Editorial

Passing the Buck – yet again!

The thirty-fourth annual Cambridge symposium on economic crime took place at Jesus College, Cambridge, from Sunday 4th to Sunday 11th September 2016. As in previous years, it was attended by well over 1,600 participants coming from a great many jurisdictions and ranging across a very broad spectrum of professional interests. The symposium this year took as its overarching these "where does the buck stop" in cases of economically motivated crime. It posed the question whether, in addition to those directly responsible, should we not cast a net, of some kind, over those who facilitated the misconduct in question and those who are at positions to control or supervise the conduct of those who do engage in abuse? Such issues until relatively recently were, at least in the context of financial and business sectors, seen as non-controversial. While those in management have certain more or less relevant responsibilities to promote good governance, any legal or, for that matter, regulatory accountability for the actions of those lower down the corporate hierarchy was at best academic. While we have increasingly come to appreciate that most complex frauds and other forms of misconduct require the assistance, innocent or otherwise, of lawyers, accountants and bankers, with the exception of the money laundering offences, we have hesitated to impose liability for "mere" facilitation.

There are real issues as to the level of culpability at which it is seen to be justified to impose responsibility in the criminal, civil and regulatory law. Where real penalties are involved, traditionally there has been a degree of hostility to imposing meaningful liability for less than recklessness. There is also a very real problem in attributing knowledge and intention to corporations. The English courts have on the whole required prosecutors to identify the "directing mind and will" of the company and it is the state of mind of that individual which will be attributed to the company. In complex situations invariably viewed two or three years down the road, establishing this in the court to the requisite standard of proof is a barrier that few have surmounted. Of course, there are other theories which may be more effectively employed, and it is true that some courts, including the House of Lords, have taken a rather more robust approach. An alternative approach to attempting to fix criminal responsibility on a company for the misconduct of those it employs is to simply create liability for failing to prevent certain types of misconduct taking place.

This is not a new idea; the US law as early as 1934 imposed liability on those who while in a supervisory position could not show that they had taken reasonable steps to prevent the wrongdoing of those under them. While this approach has morphed into a much more developed jurisprudence based on "control", some other jurisdictions have espoused it in this rather simple form. Indeed, Commonwealth Law Ministers commended it as a sensible approach in 1983. There is, of course, a watered-down version in English law: namely, section 7 of the Bribery Act 2010. The Cameron government became interested in such ideas, and the Attorney General Jeremy Wright QC announced at the 32nd Cambridge Symposium that the government was considering legislative proposals for a new separate offence of failing to prevent economic crime. However, the following year, the then Minister of Justice Andrew Selous announced that the government had decided not to pursue this approach. In May 2016, Justice Minister

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Dominic Raab announced that the government had not in fact jettisoned the idea and consultations would take place (Press Release, 12th May 2016). David Cameron also at his conference on corruption stated that it was the government's intention to press on with the crafting of such an offence, not only in regard to the facilitation of tax evasion (an agenda that the Treasury had been pursuing more or less independently) but also for other crimes such as money laundering, bribery and fraud (Guardian, 11th May 2016). At this year's symposium, the Attorney-General Jeremy Wright QC announced that this was a priority in the government's overall strategy against economic crime (The Times, Monday 12th September 2016). The Director of the Serious Fraud Office David Green has been a vocal and strong supporter of a new offence of corporate failure to prevent economic crime. In successive addresses in the symposium since his appointment he has emphasised that without such an offence, the current law (including section 7 of the Bribery Act) actually gives senior management an incentive to disassociate themselves from what is happening in their businesses.

Of course, as Americans have found with their pervasive use of control as a basis for civil and occasionally criminal liability, this is not a panacea. The circuits in the USA diverge significantly in the degree of "control" and scienter that need to be proved. The UK provision is likely to impose what amounts to a form of strict liability. Much in the same way as the FCA's senior person's regime operates, with a burden being placed, by way of defence, on those in charge to establish that everything appropriate and reasonable in the circumstances had been done, rather like under section 7. While this raises issues as to the appropriate level of responsibility in the management of enterprises, an issue which has much wider implications throughout corporate and business law, it is the case that some prosecutors have been reluctant to use section 7 on the basis that courts and in particular juries would have great practical difficulty in determining what in the circumstances would have been reasonable and appropriate. Indeed, in one leading case on attribution of responsibility for misconduct, Lord Templeman stated that if what is forbidden has in fact been done by those working for the company in question, the sufficiency of compliance is merely an issue for mitigation!

As in previous years, a great deal more than all this was discussed by the 647 speakers and panellists at the symposium. The debate ranged across a broad spectrum of issues ranging from, for example, human trafficking to intelligence-led disruption of criminal and terrorist organisations. In previous comments in this journal we have bemoaned the seeming lack of real interest in the control of economic crime within the academy and especially the British academy. Indeed, the delegation from Fiji was larger than those with active research affiliations in British universities. Perhaps a wider question that needs to be posed is just how seriously are these matters taken in the UK. Of some 120 members of parliament specifically invited to participate, only three actually bothered to respond!

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