative procedures is unlikely to resolve these issues. Some of the difficulties related to the choice of the OFT as prosecutor were foreseen as early as 2001 in a prescient report by Sir Anthony Hammond and Roy Penrose on the then new regime.[6] Others, such as the interplay between criminal prosecutions and the leniency regime and the implications of the criminal investigative procedure and timetable for the rights of defence and settlement negotiations of a civil defendant, have been underscored as a result of the experience of the BA case.

Contrary to some speculation that the collapse of the BA case may lead to the extinction of the UK criminal cartel enforcement regime,[7] it appears that, although a reallocation of prosecutorial responsibilities is on the UK coalition government's agenda,[8] the criminal prosecution of individuals involved in cartels remains very much alive and likely to remain so for some time at least. Indeed, the OFT has already commenced two criminal cartel investigations this year, one in relation to the automotive sector and the other in relation to the alleged agricultural bale wrap cartel currently being investigated by the European Commission (the Commission).[9] In that context, the collapse of the BA trial represents a timely opportunity for a reconsideration of the tensions inherent in the UK cartel enforcement regime, in particular, in relation to leniency and settlement in the context of parallel civil and criminal processes.

To that end, we proceed as follows. We first provide an overview of the machinery for enforcement of the criminal cartel offence, the role of leniency in the regime, the prosecutions undertaken to date and the background to the BA case. We then consider the implications for civil settlors of the criminal enforcement process, and conclude with our views as to the implications of the BA case, particularly with respect to the likely impact on leniency applicants and corporate defendants and consider the issues left open by the BA case which mean, in the authors' view, that, for criminal cartel enforcement in the UK, more turbulence is to come.

CRIMINAL CARTEL ENFORCEMENT

Overview

The brave new world of cartel investigation, following the coming into force of the Enterprise Act 2002 on 20 June 2003, was supposed to herald in an era of heightened

competition law enforcement and deterrence. The introduction of the first focused criminal sanction as a supplementary process to the enforcement of civil penalties, under Chapter I of the Competition Act 1998, was anticipated to provide both US style prosecutorial muscle and to enhance civil leniency programmes in flushing out whistleblowers in relation to unlawful cartel activity.

Reflecting Hammond and Penrose's conclusions on the optimal implementation of the criminal cartel enforcement regime,[10] the UK's criminal cartel enforcement regime was built on a structure in which the OFT would manage initial investigative enquiries and the criminal immunity regime, but the Serious Fraud Office (SFO) would conduct investigations and prosecutions for cases falling within its acceptance limits.[11] Hammond and Penrose believed that it was important that this structure be used to avoid the danger of small OFT teams succumbing to the temptation to become too close to the policy demands of the organisation and developing a solicitor/client relationship rather than the independent judgment of a prosecutor who serves as a form of minister of justice.[12] By contrast, they judged the SFO to be a more independent and expert prosecutor and noted that it was directly accountable to the Attorney General.[13]

As with the OFT's administrative cartel enforcement strategy, leniency and immunity were placed at the heart of the criminal enforcement regime. Thus, the Enterprise Act 2002 provided a statutory basis for the OFT to issue no-action letters to individuals involved in criminal cartels on a similar basis to that on which civil leniency was offered to corporate offenders.[14] The OFT's guidance indicated that no-action letters would only be issued to individuals who confessed their guilt of the criminal cartel offence (ie those who admitted dishonesty) in their interviews with the OFT.[15] Moreover, the criminal and civil leniency regimes were connected in that if a civil leniency applicant were to obtain Type A or Type B immunity,[16] any relevant employees would qualify for criminal immunity.[17] However, if an individual were to alert the OFT to the existence of a cartel prior to his or her employer notifying the OFT, the individual would qualify for criminal immunity but the employer may not qualify for civil immunity.[18]

In terms of investigative procedure, the OFT envisaged that criminal and administrative cartel investigations would be conducted in parallel, albeit with separate investigative teams, with ongoing dialogue between teams to ensure that the civil investigation did not prejudice the criminal investigation, and to allow evidence gathered in one investigation to be used in the other (eg original documents taken using Enterprise Act powers to be used in the civil investigation, or copies of documents taken in an initial Competition Act investigation to be shared with the criminal investigators).[19]

The prosecutions so far

Seven years after the commencement of the criminal cartel regime, two cases have come to court and others are under investigation. What does experience tell us of the interaction of leniency with criminal enforcement? Principally the answer must be that tensions between civil and criminal processes create stresses with complex consequences for both regimes.

The first cartel criminal prosecution was **R v Whittle** (the **Marine Hoses** case)[20] involving a global cartel said by the prosecution to involve UK contracts alone to a value of

£17 million – well within the SFO acceptance limits.

Contrary to the expectations set by the OFT's guidelines, **Marine Hoses** was prosecuted by the OFT in co-operation with the US Department of Justice (DoJ) with whom the defendants had entered into a plea bargain arrangement. This was a controversial co-prosecution and plea arrangement which drew some critical comment from the Court of Appeal. The defendants had bound themselves not to ask for or appeal any sentence from the UK courts which was less than that imposed by the US courts. Hallett LJ, in giving the judgment of the court, said:

> *'It follows that this court has not had the benefit of the kind of argument from counsel to which it is accustomed … we have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represent their clients in a UK court but having heard no argument on the subject, we shall express no concluded view."*[21]

Because the case was, from the outset, by reason of the US plea agreement, destined to be disposed of within the UK as a plea of guilty, it was, perhaps, tempting for the OFT to determine that it should perform the role of prosecutor. The unique circumstances of the case, however, and the special sensitivities of a transatlantic plea bargain might better have been judged to have been more appropriate challenges for the SFO.

As the first criminal case under s 188 of the Enterprise Act 2002, **Marine Hoses** was axiomatically the first which exposed the 'criminally and Chapter I immune' whistleblower to the special risks for a prosecution witness with regard to subsequent third party damages claims. It required the OFT for the first time to consider the effect on potential future whistleblowers of the impact of criminal prosecution disclosure procedures. If the OFT, in its role as prosecutor, obtained or was aware of the existence within third party hands of potentially useful material to the defence, how should the OFT discharge its disclosure obligations to the defence without undermining the incentives of future whistleblowers to come forward?
The problem was to become much more focused and critical in the second criminal cartel prosecution, **R v George, Crawley and Others** (the BA case).[22]

The BA case

The BA case was the first contested prosecution of the cartel offence. Once again, the 'value' put upon the cartel activity was well within SFO acceptance limits: an allegation of criminal collusion from August 2004 to September 2005 which was said to have resulted in hundreds of millions of pounds' worth of unlawful cost to consumers.

The case came to the OFT's attention when Virgin blew the whistle on allegedly anti-competitive discussions that it said had taken place between certain of its employees and employees of BA. Pursuant to the OFT's guidelines, Virgin secured immunity from the OFT in relation to civil penalties and criminal immunity for its current and former employees. BA secured qualified leniency (a reduction in civil penalty) by admitting infringements of Chapter I cartel activity after the OFT's investigation had begun, but did not secure criminal immunity for its employees. On 1 August 2007, the OFT announced that it would impose a penalty of £121.5 million on BA for its participation in the alleged cartel.[23] It indicated that it was continuing to investigate employees of BA using its criminal powers and froze the civil investigation prior to issuing the statement of objections

so as to avoid prejudice to any criminal prosecutions. Four BA employees were charged with cartel offences on 7 August 2008. As with the **Marine Hoses** case, the OFT conducted the prosecutions in-house.[24]

Contrary to speculation that the defendants would plead guilty to avoid extradition to the US,[25] all four defendants entered pleas of 'not guilty' on 13 July 2009, thus setting the scene for the first full criminal cartel trial in the UK. After resolving some preliminary issues regarding the jurisdiction of the Crown Court, the test for dishonesty and disclosure (the latter of which is discussed in more detail below), the trial commenced on 14 April 2010.

After the commencement of the trial, however, it emerged that a large volume of electronic documentary evidence from Virgin's files (approximately 70,000 emails) that Virgin had previously led the OFT to believe to have been irreparably corrupted could in fact be recovered and were then disclosed to the defence. One of the recovered emails revealed that at least one of the decisions taken by Virgin to increase its passenger fuel surcharge that the OFT had said resulted from the alleged cartel was actually made *prior to* the phone conversation during which the OFT alleged BA had suggested that Virgin should increase its surcharge. In light of the large volume of evidence that had been uncovered at such a late stage, the OFT took the view that it was unrealistic to seek an adjournment of the trial, and so on 10 May 2010 it indicated that it would offer no evidence against any of the four defendants. Accordingly, the jury acquitted the four men and so ended the first contested criminal cartel case in the UK.

In the aftermath of the collapse of the trial, BA announced that it would reconsider its decision to settle the civil claim with the OFT.[26] The OFT announced that BA's civil position was unaffected by the trial and that it would reconsider the immunity granted to Virgin in light of the trial's collapse.[27]

Implications of the prosecutor's disclosure obligations for the civil leniency applicant

From the outset of the criminal proceedings in the BA case, the defence made clear to Owen J, the trial judge (who conducted the case throughout with a high degree of sensitivity to the tensions caused by the interaction between civil and criminal processes), that disclosure of 'unused' material was an important issue.

By this term of art, the defence were alluding to documentary material in the hands of the OFT which had not been disclosed to the defence but also, and much more controversially, to material within the possession of the two corporate entities not before the criminal court.

One curious feature of this process was that the criminal defendants and their lawyers were necessarily provided with the draft statement of objections which was withheld from the two relevant companies pending the resolution of the criminal case. The more far reaching issue was, however, the extent to which the OFT had to pursue the two companies for material which they retained and which might have an impact on the disclosure process.

This was the subject of a detailed and carefully reasoned judgment of Owen J delivered on 7 December 2009.

Section 23 of the Criminal Procedure and Investigations Act 1996 required a code of practice to be prepared to secure that *'all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of enquiry are pursued'.*

Paragraph 3.5 of the revised Code which followed imposes on prosecutors the duty to ensure that all aspects of a criminal prosecution are conducted fairly, and in particular that *'the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspects'.*[29]

The ambit of the prosecutor's duty was addressed by the Attorney General's *Guidelines on Disclosure* which were issued in revised form in April 2005:[30]

> *'where the investigator ... believes that a third party ... has material ... which ... might reasonably be capable of undermining the prosecution case or of assisting the case for the accused, the prosecutor should take what steps they regard as appropriate ... to obtain the material.*
>
> *If ... the third party declines or refuses to allow access to it, the matter should not be left ... if ... appropriate, then the prosecutor ... should apply for a witness summons causing a representative of the third party to produce the material to the courts.'*

In his judgment, Owen J reviewed the recent authorities on disclosure and reduced the principles reflected in those cases to what he described as two simple propositions at paragraph 11 of his judgment:[31]

> *'Where there are reasonable grounds to suspect that a third party has material or information that might be disclosable if in the possession of the OFT, the OFT is under a duty to take reasonable steps to obtain it.*
>
> *Material or information will be disclosable by the OFT if relevant to an issue or issues that may arise at trial, and might reasonably be considered capable of undermining the prosecution case or assisting the case for the defence.'*

Owen J then considered the nature of the continuing obligations assumed by beneficiaries of the OFT immunity and leniency policies. These include the requirement:[32]

> *'to maintain continuous and complete co-operation throughout the OFT's investigation and any subsequent proceedings ... the overall approach to the leniency process by an applicant must be a constructive one, designed genuinely to assist the OFT in efficiently and effectively detecting, investigating and taking enforcement action against the cartel conduct.'*

At paragraph 13, Owen J continued:

> *'If not satisfied that such co-operation is being maintained, it is open to the OFT to revoke a leniency agreement and/or no-action letter ... the guidance recognises that there may be circumstances in which the OFT "will expect an undertaking ... to waive any applicable privilege to the extent that the OFT is advised that it is necessary".'*

In coming to his conclusions on the application of the duty of disclosure to the facts of the BA case, Owen J made important and far-reaching observations on the policy to be implemented by the OFT in cartel prosecutions. At paragraphs 31 and 32 he stated the following:

> *'Furthermore the argument that the OFT would not have succeeded in obtaining the relevant material, had the airlines sought to protect the privilege that they claimed by the application to the court, appears to me to miss the point. The question is whether, as the case has evolved, it would be reasonable for the OFT now to press for disclosure of the material, notwithstanding the claim to LPP, on the basis that both airlines and the VAA witnesses are under the duty to give continuous and complete co-operation as a condition of leniency/immunity, and failing*

a satisfactory response, to have invoked its power to revoke the leniency agreements and no-action letters.

In my judgment the OFT ought reasonably to take such steps … for a number of reasons … the overriding obligation of the OFT as the prosecuting authority to deal fairly with the defence … the duty on the airlines and VAA witnesses to give continuous and complete co-operation … the nature of the material sought and … the fact that it may shed light upon an issue likely to be of considerable importance at trial, namely whether the VAA witnesses were subject to pressure or inducement with regard to the changes in their account … waiver would not result in any unlimited loss of the applicable privilege since any waiver would be for the purposes only of the criminal trial.'

Owen J extended the duty to cover material obtained from non-witness VAA employees on the basis that 'the defence are seeking … to probe the extent to which the non-witnesses were involved in the price fixing agreement … As I have already indicated, I am satisfied that such material has the potential further to undermine the evidence given by the VAA witnesses'.[33]

In a further paragraph, Owen J directed that the OFT duty to obtain relevant material extended to material in the hands of investigators in other jurisdictions, in this case to the US DoJ. He stated:[34]

'*The DoJ Material.*
I am not satisfied that the OFT has taken all reasonable steps to obtain the DoJ material … a request has been made … but the DoJ have declined to release it. In my judgment the OFT … ought further to press the DoJ by means of a formal letter of request, and if that does not yield results, to consider making use of the powers contained in the Crime (International Co-operation) Act 2003.'

The ramifications of this judgment for legal advisers when considering and advising clients who may be considering applications for leniency are complex and far-reaching. The impact on simultaneous cross-border applications – not least to the DoJ and to the Commission – is extremely significant. At the same time, the echoes must resonate of the concern expressed by Hammond and Penrose about the need for sensitive and objective discharge by an experienced prosecuting authority of disclosure and privilege issues.[35]

Once material has been disclosed in criminal proceedings it is difficult to see why the same material should not be subject to discovery claims in subsequent third party proceedings, despite the confidentiality restrictions placed on the OFT by Part 9 of the Enterprise Act 2002. Similarly, the restrictions of confidentiality and use set out in the Regulation 1[36] framework may conflict with the rights accorded to defendants under national criminal law, such that the exchange of material information and documentation between the national competition authorities and the Commission, may be vulnerable to third party material disclosure applications made on behalf of defendants to criminal proceedings. Any trial judge who has to determine such applications has the overriding duty to ensure that any defendant faced with a possible custodial sentence should receive a fair trial. If such fairness requires the production of otherwise protected or privileged material, an applicant for immunity who buys his immunity by the promise of ongoing co-operation with the criminal prosecution process will be faced with pressure to comply. However, it is clear that this possibility makes whistleblowing by cartel participants a less attractive and more complex decision to take than it was prior to the introduction of the criminal cartel enforcement regime.

Implications of the leniency process for the quality of evidence used in the criminal prosecution

Before any application for immunity/leniency is made, it would be usual for an internal investigation by experienced external competition lawyers to be conducted. By the time relevant witnesses are exposed to OFT investigators, considerable legal input will have been given. The overall circumstances of the cartel activity, the impact on the applicant company, the degree of complicity of the witnesses, the extent to which the infringement is continuing and any possibility that an employee might be a coercer or the directing mind of the cartel arrangement are among the issues likely to have been extensively examined. The tension between the role of the OFT as civil investigator and the grantor of immunity or leniency and its capacity as criminal prosecutor is exacerbated when a rigorous and objective investigation into the leniency applicant's evidence is required as part of the criminal trial process.

The BA trial serves as an example of the problems which will typically arise. First, as noted above, the criminal immunity programme requires an applicant individual to admit his conduct was criminal and to accept the fact of his own dishonesty. This is a pre-requisite to the role of accomplice witness for the prosecution. This is not only hard for the individual applicant to swallow, it is likely to be reflected by a sequence of statements which progressively unveil admissions about the actor's intent until full dishonesty is accepted.

The witness has a strong interest in providing evidence which helps the prosecution. His employer has a strong interest on its own behalf and on behalf of all existing and former employees in ensuring that the evidence of the witness is helpful to the prosecution.

The witness may have secured his continued employment within the applicant company by his willingness to co-operate, notwithstanding his dishonest conduct of his employer's business. This was illustrated in the BA case where Mr Stephen Ridgeway remained the CEO of Virgin Atlantic despite having admitted to the OFT his dishonest involvement in the cartel.[37] In these circumstances, the probity of the leniency applicant's employees' evidence is bound to come into question, as it did in the BA case.[38]

Moreover, there is a serious danger that the combined effect of the investigative timing and incentives for the OFT and witnesses will lead to errors being made in the fact finding process. The extent to which apparently minor errors pertaining to detailed timing and the smallest sequential detail may affect the outcome of a case is demonstrated by the 'final straw' in the BA case. This concerned an email exchange which altered, by a mere few hours' difference, the significance of a piece of evidence relied upon by the OFT prosecutors as a principal pointer towards the guilt of the accused men.

Implications for civil settlors of the criminal enforcement process

Interaction in terms of timing in dual civil and criminal proceedings also raises difficulties for parties considering settlement of the civil aspects of an OFT investigation.

The initial stages of the civil investigation often precede that of the criminal investigation. That was certainly the experience in the **Marine Hoses** case where the Commission had conduct of the civil investigation; the OFT of the criminal. In addition, the OFT may offer a corporate defendant to a civil investigation the opportunity of 'fast track leniency' or 'early resolution' for an enhanced discount on penalty, but tends to stipulate a limited timeframe within

which such an offer is open, as early as possible in the investigation with the aim of maximising procedural savings. However, as in the BA case, in a dual-track investigation, the OFT will likely seek to avoid prejudice to the subsequent criminal trial by suspending issuance to the corporate defendant/s of the statement of objections in the civil case prior to the criminal trial. As a result, those considering settlement in dual-track investigations will need to make their decision to settle without the benefit of reviewing the detail of the OFT's case against them, as set out in a formal statement of objections. By doing so, they take the risk that further evidence will emerge in the course of the criminal proceedings, or indeed, in multi-party civil proceedings, the civil investigation, which fundamentally undermines the strength of the case initially presented to them by the OFT and the basis upon which they decided to settle. In BA's case, its early admission of civil infringement, secured by the OFT in August 2007 amidst much publicity as the largest civil cartel penalty ever levied by the OFT on a company, was put in doubt once further evidence emerged in the short-lived criminal trial in April 2010.

There is a parallel here to be drawn with the position of parties to hybrid settlements in multi-party civil investigations, where some parties choose to settle with the OFT at an early stage of the investigation and others to contest the case through to the OFT's final decision and beyond. In this case too, parties run the risk that, having initially agreed settlements with the OFT on the basis of one fact-pattern, evidence emerging or indeed deteriorating as a result of the effluxion of time taken to progress the investigation may cause them to reconsider their position. Indeed, in June 2010, Asda chose to appeal against the OFT's decision in its tobacco investigation, despite having admitted its involvement in the infringements and agreeing an early resolution with the OFT in July 2008.[39]

In both cases, the admissions of civil settlors, made against the backdrop of time pressures, adverse publicity and on the basis of an incomplete factual matrix may in the fullness of time be regretted.

Hammond and Penrose perceived the timing concerns inherent in parallel civil and criminal proceedings, albeit from the opposite end of the telescope, namely the prejudice to individuals which could arise from publicity given to the OFT's (or indeed the Commission's) civil cartel proceedings. Their recommendation was that criminal proceedings against individuals should precede civil proceedings against undertakings whenever possible.

Civil settlors with employees involved in or at risk of parallel criminal proceedings would do well to bear the risks of later emerging evidence in mind where, as in BA, several years elapsed before commencement of the criminal prosecution.

Conclusions

The addition of criminal liability for individuals to the UK cartel enforcement regime was intended to bolster deterrence of competition law infringements and enhance detection efforts, while living up to the standards of 'fairness, openness and accountability' that are demanded of the criminal justice system more generally.[40]

While the first of these objectives has been met to some extent (albeit mitigated by the spectacular collapse of the first contested case), the extent to which the second objective can realistically be achieved in the context of the current cartel enforcement regime is open to question as several aspects of the BA case illustrate.

What lessons can be drawn from the case and how might these influence the future evolution of the UK

cartel regime? The authors consider the primary implications of the case are as follows. First, from an institutional perspective, the BA case drives home the concerns raised by Hammond and Penrose in their 2001 report about the OFT as prosecutor and in particular the 'tendency for the prosecutors [in relatively small prosecution teams] to become isolated from general developments in criminal law and practice'. In failing to discharge its obligations of disclosure in the criminal prosecution, and, perhaps causative of that, its general deference to resistance from Virgin's counsel to disclose witness interviews and other materials, the OFT committed an error unlikely to be seen from a seasoned criminal prosecutor. To that extent, the UK coalition government's proposal for an Economic Crime Agency (ECA), combining the white collar crime functions and collective prosecutorial expertise of the SFO, Financial Services Authority and OFT in the criminal cartels arena, appears a step closer to the US model and in the authors' view, one in the right direction.

Secondly, the case is a harbinger of a likely change of attitude toward civil leniency applicants. Leniency applicants, already subject to onerous obligations of ongoing co-operation for the life of both the civil and criminal investigatory and court processes, should expect more rigorous demands from the authorities in relation to both prosaic matters: document disclosure, retrieval efforts, IT functionality and a fundamentally more critical eye to and forensic scrutiny of their evidence and any inconsistencies or other weaknesses within it. The OFT (or the ECA) is also likely to take more direct responsibility for the collection of evidence and to conduct early interviews of whistleblowers rather than rely on the efforts of their counsel.

There will likely be a concomitant impact on the initial decision by a would-be whistleblower to co-operate with the authorities: not only are the demands placed on whistleblowers likely to be greater than ever, but in addition, the OFT or ECA if it comes into being, may well take Hammond and Penrose's advice and commence a criminal prosecution in advance of a domestic civil investigation. This will mean that documents will come to light sooner in the process (potentially flushing out damages claims earlier than would otherwise be the case), while a lingering legacy of the BA case is likely to be conservatism toward the criminal trial demands of disclosure, perhaps at the expense of concern about the impact of disclosure on future whistleblower's incentives to co-operate.

Thirdly, the **BA** case highlights the risks for a company wishing to settle its civil case early. A company faced with an incomplete 'charge sheet' but facing adverse publicity, significant legal costs and regulatory uncertainty may well repent at leisure many years after its bargain was struck with the authorities if new facts emerge.

The **BA** case also leaves some significant unanswered questions. First and foremost, the much debated question of what a jury will make of the test of dishonesty as applied to cartel behaviour continues to remain unaddressed some seven years after the commencement of the cartel offence. Whether proof of this ingredient will be a crucial stumbling block to successful criminal prosecution as many commentators believe, remains to be seen: however, it is instructive that jurisdictions such as Australia which has recently criminalised cartel conduct, and South Africa, which proposes to do so imminently, have not followed the UK model in this respect.

In addition, the question of what a jury would make of an admission by the individual's employer of civil liability when considering an individual defendant's criminal liability remains open. For many commentators, the **BA** case would have been a potent test of Hammond and Penrose's

prediction that a finding of civil infringement against a company would not be of much evidential value in subsequent criminal proceedings against its directors and employees.

Finally, the **BA** case raises the fundamental question of whether a jury would be prepared to convict individuals on the basis of the evidence of whistleblowers who, in return for immunity from prosecution, have admitted their own dishonesty, but are asked to be considered as witnesses of truth in relation to the prosecution of their co-conspirators.

At its heart, the BA case starkly demonstrates the dangers that the relationship between the OFT and whistleblowers poses for the rigour of criminal cartel prosecutions: a difficulty which future prosecutors must address.

FOOTNOTES

1 This article was produced by Cloth Fair Chambers and Linklaters for a recent issue of the *Competition Law Journal* published by Jordan Publishing

2 See, eg, A Stephan, 'The UK cartel offence: lame duck or black mamba', Centre for Competition Policy Working Paper No 08-19 (November 2008); M Lucraft, T Payne, D Rawlings, 'The Dunlop Three: the cartel offence makes its debut' (2009) 1 *Archbold News* 7-9; and Riley, 'Outgrowing the European administrative model? Ten years of British anti-cartel enforcement' and MacCulloch, 'The cartel offence: is honesty the best policy?' in Rodger, ed. *Ten Years of UK Competition Law Reform* (Dundee University Press, 2010).

3 OFT, *OFT withdraws criminal proceedings against current and former BA executives*, press release 47/10 (10 May 2010) (see www.oft.gov.uk/news-and-updates/press/2010/47-10).

4 Ibid.

5 Ibid.

6 OFT, *The proposed criminalisation of cartels in the UK*, OFT 365 (November, 2001), report prepared for the OFT by Sir Anthony Hammond and Roy Penrose.

7 See, eg, Joshua J, 'Comment: sending the wrong message' (2010) 10(2) LS Gaz, 20 May.

8 See, eg, 'Financial regulators fight turf war' (2010) *Financial Times*, 25 June.

9 See OFT, *Investigation into automotive sector* (CE/9229-09) in relation to the automotive sector (available at www.oft.gov.uk/about-the-oft/legal-powers/enforcement_regulation/Cartels/automotive-sector/) and see www.oft.gov.uk/about-the-oft/legal-powers/enforcement_regulation/Cartels/agricultural-sector/ in relation to the alleged bale wrap cartel.

10 Op cit, n 6, above.

11 OFT, *Powers for investigating criminal cartels: guidance*, OFT 515 (January 2004), at p 11.

12 Op cit, n 6, above, at p 15.

13 Ibid, at pp 16–17.

14 Section 190(4).

15 OFT, *The cartel offence: guidance on the issue of no-action letters to individuals*, OFT 513 (April 2003), at p 5. The requirement to admit dishonesty was made even more explicit in OFT, *Leniency and no-action: OFT's guidance note on the handling of applications*, OFT 803 (December 2008) at pp 31–33.

16 Type A immunity refers to automatic civil and criminal immunity for a 'first in' whistleblower (before an investigation has commenced). Type B refers to that situation (involving discretionary rather than automatic immunity) where an investigation has already commenced.

17 OFT 513, op cit n 15, above, at pp 6–7 and OFT 803, op cit n 15, above, at p 35.

18 OFT 803, op cit n 15, above, at p 38.

19 Op cit, n 11, above, at pp 14–16. Note that in discussing the separation of investigative teams, the OFT envisaged an OFT-led civil investigation running in parallel to a SFO-led criminal investigation.

20 [2008] EWCA Crim 2560, [2008] All ER (D) 133 (Nov).

21 Ibid, at para [28].

22 7 December 2009.

23 OFT, *British Airways to pay record £121.5m penalty in price fixing investigation*, press release 113/07 (1 August 2007) (see www.oft.gov.uk/news-and-updates/press/2007/113-07).

24 OFT, *OFT announces criminal charges in airline fuel surcharges cartel case*, press release 93/08 (7 August 2008) (see www.oft.gov.uk/news-and-updates/press/2008/93-08).

25 Stephan, op cit n 2, above, at p 4.

26 'OFT to pursue BA over civil fine' (2010) *The Daily Telegraph*, 12 May.

27 Ibid.

28 Ibid.

29 The Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2005 (SI 2005/985) (the Code).

30 *Attorney General's Guidelines on Disclosure*, Attorney General (2005), at paras 51–52.

31 **R v George, Crawley and Others** (unreported) 7 December 2009.

32 Ibid, at para [12].

33 Ibid, at para [34].

34 Ibid, at para [38].

35 Op cit, n 6, above, at pp 14–15.

36 Articles 11 and 12 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1 (Modernisation Regulation).

37 'Virgin Chief Stephen Ridgway "confessed to protect job"' (2010) *The Times*, 30 April.

38 Ibid.

39 Notice of Appeal under section 46 of the Competition Act 1998 in Case No 1164/1/1/10 (1) **Asda Stores Limited (2) Asda Group Limited (3) Wal-Mart Stores (UK) Limited, and (4) Broadstreet Great Wilson Europe Limited v Office of Fair Trading.**

40 Op cit, n 6, above, at pp 13–14.

CLOTH FAIR KALISHER SCHOLARSHIP 2010

BY SIMON O'DWYER

I have always been attracted by a career in the law. Whilst I was at school I was able to undertake some legal work experience and was amazed by just how much the law is involved in every aspect of the lives of every person in the country. The law governs everything we do, from basic things such as buying a newspaper to serious criminal offences such as murder. I was intrigued by how organic the law is as it continuously evolves to reflect changes in society. I liked the fact that it was open to new and novel argument and I decided that I wanted to pursue a career in the law.

I went on to read law at the University of Bristol and graduated in 2009. When I started my undergraduate studies I began to seriously investigate the potential legal career paths available to me. I arranged various mini-pupillages at Chambers in Bristol and Cardiff in order to gain an insight into life at the Bar. I will always remember my first day in Chambers and I was soon hooked on the prospect of a career at the Bar. I was shadowing a barrister who was defending a man charged with a number of offences including threats to kill and false imprisonment. I found the atmosphere of the Crown Court incredible. I hoped that one day I would be able to present a case to the jury.

The various mini-pupillages I undertook provided me with an invaluable insight into the day to day life of a criminal barrister. I was drawn to the Bar for three main reasons. The first of these was the level of advocacy involved. I loved watching how the barristers shaped and moulded their cases as the evidence emerged and how they skilfully backed witnesses into difficult corners with expert cross examination. I liked how although each barrister had their own unique style they could all be equally effective. Secondly, I was drawn by the independence a career at the Bar brings. I found the prospect of being self-employed attractive and also the fact that my success will be measured on merit by how well I conduct my cases. Finally, the Criminal Bar offers a career that is endlessly interesting. No two days or cases will ever be the same. Although I may be dealing with the same criminal offences over and over again they will present themselves in an endless variety of factual situations with different clients and witnesses.

Simon O'Dwyer was awarded The Cloth Fair Kalisher Scholarship at the Kalisher Lecture on 12th October 2010 by the Rt Hon Dominic Grieve QC MP, Attorney General

The day of the BVC results was a very special day for me. Having opened my results to see that I had been graded 'Outstanding' I couldn't see how the day could get any better. It was then that I received the news that I had been awarded the Cloth Fair Chambers Kalisher Scholarship. I was very proud and honoured to have been awarded such a prestigious and generous scholarship. From the research I undertook in preparation for the interview, I gained an insight into just how great an advocate Michael Kalisher QC was and how widely he was respected. I take great pride in the fact that I am now a part of his legacy and hope to remain involved in the Trust in the future.

I now look forward to starting my pupillage at 9 Park Place in Cardiff in September 2011 and repaying the faith that the Kalisher Trustees have shown in me by forging a successful career at the Bar.

Nicholas Purnell QC
John Kelsey-Fry QC
Timothy Langdale QC
Ian Winter QC
Jonathan Barnard
Clare Sibson

Cloth Fair Chambers specialises in fraud and commercial crime, complex and organised crime, regulatory and disciplinary matters, defamation and in broader litigation areas where specialist advocacy and advisory skills are required.

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