Consent and connivance: the criminal liability of directors and senior officers

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IN OUR NOVEMBER ARTICLE, 'ESTABLISHING the criminal liability of corporations', we looked at how liability for criminal offences can attach to corporations, where the commission of the offence is attributable to someone who was at the material time the 'directing mind and will' of the company.[1] This article looks at the related issue of how criminal liability can attach to individual directors and senior officers as a result of actions taken by those whom they manage.

CONSENT OR CONNIVANCE

Companies can be held criminally liable for a wide range of offences, including health and safety offences, corporate manslaughter and those more commonly encountered in business contexts such as fraud, bribery, false accounting and certain Companies Act offences. Put briefly, a company will normally only be criminally liable where the commission of the offence can be attributed to someone who, at the material time, was at or close to board level. The fact that a company can be held liable for a criminal offence does not preclude the prosecution of the individual or individuals involved in committing the offence, and in fact allows the net to be cast even wider in terms of individual responsibility.

There are a number of situations in which, where an offence is committed by a company and it is proved to have been committed with the 'consent or connivance' of a director, manager or other senior person, that person is also guilty of the offence. Examples of such provisions are to be found in many statutes creating criminal offences, including the Theft Act 1968, the Fraud Act 2006 and, more recently, the Bribery Act 2010. The rationale behind them is to enable the prosecution and punishment not only of the corporate entity but, where sufficiently culpable, those who control it. In other words, they provide a means of holding to account those who are complicit in offences committed by companies.

So, under s14 of the Bribery Act, where an offence under s1 (bribing another person), s2 (receiving bribes) or s6 (bribery of foreign public officials) of the Act is committed by a company and that offence is proved to have been committed with the consent or connivance of a senior officer of the company, the senior officer as well as the company will be guilty of the offence. This provision only applies to the substantive offences under the Bribery Act – there can be no individual director liability in respect of the corporate offence of failing to prevent bribery.

Under this and similar provisions in other statutes, the corporate entity and the senior person who consented or connived are both guilty of the main offence, ie there is no separate offence of 'consent or connivance'. A relatively recent example is *Director of The Serious Fraud Office v Mabey Engineering (Holdings) Ltd* [2012], where the engineering group Mabey & Johnson pleaded guilty to breaching UN sanctions by paying kickbacks to Saddam Hussein's regime and three senior executives were subsequently convicted of the same offences on the basis of their consent or connivance. There is in fact no requirement that the company itself be prosecuted, provided the offence can be proved against it. Any prosecution of the relevant senior person would have to establish, to the satisfaction of a jury, that the company had committed the offence in question.

NEGLIGENCE

There are also a number of statutes creating criminal offences that extend the 'consents or connives' provision to include an offence committed by the body corporate that is attributable to any neglect on the part of the individual director or senior person. An example is s37 of the Health and Safety at Work Act (HSWA) 1974, which applies to all the criminal offences created by the Act (the vast majority of which, since January 2009, carry a prison sentence of up to two years). This broader basis for imposing liability is not, however, limited to health and safety matters. Similar provisions affect offences under statutes as wide-ranging as the Trade Descriptions Act 1968, the Companies Act 2006 and the Private Security Industry Act 2001, many of which carry significant custodial sentences.

The potential for criminal liability in these circumstances is more akin to the position in the United States where, in relation to certain offences concerned with public welfare (such as those relating to environmental protection and food safety), the 'Responsible Corporate Officer' (RCO) doctrine imposes criminal

liability on officers who, because of their position in the corporation, had the responsibility and authority to prevent or correct infringements of the law.[2] Crucially, corporate officers can be prosecuted under the RCO doctrine even if they were unaware of the particular conduct within the corporation, provided they:

1) knew that such conduct was unlawful;

2) were 'in a responsible relation to public danger'[3] (ie had authority to exercise control over the specific activities that caused the unlawful conduct); and

3) failed to prevent the conduct, for example by failing to implement suitable systems and controls.[4]

Penalties under the RCO doctrine can be significant. In 2007, for example, Purdue Frederick Company was accused of misbranding the painkiller OxyContin. Its CEO, general counsel, and medical director were also charged under the RCO doctrine and pleaded guilty to charges of misbranding a drug. They were each sentenced to extensive community service, fined $5,000 and excluded from participating in federal healthcare programmes for 12 years.[5] They were also collectively ordered to pay approximately $34.5m in disgorgement.

The Law Commission argues that imposing criminal liability on negligent directors or their equivalents for offences committed by companies is unfair, and that an individual should not be exposed to conviction for a criminal offence committed by another person simply because the offence was committed as a result of their neglect.[6] This is surely right, since in these circumstances it cannot be said that the acts or omissions of the director contained a sufficient element of fault to justify imposing criminal liability for a crime they did not personally commit. Perhaps a more suitable alternative would be the creation of a separate criminal offence of 'negligently failing to prevent', which would be sufficient to capture the director's conduct without effectively making them vicariously liable for someone else's crime. Arguably such a provision should only apply to the most serious criminal offences, rather than imposing criminal liability for negligence in respect of minor or quasi-regulatory offences. The Commission's proposals on the criminal liability of directors and their equivalents are currently on hold. It is expected that they will be dealt with as part of a full scale project on corporate liability at some point in the future.

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THE MEANING OF 'CONSENT', 'CONNIVANCE' AND 'NEGLECT'

So what is meant by 'consent', 'connivance' and 'neglect'? Consent and connivance have been held to imply both knowledge and a decision made on the basis of that knowledge. In *Attorney General's Reference (No 1 of 1995)*, the Court of Appeal considered that 'consent' required that the accused knew the material facts that constituted the offence by the body corporate and had agreed to conduct its business on the basis of those facts. Ignorance of the law was no defence. In *Huckerby v Elliot* [1970], the Divisional Court stated that a person is said to have connived at an offence when:

> '... he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it.'[7]

Connivance therefore encompasses wilful blindness. In *R v P* [2007], the Court of Appeal held that neglect does not necessarily require actual knowledge, if the circumstances were such that they should have put the officer on enquiry.

In 2009, the meaning of 'consent', 'connivance' and 'neglect', were considered by the House of Lords in *R v Chargot Ltd*, in relation to an offence under s37 of the HSWA 1974 arising from the death of a dumper-truck driver. The court held that the circumstances would vary from case to case and that no fixed rule could be laid down as to what the prosecution must identify and prove in order to establish that an officer's state of mind amounted to consent, connivance or neglect. According to Lord Hope:

> 'In some cases, as where the officer's place of activity was remote from the workplace or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence... In others, where the officer was in day to day contact with what was done there, very little more may be needed'.

The House of Lords in *Chargot Ltd (trading as Contract Services) & ors* [2008] agreed with the definition of consent as given in *Attorney General's Reference (No 1 of 1995)*, ie that it implies both knowledge and a decision made on the basis of that knowledge, but added that consent and connivance can also be established by inference as well as by proof of an express agreement.[8] Put simply, where a statute creating a criminal offence contemplates a particular risk, and a company fails to prevent that risk from crystallising (in this case, the death of an employee), it will be relatively easy to infer that there was connivance or neglect on the part of an officer if the circumstances under which the risk arose were under the direction or control of that officer. The more remote the officer's area of responsibility from those circumstances, the harder it will be to draw such an inference.

There is no requirement for the prosecution to prove specific knowledge of each allegation. In 2010, security company Sabrewatch Ltd was successfully prosecuted for deploying unlicensed security guards contrary to s5 of the Private Security Industry Act 2001

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(*Securities Industry Authiority v Sabrewatch* [2010]). The company's directors were also prosecuted and convicted of the offence under the Act's 'consent or connivance' provision, on the basis that they were aware of the company's policy to deploy unlicensed guards. They appealed against their convictions, arguing that it could not be proven that they had personal knowledge of the specific deployments of unlicensed employees. Dismissing the appeal, the Court of Appeal held that, if directors had to be shown to be aware of specific deployments, that would effectively allow them to shut their eyes to the management of their companies:

> '... the nature of these regulatory statutes with their provisions for secondary liability by directors and managers in accordance with their consent, connivance or neglect is to ensure that they are held to proper standards of supervision and that the size of the company and the distance of directors and managers from the coal face of individual acts should not, where there is consent, connivance or neglect, afford directors or managers with the necessary knowledge a defence'.

CONCLUSION

With enforcement agencies scrutinising corporate conduct more than ever before, in-house lawyers need to understand the potential impact of the criminal law not only on corporate entities but also on their senior management. However, despite detailed consideration by the criminal courts in the course of relatively recent cases, there remains a troubling lack of clarity around what conduct is capable of amounting to 'consent', 'connivance' or 'neglect'. Could consent include, for example, participation in a board meeting where a decision is taken? Are there circumstances in which a director would be required to resign in order to show that they had not connived at an offence? How far are directors entitled to rely on information provided to them by those they manage? The case law to date suggests that the answers to those questions will depend very much on the particular circumstances of the case, which does not make matters easy for those tasked with assessing potential liability arising from corporate incidents.

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NOTES

1) *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915], at 713.
2) *United States v Park* [1975].
3) *United States v Dotterweich* [1943]; *Liparota v United States* [1985].
4) *United States v Iverson* [1998].
5) *Friedman v Sebelius* [2010].
6) Consultation note no 195, 'Criminal Liability in Regulatory Contexts: An Overview', August 2010, at p18.
7) At para 194.
8) At paras 33-34.

Attorney General's Reference (No 1 of 1995) [1996] 2 Cr App R 320

Chargot Ltd (trading as Contract Services) & ors [2008] UKHL 73

Director of The Serious Fraud Office v Mabey Engineering (Holdings) Ltd (Unreported, High Court, 12 January 2012)

Friedman v Sebelius, 755 F Supp 2d 98 (DDC) (2010)

Huckerby v Elliot [1970] 1 All ER 189

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705

Liparota v United States, 471 US 419, 433 (1985)

R v P [2007] EWCA Crim 1937

Securities Industry Authiority v Sabrewatch (Unreported, Southwark Crown Court, 19 February 2010)

United States v Dotterweich, 320 US 277, 281 (1943)

United States v Iverson, 162 F3d 1015, 1022 (9th Cir) (1998)

United States v Park, 421 US 658, 673-74 (1975)