CORPORATE CRIMINAL LIABILITY

Recent years have seen a dramatic increase in the use of Criminal law as a means of regulatory control of business activities. Coupled with that we have seen a significant increase in the prosecution of individuals involved with companies – to the extent that the 'protection' once afforded by the corporate veil is in practical terms virtually non-existent for the majority of corporate entities. The personal and financial consequences of a criminal investigation, prosecution and any follow-on confiscation proceedings are often catastrophic.

Most of these enforcement provisions are inherently domestic and there is little prospect of any significant change in attitudes to enforcement as a result of the Brexit issue.

At the same time there has also been a noticeable increase in the use of criminal complaint as an adjunct to commercial practice or to justify employment law decisions. One of the authors has recently been providing pre-charge advice to a company director accused of trademark infringement when the UK subsidiary of an American based corporation accused his business of importing counterfeit goods. The goods had in fact been purchased perfectly legally and imported from another European based subsidiary of the parent company in the USA. Regardless of the positive outcome, the importer had his property impounded – tying up over £100,000 of stock – and was restricted in trading in this area for the duration of the investigation – protecting the UK arm of the operation from being undercut.

The area of corporate criminal liability is a constantly shifting sea, but we have highlighted a few areas:

The Most Dramatic Change in Health and Safety Enforcement since 1974

The updated Health and Safety Offences & Corporate Manslaughter sentencing guideline was the most dramatic change in health and safety enforcement since 1974.

Any company, director/senior-manager and self-employed person sentenced after 1st February 2016, regardless of when the breach in health and safety occurred, is caught by the guideline.

Whilst only 4 months have passed since the coming into force of the updated guideline, enough companies have now filtered through and been sentenced to allow considered reflection.

The new formulaic approach to calculating sentence was designed to increase the level of fines for companies (commentators have for years protested that companies – in particular large companies - were being under-fined) and reserve prison sentences for directors/senior-managers and the self-employed in only the most serious of cases.

Should companies, directors/senior-managers and the self-employed be worried? Absolutely, in particular large companies.

Recent post-guideline sentencing examples for what are relatively routine factual breaches of the Health & Safety At Work etc Act 1974 show how fines with genuine bite are now being imposed: Travis Perkins fined £2m when a customer was killed by company vehicle in the car-park; Balfour Beatty fined £2.6m following a sub-contractor's employee being killed when a trench collapsed on top of him; and McCains fined £800k after an engineer suffered a serious arm injury inspecting an unguarded factory machine belt. The most noteworthy of pending cases is in relation to the Alton Towers rollercoaster crash; Merlin Attractions have been warned to expect a substantial fine.

Why have sentences become more severe? The sentencing exercise now focuses upon the level of risk (the 1974 Act only requires proof of risk – regardless of whether or not it eventuates – for there to have been a breach). The greater the risk of serious injury or death, the greater the sentence. However, enforcement bodies in practice still look more closely at outcome; a company, director/senior-manager or self-employed person remains much more likely to be prosecuted where a serious injury or fatality has occurred. The consequence of this juxtaposition is that any company, director/senior-manager or self-employed person who is prosecuted is almost by default at risk of severe punishment if convicted, because there will probably have been a serious injury or death. At the same time the updated guideline advises fines at a much higher level than pre-guideline levels and a greater emphasis on determining a meaningful fine in light of pre-tax turnover.

For large (and some medium-large) companies this means a severe fine possibly requiring the liquidating of important capital assets (e.g. property and equipment) or reducing the wage bill (e.g. redundancies) to meet the fine, resulting in the additional problem of the company's ongoing profitably being harmed for many years. There was a perception of unfairness pre-guideline; a small or medium sized company was less likely to be able to absorb a fine than a large company. That perception is diluting given the increases in sentence for large companies.

However, for directors and senior managers - who can only be prosecuted if there is evidence the breach occurred with their consent or connivance or was down to their neglect - there still remains possible unfairness. Such an individual is now at real risk of prison. Although the number of personal prosecutions (above and beyond their employer) remains relatively low. The potential unfairness that still remains is that a hands-on director or senior-manager remains much likely to be prosecuted than a similar person at a company with layers of management, because of the need for there to be evidence of their personal consent, connivance and/or neglect. Inevitably this means that such a person is likely to be working in a small company, often a small family business and those working in large companies remain out of reach of the enforcement bodies.

All companies, directors/senior-managers and self-employed people can protect themselves by having regular and independent advice (whether from a solicitor or health and safety consultant) on the robustness of their safety procedures and policies. Further, by accepting and implementing any advice and recommended improvements. This can provide particular protection for the hands-on director/senior-manager because utilising and following independent and competent health and safety advice puts distance between them and any alleged consent, connivance and neglect.

Environmental Regulation

There may be significant changes in the area of Environmental Regulation following the Brexit decision, since a significant body of law flows from Europe. It remains to be seen what aspects will still apply over the years to come, but the existing regulations are complex with some even being interlinked with many non-EU international agreements.

That said, there has been a significant UK based trend towards increasing penalties for non-compliance with environmental regulation, coupled with personal liability for managers and company directors suggests that whatever changes that may be made, they are unlikely to significantly reduce the sanctions.

As with changes to health and safety sentencing, there have been significant changes to environmental sanctions (including civil sanctions – which many insurers will still cover – if your client is in difficulties make sure that any policies are checked.) and unlimited fines for many offences. The sentencing guidelines give a flavour of what can be in store with large undertakings potentially facing fines from tens of thousands of pounds per offence to millions per offence, depending upon the circumstances of the offences - https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf. In broad terms the guidelines are a matrix considering liability (from deliberate acts to inadvertence) and damage/harm caused.

While confiscation hearings are not legally regarded as part of the sentence, it is rare for defendants in breach of environmental regulations not to be liable to the draconian lifestyle provisions that are often sought against company directors as well as their businesses.

Service of Criminal Summons on a Company Secretary

The authors have recent experience of advising a well-known high-street supermarket chain. The fleet manager erred in not returning a traffic enforcement notice requiring the name and address of the driver of their home-delivery van caught speeding in the Midlands. Fast-forward 3 months and to his surprise the Company Sectary at HQ in his City of London office receives a summons in his name, having been alleged to have failed to supply the driver's details. There is obvious concern for the

situation the Company Sectary now finds himself in and in-house lawyers instruct counsel to advise on how the Company Secretary can avoid a conviction, fine and penalty points. This example demonstrates a common misunderstanding. Many criminal regulations dictate that an enforcement body can only initiate a prosecution of a company by service of a summons on its registered Company Secretary. In the example cited section 172(8) Road Traffic Act 1988. The enforcement notice was therefore returned, the company was fined a modest amount and the Company Sectary suffered no personal detriment.

James Bennett
Brendon Moorhouse
Guildhall Chambers
July 2016