Ticket touting: when might criminal liability arise?

Tickets for music, sporting, and other entertainment events invariably fall in high demand. Event organisers routinely contract with primary ticketing websites, such as Ticketmaster, See Tickets, and AXS, to sell tickets on their behalf. Consumers frantically refreshing a primary ticketing webpage may find event tickets sold out in a matter of mere seconds. The same tickets will appear shortly after on secondary ticketing websites, such as Viagogo, StubHub, and Seatwave, at a substantial premium.

One of the practices which causes this distorted supply and demand is ticket touting: where an individual or company acquires tickets in bulk to resell at a substantial profit. Ticket touts range from "bedroom touts" to sophisticated businesses. The practices employed by ticket touts include utilising computer software to circumvent primary ticketing website restrictions on purchasing multiple tickets. This process is known as "ticket harvesting". Hundreds of companies are believed to engage in the practice. Some secondary ticketing websites even financially incentivise the bulk selling of tickets on their platforms, rewarding so-called "power sellers" financially or with other perks.

In an effort to protect consumers and deter ticket touts, event organisers routinely impose ticket restrictions, including limiting the number of tickets that one individual can purchase, prohibiting commercial purchasing, and prohibiting resale for profit. Event organisers often make plain that they reserve the right to cancel tickets and refuse entry where tickets are purchased in breach of such conditions, something which occurs in a small fraction of cases.

These measures have unfortunately done little to stem the flow of ticket touting. There is after all vast amounts of money to be made, with the restrictions enforced by primary ticketing websites easily outsmarted by readily purchasable computer software.

Ticket touting is clearly viewed by a large portion of the public as unacceptable and deeply unfair on fans. This blog post focuses on the circumstances in which ticket touting may give rise to criminal liability on the part of individuals and companies. It begins with a discussion of the only successful prosecution for large-scale ticket touting to date. This is then followed by a general consideration of the various avenues through which criminal liability may arise.

The case of Peter Hunter and David Smith

The Trial

2020 saw the first successful prosecution for large-scale ticket touting. The prosecution was brought by National Trading Standards against Peter Hunter and David Smith, two notorious ticket touts whose practices were first investigated by the Guardian back in 2016.

Hunter and Smith were officers of a company called BZZ Ltd, which acquired and resold tickets for entertainment events. During the indicted period of June 2015 to December 2017, the pair made an outlay of £4m on acquiring tickets and obtained returns exceeding £10.8m.

Hunter and Smith stood trial at Leeds Crown Court on a four-count indictment. Three counts alleged fraudulent trading contrary to section 993(1) of the Companies Act 2006. Each of these three counts targeted a distinct aspect of their enterprise: (1) purchasing tickets for commercial and non-personal use in breach of the vendor's terms and conditions; (2) reselling tickets, marketed as guaranteeing entry, at risk of cancellation by virtue of their tainted means of acquisition; and (3) reselling unowned tickets which were marketed as in fact being in their possession ("speculative selling"). The indictment also featured a single count of possession or control of an article for use in fraud contrary to section 6(1) of the Fraud Act 2006. This concerned the computer software used to harvest tickets from primary ticketing websites.

The Crown's case was that the business system operated by Hunter and Smith – using computer software and other methods to circumvent vendor restrictions in breach of their terms and conditions, followed by the reselling of purportedly valid tickets to consumers – was fraudulent in that there was an intention to deceive both vendors and consumers.

The defence case was that primary and secondary ticketing websites were not only aware of bulk selling but facilitated and encouraged the practice such that it could not be said that the ticketing websites were deceived. Nor was there prejudice to the proprietary interests of consumers as the ticket restrictions were either ineffective or invalid.

On 13 February 2020, Hunter and Smith were convicted on all four counts. Hunter was sentenced to 4 years' imprisonment and Smith to a term of 2 years and 6 months. Both were given 10-year company director disqualifications.

The Appeal

Hunter and Smith appealed against their convictions on a number of grounds (*Hunter* [2021] EWCA Crim 1785). Whilst the appeals were dismissed, two important issues were raised that will have a bearing on future ticket touting prosecutions: (1) the components of the statutory offence of fraudulent trading; and (2) the validity and enforceability of the restrictions attaching to tickets purchased from secondary ticketing websites.

In relation to the ingredients of the offence of fraudulent trading under section 993 of the Companies Act 2006, the Court of Appeal rejected the appellants' attempt to read the offence subject to the limitations in the common law offence of conspiracy to defraud. Accordingly, there is no requirement for the prosecution to prove either an intent to defraud by deception or the deliberate putting of another person's proprietary rights in jeopardy. The appellants were attempting to use the common law tail to wag the Parliamentary dog: the primacy of Parliament meant that it would run counter to judicial policy for the common law to drive and limit the otherwise broad statutory language of section 993 of the Companies Act 2006 – particularly so when there was little overlap between the offences.

After dispensing with that ground of appeal, the Court clarified the ingredients of the second limb of the offence of fraudulent trading. Section 993, by its terms, creates two offences: an "intent to defraud creditors" offence, and a "fraudulent purpose" offence. The ingredients of the second, broader, offence are as follows:

(1) *A business of a company is being carried on by the defendant* – the issue of whether there has been the use of a business will be straightforward, but some degree of attribution will be needed: the acts of the defendant must be in connection with the business, such as controlling, managing, or running the business.

(2) *The business is carried on for a fraudulent purpose* – again, the object or purpose of the business will be straightforward, such as to purchase event tickets in circumvention of vendor restrictions. As for whether the purpose is fraudulent, dishonesty is the essential element for the prosecution to prove. This will involve a consideration of whether the acts and/or omissions of the business step beyond the bounds of what ordinary and reasonable people would regard as honest. Three important points flow from this component: first, an intention to deceive is not a requirement of the offence. Second, as a conduct-based offence, there does not have to be an actual or intended victim. Third, over and above

evidence of dishonesty, the prosecution need not prove harm or prejudice to the rights or interests of a third party. Of course, should any of these three aspects be present, they may afford powerful evidence of a fraudulent purpose.

(3) *The defendant is knowingly party to that carrying on for a fraudulent purpose* – this element requires knowledge of both the carrying on and the fraudulent purpose. A defendant will be fixed with knowledge of a fraudulent purpose if they knew that what they were doing was dishonest. This will include "blind eye knowledge": a defendant who turns a blind eye to the obvious truth of fraud may be deemed to have the requisite knowledge.

The Court then dealt with the validity and enforceability of the terms attaching to event tickets. By attacking their validity, the appellants sought a finding that the ticket restrictions had no effect, thus eliminating the risk posed to consumers and paving a path to argue that their business model was not dishonest. The three ways in which the appellants attempted to liberate themselves of the restrictions, and the Court's responses, were as follows:

(1) *The ticket restrictions fell foul of the fairness test under the Consumer Rights Act 2015 and were therefore voidable by consumers* – the Court could not see any argument for suggesting that there was any systemic unfairness in the restrictive terms imposed. They were intelligible to a lay person. They served a legitimate aim in that they were designed to curb the emergence of secondary ticketing markets which operate significantly to the detriment of consumers. If the terms were unenforceable then ticket vendors would be unable to prevent ticket touting.

(2) *That the status of a ticket in law is a good which transfers into a licence upon entry which cannot be revoked by the breach of terms relating to the initial purchase* – it was not possible to sever the burdens attaching to the benefits of a ticket. A ticket is a contractual licence issued on terms and therefore a chose in action rather than merely a good. When a ticket is transferred so too are its contractual rights and restrictions.

(3) *The doctrine of "equities darling" operated so that consumers acquired tickets unencumbered by restrictions as they were bona fide purchasers acting in good faith* – equity rarely deigned to grace the criminal courts and did not do so on this occasion to cleanse the appellants' hands. The equitable doctrine applied to property transactions in order to allocate risk between two innocent parties; it was not a device to scrub clean the dishonest hands of a fraudster.

Avenues through which criminal liability may arise

We turn now to a general consideration of how criminal liability may attach to those involved in ticket touting. It is instructive to consider four factual scenarios.

Scenario 1: an individual acquires and resells tickets for profit

Hunter and Smith carried on a business which targeted a range of events. There are a host of offences which may apply when an individual engages in ticket touting other than in a business setting. Only a handful of dedicated ticket touting offences line the statute book. Section 166 of the Criminal Justice and Public Order Act 1994 creates a specific offence of selling or offering to sell a ticket to a designated football match. Similar offences were created for the unauthorised sale of London 2012 Olympic tickets and Glasgow 2014 Commonwealth games tickets.

Outside of this esoteric and partially defunct legislation, criminal liability may arise through the offence of fraud by false representation under section 2 of the Fraud Act 2006. Knowingly false representations may be expressly or impliedly made by a ticket tout at the point of purchasing tickets (eg that the tickets are not bought with the intention of resale) and when selling the tickets (eg that the tickets are not subject to restrictions, or the restrictions will not be enforced).

Little trouble will be posed by the need to point to a false representation. Liability will therefore turn on whether a jury considers the defendant to have been dishonest when those false representations were made. Factors having a bearing on this issue will include the scale and sophistication of the operation; how tickets are acquired; the number of tickets acquired; the event for which the tickets are acquired; the degree to which terms and conditions are circumvented in doing so; the description given to tickets on resale websites; the level of risk attaching to tickets purchased by consumers; the price at which tickets are resold; and the overall profit made.

Criminal liability may also arise at the point of ticket resale under the Consumer Protection from Unfair Trading Regulations 2008, which prohibits misleading actions and omissions. This will occur where the full risks attached to the purchasing of a resold ticket are not made clear to the consumer.

Scenario 2: an individual carries on a business acquiring and reselling tickets

The case of Hunter and Smith illustrates how the offence of fraudulent trading may bite where an individual carries on the business of a company purchasing and reselling event tickets. Where a person falls outside the reach of the offence of fraudulent trading – because they carry on a ticket

touting business as a sole trader rather than as a company – a charge may be brought under section 9 of the Fraud Act 2006. Individuals carrying on a business may also be prosecuted for an offence of fraud by false representation, however, in cases with many transactions, charging fraudulent trading will avoid an indictment being overcrowded with a multiplicity of counts.

Scenario 3: a corporate facilitates ticket touting

The Court of Appeal in *Hunter* (at [19]) observed that the ticketing market appears to be characterised by a high degree of criminal fraud. This raises the question of how corporate criminal liability might reach the shores of a ticketing company.

A corporate can be a principal or accessory to almost any crime. Liability is predicated on the culpability of human agents who make up the directing mind and will of the company, and thus whose acts and omissions can be attributed to the corporate so as to affix it with criminal liability.

Assuming any issue with corporate attribution could be overcome, there are several ways in which a ticketing company could be found to have committed an offence. A prosecution for substantive offences of fraud or unfair trading could be mounted on the basis that the company failed to make clear to consumers the risk attached to purchasing a resold ticket.

Various forms of inchoate liability could also arise. A statutory or common law conspiracy could be charged based on an agreement between a secondary ticketing company and a ticket tout concerning the reselling of tickets on its platform. A corporate could also be said to have assisted or encouraged the commission of an offence through rewarding ticket touts, financially or otherwise, who bulk sell on through their websites. It should also be borne in mind that section 15 of the Consumer Protection from Unfair Trading Regulations 2008 broadens the scope of criminal liability to corporations and officers where corporate wrongdoing is attributable to an officer's consent, connivance, or neglect.

Scenario 4: use or possession of software in order to acquire tickets for resale

The case of Hunter and Smith demonstrates how criminal liability may arise specifically from the use or possession of computer software to process the acquisition of tickets. Both Hunter and Smith were convicted of possessing an article for use in fraud contrary to section 6(1) of the Fraud Act 2006. As the offence targets any "article" it matters not how sophisticated the software is; so long as the software is possessed or controlled for use in the course of a fraud then it may dovetail on an indictment with another charge targeting the actual acquisition or sale of tickets.

A specific offence of using software to obtain event tickets was created by the Breaching of Limits on Ticket Sales Regulations 2018 pursuant to section 106 of the Digital Economy Act 2017. However, there are several reasons why a prosecutor will likely prefer to charge fraud offences. First, the 2018 offence requires the actual use of software rather than mere possession. Section 6 of the Fraud Act 2006 will therefore bite at a more incipient stage of a ticket tout's operation. Where software is used for ticket acquisition, a charge of fraud may be deemed more suitable as it carries a maximum of 10 years' imprisonment compared to a maximum of a fine under the 2018 regulations. The 2018 offence is also narrower, criminalising the use of software to circumvent the limit on the number of purchasable tickets, whereas a fraud charge can capture any term circumvented by a false representation made through software.

Conclusion

As restrictions lift, venues are opening their doors and filling more seats for entertainment events. This brings with it fresh opportunities for ticket touts to acquire and resell tickets. With potentially hundreds of ticket touting companies operating in the UK, the case of Hunter and Smith should be viewed as a warning shot to ticket touts that prosecutions can and will be brought, and to expect their practices to be looked upon unsympathetically by judge and jury. Ticketing companies would also be wise to examine their own practices lest they find themselves caught in the crosshairs of prosecutorial agencies.

So we may witness emerge a rather febrile area of criminal law. As well as emboldened law enforcement agencies, it is conceivable that event organisers, long fed up with the scourge of ticketing touting, attempt to bring private prosecutions. For most prosecutions, when considering the general landscape of criminal offences, it will be offences of fraud that display the greatest utility in combatting ticket touting and are likely to be chosen by prosecuting agencies.

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