A JOINT ARTICLE BY NICHOLAS PURNELL Q.C. AND IAN WINTER Q.C.

IT TAKES TWO TO LIE: ONE TO LIE AND ONE TO LISTEN

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IT TAKES TWO TO LIE: ONE TO LIE AND ONE TO LISTEN[1]

SHOULD DISHONESTY REMAIN THE CRITICAL INGREDIENT IN PRICE FIXING CARTEL OFFENCES?

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INTRODUCTION

On 20 June 2003 s.188 of the Enterprise Act 2002 [the Act] came into force making it an offence for a person (but not a company) dishonestly to agree *"with one or more other persons to make or implement, or cause to be made or implemented, arrangements…relating to at least two undertakings (A and B)"* that include ones which would *"directly or indirectly fix a price for the supply by A in the UK (otherwise than to B) of a product or service"* [the cartel offences].

In the eight intervening years, the Office of Fair Trading [the OFT] has brought only two prosecutions: **R v Whittle [2008] EWCA Crim 2560**, arising out of the Marine Hoses cartel and firmly cemented in a plea bargain agreement concluded in the USA, and **Regina v Martin George and Others**, arising out of the BA/Virgin fuel cartel, which shuddered to a halt on 10 May 2010 when the OFT offered no evidence. The OFT website indicates that it is currently conducting three investigations into cartel activity in the automotive sector, the agricultural sector and the commercial vehicle manufacturing sector.

The government is concerned that the aggressive approach in the Act to cartel activity, trumpeted on 10 April 2002 by Patricia Hewitt, the then Secretary of State for Trade and Industry, viz. that it would be an offence that *"will send out a strong message to the perpetrators, their colleagues in business, the general public and the courts"*[2] is in reality a lame duck. There is concern that the requirement on the prosecutor to prove that the cartel was dishonest, as opposed to the strict liability offence favoured in America, Canada, Australia and in some other countries, is too difficult to prove.

In March 2011 the Department of Business Innovation and Skills [BIS] published a consultation paper entitled *"A Competition Regime for Growth: A Consultation on options for Reform"* [the consultation document]. In chapter six of the consultation document BIS set out the four options that the government is considering:

(i) Removing the "dishonesty" element from the offence and introducing guidance for prosecutors as to the sort of conduct that ought to be prosecuted;
(ii) Removing the 'dishonesty' element and defining the offence so that it does not include certain 'white listed' agreements;
(iii) Replacing the 'dishonesty' element of the offence with a 'secrecy' element;
(iv) Removing the 'dishonesty' element and defining the offence so that it does not include agreements made openly.

This article sets out the reasons why in the view of the authors the proposals are premature, misguided and likely to be counterproductive. Before turning to those arguments it is appropriate to set out what the law was before the passing of the Enterprise Act. It is only when one appreciates what the common law was with regard to price fixing and restraint of trade that one can understand the part that dishonesty plays and has always played in this field.

CARTEL ACTIVITY BEFORE THE ENTERPRISE ACT 2002.

Two features of the law are central, i) participation in a mere price fixing cartel (i.e. one without dishonesty, fraud,

1 (Title page) Homer Simpson, from the famous cartoon series.
2 *Hansard*, HC Deb. Vol.383, col.48 (April 10, 2002).

misrepresentation etc.) has never been and is not under the Act (as currently worded) a crime known to English law, and ii) participation in a dishonest, fraudulent, deceptive or intimidatory price fixing cartel has always been capable of being a crime (usually that of conspiracy to defraud). In one sense therefore the Enterprise Act did not change the law, it simply focused light upon the fact that dishonest cartel agreements are criminal. In another sense it created a detailed framework for the prosecution of dishonest cartel activity giving certainty to the law and clarifying the extent to which such agreements may be the subject of a prosecution.

A necessary element of a crime is that it involves a wrong against the public welfare. Activity that involves no such public element is adequately catered for by the exercise of the private civil law rights of the person who has been wronged. Where a person behaves dishonestly or fraudulently he harms the public welfare and as a result commits a crime. It follows therefore that where cartel activity prior to the Act involved dishonesty, misrepresentation or fraud, it was activity that harmed the public welfare and hence contravened the criminal law.

Price fixing cartels, however, do not necessarily injure the public welfare, indeed some may be of positive benefit to the public. The Competition Act 1998 specifically excluded certain types of cartel from the prohibitions created by the Act thereby recognising that some types of cartel activity are acceptable. The first question therefore is which price fixing cartels are unlawful; the second question is which price fixing cartels are criminal. In relation to the first question the cartel may be unlawful either because it infringes the private law rights of a particular person and/or because it harms the public. A cartel will only be criminal if it harms the public in that it involves the sort of criminal dishonesty, deception, fraud, intimidation, molestation or other illegality that the criminal law exists to prevent.

In **Hilton v Eckersley**[3], an agreement between employers that restricted the amount that would be paid to employees was held to be void and unenforceable at law because it was unlawful but no view was expressed as to whether it was also criminal. In **The Mogul Steamship Co Ltd v McGreagor, Gow & Co and others**[4], the judgment in **Hilton v Eckersley**, was interpreted thus: the agreement was unenforceable because it was illegal, it was illegal because it involved a wrong to the public in that it was an unreasonable restraint of trade. It was held to be significantly contrary to the public interest to impede the course of free trade in such a manner. No view was expressed as to whether it also harmed the public in that the agreement involved the sort of dishonesty, fraud or intimidation that the criminal law operates to prevent.

Bowen L.J. went on in **The Mogul Steamship**, in a rightly celebrated judgment, to give close analysis as to why certain price fixing cartels are legal, others illegal and some are criminal. The court rejected the plaintiff's argument that where a person's conduct was malicious, in that it wrongfully sought to injure another's trade, the agreement was necessarily unlawful. Bowen L.J. sought *"as far as possible to avoid terms [such as malicious, wrongful and injure] in their popular use so slippery, and to translate them into less fallacious language"*[5]. He concluded that the fact that conduct was intentional and calculated to harm another's trade did not of itself make it illegal. As long as there was a just cause or excuse for the restraint of trade, such as the right to carry on trade in the manner that best suits the trader, and no harm was done to the public, the price fixing cartel could not be said to be unlawful.

3. 6 E. & B. 47.
4. (1889) L.R. 23 QBD 598.
5. At page 613.

Bowen L.J. declined *"to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade"*[6]. He made the position very clear, *"Contracts...in restraint of trade, are not in my opinion illegal in any sense, except that the law will not enforce them...No action at common law will ever lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade"*[7]. It follows therefore that there are price fixing cartels which may be entered into intentionally and which may be calculated to harm another's business but which are not unlawful, let alone criminal. The agreement in the case ensured low prices for the shipping of tea and was to the deliberate prejudice of the plaintiff. It was held not to be an unlawful restraint of trade not least because the agreement produced lower prices to the public and was a genuine assertion of the cartel member's commercial interests. The fact that it deliberately prejudiced the ability of the cartel's competitors to compete was held to be insufficient to make the agreement unlawful.

In **Jones v North**[8], the Vice Chancellor Lord Bacon held that a cartel between suppliers of stone was *"perfectly lawful"* and contained *"nothing illegal"* and that the motives of one of the members of the cartel in suing for the breach of the cartel agreement by another member were *"very honest"*. This was so notwithstanding that the purchaser of the stone was ignorant of the price fixing agreement. The purchaser had not however suffered any loss as a result of the agreement which was breached by one of the cartel's members to the purchaser's advantage.

In **A-G of the Commonwealth of Australia v Adelaide Steamship Co Ltd**[9], the Privy Council stated in terms that *"no contract was ever an offence at common law merely because it was in restraint of trade"*[10]. The Attorney General's action failed because there was insufficient evidence of an intention to act to the detriment of the public and no sufficient evidence of injury to the public. In **North Western Salt Co Ltd v Electrolytic Alkali Co Ltd**[11], the central purpose of the cartel agreement was to raise prices. That deprived the public of the choice of manufacturers and hoodwinked them into the belief that such a choice was open to them but did not necessarily damage the public's interest. Since, however, there was no evidence that the public had been harmed by the activities of the cartel the Court of Appeal declined to conclude that the agreement was an unlawful restraint of trade. This underlines the importance of there being clear evidence of harm to the public before the common law would render unlawful an agreement in restraint of trade.

Where, however, there has been dishonesty, deception, fraud, misrepresentation or other elements prohibited by the criminal law, the agreement will likely amount to a crime. This is because of the presence of those elements as opposed to the fact that the agreement was in restraint of trade.

"No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud, or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it"[12].

It follows therefore that where such aggravating elements,

6. At page 615.
7. At page 619.
8. (1875) LR 19 Eq 426.
9. [1913] AC 781.
10. At page 797.
11. [1913] 3 KB 422.
12. Per Bowen L.J. The Mogul Steamship at page 614.

normally misrepresentation, dishonesty and fraud, have been present defendants have been successfully prosecuted for conspiracy to defraud arising out of price fixing agreements. In **R v De Berenger**[13], the defendants were convicted of conspiring dishonestly to raise the price of public funds thus causing loss to those who had bought during the period when the prices were high. In **R v Lewis**[14], the defendants were convicted of having conspired to fix prices by using false pretences and deceptive practices. In **Rawlings v General Trading Company**[15], the court made it clear that the outcome of the case would have been very different had there been evidence of misrepresentation or fraud on the vendor in question. The presence of such features would have rendered the agreement criminal[16].

In **Norris v Government of the United States of America**[17], the House of Lords produced a comprehensive and elegantly succinct overview of the history of price fixing in English law and delivered a composite opinion to the effect that mere agreements to fix prices are not criminal at common law. They noted that *"At no time up to the present has anyone, whether an individual or a company, been successfully prosecuted for being party or giving effect to a price fixing agreement without aggravating features"*[18]. Having extensively reviewed the statutory history to the Competition Act 1998 and the Enterprise Act they concluded that, *"mere price fixing (that is, the making and*

13. (1814) 3 M & S 67.
14. (1869) 11 Cox CC 404.
15. [1921] 1 KB 635.
16. Per Scrutton L.J. at page 647.
17. [2008] 1 A.C. 920.
18. At page 937.

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implementation of a price fixing agreement without aggravating features) was not, at any time relevant to [the case], a criminal offence in the United Kingdom"[19].

Section 188 of the Act accordingly has placed on a statutory footing activity specific to cartel activity which would have been criminal at common law under general principles not specific to cartel activity. It has also clarified the type of activity that is covered by the Act and, perhaps more importantly, the type of activity (such as vertical cartel agreements) that is not. The Act has codified what has long been recognised at common law; that it is the dishonesty in relation to price fixing that makes the activity a crime. For the government to remove such an ingredient from the offence would therefore amount to a substantial change in the law and require courts to treat as criminal that which has never, even to date, been regarded as such.

DISHONESTY

In **R v George and others**[20], Owen J. ruled that *"It is clear that Parliament intended that dishonesty would be assessed against the standards established in the case law, in particular by application of the Ghosh test, which requires the jury to consider both whether what was done was dishonest according to the standards of reasonable people, the objective element, and whether the defendant realised that this was the view of such people, the subjective element. As was submitted on behalf of the prosecution, an agreement to fix prices is capable of being inherently dishonest, but will not always be dishonest. Each case will be judged on its facts, and on the inferences properly to be drawn from the facts. I therefore rule that the proper construction of section 188 does not require the prosecution to prove additional dishonest conduct over and above the price fixing. It is obliged to prove dishonesty by reference to the Ghosh test."*

Given that, where dishonesty is an ingredient in an offence, the tribunal of fact must determine the issue according to the two stage test in **Ghosh** there is, with respect, nothing very surprising about this judgment. What is capable of being misunderstood is the reference to the possibility that price fixing agreements may be inherently dishonest such that the prosecution is not obliged to prove additional dishonest conduct over and above the price fixing. Given the careful consideration given by Owen J to the decision of the House of Lords in **Norris (above)**, it is not possible that he intended this to mean that where there is nothing more than a mere agreement to fix prices (i.e. without prejudice to any person or to the public and absent dishonesty, fraud or other aggravating conduct) such an agreement would of itself be regarded as being dishonest. What he surely must have intended was that the facts and circumstances of a price fixing cartel may, by themselves, be such that the tribunal of fact would be entitled to draw an inference that the cartelists had behaved dishonestly.

In other words that it is not necessary for there to be evidence of an actual lie either uttered or listened to, or an actual misrepresentation or incidence of fraud, as long as all the evidence in the case is capable of supporting the conclusion to the criminal standard of proof that the defendants had been dishonest when they entered into the agreement. For example, a bid rigging cartel that enabled party A to win the contract from B at a higher price than would have been the case without the agreement, to the prejudice of B, without B's knowledge and in circumstances where had B known of the cartel he would not have issued the contract, is capable of amounting to

19. At paragraph 62.
20. In the unreported, first instance decision of Owen J. at the Crown Court sitting at Southwark 24 July 2009 but accepted by Maurice Kay L.J. on appeal.

evidence of dishonesty without overt misrepresentation or deception.

On the other hand where B is a dominant purchaser and deliberately creates a closed situation between A and C where only A and C are allowed to bid and must bid for all parts of a contract even though A does not want the parts that only C wants (and vice versa) it might be very much more difficult to establish that an exchange of information as to the price at which A and C bid for the unwanted parts of the contract is dishonest according to the standards of reasonable people. All will depend on the facts of the case in question.

Traditionally juries have been expert at determining where dishonesty lies. Dishonesty is something, rather like the elephant, that is very difficult to define in abstract but immediately recognised when seen. Juries know what dishonest behaviour is and will have no difficulty in concluding that a defendant is guilty when criminal dishonesty is present in a case. It is also the dishonesty element that makes the offence serious. Bearing in mind that huge fines can be levied under the Competition Act 1998 on companies engaged in cartel activity it is only where there is dishonesty that in real terms the activity warrants criminal sanction. It is of note that the American prosecutor in **Norris (above)**, although the Sherman Act[21] is one of strict liability, deposed that it was alleged that Mr Norris had *"in effect...defrauded their customers by requiring them to pay higher prices than they might otherwise have paid had there been no conspiracy"*[22]. In the experience of the authors it is commonly accepted in both America and in Canada that prosecutors bring cases where in fact dishonesty can be proved (even though not required) since that is what aggravates the conduct and requires the prosecution and inclines a jury to convict.

If this is the reality then dishonesty must remain an ingredient of the offence since it cannot be right for a defendant to be prosecuted on the basis that he was dishonest but for an offence that does not require him to have been. The admissibility of evidence in such a case would be determined by the legal ingredients in the indictment. If dishonesty is removed from the offence, strictly speaking it becomes irrelevant to guilt or innocence whether it was present. In reality, however, it would be central to the case and the issue that the tribunal of fact would be principally concerned with. For a central issue in a case to be missing from the indictment would be close to absurd. It also cannot be constitutional for the decision as to whether sufficient dishonesty exists to justify the prosecution to be left in the hands of the prosecutor. Either the offence requires dishonesty to be proved, in which case the opinion to that effect of the prosecutor is tested evidentially, or it is not. To remove the ingredient, but to give policy guidance to prosecutors only to bring cases where in their view dishonesty is found , creates in the prosecutor and not the court the ability to determine the existence of dishonesty. This is objectionable, unconstitutional and unfair.

The impetus for making cartel activity criminal was clearly outlined by the Department for Trade and Industry (as it then was known) in its original consultation exercise and by the emphasis it sought to draw from the paper commissioned from Sir Anthony Hammond and Professor Penrose. The major considerations were said to be:

(i) The need to provide strong deterrents to anti-competitive behaviour.

21. United States Code 15, familiarly known as the Sherman Act.
22. At page 930 of the decision in Norris.

(ii) That only the fear of a custodial sentence might serve as a sufficient deterrent.
(iii) That companies should remain subject to existing civil law sanctions and criminal sanctions should be reserved for individuals (in other words that the point of criminal sanctions was to impose custodial sentences as opposed to fines).
(iv) That the offence should be grounded in the requirement for dishonesty.

The reasons for the inclusion of the ingredient of dishonesty were carefully stated, were a consequence of the consultation process and as such were in support of a considered policy objective. They were as follows:

(i) The perceived need to send out a strong message that this was to be "a free standing offence based on dishonesty..." (The Director of the Competition Authority May 2002).
(ii) The desire to reinforce and distance the statutory offence from some of the economic considerations which may arise in Article 81 infringements.
(iii) To signal to the individuals – through whom corporate activity is directed – that individual liberty was at stake.
(iv) To demarcate clearly between competition law and the criminal law.

What appears to have occurred in the intervening eight years is that the policy reasons that justified the creation of the criminal offence have been overlooked in the light of the failure of the OFT to produce convictions. Given the paucity of data; reaching conclusions on this basis risks abandoning the important reasons for the creation of the offence, without reliable evidence that it is those reasons that have impeded the ability to obtain convictions.

THE PREMATURITY OF THE PROPOSALS

Before considering the consequences of removing the element of dishonesty from the criminal cartel offence, it is worth considering whether the case for a change to the law is made out. The consultation document proceeds on the basis of two assumptions: (i) that the offence is harder to prove as a result of the requirement to prove dishonesty, and (ii) that the deterrent effect of the legislation is weakened by the inability of prosecutors to bring cases as a result of that difficulty. It is doubtful that either basis has been established as a matter of fact. It would be wrong in the absence of satisfactory empirical data to reach either of the two assumptions. Only two prosecutions have been brought since the Enterprise Act came into force:

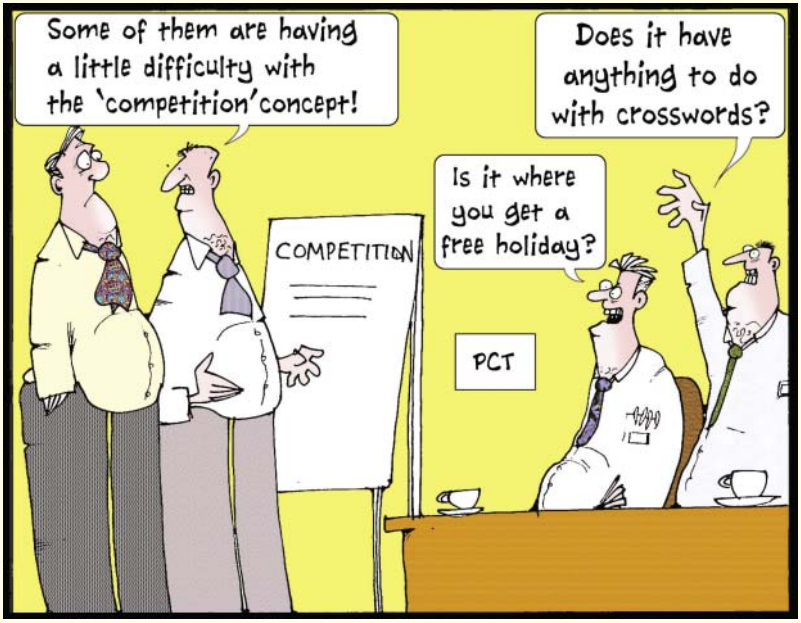
In **R v Whittle and others (above)**, the defendants pleaded guilty to the s.188 offence. This would tend to suggest that the presence of the element of dishonesty in the UK offence was not a bar to a successful prosecution. Although the case is plainly complicated by the global deal struck by the defendants in America which committed them to plead guilty in the UK, the reason the defendants accepted in the UK that they had behaved dishonestly must have been, at least in part, because of the strength of the evidence in that regard. This evidence came from the covert nature of the cartel which involved, inter alia, secret meetings where those attending came and went in ones and twos to prevent alerting customers or the authorities to the fact of the meetings and the use of code names and false email accounts.

Although not good evidence, because of the pressure in America to agree a global disposal of all cartel issues, the case certainly does not support the assumption that the element of dishonesty prevented a successful prosecution of the offence.

In **R v George and others**[23], the Court of Appeal held that it was not necessary for the prosecution to prove that both parties to the cartel had behaved dishonestly. All that was necessary was to establish dishonesty in the defendant on trial. This removed a potential hurdle for a prosecution that might be relying upon the evidence of other parties to the cartel and would otherwise require the full dishonesty of prosecution witnesses to be admitted. For the reasons set out above, it is unlikely that a jury when confronted with clear evidence of dishonesty would fail to return guilty verdicts. The case failed for other reasons and is not therefore a basis for any conclusion in relation to dishonesty.

Given that there are three cartel cases under investigation at the OFT, it would certainly appear to be premature to change the law prior to decisions being reached in those cases. Very few if any[24] of the other Competition Act 1988 decisions reached after the coming into force of the Enterprise Act would appear to have satisfied the definition of *"hard core"* cartel activity covered by the criminal offence. This appears to demonstrate that the reason for the lack of prosecutions is not the requirement to prove dishonesty but the fact that most cartel agreements are not of the hard core type that the criminal offence was designed to cover.

Reliance has also been placed, by those advocating change, upon a survey commissioned by the European and Social Research Council and the University of East Anglia into



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23. [2010] EWCA Crim 1148.
24. The exceptions might be Construction Recruitment Forum, Aluminium Spacer Bars and Stock Check Pads.

public attitudes towards cartel offences. The study appears to support the conclusion that members of the public in the UK do not believe that those responsible for cartel activity should be sent to prison (only 1 in 10 thought prison to be appropriate) and only 60% considered such cartel activity to be dishonest. Whilst such surveys are obviously always of interest and with respect to those who have conducted and analysed them, the results do not appear to justify the drastic step of removing dishonesty from the s.188 offence.

The survey was based on only 1,219 responses out of 3,000 people who were asked to respond by having been sent an email. This sample would not, on the face of it, be a satisfactory basis upon which to determine what the law should be. More importantly however, the survey was couched in terms of shopping for local items at corner shops and ice cream vans. This factual scenario is a long way from the sort of *"hard core"* cartel offences that the Act was designed to prohibit by criminal sanction. It is also a long way from the sort of serious criminality that would warrant imprisonment.

More troubling still is the fact that the manner in which the questions were framed does not establish that the respondents were making any observations by answering the specific questions as to the seriousness of cartel activity in cases such as **Marine Hose and BA**, the appropriate sanction in such cases, or whether such conduct is dishonest by ordinary and reasonable standards. For example, the question, whether a person aligns himself more with person A who likes prices to be identical across all shops or more sympathises with person B who likes to shop for the best price, tells us very little about the serious issues at the heart of cartel enforcement and criminal sanction; likewise whether a person would prefer to walk further in order to buy a cheaper ice lolly.

73% of the respondents did consider however that price fixing was harmful to customers. This would appear to support the conclusion that, in an appropriate case where a harmful *"hard core"* cartel agreement had been conducted dishonestly to the prejudice of the public, a jury could be relied upon to return guilty verdicts.

THE CONSEQUENCE OF REMOVING DISHONESTY FROM THE CARTEL OFFENCE

If dishonesty were removed from the cartel offence it would become an offence for a person to enter into or implement an arrangement, perfectly honestly, but which had the consequence of directly or indirectly fixing the price of the supply of a product or service; which limited or prevented the supply of a product or service; which divided the supply of a product or service between two suppliers or customers or which amounted to a bid rigging arrangement [see s.188 of the Act with the word *"dishonesty"* removed].

The removal of the word *"dishonesty"* would utterly transform the offence from one focused upon the intention of the cartelist to one wholly dependent upon the direct or indirect consequence of any particular business arrangement. One would be guilty of the offence, however careful one had been to prevent the consequence of one's arrangement, if it in fact, albeit indirectly, fixed, limited or divided the supply of products or services or rigged a bid. This would be damaging to business and contrary to the public interest.

The Law Commission concluded[25] that to make a man liable to imprisonment for an offence which he does not know

25 .See Working Paper No. 31

that he is committing and is unable to prevent is repugnant to the ordinary person's conception of justice and brings the law into contempt. Removing the element of dishonesty would in effect render the cartel offence one of strict liability dependent not upon what the offender intended to do or wished to achieve but on the consequences that in fact occurred as a result of his actions, however unintended they might have been.

Unless Parliament were to enact the removal of the mental element from the offence in the clearest of terms the courts would be likely to read mens rea back into the offence[26]. The new offence would therefore have to state clearly that it would be committed without any form of mens rea. Bearing in mind the history of price fixing in the criminal law, as set out above, this would be a radical departure from standards previously regarded as acceptable. It would bring with it the risk that juries would be reluctant to convict in cases where dishonesty was not in fact present. The change to the law might very well therefore be counterproductive.

The reduction of the offence to one of strict liability would also devalue it. Strict liability offences criminalise actions not intentions, normally because of an overwhelming public interest in preventing such actions (such as driving without a licence or insurance). In the case of cartel activity, the action (the existence and operation of the cartel) is already unlawful by virtue of the Competition Act 1998. There is accordingly no public interest in criminalising the action itself, since it is already unlawful and subject to a stringent enforcement regime that involves the power to levy heavy fines.

The consultation document identifies four perceived problems in relation to the element of dishonesty. On closer analysis it is clear that none of those problems in fact pertains:

(i) It is thought that the element of dishonesty introduces a lack of certainty into the offence. If this were correct then all offences that included dishonesty would be uncertain and would risk falling foul of Article 7 of the European Convention on Human Rights[27]. It has long been established that the test in **Ghosh** is sufficiently certain both for it to be lawful and for it to be a sensible, workable basis for resolution of whether someone has behaved dishonestly. People well understand what dishonesty means and cartelists are no exception. There is no basis for any conclusion that cartel cases involve any more complex a factual matrix than conspiracy to defraud, for example. Parliament deliberately included the requirement to prove dishonesty in the Fraud Act 2006.

(ii) It is thought that the requirement to prove dishonesty will introduce analysis of the economic consequence of cartel activity which would be difficult for juries to comprehend. In fact, in our view, the opposite is true. If dishonesty were to be removed the only element in any prosecution would be the consequences of the cartel arrangement and thus would focus the case on the detailed economic effect on consumers. Dishonesty would be established not by an analysis of the economic consequences but by proof of the deceptive or fraudulent behaviour of the defendant.

(iii) It is thought that 40% of ordinary people do not think that price fixing is dishonest and there is a fear that juries will decline to convict[28]. Many people think that cannabis should be legalised, for example,

26. [see the common law principle enunciated in Sweet v Parsley [1970] A.C. 132]
27. see R v Rimmington [2005] UKHL 63
28. See the above reference to the UEA survey.

but it does not stop juries doing their duty when trying such cases. Juries are told what the law is by the court and must apply it to the facts of the case. There is no basis, for thinking that juries refuse to apply the law as they are directed to by the court.

(iv) It is thought that cartel activity is particularly problematic when it comes to dishonesty because it may not be possible to prove that the individuals involved had a sufficiently clear financial motive to behave dishonestly. If the evidence shows that the individual involved in the cartel was dishonest, because it proves deceptive or fraudulent behaviour, there is no difficulty with the offence requiring the element of dishonesty. If, on the other hand, the evidence does not prove such behaviour , then the cartel is one that did not go beyond the boundaries of the activity covered by the Competition Act 1998. In any event the purpose of criminalising cartel activity was to dissuade directors and directing minds from using their companies as vehicles for cartel activity, it was not primarily designed to cover mid-level employees.

On consideration therefore there is very little if any force in the concern that requiring the prosecution to prove dishonesty is an impediment to achieving a conviction.

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To remove it would devalue the offence and might well result in juries refusing to convict whilst concluding that the appropriate place to penalise such conduct is under the civil Competition Act regime.

THE LACK OF AN AVAILABLE ALTERNATIVE TO "DISHONESTY" AS AN INGREDIENT IN THE OFFENCE

The consultation document recognises that it might well be necessary to replace the element of dishonesty with an alternative. This immediately gives rise to the problem of identifying an alternative mental element that would be appropriate to the facts of a cartel agreement but which would not down grade the offence or otherwise be impractical or difficult to prove.

Recklessness would be inappropriate since it would be wholly dependent on the consequences of the cartel arrangement and would require an analysis of the cartelist's foresight of those consequences. Deliberate intention would be meaningless since one does not ordinarily end up in a cartel arrangement by accident. It is not the deliberateness of the corporate activity that matters it is its criminal purpose. A deliberate intention to cause loss or to benefit financially is in effect, in any event, dishonest. As Bowen L.J. made clear in **The Mogul Steamship (above)**, the slipperiness in common parlance of terms such as *"malicious"*, *"wrongful"* and *"injurious"* would risk making the offence insufficiently precise and would depend on the consequences of the agreement not on the intention of those party to it.

The suggestion that dishonesty could be replaced by a complex requirement to understand *"white listed"* exceptions is wholly unworkable. The European Commission no longer favours *"white-listed"* exceptions because of the uncertainty it creates for business. They have been abandoned in the context of Block Exemptions. It is difficult to see why considerations that no longer apply in the context of the civil prohibition should be applied to criminal sanctions where penal consequences are involved.

The only remaining suggestion is to replace *"dishonesty"* with the concept of secrecy. In other words that it would not be necessary to prove that the cartel was created dishonestly only that it operated in secret. If it were sufficient for the offence to be committed by the mere fact that no persons outside of the cartel knew of its existence then the secrecy element would not be part of the mens rea of the offence at all. It would merely be a question of fact as to whether any person outside the cartel knew of it. It would be vulnerable to the problems that prosecutions experience in seeking to prove negatives. How does a prosecution prove that no-one knew of the existence of the cartel? If the burden in this regard were reversed (i.e. secrecy is presumed) would it be sufficient for the defence to produce one person, outside the cartel who knew of it? This would be open to abuse and would make the law appear ridiculous.

To achieve its aim therefore the element of secrecy would have to be defined in terms of mens rea, namely that the cartelist intended that the cartel should remain secret. The offence would be one of entering into the cartel arrangement intending that no person outside of the cartel should learn of it. The offence would focus upon the steps taken by the cartelist to ensure that its existence remained hidden. Such an offence would not catch cartelists who took no overt acts to ensure the secrecy of the cartel because no one happened to learn of it or there was no perceived risk in that regard. Those cartels that were in fact secret but not thanks to any actual covert activity would not be caught. This would be absurd. To define a crime in terms not of its

inherent criminal intended purpose but in terms of the steps taken to ensure that it is not uncovered risks bringing the law into disrepute.

Criminal offences should focus upon the criminal activity sought to be prohibited. Parliament resolved that this was the dishonesty that frequently accompanies price fixing. This has always, in fact, been a crime but one that did not sufficiently focus that crime upon cartel activity. Dishonest cartel activity is significantly more serious than the prohibited civil cartel activity and is therefore rightly a crime. It is not clear why activity that is prohibited by the Competition Act 1998 should become a crime merely because the cartelist took positive steps to keep it secret. It is also not clear why a cartelist who did not need to take such positive steps because there was no risk of the cartel being exposed (but who would have done had the need arisen) should fall into a different category under the criminal law.

It is also important to note that the replacement of the element of dishonesty with that of secrecy will remove all features of deception, fraud or dishonesty from the offence with consequences in sentencing terms. The offence would become one of keeping a cartel secret and not one of operating a criminal cartel. This would in turn have the effect of diminishing the criminal effect of the actual cartel activity. This is the diametric opposite of Parliament's stated intention.

There is a further concern. There is an essential right to privacy in English and European law such that commercial arrangements are entitled to be conducted in private. Not only is the proposal to replace *"dishonesty"* with *"secrecy"* unworkable it threatens the essential right to conduct one's business in private. It is not in the public interest to undermine such fundamental principles by requiring companies to publish their agreements for fear that otherwise they might amount to criminal cartels. It further runs the risk of catching the lawful and beneficial market share activity permitted under European Union anti-trust law.

AN ADDITIONAL LEGAL REASON FOR RETAINING DISHONESTY AS AN INGREDIENT OF THE OFFENCE

A preliminary point was taken in **R v George and others (above), the BA case**, that the Government had not correctly nominated the courts of England and Wales as the forum under the Competition Act regime wherein criminal allegations of cartel activity would be resolved. The Court of Appeal determined that this was not correct and that the courts of England and Wales had jurisdiction to try such allegations. One of the reasons supporting the argument advanced was that it is not possible under the Competition Act regime for there to be parallel investigations. It would follow that, if the European Commission were investigating the cartel under the civil regime, this would amount to a parallel investigation such as to prevent the prosecution of the criminal allegation. The Court of Appeal rejected this argument but stated that it did so in part because of the 'not unimportant' ingredient of dishonesty in the criminal offence thereby making the allegation wholly different to that, the subject of the European Commission investigation, and one properly for the jurisdiction of the criminal courts of England and Wales.

CONCLUSION

Given the paucity of information in relation to whether dishonesty is causing an impediment to a successful

prosecution, it is far too early to pass judgement on whether it should be removed. Bearing in mind that most *"hard-core"* cartels will, by definition, contain the sort of covert activity from which dishonesty can be inferred it is difficult to see the imperative for change. Parliament should not be quick to undermine the ability of juries to know when true criminal dishonesty is present. They are very good at it and rarely fail to identify it when it is truly proven to have occurred.

The purpose of the criminal law is to prevent conduct that goes beyond that which is prohibited by the civil code. The purpose is to prevent conduct that ordinary people readily understand to be criminal conduct. When a jury is directed that a dishonest cartel is a crime because of the damage it does to markets, consumers and in the end to ordinary people they will readily understand why that is the law. They will then look for the indices of dishonesty just as they do under the Fraud Act 2006, in relation to conspiracy to defraud at Common Law, under the Theft Act 1968 and in relation to all financial crimes and those involving dishonesty. In our view there is no evidence to justify a conclusion that juries would be unable or unwilling to find dishonesty just because the factual matrix of the case happens to be a cartel.

Further, Parliament should be slow to down-grade the offence to one not involving dishonesty. Cartel activity is a serious crime and one, where dishonesty is established by the tribunal of fact, that ought to result in a custodial sentence. It is much more difficult to justify such a sentence where dishonesty is not present or where the criminality involved amounts merely to keeping a cartel secret. There should be a clear distinction between the conduct that is prohibited by the Competition Act 1998 and that which is criminal.

The cartel offence has not been on the statute book for very long. Time should be given for the considered assessment of the offence by judge, jury and the Court of Appeal. The proper deterrent for cartel activity is the understanding that a cartelist is at risk of being convicted of a serious offence of dishonesty, not by the fact that he may be convicted of what is effectively a strict liability offence or an offence of keeping the cartel secret. Juries well understand what telling lies means, whether anyone is listening or not. In our view the element of dishonesty should not be removed from the cartel offence, and certainly not until it is shown (if it be the case) that prosecutions cannot be brought or fail because of it. That demonstrably has not yet occurred.

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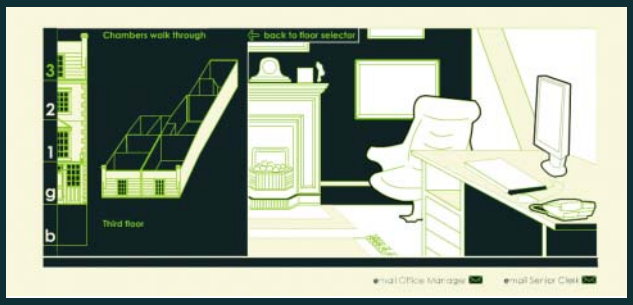

The Munificent 7

Many thanks to all those who sponsored the Cloth Fair team taking part in the London to Brighton bike ride for the British Heart Foundation. For all those who paid for pain, rest assured that the smiles in the photograph dropped off around south Croydon. Following strict tradition, the clerks beat the barristers, with Ben and Adrian finishing an hour in front of the rest of the team. Just as traditionally, they peddled straight past The Bull in Ditchling, where the barristers enjoyed a final pit stop before crossing the finishing line in a dead, barely wobbly, heat. Special mention for bicycling fashion goes out to ingénue Timothy Langlade for completing the course, without a single dismount, in his favourite pair of boat shoes.

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John Kelsey-Fry QC
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