

Shred me not

The definition of 'documents' intended by the Companies Act is very broad, as many legal cases have shown. **Sally Ramage** explains why destroying any material might be dangerous



When things go wrong, contemporary documents are of the utmost value. It is to these that legal people look with special care when there is any issue with accounts – they are the means of tracing how the trouble in hand developed.

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.

Section 450 states: "(1) An officer of a company who (a) destroys, mutilates or falsifies or is privy to the destruction, mutilation or falsification of a document affecting or relating to the company's property or affairs, or (b) makes, or is privy to the making of a false entry in such a document, is guilty of an offence, unless he proves that he had no intention to conceal the state of affairs of the company or to defeat the law.

(2) Such a person... who fraudulently either parts with, alters or makes an omission in any such document or is privy to fraudulent parting with, fraudulent making of an omission in any such document, is guilty of an offence..."

Point (5) of this section adds that: "'document' includes information recorded in any form."

If a dispute has already arisen, it is very dangerous to destroy any documents. 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.

In any case, missing documents leave indications of their existence when they are referred to in surviving documents. And if a case goes to court, one has to list not only documents in one's possession, custody or power, but also those which were in one's possession but no longer are.

Destruction of documents can lead to a case being found against you by inference. In *Infabrics v Jaytex* (1982), a case of copyright infringement, it was discovered that after the case began, most of the invoices, stock records and similar documents had been destroyed. The judge said: "I am

not prepared to give the defendants the benefit of any doubt or to draw an inference in their favour where a document, if not destroyed, would have established the matter beyond doubt."

Companies should have document retention policies and should not be haphazard about what they keep. It used to be the case that we could look to the Limitation Act 1980 in deciding how long we should keep files and most professions keep papers for at least six years. But the recent case of *Brocklesby v Armitage* makes it possible now to bring a case in respect of, say, a bad piece of accounting advice, long after the six-year limit.

Documents covered by the Companies Act can include text messages and e-mails. In the Guinness case in 1986, Ernest Saunders was charged with destroying a jottings book, some correspondence, some pages from an address book and a 1986 diary, among other things.

The judge said: "Section 450 is the part of the heavy artillery of the Companies Act... [It] 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... The onus is then on the defendant to show that he had no intention to conceal the state of affairs of the company or to defeat the law."

The judge decided that Saunders' diary and other items were documents under section 450: "Those words 'affecting or relating to the company's property or affairs' show that the embargo against destruction goes beyond the formal documents that are the company's documents, to the officer's private documents, provided they affect or relate to the company's property or affairs." It couldn't have been stated more clearly.

Today, with advanced technology on hand, it is possible to preserve files using scanners and other electronic means rather than destroy them. A written policy on document destruction and retention, applied consistently, is a wise move.

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