The Cartel Trial:
Issues of Dishonesty and Jury Nullification

Andreas Stephan

Professor of Competition Law,

School of Law, University of East Anglia, Norwich NR4 7TJ, UK.

Tel: +44 1603 592526

Email: a.stephan@uea.ac.uk

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Abstract: The case of *R* v *Stringer and Dean* provides a unique insight into issues of dishonesty and possible jury nullification in offences designed to control corporate misbehaviour. The jury were unconvinced of the defendants' dishonest state of mind in the first (and to date only) case to be tried under the UK's cartel offence. This was despite no attempt being made to dispute the existence of the cartel or present evidence in their defence. The paper asks whether the trial highlights flaws in the concept of dishonesty or reflects a broader problem of jury nullification in offences relating to corporate misconduct. It concludes that while dishonesty is unpredictable and can be easily challenged in the context of business misconduct, there is also a significant danger that juries question the legitimacy of treating some business misconduct as crime, regardless of how an offence is designed.

Keywords: Cartels, Dishonesty, Criminal Law, Competition Law

1. Introduction

Growth in the use of the criminal law to tackle corporate wrongdoing has been criticised by some as an unjustifiable form of extreme regulatory control. These white-collar offences often have few clear overlaps with 'traditional' crime and are typically more closely related to civil tools of regulation and enforcement.[1] The fact that many civil enforcement tools have become criminal in nature raises interesting questions about the extent to which the criminal/civil distinction is still important.[2] Nevertheless, the two remain procedurally distinct and 'labelling' continues to be of great importance in criminal law. It is felt that the label 'criminal' should be reserved for the most objectionable acts and that overcriminalisation (especially in relation to conduct previously subject to administrative methods of regulation) risks eroding the legitimacy and effectiveness of all criminal law.[3]

[1] See for example: AJ Ashworth 'Is the criminal law a lost cause? (2000) 116 L Q Rev 225; AJ Ashworth and L Zedner 'Defending the criminal law: reflections on the changing character of crime, procedure and sanctions' (2008) 2 Crim L & Phil 21; D Husak Overcriminalization and the Limits of Criminal Law (New York: Oxford University Press, 2009).

[2] J Coffee 'Does "unlawful" mean "criminal"? Reflections on the disappearing tort/crime distinction in American law' (1991) 71 Boston U L Rev 193

[3] See generally: Alison Jones and Rebecca Williams 'The UK response to the global effort against cartels: is criminalization really the solution?' (2014) 2(1) J Antitrust Enforcement 100–125.

Competition law provides an important example of this trend.[4] It seeks to prevent monopoly outcomes in markets by prohibiting anti-competitive agreements (cartels), abuse of dominance by powerful businesses, and preventing mergers and acquisitions that might lead to a significant lessening of competition. Infringements of competition law result in very significant levels of corporate fines (typically up to 10% of a business' worldwide turnover) and are meant to serve a strong punitive and deterrent functions.[5] They are typically imposed on businesses and not individuals and enforced through a purely civil or administrative enforcement process. Most competition regimes around the world are only 20-30 years old, having replaced pre-market liberalisation systems of regulation that were often ambivalent, or even favourable towards anti-competitive conduct that served protectionist objectives, or which were otherwise thought to be in the public interest.[6] An increasing number of jurisdictions, including the UK, have decided to go further still and criminalise anti-competitive agreements (cartels) between businesses that seek to raise prices, limit supply, divide up customers and markets, and especially those that seek to rig bids in competitive public tendering and procurement.[7] Of the three main areas of competition law, cartel enforcement has been singled out as deserving of criminalisation because of the very significant economic harm associated with cartel practices and strong parallels that are often drawn with theft and fraud.[8]

The UK regime consists of a civil prohibition of cartels that applies to businesses under the Competition Act 1998 and also a criminal offence that applies only to individuals under the Enterprise Act 2002. Cases under both the civil and criminal prohibitions were brought first by the Office of Fair Trading (OFT) and since April 2014, by its successor, the Competition and Markets Authority (CMA). The purpose of the cartel offence was to signal the seriousness of cartel conduct to the business community and also enhance deterrence by ensuring the individuals responsible (who might have left the business or otherwise not be directly impacted by the corporate fine) faced punishment for their actions.[9] Section 188 of the 2002 Act made it an offence for individuals to dishonestly agree to engage in cartel practices. The offence was designed around dishonesty (the *mens rea* for theft and fraud in England and Wales) in an attempt to circumvent complex economic arguments that can be central to civil competition law cases, and to avoid it falling within the UK's obligations at the time under EU competition law.[10]

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[4] See Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011); Christopher Harding and Jennifer Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion* (Ashgate 2015).

[5] See Competition and Markets Authority, *CMA's guidance as to the appropriate amount of a penalty* (16 December 2021) CMA73, p4.

[6] For a UK history see: Stephen Wilks, *In the public interest* (Manchester University Press 1999).

[7] Germany is an example of a jurisdiction that has criminalised only this last category of cartel behaviour. See: F Wagner-von Papp 'What if all bid riggers went to prison and nobody noticed? Criminal antitrust law enforcement in Germany' in Beaton-Wells and Ezrachi (n 4).

[8] The most famous expression of this Klein's description of cartels as "theft by well dressed thieves": JI Klein, 'The war against international cartels: lessons from the battlefront' Speech at Fordham Corporate Law Institute (14 October 1999).

[9] A. Hammond and R. Penrose, *The Proposed Criminalisation of Cartels in the UK*. A report prepared for the Office of Fair Trading (November 2001) [2002] U.K.C.L.R. 97, 7.3; M. Furse and S. Nash, *The Cartel Offence* (Oxford: Hart Publishing, Oxford, 2004), paras 3.6–3.7.

[10] Angus MacCulloch, 'The Cartel Offence: Is Honesty the Best Policy' in Barry J Rodger (ed), *Ten Years of UK Competition Law Reform* (DUP 2010); Andreas Stephan, A Stephan 'Four key challenges to the successful criminalisation of cartel laws' (2014) 2(2) J Antitrust Enforcement 305–332.

Almost two decades on from it coming into force in 2003, the UK cartel offence has resulted in only seven criminal investigations (three of which closed without charges being brought) and five convictions (two with suspended sentences) out of 11 prosecutions. In 2011, the UK government identified the dishonesty element of the offence as the key reason why more cases were not brought to trial.[11] The offence was therefore amended by the Enterprise and Regulatory Reform Act 2013 (in relation to conduct occurring after April 2014), to remove the requirement of dishonesty and replace it with a series of defences centred on the question of whether the conduct was hidden from customers and the authorities.[12]

R v *Stringer and Dean*, known as *Galvanised Steel Tanks* or 'GST', was the only case to be tried before a jury under the old offence and is the focus of this paper.[13] In June 2015 a jury at Southwark Crown Court acquitted Clive Dean and Nicolas Stringer, who had both been charged with the cartel offence for their involvement in an anti-competitive agreement in the GST industry.[14] They were acquitted despite the strength of the CMA's evidence (which included Nigel Snee, a third defendant who had pled guilty and admitted dishonesty) and the fact no attempt was made to contest the defendants' involvement in the cartel or present any evidence in their defence. The trial hinged entirely on the question of whether Dean and Stringer had a dishonest state of mind and the jury were evidently unconvinced, taking just two and a half hours (including a lunch break) to deliver their verdict. These features make the trial an important case study into how dishonesty is argued and understood, with implications for other white-collar criminal offences that hinge on this *mens rea* element. Also, as the only case to be contested before a jury under the old offence, the case is of great importance to understanding why the UK's original cartel offence faltered and whether the reformed offence is likely to fare better.

This paper makes an important contribution to the white-collar crime and competition law literature by providing a unique analysis of this important, previously unreported trial. It asks whether the prosecution failed because of issues relating to the question of dishonesty, or whether the case raises wider questions about juries' willingness to accept business practices as crime and convict individuals for offences like price fixing, regardless of how the offence is formulated. The research draws on the author's involvement as an adviser to the defence team of Clive Dean, which allowed for all related court proceedings to be observed first-hand.[15] The paper begins by providing some further background to the UK cartel offence and the GST case (Section 2). It then undertakes a critical discussion of how the trial unfolded, focusing on why the CMA's evidence failed to convince the jury that the defendants had acted dishonestly (Section 3). The focus then turns to whether the trial vindicates the decision to remove dishonesty from the cartel offence and the particular tension that was caused in the trial by the CMA's leniency programme (Section 4). The paper concludes that

[11] Department for Business, Innovation and Skills, *A competition regime for growth* (16 March 2011)
[12] Section 47 of the 2013 Act amended the wording of Section 188 Section 188 Enterprise Act from, *an individual is guilty of an offence if he dishonestly agrees*, to, *an individual is guilty of an offence if he agrees*.
[13] In May 2010, a trial of four British Airways executives did not go ahead because the OFT offered no evidence. See M Hickman, 'BA Price-fixing Trial Collapses After Discovery of New Evidence' *Independent*, 11 May 2010.
[14] *R v Stringer and Dean* (2015) Southwark Crown Court. Unreported.
[15] The author's involvement in the case came about because Clive Dean relied on legal aid and was represented by a legal team with limited knowledge of Competition Law. They approached the author for help following a Google search by a solicitor working on the case. The writing up and publication of this research was delayed to allow for subsequent court proceedings related to the case, including the sentencing of Nigel Snee, the conclusion of the civil case against the undertakings, and any subsequent appeals.

while dishonesty is unpredictable and can be easily challenged in the context of business misconduct, there is also a significant danger of jury nullification because the legitimacy of treating the conduct as crime is unconvincing, regardless of how an offence is designed.

2. Background

2.1 The UK Cartel Offence

The UK's Enterprise Act 2002, s.188 made it a criminal offence for two or more individuals to *dishonestly agree* to make or implement cartel agreements, with a maximum five years imprisonment and/or an unlimited fine.[16] Responsibility for bringing cases under the offence rests jointly with the CMA (formerly the OFT) and the Serious Fraud Office. As a concept in English law, dishonesty exists in a number of civil and criminal law contexts but is most prominent as (part of) the *mens rea* for the offences of theft and fraud. Prior to the UK Supreme Court judgment in *Ivey v Genting Casinos*[17] courts followed the test set out in *Ghosh* in determining whether a defendant was dishonest: a jury must be satisfied that: (1) the actions of the defendant were dishonest by ordinary standards of reasonable and honest people (objective); and that (2) the defendant must have realised they were dishonest by those standards (subjective).[18] It was this second, subjective, leg of the test that was thought to open the door to so-called "Robin Hood" defences, whereby the defendant argues they did not realise their actions were dishonest. The judgment in *Ivey* essentially removed this subjective leg and brought the test in line with that of dishonesty in civil law.

The UK cartel offence was created to signal the seriousness of cartel conduct to the business community, general public and the courts.[19] It was thought dishonesty was a concept that juries could easily understand, given the perceived parallels between cartels and theft, and that it avoided the need to engage in complex economic questions of whether the conduct was justified on efficiency grounds (the key defence available to businesses under the civil prohibition contained in the Competition Act 1998). Yet by 2011 the 6-10 prosecutions a year originally envisioned for the offence failed to materialise.[20] Only one case resulted in convictions (on the back of plea agreements previously entered into by the defendants with the US Department of Justice) and another saw the respective trial collapse following failures in evidence management.[21] In 2011 the UK government sought to 'make it easier to secure convictions in serious cases'.[22] Even though the offence had never been tested before a jury, the requirement of *dishonesty* was identified as the primary obstacle, because proving it in cartel cases may be particularly difficult where individuals 'were not

[16] Section 188.
[17] *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67
[18] *R v Ghosh* [1982] EWCA Crim 2
[19] See comments by Patricia Hewitt, Secretary of State for Trade and Industry: *Hansard*, HC col.47 (April 10, 2002).
[20] Hammond and Penrose (n 9), paras 2.5–2.6.
[21] OFT Press Release, "Three Imprisoned in first OFT Criminal Prosecution for Bid-rigging" (June 11, 2008); *Whittle* [2008] EWCA Crim 2560; [2009] U.K.C.L.R. 247 at [28]; OFT, "OFT withdraws criminal proceedings against current and former BA executives" (May 10, 2010) OFT Press Release 47/10.
[22] Department for Business, Innovation and Skills (n11), p.6.

clearly motivated by greed'.[23] The Enterprise and Regulatory Reform Act 2013 removed dishonesty from the offence without replacing it with anything to distinguish the conduct as amounting to crime. Instead, a series of carveouts and defences were introduced where an individual can demonstrate they did not intend to hide the agreement from customers, or the CMA. Controversially, it also created the defence of having taken reasonable steps to seek legal advice prior to the implementation of the agreement, while being silent on whether that advice should actually have been followed.[24]

Some commentators argued the reform of the offence was premature and that dishonesty served an important role in capturing the delinquency that justified cartel criminalisation.[25] However, it also set the bar significantly higher than in civil enforcement cases under the Competition Act 1998, that dominate the CMA's work (and the OFT before it).[26] Under Chapter I of the 1998 Act the CMA has the power to impose a fine of up to 10% of a business' worldwide turnover where there is any exchange of commercially sensitive information regardless of whether an agreement has been reached. In principle, an infringement can arise from any form of coordination that 'knowingly substitutes practical cooperation for the risks of competition'.[27] There is no need to show that harm, greed or any kind of anticompetitive effect was intended and an infringement can be committed intentionally or negligently.[28] Despite evidence that many small and medium sized businesses have little or no knowledge of this prohibition, ignorance of the law is no defence even where the ignorance or mistake is based on independent legal advice.[29]

While the comparable cost, time commitment and uncertainty associated with criminal prosecutions are also likely to be important, dishonesty has consistently been cited as the reason for a lack of prosecutions by the competition regulator, as will be discussed later in this paper. According to the CMA website, only seven criminal investigations have been opened and these are summarised in Table 1.

Table 1 – Criminal Cartel Investigations, 2003-2021[30]

[23] Department for Business, Innovation and Skills (n11), para.6.14.

[24] s. 188B (Defences to commission of cartel offence), Enterprise Act 2002; for discussion, see A Stephan, 'The UK Cartel Offence: A Purposive Interpretation? (2014) *Criminal Law Review* 12, pp. 877-890; P Whelan, 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) 78(3) *Modern Law Review* 493.

[25] A majority of respondents to the government's consultation argued the cartel offence should not be changed. See Department for Business, Innovation & Skills, *Competition regime for growth: responses to consultation* (16 March 2011). Available: https://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform (accessed 7 July 2022).

[26] It is worth noting that civil competition law enforcement in the UK follows something close to the criminal standard of proof. For example in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, the Competition Appeals Tribunal noted how, 'We find it difficult to imagine… this Tribunal upholding a penalty if there were a reasonable doubt in our minds…' (at 108).

[27] Case 48/69 *ICI v Commission* EU:C:1972:70, at 64.

[28] Section 36(3) of the Act; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs [453] to [457]

[29] See Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG,* EU:C:2013:404, paragraph 38. For a survey of business awareness see; ICM Unlimited, *A report by ICN on behalf of the Competition and Markets Authority* (2018). Available: https://www.icmunlimited.com/historical-polling/competition-law-research-cma/ (accessed 7 July 2022).

[30] Source: Competition and Markets Authority website: https://www.gov.uk/cma-cases?case_type%5B%5D=criminal-cartels (accessed 7 July 2022).

Investigation	Outcome
Precast Concrete Drainage Products (2003-2016)[31]	**One conviction on guilty plea:** Barry Kenneth Cooper, sentenced to 2 years imprisonment, suspended for 2 years, a 6 month curfew order, and disqualified from acting as a company director for 7 years.
Galvanised Steel Tanks (2012-2015)[32]	**One conviction on guilty plea, two acquittals by jury** Nigel Snee convicted (guilty plea), sentenced to 6 months imprisonment, suspended for 12 months and 120 hours community service (September 2015). Clive Dean and Nicolas Stringer found not guilty by a jury at Southwark Crown Court (June 2015).
Commercial Vehicle Manufacturers (2010-2011)[33]	**Case closed** (insufficient evidence)
Air Passenger Fuel Surcharge (2008-2011)[34]	**Case closed** (Trial did not go ahead - prosecution offered no evidence)
Agricultural Sector (2011)[35]	**Case closed** (insufficient evidence)
Automotive Sector (2011)[36]	**Case closed** (insufficient evidence)
Marine Hoses (2007-2008)[37]	**Three convictions on guilty plea** Peter Whittle, Bryan Allison and David Brammer convicted on guilty pleas (10 June 2008), previously subject to plea agreements with the US Department of Justice that resulted in their extradition.

As the revised cartel offence only applies to conduct occurring after April 2014, Table 1 very much reflects the period of enforcement in which the dishonesty offence applied. The apparent difficulty in bringing cases that had a realistic prospect of conviction, is reflected in a number of factors aside from the low number of investigations opened during this 18 year period. It is notable for example that three cases were considered serious enough to warrant a criminal investigation but yielded insufficient evidence to convict. Also, charges were only brought against one person in *Precast Concrete Drainage Products*, despite the cartel arrangement involving multiple individuals.[38] Finally,

[31] CMA, 'Supply of precast concrete drainage products: criminal investigation' (7 March 2016); Case reference: CE/9705/12.
[32] CMA, 'Supply of galvanised steel tanks for water storage: criminal investigation' (14 Sep 2015); *R v Stringer and Dean* (n 14).
[33] CMA, 'Commercial vehicle manufacturers: criminal cartel investigation (1 December 2011)
[34] CMA, 'Air passenger fuel surcharge: criminal cartel investigation' (8 November 2011); *R v George, Crawley, Burns and Burnett* (May 2011, unreported).
[35] CMA, 'Agricultural sector: criminal cartel investigation' (3 August 2011)
[36] CMA, 'Automotive sector: criminal cartel investigation' (4 October 2011) Case reference: CE/9229-09.
[37] CMA, 'Marine hose: criminal cartel investigation' (14 November 2008); *R v Whittle, Brammar & Allison* (unreported).
[38] See: Angus MacCulloch, 'The Quiet Decline of the UK Cartel Offence: A Principled Victory in the Face of Practical Failure' in Barry Rodger, Peter Whelan and Angus MacCulloch, *The UK Competition Regime: A Twenty-Year Retrospective* (OUP 2021)

the failed prosecution of four executives in *Air Passenger Fuel Surcharge* laid bare the OFT's lack of experience in handling evidence in a criminal case.[39] The sum of all UK cartel enforcement to date is five convictions on guilty pleas and two acquittals at trial. We now turn our attention to the only case to be tried before a jury – *Galvanised Steel Tanks*.

2.2 The CMA's case against Stringer and Dean

In May 2012, CST Industries approached the OFT with an application for immunity under its leniency programme. This is a detection tool common to most competition law regimes around the world, which provides the offer of immunity to corporate fines (and by extension, criminal prosecution of employees), to the first business to report their involvement in a cartel. Subsequent firms to cooperate receive a fine discount and the cooperation of individuals in any subsequent criminal procedure is reflected either in plea bargains in lieu of trial (most notably in the US), or in sentencing. CST reported having been involved in a cartel since 2005 with its competitors, Franklin Hodge Industries (FHI) and Galglass Ltd. The three companies together controlled the supply of cylindrical galvanised steel tanks used primarily to power fire sprinkler systems in the UK. These were bought by specialist contractors who were appointed to install fire sprinkler systems in supermarkets, warehouses and other large commercial premises, where such systems are compulsory.[40] Insurance companies generally required the tanks to meet certified standards set by the Loss Prevention Certification Board (LPCB).[41] For most of the duration of the cartel, the three companies were the only LPCB approved manufactures and there was no substitute for cylindrical GSTs for outdoors installation.[42] Neither was it easy for other manufacturers to switch production to these tanks.[43]

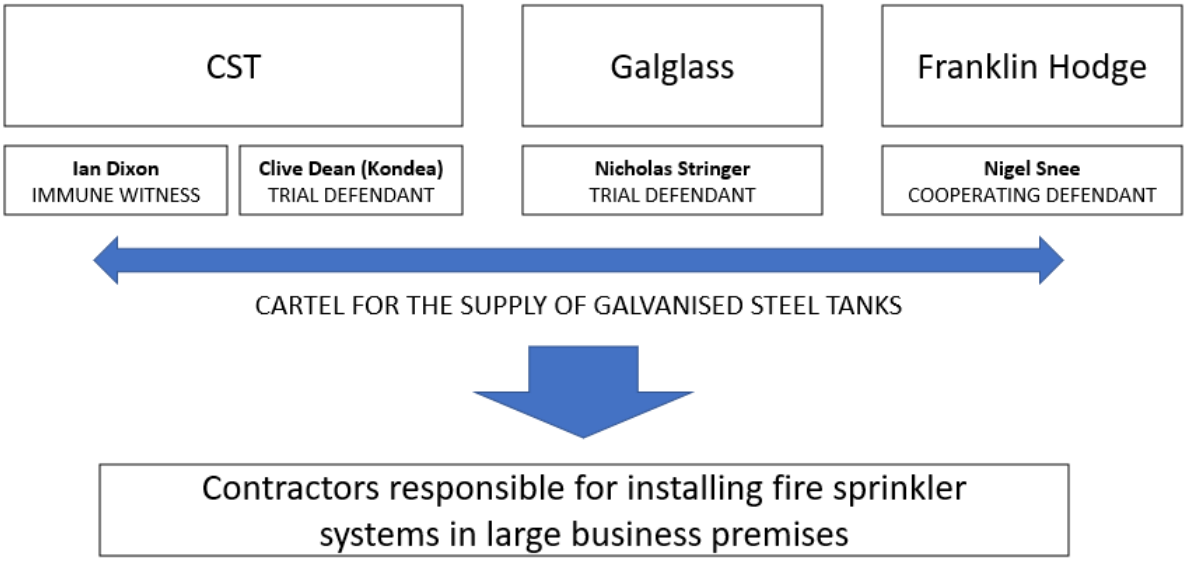
As CST was the first cartel member to report the cartel, it secured immunity from corporate fines under the OFT's leniency programme, and its employees were issued with 'no action letters' – a promise that they would not be charged under the cartel offence.[44] Franklin Hodge applied for leniency in April 2013.[45] By this time, the CMA (the OFT's successor) had already opened a criminal investigation in parallel to its civil investigation of the businesses and had undertaken searches of their premises and those of Galglass.[46] They seized evidence, interviewed witnesses (including those suspected of the cartel offence), as well as those working for the contractors and the relevant industry body. Galglass went into administration during the course of the investigation and was liquidated.[47]

The CMA's investigation focused primarily on the role of four individuals directly involved in the cartel and in the sale of tanks produced by the three manufacturers: Ian Dixon and Clive Dean (CST),

[39] Office of Fair Trading, 'Project Condor Board Review' (December 2010)
[40] Case CE/ 9691/12 Decision of the Competition and Markets Authority, *Galvanised steel tanks for water storage: main cartel infringement* (19 December 2016) at 2.2.
[41] Ibid, at 2.12
[42] Ibid, at 2.22
[43] Ibid, at 2.29
[44] See Office of Fair Trading, *Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process* (July 2013) OFT1495.
[45] Case CE/ 9691/12 (n 40) at 2.102
[46] The criminal investigation was opened in September 2012 and executed warrants to search premises in November 2012; Case CE/ 9691/12 (n 40) at 2.103-4
[47] Case CE/ 9691/12 (n 40) at 2.88

Nigel Snee (Franklin Hodge) and Nicholas Stringer (Galglass).[48] As an employee of CST, Ian Dixon received a no-action letter on condition that he cooperate with the CMA's investigation, including giving evidence in any criminal proceedings. Nigel Snee cooperated with the CMA's investigation and pled guilty at the earliest opportunity. Clive Dean had been an employee of CST for many years but became self-employed shortly before the cartel was formed. He continued to be involved in selling CST tanks throughout the cartel but did so through a family business run from his home (Kondea Water Supplies Limited).[49] Had he remained an employee, he would have benefited from the same protection as Dixon and the other CST employees. Dean's legal team attempted, unsuccessfully, to challenge his prosecution on the basis that he was a de facto employee and so should benefit from a no-action letter.[50] Kondea assumed some commercial risk in selling CST tanks and so amounted to a separate undertaking of business for the purposes of the CMA's leniency programme. Clive Dean and Nicolas Stringer both contested the charges and went to trial. Figure 2 summarises the key players in this cartel arrangement.

Figure 2 – The *Galvanised Steel Tanks* case.



The CMA's investigation amassed a significant body of evidence that would was deployed at trial. This included witness statements from Ian Dixon and Nigel Snee admitting the existence of the cartel, that it was dishonest, and setting out a full schedule of the meetings that occurred between the competitors' representatives between April 2005 and November 2012. These statements also set out how the cartel had been involved in price fixing, bid-rigging, and market sharing by way of customer allocation during this period.[51] The 60 or so contractors operating at the time were secretly allocated between the three competitors on customer sharing lists marked A, B, C to refer to FHI, Galglass and CST. Prices offered to a customer not allocated to the tank manufacturer, would be higher to prevent competition and encourage them to go back to their assigned supplier.[52] Over time, the lists were updated with customers moved between them to ensure the market was shared

[48] Snee, Dean and Stringer were Managing Directors (Dean of Kondea)
[49] Case CE/ 9691/12 (n 40) at 2.66
[50] Hearing at Southwark Crown Court. 19 May 2015 before HHJ Goymer.
[51] Case CE/ 9691/12 (n 40) at 3.5
[52] Case CE/ 9691/12 (n 40) at 3.13-14

equally by the three businesses party to the cartel.[53] This allowed the competitors to eliminate the rivalry between them (without the knowledge of the contractors) and significantly raise the prices paid for these tanks, with the higher prices generally passed on to the owners of the business premises required to have fire sprinkler systems installed.[54]

In addition to the evidence given by Dixon and Snee, the CMA had a large body of witness evidence from employees of the three businesses who were aware of the customer sharing arrangement and the meetings, as well as supporting text and email evidence.[55] The CMA also had a covert audio-visual recording of a cartel meeting that occurred on 11 July 2012, the purpose of which was to encourage a new entrant into the market (Balmoral Tanks Limited) to join the cartel arrangement.[56] Most damagingly of all, they had police interviews with Clive Dean, in which he denied involvement in the cartel and agreed his participation in such an agreement would be dishonest.

The strength of the evidence supporting the existence of the cartel was such that all of the businesses (including Kondea) agreed to the CMA's settlement procedure in its civil enforcement case, with fines imposed in December 2016, after all criminal proceedings had concluded.[57] This included the businesses associated with the two defendants who were acquitted at trial.[58] Balmoral Tanks Limited, the company the cartel sought to persuade to join the cartel at the 11 July 2012 meeting, were also fined. While Alan Joyce (the Managing Director of Balmoral, who attended the meeting) refused to join the cartel, he was found to have exchanged commercially sensitive information and gave assurances about pricing, in breach of the Competition Act 1998.[59]

3. Why the case for dishonesty was unconvincing

GST is an interesting case study of how dishonesty is argued and understood in a criminal trial involving business misbehaviour, because the two defendants on trial never challenged the CMA's case or the existence of the cartel. Instead, they were acquitted because the jury were unconvinced as to their dishonesty, despite the considerable body of evidence presented by the CMA. The key question is why they were unconvinced. This section of the paper will explore whether the failed prosecution was likely down to the way the evidence was presented, or whether the concept of dishonesty is inherently susceptible to doubt when it comes to cartel behaviour. The analysis focuses on two key themes relating to dishonesty that emerged from the CMA's evidence at trial: (i) the

[53] Case CE/ 9691/12 (n 40) at 3.25
[54] Case CE/ 9691/12 (n 40) at 3.21
[55] See generally Case CE/ 9691/12 (n 40).
[56] Case CE/ 9691/12 (n 40) at 3.33. [Franklin Hodge senior employee] witness statement, 6 June 2014, para 159.
[57] CMA Press Release, 'CMA fines water tank firms over £2.7 million' (19 December 2016).
[58] The fines were: Franklin Hodge Industries Ltd (£2m, including a 30% discount for leniency and a further 20% for settlement); The parent companies of Galglass Ltd, by now in liquidation (£653,251, including a 20% settlement discount); KW Supplies, successor to Kondea which also went into liquidation (23,720, including a 20% discount for settlement); CST Industries received no fine because it received immunity under the CMA's leniency programme.
[59] Case CE/ 9691/12 (n 40) at 3.18; CMA, 'Water tanks cartel case study' (12 February 2018); See also unsuccessful case brought by Balmoral Tanks before the Court of Appeal: *Balmoral Tanks v Competition and Markets Authority* [2019] EWCA Civ 162, para 7. See also: *Balmoral Tanks v Competition and Markets Authority* [2017] CAT 23.

motivation for entering in the cartel agreement (was there greed or deception?); and (ii) the harm caused by the cartel (were there foreseeable victims?).

3.1 Motivation for engaging in the cartel agreement

In most cases of theft and fraud the defendant's dishonest state of mind is arguably beyond doubt because of the nature of the acts themselves, and so guilt tends to hinge on evidence relating to whether the actions were those of the defendant. For example, the Court of Appeal noted in *Ghosh* that despite his virtuous intentions in giving to the poor, even Robin Hood would have known that the act of stealing itself was dishonest by the standards of reasonable and honest people.[60]

However, when it comes to economic crime, the nature of the act can be highly subjective as to its moral offensiveness. Arguably, the acts of seeking to maximise profits or speaking with competitors about prices and customers are not in themselves inherently dishonest. Unlike theft and fraud, cartels do not necessarily involve an unauthorised appropriation of another's property, or force and deception. Moreover, competition is a relative concept and the extent to which business compete with each other and the size of their profits varies greatly between markets regardless of whether there is a cartel agreement. What is important to dishonesty is the defendant's state of mind; indeed, the judge in the GST trial instructed the jury that Snee's admission of dishonesty did not mean Dean and Stringer had a dishonest state of mind too. To convince the jury of their dishonesty, the CMA therefore had to focus on the remaining two defendants' motivation and show there were dishonest traits such as greed and deception.

The CMA relied primarily on the evidence of their cooperating witnesses, Ian Dixon and Nigel Snee, both of whom had admitted dishonesty in their witness statements. However, the evidence they and other employees of the three companies gave at trial was not convincing as to the dishonest state of mind of those responsible. The defence teams challenged the CMA's witnesses in cross examination, by focusing on the threat of bankruptcy and concerns over the safety of the products, as motivations for the cartel being formed. There were repeated suggestions that very heated competition in the period prior to the cartel had brought the companies to the brink in terms of profitability[61] and that corners may have been cut in the quality of the tanks produced. The three competitors were asked to meet by the industry body (the LPCB) in June 2004, to form a working group to assist them with developing a new certification standard.[62] The meetings between these competitors continued and the discussions soon went beyond manufacturing standards, resulting in the anti-competitive practices described above.[63] The evidence of both Snee and Dixon suggested the original motivation for this was to stop contractors playing the manufacturers against each other and return to the 'reasonable price'[64] levels seen before this period of heated competition.[65] This pressure to drive down prices through rivalry is precisely the benefit to consumers and the wider economy that competition seeks to achieve. Yet it was viewed quite differently by those working within the GST manufacturers. Snee and Dixon said the motivation behind the agreement was originally to keep their businesses alive and prevent job losses. This view was shared by some of the sales employees

[60] *R v Ghosh* (n 18).
[61] *R v Stringer and Dean* (n 14), 4 June 2015.
[62] Case CE/ 9691/12 (n 40) at 3.2
[63] Case CE/ 9691/12 (n 40) at 3.9
[64] Case CE/ 9691/12 (n 40) at 3.7
[65] Ian Dixon witness statement, 20 February 2013, page 16; Case CE/ 9691/12 (n 40) at 3.34

who gave evidence. One FHI employee, for example, characterised contractors as "fat cats" who were "squeezing the life out of us" by aggressively pitting the three companies against each other to secure the best possible price.[66] This sentiment was a key focus of the defence barristers' closing arguments. Ian Morely QC (acting for Dean) described how "open competition had become ruinous competition" and that the evidence pointed to businesses trying to survive, rather than being motivated by greed.[67]

The issue of safety standards was strongly refuted by the CMA, who's legal team argued the minimum LPCB specification guaranteed a certain level of quality. Yet concerns about the integrity of the tanks as a result of the period of heated competition, emerged in the evidence of Ian Dixon. His responses to cross examination about the issue of safety were especially damaging to the CMA's arguments relating to motivation and would be referred back to by the defence teams at various parts of the trial. Dixon confirmed there had been concerns about the safety of the tanks and described them as a "very important piece of kit" in terms of fire safety, the failure of which could result in death or serious injury. He suggested the heated level of competition had put quality at risk and agreed with Ian Morely QC's suggestion that they were "essentially saving lives by being in this agreement".[68]

Neither the bankruptcy nor safety issues could fully justify the significant increases in prices (discussed in the next section) or the fact that the behaviour was carefully hidden from customers and therefore arguably amounted to a deception. Sales staff were instructed to not disclose the existence of the A,B,C lists and were told to blame the price hikes on steel prices, even though it was clear to the contractors that the "cost of the tanks seemed to be far outstripping the rise in the steel costs".[69] Although Dixon and Snee did acknowledge these deceptive features of the cartel and admitted their actions were dishonest, their perception of the conduct was clearly conflicted. In an earlier witness statement Dixon had said that "at the time I did not think I was doing a real dishonest thing".[70] In a later statement he said "I have no doubt my participation was dishonest and illegal".[71] Snee said he struggled with the concept of dishonesty, describing the intention as "noble" and the two defendants, "entirely honourable men". This was echoed in some of the evidence by other employees, with one from FHI stating that Snee "did not go into it for the money".

As a consequence, the closing arguments were riddled with inventive analogies on both sides, aimed at helping the jury understand the existence or absence of dishonesty in this case. Mark Ellison QC (acting for the CMA) described the actions as akin to a crowd turning up to a football match, not knowing that the outcome had already been decided. Morley QC suggested there were never entire truths in business and that things are not dishonest because they are untrue, citing examples of the tooth fairy, Father Christmas and "complementing your mother-in-law". Drawing on the statements discussed above, he suggested that "open competition is not the answer to everything" and suggested the GST cartel was more akin to a trade union. He asked the jury whether businesses told consumers everything – "Do you know what is in a chicken nugget? Do you want to know?". He also suggested they had been no more dishonest than the contractors who played them against each

[66] Evidence of FHI Employee *R v Stringer and Dean* (n 14), 4 June 2015.
[67] Iain Morley QC, *R v Stringer and Dean* (n 14), 22 June 2015
[68] Evidence of Ian Dixon, *R v Stringer and Dean* (n) 8 June 2015.
[69] Case CE/ 9691/12 (n 40) at 3.49.
[70] *R v Stringer and Dean* (n 14), 8 June 2015.
[71] Evidence of Ian Dixon, *R v Stringer and Dean* (n 14), 8 June 2015.

other to drive down the price to purportedly unsustainable levels. In his closing speech, John Ryder QC (acting for Stringer) told the jury, "you don't walk into a shop and buy a Mars bar and ask what it cost the shop keeper".[72]

On the question of motivation, the jury were likely left with an impression that the defendants' actions were at best well intentioned, and at worst morally-ambiguous business practices. The judge tried hard to control the raft of odd statements and opinions that were volunteered by the witnesses throughout the trial, including on the UK's membership of the European Union, the Milk Marketing Board and the free market policies of the Margaret Thatcher government.[73] Yet the range of factors that were potentially relevant to the question of dishonest motivation were such that there was little the judge (or indeed the CMA) could have done to provide greater discipline to how the evidence transpired. It is notable that although there was significant text message and email evidence (in addition to the transcript of the recorded cartel meeting), there were no statements that might be described as incendiary, in capturing the delinquency, deception or greed at the heart of the CMA's case. It was also unclear that the strongest part of the CMA's evidence (that relating to the deception of customers) was properly understood and accepted by the jury. For secret price fixing to be deceptive, it is arguably necessary to accept that customers expect prices to be the product of a competitive process and that cartel activity is an attack on the rules of the market.[74] While there is some survey evidence to suggest this is the case, it does not mean that juries accept the conduct should amount to crime, as discussed later in this paper.[75] The question now turns to the related issue of whether any harm was caused by the cartel.

3.2 The harm caused by the cartel

Strictly speaking, the question of whether the cartel actually caused any harmful anti-competitive effects is irrelevant to the cartel offence, which makes it a crime to *dishonestly agree* to enter into cartel practices. Nevertheless, much of the CMA's evidence in the trial was focused on the margins achieved by the GST cartel. This served two functions – the first was to demonstrate that there must have been a dishonest mind because harm was reasonably foreseeable and was achieved and maintained over a sustained period of seven and half years. The second was to highlight the mischief that the cartel offence seeks to address, thereby making it more likely the jury would accept that cartel conduct should amount to crime.[76] The CMA were very thorough and meticulous in their presentation of evidence relating to harm, but it proved challenging to pin down its precise magnitude or impact on the GST customers. In contrast to traditional property offences (the theft of a car or the defrauding of a pensioner), it can be hard to identify a tangible victim of the cartel or the precise harm that has been caused. Indeed, the process of bringing an action for cartel damages in tort involves significant economic evidence about what the price would have been absent the cartel,

[72] *R v Stringer and Dean* (n 14), 23 June 2015

[73] The Milk Marketing Board was a state sanctioned body that promoted milk and guaranteed a minimum price for milk producers, between 1933 and 1994.

[74] See generally: Bruce Wardhaugh, 'A normative approach to the criminalisation of cartel activity' (2012) *Legal Studies* 32(3), pp. 369-395.

[75] See Andreas Stephan, 'An empirical evaluation of the normative justifications for cartel criminalisation' (2017) *Legal Studies* 37(4), pp. 621-646.

[76] On this point, see generally: Peter Whelan, 'Cartel Criminalization and the Challenge of 'Moral Wrongfulness'' (2013) *Oxford Journal of Legal Studies*, 33(3), pp. 535-561, 559.

and those harmed can include customers who had no contractual relationship with the cartel at all (because they could no longer afford to buy the product).[77]

The CMA's evidence focused, in general terms, on the significant increases in margins during the period of the cartel and how they compared to the period before and after. It was clear that the cost of GSTs had gone up considerably during the cartel period (well beyond the pre-cartel levels) and this is what attracted Balmoral to enter the market.[78] In the absence of the sort of economic evidence described above, the CMA had to rely primarily on witness evidence from the employees of the three companies, with reference to sales and accounting documents. They also pointed to Balmoral's entry into the market, attracted by the cartel profits, and the significant margin by which they were able to undercut the three cartel members.[79]

The evidence relating to harm was harder for the defence teams to challenge in cross examination and had the potential to provide a far more tangible sense of dishonesty, compared to the more abstract and chaotic evidence relating to motivation. Yet the jury visibly struggled to stay engaged in the repeated evidence relating to prices and margins and there is a question as to whether they really understood what was being presented to them. This was not helped by the fact the CMA witnesses gave varying estimates of the cartel margins, that ranged between 24-45%.[80] While there was a stark contrast between these figures and the 6-7% margins before the cartel, the jury likely struggled to understand what margin was necessary for the production of GSTs to be profitable at all. Indeed the answer to this question would have been different throughout the duration of the cartel and the evidence presented was not precise enough to accurately disentangle the increases in price caused by the cartel, from the increases in steel prices seen over much of the same period.[81] A sales director from Galglass, for example, suggested that margins of at least 20% were necessary at one point to cover overheads.[82] Also, the pre-cartel margins may have represented levels that were unsustainable (according to the evidence given by Dixon and Snee on motivation). This allowed the defence teams to respond by posing the question, "what is a fair price?". Competition law is not concerned with price regulation or the number of businesses in an industry, it is instead about the process of competition. What matters is not what the competitive price is, but that the process of calculating prices in the market is free of anti-competitive conduct. The CMA repeatedly tried to make this point, but the evidence on margins made the question of fairness inescapable. When asked about the mark-up, Dixon said he did not feel it was "unfair or obscene".[83] If the price was fair, could it really be said that those responsible for the cartel reasonably foresaw harm?

It was anticipated that the evidence of contractors (the direct victims of the cartel) would be key to the question of harm, but their views on the arrangement were surprisingly muted. Six

[77] This is what is described as the 'deadweight loss' caused by monopoly practices such as cartels. See: Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy*, ECLI:EU:C:2019:100, 6 February 2019, Opinion of AG Wahl: 'the real harm caused by illegal restrictions of competition is the deadweight loss resulting from such restrictions, that is to say a loss of economic efficiency caused by the anticompetitive conduct in question' (at 50)

[78] This was confirmed in the evidence given by Alan Joyce of Balmoral Industries.

[79] Case CE/ 9691/12 (n 40) at 3.104

[80] Witnesses in the trial gave estimates of markups that included 24%, at least 30%, 40%, 34-45%, and 34-35%. An emoloyee of Galglass, suggested that margins reached 110% at one point. *R v Stringer and Dean* (n 14), 4 June 2015.

[81] Alan Joyce (Balmoral) suggested that margins of 15% were needed, for example. *R v Stringer and Dean* (n 14), 11 June 2015. Evidence of Galglass employee working in Accounts and Purchasing recalled steel prices increasing from £450 to £750 a ton during this period. *R v Stringer and Dean* (n 14), 9 June 2015

[82] Evidence of a Sales Director for Galglass, *R v Stringer and Dean* (n 14), 9 June 2015.

[83] Evidence of Ian Dixon, *R v Stringer and Dean* (n 14), 4 June 2015.

representatives of the contractors gave evidence.[84] They said they had no knowledge of the practices, that they thought the three manufacturers were competing and acknowledged they faced higher prices during this period that had been passed onto the owners of the business premises that required fire sprinkler systems (principally supermarkets). One also described how a quote from Franklin Hodge was 55% higher than from Balmoral when that company entered the market.[85] However, in cross examination, they echoed some of the earlier evidence about the importance of safety and the dangers of excessive competition causing bankruptcy. Two of these witnesses said that quality was more important than price and one described prices during the cartel as "fair". It also became apparent that some thought very highly of the defendants, one describing Dean as "a gentlemen – nice guy".[86] When asked what their reaction was to the secret A,B,C lists, one simply complained it had been a waste of time getting quotes from the other competitors.[87] It is likely that the harm caused by the cartel was ultimately born by the customers of the supermarkets and other business premises that had the fire sprinkler systems installed. This highlights a key problem in competition law and other corporate wrongdoing – the ill effects are often passed on, making the 'victim' of the conduct more remote and dispersed than is typically the case in traditional property offences. [88]

Absent a clear victim or a tangible sense of harm, the jury were likely left with little sense that the actions of the two defendants had been dishonest, or indeed of the mischief the cartel offence sought to address. Their views are more likely to have been shaped by the earlier evidence on the threat of bankruptcy and what Snee had described as contractors taking "ruthless advantage of competition to drive down prices", sparking a price war between the three competitors that risked the business no longer seeming viable.[89] It had also become known during the course of the trial that Galglass had recently gone into liquidation, and this may simply have served to confirm this view. [90]

4. A problem of dishonesty or jury nullification?

On the face of it, the chaotic and unpredictable way in which the GST trial unfolded was in large part due to the broad and abstract nature of dishonesty as a concept. In English law, there is no definition of *dishonesty,* and its ordinary meaning is left to the jury. This means the judge must take a permissive view of the evidence that could be relevant to the defendant's dishonest state of mind. In fact, it has been ruled that even complicated economic evidence can be used to argue or refute dishonesty – despite this being precisely what the cartel offence was meant to avoid. [91] On the other hand, a strong *mens rea* element is important in capturing the mischief of the offence and in convincing a jury that the conduct should rightly amount to crime. This section of the paper will consider whether dishonesty was really a barrier to securing convictions under the cartel offence, vindicating Parliament's decision to remove it from the offence, or whether the GST case represents

[84] Evidence of employees of Tyco, Hall & Kay, Compco and Fire Defence Plc, *R v Stringer and Dean* (n 14), 12 June 2015.
[85] Evidence of employee of Compco, Ibid.
[86] Evidence of employee of Hall & Kay, Ibid.
[87] Evidence of employee of Compco, Ibid.
[88] For a discussion of this theme, see Stuart P Green, 'Moral Ambiguity in White Collar Criminal Law' (2004) *Notre Dame Journal of Law, Ethics & Public Policy* 18, 501.
[89] This was confirmed in evidence given by Snee *R v Stringer and Dean* (n 14), 4 June 2015.
[90] Evidence of employee of Galglass, *R v Stringer and Dean* (n 14), 4 June 2015.
[91] *R* v *IB* [2009] WLR 357

a more significant problem of jury nullification in cases involving the business misconduct of individuals.

4.1 Issues of dishonesty

The decision to design the cartel offence around dishonesty was arguably flawed from the start. In the space of just five years, the UK went from a weak regulation of cartels under the Restrictive Trade Practices Act 1976, to having one of the most punitive cartel enforcement regimes in Europe, under the Competition Act 1998 and Enterprise Act 2002. It is very unlikely that many ordinary members of the public would have felt particularly strongly about cartel conduct when the offence came into force. A public survey carried out in the UK in 2007 (later cited in support of the Government's decision to revise the cartel offence[92]) suggested that only a quarter of Britons strongly felt price fixing was dishonest, with one in five thinking it was not dishonest.[93] Yet Parliament sought to 'send out a strong message to the perpetrators, their colleagues in business, the general public and the courts'[94] with a criminal offence that required jurors to make a contemporary judgement as to whether cartels are dishonest.[95] The difficulty here was highlighted by the extradition case of *Norris v United States* (2008). In finding that secret price fixing alone could not amount to the common law crime of conspiracy to defraud, the House of Lords gave a fascinating overview of the historic treatment of cartels in English law, including the case of *Jones v North* (1875) in which the act of bid-rigging was held to be "very honest".[96]

When the idea of amending the cartel offence was proposed in 2011, there was a very clear view within the competition authority of why only one successful criminal prosecution had been brought. The OFT's Senior Director of Cartel and Criminal Enforcement at the time said, "I can answer that question in one word: dishonesty".[97] For the CMA, the jury's failure to convict Stringer and Dean on the issue of dishonesty alone, vindicated this point and the decision to remove dishonesty from the cartel offence.[98] The CMA suggested the change in law would make prosecution of cases easier because cartels (unlike fraud and theft) 'rarely have clear signs of greed or even personal gain' and that this makes it easy to not doubt the facts, but argue an honest motive like bankruptcy.[99] They further noted how it was difficult to predict how a jury would respond to dishonesty based defences like preventing job losses, which 'are not really relevant to the mischief that the offence was designed to address'.[100]

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[92] Department for Business, Innovation and Skills (n11), p.6.
[93] Andreas Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) *The Competition Law Review* 5(1), pp. 123-145, 135.
[94] Comments by Patricia Hewitt (n 19).
[95] Andreas Stephan, 'How Dishonesty Killed the Cartel Offence' [2011] *Criminal Law Review* 6, pp. 446-455.
[96] *Jones v North* (1874–1875) L.R. 19 Eq. 426 and 429
[97] Ali Nikpay, 'UK cartel enforcement – past, present, future'. Speech to the Law Society Anti-Trust Section, 11 December 2012. Discussed in Beverley Williamson, *Analysing the place of the Criminal Cartel Offence within the Regulatory Landscape of Anti-cartel Enforcement in the UK: more change needed?* (April 2019), Thesis submitted for the degree of Doctor of Philosophy. Newcastle University, p44.
[98] See 'CMA statement following completion of criminal cartel prosecution' (24 June 2015); and Stephen Blake (CMA), 'Criminal cartel enforcement after galvanised steel tanks' (29 September 2015)
[99] Elly Proudlock, 'Watchdog's waiting game' (23 November 2015) *Law Society Gazette*.
[100] Tom Madge-Wylde, 'An interview with Stephen Blake' (7 December 2015), *Global Competition Review* 19(1).

The account given of the GST trial in this paper certainly lends some support to this view. With no definition of the meaning of dishonesty, the defence teams were free to explore the wide range of themes discussed previously, including fears of bankruptcy resulting from 'ruinous competition', whether small deceptions are a normal aspect of doing business, and what amounts to a fair price. The fluid nature of dishonesty also allowed them to unpick the witness evidence that suggested those responsible knew they were acting dishonesty. In particular, they challenged the suggestion that dishonesty should be viewed in binary terms and instead focused on *how dishonest* the conduct was. Morely QC asked a number of the witnesses whether they thought the actions were 'criminally dishonest', suggesting to the jury that the dishonesty was not compelling enough to amount to crime. This was supported by much of the witness evidence, including Ian Dixon who remarked, "At the time I didn't think it was really dishonest, but it was dishonest".[101] Even Dean's police interview failed to make a major impact on the trial, especially when it became clear that the word "dishonesty" was not volunteered by Dean and its significance unknown to him because he was originally interviewed without a solicitor present.

The weaknesses inherent in dishonesty go beyond the cartel offence and have been subject to considerable scholarly debate. Indeed, around the time when the UK cartel offence was initially conceived, a Law Commission report observed how *dishonesty* was likely understood differently in 'marginal cases' where there is some uncertainty as to the dishonest nature of the acts, not only among jurors but also judges.[102] Further, an 2009 ESRC project by Finch and Fafinski undertook an online survey of 15,000 respondents to find there were very significant differences in what people perceived as dishonest behaviour.[103] Even in the realms of theft and fraud, dishonesty as a concept has been strongly criticised since the enactment of the Theft Act 1968, especially as the other elements of theft (such as 'adverse interference' pertaining to appropriation) have become fairly neutral.[104] For example, Glover argues that uncertainties surrounding dishonesty played a role in the failure to bring prosecutions in response to the incident of the grounding of *MSC Napoli* in 2007*,* when huge quantities of goods washed ashore were looted by ordinary members of the public.[105] This raises the question of whether it is right that the meaning of dishonesty be decided as part of secret deliberations by jurors with no direction from the judge, other than to set out the general test they should apply. The approach to property offences varies considerably between jurisdictions. New Zealand, for example have a statutory definition of dishonesty that centres on express or implied consent for the act or omission.[106] By contrast, theft and fraud offences in Germany hinge on the *intention of unlawfully appropriating property.*[107] However, all approaches have strengths and

[101] Evidence of Ian Dixon, *R v Stringer and Dean* (n 14), 8 June 2015.
[102] Law Commission of England and Wales, Consultation Paper No. 155, Legislating the Criminal Code: Fraud and Deception (2000), at 5.16
[103] See Ian Sample, 'Honesty not best policy, survey of public attitudes suggests' *The Guardian* (7 Sep 2009), discussing the 'Honesty Lab' ESRC project led by Emily Finch and Stefan Fafinski.
[104] Two prominent examples are E Griew, 'Dishonesty: the Objections to *Feely* and *Ghosh*' [1985] *Criminal Law Review* 341 and DW Elliott, 'Dishonesty in Theft: A Dispensable Concept' [1982] Crim LR 395. For important clarifications of the other elements of the offence of theft, see: *R v Gomez* [1993] AC 442 and *R v Hinks* [2001] 2 AC 241. On adverse interference, see *R v Gomez* [1993] AC 442.
[105] Richard Glover, 'Can Dishonesty Be Salvaged? Theft and the Grounding of the MSC Napoli' (2010) *The Journal of Criminal Law* (2010) 74, pp.53-76.
[106] Crimes Act 1961, s.217 (New Zealand), discussed in Glover (n 105), p73.
[107] s 246 StGB, discussed in Michael Bohlander, 'Abandoning dishonesty – A brief German comment on the state of the law after Ivey' (2021) The Journal of Criminal Law, published online, pp. 1-9.

weaknesses and it is notable that under the Larceny Act 1916 that preceded the Theft Act 1968, the inflexible design of the offence was thought to be a major weakness that caused trials to get bogged down on technicalities surrounding the definition.[108]

Before this paper moves onto the question of jury nullification, it is important to ask whether the change in the dishonesty test brought about by *Ivey v Genting Casinos* (2017), would have had a material impact on how the GST trial unfolded, as compared to the previous *Ghosh* test.[109] The subjective element removed by *Ivey* was thought to be problematic because it risked perverse outcomes where a defendant did not comprehend ordinary, socially accepted standards of dishonesty.[110] It is unlikely its absence would have had a significant impact on the GST trial. As is apparent from the discussion in this paper, the focus was largely on the question of whether the conduct was objectively dishonest. At no point in the trial was it suggested that the defendants' understanding of the conduct was deficient as to whether it would be considered dishonest by society at large.

4.2 Issues of jury nullification

The removal of dishonesty from the cartel offence will likely address the CMA's frustration in GST, at the chaotic way in which the evidence unfolded and the unpredictable array of issues and opinions the jury were presented with. Much of what they heard in cross examination was described by the CMA's lead barrister as "hearsay" and "the evidence of barristers". With the revised cartel offence requiring only that the defendants entered into the cartel agreement and that they did not intend to do so openly, the CMA may find it considerably easier to conclude enough evidence has been uncovered to bring prosecutions.[111] Indeed, the explicit purpose of the amendment was to, 'make the offence less difficult to prove, leading to more successful prosecutions and therefore maximising the deterrent effect of the offence'.[112] Without the possibility of escaping conviction on arguments centred around dishonesty alone, it may also be significantly more likely that future defendants will plead guilty and cooperate at the earliest opportunity. However, in the absence of a US-style system of plea bargaining (through which the vast majority of criminal antitrust cases are concluded by the Department of Justice), the CMA must be prepared for more jury trials. Confidence in the revised cartel offence assumes that juries will always apply the law properly and follow the instructions of the judge. However, in relation to morally-ambiguous behaviour, juries may lean towards an acquittal regardless of how the offence is designed, because they reject the legitimacy of that behaviour amounting to crime.

Jury nullification is where a jury knowingly and deliberately rejects the evidence before them and refuses to apply the law, either because it wants to send a message about a social issue or because

[108] See M Wasik, '*Mens rea,* Motive, and the Problem of "dishonesty" in the Law of Theft' [1979] *Criminal Law Review* 543. discussed in Glover (n 105), p75.
[109] See also *Booth & Anor v R* [2020] EWCA Crim 575
[110] *Ivey v Genting Casinos* (n 17) Lord Hughes, paragraph 57.
[111] See generally: Stephan (n 24); Paul Gilbert, 'Changes to the UK Cartel Offence – Be Careful What You Wish For' (2015) *Journal of European Competition Law & Practice,* 6(3), pp. 192-196.
[112] A. Chisholm, "CMA Update: Changes to the UK Competition Regime" (2013), Available: https://www.gov.uk/government/speeches/cma-update-changes-to-the-uk-competition-regime (accessed 7 July 2022); Growth, Competition and the Competition Regime, Government Response to Consultation, March 2012, paragraph 7.8.

they find the law contrary to their own sense of morality and fairness.[113] Recent perceived examples of this include the acquittal of Extinction Rebellion activists in 2021, who caused damage to Shell's London headquarters and provided no defence,[114] and the four defendants cleared of criminal damage in relation to the toppling of a statue of the slave trader Edward Colston in 2022, even though they appeared to meet the requirements of the offence.[115] Importantly these cases demonstrate the jury ignoring not only the law but also directions from the judge that (in the case of the Extinction Rebellion activists) there was no defence in law for their actions.[116] Some feel very strongly that jury nullification is central to a jury's democratic function, in that it cannot be forced to implement harsh laws that have been passed by a powerful and unjust government.[117] Devlin famously described the jury as "the lamp that shows that freedom lives" and as a guarantee against tyranny.[118] For others juries are deeply flawed because they can be incompetent, wilfully ignorant of the law before them, and can be inconsistent when dealing with abstract notions such as dishonesty and reasonableness.[119] Juries' competence to try complex fraud cases has been subject to debate for some decades, with repeated recommendations that they should instead be decided by judges.[120] In fact only a very small number of criminal cases go to jury trial, as most are tried in the magistrates' court.[121]The Criminal Justice Act 2003, Section 43, introduced a mechanism through which certain fraud cases could be conducted without a jury. This was intended for cases where the complexity or length of the trial (or both) are likely to be so burdensome for the jury that a trial without a jury may be desirable.[122] However, complicated fraud cases (for example the £60 million prosecution in connection with the extension of the Jubilee Line in 2005) can fail because of procedural issues and poor case management, rather than poor comprehension by the jury. Indeed, judges tend to be wary of abandoning juries in criminal cases altogether.[123]

Turning back to the GST trial, it is important to consider whether the jury acquitted Stringer and Dean because they were unconvinced of dishonesty, or whether their verdict represents a broader rejection of the notion of cartel criminalisation. It is important to remember that the cartel offence was meant to have an educative function, raising what Williams describes as the 'bootstraps' problem, in that the mere act of criminalising does not ensure jurors will associate the conduct with

[113] See for example: Bradley J. Huestis, 'Jury Nullification: Calling for Candor from the Bench and Bar' (2002) *Military Law Review* 173, pp. 68-123, citing *Blacks Dictionary of Law*.
[114] BBC News, 'Extinction Rebellion: Jury acquits protesters despite judge's direction' (23 April 2021).
[115] BBC News, 'Edward Colston statute: Four cleared of criminal damage' (5 January 2022).
[116] On the judge's ability to limit the scope for jury nullification, see: Kevin Crosby, 'Controlling Devlin's Jury: What the Jury Thinks, and What the Jury Sees Online' [2012] *Criminal Law Review* pp.15-29; For a robust defence of jury nullification see: Thom Brooks, 'A Defence of Jury Nullification' (2004) *Res Publica* 10, pp. 401-423.
[117] Sally Lloyd-Bostock and Cheryl Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales' (1999) *Law and Contemporary Problems* 62(2), pp. 7-40, p10.
[118] Patrick Devlin, *Trial by Jury* (London: Stevens & Sons 1956), p164.
[119] See generally: Sally Lloyd-Bostock and Cheryl Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales' (1999) *Law and Contemporary Problems* 62(2), pp. 7-40. See also: Anthony Heaton-Armstrong, 'Editorial: The Effectiveness of Juries and the Use of the Civil Courts in the Control of Crime – the Emperor's New Clothes' (1998) *Medicine, Science and the Law* 38(2), 93.
[120] See for example, The Fraud Trial Commission Report (1986)
[121] See Catherine Elliott and Frances Quinn, *English Legal System* (Pearson 2009), at 123.
[122] Criminal Justice Act 2003, s. 43(5).
[123] See for example comments by Michael O'Kane in "Trial collapse 'does not signal end of the line' for juries in complex court cases" *The Law Society Gazette* (1 April 2005). For details of the Jubilee Line case, see@ Robert Verkaik, 'Jubilee line £60m fraud trial collapses' *The Independent* (23 March 2005).

sufficient moral opprobrium to be convinced they amount to crime.[124] Under s.8 of the Contempt of Court Act 1981, any research or other enquiry into jury deliberations in England and Wales is prohibited. So unlike in the United States, it is not possible to reach out to jury members to understand how they reached their verdict. Nevertheless, it is possible to identify compelling reasons why a jury may be unwilling to convict for individual business wrongdoing, even in the absence of the dishonesty requirement.

Following the GST trial, a Senior Legal Director at the CMA commented how,

> 'In a cartel case, typically you're not able to put the victim on the stand. You're not able to show the flow of money from the victim's bank account into the defendant's bank account. Typically, the individual won't have benefitted personally – it will be the company that benefited. What that means is you end up with considerable uncertainty as to how a jury is likely to view a particular case'.[125]

While this comment reflected on dishonesty in the context of the GST trial, it is an observation that arguably holds true of juries regardless of how the offence is designed. If there is no clear victim, harm, or personal gain, then the mischief the offence is seeking to address will likely be lost on the jury and its legitimacy will be in question.

This is especially so where the defendants' actions are known about and condoned in the wider business structure. It is notable that in the trials of banking traders found guilty of conspiracy to defraud in relation to their manipulation of Libor, the question of whether the banks had knowledge of what was going on was key to the prosecution's case. Tom Hayes, the highest profile of these defendants, was convicted of eight counts and sentenced to 14 years' imprisonment. In attempts to overturn his conviction, his legal team have maintained that the practices were condoned and encouraged by his employers, and that the suggestion they were not, was likely crucial to convincing the jury of his guilt.[126] While there are examples of rogue behaviour in cartel cases, it is more typical for there to be knowledge of the arrangement beyond the individuals directly responsible, as described earlier in this paper. This combined with the fact cartel profits go to the employer and not necessarily to the employee, would likely cause jurors to question whether it is fair for their actions to attract criminal sanction. Although Clive Dean was no longer an employee of CST, he worked largely to generate sales for the company from his three-bedroom house. The name of his business, Kondea, was derived from the names of his wife and the family cat. He drove an old Ford Mondeo (the former company car he had while still an employee of CST) with over 200,000 miles on the odometer and there was no challenge to the suggestion he was a man of fairly modest means.

It can be argued that the removal of dishonesty actually makes it less likely that a jury will convict a defendant of the cartel offence. This is because dishonesty was a strong moral marker that captured the aspects of cartel behaviour that were morally offensive.[127] Before the cartel offence was

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[124] R Williams, 'Cartels in the Criminal Law Landscape' in CBeaton-Wells and Ezrachi (n 4).
[125] Tom Madge-Wylde, 'An interview with Stephen Blake' (7 December 2015), *Global Competition Review* 19(1).
[126] See: *R v Hayes* [2015] EWCA Crim 1944.
[127] J Galloway, 'Securing the Legitimacy of Individual Sanctions in UK Competition Law' (2017) World Competition 40(1), pp. 121-158, p127, with reference to A Ashworth, 'Sentencing' in M Maguire, R Morgan and R Reiner (eds.), *Oxford Handbook of Criminology* (OUP 2007), 993; See also: Peter Whelan, 'Beyond the Theoretical: Articulating Enforcement Strategies for Successful European Antitrust Criminalization' (2016) *Antitrust Law Journal,* 81(1), pp. 235-270.

reformed, MacCulloch argued it was essential for the offence to retain a mental element, to reduce the risk of a judicial perception that it is not 'real' crime. [128] The revised cartel offence was clearly intended to hinge on the defences that relate to an intention to enter into a cartel openly, which suggests that deception or concealment are what signal the wrongfulness of the conduct. However, these are reflected in the defences and not the wording of the offence itself, which requires only an intention to enter into the arrangement.[129] According to Gilbert, the fact the cartel offence is inchoate (i.e it does not matter if the cartel agreement is actually implemented) makes the absence of an element to reflect the mischief of the offence even more problematic.[130] In cartel cases, juries will generally see no evidence of violence, have little clear sense of who the victims are or where the harm was felt, and the customers will have willingly paid for the cartelised goods, albeit unaware a cartel agreement was pushing up prices. Something is therefore needed to adequately capture the aspects of a cartel that are most offensive – deception and the way it undermines the benefits of competition.

A further issue of legitimacy centres on the use of leniency programmes in cartel enforcement. In the eyes of a jury, any attempt to convey or imply the moral wrongfulness of cartel conduct is arguably defeated where culpable defendants escape punishment simply because they are employees of the first party to cooperate with the competition authority.[131] This is not helped by the fact many members of the public consider the act of reporting others' wrongdoing itself as morally unpalatable.[132] In the GST case, the contrast between the immune employees of CST and the two defendants could hardly be lost on the jury. This was especially so given Clive Dean was a former employee of CST and would have benefited from the same protection, had he not decided to become self-employed. Despite the change in employment status, Dean continued to sell CST tanks and the invoices related to his sales were issued in the name of CST and not Kondea. [133] The jury would also have been very aware of the pressure Dixon and Snee were under to cooperate and give evidence against Stringer and Dean. In cross examination, Dixon revealed he had signed a leniency agreement with the CMA only the previous week and was conscious of their ability to revoke immunity if he changed his evidence before the criminal proceedings were concluded.[134] He also revealed that, as a condition of the agreement, he had to admit that the conduct was dishonest.[135] The jury further learned how another Vulcan employee benefitting from immunity had sent

[128] MacCulloch (n 10) pp. 283-307; See also discussion in Luke Danagher, 'Strict Liability and Mens Rea of Cartel Crime' (2020) *Criminal Law Review* 9, pp. 786-801

[129] US fraud offences hinge on falsifying, concealing and making a false or fraudulent statement or representation – See for example 18 U.S.C. § 1001.

[130] Paul Gilbert, 'Changes to the UK Cartel Offence – Be Careful What You Wish For' (2014) Journal of European Law & Practice, p3

[131] For a detailed discussion of this issue, see Williamson (n 97), Chapter 2

[132] See Stephan (n 93).

[133] Evidence of CST Employee, *R v Stringer and Dean* (n 14), 12 June 2015.

[134] Evidence of Ian Dixon, *R v Stringer and Dean* (n 14), 8 June 2015.

[135] Evidence of Ian Dixon, *R v Stringer and Dean* (n 14), 8 June 2015; The relevant guidance makes clear that a 'no-action letter' (an assurance there will be no criminal prosecution of an individual) can be revoked at any time where the recipient 'ceases to satisfy in whole or in part any of the relevant conditions'. This includes admitting participation in the cartel offence, providing all non-legally binding information, maintain continuous and complete cooperation until the conclusion of any action '(including criminal proceedings and defending civil or criminal appeals' See: Office of Fair Trading, *Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process* (July 2013) para 10.10

messages to Dean encouraging him to attend the meeting that was recorded by the CMA, but did not attend the meeting himself. [136]

The tension that exists between the immune witness and the defendants was actually acknowledged in a 2010 review of the failed *Passenger Fuel Surcharges* trial. It noted how,

> 'some of the issues which arose, and which might also arise in other cases, had the potential to undermine the credibility of the prosecution with a jury and, as transpired in this case, with the court. In particular, the alleged cartel was a bilateral one in which the immunity applicant and its witnesses (who were also immune from prosecution) were equally implicated in the alleged offence. The reliability of the witnesses might be questioned.'[137]

This was a particular concern in *Passenger Fuel Surcharges* because the defendants were all employees of one company (British Airways) and the employees of the only other business involved (Virgin Atlantic) all benefited from immunity because Virgin reported the cartel. The CMA's calculation was likely that this would be less of an issue in case that involved defendants from three other businesses. However, the experience of the GST trial suggests any use of immune witnesses has the potential to undermine the credibility of the prosecution in the eyes of the jury.

5. Concluding remarks

This paper is not concerned with whether it is right for cartel conduct and other forms of misbehaviour to be treated as crime. Compelling arguments on both sides of this debate have been made elsewhere.[138] The focus is instead on critically analysing the previously unreported trial of *R v Stringer and Dean*, the only case to be tried by a jury under the UK's cartel offence, to discuss whether the concept of *dishonesty* is a barrier to securing convictions for forms of business misconduct that do not have strong parallels with theft and fraud. The question of whether the defendants had a dishonest state of mind opened the trial to a confusing array of loosely related themes, including fears of bankruptcy, safety concerns, degrees of dishonesty and whether the defendants thought they were committing a crime. Even the evidence relating to the harm caused by the cartel and the presence of deception, turned into a chaotic tussle of analogies and conflicting perspectives. The ease with which the defence teams were able to raise doubt as to the existence of a dishonest state of mind, exposes the highly subjective and unpredictable way in which dishonesty might be understood by the jury. While *Ivey v Genting Casinos* went someway in limiting the scope for 'Robin Hood' type defences inherent in the subjective leg of the previous *Ghosh* test, this is unlikely to have changed the outcome of the GST trial. Therefore, in principle, the removing of the dishonesty requirement in 2014, albeit with the introduction of a questionable set of defences, could ultimately make it easier for the CMA to secure convictions under the offence. Any jury trials under the revised offence will likely be far less susceptible to the sorts of issues that developed in GST and will be focused on the question of whether the defendants intended to undertake the conduct openly and whether they obtained legal advice (the newly available defences). This could

[136] Evidence given by CMA investigator *R v Stringer and Dean* (n 14), 17 June 2015.
[137] Office of Fair Trading, 'Project Condor Board Review' (December 2010), p11.
[138] REFER BACK T OVERCIMINALISASTION AND WHELAN, WARDHAUGH

make it significantly more probable that defendants will plead guilty at the earliest opportunity, to secure a reduction or suspension of any sentence handed down.

Yet the experience of the only criminal cartel case to go to trial also raises the possibility of jury nullification, regardless of how the offence is designed. The failure to bring more cases to trial meant the original cartel offence never had the educative effect that was envisioned by Parliament.[139] Far from addressing this failure or bolstering the perceived legitimacy of the cartel offence, the removal of dishonesty may have created a vacuous offence that juries will find difficult to accept. The absence of dishonesty or some other marker to capture and express the mischief or moral offensiveness, could mean juries simply reject that the conduct amounts to crime. As we have observed in other spheres of criminal law, juries can make clearly defined offences unenforceable if they feel their application would be unjust. This can occur even if there is clear direction from the judge that the defendants have met all the required elements and have no defence. This void in legitimacy is heightened in cartel cases where there is little evidence of greed or direct financial gain and where the defendants' conduct is condoned or encouraged by others within the business. It is also compounded by the reliance in competition law on leniency as a method of detection and collecting evidence. Immune witnesses who were just as culpable as the defendants, will never sit easy with jurors, especially where the number of individuals involved in the alleged conduct is relatively small. All of this reinforces a sense that this behaviour is a regulatory matter and does not deserve to be labelled crime. Ironically, these concerns relating to legitimacy may actually mean future prosecutions seek to go beyond the essential elements of the revised cartel offence, to ensure the jury have a clear sense of what the mischief of the offence is and why it should rightly be treated as crime. It may therefore be that the reforms failed to make prosecutions any easier.[140] While the focus of this paper has been on the cartel offence, these issues are relevant to all attempts to criminalise business misconduct that does not map very closely to traditional forms of property crime.

[139] See discussion in MacCulloch (n 38).

[140] See: Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4(1) *Competition Law Review*, 7. It is notable that Ireland's cartel offence has largely been applied in cases where there is a clear effect on price, even though this is not a requirement of their offence. See Terry Calvani and Kaethe M Carl, 'The Competition Act: Ten Years Later' (2013) 1(2) Journal of Antitrust Enforcement 311-312.