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Citation: Slade, Jennifer and Grant, David (2010) The Consumer Protection from Unfair Trading Regulations: A Commentary (Part Three). *Travel Law Quarterly*, 2 (4). pp. 218-224. ISSN 1759-8982

Published by: Oakhurst Academic Press

URL:

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THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY. PART THREE

David Grant and Jennifer Slade

This is the third in a series of articles in which the authors examine the Consumer Protection from Unfair Trading Regulations 2008 and their impact upon the travel industry in the UK.

Introduction

In the last article¹ in this series we examined some of the definitions in the Consumer Protection from Unfair Trading Regulations 2008 (CPR) and in this article we continue that process and examine some of the rest of these important definitions: 'business'; 'trader'; 'commercial practice'; 'invitation to purchase'; 'product' and 'professional diligence'.

Business and Trader

These two definitions are closely related to each other so we will examine them together rather than separately before moving on to look at what is meant by a 'commercial practice' with which there is also a strong relationship. Put simply 'a commercial practice' is a practice carried on by a 'trader' and a trader is someone who, in relation to a commercial practice, is acting for purposes relating to his 'business'. This explanation does some injustice to the detail of the definitions but it demonstrates just how the three are linked to each other.

Business is defined in the following way:

Business includes a trade, craft or profession. (Reg. 2(1))

Trader is defined as meaning:

... any person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a trader. (Reg. 2(1))

This brevity is not particularly surprising. Previous consumer protection legislation has been no

more illuminating, presumably because we are supposed to know a business when we see one – rather like we know an elephant when we see one. Interestingly, the guidance prepared by the Department for Business and Regulatory

Reform in conjunction with the Office of Fair Trading (May 2008) does not examine the meaning of 'business' in its glossary of terms.

As far as the travel industry is concerned this lack of explanation should not really be an issue; tour operators, travel agents, airlines, cruise lines etc can all be seen as businesses and therefore fall fairly and squarely within the scope of the Regulations. At the margins however it may be difficult to say what constitutes a trade or business. For instance if a lecturer in tourism organised a foreign holiday for staff and students on an occasional basis, say once a year, and on which s/he made a modest profit, would this amount to a 'trade or business' and would s/he

We know an elephant
when we see one

be a trader? Or the bridge club organiser who takes players abroad once a year, out of season, to a hotel on the Costa del Sol, and again, makes a modest profit?

The guidance offered by the OFT and DBERR states:

Whether or not a person is a trader in any particular circumstance must be assessed on a case by case basis. When determining whether or not a person is acting as a trader, the courts are likely to take a number of factors into account, such as whether there is a profit-seeking motive, the number and frequency of transactions, and the time between the purchase and sale of products. (Para. 14.22)

The occasional sale of some worn out piece of shop equipment would not fall within the enactment

The leading English case is *Davies v Sumner* [1984] 3 All

ER 831, a House of Lords case which decided that a self-employed courier for a television company who had bought himself a car in order to carry out his business was not acting in the course of a business when he sold it. The defendant merely sold the car as a piece of equipment used in his business rather than as stock in trade. There was no regular disposal of such assets nor a disposal of a single asset for profit. In the circumstances the sale of the car did not form an integral part of D's business. The decision has been criticised as 'narrow' by Howells and Weatherill.²

In *Davies v Sumner*, in support of his decision, Lord Keith said:

...the occasional sale of some worn out piece of shop equipment would not fall within the enactment.

However he qualified this in one respect. He said:

The need for some degree of regularity does not, however, involve that a one-off adventure in the nature of trade, carried through with a view to profit, would not fall within s.1(1) because such a transaction would itself constitute a trade.

If we examine *Davies v Sumner* closely we can see that it was actually looking at two questions. First, was the defendant's sale of the car related to his business as a courier? Secondly, could the selling of the car amount to a business in itself? Both questions were answered in the negative.

Looking at mainstream travel industry activities, unlike our tourism lecturer or bridge club organiser, it is difficult to see how these more difficult issues would arise.

The rider to the definition: '*... anyone acting in the name of or on behalf of a trader*' is

intended to catch the actions of employees and agents of the trader. It makes the company vicariously liable for the statements and actions of its employees. For instance if a guest was misled by reservation staff at an hotel about the possibility of a late check out this provision would make the hotel company responsible for the statement.

Commercial Practice

Commercial practice is defined as meaning:

... any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product. (Reg. 2(1))

The definition is sufficiently comprehensive to cover most things a trader in the travel industry is likely to do. If we borrow from the existing case law on trading standards we see that it would certainly cover the brochure descriptions that figured in cases such as *Wings v Ellis* [1984] 3 All ER 577 (a false statement in the brochure that hotel rooms were air conditioned when they were not); *Yugotours v Wadsley* [1988] Crim LR 623 (a brochure photograph depicting a three masted schooner rather than the two masted schooner that was actually provided); *R v Clarkson's Holidays Ltd* (1972) 57 Cr App R 38 (an artist's impression of an hotel which showed the hotel as complete when it was not); *Direct Holidays plc v Wirral Metropolitan Borough Council Div. Ct.*, April 28, 1998 (a brochure wrongly classified a hotel as having three 'keys' rather than one).

It would also cover the oral representation made in *Herron v Lunn Poly (Scotland) Ltd* [1972] SLT 2 to the effect that an hotel was complete when it was not. The statement in a letter in the case of *British Airways Board v Taylor* [1976] 1 All ER 65 to the effect that a passenger had a 'confirmed' reservation when he did not would also be caught by this provision.

On the wider issue of the airline practice of overbooking and then 'bumping' passengers when the calculation goes wrong this would certainly amount to a commercial practice within the definition because it would amount to a 'course of conduct'. The question of its unfairness is another matter, which may have to take account of the existence of EC Regulation 261/2004 which regulates denied boarding.

Statements about the price of travel products clearly fall within the definition of commercial practices. Whether it is a one-off statement of the price in a brochure or the complex calculation of prices on the internet sites of 'no frills'

airlines or car hire companies the prices stated would amount to 'representations'. The pricing strategy on internet sites would also amount to a 'course of conduct' which may also involve an 'omission' if crucial details such as taxes, insurance and credit card charges are omitted from the 'final price'. Again, the issue here is not the unfairness of such practices but the prior question of whether they fall within the definition of a 'commercial practice'.

Advertising on television, radio, over the internet, in newspapers, on billboards and on flyers would all be caught by the definition. This would include paid for 'advertorial' content where it is not immediately obvious to the consumer that this is objective reporting. It would be a 'commercial communication' which includes 'advertising and marketing'.

The commercial practice must be '*directly connected with the promotion, sale or supply of a product to or from consumers*'. Most of the examples given above satisfy this criterion in that they concern statements

aimed directly at consumers. A more tenuous relationship may nevertheless also fall within the scope of the Regulations. The OFT/DBERR guidance provides this example:

A trader makes and sells processed cheese slices to supermarkets. Although the trader does not sell directly to consumers, any labels he produces must be compliant with the CPRs as they are directly connected with the promotion and sale of the cheese slices to consumers.

Granted this is far removed from the travel industry but an analogy may be drawn from the accommodation sector. Many hotels will contract with accommodation wholesalers or bedbanks on a principal to principal basis but in doing so they will provide information about their hotels that is intended to be provided by the bedbanks to the

A representation to the effect that an hotel was complete when it was not

consumer. Rather like the cheese maker, this information is directly connected with the promotion of the sale of the product. Note that the relationship of consumer, bedbank and hotel is fraught with legal difficulties and it may very well be the case that the hotel does have a direct contract with the consumer – in which case the relationship is much more direct. (See for instance the cases of *Secret Hotels2 Ltd (Formerly Med Hotels Ltd) v The Commissioners For Her Majesty's Revenue And Customs (VAT)* [2010] UKFTT 120 (TC) and *International Life Leisure Limited v The Commissioners For Her Majesty's Revenue And Customs*, Manchester Tribunal Centre, 13 and 14 March 2006 (Case number: 19649)). Note also that the hotel is potentially liable under the Regulations for the information it provides irrespective of whether it actually has a contract with the consumer.

A further feature of the definition is that it covers not only pre-contractual information but also any representations made 'during' and 'after' the transaction. This has serious implications for the handling of complaints during the currency of a holiday and after the consumer has returned home. For instance if a travel company adopted an across the board policy of not responding at all to complaints from consumers this would be an 'omission' or a 'course of conduct' directly connected with the sale of the product 'after a commercial transaction' in relation to that product. Similarly if a travel company responded to complaints by asserting that the consumer had no legal rights in relation to the complaint this would be an 'act' or 'representation' or a 'commercial communication' occurring after the transaction in relation to the product.

The relationship of consumer, bedbank and hotel is fraught with legal difficulties

Invitation to purchase

An invitation to purchase means:

... a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase.

The essence of this definition is that if a commercial communication does indicate the characteristics and price of a product in such a way that it 'enables the consumer to make a purchase' then it amounts to an invitation to purchase. Presumably this means that sufficient

information is provided upon which a valid contract can be made. As such it is may be coterminous with an 'invitation to treat' in that both may provide enough information on which to make a contract, but in many cases an invitation to purchase will be more

detailed. For example an airline, Zootair, may advertise 'Flights to Alicante for £5. Visit our website at www.zootair.co.uk for further details.' This may be an invitation to treat but it would not be an invitation to purchase because it would not enable the consumer to make a purchase. However if the consumer visited the website and reached the stage where full details of the flight were displayed e.g. price, airport, departure and arrival times this would be both an invitation to treat and an invitation to purchase. (Although in contractual terms it might be argued that the details on the screen went beyond a mere invitation to treat and amounted to a contractual 'offer'. See for instance *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 and *Bowerman and Wallace v Association of British Travel Agents* [1996] CLC 451 and other standard offer and acceptance cases on this point.)

The significance of the definition is that Regulation 6 defines what is meant by a misleading omission (which forms the basis of the offence in Reg. 10). Regulation 6 makes a commercial practice a misleading omission if it omits or hides 'material information'. In relation to invitations to purchase what is material is further defined in Reg. 6(4) as follows:

(4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3)—

(a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;

(b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;

(c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;

(d) either—

(i) the price, including any taxes; or

(ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;

(e) where appropriate, either—

(i) all additional freight, delivery or postal charges; or

(ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;

(f) the following matters where they depart from the requirements of professional diligence—

(i) arrangements for payment,

(ii) arrangements for delivery,

(iii) arrangements for performance,

(iv) complaint handling policy;

(g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

The effect of this is to ensure that once a commercial communication can be regarded as an invitation to purchase it must contain the information listed in Reg. 6(4) and if it does not then an offence is committed. For instance, to return to the Zootair example, the website may indeed contain enough information to enable the consumer to make a purchase but it may not contain some of the information, such as the trader's geographical address, that is required by Reg. 6(4). If so an offence has been committed. To avoid prosecution the trader has to ensure either that the communication is too vague to be treated as an invitation to purchase or that it is sufficiently detailed to comply with the Regulations.

An invitation to purchase is also relevant to the offences contained in Reg. 12 and Schedule 1. Paragraph 6 of Schedule 1 makes it an offence to make an invitation to purchase a product at a specified price and then refuse to show the consumer the product or refuse to take orders for it with the intention of promoting a different product – bait and switch.

The definition makes clear that the information must be read in context. The communication must be made '*in a way appropriate to the means of that commercial communication*'.

Professional diligence

Professional diligence means:

... the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either—

honest market practice in the trader's field of activity, or

the general principle of good faith in the trader's field of activity;

This definition is important because it constitutes part of the definition of an unfair commercial practice found in Reg. 3 which in turn forms the basis of the general offence under Reg. 8.

The OFT/DBERR Guidance gives us a shorthand version of what is meant by professional diligence:

A simple way of understanding professional diligence would be to ask: 'Is the trader acting to a standard that a reasonable person would expect?' (Para. 14.19)

So the question arises as to what amounts to honest market practice or the general principle of good faith *in the travel industry*? Judging by the practice of some no frills airlines one might suggest, cynically, that standards in the industry are not very high. Seeking to add hidden charges to the overall price at every possible opportunity or to keep you on a website until you have lost the will to live and simply give in and pay rather than start again with another airline on another site are not practices generally to be applauded. But that would be to tar the whole industry with the actions of a few. The travel industry is no worse than many others and a good deal better than some – second hand car dealers and estate agents come to mind in this regard.

Interestingly, the definition seems to suggest that different industries have different standards of honesty and good faith; and that the standard, although objective, varies according to whether one is a car dealer or a travel agent or a lawyer. Be that as it may be, this article is concerned with the travel industry so we have to examine what amounts to professional diligence in that industry.

Perhaps we can illustrate what we mean with an example. Let us say that an hotel is concerned

about the feedback that it is getting on 'Tripadvisor' or similar sites and it decides to counter what it regards as unfair, or even malicious, comment by asking its own staff to post favourable reviews on Tripadvisor as if they were guests of the hotel. Is this 'honest' or 'in good faith'? If the reviews are in fact entirely fictitious and paint an unduly complimentary view of the hotel then it would be hard to say that they were honest or posted in good faith. However, what if they were objectively correct and entirely balanced in their comment, designed merely to counteract the unfair criticism? The problem for the hotel is that if the comments are posted anonymously or without revealing that they were posted by staff it would be difficult to overcome the suspicion that they are acting in bad faith. If they are so sure of the quality of their hotel why do they need to resort to the subterfuge of anonymous comments? If they want to refute what they regard as unjustifiable criticism why not counter it directly and openly on Tripadvisor.

'Is the trader acting to a standard that a reasonable person would expect?'

To apply the OFT/DBERR test, would the hotel be acting to a standard that a reasonable person would expect? The answer is almost certainly no – however sympathetic one might be to the hotel's plight one would feel deceived by the favourable postings. Such a finding would lead almost inevitably to a breach of the general offence in Reg. 8

To further exemplify the issue, would it amount to bad faith or dishonesty if a travel agent failed to disclose the commission rates it obtained from its suppliers, thereby obscuring the fact that it encouraged consumers to take product X rather than product Y because it earned a higher commission from X rather than Y? This practice is not unknown in the travel industry and is regarded as ordinary practice if not good practice and is certainly not regarded as dishonest. However, if travel agents can actually be classified as agents of the consumer (rather than

independent contractors) then this conflict of interest would be contrary to their fiduciary duty and would almost inevitably contravene the due diligence standard.

Product

Product means:

... any goods or service and includes immovable property, rights and obligations. (Reg. 2(1))

The important point about this definition is that it includes services as well as tangible products. This would bring just about everything the travel industry sells within the scope of the Regulations – flights, hotels, cruises, excursions, timeshare, rail and bus travel and so on. Car and bike rental would be covered but probably as 'goods' rather than services.