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The law relating to financial crime in the United Kingdom (Second edition)

N. Ryder and K. Harrison (authors)
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Book review by Sally Ramage

Aims of this second edition

Professor Nicholas Ryder (see Appendix A for a list of his published works) and Dr Karen Harrison (see Appendix B for a list of her published works) have produced this second edition of *The Law relating to financial crime in the United Kingdom* (published by Routledge of Taylor & Francis Group) in order to bring the work up-to-date; to include recent legislation and government

policy developments; and also to add the financial crime topics of tax evasion, market manipulation (including insider trading) and cybercrime, making this work a complete and well-rounded university-level introduction to the criminal laws relating to financial crimes as they affect the United Kingdom.

Criminal law never stands still

English criminal law is unlike English civil law because criminal law has a very wide scope and plays a very special role in reflecting the values and culture which do determine what conduct is regarded as being criminal. The criminal law of a country is determined by the procedures it uses and which principles should be used in making criminalisation decisions (such as the *harm principle*- see Feinberg, J. (1988) *Harm to others; harm to self and harmless wrongdoing,* Oxford: Oxford University Press*).*

The 'harm principle'

The harm principle plays an important role in protecting individual autonomy and opposes moralism (of which Lord Devlin had provided one of the most sophisticated versions- (see Devlin, P. (1965) *The enforcement of morals*, Oxford: Oxford University Press). The harm principle opposes moralism, and can be said to be popular simply because the notion of harm is so vague that it can cover a wide range of views. One can say that financial crime is harm to society even though it does not directly harm anybody, but does so indirectly. One can therefore argue that financial crime harms the 'public interest' and

therefore criminal law is justified to prohibit conduct which harms the public interest. Use of the harm principle in these cases is a preventive role as gatekeeper, with conventions such as the European Human Rights Convention 1948 (ECHR) imposing obligations on the Member State to create criminal offences.

Effect of the UK Human Rights Act 1998

The Police will verify that the introduction of the UK Human Rights Act 1998 (HRA) has greatly affected operational policing, legislation, and court decisions because the HRA guarantees and encompasses the fundamental rights and freedoms contained in the ECHR.

In particular:

* Section 2 HRA requires a court to take account of the opinions/decisions of the ECHR, the European Commission or Committee of Ministers when determining a question relating to a Convention right;

* Section 3HRA demands that all UK legislation must be construed and given effect in such way as to be compatible with Convention rights.

* Section 4 HRA permits the Supreme Court; High Court and the Court of Appeal to make a declaration of incompatibility on any question of UK law;

* Section 6 makes it unlawful for a public authority to act in a way incompatible with a Convention right and this includes a failure to act;

* Section 7 provides for an aggrieved party to take proceedings where a public authority has breached, or proposes to breach, s6, but only if that person is or would be a victim of the unlawful act;

* Section 8 empowers a court to grant such remedy or relief within its powers as it considers just and appropriate; and

* Section 11 preserves any other right of freedom enjoyed under UK law.

Society today

However, there is no complete uniformity of criminal law across different countries of the world. The United Kingdom(UK) is a jurisdiction which is governed by a mixture of common law (or judge-made laws) and compliance rules and regulations laid out in black letter law consisting of UK statutes; statutory instruments; European Union Directives, and international treaties and conventions.

Criminal and civil laws

Added to the Human Rights Act 1998 is the fact that this statute also applies to civil proceedings with restraints: the right to a fair and public hearing by an impartial tribunal is provided by Article 6 (i) which right is guaranteed in relation to both civil and criminal proceedings, but, the protection offered by Article 6-subsections (2) and (3) is only available if a person is charged with a criminal offence. Thus, the Defendant is entitled to a greater deal of safeguards when involved in criminal proceedings. In criminal proceedings,

the burden of proof is on the prosecutor and the standard of proof is higher. The only types of cases *not* entitled to Article 6 protections are: entry or removal of immigrants; and cases concerning taxation obligation.

In the case of *Cuscani v United Kingdom* (2002) ECHR 630, (2003) 36 EHRR 2, 439, at para 44, the European Court of Human Rights decided that the defendant was entitled to an interpreter in this taxation evasion case, and not only to a lawyer.

The different standards of protection are very important. In a criminal case, the Defendant usually enjoys protection against illegal searches. Criminal law protection is of a higher standard because usually, a person will face imprisonment if convicted. A similar case taken to the civil court often has the defendant punished in a financial way.

The right to a fair trial, nevertheless, contains several requirements, namely:

1. There must be real and effective access to a court and thus to Legal Aid,
2. The hearing must be before an impartial court- established by law.
3. This hearing must be held within a reasonable time.
4. The applicant must have access to the other side's submissions and procedural equality. Procedural equality is to include the doctrine of *equality of arms*.
5. The court must explain its decision.

The person accused of a civil wrong or a criminal offence must be able to be present during the trial, which must be a public hearing, unless required to be private under circumstances.

Financial crime in the civil courts or criminal courts

To add to this complexity is the fact that parallel to criminal procedures - is the civil law - under which much fraud is and has been litigated for many decades. A criminal law prosecution is brought by the government and sometimes privately, against a person who is alleged to have done an act that has been classified as a crime.

Financial crimes can also be litigated on the other hand, when it involves individuals and organisations seeking to resolve legal disputes. In a criminal case, the state, through a prosecutor, initiates the lawsuit, while in a civil case the victim brings the lawsuit. Persons convicted of a financial crime may be incarcerated, fined, or both. However, persons found liable in a civil case may only have to give up property or pay money, but are not incarcerated. This belies the truth about the extent of fraud in the UK.

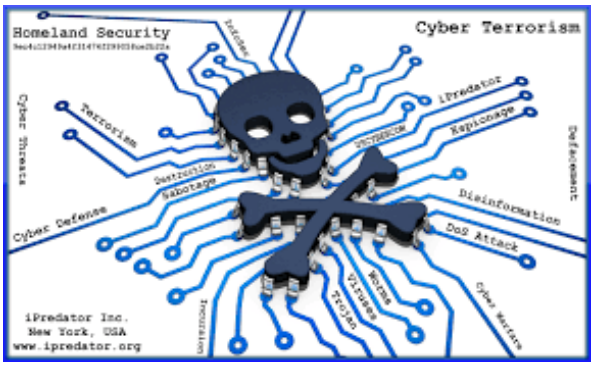
Difficulties of prosecuting computer cyber-crimes

Today, we realise the inexorable growth of cybercrime, yet most cybercrimes, like crimes in general, never result in prosecution.

Cybercrime. Source: Google.

Yet cybercrimes are often committed by the usual theft motivations of greed, curiosity, revenge, cyber-stalking and cyber-terrorism, now that digital technology is prevalent throughout the world and cybercrime is no longer only associated with the actions of young, well-educated, middle-class, male criminals. Theoretically, cybercrime is indeed a 'white-collar crime' made more difficult to prosecute in its usual cross-border aspect. In particular, cybercrime in the UK has been defined as entailing conduct proscribed by legislation and/or common law as developed in the courts, that involves the use of digital technologies in the commission of the offence, or, is directed at computing and communications technologies themselves; or is incidental to the commission of other crimes. Computers may be incidental to the offences or indeed instrumental to criminal offences.

Cybercrime offences



Cyberterrorism. Source: Google.

Cybercrime can be prosecuted through the use of traditional offence categories such as:

* Theft Acts offences, or

* Fraud Act offences such as obtaining financial advantage by dishonesty; or

*gaining unauthorised access to computers; or

* modifying computer data without authorisation; or

* disseminating offensive material electronically; or

* disseminating misleading advertising information; or

* Online fraud and financial crime offences; or

* electronic manipulation of share markets; or

* denial of service (DoS) attacks; or

* unauthorised access to computer networks; or

* theft of telecommunications and Internet services, and other offences.

All of the above cybercrime offences require access to evidence for police.

Changes legally brought about with a change of government

Added to this complexity is the fact that general elections in the UK, which often results in a change of government , compels new government to 'put their mark' on the State by dismantling old criminal law agencies, and replacing these with new agencies, be they sometimes, with political, legal and historical agendas.

Customer confidence and confidentiality

A worrying factor of cybercrime is banking confidentiality whereby, for many years, the banking industry has withheld losses caused by computer hackers entering their electronic systems and stealing billions of pounds without even the police being notified. This is because almost all UK national banks have been floated on the London Stock Exchange (LSE) and therefore any such bad news may drive down their share price. This inequitable treatment of one sector over others is a very *serious issue* which must be addressed because other companies floated on the stock markets are prone to the ill effects of undesirable news concerning them.

Insider Trading

Insider trading crime occurs when the buying or selling of a security occurs in breach of a fiduciary duty or other relationship of confidence or trust, while in possession of information about a security that is not available to the public –

this is known as material non-public information. Insiders are allowed to trade as they do not rely on material information not in the public domain. As soon as they rely on such material – relevant information which the public does not have access to – their activity is illegal by definition.

A notorious example of such a crime was committed by Martha Stewart in the United States. (See Ramage, S. (2012) 'Preserving legal privilege and employing a PR professional whilst your client is being investigated or prosecuted', *The Criminal Lawyer*, Issue Number 206, January/February 2012).

Conclusion

The above merely touches the tip of the iceberg with regard to the complexity of addressing financial frauds, especially insider trading.

This new book should whet the appetite of university students in the UK. It is serious 'food for thought'.

Note: Appendices A and B follow.

Appendix A: Other writings by Professor Nic Ryder

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