

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

David Grant

This is the sixth 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 is examined.

In the last two articles the general offence created by Reg. 8 of the CPR, of knowingly or recklessly engaging in a commercial practice, was discussed. In this article we begin to examine the first of the strict liability offences. This is the offence of engaging in a commercial practice which is a misleading action – to be found in Regulation 9. Note that although this is a strict liability offence i.e. no state of mind needs to be proved by the prosecution, the severity of this is mitigated by the due diligence defence to be found in Reg. 17. The defence will be discussed in later articles.

Regulation 9 provides:

“A trader is guilty of an offence if he engages in a commercial practice which is a misleading action under regulation 5 otherwise than by reason of the commercial practice satisfying the condition in regulation 5(3)(b).”

Regulation 5 provides an extensive definition of what amounts to a misleading action:

“5.—(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfies the conditions of this paragraph—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and
(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

This is a strict liability offence

(3) A commercial practice satisfies the conditions of this paragraph if—

(a) it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or
(b) it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if—

(i) the trader indicates in a commercial practice that he is bound by that code of conduct, and

(ii) the commitment is firm and capable of being verified and is not aspirational, and it causes or

is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances.

(4) The matters referred to in paragraph (2)(a) are—

- (a) the existence or nature of the product;
- (b) the main characteristics of the product (as defined in paragraph 5);
- (c) the extent of the trader's commitments;
- (d) the motives for the commercial practice;
- (e) the nature of the sales process;
- (f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader

or the product;

- (g) the price or the manner in which the price is calculated;
- (h) the existence of a specific price advantage;
- (i) the need for a service, part, replacement or repair;
- (j) the nature, attributes and rights of the trader (as defined in paragraph 6);
- (k) the consumer's rights or the risks he may face.

(5) In paragraph (4)(b), the "main characteristics of the product" include—

- (a) availability of the product;
- (b) benefits of the product;
- (c) risks of the product;
- (d) execution of the product;
- (e) composition of the product;
- (f) accessories of the product;

- (g) after-sale customer assistance concerning the product;
- (h) the handling of complaints about the product;
- (i) the method and date of manufacture of the product;
- (j) the method and date of provision of the product;
- (k) delivery of the product;
- (l) fitness for purpose of the product;
- (m) usage of the product;
- (n) quantity of the product;
- (o) specification of the product;
- (p) geographical or commercial origin of the product;
- (q) results to be expected from use of the product; and
- (r) results and material features of tests or checks carried out on the product.

(6) In paragraph (4)(j), the "nature, attributes and rights" as far as concern the trader include the trader's—

- (a) identity;
- (b) assets;
- (c) qualifications;
- (d) status;
- (e) approval;
- (f) affiliations or connections;
- (g) ownership of industrial, commercial or intellectual property rights; and
- (h) awards and distinctions.

(7) In paragraph (4)(k) "consumer's rights" include rights the consumer may have under Part 5A of the Sale of Goods Act 1979 or Part 1B of the Supply of Goods and Services Act 1982."

False or deceptive actions

A trader is guilty of an offence if –

- He engages in a commercial practice
- Which contains false or deceptive information,
- Relating to one of the categories in Reg. 5(4), and
- It causes the average consumer to take a transactional decision he would not otherwise have taken

We have already looked at what is meant by a commercial practice and transactional decision so for the moment we will concentrate on the meat of this offence – false or deceptive information in relation to the long list of categories in Reg. 5(4).

There is considerable body of case law under the TDA dealing with false statements

(i) False information

False information is information which is untruthful in relation to the matters listed in Reg. 5(4) – which in turn is expanded upon in Regs. 5(5)(6) and (7). As we have already seen there is considerable body of case law under the TDA dealing with false statements and as with other articles it is informative to examine these cases in the light of the new legislation.

Direct Holidays plc v Wirral Metropolitan Borough Council (Div. Ct., April 28, 1998) was a prosecution under section 14(1)(b) for falsely describing the official classification of some holiday apartments. They were described as 'Three Keys' rather than 'One Key. Although this was false, to succeed in a prosecution today it must be false in relation to the categories listed in Reg. 5(4). The nearest category is Reg. 5(4)(b), 'the main characteristics of the product' which is further defined in Reg. 5(5)(o) to include the 'specification of the product'. It might also fall under Reg. 5(5)(r) the 'results and material

features of tests or checks carried out on the product' given that the classification of the hotel would probably be as a result of checks carried out by some kind of tourist authority. There is also the possibility of it being false in relation to the 'nature' of the product (Reg. 5(4)(a)).

Yugotours v Wadsley [1988] Crim. LR 623, was a prosecution for publishing a picture of a three masted schooner when in fact it was a two masted schooner and had no sails. Under the CPR this would be false in relation to the 'nature' of the product (Reg. 5(4)(a)) or the 'main characteristics of the product' (Reg. 5(4)(b), in conjunction with Reg. 5(5)(o) – 'specification of the product').

These are very straightforward cases, as is *Wings v Ellis* [1984] 3 All E.R. 577, which we have

looked at already on a number of occasions where an hotel was described as having air conditioning when it didn't. This too would fall under Reg. 5(4)(a) false as to the 'nature of the product or Reg. 5(4)(b), in conjunction with Reg. 5(5)(o) – false as to the 'specification of the product'.

(ii) Deceptive information

Under the TDA there was only one question – was the statement false? However under the CPR the question is wider – was the information false or deceptive? And deceptive will cover situations where the information is factually correct but the consumer is nevertheless deceived by it or its overall presentation. The facts of *R v Clarksons Holidays Ltd* (1972) 57 Cr App R 38 are a useful vehicle for exploring this issue. In that case a brochure featured an hotel which was not yet built. On the page giving the holiday details the hotel was depicted by an artist's impression. Nothing else on that page suggested that the hotel was incomplete but at the end of the brochure, a further 160 pages on, it stated:

"Artist's Impressions"

In the case of most hotels which are in the course of construction we are unable to provide photographs which will help our clients see what the new hotel will be like. To give our clients this information we therefore print 'artists' impressions', which are based on the architect's plans and drawings and other information available at the time this brochure is published. Such 'impressions' are clearly shown on the appropriate pages and are published in good faith and to help our clients with their choice. If some details of construction, surroundings and background are later found to differ, we only accept responsibility to our clients if such differences, if any, are fairly judged to have materially marred our clients' holiday. We constantly seek to improve both the range and standards of hotel accommodation and consequently inaugurate a number of brand new hotels each season. Every effort is made to ensure that new hotels are 100 per cent ready but clients will appreciate that some delay in the completion of some facilities is possible. In such rare instances we will, of course, make an appropriate refund to the client or provide extra facilities, entertainment etc. in lieu."

The case turned on whether the statement was actually false. Could the artist's impression be interpreted as meaning that the hotel actually existed, in which case the statement was false; or was this merely a statement that the hotel would be like this when the consumers arrived – which was not a statement which was false when it was made. The jury convicted Clarksons and the Divisional Court upheld the conviction. Under the CPR the prosecution would probably find a conviction easier to secure because they would

be able to argue that even though the information about the hotel was technically correct it nevertheless deceived consumers – subject of course to the 'average consumer' test already discussed.

There are similarities between the offence in Reg. 9 which is based upon the consumer being *deceived* and Reg. 4 of the Package Travel Regulations 1992 which make it a civil offence to *mislead* a consumer. The leading case on Reg. 4 is *Mawdsley v Cosmosair Plc* [2002] EWCA Civ 587. A brochure described an hotel as having a lift "in main building". The hotel did indeed have a lift but it did not stop at the mezzanine floor where the restaurant was located. The claimant was

injured when she slipped and fell while negotiating her way down the stairs to the restaurant with her baby in a buggy. The court decided that the claimants had been misled about the description of the lift in the hotel – on the

**Even though the information
was technically correct
it nevertheless
deceived consumers**

grounds that it represented that the lift would go to all floors – which it didn't. The question that arises under the CPR is which category in Reg. 5 does this relate to, and would the statement about the lift amount to deceptive information in relation to this category?

The category the statement falls most closely into is Reg. 5(4)(b) – 'the main characteristics of the product', which is further defined in Reg. 5(5)(o) to include the 'specification of the product'. It is hard to imagine a court denying that a lift in a hotel was a 'main characteristic'.

Assuming a lift is a 'main characteristic' would the statement in the brochure 'lift (in main building)', although 'factually correct', deceive the 'average consumer'? Given the decision by the Court of Appeal in a civil context, that the words were misleading it is difficult to see a criminal court coming to a decision that they were not deceptive. To escape conviction the defendant would have to fall back on the due diligence defence.

The Categories in Reg. 5(4)

The information must not only be false or deceptive it must also relate to one of the categories in Reg. 5(4). We do not pretend to be able to provide an exhaustive examination of all these categories and the various ways in which a travel company could infringe the law but we will give some examples of the kind of false or deceptive information a defendant might provide in relation to some of those categories.

(i) The existence or nature of the product (Reg. 5(4)(a))

The *Clarksons* case is a good example of this category. The tour operator deceived the consumers into believing that the hotel existed when it didn't. The TDA also had a category of making a false statement about the *nature* of services and as the hotel was not complete and also a number of advertised facilities were not available *Clarksons* were also prosecuted under that provision.

In Buckinghamshire County Council v Crystal Holidays Limited (Divisional Court, January 26, 1993) the defendant tour operator had advertised that the resort had an 18 hole golf course. The brochure said: "The pride of the village *is* the new 18 hole Bernhard Langer golf course." [Emphasis added] When holidaymakers arrived they found that the course had not been built yet. Another example of false information about the existence of a product.

(ii) The main characteristics of the product (Reg. 5(4)(b))

This category has to be read in conjunction with Reg. 5(5).

(iii) Availability of the product (Reg. 5(5)(a))

If a hotel advertised that rooms were available for occupation from 2pm on the day of arrival and this was not so this would be a misleading action in relation to the availability of the product. Likewise if an airline advertised that an executive lounge was available for business class passengers and it wasn't this would also be misleading as to the availability of the product.

(iv) Benefits (Reg. 5(5)(b))

If an hotel advertised that it had a spa and that a particular treatment at the spa would 'remove wrinkles' and this turned out to be false this would be a misleading action relating to the benefits of the product.

**The tour operator deceived
the consumers into believing
that the hotel existed
when it didn't**

(v) Risks of the product (Reg. 5(5)(c))

If a hotel advertised that its swimming pool was supervised and it wasn't this would be misleading as to the risks of the product. That would be a straightforward *false* statement. If it published a photograph of the pool with a lifeguard on duty but it turned out that a lifeguard was on duty for only limited periods of the season it might be easier to say that this was deceptive rather than false.

(vi) Handling of complaints (Reg. 5(5)(h))

If a tour operator stated in its brochure that it responded to consumer complaints within 28 days and this was untrue this would amount to a breach of Reg. 5(5)(h)). It would be similar if it advertised that complaints could be referred to an independent arbitration service but it turned out that this was a body appointed solely by, and responsible only to, the travel industry.

(vii) Fitness for purpose (Reg. 5(5)(l))

If a tour operator advertised that its holidays at a particular hotel were 'suitable for children' but it turned out that the hotel was largely patronised by elderly clients and there were few children's facilities this would infringe this 'fitness for purpose' requirement.

(viii) Quantity (Reg. 5(5)(n))

If an airline advertised 'Flights for 50p – Stansted to Tralee' and it turned out that it was not possible to buy a flight at that price this would be false and therefore, prima facie, in contravention of Reg. 5. The big question however is whether this 'causes or is likely to cause the average consumer to take a transactional decision he would not otherwise have taken'. (For an interesting variation on this theme go to YouTube and type in 'Fascinating Aida – Cheap Flights')

'Flights for 50p –
Stansted to Tralee'

More difficult would be the case where the airline did have such seats available but only one per flight. Although only of persuasive authority the Advertising Standards Authority regularly investigates such claims and finds against advertisers if they have not demonstrated that they have made a reasonable estimate of the likely response and that they were capable of meeting that response (CAP Code, section 8.9) or they have not made a reasonable estimate of the demand for the product (CAP Code, section 3.27).

(ix) Specification (Reg. 5(5)(o))

If an airline advertised that it had a fleet of modern jet aircraft but passengers found themselves being flown to a remote Caribbean island on an ageing turbo prop this would be false in relation to the specification of the product.