Shooting the Messenger: Does the UK Criminal Cartel Offense Have a Future?

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The architects of the UK's ambitious project to criminalize cartel conduct, resulting in the Criminal Cartel Offense (the Offense) under Section 188 Enterprise Act 2002, wanted the legislation to "send a message." The first contested prosecution of individuals for the Offense certainly sent a message, but not the one the Office of Fair Trading (OFT), Britain's competition watchdog, was expecting. On May 11 of this year, the trial of four British Airways (BA) executives on charges of "dishonestly agreeing" with their counterparts at arch-rival Virgin Atlantic (VA) to fix passenger fuel surcharges on transatlantic routes collapsed even before any witnesses were heard.[1]

While the defendants all left court "with their reputations unsullied," (per Owen, J.) an embattled OFT is now struggling to retrieve its credibility and is threatening to cancel the immunity it granted Virgin Atlantic in the separate administrative proceedings under the Competition Act 1998.[2] BA is hinting it may withhold the GBP 121 million it agreed to pay in civil fines in July 2007 to settle the case.[3] Unlikely to have the appetite for any more prosecutions in the near future, the OFT is in any case slated by the new Coalition government to lose its powers in criminal antitrust to a unified economic crime agency.[4] The ramifications of the failed prosecution may well extend to the repeal of the cartel offense itself.

Up to this year, the OFT's record of enforcement action under the Offense had been uninspiring. The only convictions—of three individuals in *Marine Hose*—were obtained through guilty pleas and by gift of the U.S. Department of Justice via an overseas plea deal, the propriety of which was questioned by the English Court of Appeal.[5]

The First Trial Under the Offense

The prosecution of the BA executives was the first contested trial in the eight years the Offense has been on the statute book. Observers hoped that the trial would provide some answers to the many unresolved questions surrounding the Offense, not least on how juries might tackle the element of dishonesty. With jurors required to judge the defendants according to their own moral compass (see Dishonesty section below), it would have been intriguing to see how they viewed

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[1] Alistair Osborne, *Collapsed BA Price-Fixing Trial Places OFT and Virgin in the Dock*, DAILY TEL., May 11, 2010, *available at* http://www.telegraph.co.uk/finance/newsbysector/transport/7707701/Collapsed-BA-price-fixing-trial-places-OFT-and-Virgin-in-the-dock.html.

[2] Press Release, Office of Fair Trading, OFT Withdraws Criminal Proceedings Against Current and Former BA Executives (OFT Press Release 47/10) (May 10, 2010). Virgin strongly denies failing to comply with its cooperation obligations.

[3] David Robertson & Michael Herman, *BA Threatens to Bite Back After Collapse of Price-Fixing Trial*, THE TIMES, May 11, 2010, *available at* http://www.business.timesonline.co.uk/tol/business/industry_sectors/transport/article7122341.ece.

[4] Philip Aldrick, *Coalition Unveils New UK "White Collar" Crime Fighting Agency*, DAILY TEL., May 21, 2010, *available at* http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7746790/Coalition-unveils-new-UK-white-collar-crime-fighting-agency.html.

[5] R v. Whittle, [2008] EWCA Crim 2560; [2009] UKCLR 247. For the United States plea agreement, see Plea Agreement, United States v. Brammar, No. H-07-487-02 (S.D. Tex. 2007), *available at* http://www.usdoj.gov/atr/cases/f228500/228585.pdf.

the testimony of immunized Crown witnesses who by their own admission were as deeply involved in the alleged cartel but were escaping prosecution by incriminating the defendants.

By coming forward in early 2005 to both the DOJ and the OFT to denounce BA, VA had won full immunity for itself and its associated executives. In the UK, where the Offense may only be committed by individuals, the company was given a full pass from civil penalties under Chapter 1 of the Competition Act 1998, while executives were granted so-called "no action letters" guaranteeing their non-prosecution provided they gave evidence for the prosecution.

After the trial opened, one disquieting revelation after another emerged regarding the conduct of the prosecution. The defense accused the OFT of a wholesale failure to respect the basic rules on pre-trial evidence disclosure[6] and of farming out its prosecutorial responsibilities to VA's lawyers—whose acknowledged mission was to safeguard their client's interests. The same lawyers had also assiduously screened the prosecution's contacts with its witnesses: in the words of defense counsel, they were "well and truly lawyered up."[7]

The trial exposed a deep fault line running through the whole criminalization project, linking the requirement of dishonesty and the built-in reliance on immunity as the driver of investigations and prosecution.

After two weeks of bruising legal skirmishing outside the presence of the jury that brought to light a catalogue of disclosure failures, the judge made it clear that he would allow the prosecution no further adjournments. The last straw was VA's sudden production to the prosecution, well into the trial, of 70,000 emails previously dismissed as irrelevant or corrupted: one of them seemed to undermine a main plank of the case prosecuting counsel had made in opening to the jury.[8] The OFT maintained that had the omission been uncovered earlier, the trial would have been able to proceed.[9] As it is, when the jury was called in, OFT had no option but to offer no evidence, as it was unable to put forward a proper prosecution. A directed verdict of not guilty followed.

It could well be that the dishonesty issue will never be tested before a jury. If the controversy surrounding the OFT's capability to act as a prosecution agency was rendered moot by the plan to strip it of its criminal law powers, the disquiet extends to the "fitness for purpose" of the Offense itself. The trial exposed a deep fault line running through the whole criminalization project, linking the requirement of dishonesty and the built-in reliance on immunity as the driver of investigations and prosecution.

The Anatomy of the Criminalization Project

For an understanding of the project it is important to appreciate how the Offense was supposed to fit into the existing national and European enforcement landscape. The UK was one of the last major jurisdictions in the developed antitrust world to introduce even administrative fines against companies for cartel violations. Until the Competition Act 1998, it was left largely to the European Commission to sanction cartels involving British companies: while Europe-wide cartels were caught in the net, the Treaty requirement for an effect on interstate trade let off the hook equally damaging cartels with an exclusively national flavor.[10]

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[6] Under section 3 of the Criminal Procedure and Investigations Act 1996, the prosecution is required to disclose any prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

[7] Trial Transcript, April 29, 2010, at 85.

[8] The email seemed to show that Virgin had unilaterally decided to increase its surcharge to GBP 6 in August 2004 before a telephone call on which the prosecution heavily relied.

[9] OFT Press Release 47/10, *supra* note 2.

[10] Under the original draft proposals made by the European Commission for the Modernisation Regulation, the Commission might have maintained its primacy. *See* Julian M. Joshua, *The UK's New Cartel Offence and its Implications for EC Competition Law: A Tangled Web*, 28 Eur. L. Rev. 620, 628 (2003).

The Competition Act had only been in force for two years when the then administration announced in early 2002 the second stage of its plan to transform Britain into a bracing "Enterprise Economy."[11] Heavily influenced by transatlantic thinking about cartels, and to approving noises off from the DOJ,[12] the OFT's agenda was driven by the insight that only by targeting individuals could effective deterrence be achieved. Companies would cynically discount the chances of detection against the benefits from operating an illegal cartel. Accepting as realistic U.S. estimates that only one in six cartels was detected, the government concluded that to have any deterrent effect civil fines would have to be set at many times the participants' annual sales.[13] This called for the introduction of a criminal offense that would reinforce and supplement the administrative enforcement regime of the Competition Act that was directed at companies. Unlike the Sherman Act, the new system would (a) involve separate but potentially parallel administrative and criminal enforcement schemes; and (b) distinguish corporate and individual liability. From an early stage, it was made clear that the new Offense could only be committed by an individual and not by a corporation.[14]

Besides the need to accommodate the existing Competition Act administrative system, an added challenge was provided by the interface at the European level with Article 81 of the EC treaty (now Article 101 of the Lisbon Treaty, or TFEU) then administered by the European Commission, but due to be devolved under "Modernization" to a network of competition authorities in which the Commission was an uneasy first among equals.[15] To be sure, the draft of Regulation 1/2003 foresaw the criminalization at the Member State level of breaches of Article 81, but would have involved subordination of criminal proceedings to complicated rules governing the operation of the European "network."[16] An additional hurdle in the way of simply criminalizing a breach of the EC (and national) rules was that (while invariably condemned) even hard core cartels are not per se prohibited under either the EC or the UK administrative schemes.[17]

Prudently enough, the planners of the UK legislation determined to create a "stand-alone" Offense. The OFT could thus bring a criminal prosecution against individuals not only where it had itself targeted the companies under the Competition Act 1998 or where the firms were being pursued by the EC under Article 81, but also even if no administrative action was taken against the companies at all. By focusing on individual conduct, it was hoped to free the criminal process from the kind of "economic" justifications that would be invited by shadowing the civil regulatory scheme.[18] Nevertheless, as the Court of Appeal made clear during a preliminary appeal in the BA

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[11] Dep't of Trade and Indus., Productivity and Enterprise: A World Class Competition Regime, CM 5233 (July 2001) [hereinafter White Paper].

[12] Press Release, U.S. Dep't of Justice, Assistant Att'y Gen. Charles A. James, Statement Regarding Proposed Amendments to the UK's Antitrust Laws (Nov. 28, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/9611.htm.

[13] White Paper, *supra* note 11, at Box 7.3.

[14] Sir A. Hammond & Roy Penrose, Proposed Criminalisation of Cartels in the UK—A Report Prepared for the Office of Fair Trading (OFT 365) , Nov. 2001, ¶ 2.11.

[15] The scheme established by Reg. 1/2003 confers a parallel competence on the Commission and the National Competition Authorities for the application of what are now Articles 101 and 102 TFEU. *See* Council Regulation (EC) 1/2003, arts. 3 & 5, 2003 O.J. (L 1) 1 (explaining the implementation of the rules on competition in Articles 81 and 82 of the Treaty).

[16] *Id.* art. 12.

[17] Case T-17/93, Matra Hachette v. Comm'n, 1994 E.C.R. II-595 (No anticompetitive agreement in principle incapable of benefiting from Article 101(3).)

[18] Hammond & Penrose, *supra* note 14, ¶¶ 2.5–2.6. It was never, however, explained why this required the insertion of the dishonesty component, the only option put forward.

case, the prime purpose of the Enterprise Act criminal legislation was to strengthen the UK's competition regime.[19]

Section 188(1) of the Enterprise Act provided: "An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement . . . arrangements of the [specified] kind relating to at least two undertakings." The arrangements specified in Section 188(2) are price fixing, market and customer allocation, and bid rigging.

Deterrence. Deterrence was the dominant theme of the criminalization project. Introducing custodial sentences would focus the mind of potential cartelists unmoved by the threat of corporate fines on their employers.[20] The optimistic prediction of six to ten major cases a year, originally floated in an independent report commissioned by the OFT from two retired public servants,[21] was soon abandoned. During the parliamentary debates, the Minister argued: "The point is not about how many people we send to prison . . . . We would rather that people did not end up operating cartels, but it is important if they do that we send a message, both to the individual and to society, that that is unacceptable and a serious offence."[22]

"Sending a message" came to dominate the drafting of the legislation itself, manifested in particular by the insistence on including "dishonesty" in the definition of the Offense.

But attitudes towards cartels in Britain were notoriously benign. In a bid to harden UK public and business opinion, the OFT assumed the "competition advocacy" role foreseen for it as part of the administration's bracing new regime. Ministers and senior officials robustly—if inaccurately—condemned cartel participation as "equivalent to theft."[23] "Sending a message" came to dominate the drafting of the legislation itself, manifested in particular by the insistence on including "dishonesty" in the definition of the Offense. Batting away a prescient question from an opposition spokesman who asked, "Is the message more important than whether the provision works?," the Minister riposted: "The message is important as it is part of the working of the provision. Of course the message is useful if it causes few cartels to be created . . . . Dishonesty is an important part of the provision. I agree with my hon. Friend that cartels are theft."[24]

Dishonesty. It is clear that for its advocates, the main purpose of the dishonesty component was to perform a declamatory function: the *Offense itself* was to be designed in such a way as to "demonstrate that it is a serious offence with effects which are harmful to the economy and to society."[25] Embedding "dishonesty" in the definition of the Offense was seen as the way to achieve that. If the objective, however, was to "send a seriousness message," framing the offense in a way that made it difficult for hard core offenders to escape conviction would also have served that purpose without legal complications.

Officials seemed to have believed the concept would make it *easier* to obtain jury convictions as well as to persuade judges to impose tough sentences.[26] Although the OFT insisted that dis-

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[19] IB v. R, [2009] EWCA Crim 2575.

[20] WHITE PAPER, *supra* note 11, ¶ 7.16.

[21] *See* HAMMOND & PENROSE, *supra* note 14, ¶ 3.6.

[22] MELANIE JOHNSON MP, HANSARD, HC, STANDING COMMITTEE B, ENTERPRISE BILL (Apr. 23, 2002) at col.169.

[23] Rt. Hon. P. Hewitt MP ("Cartels are theft from the customer and they ought to be treated as a serious criminal offence.") (*quoted in* Mary Fagan, *Doing Time or Paying Fines—Crackdown on Cartels*, DAILY TEL., Mar. 24, 2002, *available at* http://www.telegraph.co.uk/finance/2757594/Doing-time-or-paying-fines-crackdown-on-cartels.html); Margaret Bloom, Dir. of Competition Enforcement, Office of Fair Trading, Key Challenges in Public Enforcement, Speech Delivered to the British Institute of International and Comparative Law, (May 17, 2002) *available at* http://www.oft.gov.uk/shared_oft/speeches/spe0402.pdf.

[24] JOHNSON, *supra* note 22, at col.169.

[25] HAMMOND & PENROSE, *supra* note 14, ¶ 2.1.

[26] *Id.* ¶ 1.10.

honesty is "well understood in English law," for the leading commentators it is "a deceptively simple name for a complex concept."[27] Officials may have misunderstood the subtle role the notion had come to play in the evolution of the law of theft and fraud: in English law, "dishonesty" is conceptually not a characterization as such of the accused's conduct but relates to his or her state of mind.[28] It had never been intended to perform the condemnatory function the OFT conceived for it in the Offense. Far from going "a long way to preclude a defence argument that the activity being prosecuted is not reprehensible,"[29] as the advocates of dishonesty believed, its incorporation not only invites that very defense but also opens up the whole question of motive.[30]

In its official pronouncements, the OFT declared that the "test" for dishonesty would be the two-stage process set out in a leading Theft Act case, *R v. Ghosh*:[31] juries would have to ask themselves (a) whether what was done was dishonest by the standards of ordinary and honest people; and (b) if so, whether the defendant *realized* it was dishonest by those standards.

[A]s surveys show, there is no community consensus that price fixing equals turpitude.

The existence of dishonesty is supposed to be a question of fact from case to case. The OFT may not have fully appreciated that judges are not even allowed by the Court of Appeal (which assiduously polices the application in practice of *Ghosh*) to give the jury any real assistance with understanding what dishonesty means.[32] Indeed, in the theft/fraud context, the *Ghosh* jury instruction is discouraged in clear-cut cases as "likely to confuse": if the defense is simply "not dishonest," the direction is not supposed to be given.[33] It only comes into play at all in the rare case that a defendant argues that even if most people would think his conduct dishonest, moral obloquy should not attach as he did not realize others might take that view.[34]

As for dishonesty itself, the concept does call for the jury to make a judgment on where to place the defendant's conduct on the moral scale, but as the Court of Appeal judgment in *R v. Feely*[35] showed, it requires the jury to have a view on acceptable moral standards. It is entirely for the jury to decide what those standards are. Such shared standards may still exist when it comes to stealing or fraud, but as surveys show, there is no community consensus that price fixing equals turpitude.[36]

Supporters of the Enterprise Act appear to have equated hardcore cartel conduct with dishonesty, and indeed the explanatory notes to the supporting bill went so far as to suggest that bid rigging was automatically dishonest. What the then government may not have appreciated was

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[27] Anthony Arlidge & Jacques Parry, Arlidge & Parry on Fraud ¶ 2-002 (3d ed. 2007).

[28] R v. Feely, [1973] 1 Q.B. 530. A full Court of Appeal stopped in its tracks a tendency that had developed that a technical taking could be theft. The judicial policy informing the judgment was that given the stigma attaching to a conviction for theft or fraud, the criminal law should be slow to extend criminal liability to conduct which would not be condemned as dishonest according to conventional moral standards.

[29] Hammond & Penrose, *supra* note 14, ¶ 2.5.

[30] Joshua, *supra* note 10, at 625. *See also* Law Comm'n, Fraud: Report on a Reference Under Section 3(1)(e) of the Law Commissions Act 1965 (Law Com No. 276, CM 5560, 2002), ¶ 5.18.

[31] R v. Ghosh, [1982] Q.B. 1053. Even where the defendant admits that what he did was unlawful and that he knew it was, *Feely* and *Ghosh* allow him to seek an acquittal on the basis of any circumstances which the jury might be persuaded to view as justifying his conduct. Arlidge & Parry, *supra* note 27, ¶ 2-021.

[32] "We do not believe that judges should define what 'dishonestly' means. The word is in common use . . . Jurors, when deciding whether an appropriation was dishonest can be reasonably expected to, and should, apply the current standards of ordinary decent people." R v. Feely, [1973] 1 Q.B. 530 at 537–38 (Lawton, L.J.).

[33] R v. Price, (1989) 90 Cr. App. R. 409 (CA).

[34] *See, e.g.*, R v. Barrett, [1999] EWCA Crim 1587.

[35] R v. Feely, [1973] 1 Q.B. 530.

[36] Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain*, 5 Comp. L. Rev. 123 (2008).

that the introduction of this element opened the door to defense arguments that however deliberate and intentional the behavior, on the broader "moral" scale it had noble—or at least unobjectionable—motives. It follows from the whole construct of *Ghosh* dishonesty that it ultimately boils down to letting the jury decide whether the end justifies the means.

Immunity. The enforcement program under the Enterprise Act was also heavily dependent upon the institution of immunity. The corporate leniency system under the Competition Act 1998 already promised a free pass from fines to the first *company* through the OFT's door to denounce its fellow price fixers.[37] In a highly unusual innovation for English criminal jurisprudence, the mechanism was to be extended to co-operating individuals: section 190 (4) Enterprise Act provided for a guarantee of non-prosecution, a device that was later fleshed out by OFT Guidance notices on so-called "no action letters."[38] Individuals are required to make an express written admission of guilt—including the crucial component of dishonesty. The grant of no action letters to individuals in a criminal case is closely linked to their employer's application for civil immunity from Competition Act fines—a potentially unsettling factor that was to be fully exploited by the defense in the *Virgin* case.

The Enforcement Scheme: Rhetoric and Reality

The passage into law of the Enterprise Act was not supposed to be a "fire and forget" weapon. In the OFT's grand enforcement vision, a virtuous and self-perpetuating circle of hardening public opinion, immunity applications, carefully selected prosecutions, easy convictions and exemplary prison sentences would turn Britain from a cartel-friendly jurisdiction into the scariest place in the world for them to do business.

While the criminal regime was designed to operate alongside the existing Competition Act system of administrative fines on companies, criminal prosecution was not to be the default mode in the range of enforcement options available to the OFT.[39] Officials insisted that criminal powers would, however, be systematically deployed against the worst offenders. According to one senior official, criminal prosecution would be reserved for "the really hardcore cartels with evidence of deep dishonesty," citing as an example the scenario of bogus trade association meetings with false agendas and fictitious minutes as an elaborate cover for deliberately fixing prices.[40]

In May 2002 another OFT Director issued the following Mission Statement: "[W]e will select carefully the cartels for criminal prosecutions, concentrating on the serious ones. We expect that there will be a relatively small number of prosecutions—but they will have significant deterrent effect. The first prosecutions will reach the courts in a few years."[41]

Whatever the promises of "careful case selection," the OFT's enforcement agenda has seemed at best erratic. Since 2005, senior officials were issuing dire warnings to the construction indus-

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[37] OFT'S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY (OFT 423) (Dec. 2004), *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf.

[38] The latest being LENIENCY AND NO-ACTION: OFT'S FINAL GUIDANCE NOTE ON THE HANDLING OF APPLICATIONS (OFT 803) (Dec. 2008), *available at* http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf.

[39] WHITE PAPER, *supra* note 11, ¶ 7.37.

[40] Adrian Walker-Smith, Dir. of Cartel Enforcement, Office of Fair Trading, *quoted in* Michael O'Kane, Understanding Current Regulator Approaches and Managing Regulator Relationships: International Anti-Cartel Enforcement, Speech Before the C5 European Forum on Conducting, Managing, and Responding to Internal and Regulatory Investigations (June 25, 2008).

[41] Bloom, *supra* note 23.

try to expect criminal prosecutions in the pending investigation of suspected bid rigging, inviting implicated individuals to come forward as the only way to be safe from charges.[42]

No prosecutions of individuals were brought in the construction investigation, even for explicit examples of unalloyed bid rigging.[43] Despite the allegations of "compensation" payments disguised by raising false invoices, officials apparently doubted privately whether dishonesty could be proved. According to an Australian commentator, "[t]he OFT decisions . . . highlight the dangers of loss of credibility and compromise of deterrent impact where an enforcement agency describes a cartel case as serious yet gives no explanation, or an unconvincing explanation, for not bringing criminal proceedings."[44]

The guilty pleas secured from three executives and heavy prison sentences in *Marine Hose* in 2008[45] provided the OFT program with a temporary boost but still left unresolved many of the troublesome questions surrounding the cartel offense.

Absent the indicia of "deep dishonesty" to which the OFT had pointed in public pronouncements, the prosecution came close to implying that any deliberate breach of competition rules was dishonest.

The BA Prosecution

The trial was due to last as long as six months. Following a defense challenge to the Court's jurisdiction, the OFT may have felt vindicated by the preliminary ruling of the Court of Appeal in *IB v. R* that as a stand-alone offense, section 188 did not implicate the complex rules in regulation No 1/2003 regulating the relationship between national authorities and the Commission on the administration of Articles 101 and 102 TFEU.[46]

A defense submission that "mutuality of dishonesty" was required was also rejected. On the express wording of Section 188, it was only necessary for the accused, not both sides, to have "dishonestly agreed."[47]

Given that the case outlined to the jury by the prosecution did not involve much more than bilateral telephone calls between the alleged conspirators, the issue of dishonesty would clearly have been central to the defense.[48] Absent the indicia of "deep dishonesty" to which the OFT had pointed in public pronouncements, the prosecution came close to implying that *any* deliberate breach of competition rules was dishonest. Much was made of the accused ignoring BA's rigorous compliance program. But as the Court of Appeal had held in *IB v. R*, an infringement of Article 81 (or the Competition Act) including via an agreement within section 188(2) "could easily occur without any hint of dishonesty."[49] The Court abstained in *IB* from expressing any opinion on the effect of deliberate secrecy.

Although the prosecution tried to dismiss the multiple disclosure failures as a "technical issue," the problem was more deep-seated and arose from the OFT's administration of the leniency

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[42] *See, e.g.*, Simon Williams, Competition Enforcement in the UK and the Impact of UK Criminalisation, Paper Presented at the IBC Advanced Competition Law Conference (Apr. 27–28, 2005).

[43] Case CE/4327-04, Bid Rigging in the Construction Industry in England, OFT Decision CA98/02/2009 (Sept. 21, 2009), *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/general/CE4327-04_Decision__public_1.pdf.

[44] Brent Fisse, Recent OFT Cartel Decisions Illustrate Fundamental Flaws in UK Cartel Law 5 (Oct. 7, 2009), *available at* http://www.brentfisse.com/images/Fisse_Recent_OFT_Cartel_Decisions_041009.pdf.

[45] R v. Whittle, [2008] EWCA Crim 2560.

[46] IB v. R, [2009] EWCA Crim 2575.

[47] R v. George, [2010] EWCA Crim 1148.

[48] It was established by another preliminary ruling (*see id.* ¶ 6.) that the *Ghosh* test would be applicable, which might have raised a whole new set of intriguing questions.

[49] IB v. R, [2009] EWCA Crim 2575, ¶ 27.

regime itself. Had the trial proceeded to the hearing of witnesses, defense counsel would have moved for dismissal on the ground that "this whole investigation had been skewed by the leniency regime."[50]

With the collapse of the trial before any evidence was heard, prosecuting counsel never had to address the dilemma of inviting the jury to accept as evidence of the truth against accused of good character, who denied they were dishonest, the testimony of witnesses who had signed admissions of dishonesty.[51] Defense counsel had neatly encapsulated the conundrum thus:

> So it is the world turned upside down. If you say you are honest in making an agreement, then you may go to prison. If you say you did nothing wrong, then you're at risk of being charged but if you say you were dishonest, then you and your company will not be punished, you will keep your job.[52]

The OFT's warning in the wake of the collapsed trial that it might withdraw corporate immunity from VA[53] could be mere sabre-rattling: it is not clear how charges could be made to stick based mainly on VA's own confession. After the exposure of the gaps in the evidence during the criminal trial, BA is hardly likely to step forward now to support the OFT's case that there was an infringement by the company under the Competition Act 1998. Intriguingly, on the very eve of the trial, the OFT announced that it had launched civil proceedings against VA under the Competition Act for an alleged agreement to fix the fuel surcharge on Asian routes.[54] This time it was Cathay Pacific that had won full immunity for blowing the whistle on VA in 2007. Although VA vigorously denies the allegations, and the OFT says it has no grounds for bringing any criminal charges, the revelation would have done nothing to enhance the credibility of the prosecution or its witnesses on cross-examination.

While the four exonerated individuals remain as carve-outs in BA's plea agreement with the DOJ and should no doubt be wary of any U.S. border watch or Interpol Red Notices, their acquittal is an absolute bar to extradition proceedings in Britain.[55]

Lessons

It is no exaggeration to say that the failed prosecution has left an intractable enforcement muddle with implications extending far beyond the case itself. Both immediate and longer term lessons may be drawn from the debacle.

Despite the manifest prosecutorial failures, the outcome was a vindication of the adversary system of trial. As in the United States, the key to a successful defense strategy lies in defense counsel insisting on maximum prosecutorial disclosure and being able to sift through and analyze a

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[50] Trial Transcript, April 29, 2010, at 48. Defense claims that the potential prosecution witnesses were given an easy time in their interviews by the OFT seem to have had some substance. Given that their only admissions of dishonesty were in the signed copies of the "no action letters" returned to the OFT by Virgin's lawyers, the defense wanted to probe whether they had been encouraged to make the admissions because of the advantages it gave them or their employer. Documents that might provide the "context" for the manner in which the investigation had been conducted were, however, met with claims of privilege from Virgin's lawyers and not provided by them to the prosecution.

[51] The retraction in the witness box of their admissions of 'dishonesty" despite the risk of losing their immunity (a prospect raised by the prosecution) would have provided a double twist to the conundrum.

[52] Trial Transcript, April 29, 2010, at 30.

[53] OFT Press Release 47/10, *supra* note 2.

[54] Press Release, Office of Fair Trading, OFT Issues Statement of Objections Against Cathay Pacific Airways and Virgin Atlantic (OFT Press Release 41/10) (Apr. 22, 2010).

[55] Extradition Act 2003, Sec. 80.

vast number of documents that could allow an effective challenge of immunized witnesses.[56] If there ever is another prosecution for the Offense, future defendants who maintain their innocence should have no fear of getting a fair trial.

The judge took firm and active control of the proceedings. And even though dishonesty was never put to the test, the prosecution surely faces an uphill task attempting to persuade a jury to convict based on the testimony of witnesses who have admitted their own dishonesty to escape jail. In the United States, where there is no requirement of dishonesty in Section 1, the Department of Justice has suffered a series of losses at trial in the past few years,[57] an important factor being the jury's negative view on deeply involved cartel members testifying against lower level employees in exchange for a reduced sentence.

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With the benefit of hindsight, BA could now be reflecting on its decision to go for early settlement on both sides of the Atlantic. No doubt it is difficult to resist the might of the Justice Department in a criminal investigation, but administrative agencies do not have the cards so well stacked in their favor. The OFT insists there is no reason to revisit the civil proceedings, but the newly revealed emails may well cast the facts in a different light.[58] As for the plea agreement with the DOJ, likely few companies ever find it worthwhile going to trial in the United States, but with no fewer than twelve individuals "carved out" of the plea agreement in the two cases, it is not as if the DOJ had been exactly generous.[59]

VA may now be regretting what might at the time have seemed a smart competitive move. It is finding out that immunity is no panacea. It could now face being fined not once but twice. Did its denunciation of BA trigger the Cathay application? Companies considering the attractions of going for immunity should get a handle on their own total exposure risks before opening Pandora's Box. The OFT might also need to explain why it does not seem to have asked VA the "omnibus question"[60] that is an essential weapon in the DOJ's arsenal.

The OFT might have paid better heed to its own case selection criteria. The Offense is supposed to be reserved for the "worst cases." Despite official insistence that the prospects of conviction were carefully weighed, it is difficult to imagine a less suitable case for the new Offense's first outing before a jury. Where was the "deep dishonesty" the OFT says is required? The contrast between the OFT's treatment of the construction industry—relatively modest corporate fines for bid rigging—and prosecuting the BA executives on thin facts could not be sharper. The OFT should have been alerted too by the worrying asymmetry of its prosecution. The apparent injustice of one-

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[56] As in the United States: *see* Robert H. Bunzel & Howard Miller, *Defending "The Last Man Standing": Trench Lessons from the 2008 Criminal Antitrust Trial,* United States v. Swanson, ANTITRUST SOURCE, June 2008, at 1, http://www.abanet.org/antitrust/at-source/08/06/Jun08-Bunzel6=26f.pdf.

[57] *See, e.g.*, United States v. Northcutt (Marine Hose) (S.D. Fla. 2008), where following a four week trial in which the cartel protagonists testified for the government the jury acquitted a junior employee after only two hours deliberation. News Release, Carlton Fields Attorneys, Nov. 11, 2008, *available at* http://www.carltonfields.com/newseventspubs/news/Detail.aspx?news=759.

[58] Alistair Osborne, *OFT to Pursue BA over Civil Fine*, DAILY TEL., May 12, 2010, *available at* http://www.telegraph.co.uk/finance/newsbysector/transport/7712896/OFT-to-pursue-BA-over-civil-fine.html.

[59] For the U.S. Plea Agreement, see Plea Agreement, United States v. British Airways, No. 07-183 (D.D.C. 2007), *available at* http://www.justice.gov/atr/cases/f225500/225523.htm.

[60] Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Cornerstones of an Effective Leniency Policy, Speech Delivered at the ICN Workshop on Leniency Programs (Nov. 22–23, 2004). ("We will ask executives, who are subpoenaed and compelled to provide sworn testimony under penalty of perjury, not just about their knowledge of price fixing in the market under investigation, but whether they have any information of any cartel activity in any other markets as well. This last practice is commonly referred to as the "omnibus question.").

half of the alleged cartel going unprosecuted in exchange for denouncing its main business rival would not be lost on a jury.

Did the OFT delegate its disclosure responsibilities to lawyers representing VA's interests? While it has acknowledged responsibility for its part in what it called "this oversight," the OFT claims that they occurred at a time when the UK criminal cartel regime was still relatively new and its approach to the handling of leniency applications in parallel criminal and civil investigations still evolving.[61] Yet the prosecution had four years to get its case in order. In what sounds like a classic example of shutting the stable door after the horse has bolted, the OFT announced after the collapse of the trial that it was reviewing its procedures "as regards the way in which the OFT interacts with leniency applicants and their advisers, including how it obtains electronic material and other evidence from them."[62] Indeed, depending as it does almost entirely on immunity, the whole structure of the criminal enforcement regime needs urgent examination. But there is a deeper structural problem with leniency: the tangle of corporate and individual interests opens the system to charges that immunized witnesses could tailor their recollections to suit their employer.

And will juries ever warm to the inherent fairness deficit? We may never find out. Even if the OFT manages to retain its criminal jurisdiction, after the BA debacle it is unlikely to risk bringing another prosecution any time soon. A strong case can be made for criminalizing hard core cartels.[63] However, for many, the Offense looks like a dead man walking. The best place for it may be the new government's promised bonfire of pointless legislation. ●

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[61] OFT Press Release 47/10, *supra* note 2.

[62] *Id.*

[63] For an early example, see Gregory J. Werden & Marylin Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917, 917 (1987).