



THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY.

PART NINE

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This is the ninth in a series of articles in which the Consumer Protection from Unfair Trading Regulations 2008 and their impact on the travel industry in the UK are examined.

Introduction

This article will examine Reg. 11 of the CPR which creates the offence of engaging in commercial practices which are aggressive. Fortunately this will not detain us very long and we will then move on to examining the offence created by Reg 12.

Aggressive commercial practices

Reg. 11 provides:

A trader is guilty of an offence if he engages in a commercial practice which is aggressive under regulation 7.

Regulation 7 provides:

(1) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances—

- (a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and*
- (b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.*

(2) In determining whether a commercial practice uses harassment, coercion or undue influence account shall be taken of—

- (a) its timing, location, nature or persistence;*
- (b) the use of threatening or abusive language or behaviour;*
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;*
- (d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract,*

including rights to terminate a contract or to switch to another product or another trader; and
(e) any threat to take any action which cannot legally be taken.

(3) In this regulation—

(a) “coercion” includes the use of physical force; and
(b) “undue influence” means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.

If we break the offence down into its component parts we can see that a trader is guilty of an offence if -

- He engages in a commercial practice which is aggressive, such that it
- Significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned
- Through the use of harassment, coercion or undue influence and
- It thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise

The first thing that needs to be said about the offence in Reg. 11 is that the travel industry with perhaps one exception does not generally indulge in such practices. That exception is the timeshare industry which over the years has attracted a reputation for its high pressure sales techniques. Indeed, apart from the timeshare industry it is difficult to find examples of commercial practices by travel companies which come anywhere near aggressive.

If we take the facts of *Dixon v Direct Holidays* [2006] CLY 1991 as a starting point we might be able to construct a scenario that would satisfy Reg. 11. In that case the claimants were accommodated in an appallingly filthy damp apartment with raw sewerage bubbling up in the bath and had to deal with hostile staff amongst other things. The party wanted to go home early but they were refused. No suitable alternatives were offered and the family had to endure substandard accommodation for the rest of the holiday. Under these circumstances they had a good claim under Reg. 14 of the Package Travel Regulations to be repatriated. One can imagine the claimants asking to be taken home but the defendants refusing to do so and coercing them into staying by saying, falsely, that the claimants had no rights in these circumstances and if they chose to fly home at their own expense they would lose not only their holiday but also the costs of the flight. As a consequence the family decide not to take the risk of losing their money and remain behind in the substandard accommodation. This could be viewed as the defendant exercising ‘undue influence’ over the claimants i.e. they were exploiting a position of power in relation to the claimants so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limited the claimants’ ability to make an informed decision.

Another example might be the case of *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) a package holiday case involving the insolvency of a tour operator. The consumers in that case were on holiday at the time that their tour operator became insolvent and the owner of the hotel in which they had been placed by the tour

operator demanded that they pay for the cost of staying in the hotel and physically prevented them from doing so until they did. When they paid up this was presumably because their freedom of choice had been impaired through the use of ‘coercion’ – defined as including ‘the use of physical force.’

Regulation 12. Commercial practices unfair in all circumstances

Regulation 12 provides that:

A trader is guilty of an offence if he engages in a commercial practice set out in any of paragraphs 1 to 10, 12 to 27 and 29 to 31 of Schedule 1.

The list of practices found in Schedule 1 are as follows:

1. *Claiming to be a signatory to a code of conduct when the trader is not.*
2. *Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.*
3. *Claiming that a code of conduct has an endorsement from a public or other body which it does not have.*
4. *Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation.*
5. *Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).*
6. *Making an invitation to purchase products at a specified price and then—*
 - (a) *refusing to show the advertised item to consumers,*
 - (b) *refusing to take orders for it or deliver it within a reasonable time, or*
 - (c) *demonstrating a defective sample of it,**with the intention of promoting a different product (bait and switch).*
7. *Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.*
8. *Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the EEA State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.*
9. *Stating or otherwise creating the impression that a product can legally be sold when it cannot.*

10. *Presenting rights given to consumers in law as a distinctive feature of the trader's offer.*
11. *Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).*
12. *Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.*
13. *Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.*
14. *Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the products.*
15. *Claiming that the trader is about to cease trading or move premises when he is not.*
16. *Claiming that products are able to facilitate winning in games of chance.*
17. *Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.*
18. *Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.*
19. *Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.*
20. *Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.*
21. *Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.*
22. *Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*
23. *Creating the false impression that after-sales service in relation to a product is available in an EEA State other than the one in which the product is sold.*
24. *Creating the impression that the consumer cannot leave the premises until a contract is formed.*
25. *Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return, except in circumstances and to the extent justified to enforce a contractual obligation.*
26. *Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.*
27. *Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to*

whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.

29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer, except where the product is a substitute supplied in accordance with regulation 19(7) of the Consumer Protection (Distance Selling) Regulations 2000 (inertia selling).

30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either—

(a) there is no prize or other equivalent benefit, or

(b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

If, as with the other offences, we break the Reg. 12 offence down into its component parts we see that a trader commits an offence if

- He engages in a commercial practice listed in Schedule 12

The important thing to note about the Reg. 12 offence is that it does not require the prosecution to prove that it caused consumers to take a different transactional decision. The offence is complete once the trader has engaged in the practice – subject of course to the due diligence defence (but see *CHS Tour Services GmbH v Team4 Travel GmbH* (Case C-435/11)).

Although the list is long much of it can be ignored as far as the travel industry is concerned either because the practices are not relevant to the industry or is not the kind of practice the industry indulges in on a widespread scale. Category No. 17 for example, falsely claiming that the product is able to cure illnesses, dysfunction or malformations, is not the kind of claim that has any real relevance to the industry – although perhaps tour operators taking pilgrims to Lourdes might wish to be careful about this provision. And category 24, 'creating the impression that the consumer cannot leave the premises until a contract is formed' is not a practice found in the travel industry outside of the less reputable parts of the timeshare industry.

Paragraph 1, 'claiming to be a signatory to a code of conduct' when that is not the case may be relevant if a non-member of ABTA claims to be a member and category 4, claiming that a trader has been approved by a public or private body would be relevant to hotels which falsely claimed to have been graded by the AA, the RAC or Visit Britain.

Failing to respond to consumer complaints is a practice caught by paragraph 27 but there is a degree of ambiguity in the provision. Does it only apply to insurance claims or does it apply more generally? The latter seems to be an interpretation more in line with the general tenor of the legislation and there seems no legitimate reason for limiting it to insurance claims.

Even if this is so the offence consists of 'systematically' failing to respond to complaints which is a relatively tough threshold to cross. And would it cover those companies that did respond but only by a blanket denial of liability that did not meet the specific complaints?

Paragraph 31, creating the false impression that the consumer has won, a prize when in fact claiming the prize is subject to the consumer incurring a cost, has a personal resonance. For the full story you should read the Editorial at [2013] TLQ 270 but in short it involved a 'free' entry into a raffle at an art auction on board ship. On winning the raffle it was revealed that in order to get the 'free' prize, an art print, the winner had to pay for the carriage from the US to the UK, or to have it framed at great expense, but delivered free. Either way the prize was not free and a *prima facie* breach of paragraph 31.

This article concludes the discussion of the offences in the CPR. The next article will examine the due diligence defence.

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