

Current Criminal Law

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Criminal destruction of business documents

by Sally Ramage

Being deeply involved with the figures as accountants and lawyers often are, it can lead us to miss the importance of the very documents we use to get to the accounts we deal with. When things go wrong, contemporary documents are of the utmost value. It is to documents that the lawyers look with special care when there is any issue with accounts. Oral testimony alone is less reliable. Documents are the means of tracing a contemporary record going to the thing in issue. That is why no document should be destroyed.

In certain cases, the destruction of documents is illegal. For example, a company officer who destroys or falsifies a document affecting the company's property or affairs is liable to prosecution under the Companies Act 1985, section 450, unless he can prove that he did not intend to deceive by doing so. If a dispute has already arisen, it is very dangerous to destroy any document as was seen in the Australian case of *BAT v McCabe* [2002] in which Justice Eames in this Australian case ruled that the tobacco company's defence must be struck out because it deliberately destroyed tens of thousands of documents in trying to avoid responsibility for the harm its products cause. The judge said that BAT had misled the court

In the case of *Douglas v Hello* [2004] EMLR 2, the Douglas' objected to their photograph being taken by the magazine "Hello!". During this privacy issue, the Douglas' alleged that Hello had destroyed documents, this interfering with the course of justice. The English court, adopting the reasoning in *BAT v McCabe*, 11th April 2002, Australian High Court, accepted Hello's document destruction as persuasive authority, having proved the facts. The court, however, could not agree with the Douglas' that this document destruction was indeed an attempt to pervert the course of justice. In some cases a deliberate decision to destroy documents, if it is extremely likely that a dispute is soon to arise, or after a dispute has arisen could make one liable under the criminal offence of obstructing or perverting the course of justice.

Tell-tale signs of missing documents

However, missing documents usually leave tell-tale indications of their existence because they are often referred to in surviving documents. If the case goes to court, one has to list not only documents in one's possession, custody or power, but also those which were but are no longer. Destruction of documents can lead to the case being found against you by inference. Such a case was the 1985 case of *Infabrics v Jaytex* [1981] 2 WLR 646, a case of copyright infringement of prints for shirts. It was discovered that after the case commenced, most of the invoices, stock records and similar documents had been destroyed.

A similar case was *Logicrose v Southend United Football Club* [1988] 1 WLR 1256. The judge considered the application to strike out the case. He said that it was not always necessary to strike out such a case if a fair trial was still possible without that document. But if the destroyed documents were key to the case, as in *Landauer Ltd v Comins and Co.*, C.A., 14 May, 1991, the case would have to be struck off, since the absence of such documents would impede the case.

Document Retention Policies

Companies should have document retention policies and should not be haphazard as to what they keep and what they decide not to keep. It used to be the case that we could look to the Limitation Act 1980 for how long we should keep files, most professions keeping papers for at least six years. But the case of *Brocklesby v Armitage* [2002] 1 WLR 598, makes it possible now for someone to bring a case in respect of say, a bad piece of accounting advice, long after the

six year limit. There is no excuse for destroying documents, especially as case after case illustrates that the Limitation Act is not a simple matter. Just recently, in the judgment on 18th March 2005 *In Re Loftus (deceased)*, The Times 18th March 2005, it was held that the twelve year limitation period in respect of any claim to the personal estate of a deceased person, ran, not from the date of death, but from the date of the executor's year: the time during which a personal representative was not bound to distribute.

A written document retention policy along these lines, is a wise move :-

- * Create a position in your firm for electronic data management.
- * Log all hardware and software that are in the office.
- * Have one person in charge of back-up procedures, writing up procedures, emergency situations, accidental loss of software and laptops; safeguard wireless networks from hackers.
- * Have procedure manual for everything to employees.
- * Set up data retention system.
- * Train personnel to use, retrieve and create safe data, checking firewalls.
- * Regularly update training of staff and of senior officers.
- * Set up a whistle-blowing policy and let all know where they stand.
- * Appoint solicitors in case of document damage, theft of data or document sabotage.
- * Be aware of electronic "footprints", in that there is more to hiding a document which should not have been created by pressing the delete button. It does not work.

What are the documents that the Companies Act mentions in section 450? Well, documents can include text messages and emails. In *Guinness v Saunders, CA*, 17th October 1988, Mr Saunders was charged with destroying a jottings book, some correspondence, some pages from an address book and a 1986 diary, among other things. They were seen to be documents. In this case the judge said:

"Section 450 is the part of the heavy artillery of the Companies Act. It carries a maximum of a seven year sentence."

The judge went on to decide that Mr Saunders' diary, etc. were documents as per section 450. No other Companies Act offence carries a higher maximum sentence. This section 450 of the Companies Act 1985 is also unusual in that it places the burden of making out the statutory defence on the defence. Under this section, the prosecution need merely prove that the documents destroyed affected or related to the company's property or affairs. Section 450 Companies Act 1985 has had its subsection 3 substituted by the Companies Act 2006, section 1124, Schedule 3, paragraph 4 (1), in force since 1 October 2007. Subsection 4 has been repealed by the Companies Act 2006, section 1124, 1295, Schedule 3, paragraph 4(2) and Schedule 16.. Subsection 5 was inserted by the Companies Act 1989, section 66 (4).

Reconstruction of documents

In any case, even if documents are alleged to have disappeared, they can be re-constructed and retrieved. For example, a lawyer had lost email that was critical to the case and needed it to recover this to prove that an exchange of emails had taken place. There were no back-ups of the system. Forensic examination recovered the metadata of the file as well as that of the operating system and this supported the claim. It couldn't have been stated more clearly. Nowadays with advanced technology at our hands, it would be wise to preserve files electronically, using scanners and other electronic storage means rather than destroy them.

Charity reserves in the United Kingdom

By Sally Ramage

A report published in May 2009 by the Charity Commission stated that £3.6 billion is being held by charities without being accounted for by a reserves policy.¹ A policy can help a charity ensure service delivery if funding is disrupted, and explain to supporters and funders alike why the charity holds money in reserve instead of spending it. The Commission first researched charities' reserves in 2002. This follow-up report, *'Tell it like it is'* highlights a number of developments in the sector since. The report is based on data from 87% of charities with annual income of over £10k. Key findings include the following:

- * The proportion of charities with a reserves policy has risen from 27% in 2002 to 40% in 2009.
- * Charities hold at least £35.5 billion of reserves, up from £26 billion in 2002
- * The number of months' activity that reserves will cover has fallen - from an average of 18 months in 2002 to 12 months today. While expenditure is up by 61%, reserve levels have increased by only 35%.
- * £3.6 billion is being held as financial reserves without being accounted for by a policy - against £5.5 billion in 2002.
- * Nearly a third of charities with reserves still have no reserves policy in place for their management.

Accountancy

In financial accounting, the term reserve is most commonly used to describe any part of shareholders' equity, except for basic share capital. Sometimes, the term is used instead of the term provision; such a use, however, is inconsistent with the terminology suggested by International Accounting Standards Board. For more information about provisions, see provision (accounting). Equity reserves are created from several possible sources: Reserves created from shareholders' contributions, the most common examples of which are: (i) legal reserve fund – which must be paid as a percentage of share capital ; (ii) share premium or the amount paid by shareholders for shares in excess of their nominal value ; (iii) or reserves created from profit, i.e. retained earnings or accumulated accounting profits. However, profits may be distributed also to other types of reserves, for example: (i) legal reserve fund from profit; (ii) remuneration reserve - used to pay bonuses to employees or management ; (iii) translation reserve , arising during consolidation of entities with different reporting currencies.

No reserve policy is dangerous

Although this abundance of reserve seems a good thing, it may also be an indication of charities management performance. Various inventory methods and approaches to depreciation calculation, for example, are acceptable alternative accounting treatments that allow entities to adapt their reporting methods to reflect economic reality. However, two entities experiencing the exact same economic events may choose different inventory methods and depreciation calculations and thus report different quarterly and annual earnings figures. In fact, GAAP contains numerous instances in which managers and accountants can choose alternative methods to account for a company's performance. And while such choices may allow for a truer

measure of earnings, too often the selection of a particular GAAP method is made to distort performance measurements.

Conversely, GAAP sometimes shuts the door on accounting methods that may provide a truer measure of earnings. For example, if a company increases research and development (R&D) spending by \$10 million in a given year, a case could be made for treating that amount as an asset, spreading the cost over more than one year. However, with few exceptions, GAAP calls for R&D costs to be expensed as incurred. The costs are matched against revenues of the current period and not against the future year revenues they may generate. The result is understated reported earnings initially and then overstated reported earnings in future years.

No-one knows how much of this £3 billion has been securitised and indeed how much, if anything, that is worth today.

Hate on the Net

Roversi, A. (2008) HATE ON THE NET

Extremist Sites, Neo-fascism On-line, Electronic Jihad, Hampshire: Ashgate Publishing, 2008; ISBN 978-0-7546-7214-2

Book Review by Sally Ramage

The first sentence of Roversi's book struck a chord with me. He wrote:

'I did all the research for this book sitting comfortably in my study. All I needed was a laptop, an always-on connection to the Internet and a lot of time.....'

Being severely disabled, I myself engage in much desk research and I can empathise with Roversi.

We are all aware, mostly from media reports of terrorism in all its forms, of terror groups on the internet and of extremists, be they pornographers or religious extremists. Indeed, in the UK, the Criminal Justice and Immigration Act 2008 introduced a new criminal offence of 'extreme pornography'.

This book consists of just 4 chapters which I read straight through as I found its outrageous contents unbelievable. The four chapters are titled:

The Net and the Web: Web Communication

Football Fans on the Net: Ultra Websites

The Black Pages: Fascist and Neo-Nazi Websites

One More Weapon: The Use of the Web in the Middle East Conflict.

Roversi gives us a full and frank description of these extremist websites around the world and he also gives us some of these websites. For the first time in my life, I furtively tried to access all the websites he lists and found that all but one was still online. After reading the book and reading the websites, I quickly deleted my searches, being aware of the Terrorism Act 2006 and not wishing to get into any trouble. I was so frightened and startled by what I saw online that I am still in a state of shock that there are people who can think and write such atrocities, flying in the face of laws, of humanity and of decency.

The one site I did not attempt was the FBI site where Rovers states that the FBI has uploaded an edited 'Terrorist Handbook'. I am aware of the case of.

However, a Google search under the term 'terrorist handbook' surprisingly brought many sites.

Terrorism

This was shocking and disconcerting because this accessing of terrorism material is a terrorism offence in the UK. Yet terrorist training material was an online click away from any person, child or adult, inside or outside the United Kingdom! One must remember that when it comes to selecting targets, terrorists think globally but act locally. Local events and persons are still the primary source of information about terrorist activities. Studies have revealed that International terrorists live relatively near their targets, whereas right-wing terrorists live in rural areas but select targets in nearby cities. Studies also reveal that, compared to environmental extremists, for instance, international terrorists engaged in nearly three times as many preparatory acts per incident, and the average planning cycle was considerably longer.

Terrorism News Reports Online

Terrorism reports by the media do tend to keep the situation in perspective and show that, overall, the authorities have this type of criminality under control, as the media reported.

Fear of terrorism

The continuing menace of terrorism around the world cannot be denied, and it is time to take the implications seriously. The threat is real. There are two kinds of fear that the threat of terrorism creates. Irrational anxiety is brought about just by the knowledge that extremists websites exist. It increases a sense of insecurity and interferes with production and efficiency and is eventually replaced either by on-going background stress or by denial and complacency that enable us to ignore the real danger.

Then there is the rational fear of terrorism which occurs when people recognize that the danger is real and develops proactive resolutions to counter the threat. It is a constructive reaction to a real and present danger. The process of understanding the nature of threat, and taking proactive steps towards definitive solutions creates an environment in which security can be significantly enhanced and continuity of life and 'business as usual' can prevail.

Conclusion

This book was a frightening journey into the dark. We must fervently believe that the Rule of Law will force out extremism and as Tony Blair said in his 2006 speech at the Los Angeles World Affairs Council on the 1st August 2006, we need a complete renaissance of our strategy against the arc of extremism fanning out across the world, for we will not win the battle against this global extremism by conventional means alone but by winning at the level of values as much as force. To win the war of values we have to show, that our values are stronger, better and more just. We must show justice rather than the injustice of those of extremists. A brave writer has dared to delve deeply into the subject of internet extremism.

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