

# Criminal Law News

SALLY RAMAGE®

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## **Prison drug cartel in the United States**

**Sally Ramage**

A prison drug cartel, called Barrio Azteca (BA), came to light in 2008 in Texas, United States. The criminal enterprise was prosecuted. Group members were charged with drug trafficking and distribution, extortion, money laundering and murder. The six defendants included the organization's three bosses, Benjamin Alvarez, Manuel Cardoza, Carlos Perea Said Francisco Herrera, Eugene Mona; and Arturo Enriquez. The cartel BA operated in El Paso, West Texas, New Mexico and Arizona. Mexico's cartels sell drugs- marijuana, cocaine and heroin- in the United States and BA is not the only prison drug cartel in the United States with ties to Mexico.

### **Barrio Azteca cartel**

BA operated in a Texas prison since 1986, providing the minions who took orders from the Mexican Juarez drug cartel leaders, including committing many murders on request. They were provided with guns and other weapons, mobile phones and other equipment and contravened the United States Racketeer Influenced and Corrupt Organizations (RICO) Act, BA received discounts on drugs from the Juarez cartel by providing tactical help to its associates.

### **BA's prison gangs**

Prison gangs are endemic to prison systems. Tensions among dangerous individuals regularly erupt into deadly conflict and so prison gang membership affords a certain amount of protection against rival groups and offers fertile recruiting ground. A prison gang leader can wield an impressive amount of power and disobedience is punishable by death, regardless of whether a boss is in prison, as he can order the murder of a member who has crossed him. BA's

illegal activities mean that the cartel gang members are usually in a cycle- in and out of prison. It was discovered that BA had organizations in every prison in Texas. Former BA member Edward Ruiz testified during the cartel trial that from 2003 to 2007, he acted as a clearinghouse for jailed members' letters and packages, which he then distributed to members on the outside. This tactic ensured that all prison communications would be traceable to just one address, thus not revealing the location of other members. The FBI was able to infiltrate BA with the help of informers. Large amounts of drugs were successfully trafficked across the border to the US through bribing border guards and border town policemen.

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# Global cartels

**Sally Ramage**

## Introduction

What are cartels? Are there many types? How can there be cartels when the companies concerned are usually incorporated and with shareholders and watch-dogs around? If we assume that directors and other officers are around year after year and that Professor Bebchuk's survey (2002) is correct, i.e. that anything the directors do to keep their positions must be harmful to shareholders, then cartels must be run by entrenched directors in companies whose shareholders are, or have had their stamina weakened to allow directors to empire-build and allocate fringe benefits to themselves (Manne ,1965). So let us look at cartels and unpack what is there, using all the financial analysis, legal armament and management research we can. To understand cartels, we will also examine the agencies that combat cartels to look for differences and similarities.

## Anti-trust agencies

*Among anti-trust agencies are-*

- UNCTAD – United Nation's Confirmation of Trade and Development
- OECD- Organisation for European Co-operation and development.
- APEC – Asia Pacific Economic Community
- ICN - International Competition Network.
- IBA – International Bar Associations Global Forum
- IMF- International Monetary Fund

There are a wide variety of organizations that may reasonably be described as international cartels. Explicit price-fixing or market division agreements are

known as 'hard core' cartels, among private producers from multiple countries. Producers form a cartel with the goal of limiting competition. By restricting output and increasing price, ideally to the price a monopolist would set. These agreements are illegal in the United States (US) and in the European Union (EU). The US and EU have increased prosecution of international cartels but few developing countries have similar enforcement even though cartels have significant effects on developing economies.

### **Prosecution and punishment of cartels by industrialised countries**

Developing countries' producers cannot afford to expand and take the spaces left by prosecuted cartels, this perhaps being one reason why such poor countries do not bother to legislate or prosecute cartels notwithstanding the fact of barriers to entry and antidumping legislation usually lobbied for by the same international cartels. These barriers are a barrier which stops poor countries from trading on a level par.

### **Australia's cartel legislation**

The 2008 Australian anti- cartel statute has no joint venture defence to the cartel offence. And section 44ZZRF of 2008 created the offence of making a contract or arrangement or arriving at an understanding containing a cartel provision. Under the Australian *Criminal Code*, a physical element may be "conduct", "a result of conduct" or "a circumstance in which conduct or a result of conduct occurs." The characterisation of a physical element has implications for the fault element of the offence (see Pt 7). The physical elements of the civil penalty prohibitions are the same as for the criminal cartel offences which are defined in terms of price fixing, restriction of output, allocation of customers and bid-rigging offers no apparent advantage, whether in terms of scope, certainty and ease of application or avoidance of loopholes . There was judicial emphasis on

the need to prove some form of a commitment or undertaking or at least some moral obligation by at least one of the participants in the arrangement (see *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383; 31 ALR 53).

### **Collusion of cartel firms**

Collusion has worldwide benefits for firms that take part in this generally illegal activity of cartelisation and Western governments have been found susceptible to manipulation by domestic producers, using tariff barriers<sup>1</sup> and anti-dumping duties to protect the home market. The US enforces against cartelisation by being the place where the majority of the world's cartel prosecutions takes place and this is the main way to get restitution for developing countries presently. The cartels that exploit poor countries are known to produce sophisticated manufactured goods and services; their members are largely international corporations based in industrialised countries.

### **Suppose the US were to legitimise cartels?**

The EU already legislates for struggling businesses to form legal cartels until such time as they are in profit again. However, change was imminent when Mexico sued the vitamin cartel and Brazil the lysine cartel. Most of the cartels caught in the antitrust net of the US and EU competition authorities are actions by producers in industrialised, OECD countries. So why should poor countries use their already limited resources to stop rich companies exploiting them when it is the regulatory institutions of the countries from where these cartels were born that should have capacities to stop these cartels wherever they are? It does appear that the world's current regulatory institutions are neither international

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<sup>1</sup>Cartels do this by price fixing. This is done by raising price above marginal cost, creating an incentive for each producer to cheat. Each firm has an incentive to shave its price, increase its output and market share, and thereby increase its profits.

enough nor sufficiently focused on promoting competition. None of the competition authorities actively ensure that developing countries' producers have access to markets uninhibited by restraints from private agreements signed by established producers.

### **Collusion threatens competition**

Collusion threatens competition and is a conspiracy to defraud. If every company in one particular industry took part, collusion<sup>2</sup> would immediately dissolve into competition. Repeated interaction over time or across markets creates cartels with significant state involvement, such as OPEC.

The goals of OPEC are much more complex than goals of private cartels. The maximisation of joint profits is the only goal of private cartels whilst economic stability and international political influence are goals of legitimate cartels like OPEC. Consider the benefits of cheating. If the benefits of cheating are sufficiently low relative to the gains from colluding will not be sustained unless cartel members devise punishment mechanisms to deter cheating. One important factor is industry structure on the buyer's side of the market. If consumption is concentrated in just a few customers, it is more likely that a cartel member would succeed in increasing its market share with just a small cut in price. This will encourage him to continue to cheat. The ability of the cartel to punish cheaters also affects the benefits of cheating.

Antitrust enforcement makes it difficult for a cartel to punish its members as such punishment would make its existence more obvious to the antitrust enforcement authorities.

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<sup>2</sup> Stigler.G.J, 1964, "A Theory of oligopoly", 72, *Journal of Political Economics*, 44.

See also Levenstein.M and Suslow.S, 2002, "What Determines Cartel Success?" University of Michigan Business School, 02-001.

Economists have focused on the importance of the observables of cheating to collusive stability. When cheating cannot be observed, it is harder to give firms an incentive not to cheat. Collusion will be disrupted either by cheating or by events that are empirically indistinguishable from cheating. For this reason, firms in a cartel invest in information collection in order to support the collusive equilibrium. Cartel members often find that there is no substitute for frequent face-to-face meetings, in order to compare market information and discuss alleged occurrences of cheating.

### **The Vitamin Cartel, etc**

The vitamins cartel lasted for many years. The sugar and bromine industries often engage in the collection and dissemination of information which may facilitate collusion. The government may encourage this information dissemination, as the federal government did during the open price policies under the US National Industrial Recovery Act, or as state governments did in the nineteenth century salt industry. However, by accommodating developing country entry into a cartel under their own terms or to engage in an implicit cooperative pricing arrangement gives developing countries' producers access to the world market, even though this would be at a cost to the degree of competition that would otherwise be obtained in that industry.

### **Joint ventures**

In several recent international cartel cases, joint ventures have been established in the years following the forced break-up of the cartel. This may reflect an attempt to consolidate and restructure the industry in a more direct way, in light of the break-up of the cartel. Developing country entrants and established producers could have other, welfare motives for establishing such joint



ventures, such as sharing technology, local market expertise or capital. Joint ventures in industries has a history of international price-fixing scrutinised by regulatory authorities allowing consumers in both developing and industrialised countries the benefits of enhanced competition.

### **International cartels**

Among the dozens of international cartels indicted and prosecuted by the US Department of Justice and the European Union's European Commission are the well reported citric acid cartel, the graphite electrodes cartel and seamless steel tube cartel. The effects of international cartels are felt worldwide. Where cartels cover only a specific region, they may have significant effects for a period of time. In particular, the international citric acid had worldwide effects supported by public price data.

### **The citric acid cartel**

Citric acid is used primarily as a flavour enhancer and preservative. Acidulants are naturally occurring acids that inhibit the growth of bacteria and can offset product sweetness with their tart flavour. The main uses for citric acid are in soft drinks, processed food, detergents, pharmaceuticals and cosmetics.

Acidulants include lactic, fumaric, malic and tartaric acids.

Fumaric acid competes against citric acid as a preservative. It is generally cheaper, but has certain chemical characteristics that make it an inferior substitute for many processed foods. Citric acid accounts for about two-thirds of the total acidulant market.

A huge part of citric acid production goes to beverage companies, such as Coca Cola and Pepsi and Procter & Gamble is one of the largest US consumers of citric acid. There are two primary production processes – shallow pan and deep

tank fermentation. The shallow pan process is more labour intensive and less capital intensive and operates on a smaller scale. Production is concentrated in the US, Europe, and China.

### **Conspiracy**

By the late 1990s Western Europe, the US and China together had over three quarters of market share of world capacity, estimated at approximately £1.2 billion in 1994. Prior to the start of the conspiracy in 1990, the US had three players- ADM, Cargill, and Bayer AG. Cargill entered the industry in 1990, as the first producer vertically integrated forward from corn refining into citric acid production.

### **Vertical integration**

All producers are now vertically integrated. In Europe in the early 1990s there were five producers in the citric acid market; the three largest were Bayer, Hoffmann-La Roche and Jungbunzlauer International AG. These European companies, as well as smaller Chinese importing companies, satisfied most of the U.S. import demand during the 1990s.

### **Price-fixing conspiracy in the citric acid industry**

Firms in the citric acid industry fixed prices from 1991 to 1995. Although the citric acid cartel did not control world production, it did account for over three-quarters of sales in the US and Western Europe. On discovery of the citric acid cartel, sixteen firms were indicted and convicted in the United States, Canada, and the European Union and there were several resultant law-suits by customers who claimed damages.

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## United Kingdom's cybercrime?

### Sally Ramage

UK's economy will suffer "profound effects" if the growing threat of cyber crime is not tackled, warns one of the UK's most senior police officers.

Janet Williams, Deputy Assistant Commissioner of the Metropolitan police and the Association of Chief Police Officers' lead on cyber crime, says online fraudsters and hackers will cause a fall in the value of shares, pensions and business investments if they are not stopped.

The government upgraded cyber crime to a tier one threat in October, putting it on the same level as international terrorism or a flu pandemic. It has set aside £650m to combat the threat.

### **“Real problems with collecting cyber crime data but ... £27bn was a conservative estimate of the losses”**

Williams told the Guardian that £30m of the funding will be used to set up regional e-crime units which will more thoroughly police the "dark side" of the internet. Online retailers and cyber criminals are both groups, which work overtime during the Christmas holiday season when there is a rise in the number of fraudulent orders. Techniques to over-ride tightened security practices are being created by cyber-criminals as fast as retailers install more secure systems, although evidence appears anecdotal. The Cyber fraud offenders appear to see the busy season and hence larger volumes of transactions as ripe for taking advantage of. Such fraud against online retailers involves stolen credit card numbers rather than breaches of a merchant's online systems. Criminals use the

stolen card data to buy goods they can easily resell, or to prove the card data is valid before reselling that data to other criminals.

Surveys reveal that approximately one and a half percent of the average retailer's sales turn out to be fraudulent. Online merchants who suffer from illegal purchases repay credit card companies for the purchase and shopping surveys reveal that millions of Internet users reject online shopping because of security fears.

### **Gift card frauds**

Fraud rates are almost twice the rate for smaller merchants compared to r larger merchants with the main fraud technique being the purchase of gift cards with stolen credit card numbers.

### **Software spots repeated patterns**

Researchers have found a data mining technique, which assists counter-fraud by using software, which looks for patterns of users who have repeated dealings with one another, and this possibly identifies those likely to commit fraud. The technique resulted from an analysis of one million transactions by 66,000 eBay users, which produced graphs called bipartite cores and these identify users interacting with unusual frequency.

### **National fraud infrastructure claims to be good**

While larger companies can afford blanket protection from computer criminals, and the national infrastructure receives an "extremely good" protection service, Williams warns that smaller businesses, universities and individuals are still dangerously exposed to criminal rings from around the world looking to steal everything from cash and identities to intellectual property.

Williams said:

*"We are very concerned at the extent and growth of cyber crime. It is getting to be an increasingly larger problem. The agencies policing this are bringing all of their skills and capacity to the table to fight this. If we don't, it will have such a profound effect on share prices, on investment, and on how much the government has to spend on pensions. It is big stuff."*

A Cabinet Office report released two weeks ago and written in conjunction with private firm *Detica*, a subsidiary of weapons manufacturer BAE Systems, estimated cyber crime losses at £27bn. Williams conceded there were real problems with collecting cyber crime data but she said £27bn was a conservative estimate of the losses.

### **Youthful Online Fraudsters**

She drew attention to the increasing youth of online fraudsters and her fears that e-criminals, including politically motivated hackers or 'hacktivists', may be too readily sucked into breaking the law because of a lack of human interaction. An eight-month operation by the police services central e-crime unit, codenamed *Pagode*, discovered in early 2010 that five British teenagers, including two females, were running the world's largest English-language website for selling stolen identities and credit card details.

### **Gh0stMarket.net**

The site, Gh0stMarket.net, could only be viewed as lines of computer commands mixed with 'text-speak' English. It had more than 8,000 members. Police estimated £16.2m of financial losses resulted from the 135,000 compromised card numbers found on the site.

Four of the gang were sentenced at Southwark crown court on Wednesday to jail terms of 18 months to five years. Williams said:

*"I describe what these very young people were operating as a kind of supermarket for criminals. You had thousands of customers purchasing illicit goods, like packs of stolen identities and instructions for defrauding major organisations. So it was like they came with a shopping trolley in order to load up what they would like. And they got paid quite huge amounts of money for that service."*

Williams described the teenagers running the Gh0stMarket site as very bright and very well educated but queried whether they were fully aware of their actions. She said:

*"Their age is very concerning. I wonder whether they completely appreciate the impact of what they've done."*

The e-crime unit, which Williams helped establish in 2008, was involved in last month's arrests of three teenagers and two 20-year-olds from the political group Anonymous. Members of the group are known to have created, and distributed computer software to take down the websites of multinational companies deemed as being hostile towards *WikiLeaks*.

Drawing a similarity between the Gh0stMarket gang and the Anonymous protesters, Williams said that in both cases the internet had created an "echo-chamber" where individual actions were not readily questioned. This made it easier for young people to get sucked into criminal behaviour. She continued:

*"If we talk about Anonymous, people were downloading software voluntarily in order to attack another organisation. Allowing your computer to be used in that way is a criminal offence but I'm not sure that people realise that. I think a lot of people thought they were engaged in online protest and didn't appreciate the potential impact on them and the potential of what they were allowing their computers to be used for. If they would have had to have a face-to-face contact conversation, they would have questioned that more. Human contact gives you thinking time and enables you to question what you are doing. But sometimes these websites almost act like an echo chamber. There is no testing of what you are seeing ... It is not an intellectual exchange, it is just download. I think it is quite a dangerous thing."*

Williams said she had seen no evidence that cyber criminals operating in different parts of the world were receiving state support. She said:

*"Sitting in this seat, I have read the secret intelligence but, in terms of the cyber investigations, very little we have seen has had that link. We have seen a great deal of criminal activity in Russia, Ukraine, Eastern Europe but we have absolutely no evidence that it is state sponsored."*

Williams said the e-crime unit was now returning £21 in "harm return" for every pound invested and had justified the multimillion-pound rise in funding by "proving its business case".

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## **Covert investigation**

### **Sally Ramage**

Covert Investigation is a means to detection. This includes why investigate covertly, the drawbacks, directed and intrusive surveillance, interception of communications, mobile phones, computers, CHIS's and the legal issues including the effect of the Human Rights legislation.

The articles are excerpts from a new book from Blackstone's, 'Covert Investigation' 2nd Edition, written by two highly experienced former detectives (see 'About the Authors' at the end of the article).

### **Introduction - Managing Covert Investigation**

At the risk of inducing apoplexy in die-hard detectives, the key to successful covert investigation management is to think like managers, not investigation practitioners.

The reflective reader will have discerned from the previous chapters that managing covert investigation is more than just ensuring the quality and accuracy of authorization applications: it involves skilled investigation management but also complex resource management in an environment in which there are frequently many competing priorities for scarce skills and capacity.

### **Securing a covert investigation authority**

Securing a covert investigation authority may be easier than securing the resources needed to execute the covert investigation activity. Investigators planning the use of covert techniques will need to plan for circumstances in which the resources are not available: and if an alternative means of obtaining the intelligence/ evidence is available, that immediately begs questions about



the proportionality of the proposed action. Alternatively there may be occasions on which covert investigation methods offer a less resource-intensive means of acquiring information that could also be obtained by non-intrusive means: the issue for managers is whether authorization can be given lawfully in circumstances where desired information could be obtained in a way that engages Article 8 rights at lesser cost than a method that would produce the same information for greater expense but without engaging Article 8 rights.

### **The proportionality test must be met**

In the event resources are available, the proportionality test is met, and an authorization is granted, management of the covert investigation does not stop when the specific activity is completed and the authorization cancelled.

There then exists the covert investigation product that has to be managed, and the organizational learning from each operation to be captured and, as appropriate, disseminated.

### **Covert Investigation governance**

Professional management is the first layer of covert investigation governance and accountability: from the outset, empowered organizations have the opportunity to demonstrate that covert investigation has been used only when appropriate and not extravagantly.

- How does the proposed investigation/operation relate to NIM tasking and co-ordinating?
- What evidence/information is being sought? Is it essential or desirable?
- Is it already known (by another agency perhaps?) Can it be obtained by non-covert means?
- What are the resource implications of the proposed action?

- If used, what is the risk of covert investigation methods being exposed in the surveillance arena or at court?

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## **Local Authority Fraud Strategy in Scotland**

### **Sally Ramage**

Local authorities have core values which guide the way they operate and these values are:

- \*equality;
- \*openness and accountability;
- \* honesty and integrity; and,
- \*commitment to the elimination of fraud and corruption.

### **What is fraud?**

Fraud is the intentional distortion of financial statements or other records by persons internal or external to the organisation which is carried out to conceal the misappropriation of assets or otherwise for gain.

### **What is corruption?**

Corruption is the offering, giving, soliciting or acceptance of an inducement or reward, which may influence the action of any person.

### **Local Authorities duty of care**

Local Authorities duty of care includes their commitment to providing the highest quality of service to all their residents and customers. The following strategy outlines measures that can be taken by all Local Authorities against malpractice through either fraud or corrupt practice.

### **Protection of public funds**

All local authorities are committed to fighting fraud and corruption, whether attempted from inside or outside of the authority, in order to protect public funds. Suppliers, contractors, employees, members and service users are all expected to act with integrity and without intention to commit fraud or corruption against a local authority. Any investigative activity required will be conducted without regard to any person's relationship to the local authority, or to their position or length of service.

### **Fostering bonds to combat fraud and corruption**

Local authorities actively support and foster relationships with the Police and other external agencies in order to combat fraud and corruption. Where criminal activity may have occurred, the Police are always consulted.

A fraud strategy covers:

- \*culture;
- \* prevention;
- \*detecting and investigating fraud and corruption;
- \* training; and,
- \*fraud response.

Members and staff, suppliers and contractors to local government are expected to lead by example in opposing fraud and corruption. Members must adhere to the approach outlined in the National Code of Conduct. Staff must adhere to the approach outlined the Local Employee Code of Conduct.

### **The Ethical Standards in Public Life etc. (Scotland) Act 2000**

This Act imposes on local authorities in Scotland a duty to help their members to comply with the relevant code. The Standards Commission for Scotland was established by this statute, with duties to deal with alleged breaches of the codes.

This Code applies to every member of a local authority in Scotland.

Managers must strive to create an environment in which their staffs feel able to approach them with any concerns they may have about suspected irregularities.

### **Public Interest Disclosure Act 1998**

The Chief Executive or Chief Auditor will refer matters to the police as soon as they suspect any criminal activity has been carried out. If employees make allegations in good faith but they are not confirmed by an investigation, no action, (disciplinary or otherwise), will be taken against the employee who raised the concern.

### **The Accounts and Audit Regulations 1996 and 2003**

Members by law are required before accepting office to undertake to meet the requirements of the Councillors' Code of Conduct and employees must follow the Code of Conduct for Employees.

*A Defalcation Procedure* is operated by all local authorities and it is relevant to all employees as it contains provisions for dealing with allegations of fraud and corruption.

Internal Audit as per statute plays an important role in the detection of fraud and corruption. Internal Audit reviews the adequacy, efficiency and effectiveness of internal controls within a local authority by undertaking a comprehensive programme of work targeted at key risks.

### **Bribery Act 2010**

Employees should not accept gifts from any customer, service user or supplier other than token items such as pens, diaries, calendars, etc which have a total collective estimated value of no more than £10.00. Gifts of alcohol, food hampers or other articles should generally not be accepted irrespective of their estimated value. Employees must not accept any gifts whatsoever (no matter the value) from anyone who is seeking decisions on applications for licenses, planning consents, building warrants etc.

In no circumstances should gifts or hospitality be solicited. Employees should not use any information obtained in the course of their employment for personal gain or benefit nor should they pass it on to others who might use it in such a way.

The Council cannot disclose information about individuals unless the specific information requested is exempt from Data Protection legislation. Orders and contracts must be awarded in accordance with the Council's approved Contract Standing Orders. Employees who are involved in any form of tendering exercises must follow approved procedures and must clearly act in a fair and impartial manner when dealing with contractors, sub-contractors and suppliers.

All known relationships of a business or private nature with external contractors or potential contractors should be made known to the appropriate line manager who will advise and enter the details into the local authority's register of interest. Council employees and Members must declare any possible conflicts which they may have in contracts entered into by the Council.

### **Detecting bribery, fraud and corruption**

All employees and members have a role to play in preventing and tackling malpractice at work. Employees are responsible for ensuring that they follow the instructions given to them by management, particularly in relation to the safekeeping of the assets of the authority. Employees are expected always to be aware of the possibility that bribery, fraud, corruption or theft may exist in the workplace and be able to share their concerns with management.

In cases relating to Housing Benefits and Council Tax Fraud, the action taken will follow the Local Authority's Benefit Fraud Prosecution Policy. The investigation of any other suspected bribery, fraud or corruption is carried out by the Council's Internal Audit Section.

Local authorities provide training for their employees who are involved in, or are managing internal control systems. This training includes input from other related public bodies such as the Police.

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## **ID theft**

Identity theft can take many forms and often results in unauthorised charges or an application for new credit in the victim's name.

Banks offer free e-mail and text message alerts that enable customers to learn of any suspicious charges immediately. Quick reaction is essential as it becomes more difficult to recover stolen money if the matter is not dealt with immediately.

Customers must always review their bank and credit card statements immediately they receive them. Better still is to review such statements online. Some sophisticated scams avoid detection longer by repeatedly stealing small amounts from their victims' accounts.

Using a credit monitoring service helps to avoid credit unworthiness should someone use a victim's identity to open a credit card account or take out a loan for a car. Better still, one can obtain free credit reports from CIFAS, etc.

## **Victims**

One could become a victim of ID theft if one's wallet is lost but this cannot happen if a fraud alert is placed on one's profile with the credit bureaus. This notifies lenders to proceed with caution when reviewing applications for credit in one's name. The CIFAS system stays in place for one year at a cost of under £20.

## **ID Theft Insurance**

Many banks offer ID theft insurance free to their customers. ID theft insurance is often included in homeowner policies at no additional cost. It would be

advisable to check the terms and condition of any ID theft policy one is offered because policies only cover the costs incurred in repairing the victim's credit, such as solicitors' fees or copying expenses. Such policies may only cover ID theft when the perpetrator is not a family member.

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## **Directors who commit financial shenanigans**

**Sally Ramage**

### **Defrauding shareholders: Torex Retail Plc**

Edwin Dayan and Christopher Ford have been given prison terms for defrauding the shareholders of the former AIM listed company Torex Retail Plc (Torex). Both were directors at the Torex subsidiary *XN Checkout Ltd* when they caused over £1.65 million in fictitious profits to be recognised within the published accounts of Torex.

### **Conspiracy to defraud**

Following a trial at Oxford Crown Court, they were found guilty on 19 January 2011 of the charge of '*conspiracy to defraud*' shareholders of Torex.

*Edwin Nessim Dayan* was sentenced to 12 months imprisonment, disqualified from acting as a company director for *four* years and ordered to pay prosecution costs of £75,000.

*Christopher Mark Ford* was sentenced to six months imprisonment, suspended for two years, a community service order of 200 hours, disqualified from acting



as a company director for *two* years and ordered to pay prosecution costs of £2000.

In passing sentence, Eccles.J. said:

*'Unless directors recognise they will go to prison, the temptation to manipulate accounts in hard times will be harder to resist'. He also said "such sentences may seem harsh on a personal level, but a strong deterrent is needed.'*

### **Fictitious profits-fictitious revenue, fictitious sales, forged delivery notes**

Both men were directors at the Torex subsidiary *XN Checkout Ltd* when they caused over £1.65 million in fictitious profits to be recognised within the published accounts of Torex.

Phantom sales involve the recording of fictitious revenue which involves the existence of non-existent sales and/or services and forged delivery notes.

A scrupulous examination of the receivables balance would reveal phantom sales. The fraud in this case was discovered when a former software company executive, Mr Crawford, alleged that the former chairman of Torex Retail Plc 'conspired to defraud' him of his company, *Romulus*.

Robbie Crawford was the 39-year old former managing director of *Romulus*, a small, Banbury-based software group. He told authorities that the former chairman of Torex Plc had 'stolen' the company *Romulus*, which Mr Crawford had built up since 1998.

Mr Robbie Crawford said he had been dismissed without formal process or notification in July after he discovered that *Romulus*'s largest contract, a deal with WH Smith worth £500,000 a year, was in the process of being moved and

backdated, without his knowledge, to a shadow company called *Romulus Retail*, wholly owned by Sarah Jane Moore, Mr Moore's wife.

Mr Robbie Crawford said he subsequently discovered that Romulus' company cash had been used to buy a former director's shares while Mrs Moore, also now a director of Romulus, had extracted £300,000 of cash without board approval. He said that this amounted to a conspiracy to defraud his company, Romulus.

Mr Robbie Crawford alleged that Mr Moore did not invest a single penny in *Romulus*. Romulus was declared insolvent in September 2010.

A debenture between Romulus and Steplink, a company wholly owned by Mrs Moore, was set up prior to Romulus going into administration. Crawford said:

*'Mr Moore is sitting in the same seat in Radman Retail (formerly 'Romulus Retail' running the WH Smith contract.'*

Mr Crawford resigned as a director of Romulus, after which he immediately made a formal complaint to the Serious Fraud Office (SFO) on July 15. Neil Mitchell, former chief executive of Torex, approached the regulators with a dossier containing allegations of fraud and insider trading at the Banbury software group.

Following a trial at Oxford Crown Court, two Torex directors, Dayan and Ford, were convicted, on 19 January 2011, of the charge of '*conspiracy to defraud*' shareholders of Torex.

Torex Retail used to employ more than 100 people in Witney and Banbury, but the company collapsed in 2007 for separate reasons to the directors' breaches in this trial.

Torex had a subsidiary, XN Checkout, a wholly owned subsidiary which provided point-of-sale equipment to the hospitality trade. Torex subsidiary, XN Checkout, had a £2.1m-a-year contract with pub chain Mitchells & Butlers, but that ended in the year 2000 when IBM took over the contract.

XN Checkout remained a sub-contractor in the Mitchells & Butlers contract until IBM began reducing its annual payment to XN Checkout from £2.1m in 2000 to 1.2m by 2006. The directors, Dayan and Ford decided to deceive everyone by falsifying the accounts to hide this loss of income in the Torex subsidiary.

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### ***R (Medical Justice) v SSHD –case comment***

On 26 July 2010, in a case brought against UK Borders Agency by the charity Medical Justice, the High Court quashed the UK Borders Agency (UKBA) policy whereby foreign nationals can be removed from the UK with little or no warning after individuals were denied access to justice in the process. *Medical Justice* challenged UKBA's policy that allowed the standard 72 hours notice of removal directions to be reduced to little or no notice for certain categories of cases, including where there is medical documentation indicating that prior notice will create a risk of suicide or self harm and where standard notification is not in the best interests of an unaccompanied child due to an abscond risk. In a decision of 25, 751 words, scrupulously written by Justice Silber at the Royal

Courts of Justice. London, *Medical Justice*<sup>3</sup> challenged the Home Office as to the lawfulness of the policy of the Secretary of State set out in a document entitled '*Judicial Review and Injunctions*'.

The policy gave individuals who had made unsuccessful claims to enter or to remain in the United Kingdom, little or no notice of their removal directions.

The new policy to a large extent constitutes an exception to the previous policy although it did repeat existing exceptions of the previous policy.<sup>4</sup> *Medical Justice* argued that the new policy abrogates the constitutional right of access to justice without statutory authority and was therefore *ultra vires*.

*Medical Justice* successfully argued that the policy contravenes the Race Relations Act 1971 (RRA) and the Disability Discrimination Act 1995 (DDA); and article 5(4) and article 6 of the European Convention on Human Rights (ECHR), notwithstanding article 14 ECHR, when read with articles 5,6 and 8.

The Home Secretary had relied on an unpublished case, *R (N) v Secretary of State for the Home Department*<sup>5</sup> to order the Secretary of State to use her best endeavours to secure the return to this country of somebody removed under these directions. This became a second exception and followed the exception made in 2006 where removal would no longer be deferred upon threat of

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<sup>3</sup> *Medical Justice* is an independent medical advice and representation to those detained in immigration removal centres as well as conducting research into issues affecting those in immigration detention.

<sup>4</sup> An exception to the general rule of 72 hours notice was in those circumstances where the detainee or a family member, and who was also detained, had a history of non-compliance with removal directions and there was strong evidence to suggest an attempt to remove that person with advanced notification posed a risk to the good order and discipline of the Immigration Removal Centre but which could not be managed effectively in another way.

<sup>5</sup> [2009] EWHC 873 Admin.

judicial review but would only be deferred upon receipt of an Administrative Court Office reference number and of the grounds of claim.<sup>6</sup>

The 2007 Police *Operational Enforcement Manual* specified that the standard position was that a minimum of 72 hours, including at least 2 working days, had to be allowed between notification of removal direction to the person being removed and the actual removal.

The last 24 hours would have to include a working day.

Further to a riot in 2007 at the Campsfield House Immigration Removal Centre, another exception was made but was not conveyed to defence lawyers until December 2009.

The 2010 standard policy for setting removal directions, are provided in paragraph 2:

*‘(a) When removal directions are served on the individual being removed, they should always be copied to legal representatives where the UK Border Agency has details of any representative actively involved in the case, or where a person asks that a specified representative be sent copies of papers served with removal directions.*

*(b) Removal directions should also be accompanied by a short factual summary of the case which should include a chronology of the case history, including details of whether any appeal rights were exercised and past applications for judicial review. A minimum of 72 hours (including at least 2 working days) must*

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<sup>6</sup> This exception became policy and was published in on 1 March 2007 in Chapter 44 of the *Operational Enforcement Manual* published and took effect from 12 March 2007.

*generally be allowed between informing a person of their removal directions and the removal itself. The last 24 hours of this period must include a working day. There are occasions where this will not apply. (see section 3 of this guidance) which you should consider before setting removal directions People detained for removal should, where possible, be given access to telephone facilities to enable instruction of and ongoing contact with representatives.'*

The 2010 **exceptions** apply in 5 situations:

\*certain medically documented cases where '*service of removal directions will create a risk of suicide or self-harm and that risk is medically documented*' (paragraph 3.1.1). This exception was in place since March 2007 pursuant to the 2007 document;

\* '*where the enforcement officer believes that it is not in the best interests of unaccompanied children because of an abscond risk, this must be considered in liaison with Children's Services and the receiving country*' (paragraph 3.1.2).

\*where the Secretary of State believes that standard notification is not in the best interests of another because there is a threat or credible risk that the person about to be removed would seek to harm other detainees if notified of removal;

\*where the Secretary of State considers reduced notice is necessary to maintain order and discipline at a detention centre either because an individual has frustrated removal in the past or because there is evidence that they are planning actions which seriously threaten the good order and discipline of the detention centre; and

\*where the removee consented in writing to reduced notification.

The only similar case to the present challenge is *R (Refugee Law Centre) v Secretary of State for the Home Department*<sup>7</sup> in which a challenge was made to a scheme for the fast-track adjudication of asylum applications established at removal centres and the Court of Appeal had to ascertain a test for determining the legality and fairness of the scheme which compressed the decision-making process into three days.

### **To prove a policy unlawful**

Justice Silber said that:

*‘[T]he unlawfulness of a policy can be shown in a number of different ways such as if the policy or guidance itself envisages or recommends conduct which would be in breach of the right of those subject to it to enjoy access to justice because then the policy would be clearly unlawful. By the same token, applying the approach in *Fernandez v Government of Singapore*<sup>8</sup> if there is a “reasonable chance”, “substantial grounds for thinking” or “serious possibility” that the policy, if executed in accordance with its terms, would give rise to such breaches of the right of access to justice, then again it would be unlawful.’*

Given that a citizen’s right to access to justice is an important constitutional right, and that every citizen has a right of unimpeded access to a court,<sup>9</sup> rules which did not comply with that principle would be *ultra vires*.<sup>10</sup>

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<sup>7</sup> [2005] 1 WLR 2219.

<sup>8</sup> [1971] 1 WLR 987.

<sup>9</sup> *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198, 210.

<sup>10</sup> *Raymond v Honey* [1983] 1 AC.1, 13].

Every individual has the right of access to justice,<sup>11</sup> that is, the right of access to a court, and the right of access to a legal adviser under the seal of legal professional privilege.<sup>12</sup> At the same time, the SSHD correctly submitted:

*'[T]here is no principle of common law that leads to the conclusion that giving a person about to be removed less than 72 hours notice leads automatically to a breach of his or her right of access to a court and, second, that the 2010 exceptions do not entail denial of access to a court in accordance with the requirements of common law.'*<sup>13</sup>

### **Facetious safeguards**

Personal relationships constitute grounds for preventing removal because of article 8 ECHR rights.<sup>14</sup>

Improper and lack of certification is another good ground for preventing removal but this has been obfuscated because the Secretary of State frequently serves a certification decision at the same time as removal directions.<sup>15</sup>

### **Inappropriate removal route is a good ground for preventing removal**

In Sri Lanka, Iraq, Somalia, the Democratic Republic of Congo and Sudan, for example, the safety of a particular route may be critical to the lawfulness of the removal directions.<sup>16</sup>

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<sup>11</sup> *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 at 621.

<sup>12</sup> *R (Daly) v Secretary of State for Home Department* [2001] 2 AC 532, 537-538.

<sup>13</sup> See paragraph 48.

<sup>14</sup> *HK (Iran) v Secretary of State and HT (Cameroon) v Secretary of State* [2010] UKSC 31.

<sup>15</sup> *R (FF, EQ, and AO) v Secretary of State* (CO/4358/09).

<sup>16</sup> *GH v Secretary of State* [2005] EWCA Civ 1182.



The safeguard of ensuring legal advice for those being deported is facetious, since it would be impossible for a lawyer to take any effective instructions at all or to give legal advice to a new client, who was calling while he or she was in transit to the airport.

There is no safeguard in scheduling a person's removal for a working day, during office hours because there is no obligation for removal to take place during *court hours* as opposed to *office hours* and there is no obligation that the time period includes anything other than a minimal period of time during office hours on a working day.

There is no provision which states that removal will be deferred where a person subject to the 2010 exceptions could not conceivably have been able to obtain legal advice or even where that person has made all reasonable efforts to obtain legal advice and access to the courts but nevertheless has been unable to do so in the very limited time available.<sup>17</sup>

*Medical Justice* argued that the Secretary of State should have consulted various organisations and that this removal scheme is therefore irrational, but was not upheld.<sup>18</sup> The Secretary of State's arguments in support of the 2010 extradition exceptions were upheld;<sup>19</sup> however the court concluded that the Secretary of State did not consult adequately.<sup>20</sup>

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<sup>17</sup> See paragraph 102 of the caselaw.

<sup>18</sup> *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139. The alteration without consultation by the Home Secretary of the policy to abolish free training for doctors who lacked a right of abode in the United Kingdom was a breach of public law rights. The Court of Appeal rejected the idea that there was any need to consult.

<sup>19</sup> *R v London Borough of Camden*.

<sup>20</sup> *Secretary of State for Education v Tameside MBC* [1977] AC 1074, 1005.

## **Child Trafficking In Scotland**

At least 80 children have been recently trafficked to Scotland to face sexual exploitation and other forms of abuse including forced labour, benefit fraud and domestic servitude, a report published on April 2011 stated.

The findings concluded that these cases are the ‘tip of the iceberg,’ with many more child victims sold, stolen and/or transported thousands of miles away.

### **“Scotland: a safe place for child traffickers?”**

The report – “Scotland: a safe place for child traffickers?” – criticised police for failing to secure a single conviction for trafficking, and the authorities for their poor response to young victims' needs.

In November, 2010, it emerged that a young Nigerian girl had been trafficked to Scotland, held prisoner and gang-raped. Her case was just one of several documented by the Scottish Refugee Council. Some of the children identified have been forced to work in cannabis factories and private homes and to pose as dependents for benefit frauds. These children originated from a number of countries including:

China,

Democratic Republic of Congo,

Kenya,

Somalia,

Sudan, and,

Vietnam.

The youngest of these trafficked children was 14 years old.

### **Border control and child trafficking**

Child trafficking has long been considered an issue of border control, the study stated, leading to those who have been trafficked being regarded as part of a problem, rather than as victims.

Scotland's then Commissioner for Children and Young People, Tam Baillie, and the Centre for Rural Childhood, at Perth College University of the Highlands and Islands, produced this report, titled, "Scotland: a safe place for child traffickers" and included a number of urgent recommendations.

The researchers called on the UK government to review the national referral mechanism; to strengthen co-operation between government agencies; and to appoint an independent human trafficking rapporteur, accountable to the UK Parliament.

The authors recommended that the Scottish government should ensure that adequate resources are available to tackle the problem and to act as a lead for Scotland's Local Authorities in order to ensure that nationally agreed procedures are being followed consistently at a local level. Baillie said:

*"When children are raped or exploited as slaves in households or businesses in Scotland it becomes our national scandal. When we fail to notice, fail to pick up the signs and fail to act on children's trauma, it demands action. I hope this report, the first of its kind in Scotland, will take the issue out into the open and result in action and change for child victims of trafficking."*

Professor Rebecca Wallace, director of the Centre for Rural Childhood at Perth College UHI, said that this report's findings address the previous lack of an evidence-base regarding child trafficking in Scotland.

Professor Wallace added that the study was an opportunity to "*harness the very evident willingness of professionals encountered during the research to improve the identification and treatment of children trafficked into and within Scotland*".

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## **Internet website linking and framing**

### **Website owners and links to other websites**

If you have a website, the chances are that your website contains links to other websites. You may have heard that links can be illegal or that you need permission to link.

### **What about framing?**

Is permission needed to 'frame' another web site in a window on your own website? These questions have never been addressed by the courts, so there are no definitive legal rules, although there are some best practice guidelines which you, as a website owner, should try to follow.

### **Guidelines for safe linking**

Ideally, first obtain permission from a website to which you want to link. This can be done by a simple email request or by a formal linking agreement. An agreement can also give the terms on which one site links to another. It may be that there is to be a reciprocal link and a provision for payment from one

website owner to the other website owner. If it is impractical to seek permission to link to a third party website some points to consider are as follows:

\*Only link to a third party website if you are confident that the website owner would either be pleased or would be indifferent about the weblink.

If you are critical of the third party website, its owner may look for ways to object to your link.

\*Make it clear in your link that the user on your website is going to another website. This is good practice for accessibility.

\*Only link to the home page of the target website. Should you link to a specific page of that party's website, this is termed "deep linking". Most website owners are unlikely to object to such deep linking, but some website owners do object to deep links because their homepage may include their most prominent branding and may attract third party advertising.

\* If the third party website owner objects to your link, please remove it immediately.

\*Do not display the brand of the target site next to the link on your site without the brand owner's permission. You may be accused of risk infringing their trade mark.

### **Framing v linking**

Framing tends to more of a source of annoyance to target websites because the Internet user may become confused as to who owns which website. Do not frame another website within your own website unless you have permission to do so.

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