Packaging a Holiday Brochure

by Ben Hicks

Packaging an Olympic brochure – what can - and does - go wrong

1. Introduction

More than ever before, consumers now rely on electronic sources of information when booking holidays and – the Internet and Teletext continue to throw up their fair share of problems for travel lawyers. They will no doubt continue to do so.

Despite this, the days of potential holidaymakers wandering into their local travel agent are far from over. Having done this, the brochures those future customers pick up once inside those high street stores remain a source of confusion, disagreement and, eventually, litigation.

These notes and the accompanying lecture are intended to provide an overview of the difficulties that can be caused by travel brochures and their contents – along with a selection of graphical illustrations! It is also intended to provide suggestions as to what those advising tour operators might suggest in order to head off problems in the future.

The topics considered fall broadly under two heads – dealing with civil and criminal liability respectively.

All references to the Regulations are, of course, to the Package Travel, Package Holidays and Package Tours Regulations 1992 unless stated otherwise.

2. Regulation 4 – loss consequent upon supplying misleading information

Regulation 4 reads as follows:

4(1) No organiser or retailer shall supply to a consumer any descriptive matter concerning a package, the price of a package or any other conditions applying to the contract which contains any misleading information
(2) If an organiser or retailer is in breach of paragraph (1) he shall be liable to compensate the consumer for any loss which the consumer suffers in consequence

Descriptive matter: This is not a concept limited to documents falling within the definition of a "brochure". It probably covers just about any material supplied in connection with the offer of a holiday for sale. There is also no reason why material supplied through Internet websites should not fall within the ambit of this phrase.

Misleading statement: This concept may cover any statement of fact, whether express or implied - including pictures and graphical representations. However, for a statement to be misleading, it is not necessary to show that the statement in question is untrue. It will be sufficient to demonstrate that the information conveyed to the consumer is not a true and fair impression of that feature of the holiday to which it relates.

The essential test in respect of information supplied is whether it was misleading when taken as a whole. This of course requires consideration of any qualifying statements or counter-suggestive statements elsewhere. However, where the true state of affairs is radically different from the impression given by one statement, the warning elsewhere that it is not accurate should be very clear indeed.

A recent illustration of the application of this Regulation can be found in *Mawdsley v Cosmosair plc* . Here, Mrs Mawdsley was disturbed, upon reaching her hotel, to find that the restaurant could not be reached by lift. Having read that the hotel had "lifts to all floors", she had assumed that this included the restaurant. It did not, as the restaurant was not situated in the main building of the hotel (which did have lifts to all floors). She succeeded in her claim for personal injuries, having fallen down the stairs when trying to carry a pushchair containing her child.

Organiser or retailer: Unsurprisingly, the obligation is imposed on the organiser supplying the brochure. However, it is also imposed upon the agent (who may well not be the other party to the contract). This is despite the fact that they presumably have no knowledge of the discrepancy –and probably no reason to know.

3. Regulation 6 – if it's in, it's an implied warranty

Regulation 6 is perhaps the most significant of the Regulations with regards to brochures and their contents. It reads as follows:

6(1) Subject to paragraphs (2) and (3) of this Regulation, the particulars in the brochure (whether or not they are required by Regulation 5(1) above to be included in the brochure) shall constitute implied warranties for the purposes of any contract to which the particulars relate.
(2) Paragraph (1) of this Regulation does not apply:
(a) in relation to information required to be included by virtue of paragraph 9 of Schedule 1 to these Regulations; or
(b) where the brochure contains an express statement that changes may be made in the particulars contained in it before a contract is concluded and changes in the particulars so contained are clearly communicated to the consumer before a contract is concluded.
(3) Paragraph (1) of this Regulation does not apply when the consumer and the other party to the contract agree after the contract has been made that the particulars in the brochure or some of those particulars should not form part of the contract.

A brochure: The first, and for obvious reasons most important point is the question of what is a brochure for the purposes of the Regulations. Unfortunately, the Regulations themselves do not provide any useful definition. The only attempt made is the rather circular statement in Regulation 2, in which a brochure is defined as being "any brochure in which packages are offered for sale". This is in practice pretty well useless.

There is however nothing specifically excluded from the meaning of the word. In light of this, it is submitted that it is sensible to assume that the lack of any definition

should be read as an indication that within the context of the Regulations, any reference made to a "brochure" is to be construed very widely.
Assuming that this is the case, the term is likely to be applicable to a range of documents which would perhaps not be described as "brochures" in normal use of the word. These would include flyers placed in magazines, "mailshots" and similar marketing tools.

There is one obvious exception to this. This is magazines, whether stand-alone titles or "Sunday supplements". These can (and of course commonly do) include offers of package tours made both by advertisers and by the magazine itself (such as historical tours for readers). Frequently of course, a reader will come across several such advertisements in any given issue.

Despite this, it is submitted that to construe every magazine containing such an advertisement as a brochure is verging on nonsensical. Stand-alone publications are clearly not published with the intent of collating and/or offering such opportunities to the public. Their presence and content is no more governed by the editorial functions of the magazine than any other advertisement.

There may however be an interesting point in relation to magazines which have holidays and travel as their central theme. For instance, *Condé Nast Traveller* (the aim of which is obvious even to non-readers!) contains many advertisements for package tours or holidays – more than many documents about which it would have to be said were brochures. Coupled with the clear and obvious aims of the magazine, is this enough to render it a "brochure" for these purposes?

Particulars: The Regulations are similarly unhelpful in defining "particulars". Again, however, it would seem sensible to construe the term widely. There is nothing in the Regulations to suggest that it should be read otherwise. Nor would there seem to be any obvious reason to deem certain types of representation to fall within the ambit of the Regulations whilst excluding others.

Written comments would, it is clear, form part of the "particulars" contained in a brochure. This will usually be the case whether the representation in question takes the form of a specific statement or is subsumed within more general comments aimed at the package(s) contained in the brochure as a whole.

There is no doubt that images contained in a brochure are particulars. A more difficult question is the issue of how far the information conveyed by those images can be said to constitute "particulars" contained within the brochure. Clearly, illustrations showing the presence of some facility or amenity will be said to contain particulars to this extent.

A further level of subjectivity is introduced where artistic impressions and graphical illustrations are used. By their very definition, these are not photographic. This does not of itself mean that they are incapable of constituting particulars. Again, an express indication of the presence of some amenity will be sufficient to constitute particulars.

Furthermore, where such an image is used, if it is suggestive of a particular quality of the holiday, it may be sufficiently clear to fall within the definition of a "particular".

Examples might be; where shading on a map suggests a verdant landscape or where an artists impression of a harbour shows it filled with yachts, as opposed to the cargo vessels more commonly found there in practice.

The answer is not always so clear cut. For instance, an artist's impression of a resort on a sunny day be said to convey an impression of the local weather conditions which can be expected? The author would suggest probably not. It is however, at least arguable.

In summary, it is submitted that as a rule, where images are used, it must be made very clear indeed that they are illustrative and non-representative if their contents are not to form part of the "particulars". However, given that there would seem to be no reason to have placed the image in the brochure in the first place if it were in fact not representative of what was being offered, reliance on any such purported disclaimer is in practice likely to prove ineffectual.

An implied warranty: The wording of Regulation 6 makes it clear that the significance of a representation being deemed to be a particular contained within a brochure is considerable. This is of course because it will as a result be treated as being an implied warranty for the purposes of the holiday contract in question. Consequently, when taken in connection with Regulation 15, the provisions of Regulation 6 render any representation contained in the particulars potentially actionable.

It should be noted that in order to be so actionable, the brochure in question must in practice have been seen or relied upon by the holidaymaker. It is not sufficient to simply show that the holiday package in question differed from the specification set out in the brochure (although this might in practice be of some assistance in quality complaint cases).

For obvious reasons, the sighting of the brochure must also be prior to the formation of the holiday contract. The contents of post-booking "information packs", even if capable of constituting particulars will not suffice. For instance, had the brochure in *Yugotours v Wadsley* only been seen by some of the holidaymakers prior to booking (the others having booked through Teletext) the latter group would almost certainly have been unable to claim successfully in respect of the "yachts" upon which the group travelled being steel hulled barges.

Exceptions: Regulation 6 provides two means by which the tour operator can potentially prevent particulars contained in the brochure from becoming implied warranties. There is of course also the exception contained in Regulation 6(2)(a) in relation to information that must be provided by reason of paragraph 9 of Schedule 1 to the Regulations. This is of course information relating to arrangements for security in respect of monies paid over and repatriation in the event of insolvency.

The first of the two "options" these is provided by Regulation 6(2)(b). It allows tour operators to include within a brochure a statement that particulars may change before the conclusion of a contract. However, for this to be effective, the changes must be "clearly communicated" to the consumer before the contract is concluded.

The second option is that contained in Regulation 6(3). It provides that the parties may, after the formation of the contract, vary the terms so that some of the particulars are not to form part of the contract. This is, it is submitted, a somewhat pointless provision. There is surely no reason the parties should not vary, discharge or otherwise amend the contract as they wish – provided they come to some agreement to do so.

4. Regulation 9 – what the contract must contain

Regulation 9 imposes two requirements. Firstly, it provides for a bare minimum set of provisions that must be included within the contractual terms. Secondly, it requires that these terms (along with all others!) must be communicated to the consumer. It reads as follows:

9(1) The other party to the contract shall ensure that:
(a) depending on the nature of the package being purchased, the contract contains at least the elements specified in Schedule 2;
(b) subject to paragraph (2) below, all the terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer and are communicated to the consumer before the contract is made; and
(c) a written copy of these terms is supplied to the consumer.
(2) Paragraph 1(b) above does not apply when the interval between the time when the consumer approaches the other party to the contract with a view to entering into a contract and the time of departure under the proposed contract is so short that it is impracticable to comply.
(3) It is an implied condition of the contract that the other party complies with the provision of paragraph (1).

All the terms of the contract set out…and are communicated to the consumer before the contract is made: The first point to note in respect of this provision is that the terms of the proposed contract must be before the consumer prior to the actual formation of the contract – as required by paragraph 1(b). This obligation is not absolute and does not apply where it can be said to be "impracticable to comply" with the requirements.

Note however that only paragraph 1(b) can be ignored on the grounds that it is "impracticable to comply". Even where time is sufficiently short as to justify not providing the proposed terms, a written copy must still be sent to the consumer after the formation of the contract.

It does however seem rather unlikely that there will in practice be no means by which the contractual terms can be placed before the consumer prior to the contract. There would seem to be no reason preventing these being provided by fax or emailing a document as an "attachment" – which is presumably how the consumer will be supplied with the written copy of the concluded contract.

The safest and most practical solution in the vast majority of cases will probably be to simply provide a complete copy of the proposed agreement prior to purchase – by fax or email if necessary. This avoids the requirement to consider whether it can justifiably be said to be "impracticable to comply" with the requirements of paragraph 1(b). It also of course meets the operator's obligations under paragraph 1(c).

In writing or such other form as is comprehensible and accessible: The requirement that the terms be reduced to writing only applies after the conclusion of the contract. The provision of the intended terms of the contract may be by "such other form as is comprehensible and accessible". The stipulation as to the form of communication is presumably intended to refer to some form of oral discussion with a representative of the operator.

However, the stipulation that the information provided be "comprehensible or accessible" may be a little more complicated than it first appears. Is there a requirement to ensure that the individual in question has taken in and understood the significance of what may potentially be a large number of contractual terms? It is submitted that the answer is no – an explanation adequate to inform a reasonably intelligent, attentive and sensible consumer will probably suffice. This analysis seems more sensible than applying a subjective test, given that the consumer will be provided with a written copy of the contract in any event.
…the elements specified in Schedule 2: These matters are as follows:

- The travel destinations, duration of stay and dates
- Details of transport involved
- Details of any accommodation
- Details of meals to be provided (within reason!)
- Whether a minimum number of passengers is required
- The itinerary
- Any excursions included in the package
- The contact details of the organiser, retailer and insurer
- Price of the package and how this might be varied
- Details of the payment schedules offered
- Details of any special terms arising out of the consumer's specific requirements
- The "limitation period" in respect of complaints which may arise out of the package

It goes without saying that there need only be reference to each of the above matters insofar as they are of any relevance to the package in question.
It is an implied condition…: The significance of failure to comply with Regulation 9 would very likely be negligible if it were not for paragraph (3). As with any breach of condition, failure to supply information as requested will give the consumer the power to terminate the contract. However, given that most consumers are unlikely to be aware of the provisions of Regulation 9, it is a little hard to envisage when it might in practice be relied upon.

5. Limiting liability

As with any human endeavour, even where the intention is good, tour operators do not always succeed in providing what the consumer believes was contracted for.

This raises the question of how far the tour operator can protect itself from the ramifications of the holiday failing to live up to that which the brochure suggested would be provided. Such efforts fall into two camps. Firstly, there are efforts to allow

the operator some latitude in performance. Secondly, there are those terms seeking to restrict or limit the liability of the operator in the event of non-performance or defective performance.

The provisions of the Unfair Contract Terms Act 1977 will be applicable to any agreement to provide a holiday. This of course precludes the operator from attempting to introduce any bar on claims for personal injury or death or any abrogated limitation period in respect of claims of this nature. They also preclude any attempt to allow the operator an opportunity to deliver either no contractual performance at all or one that is substantially different from that intended. The latter stipulations are mirrored in Regulation 15(5).

However, the provisions of Regulation 15(4) allow an operator to place some limitations upon the amount of damages to be payable to the consumer in the event of "non-performance or improper performance". However, such a limitation must be "not unreasonable". Note that it will be for the operator to demonstrate that the limitation is "not unreasonable".
Turning to limiting provisions arising out of the contract itself, the first way in which some protection might be obtained is by wording the agreement so as to allow the tour operator a significant degree of latitude for error. A rather extreme attempt was made in *Anglo Continental Holidays Limited v Typaldos Lines (London) Limited* . In this case, the "tour operator" made a (frankly deplorable) effort to allow itself unlimited leave to amend the identity of the cruise ships involved, the prices and the timetable. On appeal, the Court of Appeal refused to accept that the contract should be interpreted so as to allow the defendant cruise ship operator the opportunity to render whatever sort of performance it chose.

This result would of course now arise not only as a result of the interpretation of the contract. S.3(2)(b)(i) of the Unfair Contract Terms Act 1977 would prevent a tour operator from attempting to deliver a performance either substantially different from that expected or indeed from providing no performance at all. This is of course what Typaldos Lines were trying to do.

More recently, in *Williams v Travel Promotions Limited (t/a Voyages Jules Verne),* an attempt by a tour operator to allow itself a little latitude was almost successful. Mr Williams was unhappy that he had to stay in Zambia rather than Zimbabwe for the last night of his holiday to the Victoria Falls. The tour operator sought to avail itself of a provision allowing it to change "any flight or hotel listed and, if necessary, even to modify the itinerary itself without prior notice". No compensation would be paid in this event. In the event, the claim succeeded before the Court of Appeal. However, this was on the basis that it had not been demonstrated that it was "necessary" to make the change.

It is submitted that this is probably as far as a tour operator can go in attempting to avail itself of a contractual term allowing a variation to the agreed performance. Any wider scope for change or lesser degree of justification required for the change is likely to fall foul of either Regulation 15(4) or the Unfair Contract Terms Act 1977.

6. Criminal liability for the contents of brochures

Those potentially affected by the offences discussed in this section would be well advised by two words – be wary. These are a number of compelling reasons for this.

Firstly, it is fair to say that the offences discussed are all wide ranging in terms of both the number of persons who may potentially be "caught" and the scope of the acts or omissions regulated. Secondly, the majority of them may be committed in a course of conduct that would rarely be characterised as morally reprehensible or "criminal" in normal use of these words. For this reason, it is easy to sympathise with many of those caught within the regulatory ambit of these offences.

However, perhaps a better view – albeit of little comfort to those convicted – is that prosecutions of this kind are to be seen as manifestations of the desire to "load the scales" very firmly in favour of the consumer. They are attempts to ensure that those owing duties under the Regulations are left in no doubt as to the scope and extent of their obligations. It is submitted that this is an approach that is not unique to holiday brochures or even to travel law as a whole. Rather, it is consistent with a general trend to interpret consumer protection legislation in the widest possible sense – giving consumers as much protection as can possibly be derived from the statutory provisions in question.

7. Procedural issues

All offences arising out of the Regulations are triable either way. The usual principles apply when selecting a "venue".

However, it is worth remembering that the maximum fine that may be imposed on summary conviction is £5,000. Following trial on indictment, the Court may impose an unlimited fine. The conclusion is therefore obvious – keep it before the Magistrates if you can! This will of course not be possible if the Magistrates decline to deal with the case. This is relatively unusual in the context of prosecutions under the Regulations, but may well occur if the scale of the alleged wrongdoing is considerable.

When advising those charged with offences under the Regulations, it is also worth checking that the time limit for the prosecution has not passed. This is the earlier of:
(a) three years from the commission of the offence; OR
(b) one year from the discovery of the offence.

8. Regulation 5(1)

Regulation 5(1) states as follows:

5(1) Subject to Paragraph 4 below, no organiser shall make available a brochure to a possible consumer unless it indicates in a legible, comprehensive and accurate manner the price and adequate information about the matters specified in Schedule 1 to these Regulations in respect of the packages offered for sale in the brochure to the extent that those matters are relevant to the packages offered.

Dealing with these requirements in turn…

Made available: A brochure is likely to be deemed to have been “made available” as soon as it passes out of the makers hands and into any sort of wider circulation. Consequently, whether it has been passed out at a trade fair, sent to travel agents or even simply allowed to fall into the hands of a third party, the brochure in question is likely to be deemed to be “available”.
It is submitted that one can go so far as to say that if an offending brochure has passed into the hands of another party, in the absence of theft, it will have been made available at least for a time. As a result, it will be obvious that in practice, successful defences based on the argument that a brochure was not made available are likely to be extremely rare.

Note also that once in the public domain, a brochure remains so, certainly until the end of the time period for which it was produced or the conclusion of the event in respect of which it has been presented. Thus, the sample brochure accompanying this talk would no longer be deemed to be available after 29th August 2004 – when the closing ceremony of the Olympics will take place. Until this point in time is reached, it will remain available as long as a single copy remains in circulation.
Note that it is not sufficient to show that efforts have been made to recover and/or correct the offending item. Even if it can be shown that each and every copy was collected and destroyed as soon as it was found to be incorrect, this will not allow a defence to be mounted. The brochure will still have been “available” for a period of time – this is all that is required by Regulation 5(1).

Brochure: It is submitted that the definition of “brochure” is as discussed above in the context of Regulation 6.

Possible consumer: Put simply, there is almost no living person who would not satisfy the requirement that the brochure be made available to a “possible consumer”. Moreover, there is no requirement that the brochure be read, understood or even looked at – much less relied upon in booking a holiday contained in it.

Consequently, given the fact that some individuals must by necessity have been involved in the design, marketing and printing of the brochure, an organiser could potentially find itself in breach of this requirement before the brochure and its contents have even left its premises. Again, arguing that this requirement has not been fulfilled is unlikely to prove of assistance to a defendant tour operator.

Required by Schedule 1: There is an unconditional requirement that the price of the package be included. Other than this, the information that must be provided must include details in respect of those matters falling into the nine categories set out in Schedule 1. These are:

1. Destination and transport
2. Accommodation – location, category, comfort and main features
3. Meals
4. Itinerary
5. 5.Passport, visa and health requirements
6. Payment timetable
7. Whether a minimum number of travellers is required
8. Arrangements for delay at points of departure (if any)

9. Security arrangements in respect of monies paid for the package

However, information in respect of each category need only be provided to the extent that it is relevant to the package in question. Consequently, the Manchester-based purchasers of a coach tour of Devon are unlikely to require information relating to passports or visas. Nor would any except the most paranoid of the members of the coach party be likely to require health information. Nor are contingency plans in the event of delay likely to be required – the operator is not likely to be able to say or do anything worthwhile about the inevitable delay on the M5.

However, at the other end of the spectrum, the offer of a £12,000 package to see all the main athletics events at the Olympics will likely require a considerable amount of information be provided. The matters raised by issues such as the number of venue(s), likely complexity of the arrangements and nature of the services in question must all be dealt with.

Adequacy of information: This stipulation is probably best paraphrased as requiring the brochure to contain sufficient detail to give a true and fair impression of the matters in question. It would be difficult to argue that information which constituted an entirely accurate description of some aspect of a package but which nonetheless created a misleading impression was adequate.

Legible, comprehensible and accurate: It is submitted that the requirement for legibility simply requires that the information be recorded in a manner making it accessible to a reasonable consumer. This requirement is probably best seen involving at least some degree of consideration of the market at which the brochure is aimed. It would, for instance, be inappropriate for information relating to a package for elderly people to be written in blue ink, in an "experimental" font on a green background. Such information is likely to prove useless for all practical purposes. Other relevant considerations might include placement of the information, the language used and the size of the text it appears in.

"Comprehensible" relates to the clarity and ease of understanding of the information. Again, the test is whether a reasonable consumer would consider it so.

The third requirement is that the information be accurate. This stipulation is to some degree self-explanatory. Outright untruths will never be acceptable. However, the information provided must also be accurate in the wider sense, as discussed above in terms of its adequacy. Consequently, it is submitted that taken together, the two concepts impose an obligation that can be paraphrased as requiring that the brochure contain sufficient correct information to give a true and fair impression.

9. <u>Regulation 5(2)</u>

Regulation 5(2) reads as follows:

Subject to paragraph (4) below, no retailer shall make available to a possible consumer a brochure which he knows or has reasonable cause to believe does not comply with the requirements of paragraph (1)

This offence relates not to the tour operator but to "the retailer" – usually of course a travel agent. The majority of the elements of the offence are as discussed above. However, this is not an offence of strict liability. The retailer in question must have "known or had reasonable cause to believe" in the defective or erroneous nature of the brochure.

Knows or has reasonable cause: In short, once any member of staff becomes aware of a relevant error or omission in a brochure, the organisation will be fixed by knowledge of it. It is not necessary to show that the information reached some element of the "controlling mind" of the organisation. This is entirely in accord with normal principles of agency – and is endorsed in the context of holiday law by the opinion of Lord Scarman in *Wings Ltd v Ellis* . It is also of course true no matter what the size of the organisation – giving rise to considerable practical problems.

As Regulation 5(2) makes clear, it is also possible for the offence to be committed by failure to respond to information which gives rise to a reasonable cause to believe that there is a relevant error in a brochure. Whilst the reasons for criminalising Nelsonian blindness are obvious and compelling, more worryingly for retailers, the practical obligations falling on them are somewhat more onerous than might be expected. An assumption that all is well, save when confronted with evidence to the contrary, will not suffice.

In the light of *Old Barn Nurseries v West Sussex County Council*, retailers of packages would be well advised to institute some form of practical system of monitoring and evaluation of the brochures in question . This may include consideration not only of the contents of the stock of brochures held at any one time, but may require consideration of factors such as the previous "form" of the organiser and sudden, unexpected changes to the form and type of an organisers brochures .

10. Regulation 7

Regulation 7 reads as follows:

7(1) Before a contract is concluded the other party to the contract shall provide the intended consumer with the information specified in paragraph (2) below in writing or in some other appropriate form

(2) The information referred to in paragraph (1) above is:

(a) general information about passport and visa requirements which apply to United Kingdom nationals who purchase the package in question, including information about the length of time it is likely to take to obtain the appropriate passports and visa;

(b) information about health formalities required for the journey and the stay; and

(c) the arrangements for security for the money paid over and (where applicable) for the repatriation of the consumer in the event of insolvency.

The "other party to the contract" is clearly intended to be interpreted as meaning "the other party to the prospective contract". By definition, no contract will in fact be in existence before it is concluded! The party in question will usually be the tour operator.

Clearly, where the package has been purchased after consideration of a brochure, the requirements of Regulation 7 will in many cases be fulfilled. However, there are a number of differences.

Who must be informed and when: The requirement to supply information concerning passports and visas is imposed in respect not of British citizens , but UK nationals. Furthermore, there is a specific requirement to supply information in respect of the time that will be required to obtain the relevant documents . The obligation to make this information clear becomes greater as the time of the intended performance of the contract draws nearer. The reason for this is obvious – the time required to obtain an entry visa for certain states is considerable.

When information is not needed: The author is unaware of any instances of prosecution of organisers for failure to comply with Regulation 7(2)(a) when such information is patently unnecessary – such as when the package is to be performed in the consumer's home country. Nonetheless, such a prosecution is in no way excluded by the provisions of Regulation 7! This is, it is submitted, an unhappy state of affairs, and one that could potentially lead to some quite ridiculous and unnecessary prosecutions. Whilst it is in practice unlikely that a prosecution would be attempted in such circumstances, this lack of clarity is a regrettable state of affairs in the context of the potential imposition of criminal liability.

Form of the information: The information must be supplied in "writing or some other appropriate form". The latter is not defined in the Regulations and the question is therefore whether the oral provision of information will suffice.
In short, there is no firm answer to this point. An oral exchange of information is certainly sufficient for the purposes of concluding the contract itself. Yet if informing the consumer of the relevant information over the telephone will not suffice, the inclusion of "some other appropriate form" is rendered completely pointless – certainly in practical terms. Consequently, at the present time, it is frankly impossible to advise on how to ensure certain compliance with this Regulation – save by ensuring that information is always supplied in writing.

11. Regulation 8

Regulation 8 reads as follows:

8(1) The other party to the contract shall in good time before the start of the journey provide the consumer with the information specified in paragraph (2) below in writing or some other appropriate form.
(2) The information referred to in paragraph (1) is the following:
(a) the times and places of intermediate stops and transport connections and particulars of the place to be occupied by the traveller (for example, cabin or berth on ship, sleeper compartment on train);
(b) the name, address and telephone number
(i) of the representative of the other party to the contract in the locality where the consumer is to stay;
or if there is no such representative

(i) of any agency in that locality on whose assistance a consumer in difficulty would be able to call
or if there is no such representative or agency, a telephone number or other information which will enable the consumer to contact the other party to the contract during the stay; and
(a) information regarding travelling arrangements for persons under 16
(b) information about insurance if the consumer has not been obliged by the contract to take out his own insurance

In good time: DTI guidance suggests that 14 days is an appropriate period – although it is submitted that this is a little excessive given the sort of use to which the information in question is likely to be put. However, it would be advisable to comply with this if realistically practicable, although this is obviously not always going to be possible. Where, for instance, "last minute" holidays are booked, the information should, it is submitted, be provided as soon as is practicably possible.

12. Statutory defences

Whilst, as noted above, the prospects are invariably poor for any body against which a tenable prosecution is brought under the Regulations, there remains one ray of hope! In respect of proceedings brought under the Regulations themselves, this is the defence of due diligence contained in Regulation 24. It provides that:
24(1) Subject to the provisions of this Regulation, in proceedings for any person for an offence under regulations 5, 7, 8, 16 or 22 of the Regulations, it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence
Regulation 24 then sets out requirements in respect of notice to be given before the hearing of proceedings where certain allegations are made in a Defendant's defence. It also requires that where a defence of reliance upon information supplied to another is to be run, the reasonableness of such reliance must be demonstrated by the Defendant.

As is almost inevitably the case with statutes creating regulatory offences subject to statutory defences, the onus of proof is firmly upon the Defendant both to raise the defence and then to prove it. The lack of reasonable precautions or unreasonable reliance upon another are not elements which the prosecution are required to prove.

All reasonable steps/all due diligence: Arguments which may assist in establishing this concept are all too often confused with issues going not to liability but to mitigation – especially by those committing the offences. For instance, where only one branch of a tour operator's chain of shops has continued to sell an inaccurate brochure, it will not suffice to suggest that it was removed from sale in all other branches and/or that a system of monitoring was in place. Whilst this suggests a very limited degree of culpability, it is not the same as being able to properly argue that a suitable system was in place to prevent this occurring in the first place.
In practice, the onus upon a Defendant seeking to raise a defence of this type is considerable. The degree of diligence, monitoring and control that must be demonstrated is considerable. It must also be emphasised that it will not be sufficient to call evidence to establish the intent to operate such a system. Any Defendant

seeking to rely on these provisions is going to have to be able to show that it being properly and effectively operated in practice.

Unfortunately, the fact that a "defective" brochure has escaped this system and made it into circulation - thus giving rise to the prosecution in the first place – leaves any such argument on shaky ground from the outset. Any argument justifying such a failure to detect must be convincing and compelling. It is submitted that in practice, the defences set out above are only likely to work when it can be shown that the failure arises from the fault or default of another and where there was no way that this could in practice have been detected and/or prevented. Where there is an element of "system failure" within the Defendant's operations, any prosecution will almost inevitably succeed.

13. Other offences potentially arising from brochures

There are a number of other statutes that may prove relevant to criminal liability arising from the sale and/or supply of brochures. However, they fall well outside the time constraints imposed by the brief duration of this lecture. This does not of course mean that they are not potentially applicable to regulated packages and their supply – they most certainly are. The following (non-exhaustive) table shows those which are commonly encountered in this context.

Statute	**Section**	**"Mischief" aimed at**
Trades Descriptions Act 1968	s.14	False/misleading statements
Consumer Protection Act 1987	s.20(1) and (2) s.40(2)	Giving misleading price & p & permitting misleading prices to remain on offer Renders officers of body corporate liable under s.20 if committed with their connivance
Timeshare Act 1992	Most of statute!	Timeshare operators
Health and Safety at Work Act 1974	s.2 and 3	Health and safety and welfare of employees engaged in travel and tourism

14. Conclusion

Whilst this lecture has demonstrated that the negative consequences of lax planning by tour operators can be considerable, it is to be stressed that this need not always be the case! Rather, it is suggested that the brochure from which packages are offered to the public can, from the very start of the contractual relationship, offer both parties contractual certainty and protection from disputes as to what was and was not supposed to be provided. It may also serve the operator distributing it by fending off the possibility of future criminal prosecution!