Additional chapter:

White Collar Crime – Regulatory offences

Contents

1 INTRODUCTION

White collar crime refers to criminal acts of business people, in the course of, or in connection with, their occupation.

Generally, white collar crime may be dealt with like any other offence, using the principles and procedures set out in the main body of this work. However, the specialist nature and complexity of white collar crime gives rise to special considerations, and special procedures, which do not apply in criminal law in general.

White collar crime may be split into two broad areas:

- Fraud: generally acquisitive crime perpetrated through the medium of a person's occupation or business; e.g. fraud on an employer, fraud on the public, tax fraud, etc.

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- Regulatory offending: where regulations are of such importance that they require criminal sanctions to enforce them; e.g. in the fields of health and safety, and environmental law.

This chapter deals with the second of those areas.

This chapter

The purpose of this chapter is to provide a practical overview of the law and procedure pertaining particularly to the category of criminal offences frequently generically referred to as 'regulatory offences.'

Very many standard principles and practices arising from general criminal law are equally applicable to this category of offences. This chapter intends, as far as possible, to discuss matters of general application to regulatory offences, and accordingly functions as a gloss to the chapters on criminal law and procedure.

Regulatory reform

In March 2005, the Hampton Review published its final report '*Reducing Administrative Burdens: Effective Inspection and Enforcement*', that report revolving around seven principles, now generally referred to as the Hampton Principles. In November 2006, the Macrory Review, instituted in response to the Hampton report to examine the regulatory sanctioning regime, published its final report '*Regulatory Justice: Making Sanctions Effective*.' The recommendations of both reviews were fully accepted by government. On 8th January 2007, the Legislative and Regulatory Reform Act 2006 came into force. There followed the establishment, on 28th June 2007, of the Department for Business, Enterprise and Regulatory Reform ['BERR'], later Department for Business, Innovation and Skills ['BIS'], and now the Deparment for Business, Energy & Industry Strategy ['BEIS']. Part of BEIS is the Better Regulation Executive, which has wide ranging responsibilities for the improvement of regulation generally. In July 2007, government published its paper 'Next Steps on Regulatory Reform'. On 17th December 2007, the Regulators' Compliance Code was published. The Regulatory Enforcement and Sanctions Act received Royal Assent on 21st July 2008, and was in fully in force on 6th April 2009.

On 14th June 2010 a full review of Britain's health and safety legislation was announced. The resulting report by Lord Young of Graffham, entitled "Common

Sense – Common Safety", was published on 15th October 2010. It espouses a practical, sensible, and simple approach to health and safety by organizations. The Health and Safety Executive welcomed the report in its attempts to prevent a legitimate regulatory tool from being usurped as a shield by those with ulterior motives, such as cost saving or laziness.

On 15th April 2013, the Enterprise and Regulatory Reform Act 2013 received Royal Assent and was largely, though not completely, in force by April 2014. The Act is ambitious, aiming to cut the costs of doing business in Britain, to boost consumer and business confidence and to help the private sector to create jobs by (amongst other wide ranging measures) simplifying regulation.

In August 2018, BEIS published 'Better regulation framework: guidance.' The guidance is directed at government officials, who are developing or implementing policies that will regulate or deregulate business or civil society organisations.

The recognition of and desire to improve a hitherto disjointed and sometimes inconsistent approach to regulation reflected in this history mean that practitioners and regulators alike must be particularly vigilant to remain properly informed. Some of this material is discussed in more detail below; in-depth and specific consideration is unfortunately beyond the scope of this work but is commended. BEIS's website provides a good starting point.

What are regulatory offences?

'Regulatory' offences are statute created criminal offences, prosecuted and defended in the usual way in the magistrates' and Crown courts. Such offences are frequently enforced by a specialist regulator.

Criminal liability is not normally imposed in England and Wales unless the requisite element or elements of *mens rea* are proved. Where the offence is a 'regulatory' one, criminal liability can exist where the defendant was ignorant of one or more of the factors which rendered his conduct criminal. Such ignorance may exist absent any other reprehensible conduct (such as negligence). We have long been accustomed to such offences in the context of road traffic offending.

'Regulatory' offences are accordingly frequently described as 'quasi-criminal' or 'strict liability' or 'absolute liability'. These terms are frequently interchanged, though in some cases distinctions can and should be drawn.

Absolute liability offences require no element of *mens rea* to be proven; the act itself is deemed worthy of punishment.

Strict liability or quasi-criminal offences require either a reduced or no level of mens rea, and may allow for limited statutory defences, such as due diligence.

In *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1 the reason for the exception to the general rule that *mens rea* is an essential ingredient of a criminal offence was thus stated by Channel J.

> 'By the general principles of criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of mens rea, and, therefore ... a master (can not) be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the legislation has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is criminally liable to a penalty whether he had any mens rea or not, and whether or not he intended to commit a breach of the law.'

Whether an offence is strict liability is to be discerned from the words of the particular statute, with regard being given to all the circumstances: *Sweet v Parsley* (1969) 1 All ER 347. Only where parliamentary intention is wholly clear will the requirement of *mens rea* be set aside. For regulatory offences parliament has frequently, for example, cast the burden of proving a defence that involves the rebuttal of an otherwise assumed element of *mens rea* onto the defendant (see below on defences). Where some offences in a particular statute contain words such as 'knowingly', or 'wilfully', and other offences do not, the omission will be interpreted as intentional: *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd*. (1998) 2 WLR. 350.

2 THE REGULATORY AGENCIES

Regulatory offences tend to arise in relatively specialist areas of law, for example:

- environmental law
- health and safety law
- food safety law
- trading standards law
- consumer protection law

The legislation often consists of an Act of Parliament in which the overriding principles, the organisational infrastructure and the necessary enforcement powers are established. The act will provide a power to issue regulations for specified purposes by way of statutory instrument or another form of delegated legislation. Regulations will then be issued under that power. The regulations are often drafted in response to European legislation.

Generally, a specialist agency will be given specific statutory responsibility for the enforcement of such an area of law. Frequently, too, there will be a division in responsibility between a dedicated national agency or authority and a local authority, which may be reflected in agreed protocols. Thus, for example, the 'Protocol between local housing authorities and fire and rescue authorities to improve fire safety' seeks to identify the circumstances in which those authorities will respectively take lead investigatory and enforcement responsibility.[1] Where necessary a breach of regulations will constitute a criminal offence. The enforcement of regulations includes the power to prosecute. A few examples of enforcing authorities are given below.

2.1 Environment Agency

The Environment Agency of England and Wales was established by the Environment Act 1995 and came into being on 1st April 1996. The principal aim and objective of the Agency is to protect and enhance the environment so as to achieve sustainable development. Its responsibility is wide-ranging, including pollution; water protection; flood defence; waste-regulation; radioactive substances; abandoned mines.

[1] http://www.cieh.org/policy/protocol_local_housing.html.

The principal legislation enforced by the Environment Agency includes:

- The Environmental Protection Act 1990
- The Environmental Permitting Regulations 2016

Enforcement responsibility is shared with local authorities. Thus, local authorities have power of prosecution for various offences, including:

- Environmental Protection Act 1990 s. 80 (statutory nuisance, which accounts for the vast majority of local authority prosecutions)
- Environmental Protection Act 1990 s. 33-34 (waste)
- Environmental Protection Act 1990 s. 78 (remediation notices on contaminated land)
- Control of Pollution Act 1974 s. 60-61
- Clean Air Act 1993 Part 1

2.2 Health and Safety Executive

The Health and Safety Executive is a non-departmental public body which is responsible, amongst other functions, for the encouragement, regulation and enforcement of workplace health, safety, and welfare. The Health and Safety Executive shares its enforcement function with local government.

2.3 Data protection

The Information Commissioner's Office is the UK's independent authority set up '*to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals*' (www.ico.gov.uk). It enforces

- the Data Protection Act 1998
- the Freedom of Information Act 2000

- the Privacy and Electronic Communications (EC Directive) Regulations 2003
- the Environmental Information Regulations 2004

It has a range of criminal and civil enforcement powers at its disposal.

2.4 Financial Conduct Authority and Prudential Regulation Authority

The Financial Conduct Authority ['FCA'] is the UK financial services regulator responsible for the conduct of all firms previously regulated by the FSA (including those subject to supervision by the Prudential Regulation Authority ['PRA']). It will also be responsible for prudential regulation of smaller firms that do not fall under the PRA's jurisdiction, so smaller firms will only have one regulator. The regulation of conduct concerns the selling, management and handling of investments by firms to or for investors. The FCA's handbook is here: https://www.handbook.fca.org.uk.

Prudential regulation primarily relates to the capital solidity and liquidity of financial institutions. The PRA is responsible for the prudential regulation of capital-intensive firms, including banks, insurers and certain investment firms. Such firms are dual-regulated firms because, while the PRA regulates prudential issues, the FCA acts as the conduct regulator. The PRA's handbook is here: https://www.prarulebook.co.uk . Both the FCA and the PRA handbooks are very similar to the previous FSA rules.

2.5 Local authorities

Local authorities share the enforcement responsibility in number of regulatory areas, and are the sole enforcers in other areas. For example, the enforcement of consumer protection legislation includes responsibility for offences in following acts:

- Animal Health Act 1981
- Children and Young Persons (Protection From Tobacco) Act 1991
- Consumer Credit Act 1974
- Consumer Protection Act 1987

- Consumer Protection from Unfair Trading Regulations 2008
- Hallmarking Act 1973
- Property Misdescriptions Act 1991
- Trade Marks Act 1994
- Video Recordings Acts 1984 and 1993
- Weights and Measures Act 1985

2.6 Other bodies

There are many other Acts of Parliament which contain strict liability offences, and which authorise particular bodies to prosecute them. Care must be taken in any such prospective or actual case to check responsibilities. However, in *R (on the application of Securiplan plc and others v Security Industry Authority* [2008] EWHC 1762 (Admin), it was held that whilst the Private Security Industry Act 2001 did not expressly confer a power or authority to prosecute on the Security Industry Authority ['SIA'], on a true construction of the functions of the SIA as prescribed by section 1(2)(3) of the 2001 Act, those functions were facilitated by the enforcement of the sanctions prescribed by the Act, including by prosecution.

3 PRIVATE PROSECUTIONS

Regulatory agencies work to limited budgets, and are necessarily selective about the cases that they choose to prosecute. Meanwhile the commission of a regulatory offence often impinges upon the interests of an individual, or of a particular group, or of a company. For example, an individual may be poisoned by unsafe food, or a business concern may be affected by the noise from a neighbouring premises. It is perhaps for these reasons that private prosecutions occur relatively regularly in this context.

Private prosecutions (for present purposes) are those initiated by a person or body other than the Crown Prosecution Service, or the statutorily empowered agency.

Subject to any specific limitation within the offence-creating legislation, a person may institute or conduct proceedings for any criminal offence.

Defendants are, however, protected from the improper use of private prosecutions:

- The Director of Public Prosecutions may take over the conduct of any private prosecution, and may do so where they are not in the public interest, in order to discontinue them, or to offer no evidence in them.

- Alternatively, the Attorney General may issue a *nolle prosequi*, the effect of which is to stay the proceedings; it does not operate as a bar to future continuation of the proceedings. Nor does it amount to a discharge, or acquittal, on the merits. The majority of cases in which a *nolle prosequi* is entered concern defendants who cannot plead or otherwise stand trial, due to some mental or physical incapacity.

The DPP is not obliged to take over all proceedings which he could have started: *R v Bow Street Magistrate, ex p. South Coast Shipping Company Ltd,* 96 Cr App R 405, DC. In *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, the Supreme Court considered the lawfulness of the policy in respect of private prosecutions instigated by the DPP in 2009, which provided that a private prosecution should be taken over and stopped unless the prosecution was more likely than not to result in a conviction. The DPP's previous policy was to ask whether there was clearly no case for the defendant to answer. If such was his conclusion, he took over the prosecution and discontinued it; otherwise, subject to the application of further criteria, he declined to take it over. The question for the Supreme Court was whether the application of the DPP's current policy towards intervention and discontinuance frustrated the policy and objects underpinning the right to maintain a private prosecution in the Prosecution of Offences Act 1985 section 6(1). The appeal was dismissed. Section 6(2) gave the DPP discretion to take over the conduct of any private prosecution. Parliament could not have intended by section 6(1) that the DPP should decline to exercise his discretion so as to intervene and discontinue a prosecution even if it lacked a reasonable prospect of success. In focusing, as the current policy of the DPP did, on the likely prospect of a private prosecution resulting in a conviction, the DPP posed to himself a much more relevant question than the "no case to answer" test. Private prosecutions were frequently instituted and the great majority survived the DPP's current tests and policy for intervention and discontinuance.

A private prosecutor is bound by principles similar to those pertaining to public prosecutors (duty to act fairly; disclosure obligations). A private prosecutor who fails so to do, or is vexatious, or who brings a case which fails the evidential or public interest tests is likely to have his case taken over. Such a prosecutor will need to consider his position (including his financial position) carefully.

Magistrates are required to scrutinise any proposed summons with care, and have a discretion to refuse to issue. Magistrates should consider:

- whether the offence alleged is known to law.
- whether the essential ingredients of the offence are prima facie present
- whether time limits have been complied with
- whether the court has jurisdiction
- whether any relevant consent to prosecute has been obtained and
- whether the application is vexatious.

In *R* v *Zinga* [2014] EWCA Crim 52, the Court of Appeal considered whether a private prosecutor was entitled to bring confiscation proceedings under the Proceeds of Crime Act 2002 even if it had no financial or personal interest in the outcome, and the propriety of a private prosecutor procuring assistance from the police in return for a "donation" to police funds. The Court declined to comment on the latter issue. On the former issue: since sentencing was part of "criminal proceedings", it followed that confiscation proceedings were also part of "criminal proceedings". Charitable or public interest bodies regularly engage in private prosecutions. The right of such bodies to pursue confiscation proceedings had never been challenged, The question was whether the Proceeds of Crime Act 2002 specifically provided for such proceedings to be instituted solely by a state prosecutor. The words used in section 6 of that Act, together with the content of s.40(9)(b), were clear that a prosecutor was to be read in a wide sense as meaning any person permitted to prosecute. It therefore included private prosecutors.

In *R (DPP) v Sunderland Magistrates' Court* [2014] EWHC 613 (Admin), summonses issued by a lay magistrate alleging misconduct in public office against a Chief Crown Prosecutor and her deputy were quashed because, firstly, the informations pertained to their decisions not to investigate allegations against a wide range of potential defendants, despite Crown Prosecutors having no such investigative powers, and, secondly, the informations were vexatious. Whilst citizens enjoy the right to bring a private prosecution, it being an important safeguard against improper inaction by a prosecuting authority, the right is not unfettered. The issuing magistrate must be scrupulous to ensure that all elements of the alleged offence were established. In the circumstances of the particular case, either it was known or should have been known on proper enquiry that the informations were vexatious.

4 INVESTIGATIONS, AND THE DECISION TO PROSECUTE

4.1 Investigations

The officers of the prosecuting authorities with which this chapter is concerned are not police officers and do not have police powers (though some agencies may apply in particular circumstances for a warrant from a magistrates' court).

The Codes of Practice issued pursuant to section 67 of PACE, apply to persons '*other than police officers who are charged with the duty of investigating offences or charging offenders'*: section 67(9). Accordingly, insofar as they have power to do so, investigating officers must comply with the Codes. The limitations in applying the codes outside of a police context is illustrated in the case of *R (Beale) v South East Wiltshire Magistrates' Court,* 167 JP 41, DC. In this case a person who was not under arrest but was interviewed under caution by a trading standards officer (not at a police station) was not entitled to non-means tested free legal advice.

Interviews and the provision of information under compulsion

As with serious fraud investigations, it is common to find powers accorded to non-police investigating officers to compel the giving of information. So, for example, section 71 of the Environmental Protection Act 1990 provides as follows:

'(2) *For the purpose of the discharge of their respective functions under this Part –*

(a) the Secretary of State, and

(b) a waste regulation authority

may, by notice in writing served on him, require any person to furnish such information specified in the notice as the Secretary of State or the authority, as the case may be, reasonably considers he or it needs, in such form and within such period following service of the notice … as is so specified

(3) A person who –

(a) fails, without reasonable excuse, to comply with a requirement imposed under subsection (2) above …

shall be liable –

(i) on summary conviction, to a fine not exceeding the statutory maximum;

(ii) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or to both.'

Similar provisions are to be found in, for example, section 20 of the Health and Safety at Work Act 1974 and section 165 Financial Services and Markets Act 2000 and widely throughout regulatory regimes.

These provisions are typical in that a failure to comply with the requirements is an offence.

Concerns have arisen about the propriety of the use of evidence obtained in this way in criminal cases, and whether such evidence should be excluded (applications generally being made under section 78 PACE). Some of the recent case law is summarised below.

Cases relating to the compulsory provision of information

The relationship between provisions mandating the provision of information upon proper request by an authority and the privilege against self-incrimination was discussed in *R v Hertfordshire County Council ex parte Green Environmental Industries Ltd* [2000] 2 AC 412. In that case, large quantities of clinical waste had been found stored on two sites, which were used by the applicants, a company and its sole director. The sites were not licensed for the deposit or keeping of waste. The local authority served on the applicants a notice pursuant to section 71(2) of the Environmental Protection Act 1990, requesting particulars of all those that had supplied clinical waste to the company, the persons who had carried waste on its behalf, the staff employed and the locations used. The local authority would not give undertakings that the information thus obtained would not be used in a subsequent prosecution. The applicants did not give the information. A summons was issued alleging a contravention of s. 71(2) of the Act. Judicial review was sought and the application refused. The Court of Appeal upheld the Divisional Court's decision, and the matter was appealed to the House of Lords. The House of Lords dismissed the appeal.

- The power under s. 71(2) had been conferred not only for obtaining evidence but also for the purpose of protecting public health and the environment
- That purpose would be frustrated if those from whom the information was sought could legitimately refuse to provide it
- Those questioned under s. 71(2) should not be entitled to rely on the privilege against self-incrimination
- Exclusion of any potentially incriminating answers at any trial would be a matter for the trial judge
- The notice sought factual information only for public health reasons and not for any admission of wrong-doing

In *Brown v Stott* [2001] 2 WLR 817 the question was the use to which the answer could be put in criminal proceedings. It was held that section 172 of the Road Traffic Act provides for the putting of 'a single, simple question' (as to who was driving a vehicle on a given occasion – rather than a course of prolonged questioning). There was no problem in adducing the evidence of the answer during a criminal case. The general public interest in upholding a regulatory scheme meant that this power of questioning was not a disproportionate response to the problem of maintaining road safety. It appears from this case that proportionate derogations from the privilege against self-incrimination are justifiable if they pursue a legitimate aim.

In *Attorney-General's Reference No 7 of 2000* [2001] HRLR 41, the respondent to the appeal was a bankrupt, prosecuted for the offence of materially contributing to or increasing the extent of his insolvency through gambling, contrary to section 362(1) Insolvency Act 1986. He was required by section 291 of the Act to deliver up all his books, papers and other records relating to his affairs. Failure to comply is a contempt of court, punishable with 2 years in prison. The issue for the court was whether documents delivered under this compulsory provision could be used against him at his criminal trial, in this case pursuant to section 362 of the Insolvency Act 1986. The Court considered that there was a relevant distinction between that testimony a person is forced to create, and that which exists independent of the compulsion, the quality of which therefore is unaffected by the compulsion.

In *R (Wandsworth LBC) v South Western Magistrates Court* [2003] EWHC 1158 (Admin) it was held that section 20(2)(j) of the Health and Safety at Work etc. Act 1974 was to be widely construed so as to enable questions and answers forming part of investigations by a Health and Safety Inspector to be conducted in writing as well as face to face. The use to which the results of a required response pursuant to section 20(2)(j) can be put is expressly restricted by section 20(7), which provides that: *'(7) No answer given by a person in pursuance of a requirement imposed under subsection (2)(j) above shall be admissible in evidence against that person or the spouse or civil partner of that person in any proceedings.*'

In *R v Brady* [2004] 1 WLR 3240, the Court of Appeal decided that material handed to one agency pursuant to powers to obtain information compulsorily (here, the Official Receiver) could, where appropriate, be handed over to another agency (the

Inland Revenue) where that agency used the statements to begin criminal proceedings.

In light of these authorities care needs to be taken whether prosecuting or defending to appreciate the extent and the limitations of the powers to compel information.

4.2 The decision to prosecute

In March 1998, an Enforcement Concordat ['the Concordat'] was produced by the Cabinet Office and voluntarily adopted by the vast majority of authorities with an enforcement function. It attempted to provide a degree of consistency in the approach of such authorities. It was a short document, setting out policies in relation to standard setting, proportionality, openness, consistency, helpfulness, and the provision of a complaints procedure.

In December 2007, the Regulators' Compliance Code was published by BERR (now BEIS). This statutory Code of Practice, made following consultation under section 22(1) of the Legislative and Regulatory Reform Act 2006, was replaced on 6th April 2014 with the Regulators' Code ['the Code']. The Code is to be applied voluntarily in preference to the Concordat where the Code does not formally bind a regulator. Not all regulators or regulatory functions are bound by the Code; orders made under section 24(2) of the Act specify those who are bound. The vast majority of significant regulators are so bound, including the Environment Agency, local authorities (in relation to licensing, trading standards and environmental health functions), and the Health and Safety Executive. Regulators are required to have regard to the specific obligations set out in the Code; those obligations themselves are designed to elaborate on the seven Hampton Principles. Section 22 of the Act provides that:

> *(2) Any person exercising a regulatory function to which this section applies must, except in a case where subsection (3) applies, have regard to the code in determining any general policy or principles by reference to which the person exercises the function.*
>
> *(3) Any person exercising a regulatory function to which this section applies which is a function of setting standards or giving guidance generally in relation to the exercise of other regulatory functions must have regard to the code in the exercise of the function.*

Importantly, the duties do not apply to a regulator (or its staff) exercising a specific regulatory function in a particular case (Code, Part 1, paragraph 2.4).

Enforcing authorities have generally adopted a more specific Enforcement Policy of their own, and will continue so to do. Such a policy will be available on request. It will normally set out at least the enforcement options available to the authority and the means by which an option is selected.

The practical importance of the Code and any policy in respect of decisions to prosecute was demonstrated by the case of *R v Adaway* [2004] EWCA Crim 2831. In *Adaway*, the local authority had prosecuted the appellant for offences under the Trade Descriptions Act 1968. Its Enforcement Policy identified certain criteria, at least one of which had to be present before a prosecution could be brought. An individual must either have 'engaged in fraudulent activity' or 'deliberately or persistently breached legal obligations'. On the facts of the case, neither could properly be said to exist, and the prosecution eventually conceded as much. The Court of Appeal, in staying the proceedings as an abuse of process, emphasised that before criminal proceedings are instituted by a local authority, they must consider with care the terms of their own prosecuting policy. Cases decided since *Adaway* have restricted the apparently broad reach of that decision. In *Wandsworth LBC v Rashid* [2009] EWHC 1844 (Admin), magistrates had acceded to an application to stay proceedings because they found that it would have been reasonable for the council to take a step other than prosecution in response to the perceived conduct of Mr Rashid. In so doing, they took into account various alleged mitigating features raised on Mr Rashid's behalf. It was held, on the prosecution's appeal by way of case stated, that the magistrates had been wrong to find an abuse of process on the evidence. They should only have taken into account the evidence available to the prosecuting authority when the information was laid. The underlying principle was that it was for prosecutors to decide when to prosecute. It was only when an abuse was plainly shown that a court should intervene. The magistrates' finding that it would have been reasonable for the local authority to take another course of action did not necessarily lead to a conclusion that the course of action it did take amounted to an abuse of process. The magistrates had erred in their reasoning; the local authority was not required to go through each of the other

possible courses of action in order to justify its decision that the course of action it had taken was lawful. Although other options might lawfully have been taken, it was wholly unwarranted to decide that the local authority was behaving oppressively towards Mr Rashid or abusing the process of the court.

In *R (Barons Pub Company Limited) v Staines Magistrates' Court and ors* [2013] EWHC 898 (Admin), the claimant challenged by way of judicial review a district judge's refusal to stay proceedings for offences reflecting breaches of the Food Hygiene (England) Regulations 2006. On the evidence available to him, the judge had concluded that it was more likely than not that the prosecuting authority's decision maker had not considered the Enforcement Policy as he was required to do. The judge went on to hold that he had to consider whether a prosecution would in all the circumstances be oppressive. His view was that '*if the kitchens on the day of the inspection were so lacking in cleanliness to infringe the Regulations, a conviction could not be regarded as oppressive, unless a defence on the facts could be raised*.' The points raised by the defence could be made in mitigation, should the case reach that stage. The High Court agreed with the judge's approach, confirming that saving in the exceptional case of an arbitrary decision to prosecute, oppression had to exist and had to consist of something more than the fact of prosecution and risk of conviction.

Once the decision to prosecute has been taken, it is as well to remember that regulatory offences are frequently unfamiliar to magistrates' courts, and it is accordingly good practice for any prosecutor, public or private, to provide a full explanation of the relevant legislation together with the initial information when seeking to commence proceedings.

5 THE DEFENDANT

5.1 The nature of the defendant

Generally, the statutory provisions that create criminal offences refer to the conduct of a *person*. "Person" includes both individuals and corporations. So the defendant in

criminal proceedings may be a company as well as an individual. Because of the subject matter involved, the prosecution of companies is more widespread within regulatory law than in the general criminal law.

Vicarious liability

Where the offence requires no element of *mens rea*, then a person may commit the offence either by his own acts, or by those of a delegate; he may be vicariously liable. In *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1, it was said that:

> 'Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable. There is no reason why he should not be, because the very object of the legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation.'

Indeed, the fact that an offence does require *mens rea* is not a bar to the imposition of vicarious criminal liability.

The corporate defendant

For offences without mens rea corporate criminal liability is straightforward: have those acting on behalf of the company conducted the forbidden acts? Where the offence involves mens rea, the position is more difficult; how can a non-human entity such as a company be said have an intention? The courts will look at the state of mind of those running the company (those with the '*directing mind and will*': *Lennard's Carrying Co v Asiatic Petroleum Co* [1915] AC 705) to see whether the mens rea is established. The question of whether the mind of a particular person is to be characterised as 'directing', is a matter of law; the characteristics of that person are matters of fact to be determined by a jury if necessary: *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 HL.

Criminal liability is not transferred from one corporation or body of persons by virtue of a Secretary of State's order which transfers '*property, rights and liabilities*': *R v Pennine Acute Hospitals NHS Trust* [2004] 1 All ER 1324, CA. A mere change of name, however, does not affect legal proceedings; any legal proceedings that might have been continued or commenced against a company by its former name may be

continued or commenced against it by its new name: section 28(7) Companies Act 1985. However, the correct corporate defendant must be identified in the summons and summonses cannot be amended to cure defective identification. This may be less than straightforward with large corporate structures. In *Sainsbury's Supermarkets Limited v HM Courts Service (South West Region, Devon and Cornwall Area) and anr; J Sainsbury Plc v HM Courts Service (South West Region, Devon and Cornwall Area) and anr* [2006] EWHC 1749 (Admin), the trading standards department of a local authority had invited a representative of Sainsbury's Supermarkets Ltd to answer written questions. The regulatory affairs manager of J Sainsburys plc replied stating that he was able to speak on behalf of Sainsbury's Supermarkets Ltd. Thereafter a prosecution was brought under the Food Safety Act 1990 alleging that there had been a failure to comply with food safety requirements. The information was laid shortly before the expiry of the relevant time limit and it named the defendant as 'J Sainsbury plc (trading as Sainsbury's Supermarket Ltd)'. J Sainsbury plc stated that it was not the proper defendant and that the store to which the prosecution related was operated by Sainsbury's Supermarkets Ltd. The prosecution applied, after the time limit for bringing a prosecution had expired, to amend the information to reflect the correct position. The judge granted the application to amend, holding that whilst there were two separate legal entities and the information had been incorrectly addressed, everyone involved was aware of who was being investigated and why, and refused to make a defendant's costs order in favour of J Sainsbury plc. Both decisions were subject to judicial review claims, with the limited company contending that the judge had erred in allowing the information to be amended and the plc contending that the judge had erred in refusing to make a defendant's costs order in its favour. Both claims were granted. The High Court held that the effect of the judge's decision was that it was sufficient for the prosecution to have intended to lay the information against the proper defendant, but the intention of the prosecution was not sufficient. The information was laid against the wrong company and it was impermissible to allow it to be amended out of time. J Sainsbury plc was entitled to a defendant's costs order as it had a complete defence, it was not the party responsible for the sale that was the

subject of the prosecution, it was not responsible for the delay in the case, and had acted properly throughout.

No proceedings may be instituted or proceeded with against a company in administration without the consent of the administrator or the permission of the court (that is, the High Court): Enterprise Act 2002 section 278 and Schedule 16, para 43(6). There is a similar prohibition in the Insolvency Act 1986, section 130, on proceedings against a company in relation to which a winding up order has been made. Where a winding up petition has been presented, section 126 of the 1986 Act provides for applications to stay proceedings. Where it is in the public interest, leave should readily be given: *R v Rhondda Waste Disposal Ltd* [2001] Ch.57, CA.

Liability of company officers

Many statutes which create regulatory offences make specific provision for the criminal liability of company officers. Section 36 of the Food Safety Act 1990 is typical and self-explanatory, and reads as follows:

> '**36 Offences by bodies corporate**
>
> (1) Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of –
>
> any director, manager, secretary or other similar officer of the body corporate; or
>
> any person who was purporting to act in any such capacity,
>
> he as well as the body corporate shall be deemed guilty of that offence and shall be liable to be proceeded against and punished accordingly.
>
> (2) In subsection (1) above 'director', in relation to any body corporate established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or

undertaking, being a body corporate whose affairs are managed by its members, means a member of that body corporate.'

The Financial Services and Markets Act 2000 is the most expansive such provision, section 400 providing as follows:

'**400 Offences by bodies corporate etc**

(1) If an offence under this Act committed by a body corporate is shown—

(a) to have been committed with the consent or connivance of an officer, or

(b) to be attributable to any neglect on his part,

the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body.

(3) If an offence under this Act committed by a partnership is shown—

(a) to have been committed with the consent or connivance of a partner, or

(b) to be attributable to any neglect on his part,

the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

(4) In subsection (3) "partner" includes a person purporting to act as a partner.

(5) "Officer", in relation to a body corporate, means—

(a) a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity; and

(b) an individual who is a controller of the body.

(6) If an offence under this Act committed by an unincorporated association (other than a partnership) is shown—

(a) to have been committed with the consent or connivance of an officer of the association or a member of its governing body, or

(b) to be attributable to any neglect on the part of such an officer or member,

that officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly.

(7) Regulations may provide for the application of any provision of this section, with such modifications as the Treasury consider appropriate, to a body corporate or unincorporated association formed or recognised under the law of a territory outside the United Kingdom.'

'Consent' is generally taken to require knowledge; 'connivance' to require tacit acquiescence; 'neglect' to the omission to do something which the director was under a duty to do: *Huckerby v Elliott* (1970) 1 All ER 189. These states of mind have been considered more recently *R v Chargot Ltd* [2009] 1 W.L.R. 1,where it was said (paragraph 34) that:

'*where "consent" is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts … consent can be established by inference as well as by proof of an express agreement. The state of mind that the words "connivance" and "neglect" contemplate is one that may also be established by inference. … Where it is shown that the body corporate failed to*

achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference.'

R v Hutchins [2011] EWCA (Crim) 1056. provides an example of this secondary liability. Two directors of a private security company were charged with employing unlicensed security guards in contravention of s5 of the Private Security Industry Act 2001. The two directors denied that they had any consent or connivance in the use of unlicensed security guards. The prosecution neither sought to prove nor could prove that either director knew of any specific deployment of specific unlicensed employee in any particular role on the dates in question. However, it adduced documentary evidence to show that it was the policy of the company for which they were directors to use security guards whose applications for a licence were pending. The Court of Appeal, in rejecting the defence argument, stated at paragraph 25 that:

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.

The Law Commission's consultation 'Criminal Liability in Regulatory Contexts' considered, amongst many other matters, doctrines of liability affecting corporations and their officers. The relevant proposals remain on hold, but are of potential significant impact in this area of law and repay careful attention. Amongst the most radical and far-reaching proposal is Proposal 16:

Proposal 16: When it is appropriate to provide that individual directors (or equivalent officers) can themselves be liable for an offence committed by their company, on the basis that they consented or connived at the company's commission of that offence, the provision in question <u>should not be extended</u> to include instances in which the

company's offence is attributable to neglect on the part of an individual director or equivalent person.

5.2 Representing the defendant

The defendant in regulatory proceedings may have somewhat different concerns to a normal defendant to criminal proceedings. The Health and Safety Executive's Enforcement Policy (as an example) encourages openness and the use of publicity following conclusion of proceedings. A defendant may be concerned for example about negative publicity, about the size of any eventual fine, and about its exposure to costs.

The prosecuting agencies are similarly wary of negative publicity arising from high profile failed prosecutions and of wasting limited public funds. They are also interested in encouraging those they regulate to behave appropriately in the future, and in forging good working relationships.

Accordingly, there will frequently be a considerable amount of communication between the investigator and the defendant, beyond that in interview, particularly before a proposed defendant is charged. For example, a defence solicitor may want to make representations to the investigator about why the prosecution should not be brought, with reference particularly to the criteria in the relevant enforcement policy. This may involve demonstrating that a particular defence is likely to succeed, or that an element of the offence is unlikely to be proven to the criminal standard.

5.3 Defences

Care must be taken to ascertain in each statute what (if any) defence is available to each charge. The main defence relevant to regulatory offences and common across statutes is that of 'due diligence'. It is inherent in the structure of this defence that the facts of the offence must be made out before the question of due diligence arises.

Section 21 of the Food Safety Act 1990 is typical of the modern provisions which set out the defence:

> 'In any proceedings for an offence under any of the preceding provisions of this Part … it shall, subject to subsection (5) below, be a defence for the person charged to prove that he took all reasonable precautions and

exercised all due diligence to avoid the commission of the offence by himself or by a person under his control.

…

(5) If in any case the defence provided by subsection (1) above involves the allegation that the commission of the offence was due to an act or default of another person, or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless –

(a) at least seven clear days before the hearing; and

(b) where he has previously appeared before a court in connection with the alleged offence, within one month of his first such appearance,

he has served on the prosecutor a notices in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.'

Other statutes set out a two-limbed test, requiring proof that the offence was due to the act or default of another person (for example, Trade Description Act 1968, section 24).

Other regulatory regimes set out still more restricted defences, for example regulation 40 of the Environmental Permitting Regulations 2010, which provides that to establish a defence to the primary offences under the Regulations (regulations 38(1)(2) or (3)), a defendant must prove:

that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where—

(a) the person [who committed the offence] *took all such steps as were reasonably practicable in the circumstances for minimising pollution; and*

(b) particulars of the acts were furnished to the regulator as soon as reasonably practicable after they were done.

Establishing such a defence presents a significant challenge to a defendant.

The purpose of such provisions was explained in the case of *Tesco Supermarkets v Nattrass* [1971] 2 All ER 127 HL, at 130:

> '*If the offence is not held to be absolute, the requirement that the prosecutor must prove mens rea makes it impossible to endorse the enactment in very many cases. If the offence is held to be absolute that leads to the conviction of persons who are entirely blameless: an injustice which brings the law into disrepute. So Parliament has found it necessary to devise a method of avoiding this difficulty. … In my judgment, the purpose of these provisions must have been to distinguish between those who are in some degree blameworthy and those who are not, and to enable the latter to escape from conviction if they can show that they were in no way to blame*.'

R v. EGS Ltd [2009] EWCA Crim 1942 was a case under the Health and Safety Act 1974, and involved the similar defence set out in section 40 of that Act (defence had done all that was reasonably practicable). The Court of Appeal was unimpressed by the contention that it was common practice for a defendant to fail to indicate reliance on this defence at any stage prior to calling its own case:

'*In our judgement, judges should not normally allow a defendant to raise a section 40 defence of which reasonable notice has not been given to the prosecution. But we accept that it will always be a matter for the judge to decide whether in the particular circumstances of the case fairness requires that the defendant should be permitted to raise a section 40 defence of which notice has not been given in his Defence Statement.* '

What is 'due diligence'?

Determining the existence of due diligence is pre-eminently a question of fact in all the circumstances of the case and of judgment: (*Bibby-Cheshire v Golden Wonder Ltd* [1972] 3 All ER 378; *William Frank Smith v T&S Stores plc* [1994] TrLR 337,

342E). Accordingly, whilst recourse to case law is helpful, both factual context and the niceties of the defence must be recollected.

Due diligence has been defined as the converse of negligence in an important House of Lords judgment:

> '*To establish a defence under section 24 [of the Trade Descriptions Act 1968] a principal who is a corporation must show that it took all reasonable precautions and exercised all due diligence … To constitute a criminal offence a physical act done by any person must generally be done by him in some reprehensible state of mind* …
>
> Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind – lack of care for the consequences of his physical acts on the part of the person doing them. To establish a defence under section 24(1)(b) of the Act a principal need only show that he acted without negligence.'
>
> *(Tesco Supermarkets v Nattrass* [1971] 2 All ER 127 HL)

The *Tesco Supermarkets v Nattrass* case was considered by the High Court in *London Borough of Croydon v Pinch A Pound (UK) Ltd* [2010] EWHC 3283 (Admin). The case involved the sale of knives to 15 year olds in a test purchase operation, contrary to section 141A Criminal Justice Act 1988 as amended. The defendant company was convicted in the magistrates' court and appealed to the Crown Court. The issue in both courts was the availability of the statutory defence. The Crown Court acquitted the defendant, and posed the question in the ensuing appeal by way of case stated for the High Court:

'*Were we entitled to rule that the essential question [we] needed to answer was whether the [Defendant] company had been negligent and their state of mind reprehensible?'*

The second question derived from the Crown Court's interpretation of the *Nattrass* case. In answering this question in the negative, Mr Justice Roderick Evans considered the *Nattrass* case in detail and observed as follows:

'*19 The statutory defence requires proof of two elements: the taking of all reasonable precautions and the exercise of all due diligence. These are cumulative requirements*

although circumstances no doubt arise where they overlap. For example, all due diligence must be exercised in instituting a preventative regime whereby an employer takes all reasonable precautions to avoid the commission of the offence created by the act by his employees. However, the employer must go further and exercise all due diligence to ensure that the measures he put in place are maintained, adhered to by his employees and continue to be adequate in the context of the risk at which the statute is directed and of the nature of his own business. Helpful though Lord Diplock's explanation of the rational underlying offences of strict liability in this area of the criminal law and his interpretation of the statutory defence are, concentrating on due diligence, which is only one aspect of the defence, creates a danger of failing to have adequate regard to the other elements of the defence.
20 Furthermore, deciding whether a defendant has discharged the burden of proving the statutory defence by applying a test based on a need to prove both negligence and a reprehensible state of mind before a finding of guilt can be made runs the risk of importing into this area of the criminal law a mental element which is inappropriate.'

The circumstances of the defendant are relevant:

> 'Of course, I need scarcely say that every case will vary in its facts; what might be reasonable for a large retailer might not be reasonable for the village shop. '
>
> *(Garrett v Boots Chemists Ltd* (16 July 1980, unreported))

It is not, though, necessary to show that all practical steps have been taken:

> 'It is important to remember, in my view, that the Act does not require all practical steps to be taken but merely all reasonable steps and all reasonable diligence. The wording of the Act, in my judgment, leaves it to the justices to weigh the risk of misleading price information being given against the reasonableness of the steps taken and the reasonableness of the steps which the prosecuting authority claimed should have been taken'
>
> *(Berkshire County Council v Olympic Holidays Ltd* [1993] TrLR 251)

Nor is it correct to assert that the identification of a single step, which could have been taken automatically, prevents a defendant from relying on a defence:

> '*I am not prepared to say that we must be constrained in this case to say that there is a general rule that once any precaution can be identified, magistrates must have been wrong in deciding that all reasonable precautions had been taken.'*
> *(William Frank Smith v T&S Stores Ltd* [1994] Tr LR 337, 341-2*)*

The simple fact of an event – or indeed more than one event, which occurs in breach of a regulation or statutory provision, does not of itself and without more prevent a 'due diligence' defence being made out.

However, the defence is 'all reasonable precautions' and these are '*strong words'*: (*Garrett v Boots the Chemists Ltd* (16th July 1980, unreported)).

A defendant's lack of expert knowledge is no defence: *Sutton London Borough v Perry Sanger & Co Ltd* (1971) 135 JP Jo 239. Where reliance is to be placed on the assurance or expertise of someone outside the defendant, the reasonableness of that reliance will fall to be assessed as to whether is was properly diligent. In some context, such reliance may be duly diligent, as in *Carrick District Council v Taunton Vale Meat Traders Ltd* (1994) 158 JP 347, DC. Here, a meat trader charged under section 8(1) of the Food Safety Act 1990, was entitled to rely on a meat inspector's certificate to show he had exercised all due diligence. The meat inspector worked for East Devon District Council; there was nothing to suggest that the inspector's competence was suspect and the company dealt with him at arm's length. Blanket assurances, however, will not do: *Riley v Webb* (1987) 151 JP 372.

Where a person charged is a limited company, a failure to exercise due diligence on its part will occur where the failure is that of a director or senior manager in actual control of the companies' operations who can be identified with the controlling mind of the company; the default of a subordinate manager who cannot be so identified will not be the default of the company but of a person other than the company: *Tesco Supermarkets Ltd v Nattrass* [1971] AC 153, HL. Responsibility for the exercise of due diligence can be delegated.

However, although a distinction must be drawn between the company on the one hand and those who act on its behalf at a local level on the other hand, where there is evidence that there is a failure by the company to supervise and control properly the branch in question, it is possible, when the acts of the offence are committed by an individual acting under instructions, that the defence of due diligence will be precluded: *DSG Retail Ltd v Oxfordshire County Council* [2001] EWHC Admin 253.

Due diligence in court

The burden of proving the defence rests on the defendant. The standard is the balance of probabilities. The case of *David Janway Davies v Health & Safety Executive* (2002) [2002] EWCA Crim 2949 considered the issue of reverse burden of proof in the context of regulatory offences. The defence in question was the use of all reasonably practicable precautions under section 40 of the Health and Safety at Work Act 1974.

> '**40 Onus of proving limits of what is practicable etc**
>
> In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.'

The conclusion of the court was that the imposition of a legal burden of proof was justified, necessary and proportionate because the Act was regulatory. It had both a social and economic aim, and was intended to protect the health of safety of employees and others at work.

> 'The reversal of the burden of proof takes into account the fact that duty holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it.'

The issue of the burden of proof on the defendant did not arise until the prosecution had discharged its burden in relation to the ingredients of the offence. The imposition of the burden on the defence was clearly the intention of parliament. The matters that would go to make up a defence were within the defendant's own knowledge.

If the defence of due diligence is raised, a judge must allow a jury to consider it.

If a (magistrates') court is minded to base a conviction on a particular failure, the defence must be allowed the opportunity to comment. In the case of *Asda Stores Ltd v Birmingham City Council* (1998) unreported, margarine had been displayed at the appellant's store with a shelf edge label indicating a price of £1.17, when the price in fact was £1.35. Two informations were laid, alleging that misleading indications as to which goods were available had been given, contrary to section 20 Consumer Protection Act 1987. Notices under section 39 were served, identifying the store manager and a trading standards clerk as those whose actions had led to the commission of the offences. There was a system for checking the butters once within a 3 week cycle by the trading standards clerk, and three times a week visually. The problem was caused by the clerk altering the computer that generated shelf edge labels. The company policy was not to alter shelf edge labels where there were promotional offers. The clerk did alter the shelf edge label. At the time of the error, the clerk was under pressure because of the recent death of her husband.

The magistrates found that the company had failed to take all reasonable steps as they did not immediately relieve the clerk of her responsible position.

The appeal was allowed. The conviction was quashed for procedural unfairness. The appellant was given no opportunity to deal with the single point on which the conviction was apparently made.

6 SENTENCING

Reform

The recommendations of the Macrory review ("Regulatory Justice, making sanctions effective" published in 2006) proposed that regulators should have access to a flexible set of sanctioning tools that were consistent with the Hampton review risk-based approach to enforcement. The Macrory review recognized an excessive reliance in the subsisting regimes on criminal prosecution. Part 3 of the Regulatory Enforcement and Sanctions Act 2008 sets out a range of sanctioning powers which

minister may confer on specified regulators, or on those who enforce particular criminal offences created by specified primary or secondary legislation. The range of sanctions set out in Part 3 of the Act include:

a. Fixed monetary penalties
b. Discretionary requirements, including:
    - Variable monetary penalties, the value to be determined by the regulator
    - Compliance notices
    - Restoration notices
    - Stop notices
    - Enforcement undertakings

Civil sanctioning powers are outside the scope of this chapter.

Sentencing Regime

The maximum sentencing powers for the magistrates' and (if relevant) the Crown Court are set out in the relevant statute or statutory instrument. Frequently, the magistrates' power is limited to the imposition of a financial penalty, although a short custodial sentence is available in some cases. Historically, the maximum financial penalty available to magistrates was regularly specifically extended from the statutory maximum or prescribed sum, to £20,000 in the case of a large number of offences committed under the Health and Safety at Work etc Act 1974, or, in the case of the Environmental Permitting Regulations 2010, to £50,000. With the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 85(1)(2)(March 12th 2015), unlimited financial penalties are available in the magistrates' courts for most offences committed on or after that date. It remains the case, therefore, that careful attention needs to be paid to the date of the commission of an alleged offence to establish the correct maximum penalties in the magistrates' court. The Crown Court may have a power to impose custody as well as an unlimited financial penalty. Important guidance was issued by the Lord Chief Justice in July 2014 (Criminal Practice Directions Amendment No 2 [2014] EWCA 1569, CPR XIII Annex 3) for cases 'involving very large fines in the Magistrates' Courts'. Allocation

decisions must be dealt with by an authorised District Judge where cases of the following types are triable either way:

a) Cases involving death or significant, life changing injury or a high risk of death or significant, life-changing injury;

b) Cases involving substantial environmental damage or polluting material of a dangerous nature;

c) Cases where major adverse effect on human health or quality of life, animal health or flora has resulted;

d) Cases where major costs through clean up, site restoration or animal rehabilitation have been incurred;

e) Cases where the defendant corporation has a turnover in excess of £10 million but does not exceed £250 million, and has acted in a deliberate, reckless or negligent manner;

f) Cases where the defendant corporation has a turnover in excess of £250 million;

g) Cases where the court will be expected to analyse complex company accounts;

h) High profile cases or ones of an exceptionally sensitive nature.

Where one or more of these factors exist, attention must be paid to the mandatory procedures set out in the CPD. It will immediately be appreciated that one or more of factors (a)-(g) are frequently present in the regulatory sphere with which this chapter is concerned.

Fines are, by a very substantial margin, the most common punishment (which is not to say, where the defendant is an individual, the alternative penalties should not be considered). Company fines tend to be considerably higher than those imposed on individuals.

6.1 The problem of sentencing for regulatory offences

Regulatory offences are frequently widely drawn, encompassing a broad range of criminality and culpability. Thus, a defendant who has deliberately breached a particular law may fail to be sentenced very differently from one whose conduct has been purely accidental. It can, therefore, be extremely difficult for a court to know upon what basis it should sentence a particular defendant. The wide range and

specialist nature of regulatory offences make it difficult to maintain consistency between decisions, and to find previous decisions truly analogous to a particular set of facts. In turn, this makes it difficult for the lawyer to give their client a realistic prediction of their sentence.

The problem is addressed in two principal ways:

- through the creation of a 'Friskies schedule';
- through sentencing guidelines, supported by case law of general application.

6.2 *Friskies* schedule

In *R v Friskies Petcare UK Ltd*, CA, 10th March 2000, it was held that in cases involving prosecutions under the Health and Safety at Work Act 1974 in which a guilty plea was entered, the parties had to attempt to agree the relevant mitigating and aggravating features in writing so there would be no doubt about the basis upon which the court was sentencing. If there was a disagreement of substance the court could conduct a Newton hearing. The ensuing document has become known as a Friskies schedule.

The practice is not limited to health and safety offences, and should be applied in the criminal regulatory context wherever such sentencing difficulty may arise.

Aggravating and mitigating factors

Guidance has been offered in case-law as to specific features whose presence or absence is capable of aggravating or mitigating an offence. In *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 observations were made concerning the approach of the court to fines for health and safety offences. The following (non-exhaustive) features were said to be relevant:

- the extent to which the defendant fell short of his duty
- the causing of death or serious injury

- the skimping of proper precautions to make or save money or gain a competitive advantage
- the deliberate breaching of a duty in order to maximise profit
- the degree of risk and danger created by the offence
- the extent of the breach or breaches
- evidence of repetition or failure to heed warnings
- the financial profit (if any) accruing to the offender as a result of the offence
- admission of guilt and plea of guilty at an early opportunity
- the taking of prompt and effective measures to rectify any failures
- a good record of compliance with the law

It was further said that any fine should reflect the gravity of the offence and also the means of the offender, whether the offender was an individual or a corporation. The more culpable the offence the more severe, generally speaking, a penalty should be. If a commercial entity has profited from its offending, that is a very relevant consideration when assessing the level of any penalty.

Distinctions can be detected in the fundamental definitions of various types of 'regulatory' offences, and the aggravating/mitigating features must reflect this. Thus, in *R v Milford Haven Port Authority* [2000] All ER (D) 352, CA, the court reminded itself that, in contrast to health and safety related offences, environmental crime does not necessarily involve the threat of personal injury or death.

A useful consolidation of pre-Guideline sentencing principles was provided in *R v Balfour Beatty Rail Infrastructure Ltd* [2007] 1 Cr App R (S) 65

6.3 Guidelines

In February 2010, the Sentencing Guidelines Council published its definitive guideline on 'Corporate Manslaughter & Health and Safety Offences Causing Death'. This was the first offence guideline relating to sentencing organizations rather than individuals. It '*concerns sentencing for offences where the most serious form of harm was caused, the death of one or more persons*.'

On 1st July 2014, the 'Environmental Offences Definitive Guideline' issued by the Sentencing Council came into force. It provides a detailed staged approach to sentencing such offences.

On 1st February 2016, the Definitive Guideline for sentencing in health and safety offences, corporate manslaughter and food safety and hygiene offences came into force. Not every 'health and safety' offence is caught. For example, there is no reference in the Guideline to fire safety offences under the Regulatory Reform (Fire Safety) Order 2005 and the consultation response confirms that the Council considered and rejected submissions that these offences should be included. Whilst the rationale for excluding this species of safety offences from the Guidelines is not perfectly clear, it was previously established that the general principles of health and safety sentencing do apply to sentencing in fire safety offences: *New Look Retailers Ltd v London Fire and Emergency Planning Authority* [2010] EWCA Crim 1268. The case of *R v Sandhu* [2017] EWCA Crim 908 was an appeal against sentence following guilty pleas to five offences under the Regulatory Reform (Fire Safety) Order 2005. The Court of Appeal held that whilst the sentencing guidelines on breaches of health and safety law were not directly relevant, they could be used as a check. The Crown Court sentencing judge had been entitled to look at them for this purpose, and to conclude that the case was one of high culpability and harm.

The Court of Appeal in the case of *R v Thelwall* [2016] EWCA Crim 1755 made three important observations about the approach to sentencing in cases subject to a sentencing guideline:

'The citation of similar cases

21 *The court would like to add three observations in relation to this kind of case. As the court has made clear in other cases where the offence is the subject of a Sentencing Council Guideline, and also in relation to Schedule 21, guidelines are guidelines. The citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance. There may be cases where the court is asked to say something about a guideline where, in wholly exceptional circumstances – and we wish to emphasise that these are rare – the guideline may be unclear. In such circumstances the court will make observations which may be cited to the court in the future. However, in those circumstances it is highly likely that the Council will revise the guideline and the authority will cease to be of any application.*

22 *It is important that practitioners appreciate that our system now proceeds on the basis of guidelines, not case law. It will, therefore, be very rare, where there is an applicable guideline, for any party to cite to this court cases that seek to express how the guideline works, other than in the rare circumstances we have set out. Decisions of this court are of particular importance to the individuals concerned, but they are unlikely to be of any assistance to further appeals where the guidelines are in issue.*

23 *Secondly, where a case comes before a sentencing judge, it is important that matters follow the same course. As we observed in the course of argument, the judge said:*

"… before dealing with sentence, I have been referred in the defence bundle and in submissions this morning to a number of online articles where suspended sentences of imprisonment have been imposed on individual defendants for breaches of health and safety legislation. These emanate from the HSE themselves, the CPS website, the BBC news webpage and the Express and Star newspaper webpage. They are all online articles or summaries and not reports of cases. None purports to be full transcripts of court proceedings and the sentencing remarks of judges who imposed those sentences and may therefore be quite inaccurate. All are first instance decisions. To my mind when sentencing in a case like this, it is important to remember, as I have said, that every case is fact specific."

It is right to point out that these matters were not put before the judge by the Health and Safety Executive. We wish to make clear that it is impermissible to adduce

reports of that kind before a judge. The judge has the guideline. His duty is to apply the guideline and to make it clear that that is what he is doing. It will, we hope, make it much easier for judges and shorten the time that such cases take if the practice to which we have referred ceases forthwith.'

The sentencing exercise may be particularly difficult for a court where a significant sum by way of voluntary compensation has been paid or promised by a defendant. The point was expressly considered in *R v Thames Water Utilities Ltd* [2010] EWCA Crim 202, where it was said that the making of substantial voluntary reparation should generally be regarded as a significant mitigating feature in that respect, typically requiring at least some reduction in the level of the deterrent (though not the punitive) element of the notional fine, prior to reduction for mitigation.

In the important case of *R v Sellafield Ltd; R v Network Rail Infrastructure Ltd* [2014] EWCA Crim 49, the Court of Appeal dismissed appeals against the level of fines imposed following guilty pleas to breaches of environmental protection and health and safety legislation. The Court considered the approach to sentencing very large and/or atypically structured corporate entities. The court had to have regard to the purposes of sentencing and the seriousness of the offences, and to take account of the criteria set out in the Criminal Justice Act 2003 s.164. The structure, turnover and profitability of companies with turnover in excess of £1 billion had to be carefully examined. It was important that any information necessary to enable the sentencing court to assess their financial circumstances was provided well in advance of the sentencing hearing. Both companies discharged important public services that had from time to time been directly undertaken by the state, but differed considerably. Sellafield was a ordinary commercial company, whereas Network Rail's parent company had no shareholders who received profits; rather, it invested its profits in the rail infrastructure. Whilst Sellafield's offences were of medium culpability, extending to management but with no actual harm and a very low risk of harm, guilty pleas had been entered at the first opportunity and it had co-operated, it did have previous

convictions, and it was not appropriate to consider a fine of £1 million as apposite only to a major disaster. A fine of £700,000 after a guilty plea reflected moderate culpability, no actual harm and a very low risk of harm in the circumstances of a company of this size bearing such significant safety responsibilities. In the case of Network Rail, the actual harm was serious and even greater harm had been foreseeable. The culpability of local management was serious and persistent, but there had been no specifically identified failure by senior management. The failures had to be judged in the context of N's poor previous record of similar offending, which did reflect on senior management, but also in the light of N's expenditure of £130 million on level crossing safety. Account was taken of, amongst other matters, the guilty plea and the remedying of the safety failures at the crossing in question. Network Rail's submission that a fine of £750,000 was only appropriate where there had been a fatality was rejected as it ignored the statutory obligation to consider the offender's means. However, a significant fine imposed on Network Rail would inflict no direct punishment on anyone and could be said to harm the public, as its profits were invested in the rail infrastructure for the public benefit. A fine would serve other sentencing purposes if it reduced such offending, reformed and rehabilitated the company as an offender, and protected the public. It could be inferred from the company's investment in level crossing safety and some minor adjustment downwards of its directors' bonuses that it was attempting to reduce its offending behaviour, was being reformed and rehabilitated, and was taking steps to protect the public. Nonetheless, the fine imposed on a company of Network Rail's size represented a very generous discount for the mitigation advanced, and a materially greater fine could not have been criticised.

It was generally thought that this case, followed by the sentencing guidelines of 2014 and 2016, would change the landscape for sentencing regulatory offences, and so it proved, certainly for large and very large organisations and wealthy individuals: see for example: *Natural England* v *Day* [2014] EWCA Crim 2683; *R v Southern Water Services Ltd* [2014] EWCA Crim 120. On 23rd March 2017, Thames Water Utilities Ltd was sentenced to a record fine pursuant to the environmental guideline of £20 million. The case of *R v Tata Steel UK Ltd* [2017]

EWCA Crim 704 provides more recent assistance as to the correct approach to sentencing a loss making defendant company where there are related – and non-loss making – corporate relatives. Step 2 of the Guideline states that normally the only relevant financial information will be that relating to the organisation before the court, but that exceptionally the resources of a linked organisation may be taken into account. The case of Tata Steel was one such exceptional case. Tata Steel was a going concern, according to its accounts, by virtue of the availability of the resources of its parent company. In the circumstances, the sentencing judge had been wholly correct to take the resources of the parent company into account in refusing to make a downwards adjustment in the financial penalty to which the defendant company would otherwise have been entitled. The case also confirms that where an organisation exceeds the turnover for large organisations, defined within the Guideline as an organisation with a turnover over £50m, by a considerable margin or multiple, then whilst the Guideline permits a court to move outside the sentencing range for the offence, it does not require or commend a linear or arithmetical approach to settling the ultimate starting point.

7 COSTS

Space precludes a full discussion of costs in regulatory proceedings. The following points are of particular note:

a. The prosecution application for costs will typically be many times higher than an application made by the CPS. This is because the prosecuting authority will seek recovery, at the commercial rate (or something approximating it), of the actual hours of both lawyers and investigating officers (and, of course, the particular costs associated with for example the instruction of an expert). That such a course is quite proper was confirmed in *R v Associated Octel Ltd* [1997] 1 Cr. App. R. (S.) 435

b. It is incumbent on the prosecution to serve a schedule of its costs application at the earliest opportunity so as to give the defence a proper opportunity to consider them and make representations if appropriate. Once served with a schedule of costs, the defendant, if he wished to dispute the whole or any part of it, must give proper notice to the prosecution of any objections that he proposed to make, or at least make it plain to the court precisely what those objections were (*Associated Octel* again)

c. A successful defendant (corporate or otherwise), in relation to proceedings commenced prior to 1st October 2012, could seek a defendant's costs order ['DCO'] from central funds under section 16 Prosecution of Offences Act 1985, which gave the courts the power to award costs to successful defendants of such an amount "*as the court considers to be reasonably sufficient to compensate the defendant for any expenses which he has properly incurred in the proceedings*". For proceedings commenced on or after 1st October 2012, following significant amendments to the 1985 Act made by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012, severe restrictions were imposed on the ability of companies, other legal persons, and individuals to recover legal costs. These changes were always likely to concentrate corporate defendants' attention on the wasted costs provisions of the 1985 Act and anecdotally have done precisely that. The case of *Evans v Serious Fraud Office* [2015] EWHC 263 (QB) provides a rare example of a successful application under section 19 of the 1985 Act, which resulted in the Serious Fraud Office being required to pay a large proportion of the costs incurred by six defendants in successfully contesting a charge of conspiracy to defraud. The High Court held that the Serious Fraud Office had put its case in four different ways, yet on each occasion it had failed to conduct a proper legal analysis of the case. At paragraph 148 of his judgment, Mr Justice Hickinbottom summarises the principles relevant to such applications as follows:

148 It would be helpful to summarise the propositions I have derived from the statutory provisions, the authorities and principle, so far as section 19 applications for costs against public prosecutors are concerned.

i) When any court is considering a potential costs order against any party to criminal proceedings, it must clearly identify the statutory power(s) upon which it is proposing to act; and thus the relevant threshold and discretionary criteria that will be applicable.

ii) In respect of an application under section 19 of the 1985 Act, a threshold criterion is that there must be "an unnecessary or improper act or omission" on the part of the paying party, i.e. an act or omission which would not have occurred if the party concerned had conducted his case properly or which could otherwise have been properly avoided.

iii) In assessing whether this test is met, the court must take a broad view as to whether, in all the circumstances, the acts of the relevant party were unnecessary or improper.

iv) Recourse to cases concerning wasted costs applications under section 19A or its civil equivalent, such as Ridehalgh , will not be helpful. Similarly, in wasted costs applications under section 19A, recourse to cases under section 19 will not be helpful.

v) The section 19 procedure is essentially summary; and so a detailed investigation into (e.g.) the decision-making process of the prosecution will generally be inappropriate.

vi) Each case will be fact-dependent; but cases in which a section 19 application against a public prosecutor will be appropriate will be very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an

improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision.

D. Two recent cases are of particular note in this arena:

- R v Cornish [2016] EWHC 779
- R (Haigh) v City of Westminster Magistrates' Court [2017] EWHC 232 Admin

In Cornish, the following principles were found (Coulson J) to be relevant:

(a) Simply because a prosecution fails, even if the defendant is found to have no case to answer, does not of itself overcome the threshold criteria of s.19
(b) Improper conduct means an act or omission that would not have occurred if the party concerned had conducted his case properly …
(c) The test is one of impropriety, not merely unreasonableness… The conduct of the prosecution must be starkly improper such that no great investigation into the facts or decision-making process is necessary to establish it …
(d) Where the case fails as a matter of law, the prosecutor may be more open to a claim that the decision to charge was improper, but even then, that does not necessarily follow because 'no one has a monopoly of legal wisdom, and many legal points are properly arguable' …
(e) It is important that s.19 applications are not used to attack decisions to prosecute by way of a collateral challenge, and the courts must be ever vigilant to avoid any temptation to impose too high a burden or standard on a public prosecuting authority in respect of prosecution decisions …
(f) In consequence of the foregoing principles, the granting of a s.19 application will be 'very rare' and will be 'restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him'

Evans and Cornish both involved public prosecutors. As set out above, many prosecutions in this field of practice are pursued by private prosecutors. The

position of private prosecutors in the wasted costs jurisdiction was expressly considered by the High Court in Haigh.

35 … First, as reiterated in R (Gujra) v Crown Prosecution Service [2012] UKSC 52; [2013] 1 AC 484 , by Lord Neuberger of Abbotsbury PSC (at [68]):
“ There is no doubt that the right to bring private prosecutions is still firmly part of English law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities, as Lord Wilson JSC acknowledges at paras. 28 and 29, and Lord Mance JSC says at para. 115.”
On this footing, the law should guard against inadvertently discouraging the bringing of private prosecutions because of a fear of adverse costs consequences.

36 Secondly, however, those bringing and conducting a private prosecution must conform to the highest standards, as “Ministers of Justice”. In R v Zinga [2014] EWCA Crim 52; [2014] 1 WLR 2228 , Lord Thomas of Cwmgiedd CJ said (at [61]):

“ …. Advocates and solicitors who have conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a Minister for Justice (as described by Farquharson J) in preference to the interests of the client who has instructed them to bring the prosecution. As Judge David QC, a most eminent criminal judge, rightly stated in R v George Maxwell (Developments) Ltd [1980] 2 All ER 99 , in respect of a private prosecution:
‘Traditionally Crown counsel owes a duty to the public and to the court to ensure that the proceeding is fair and in the overall public interest. The duty transcends the duty owed to the person or body that has instituted the proceedings and which prosecutes the indictment.’”

See too, the observations of Buxton LJ (giving the judgment of the Court) in R v Belmarsh Magistrates' Court, ex parte Watts [1999] 2 Cr App R 188 , at p.200, as to private prosecutors being subject to the same obligations, as a minister of justice, as are the public prosecuting authorities.

37 Thirdly, because private interests are, to some degree, almost invariably inherent in the bringing and conduct of private prosecutions, there is more scope for scrutiny of private prosecutors than public prosecutors. As Sir Richard Buxton observed, in The Private Prosecutor as a Minister of Justice, [2009] Crim LR 427, at p.427:

" A private prosecutor will almost by definition have a personal interest in the outcome of a case."
As an important constitutional principle, public prosecutors enjoy a wide and independent prosecutorial discretion, including, under the Code for Crown Prosecutors, a focus on the public interest. They are not immune from scrutiny (see, for instance, the Victims Right to Review ("VRR") Scheme) but the Court will be astute to avoid the jurisdiction under s.19 of the Act being misused by becoming an appeal from a prosecutorial decision: see, R v P (supra), at [15]. While the private prosecutor too must enjoy a wide measure of discretion and s.19 must not be abused so as to have a chilling effect, realistically there will likely be more room for questioning the initiation and conduct of a private prosecution. This is, perhaps, especially so where individuals, in effect, seek to prosecute or turn the tables on their accusers … where the contrast with the independence and detachment of a public prosecutor is particularly noteworthy. That said, when scrutinising private prosecutors, the principles set out in Evans and Cornish … will be applicable ... A private prosecutor will not be liable for costs merely because the prosecution fails or is withdrawn, still less because it is a private prosecution.