Does prison work for cartelists?
The view from behind bars

The Journal of American and Foreign Antitrust and Trade Regulation Bulletin
On May 2, 2007, the United States Department of Justice (DOJ) arrested eight foreign executives in Houston, Texas, in relation to alleged cartel conduct in the market for supply of flexible marine hoses. On December 3, 2007, the DOJ filed a one-count felony charge that from early 1999 to May 2007, the defendants participated in a conspiracy, the primary purpose of which was to suppress and eliminate competition by rigging bids, fixing prices and allocating market shares for sales of marine hoses in the United States. In furtherance of the conspiracy, it was alleged that the defendants attended meetings and engaged in discussions with executives from other marine hose manufacturers. On conviction for a violation of section 1 of the Sherman Act of 1890, each of the defendants could have faced a max.

AN INTERVIEW OF BRYAN ALLISON

The view from behind bars
Does prison work for cartelists?

MICHAEL O'KANE

Head of Business Crime Practice, Peters & Peters
Member of the Law Society of England & Wales
LLB (Lions) Manchester Metropolitan University 1992
B.A. Kent University 1976
maximum of ten years imprisonment; Meanwhile, in the United Kingdom, the Office of Fair Trading (OFT) launched a simultaneous criminal investigation into suspected cartel conduct in relation to that country's market for marine hoses.

The U.K. executives, Bryan Allison, David Brammer, and Peter Whittle, admitted guilt in the United States and agreed to jail sentences under a plea bargain. However, the DOJ allowed them to return to the United Kingdom on condition that they plead guilty to the U.K. cartel offense and that they return to the United States if their U.K. sentences were shorter than those agreed to under the plea agreement. The deal was unprecedented in international criminal law enforcement and was achieved through the defendants' full cooperation with the U.S. and U.K. authorities. They were returned to the United Kingdom in handcuffs by the U.S. Marshals Service on December 17, 2007. Upon their arrival at Heathrow, they were arrested and charged with the U.K. cartel offense. On Wednesday, June 11, 2008, the three executives were sentenced to serve terms of imprisonment of between thirty months and three years for their roles in organizing the cartel. Bryan Allison received a term of three years' imprisonment, subsequently reduced on appeal to the two years set out in his plea agreement. Through this agreement, not only was the OFT able to initiate the first criminal prosecution under the Enterprise Act: 2002 in the United Kingdom, but the DOJ also obtained guilty pleas and agreed sentences that will carry a powerful deterrent message in the United Kingdom, the United States, and elsewhere.

In 2004, the statute was amended to increase the maximum term of incarceration from three to ten years imprisonment. See 15 U.S.C. § 1 (2010).


INTERVIEW: DOES PRISON WORK?

In this interview with Michael O'Kane, the lawyer who brokered the agreement in the Marine Hose case, Bryan Allison shares his experience of the proceedings against him as well as his views on the role of criminal process in deterring international cartels.

Bryan, can you begin by describing what happened at the moment of your arrest in the hotel room in Houston?

It was five in the morning, on May 2, 2007, and I was up doing some work when the phone went. It was reception and they said the police were there to see me. I thought that's a bit odd and, because I had had an accident in the car the previous day, I thought it must be that. My mind was thinking, why is the road traffic officer coming to speak to me at five o'clock in the morning? Anyway there was a knock on my door, and I opened it.

So it never occurred to you it was anything to do with the cartel?

Never. Six men came in, five with guns and Craig Lee, the DOJ trial attorney. [Lee is a staff attorney within the National Criminal Enforcement Section of the Antitrust Division of the U.S. Department of Justice. The police were special agents of the Inspector General's Office of the U.S. Department of Defense.] I was instantly handcuffed and made to sit down in a chair. I was bewildered, thinking what the hell is going on here? Craig Lee started talking. He said I was in a meeting yesterday and then showed photographs of me at the meeting. As soon as I saw these photographs I thought the game was up. There was no point in pretending I haven't done anything.

Even then the enormity of what I'd done hadn't quite dawned on me. The questioning went on for about an hour, in my hotel room, back and forth. I was allowed to get dressed before we descended the stairs with me in handcuffs and marched through the lobby, very politely, and stuck in the back of a police car. I was taken downtown.

In this interview with Michael O'Kane, the lawyer who brokered the agreement in the Marine Hose case, Bryan Allison shares his experience of the proceedings against him as well as his views on the role of criminal process in deterring international cartels.
was the great of some of the pathfinders. If they hadn't been so
was the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
were the great at some of the pathfinders. If they hadn't been so
null
thing. Isn’t that a little unethical? There is nothing could be more
crazy than a convicted criminal talking about ethics, so I understand
the conundrum I am in. However I really didn’t feel that we could go
around “grassing people up.” I just didn’t think that was on.

For the cartel to survive as long as it did there has to be a certain element of
trust among all the participants that they all will subscribe to the same ethi-
cal standards you mentioned. Did you have that degree of confidence in
everybody else?

I had a reasonable degree of confidence in the Europeans. I was
always a little wary of the Japanese but remember all communications
were filtered to me. I never had any direct access to any of these peo-
ple really. I never spoke to them on the phone or met them. Every-
things I got was filtered through Peter Whittle who was the
coordinator of the cartel. He would receive the tenders from compa-
nies and would then administer the cartel by ensuring that particular
companies won the tender through a rigged bidding process. In addi-
tion he coordinated the creation of global price lists. Who would tell
people what they largely wanted to hear and who was basically run-
ning the cartel for his own ends rather than the benefit of the mem-
bers, I never got the full picture and I readily admit I didn’t ask the
right questions. I probably wasn’t armed to ask the right questions,
and I probably wouldn’t have got told the truth if I did. I trusted oth-
ers implicitly as my conduit to the cartel, and that was trust that was
essentially misplaced. I only had to really trust one person in a sense.
The consequences of doing that are well known.

The automatic immunity regime was introduced to destabilize cartels, to
impair the trust among the cartel participants. What are your views on the
fairness of the regime and its effectiveness as a deterrent?

The authorities have to get one of the participants to come in and
tell them what the cartel was up to. How else are they going to uncover cartels? If
you want to protect people from cartels, I fully understand why that
is done. But again, taking some sort of moral high ground, which is
obviously tricky, it doesn’t seem right that by dumping everybody
else in the mud you can get away with it. Especially when, clearly in
some of these incidents, the people that have gone to the authorities
clearly in some of these incidents, the people that have gone to the authorities
didn’t go because they were aware of cartel activity. They just went be-
cause they knew they had done something illegal, and they wanted to
protect people from cartels. I apply the automatic immunity regime
you tell people that is going on here are they going to be able to uncover cartels?

I think it goes against the principle that some people may be,
immoral, but I don’t think the regime is justified.

The automatic immunity regime was introduced to destabilize cartels, to
impair the trust among the cartel participants. What are your views on the
fairness of the regime and its effectiveness as a deterrent?

The authorities have to get one of the participants to come in and
tell them what the cartel was up to. How else are they going to uncover cartels? If
you want to protect people from cartels, I fully understand why that
is done. But again, taking some sort of moral high ground, which is
obviously tricky, it doesn’t seem right that by dumping everybody
else in the mud you can get away with it. Especially when, clearly in
some of these incidents, the people that have gone to the authorities
didn’t go because they were aware of cartel activity. They just went be-
cause they knew they had done something illegal, and they wanted to
protect people from cartels. I apply the automatic immunity regime
you tell people that is going on here are they going to be able to uncover cartels?

I think it goes against the principle that some people may be,
immoral, but I don’t think the regime is justified.
argue their case, and twelve good men and women decide whether you are guilty or not. At least they have the opportunity to weigh the evidence. I was always of the view that if I had been caught in the United Kingdom I might have had a case in court. But whether I had or not was perhaps a little wishful thinking on my part. In the United States we were clearly bang to rights, and there was no point in arguing; any defense was to get away with the least we could. There wasn't any real alternative. I think if we had gone to court maybe a clever defense lawyer could have got us off by finding out some flaws in the case. But we saw in other cases defendants having to wait eighteen months for their day in court. That was a hell of a long time.

Do you think that in the absence of an immunity regime the cartel would ever have been detected?

The cartel actually was detected because they caught one of the participants in another cartel and, in order to get out of that one, one of the people that was due to be prosecuted gave up the marine hose. If we hadn't been caught would it have carried on? Yes, I think it probably would for a while.

Now that I understand what has gone on, the cartel was starting to fall apart, that's quite clear. The Japanese were getting very cold feet and wanted to find a way out of it. It's quite clear that at some stage there would have been a move to China and low cost production by one of the participants and that, I think, would ultimately have sounded the death knell of the cartel. So the short answer is, it would have carried on for a while but ultimately would have died.

Before you knew there was a possibility to agree a deal with the U.S. authorities, can you remember what you wanted your position to be given the potential penalties and your options at the time?

"This reference suggests that the immunity applicant sought "amnesty plus;' under which a person or entity obtains a reduction in sanctions for its cartel conduct in return for bringing another cartel to the attention of the authorities. The applicant then obtains immunity for its conduct in this "new" cartel. See general Thomas O. Barnett, former Assistant Att'y Gen., Antitrust Div., U.S. Dept of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model, Address at Fordham Corp. Law Inst., New York (Sept. 14, 2006)."

I remember very clearly the judge saying we could get up to ten years and my lawyer in the United States, Mike Ramsey, saying that he thought I was very likely to get significantly less. His guess was that I would spend a year in jail and that was reasonably comforting although, like all lawyers, he put that in some quotation marks and caveats. On my own volition I started looking at what had happened in previous cases, seeing how long people had got, what the outcomes were and so on, and I was starting to get a sense of what was going to happen. I suppose one starts to relax a little bit that the first inklings you have of some terrible outcome probably won't come to pass and, by that stage, you are in a position to be able to talk to your family and reassure them that things weren't actually brilliant but at least we were out. The first thing was to get out of jail. So you imagine the worst and you prepare for the worst, as you should do being a sensible person, hoping that the worst won't happen. You have to be prepared for something pretty unpleasant coming towards you, and I certainly slept very badly in the United States.

It was a bizarre existence. We were confined to the apartment between the hours of 10:00 at night and 6:00 in the morning, and I was walking up and down the streets by 6:00 and walking in the morning. I was afraid to eat anything well in the United States.

What were your priorities at that time?

My priority was just to get back to the United Kingdom. That was key. After about four or five days of being released, it became clear there was a possible deal on offer to go back to the United Kingdom. That was a huge relief.
can lawyers. They told me that I was being offered two years and that we had to pay fines. That came through fairly early, and then there was the long period of negotiation to try and get the return to the United Kingdom, without us having to spend any time in custody in the United States. That really seemed never ending. We would wake up each morning hoping something would be through on the email and we read emails two or three times to see if we could scan some hidden meaning in them, which there wasn’t. We felt we had to search every single new email and document like some crazed scholars rereading the Koran or the Bible to try and interpret it in the way that they wanted. I don’t think we found a way of coping with it but it was a peculiar time.

In general terms, what do you feel about the process in the United States as opposed to the process in the United Kingdom? Some say the nature of the U.S. system puts intolerable pressure on people to enter into agreements they perhaps otherwise wouldn’t. Others say it encourages people to admit that they’ve engaged in wrongdoing to get it over with quickly and put it behind them.

I think there is considerable pressure on you to do a deal. I am not suggesting that innocent people would do a deal, although I could see that some people might just do that to get back home. I can recall well going into court for the first time in the United States and the judge telling us this had a maximum term of ten years. Your face drops at that ten years. It was pretty frightening faced with the possibility of ten years. I thought if somebody was going to offer me eighteen months or two years, I would take it. Thanks a lot, let me get out of here. It’s almost like an insurance policy. The concept of spending even five or six years in a U.S. jail, even done, was pretty frightening.

I’m not a big fan, even though I’m a beneficiary, of the plea bargain system. I don’t necessarily think it gets at the truth. I’m not even sure it gets at guilt or innocence. There is extreme pressure on people to settle simply because it’s the lesser of two evils, to avoid the risk of a very lengthy prison term when you could get away with perhaps a fifth or a sixth of that. It puts great pressure on people to just get it over with and get on with their lives. The DOJ would say very clearly that this gets results: “Our conviction rate as a consequence of this is very high.” Yes it is, but it’s not a system that I would be very happy with.

At that time, I would have probably paid it to avoid going to jail. It’s very alien for ostensibly respectable middle class people like me, university educated, never been in trouble before, to suddenly be faced with the prospect of going to jail. Nobody in their right mind would want to go to jail. It’s a pretty unpleasant place. If somebody had said to me you can avoid going to jail by paying a bigger fine then I would probably have paid it. But that is because you are frightened. All of a sudden you are faced with this terrible thing especially in the United States. The image of a U.S. jail is not pleasant. Certainly, unlike the Shawshank Redemption, Morgan Freeman isn’t there to hold your hand. You are frightened to death of what’s going on, and the desire to do a deal, I think, is overwhelming. If you can avoid going to jail, you will.

What was particularly frightening about the prospect of going to jail?

The unknown, I guess, and the image of prison. It’s really not a normal standard ledger. That is not what it is like. So the fear of the unknown and the fact that your personal reputation is shredded, it’s in tatters. Even though I didn’t have any personal gain, and that was accepted by everybody, there is no smoke without fire, is there? You have clearly broken a law. I recall somebody saying to me, “What you have done, was it really that bad? Does it deserve this jail sentence?” at which I shrugged my shoulders saying, “Well, the law believes so, I suppose.”
personal damage, be it time, be it money, be whatever it is, is too great to allow yourself to worry about what will happen to other people. That's a terrible sentence to come out with, it really is. I would never ever do it again, and I wouldn't recommend to anyone that they do it. The loss to you in terms of your life is too great. Nobody will appreciate it afterwards. For people to do what they think is the right thing can sometimes cost them, and in my case I guess it wasn't that serious, I lost a few months or a year or two of my life but I certainly wouldn't recommend anybody to go down the route of cartels.

Do you think that people in certain industries have a cultural perception that this sort of cartel behavior is necessary for industries to continue to be competitive and survive?

I don't think peoples' attitudes have changed that much. The primary function if you are a businessman is to make sure your business survives, and to some extent people almost do anything in order to achieve that. I think what's changed is, first of all, manufacturing is disappearing from the United Kingdom and it's disappearing from Europe. It's all moving to the Far East. The internationalization of business, the globalization, means that the world has changed around the people who are still operating manufacturing industries in the United Kingdom. Their competition is not so much within Europe. It's the Far East where cost is much lower and so it's much more apparent to them that they have to be competitive in order to survive. It's the international landscape that's changed rather than people's cultural attitudes.

One can think of scenarios where price fixing is actually for the benefit of a particular industry or for the benefit of a country. Do you think it's too simplistic to say that price fixing is always dishonest, it's always wrong?

I guess I'm biased but I do not go down whole-heartedly the route of being dishonest. I think the majority of people causing cartels are usually doing it not for personal gain but for their firm, for their business. I don't think from what I've seen that many individuals are doing it for their own ends. They are doing it because it's expected of them, because they've always done it, or because it's the only way they are going to survive. I don't view it as dishonest. I can distinctly recall when the OFT interviewed me they said, "Do you accept that your behavior was dishonest?" I knew I had to say yes in order to get the deal, but I stick in my head having to say yes in order to..."
Bryan Allison was released from his prison term in March 2009. The Marine Hose deal, as it became known, was acclaimed as setting a precedent for dealing with cross-border cases involving foreign defendants. It remains to be seen if this is the case, but it clearly put the spotlight on issues surrounding international cases involving foreign defendants. Issues surrounding how to deal with defendants caught in cartel conduct that affects more than one jurisdiction will become increasingly important as cartel conduct is criminalized in more and more countries.

I'm planning to do well with my swing, no.