How far would you go for success?

Two years after Jerome Kerviel 'bet the bank', *Legal InCite* considers the impact this trader may have on how we pursue success.

"HE DIDN'T DISTINGUISH himself from the others", recalled Giselle Reynaud, a former lecturer at the University of Lyon, a criticism that has been handed down to innumerable graduates; however, in this instance the subject was a banker at Société Générale, who allegedly masterminded the biggest rogue trading scandal in financial history.

Jerome Kerviel's losses if left undiscovered would have amounted to £37 billion, £12 billion more than the value of the French bank in which he worked at. In January 2008 his position was salvaged to result in a net loss of (only) £3.8 billion, dwarfing Nick Leeson's £800 million loss in 1995 - quite a feat for a trader of stunning mediocrity!

His actions can, and have been, dismissed as the crazed actions of a French banker; but does this fraud reveal more than the obsessions of a mediocre trader? Is corporate culture culpable for turning average, even well meaning employees into criminals?

White-collar criminals are routinely dismissed as rotten apples in a barrel: inevitable exceptions to the work force, but just how realistic is that claim? Firms often recruit in vast quantities and conceivably recruit potential criminals, willing to exploit opportunities for their own gain. However, competition is such that each recruiter is able to undergo methodically precise screening processes: with group exercises, interview panels, numerous references and psychometric testing regularly used to sort the wheat from the chaff. Yet still white-collar crime persists, could the problem extend to the barrel itself?

Kerviel's employers disagreed. Société Générale's then Chief Executive Daniel Bouton, described the trader as a "terrorist" and a "crazed loner trader"; however, is this too simplistic? Mental instability has regularly been discredited as a motivation for a crime; instead the characteristics of white-collar criminals are often worryingly similar to those who are a business success.[1] The result being that screening will inevitably be flawed as many of the attributes recruiters specifically search for are prospective white-collar criminals have in abundance. The accusation of terrorism is more likely to be a crafted sound bite than a plausible explanation.

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[1] Power, Crime and Mystification, Box, 1983, Tavistock, London

Surprisingly, white-collar criminals are rarely even “bad people” instead they are often seeking success for the company, for which they will be rewarded.[2] Jerome Kerviel’s personal goal was a £235,000 bonus, rather than siphoning off bank funds. Instead of stealing millions, he tried to earn thousands by gambling billions. He was in a low risk desk, not trusted with more lucrative trades and he was understandably frustrated. Kerviel’s actions were seemingly motivated by his desire “to be seen as an exceptional trader”, according to those close to him. However, Does blame rest solely with the rogue trader?

Focus on the ‘rotten apples in a barrel’ diverts attention from the ‘barrel’ “which include policies, practices and culture of the organisation.[3] They provide the crucial context for the crime. The companies tend to provide the setting, the rationale and the opportunity for corporate deviance.[4] Kerviel began his defence in the media by explaining that: "as long as we earn money and it's not too visible, nobody says anything." The suggestion being that the company was either complicit in his rule breaking, which lasted for two years, or that by failing to supervise they tacitly encouraged the crime. The truth of the claim is for the courts to decide; however, when we consider that this average trader managed to amass an undetected profit of £1.1billion in 2006, from a trading area designed to be low risk, we must look beyond the personal motives of individuals.

Railing against corporate practices and their effect on society, was central to President Obama’s election, citing “a corporate culture rife with insider dealing, questionable accounting practices and short-term greed.” While this comment is hyperbolic, the fact that this view is popular despite the introduction of numerous regulatory devices in the UK and US, is concerning. The former’s introduction of the Companies Act 2006 betrays a lack of confidence in the business community to show integrity, by codifying the desire for them to take an enlightened approach to corporate governance. The latter had no confidence in business’ better nature, using Sarbannes-Oxley to prevent fraud through reams of red tape. The idea that the three R’s for preventing corporate crime (regulation, regulation, regulation) are failing us has led to focus on the working culture itself.

Regulation is undermined by the approach of the regulated. Worryingly Kerviel saw his actions as a pleasant “surprise” for his employers; corporate controls were hurdles to be overcome not necessary regulations to prevent abuse and immoral practice. The former trader believed that “his winning positions earned him tolerance” irrespective of what rules were broken. Kerviel believed that there was a sum of money

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[2] Dirty Business: exploring corporate misconduct, Punch, 1996, Sage, London
[3] Corruption and Misconduct in Contemporary British Politics, Doig, 1984, Harmondworth, Penguin
[4] Supra 2

he could make for his company that was large enough that his bosses would overlook the crimes he committed to achieve it. That as long as profits grew each year, the means, criminal or otherwise, can always be justified.

Corporate governance has to be reasserted by both management and legal counsel. This issue becomes ever more pressing during economic downturn, with unemployment increasing; the problem is likely to evolve. Employees may be tempted to commit crime simply to maintain job security, rather than to pursue a promotion or a bonus. With the reward less eye-catching detection becomes more difficult. Employers should now recognise that a winning mentality comes with its own costs. As a certain former French trader demonstrated, it may be more dangerous for a bank if you don’t embezzle and instead you try to fight your way to the top.

The enduring irony of Kerviel is that despite the audacity of his fraud the events that followed his discovery consigned him to a footnote in business history: Lehman Brothers collapsed; AIG teetered on the verge of collapse, prompting bail outs for leading financial institutions; 40% was wiped off the value of world stock markets; a $700 (£472) billion stimulus package was pledged by the US government and then there was Madoff.

So why should we care about Kerviel? In sheer monetary terms Kerviel is of little significance compared to the actions of governments or the implosion of Bernie Madoff’s £50 billion pyramid scheme; however, this mediocre trader could be everything. Kerviel could be to corporate culture what Enron was to corporate governance: the criminal that exposed the fatal flaws in the business safety nets.

For employers the case prompts difficult questions of business management worldwide. What would you have done if his gambles had have won? Is there a set of circumstances where the ends justified his illegal means? Or can we rationalise this problem away by denying that it wasn’t even a crime, but an internal matter?

However, for us budding lawyers Kerviel is a reminder that integrity will go beyond our professional conduct lectures and assessments. Remaining immune from the pressures of corporate culture is not as simple as avoiding conflicts of interest. Professional conduct is answering the question that faces all of us: “How far would you go for success?”