# Moving in the right direction

## A look at the future of criminal cartel trials

*by* ***Michael O'Kane*** *and* ***Rebecca Meads****

In June 2003, the UK government criminalised cartel activity by enacting section 188 of the Enterprise Act 2002. The intention was to target culpable individuals and, in doing so, deter the most serious and damaging forms of anticompetitive conduct, as a necessary complement to the civil fines regime, which, on its own, did not go far enough in discouraging anticompetitive criminal agreements.

A key requirement of the statutory offence was the need to prove that the alleged cartelists had entered into a "dishonest" agreement. The rationale for the inclusion of "dishonesty" as an element was to assist in validating the seriousness of the offence and to meet any arguments that the activity being prosecuted may have had economic benefit and was therefore not reprehensible. It was hoped that this would make the issues clearer for jurors and encourage convictions, while also ensuring that judges would impose robust sentences commensurate with the level of harm caused.

Since 2003, the UK competition regulators (initially the Office of Fair Trading and, since 1 April 2014, the Competition and Markets Authority (CMA)) have struggled to secure convictions. This was highlighted in the recent *Galvanised Steel Water Tanks* case in which two of the three defendants were acquitted (while the other pleaded guilty). The acquittals were widely perceived to be a consequence of the difficulties associated with proving the "dishonesty" element of the offence.

While not retrospective – and therefore of no application to the *Galvanised Steel Water Tanks* case – on 1 April 2014, the "dishonesty" element of the offence was removed by the Enterprise and Regulatory Reform Act 2013. The anticipated effect of removing the dishonesty requirement was that it would be easier to secure convictions. As of yet, no cases involving the new offence have been prosecuted.

In the period running up to the removal of "dishonesty" from the criminal offence, much commentary was devoted to the problem of having to prove dishonesty in any cartel prosecution, where often no personal gain has been made by the cartelists. However, one barrier to successful prosecutions that has been frequently overlooked is the potential unfairness in the eyes of the jury of a cartel participant receiving automatic immunity from prosecution

### Track record of enforcement

Since the inception of the criminal cartel offence, there are believed to have been just 10 formal criminal investigations commenced. Only four have proceeded to prosecution. To date, all of the convictions have resulted from guilty pleas:

- In the 2008 *Marine Hose* case, all three defendants pleaded guilty following plea negotiations in the US;
- In the 2010 *BA/Virgin Passenger Fuel Surcharge* case, all four defendants were acquitted prior to the jury hearing the case (the jury were directed to acquit);
- In the 2015 *Galvanised Steel Water Tanks* case, one defendant entered a guilty plea and the remaining two defendants were acquitted; and
- In the 2016 *Concrete Drainage* case, the sole defendant to have been charged to date pleaded guilty.

Of the above four prosecutions, the *Galvanised Steel Water Tanks* case is the only one to have made it to a full jury trial. It arose from a 2012 OFT investigation into suspected cartel conduct over the supply of galvanised steel tanks in the UK. Three individuals were charged and one of the individuals, Mr Snee, pleaded guilty after co-operating with the CMA. Along with a representative of the immunity applicant company, he gave evidence as a witness against his co-defendants. They were acquitted and the CMA largely attributed these acquittals to the need to prove that the anticompetitive behaviour was entered into dishonestly. After this case, the CMA dropped all but one of its investigations (which resulted in the prosecution of the *Concrete Drainage* case, referred to above). Currently, the CMA has no ongoing criminal cartel investigations.

### Immunity concerns

According to the UK's National Audit Office, over half of the cartel investigations opened by the UK competition regulators since 2010 have been predicated upon immunity applications. They are a significant feature of cartel enforcement and a key source of intelligence for the CMA. However, the granting of immunity may act as double-edged sword, as although this leads to the uncovering of cartel conduct, the very means by which they do this (whistleblowers being granted immunity) may be a significant contributor to the issue of securing convictions.

Unlike any other area of criminal law, immunity from criminal prosecution for the cartel offence is automatic if the CMA is informed of the conduct before it has knowledge and certain clear conditions are complied with by the applicant. The justification for such an exception is the difficulty in obtaining evidence of secret cartels. In practice, the application is very often made by the company and, if successful, it provides blanket immunity to all current and ex-employees. Conditions for the grant of immunity include:

- an admission of participation in the cartel conduct;
- continuous and complete co-operation; and,
- the provision of information including documents and evidence of the conduct and possible leads or sources that the CMA may wish to pursue and that genuinely assists the investigation.

The applicant must also immediately refrain from further participation in the conduct, and must not have coerced another business to take part in the activity. If it has engaged in coercion, then it will only be able to avail itself of Type C immunity,

* *Michael O'Kane is a partner in – and Rebecca Meads is an associate with – Peters & Peters LLP*

where the level of protection is limited to discretionary corporate leniency reductions in financial penalties of up to 50%, discretionary immunity from criminal prosecution for specific individuals and director disqualification protection if a corporate leniency reduction is granted.

This process presents two clear problems for cases that come to trial. First, the immune prosecution witnesses have often played no role in the decision to apply for immunity taken by the company. In numerous cases, it has been shown that the immune witnesses are often very reluctant, at the initial stages of an internal investigation, to admit fully to their complicity. In one UK prosecution, this led to the jury being told that the immune prosecution witnesses may not even accept that their conduct was dishonest, despite those witnesses having made an admission to that effect in writing some months earlier. In other areas of criminal law where immunity is available – for example, under an agreement under the Serious Organised Crime and Police Act 2005 (SOCPA) – the witness is heavily involved in the decision to apply for immunity and then goes through a "cleansing" process of full admission and often expressions of contrition. A jury in such a case is naturally better able to understand the motivation of the witness when testifying, than in a cartel matter where immunity has been conferred on the witness often through little or no effort of their own and where a clear benefit is being bestowed on them and their company against a competitor in the marketplace.

Second, immunity outside the cartel context (for example, under SOCPA) only occurs if it is in the public interest. There is no such test for cartelists. So a key member of a cartel, an orchestrator or instigator can be immune, thereby escaping prosecution, and then become a witness against a more peripheral member of the cartel. Many jurors may consider there to be a profound unfairness about such an outcome.

This issue was recognised recently by the senior director of the cartels and criminal group at the CMA, who commented that:

> "… in any criminal case involving immunity or in which a defendant has offered to co-operate and give evidence, these issues will need to be given careful consideration when weighing up the prosecution strategy, including which witnesses to call and therefore the extent to which the prosecuting authority chooses to rely on immune witnesses."

In the US, the acquittal rate in contested cases remains high, with one defence counsel commenting that the acquittals:

> "show, in part, the danger to prosecutions in which the Department of Justice makes deals with the most culpable parties and then uses these people as witnesses against innocent defendants. It also shows that the trial remains the great equaliser when in search of justice, and that our jury system is alive and well."

Further support for this concern comes from a review conducted by Warin, Burns and Chesley of a decade of criminal antitrust trials, which found that reliance by government agencies on immune witnesses:

> "… arms defence counsel to argue that the jury's sense of fair play and justice should be offended by the disparate treatment. It is not difficult to understand why juries simply do not like to rely on witnesses who have not had to accept responsibility for their own conduct and who have an obvious incentive to blame others in order to escape punishment."

This perspective is supported by a 2015 study by Professor Andreas Stephan at the University of East Anglia into public attitudes towards price-fixing and cartel enforcement. Over 10,000 people were surveyed across the UK, Germany, Italy and the US. The survey revealed that despite 74% of Britons agreeing that price-fixing was harmful, only 53% (the highest percentage out of all the countries surveyed) agreed that providing immunity to a guilty party justified the means (interestingly, exactly the same percentage of Britons were aware that price-fixing is a crime in the UK). Significantly, however, only 27% of those surveyed believed imprisonment was an appropriate punishment for this type of offending. The figures for the remainder of the jurisdictions surveyed were not very encouraging in this regard either, with Germany 28%, Italy 26% and USA 36%. The US figure is particularly interesting, given that it has a level of criminal enforcement against individuals that exceeds the rest of the world put together – they have been prosecuting this offence for the last 100 years, and very aggressively in the last 20 years. Yet public perception in the US that such conduct is harmful to the extent that it warrants imprisonment is troublingly low.

A similar 2010 study, conducted by the University of Melbourne, revealed that a large proportion (ranging from 42.4% to 49.6% depending on the type of cartel conduct) of the Australian public regarded it as "unacceptable" to give immunity to the first company to report a cartel, even if the authorities would not otherwise have found out about the cartel. Only 4% of those surveyed strongly agreed that it was acceptable, with 12.9% to 21.9% (depending on the conduct) "agreeing" that it was acceptable, highlighting the conflict between the use of immunity procedures versus the jury's inherent sense of fairness.

## Future

The poor record of UK criminal cartel enforcement over the last 13 years has, in recent years, been blamed mostly on the requirement to prove "dishonesty". This may be a distraction. Surveys have repeatedly demonstrated that the public, from whom juries derive, do not support imprisonment for cartel conduct and that there are clear reservations about the appropriateness of relying on immune witnesses. The CMA recognises that future prosecutions should be less reliant on the use of immune witnesses, and to enhance enforcement in the UK there needs to be greater general awareness of the damage caused by cartel behaviour and that an effective criminal cartel regime requires a willingness on the part of juries to convict, based on societal attitudes that recognise the harm caused by cartel activity as deserving of criminal sanction.

The CMA in its annual plan for 2016/17 strikes a positive tone in relation to competition enforcement, and in particular in relation to prosecuting the criminal cartel offence. The annual plan promises that the CMA will "open new criminal investigations and pursue prosecutions as appropriate", taking on a balanced portfolio of cases across a broad range of sectors. With extra CMA resources being applied to intelligence gathering and education, cartel enforcement in the UK may finally be moving in the right direction.