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THE DEVELOPMENT OF CRIMINAL OFFENCES FOR ANTI-COMPETITIVE ACTIVITY IN ENGLAND AND WALES

A CURIOUSLY ENGLISH APPROACH

PART ONE

NICHOLAS PURNELL QC

1. As befits an island maritime trading nation, an examination of the legal history of England discloses a close relationship between the desire to legislate to encourage, control, restrain, liberalise or regulate trade in accordance with the pragmatic sensitivities of the changing emphases in economic conditions and political imperatives.

2. As early as the reign of Edward VI in the middle of the sixteenth century, statutory criminal offences were enacted to control market abuses in the trade of corn, meal, flour and cattle. These offences were in addition to ancient common law offences, with wonderful ringing names, badgering, regrating, forestalling and engrossing, and acted in the King's name to control free trade and inhibit the growth of the market for such commodities and were intended to protect their price.

3. These Tudor offences remained in force until the repeal of the statutory offences in the reign of George III (1727) and the subsequent abolition of the common law offences during the first decade of Queen Victoria's reign.

4. It is difficult to resist the observation that ambitions of Empire and international trade seemed to have had the effect of transforming yesterday's unlawful restraint of trade into today's entrepreneurial opportunism. However, the law reports reflect that, throughout this development, the Courts sustained the core concept that the legality of an agreement freely entered into between traders was not to be determined by whether any wrong was done to the traders who so agreed. Instead the decisive factor was whether by restraining themselves from a free course of trade, the agreement that was reached was injurious to the public.

5. The controversial debate centred upon whether this injury to the public, by its mere fact, rendered the agreement illegal and consequently a crime or whether it was merely void and unenforceable between the parties. This debate reached its most explicit

exposition in the conflict between the dissenting judgment of Lord Esher MR and the judgments of the majority, **Bowen LJ and Fry LJ in Mogul Steamship Company v McGregor, Gow and Co [1889] 23 QBD 598**. The majority decision was upheld in the House of Lords by the unanimous decision of seven Law Lords **[1892] AC 25**.

6. In essence the case settled the debate by ruling that it was not the business of the Courts to draw the line between fair and unfair competition or between what was reasonable and unreasonable. Thus merchants were free to enter into restrictive agreements between themselves for the purpose of extending or protecting their business provided that they did not thereby make use of criminal means to operate the agreement, for example by intimidation or fraud. Where traders refused to extend the advantageous terms of their trading agreements to others:

   "It is absolutely unnecessary to consider whether these grounds were morally or commercially justifiable. They were not unlawful and they were of a nature legitimately, if not necessarily, to be taken into account in carrying on the respondents' business with profit."

   Per Lord Field **[1892] AC 25 at p 54**

7. Any move to limit competitive or "anticompetitive" practices between traders was not the function of the Courts, so held the majority in the Court of Appeal and it was confirmed by the unanimous decision of the House of Lords.

   "If peaceable and honest combinations of capital for purposes of trade are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law."

   Per Lord Justice Bowen **[1889] 23 QBD 598 at p 620**

8. It was a further sixty years before the admonition of Bowen LJ was reflected in legislation. The entrepreneurial spirit of the Victorian judiciary, their sense that legislation "by preventing a free trade in commodities, had a tendency to discourage the growth and to enhance the price of the same." Per Fry LJ *ibid*, was the dominant policy.

9. The **Restrictive Trade Practices Act 1956** produced the first change in the legislation with its introduction of a means of control by the State authority in a specialist court by the grant of injunctions against agreements to effect practices which were deemed restrictive or to declare collective agreements to enforce resale price maintenance unlawful.

10. Although the remedies provided by the statute were civil and the Act expressly stated in section 24 that no criminal proceedings shall lie in respect of any contravention of that section, the legislation had a sting in the tail:

    "The 'odour of criminality' is kept away from the world of restrictive practices in trade. But the extent of this distinction should not be exaggerated... any breach of that order involves a contempt of court with quasi-criminal sanctions, and it must not be overlooked that, in order to ensure that the Crown can effectively proceed against restrictive practices in trade, a number of directly criminal offences... are created." Wilberforce, Campbell and Elles on Restrictive Trade Practices and Monopolies. (2nd ed. 1966 p62).

11. The extent and character of the enforcement regime and the tension which Lord Wilberforce was noting in the passage cited above have been considered in cases which have been decided under the Restrictive Trade Practices Acts 1956 and 1968. The cases cast a shadow forward on issues of corporate liability for criminal acts by employees.

12. In **Director General of Fair Trading v Pioneer Concrete [1995] 1 AC 456** the House of Lords had to consider the extent to which an unlawful price fixing agreement put into effect by employees who disregarded prohibitions placed on such action by their employers nevertheless brought the employers into contempt of court. Lords Templeman and Nolan, whilst accepting that "...this unlawful behaviour may give rise to civil proceedings... but is not a criminal offence..." went on to find that to excuse a company from contempt by reason of its employees' acts in contravention of an express prohibition would be to fly in the face of two principles of corporate activity:

    "The first principle is that a company is an entity separate from its members but, not being a physical person is only capable of

acting by its agents The second principle is that a company... falls to be judged by its actions and not by its language.

Per Lord Templeman **ibid at page 465**.

Lord Nolan went further:

"even in the case of a statute imposing criminal liability, and even without any express words to that effect, Parliament may be taken to have imposed a liability on an employer for the acts of his employees, provided that those acts were carried out in the course of the employment. Further the liability may be imposed even though the acts in question were prohibited by the employer."

Per Lord Nolan **ibid at page 472**.

13. Whilst this proposition holds good for offences in which statutes impose a strict liability, for example in cases concerning consumer protection, the conventional approach of the criminal courts has been to look to the status of the employee in an endeavour to find liability in a directing mind. Perhaps the subject matter of another paper at another time.

14. This was the background state of the law at the point when **The Competition Act 1998** came into force in February 2000. It repealed the RTPA and introduced legislation to harmonise the practice of competition law in England and Wales with the approach within the rest of the European Community. In place of a legislative scheme which examined the conduct of the parties who entered into an agreement, the law now requires the courts to examine whether, on an economic analysis, such an agreement restricts competition.

15. The only criminal offences which the Act introduced were directed at penalising conduct which obstructs the proper application of the legislative regime by, for example, furnishing false information to the relevant competition authority or obstructing the execution of a warrant to search for evidence of anti-competitive activity.

16. The dramatic development which brings the full force of the criminal law back into play in legislating to control anti-competitive practice has been the enactment of the **Enterprise Act 2002** which came into force on 20 June 2003.

17. Section 188 creates for the first time a cartel offence. It establishes a marked shift from the European culture of the 1998 Act towards the developed American model which deters through much higher financial penalties and criminal sanctions. The first element of the new approach is to target individual deterrence. The criminal offence is directed at directors and employees:

"188

a. *An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B) .*
b. *The arrangements must be ones which, if operated as the parties in the agreement intend, would –*
   (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,
   (b) limit or prevent supply by A in the United Kingdom of a product or service
   (c) limit or prevent production by A in the United Kingdom of a product,
   (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers
   (e) divide between A and B customers for the supply in the United Kingdom of a product or service, or
   (f) be bid-rigging arrangements.
c. *Unless subsection (2(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would –*
   (a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,
   (b) limit or prevent supply by B in the United Kingdom of a product or service, or
   (c) limit or prevent production by B in the United Kingdom of a product.

18. The political imperative for the introduction of a cartel offence was spelt out by the then Secretary of State for Trade and Industry, Patricia Hewitt during the second reading of the Bill in Parliament on 10 April 2002:

"We regard forming cartels as very serious offences, and the threat of imprisonment is important to deterring them." (The maximum sentence is five years' imprisonment.)
"The new criminal offence will send out a strong message to the perpetrators, their colleagues in business, the general public and the courts."

19. If any underlining emphasis were required, the Director of the Competition Authority has provided it in an address in May 2002 in which she said:
"This is a free standing offence based on dishonesty involving price-rigging, market sharing, limitation of supply or production and bid-rigging. These are the most serious forms of anti-competitive activity."

20. The characterisation of the offence as directed at serious dishonesty is intended to distance the offence from some of the economic considerations which arise in infringements of Article 81 EC and which define the block exemptions and so on from registration which are contained in Chapter 1 of the Competition Act 1998. The necessity to avoid conflict with Article 81 EC Prohibition is an important compliance with the adoption of Community modernisation proposals. (Regulation 1/2003/EC, OJ, 2003 L1/1)

21. Similarly the emphasis on imprisonment rather than financial penalties was intended to send the signal that individual liberty was at risk; whereas a corporate employer might "pay the fine" for a convicted director or manager, no custodial sentence could be served by a corporation.

22. In addition the Act enables the courts to issue disqualification orders under the **Company Directors Disqualification Act 1986** where an individual has been involved in any type of competition law violation at either the UK or EC level. ***Section 204***. The conditions under which, if satisfied, the Court *must* make a disqualification order are firstly that an undertaking of which the person is a director has committed a breach of competition law and secondly that the Court considers that his conduct makes him unfit to be a director.

23. The first key element of the offence in Section 188 is ***dishonesty***. This bears the two stage "Ghosh" test.

24. The second element is the requirement to have ***made or implemented*** the arrangements. This will determine how far down the corporate hierarchy the arm of criminal liability will stretch – in theory to any employee who acts dishonestly to make or implement such an arrangement. The UK territorial restriction is also a key feature.

25. The type of arrangements set out in sub-section 2 are the serious agreements which could not be said to have any pro-competitive purpose or effect. The complementary provisions of Section 189 exclude from the offence vertical price fixing, for example between a manufacturer and his distributor.

26. Section 190 provides the maximum penalty of five years' imprisonment and or an unlimited fine.

27. The section empowers both the SFO and the OFT to act as the prosecuting authority for a cartel offence although current government policy is to entrust all the initial prosecutions to the SFO. The section restricts the extra-territorial effect of the offence to agreements which must be at least in part implemented in the UK.

28. The key sub-section of section 190 is ss(4)
"Where for the purposes of the investigation or prosecution of offences under section 188, the OFT gives a person written notice under this sub-section, no proceedings for an offence under section 188... may be brought against the person... except in circumstances specified in the notice."

29. This is the introduction of a "leniency programme" – a provision which reflects American and European Commission practice and enables the OFT to issue "no action" letters to individuals who co-operate with the OFT during an investigation. How it will work in practice is still evolving. Certainly no Law Officer has yet issued any code or procedural guidelines to indicate the landscape of the policy. It seems unlikely that such letters will be issued in cases where the OFT already has sufficient evidence to bring a successful

prosecution. The OFT has issued an explanatory note "The Cartel Offence: No Action Letters for Individuals" OFT 503 July 2002.

30. The sub-section confers immunity for those who comply with the conditions contained in the letter – presumably a full and accurate admission of participation, the provision of all relevant information and the undertaking to maintain co-operation and to cease any further participation. It would seem to be against public policy to issue such a letter to the principal instigator of an aggressive and dishonest anti-competitive arrangement.

31. The offence and attempts and conspiracies to commit the offence are extraditable.
Section 191
This affords other national powers reciprocal extradition arrangements. The startling effects of this are being reflected in the *Norris* and *Bermingham* cases.

32. The Act provides the SFO and the OFT with evidence gathering powers similar to those first introduced for the SFO in the 1987 and 1988 Criminal Justice Acts. The powers, set out in ***sections 192–203*** enable search warrants, production orders and compulsory questioning to be deployed in the course of criminal investigations under ***section 188***. These powers are backed up with the customary criminal sanctions for refusal or for the supply of false information.

33. The alternative weapons of using the criminal offence for the most serious cases or bringing a civil case and then engaging the parasitic disqualification regime to target the individual directors is a massive broadening of the scope for penalising individuals. The disqualification process is capable of covering a much wider range of competition violations than the criminal offences.

34. CONCLUSION

The questions which most immediately arise for consideration are:

How does the American experience inform us of the way in which the criminal powers will be exercised and developed in practice ?

How will the mutual assistance regimes and exchange of information between national regulators bite on domestic investigations and vice versa ?

What will be the locus for a criminal prosecution in the case of a cross-border violation ?

What is the increased risk of aggressive use of extradition applications from the US ?

How does a corporate entity organise and provide for appropriate representation for itself and its employees and directors in the face of a criminal competition investigation ?

More on this topic will follow in the next issue.

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