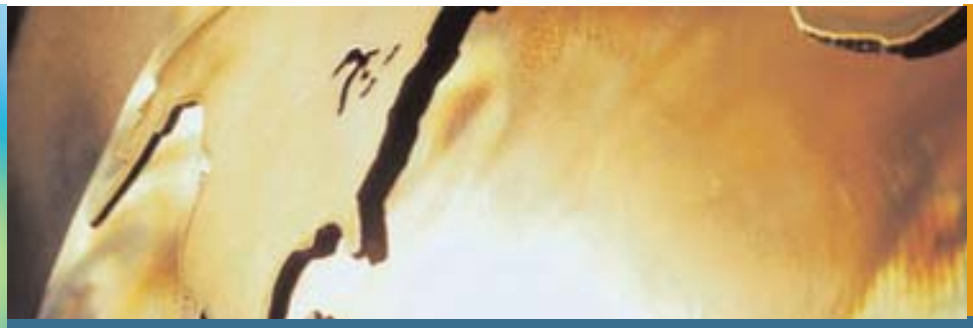

LAWYERS TO THE TRAVEL AND LEISURE INDUSTRY

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Winter 2007

Travellers' Checks

Corporate manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 (the "Act") will come into force on 6 April 2008. The Act focuses on punishing organisations rather than individuals. The new offence applies to companies, other incorporated bodies (which will include some public sector bodies such as local authorities) and partnerships, meaning that for the first time some government bodies and other Crown bodies will also be liable for prosecution for manslaughter.

The Current Law

The Act creates a new statutory offence of corporate manslaughter which will replace the common law offence of manslaughter by gross negligence where corporations are concerned. Under the current law, to be guilty of the common law offence, there must have been a gross breach of a duty of care owed to the victim.

It has been virtually impossible under this current regime to bring a successful corporate manslaughter case, because the prosecution must show that one person, who was the controlling mind and will of the company, committed or was aware of negligent acts or omissions which led to the death. This is difficult to achieve: there tends to be a gap between the "directing mind" and day to day operations, particularly in large organisations. Prosecutions such as that resulting from the capsize of the Herald of Free Enterprise failed notwithstanding that the judge described the company's operations as "from top to bottom … infected with disease of sloppiness". There have only been a handful of successful prosecutions, invariably involving small owner-managed companies.

The new Act closes that gap and a company will now be guilty of manslaughter if the way in which its senior management organised its activities causes a person's death by a gross breach of a duty of care.

Provisions of the Act

The Act states that:

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised:

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) An organisation is guilty of an offence under this section only if the way in which its activities are managed

continued on page 2

Welcome to the Winter edition

Welcome to the Winter edition of Travellers' Checks. In this edition, we update you on a number of interesting legal developments, including the Corporate Manslaughter and Corporate Homicide Bill which finally received Royal Assent on 26 July and was a decade in the making. The indications are that the material provisions of the Corporate Manslaughter and Corporate Homicide Act 2007 will come into force on 6 April 2008. We also review the Government's decision to introduce a £1 levy on all consumers who book package holidays from April 2008 and are very pleased to have commentary on the implications of this from our two guest contributors, Andy Cooper of the Federation of Tour Operators and Simon Bunce of ABTA.

Contents

K&L GATES

continued from page 1

or organised by its senior management is a substantial element in the breach referred to in subsection (1).

The offence will only be triable in the Crown Court in England and Wales and a company guilty of the offence is liable to an unlimited fine.

The prosecution has to establish that the company owed a relevant duty of care to the deceased. It then falls to the jury to decide whether there was a gross breach of that duty. The jury must consider whether the evidence shows that the company failed to comply with health and safety legislation relating to the alleged breach and, if so, how serious that failure was and how much of a risk of death it caused.

The Act has broad applicability. The offence will apply not only to UK companies and partnerships but also to foreign companies registered in the UK if the death (or injury leading to the death) occurs where the Courts have jurisdiction. The duty of care extends to the supply of goods or services or the carrying out of any activity on a commercial basis. The Act only applies, however, where the death occurs in the UK. Where a death occurs abroad, criminal charges may of course be brought in the country where the death occurred.

Meaning of "Relevant Duty of Care"

A "relevant duty of care" equates to a duty owed by the organisation under the law of negligence. The definition covers duties owed to employees, other persons working for the organisation and in connection with activities such as the supply of goods and services, the carrying on of any construction or maintenance operations or, indeed, any other activity on a commercial basis. Whether a particular organisation owes a duty of care to a particular individual is a question of law. The judge must make any finding of fact necessary to decide that question.

Meaning of "Senior Managers"

The Act defines "senior managers" as those individuals playing a significant role in the making of decisions about the whole or a substantial part of an organisation's activities or those actually managing or organising the whole or a substantial part of those activities.

Two threshold tests must therefore be passed before an individual would constitute "senior management":

- they must play a role in making management decisions about, or actually managing, the activities of the organisation as a whole or a substantial part of it; and
- the individual must play a significant role.

The first threshold is intended to include management at regional level if it is made within the context of a national organisation. For example, where a company has a national network of regional retail shops or operational sites, such as call centres, this would cover management at a regional level. This definition may well mean that an offence within a smaller organisation might not necessarily be an offence in a larger organisation.

The second threshold test is intended to ensure that the senior manager's role in the decision-making process is decisive and influential. The aim of the Government in adopting this approach is to focus on how the particular activity which caused the death(s) was being managed or organised. The idea is to analyse the working practices of the organisation rather than looking at immediate operational negligence causing death or unpredictable acts of employees.

By using the collective term of "senior management", the Act side-steps the issue of identifying the "controlling mind". It is not, however, intended to involve aggregating together individuals' conduct to identify a gross management failure. Instead, the new offence is targeted at failings in the strategic management of an organisation's activities.

How severe does the breach have to be?

In order for proceedings to be brought against an organisation, there must have been a gross failure by senior management leading to death. The aim is to target the most serious management failings that warrant the application of a serious criminal offence.

Section 1(4)(b) of the Act sets out the test for whether a particular breach is "gross". The test asks whether the conduct that constitutes the breach "falls far below" what can reasonably be expected of the organisation in the circumstances.

In determining this issue, Section 8 of the Act requires the jury to consider whether the evidence shows that the organisation failed to comply with any health and safety legislation and guidance relating to the alleged breach and, if so, how serious that failure was. This will involve looking at senior management conduct, collectively and individually, to pinpoint the root cause

of the failure to provide adequate systems for managing the particular activities which the organisation undertakes. The jury may also consider whether the evidence shows there were attitudes or accepted practices within the organisation that were likely to have encouraged the failure, or to have produced tolerance of it. However, Section 8 does not prevent the jury from having regard to any other matters they consider relevant.

Convictions under the Act

Only relevant organisations can be liable for the new offence, not individuals. The Act does not, therefore, increase liability for individual directors or managers, who can still be held to account through health and safety legislation and the common law of manslaughter. Also, an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of the new offence.

As a result, the Act provides for an unlimited fine in the event of conviction, rather than a term of imprisonment. The court is also given powers to make 'remedial orders' against convicted organisations, which can require them to remedy breaches of duty, and to make 'publicity orders' requiring them to publicise the conviction and the particulars of the offence. Failure to comply with a remedial or publicity order is a criminal offence punishable by an unlimited fine.

What should a company or organisation do?

It is too early to be certain how the Act will be applied in practice. However, taken on its face, the Act will require UK businesses to take an even more stringent approach to health and safety obligations or face the very real prospect of criminal prosecution, if disaster strikes.

There are a number of steps that a company or organisation could do in light of the Act and the following principles hold good in any situation:

- Think holistically about safety. Ensure that a culture of safety awareness extends throughout the business and its activities.
- Increase health and safety training for senior management.
- Ensure that there are clear lines of communication for reporting safety issues.
- Put health and safety at the top of the agenda for each board meeting.
- Conduct regular risk reviews.
- Regularly review internal policies and procedures to ensure compliance with existing health and safety laws.
- Never put profit before safety.

Ensuring that people are properly and regularly trained in health and safety and reviewing policies and procedures to ensure compliance with the law will make a material difference to a company should it find itself in court.

£1 Levy - Update and industry opinion

On 22 October 2007, the Transport Minister, Jim Fitzpatrick announced that the current Air Travel Organiser's Licence ("ATOL") scheme, whereby operators have to pay for a bond to cover reimbursement if the travel business fails, will be replaced with a £1 levy. The new scheme will be introduced for bookings made on or after 1 April 2008. This will mean that holidaymakers will have to pay a £1 levy every time they buy a package holiday to ensure a refund if their travel company fails. Our two guest contributors, Andy Cooper, Director General, of the Federation of Tour Operators (the "FTO") and Simon Bunce, Head of Legal and Member Services, of ABTA, give us their views on the introduction of the levy and the effect it will have on the travel industry.

Andy Cooper, FTO
"FTO broadly supports the implementation of a £1 levy to replace the existing bonding regime. It recognises that the Government would, come what may, implement a levy to ensure that the deficit in the Air Travel Trust was addressed. It is a matter of disappointment that the deficit has existed since the early 1990's and, despite repeated calls from the industry to address the issue, it took the government 15 years to do so. This has resulted in the deficit having increased by somewhere between £5 million and £10 million in interest alone.

FTO regards the levy as a necessary first step in achieving what it still regards as the most equitable solution, namely a financial protection levy on all air travellers. It is fanciful to suggest that tour operators selling mainstream holidays somehow impose a higher risk of failure than airlines. Some 63,000 airline passengers have been stranded overseas as a result of airline failures across the EU between 2001 and 2005, not counting the large numbers of Spanish customers affected by the failure of Air Madrid last year – demonstrating the need for a much more comprehensive solution. However, in the meantime, we do think that the move to a £1 levy is a sensible first step."

Simon Bunce, ABTA
"The UK outbound travel sector has long been plagued by a multitude of complex, overlapping and sometimes contradictory regulations. There is a clear need for a simple method of providing the protection that consumers need. ABTA supports the introduction of the £1 ATOL Protection Charge as being a step towards this.

If the CAA is able to construct a model which provides sufficient funding to deal with failures, effective monitoring of licence holders so that problems can be identified early on and straightforward accounting and collection procedures, we see no reason why that model should not be extended in future to provide the protection mechanism for all package holidays.

Equally, once the system is shown to work, the obvious next step is the introduction into the scheme of the scheduled airlines. If it is shown that there is a clear link between the £1 charge and the protection of UK travellers overseas it is difficult to see what objections could be raised against this although, undoubtedly some will.

We are confident that the model will succeed and have been working closely with the CAA to ensure that all the industry expertise is available to them when putting the details into place."

BA fined over long-haul passenger fuel surcharges

In our Summer edition of Travellers' Checks we reported on the final ruling in the case concerning British Airways' loyalty programmes. In this edition we report on fines that BA received from the Office of Fair Trading (the "OFT") and the US Department of Justice in August after it admitted collusion over the price of long-haul passenger fuel surcharges.

The OFT has said that BA admitted that between August 2004 and January 2006 it colluded with Virgin Atlantic over surcharges which were added to ticket prices in response to rising oil prices. Over that period, the surcharges rose from £5 to £60 per ticket for a typical BA or Virgin Atlantic long-haul return flight. The OFT has said that BA accepted the OFT's finding that on at least six occasions between August 2004 and January 2006 the two companies discussed and/or informed each other about proposed changes to the level of the surcharges, rather than setting levels independently as required under UK competition law. Chapter I of the Competition Act 1998 prohibits agreements or collusion between undertakings that have as their object or effect the prevention, restriction or distortion of competition in the UK. Such agreements or collusion are unlawful and carry a risk of possible fines up to 10% of worldwide turnover for each party involved. Such agreements may also infringe EC and US competition laws (Article 81 and the Sherman Act respectively).

The investigation by the OFT and the Department of Justice began after Virgin Atlantic turned whistleblower. Virgin Atlantic tipped off the OFT about the price fixing scandal, and was therefore granted immunity. Under this policy, a company which has been involved in cartel conduct and which is the first to give details about it to the OFT, will qualify for immunity from penalties in relation to that conduct. In August this year, the OFT fined BA £121.5 million, and a US judge upheld a $300 million (£150 million) fine against BA for price fixing after a guilty plea. This is the first time that the UK and the US have simultaneously brought action against a company. It is understood that BA could have faced a US fine of up to $900 million, but the Department of Justice credited it for co-operating with the inquiry. The penalty is the highest ever imposed by the OFT for a competition law infringement and demonstrates the determination of the OFT to deal vigorously with anti competitive behaviour.

BA and Virgin now face the prospect of class action lawsuits brought by thousands of US customers who will allege they were overcharged.

Class Actions – spreading to the UK?

Class actions are a well established factor for US businesses where awards for damages can break a company's balance sheet or reputation, and may also be of increasing concern for UK businesses too. Settlements in the US can be enormous - $127 million by the Minneapolis Airport Commission to local residents for noise pollution and $125 million by Merrill Lynch for misleading reports on stock. Class action judgments can be even larger. In 2003, a state court judge entered a class action verdict against tobacco giant Philip Morris USA for $10.1 billion. US style class actions are not, currently, a feature of the litigation landscape in the UK where individuals have the ability to act in a representative capacity to bring proceedings on behalf of other people who have the same interest. A group of common claims can also be managed as a single case as we have seen with group actions for damages following holidays spoiled or disrupted by norovirus or hurricanes.

Recent developments suggest that group or class actions could become a more significant feature of litigation in England & Wales in future:

- In 2006, the UK's Department of Business Enterprise & Regulatory Reform (BERR - then the Department of Trade & Industry) published a consultation paper on extending the scope of representative actions for consumers. In their present form, BERR's proposals, on their own, seem

unlikely to foster US style class actions in the UK. The limitation of representative actions to named consumers; the need for consumers to demonstrate individual loss; the designation of representative bodies; the need for permission from the Court; the need for identity of the cause of detriment and loss amongst the representative group; and the absence of public funding, all militate against a US type model. However, following the BERR's review of submissions made by consumer groups, it is possible that some of these provisions may be watered down. While closely watched, the BERR has not yet announced when it will publish its response to the many comments it has received on the consultation paper.

- Representative actions are already available in the field of UK competition law. We brought a successful action on behalf of ABTA and its members to recover unpaid commission on passenger service charges from a low cost carrier. The Competition Act 1998 permits specified bodies to bring follow on representative actions in the Competition Appeal Tribunal. This right is being exercised. For example, earlier this year, Which?, the UK consumer association commenced a representative action in the Competition Appeal Tribunal. Which? seeks damages based on the findings made by the Office of Fair Trading (the "OFT"), the UK's competition and consumer authority, in respect of price fixing of replica football shirts. In April 2007, the OFT published a discussion paper containing proposals designed to make private competition law actions more effective. This, amongst other things, builds on the OFT's submissions to BERR's consultation paper.

- Since 1 October 2007, the Companies Act 2006 has provided shareholders with a statutory right to bring derivative actions on behalf of a company against directors of the company for breach of duty. The 2006 Act codified directors' duties and in carrying out those duties directors must have regard to matters including the impact of the company's operation on the community and the environment. It remains to be seen how these duties are interpreted by the Courts and whether the checks and balances that have been put in place prevent unmeritorious claims. However, there may be scope for groups of activist shareholders to commence the type of securities class action that has previously been seen in the US.

These developments will be a matter of concern for travel businesses, many of whom have been on the receiving end of class actions already. We will keep you updated on developments.

Consumer Protection from Unfair Trading Regulations 2007

The Unfair Commercial Practices Directive (the "Directive") harmonises unfair trading laws in all EU member states to allow for easier cross-border trade, and an increase in choice and competition for consumers. It introduces a general obligation on all businesses not to treat consumers unfairly and, in particular, not to mislead consumers through acts or omissions, or subject them to aggressive sales techniques.

The Consumer Protection from Unfair Trading Regulations 2007 (the "CPRs") will implement the Directive into UK law. The Directive's broad scope meant that it overlapped with some UK legislation. As a result, some statutes such as the Trade Descriptions Act 1968 and the Consumer Protection Act 1987 are repealed or amended. The CPRs which come into force on 6 April 2008 apply to commercial practices before, during and after a contract is made. The CPRs will prohibit unfair commercial practices which distort consumers' decisions. They will introduce a general duty not to trade unfairly on businesses dealing with consumers.

Regulation 3 contains a general prohibition of unfair commercial practices. The commercial practice is unfair if it is not professionally diligent and it materially distorts, or is likely to materially distort, the economic behaviour of the typical consumer. Essentially, for a practice to be prohibited, the trader's practice must be of an unacceptable standard as well as there being an effect (or the likelihood of such) on the economic behaviour of the typical consumer (for example, the typical consumer would buy a product they would not otherwise have bought).

The CPRs will also contain prohibitions against misleading and aggressive practices (Regulations 5-7). A misleading commercial practice is an action or omission which either contains false information (that is, it is untruthful) or will in some way deceive, or be likely to deceive, the typical consumer into taking a transactional decision that he would not have otherwise made.

An aggressive commercial practice is one which, by means of harassment, coercion or undue influence, significantly impairs (or is likely to significantly impair) the typical consumer's freedom of choice or conduct and so causes, or is likely to cause, the typical consumer to take a transactional decision that he would not otherwise have made. In establishing whether a commercial practice is aggressive, the practice must be considered in its factual context. The CPRs provide a non-exhaustive list of factors to be considered, including the time, location, nature or persistence of the practice and the use of threatening or abusive language or behaviour.

The Directive also lists 31 practices that will always be considered unfair, including:

- Displaying a quality mark without authorisation.
- Falsely claiming to be a signatory to a Code of Conduct.
- Falsely stating that a product will be available for a very limited time in order to obtain an immediate decision.
- Significantly misrepresenting the risk to the consumer or his family of a decision not to purchase the product in question.

Broadly speaking, if consumers are treated fairly, then traders are likely to comply with the CPRs. This means that fair dealing businesses should not have to make major changes to their practices. However, if a trader misleads, behaves aggressively, or otherwise acts unfairly towards consumers, then the trader is likely to be in breach of the CPRs and may face action by enforcement authorities.

Local Authority Trading Standards Services ("TSS"), the Department of Enterprise, Trade & Investment in Northern Ireland and the Office of Fair Trading have a duty to enforce the CPRs. This does not mean that formal (civil or criminal) enforcement action must be taken in respect of each and every infringement. Instead, enforcers should promote compliance by the most appropriate means, in line with their enforcement policies, priorities and consistently with available resources.

Prohibitions will be enforceable through civil actions (injunctions brought under the Enterprise Act 2002)

and through criminal sanctions. The CPRs propose that the prosecution will be required to prove that the trader has knowingly or recklessly breached the requirements of professional diligence in order to establish a breach of the general prohibition under Regulation 3. The other offences under Regulations 5-7, will be strict liability offences and so it will not be necessary for a specific state of mind to be proven. However, the draft CPRs provide a number of defences to the strict liability offences including due diligence and innocent publication of advertisements.

Where offences have been committed by corporate bodies, the CPRs provide for the prosecution of management (that is, a director, manager, secretary or similar officer) where the offence has been committed with the consent or connivance of the management or where the offence is attributable to any neglect on its part.

Seasons Greetings!

We would like to take this opportunity to wish you all a peaceful and prosperous holiday.

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