SWEET & MAXWELL

Issue 10 21 December 2020

Archbold Review

Cases in Brief

Animal welfare offences—Welfare of Animals at the Time of Killing (England) Regulations 2015—Regulation (EC) No 1099/2009 on the protection of animals at the time of killing—whether strict liability offences

R (HIGHBURY POULTY FARM PRODUCE LTD) v CPS [2020] UKSC 39; 16 October 2020

By the Welfare of Animals at the Time of Killing (England) Regulations 2015 reg.30(1)(g) and Sch.5, it was an offence to contravene a provision of Regulation (EC) No 1099/2009 on the protection of animals at the time of killing, arts.3(1) and art.15(1), Annex III, 3.2. The Supreme Court concluded that the provisions imposed strict liability offences.

(1) The domestic regulations were merely the mechanism whereby the EU regulations were given effect in this jurisdiction. There was no independent interpretative exercise to be performed in relation to the domestic regulations in addition to that in relation to the EU regulations. EU Regulations laid down the detail of the duties imposed while leaving the member states with the discretion to decide whether to create criminal offences in their domestic legislation. While the Member States had a discretion as regards penalties, they had no discretion to lower the standards required by the EU Regulation. Even if there were words in the domestic regulations which departed from what was required by EU legislation, the domestic court was required, if at all possible, to interpret the words of the domestic regulation so as to conform with the EU legislation: *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135).

(2) Accordingly it was EU principles of legislative interpretation that were to be applied, displacing, if necessary, domestic principles. The imposition of strict liability in the context of criminal law was not contrary to EU law: *Public Prosecutor v Hansen & Son I/S* (Case C-326/88) [1992] ICR 277. The words of neither article imported mens rea, and there was nothing in the context of the EU Regulations as a whole that did so. Strict liability was consonant with the purposes of the provision, imposing a clear and easily enforceable standard in line with the goal of uniformity across the EU.

(3) Recital (2) of the Regulations referred to avoidable pain, suffering or distress to animals being "induced by negligence or intention", in relation to art.3(1). That did not import those forms of mens rea into that offence. The words made clear that a breach of art.3(1) would usually entail fault but they were not laying down that fault was an essential element. It was important to stress these were words in a recital, not an operative provision. While the teleological approach required for the interpretation of EU instruments made recitals of importance, it was well established that a recital should be interpreted in such a way as to not contradict the terms of a regulation (see e.g. *Criminal Proceedings against Caronna* (Case C-7/11), EU:C:2012:396 at [40]; *R (International Air Transport Association) v Department of Transport* (Case C-344/04) [2006] 2 CMLR 20).

Defences—human trafficking—Modern Slavery Act 2015 s.45 defence—whether special abuse of process jurisdiction survived in relation to excluded offences (Sch.4)—safeguards

R v A [2020] EWCA Crim 1408; 29 October 2020

(1) With the enactment of the Modern Slavery Act 2015 s.45 defence, the lacuna in the UK's ability to discharge its international obligations that required the development of the special abuse of process jurisdiction in such cases had been filled by legislation the scope of which could not be circumvented (*R v DS* [2020] EWCA Crim 285, [2020] 3 *Archbold Review* 3). Parliament's decision to legislate by Sch.4 to the 2015 Act to limit the scope of the s.45 defence by excluding serious sexual and violent offences reflected the balance struck by Parliament between preventing per-

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petrators of serious criminal offences from evading justice and protecting genuine victims of trafficking. An absolute defence for all offences was not required by the UK's international obligations and was not adopted in the domestic legislation. The CPS must apply the domestic law enacted by Parliament and there could be no abuse of process when that was done.

(2) In serious criminal cases to which Sch.4 to the 2015 Act applied, the common law defence of duress/necessity and the four-stage approach to prosecution decisions set out in the CPS Legal Guidance on Human Trafficking, Smuggling and Slavery issued following the enactment of s.45 provided appropriate safeguards. Cases in which duress and the s.45 defence were not available, but where it would not be in the public interest to prosecute on the basis of a victim of trafficking's status, would be rare. The seriousness of the offence would in such circumstances require an even greater degree of continuing compulsion and the absence of any reasonably available alternatives to the defendant before it was likely to be in the public interest not to prosecute an individual suspected of an offence regarded by Parliament as serious enough to be included in Sch.4.

Double jeopardy—abuse of process of the court—Connelly v DPP *[1964] AC 1254—second prosecution for dangerous driving following conviction for summary offences arising from same facts—whether principle applied—whether special circumstances*

WANGIGE [2020] EWCA Crim 1319; 14 October 2020

L, a pedestrian, died as a result of being hit by W's car. An initial police report concluded that the car had been travelling at about 30 mph (the speed limit for the area), and that none of a series of defects in the car would have affected its handling or stopping. In the magistrates' court, W pleaded guilty to charges relating to the defects, no test certificate, failing to stop and to report. As a result of coronial enquiries, a further accident report from a more experienced examiner was obtained which put the speed at around 46 mph. Some doubt was also cast on the conclusion that the defects would have had no effect on the collision. W was charged with causing death by dangerous driving and, about two years after sentence for the summary offences, pleaded guilty following the judge refusing to stay proceedings as an abuse of process. The judge had been wrong to do so. On a proper application of the principles outlined in *Beedie* [1998] QB 356 and *Phipps* [2005] EWCA Crim 33, the only proper course was to stay the second set of proceedings. It was unfair and oppressive for the appellant to have to face a second prosecution.

(1) The facts underlying both prosecutions were substantially the same. The primary facts had not changed between the two charging decisions. What had changed was that there was a different expert opinion, making a different analysis and reaching a different conclusion on the evidence. Further (and contrary to the judge's ruling), the charges in the magistrates' court could not be divorced from the substance of the charge of causing death by dangerous driving. Essential ingredients of the latter charge were the manner of driving and the causation of death – which were not ingredients of the first four charges. But the reality was that there would have been no prosecution of either kind had there not been unlawful driving and the collision. As it was put in *Phipps*, all arose out of "the same incident". Crown counsel argued that the second charge, unlike the earlier, focussed on the *manner* of driving and were thus wholly different. Such a narrow approach was rejected in *Phipps*, which decided on a more holistic approach. There were also material factors relevant to both sets of proceedings – the fact of death was properly put forward in the magistrates' court, as was the defective state of the vehicle in the Crown Court.

(2) The argument that all had changed on the reception of the second expert report invited the obvious repost that it was not the facts that had changed, but the evaluation of the evidence as to those facts (and the objection was more relevant to special circumstances). But in any event, if, as counsel argued in reliance on *Dwyer* [2012] EWCA Crim 10, "the same incident" was to be taken to be the state of affairs "as existed to the knowledge of the prosecutor at the date the proceedings were concluded", the implications would be disconcerting – the court used the example of re-examination of an x-ray justifying a prosecution for causing actual bodily harm after a conviction for common assault. The approach of both divisions of the court to new evidence on appeal was illustrative of the caution to be shown to the reception of new evidence following determination of proceedings. The statement in *Dwyer* at [25] should be modified to add an additional requirement by reference to what reasonably could have been known to the prosecutor by the time the proceedings were concluded. Were it otherwise, the prosecution might be advantaged by its own wholesale failures and neglect in investigation at the first stage.

(3) The decision as to special circumstances was an exercise of judicial evaluation by reference to the circumstances, not the exercise of judicial discretion, albeit that the court would be slow to interfere with such an evaluation. The judge's reasoning was flawed. The prosecution and the police, before the first prosecution, considered the matter and proceeded on the basis of the first accident report. The prosecution authorities had to live with that. A change in position on charging made solely by reference to the new report, founded on the same facts that were in existence at the time of the first charging decision, could not, in the circumstances of this case, amount to a special circumstance sufficient to justify refusing to grant a stay. To hold otherwise would amount to a significant and unwarranted encroachment on the application of the principles of *Henderson v Henderson* (1843) 3 Hare 100 and of *Beedie* and *Phipps*.

(4) *Antoine (Jordan)* [2014] EWCA Crim 1971, [2015] 1 Cr.App.R 8 was demonstrably an exceptional case, very different from W's. The erroneous charge as brought was contrary to what was really intended: the mind did not go with the act, whereas in W's case the more serious charge was carefully considered and consciously rejected. In *Antoine* the defendant had expected a high sentence and must have known that he was the undeserving beneficiary of a complete blunder at the magistrates' court. Moreover, attempts to correct the error were immediately made by the prosecution and fresh charges were very swiftly brought. W, by contrast, would reasonably have believed that it was the end of the matter when he was sentenced in the magistrates' court, being told that he was not to be sentenced for causing L's death.

(5) The court considered *Beedie* [1998] QB 356, *R v LG* [2018] EWCA Crim 736, [2019] Crim. L.R. 706; *Elrington* [1861] 1 B & S 688; *Connelly v DPP* [1964] AC 1254; *Henderson v Henderson* (1843) 3 Hare 100; *Phipps* [2005] EWCA Crim 33; *Antoine (Jordan)* [2014] EWCA Crim 1971, [2015] 1 Cr.App.R 8; *Arnold* [2008] EWCA Crim 1034, [2008] 1 W.L.R. 2881; *Quelch v Phipps* [1955] 2 QB 107; *Ladd v Marshall* [1954] 1 W.L.R 1489; and *Foy* [2020] EWCA Crim 270.

[*Comment: This case is an assertion of orthodoxy, returning to the version of the double-jeopardy related abuse of process set out in* Connelly *as interpreted in* Beedie *(rejecting as a mis-reading an alternative interpretation of* Connelly *which had persisted for the preceding 34 years). As a result, the Court's attempt to distinguish* Antoine *is unconvincing (although, of course, the Court had no alternative to distinguishing it). Despite insisting that the prosecution has to live with its initial decision-making, it appears to distinguish* Antoine *by saying that, while bad decision-making does not constitute a special circumstance, really terrible decision-making – perhaps with the added ingredients of its being quickly noticed and the defendant's subjective understanding that he had got away it – may do so.* Connelly *abuse of process goes beyond the narrow double jeopardy protection of the autrefois pleas in bar. The statutory exception to autrefois acquit in Pt.10 of the Criminal Justice Act 2003, which allows the quashing of an acquittal and a subsequent retrial, lists lack of due diligence by the prosecution as a factor relevant to whether it is in the interests of justice to quash the acquittal. These provisions are substantially based on the Law Commission's recommendations. In its Consultation Paper the Commission first suggested that due diligence at the first trial be a condition precedent for quashing. It moved away from that position in its Report (in part, because by then it would have limited the exception to murder, a limitation not accepted by the Government), but in its Report the broad principle was maintained (Law Com 267, 4.73 to 4.84). If that is the correct policy for the exception to the strict inner core of double jeopardy protection under the autrefois doctrine, it is difficult to justify the* Antoine *position in the more discretionary outer circle of* Connelly *abuse of process. For further criticism of* Antoine *see LH Leigh, "Saving the CPS's Bacon",* [2015] 1 Archbold Review 4.]

*Evidence—expert evidence as to age—whether admissible—*Land *[1998]* 1.Cr.App.R 301*—obiter dicta*

TOWNSEND AND METCALFE [2020] EWCA Crim 1343; 19 October 2020

Expert evidence as to the age of an unidentified person appearing in a video film which, on the prosecution case, showed M committing an indecent assault was properly admissible (the evidence being admitted as going to the likelihood that the completely still person was consenting). The court considered a passage in *Land* [1998] 1 Cr.App. R 301, 306B, in which Judge LJ, having rejected a ground of appeal against a conviction for possessing an indecent photograph of a child (Protection of Children Act 1978 s.1(1)(c)) based on a complaint that there had been no expert evidence as to the age of the person in the photograph, went on to observe that such evidence would in any event be inadmissible, as not being outside the ordinary experience of the members of the jury. The ratio of *Land* was (in part) that the conviction was not rendered unsafe by the prosecution's failure to adduce expert paediatric evidence that the person in the photograph was under 16. The passage observing that such expert evidence would be inadmissible was *obiter*. It was not easy to construe. Judge LJ cannot have meant that expert evidence about the age of an individual was always inadmissible. There were many types of criminal case in which such evidence was routinely given. It was, however, unnecessary for the court to decide whether expert evidence as to the age of a person in a photograph was inadmissible in the normal case where the face was shown. In this case, only the lower half of the body was visible, and it was not a matter of normal experience to be asked to assess age in such circumstances.

Trial—withdrawal of counsel as a result of professional embarrassment—whether representation should be transferred—whether jury should be discharged

CADAMARTRIEA [2019] EWCA Crim 1736; 18 October 2019

In his defence statement, C's defence to murdering another alcoholic with a knife in a hostel in which they both lived was loss of control, and he indicated a guilty plea to manslaughter on that basis. He was tried for murder, and the trial proceeded on the basis that the issue was loss of control. In cross-examination, however, he suggested he had acted in self-defence (asserting for the first time that the victim had a knife), that it was an accident, and that he had not intended to harm the victim. Re-examined at the judge's suggestion, he repeated these three possible defences. Having been given time to seek instructions, his counsel told the judge they were professionally obliged to withdraw. The following day (and with assistance as to the possibility of new counsel being instructed by C's withdrawn counsel), the judge, without asking for submissions from C, ruled that he would not discharge the jury nor transfer the representation order. C made a less-than-one-minute closing speech. The judge directed the jury on all the defences, and instructed them not to hold the withdrawal of C's defence team against him. The jury should have been discharged, and the trial was not fair. Whether the withdrawal of counsel rendered a trial unfair depended on all the circumstances of the particular case, including the nature and complexity of the issues, the stage at which the defendant became unrepresented, the extent to which the defendant was responsible for the withdrawal, and whether and to what extent the defendant was able effectively to take part. They called for a careful assessment by the judge of whether the trial should continue and whether a new defence team should be instructed, and it may be appropriate to instruct new lawyers in order to consider an application to discharge the jury. In C's case, the jury should have been discharged: the allegations were extremely grave; C (as the judge found) had not engineered the situation (unlike cases such as *Kempster* [2003] EWCA Crim 3555, *Williams (Derron Anthony)* [2006] EWCA Crim 1457 and *Ulcay* [2007] EWCA Crim 2379, [2008] 1 W.L.R 1209); C himself was unable to have any input into the remaining stages; the judge had given the impression, if no more, that he had predetermined he would not discharge the jury without hearing argument; and the judge's reasons did not withstand scrutiny, particularly as to not instructing new counsel and solicitors – the requisite delay of a day or two was not too high a price to pay to ensure a fair trial.

Sentencing

Sentencing Code

The Sentencing Act 2020 is force from 1 December 2020[1], and applies to those convicted on or after that date (s.2(1)). Those convicted of offences before 1 December 2020 will still be sentenced according to previous sentencing legislation, and sentences imposed prior to 1 December 2020 will be dealt with according to the previous sentencing legislation (s.2(2)). The Act introduces a "Sentencing Code" (s.1(1)) that consolidates existing sentencing legislation, adopting a clear structure corresponding to the progression of a case through the criminal courts. The Code does not make substantive changes to the law; it does not alter maximum sentences and emphasises the relevance of the Criminal Procedure Rules and sentencing guidelines to sentencing (s.1(4)).

The Sentencing Act 2020 is in 14 Parts. Part 1 provides an overview of the Act. The layout of the following Parts of the Act demonstrates how it neatly follows the flow of a case through the criminal justice system. Part 2 concerns "before sentencing" and includes "deferment of sentence", "committal to the Crown Court for sentence" and "remission to the youth court or other magistrates court for sentence". The provisions relevant to when and where an offender is sentenced are clearly set out before the provisions that will apply to the sentencing decision.

Part 3 concerns "procedure" and includes "information and reports", "derogatory assertion orders", "surcharge", "criminal courts charge" and "duties to explain or give reasons". In relation to reports, as well as setting out provisions relevant to ordering of pre-sentence reports (ss.30 and 31) s.37 of the Act also points to other powers of the court relevant to obtaining reports and information, several of which may be found outside the Sentencing Act 2020.

Part 4 concerns "exercise of the court's discretion" and sets out overarching principles; for example, s.57 of the 2020 Act sets out the purposes of sentencing when dealing with adults, usefully followed by s.58, which sets out the court's considerations in relation to those under 18. Section 63 sets out how the court is to assess seriousness.

Parts 5-11 concerns "sentences" and sets out particular sentencing disposals. A clear structure is adopted, with sentences being broadly listed according to their severity (for example, Pt.5 is about absolute and conditional discharges, Part 10 is about custodial sentences). Part 11 concerns behaviour orders and includes criminal behaviour orders, sexual harm prevention orders and restraining orders. Part 12 concerns miscellaneous provisions relevant to sentencing, Part 13 concerns interpretation and Part 14 concerns supplementary provisions.

Accompanying the Act are a Table of Destinations and a Table of Origins. These tables allow easy cross-referencing between the old legislation and the Sentencing Act 2020. Practitioners should expect to use these tables to assist them to navigate between the old and new legislation.

The Sentencing Act 2020 has 420 sections and 29 schedules. It sought to consolidate sentencing legislation that ran to over 1300 pages. The breadth and structure of the 2020 Act is hugely impressive, and it introduces order and clarity. Introducing the draft Sentencing Code, the Law Commission included undue cost and delay as one consequence of the difficulty of interpreting and applying the existing law, stating that "the effect of this is particularly keenly felt in a criminal justice system which is increasingly having to do more with fewer resources". The Sentencing Act 2020 comes into force at a time when such pressures have unquestionably increased and this makes the achievement of its objectives particularly pressing.

1 The Sentencing Act 2020 (Commencement No. 1) Regulations 2020, SI 2020 No. 1236 (C.35).

Features

Applications to dismiss

By Paul Jarvis[1]

On 28 February 2020, an Old Bailey jury acquitted Roger Jenkins, Tom Kalaris and Richard Booth of offences of conspiracy to commit fraud during a period when they were senior directors and executives of Barclays plc and Barclays Bank plc, collectively referred to as the companies. The companies had originally been indicted as co-conspirators but in a judgment dated 21 May 2018, Jay J dismissed the charges against them. The prosecutor, the Serious Fraud Office, subsequently applied for a voluntary bill of indictment to revive the prosecution against the companies but Davis LJ rejected that application in a written judgment dated 12 November 2018.[2] It was following the acquittals in February 2020 that the judgments of Jay J and Davis LJ respectively were published.

No doubt much will be written elsewhere about various aspects of those judgments, and in particular the approach taken by the court to the principles of corporate criminal liability[3]. The focus of this article is the procedural dimension to the court's considerations and specifically whether the court fully grasped the important distinction between the charges on which the defendants were sent to the Crown Court and the counts in the indictment subsequently preferred against them.

1 Barrister, 6KBW College Hill, and Junior Treasury Counsel at the Central Criminal Court.
2 [2018] EWHC 3055 (QB).

3 For an interesting and recent discussion on how those principles could be reformed, see M. Dsouza, "*The Corporate Agent in Criminal Law – An Argument for Comprehensive Identification*" in Volume 1 of the 2020 edition of the Cambridge Law Journal. See also in this issue of *Archbold Review*, H. Spector, "*SFO v Barclays: Elusive corporate criminal liability in the UK.*"

In the very first paragraph of his judgment Jay J described his task in this way:

> Para.1 – 'Barclays PLC ("Barclays") and Barclays Bank PLC ("Barclays Bank"), collectively "the companies", have applied to dismiss all charges brought against them by the Serious Fraud Office ("the SFO") on Counts 1, 2 and 3 of the joinder indictment preferred on 16th February 2018"

The indictment was attached as an Appendix to his judgment, and Jay J embarked on an exposition of the law by reference to the offences charged in the indictment under the heading "The Offences Indicted".[4] He went on to identify the test to be applied at the stage of a dismissal application[5] and recognised that the jurisdiction of the court was governed by para.2(1) of Sch.3 to the Crime and Disorder Act 1998, which provides that where a person is sent for trial he may apply to the Crown Court to dismiss the charge or charges in the case. He then added –

> By paragraph 2(2) the judge must dismiss a charge, and take necessary consequential action in relation to the Indictment 'if it appears to him that the evidence contained against the applicant would not be sufficient for him to be property convicted'".[6]

Having considered the facts and the law, he allowed the applications and held that "the charges specified in Counts 1, 2 and 3 on this Indictment must be dismissed" in so far as they related to the corporate defendants.[7]

It is important to recognise at the outset that there is an important conceptual difference between the offences a defendant is charged with and the offences that are particularised in the counts of the indictment ultimately preferred against him. They may not be the same offences, but even if they are the same offences, the way in which they are framed can differ. Nowhere in his judgment does Jay J set out the offences with which the companies had been charged when they made their first and only appearance in the magistrates' court. The casual reader of the judgment is left to assume they must have been the same offences as subsequently appeared in the indictment, and with the same particulars as well. That may or may not have been the case here.

In serious fraud cases, as with other cases, there are a variety of different ways in which a prosecutor can commence criminal proceedings. They are neatly set out in rule 7.1 of the Criminal Procedure Rules. If a defendant is in custody already they can be charged with the offence by the police. If they are not in custody then the prosecutor can either issue the defendant with a written charge and requisition pursuant to s.29 of the Criminal Justice Act 2003 (if the prosecutor has the power to do so) or apply to the magistrates' court for the issue of a summons under s.1 of the Magistrates' Courts Act 1980. In any case, rule 7.3 provides that the allegation of an offence must describe the offence in ordinary language and must identify any legislation that created it. Moreover, the allegation must contain "such particulars of the conduct constituting the commission of the offence as to make clear what the prosecution alleges against the defendant".

Where the prosecutor serves notice pursuant to s.51B of the Crime and Disorder Act 1998 in a serious or complex fraud case then at the defendant's first appearance the magistrates will allocate his case to the Crown Court.[8] Where a s.51B notice has not been served the magistrates will nevertheless consider under s.51 (in the case of an adult) whether to send the case to the Crown Court for trial and if there is a sending then the procedure in rule 9.7 needs to be complied with and the magistrates will ask the defendant whether he intends to plead guilty in the Crown Court.

The offence the defendant was charged with in the magistrates' court accompanies him to the Crown Court. Once there, para.2(1) of Sch.3 to the 1998 Act stipulates that after he has been served with the documents containing the evidence on which the prosecution rely, but before arraignment, he may apply orally or in writing to the Crown Court for any of the charges on which he was sent to the Crown Court for trial to be dismissed. The procedure for making an application to dismiss is governed by rule 9.16, which again makes it clear the application is in respect of the offences for which the defendant was sent to the Crown Court to be tried. The effect of para.2(2) is that if the charge is dismissed then the Crown Court should also quash any count relating to that charge in any indictment preferred against the defendant, which also serves to emphasise that there is a difference between the charge to which the application relates and the contents of the indictment, if one has been preferred by the time the application is made.

What this all means in practice is that by whatever route the defendant arrives at the magistrates' court, by that stage he will face an offence or offences that should be clearly identified and sufficiently well-particularised to enable the defendant to understand what the allegations against him are.[9] If those particulars are lacking, the magistrates' court can order them to be supplied by the prosecution. Once those charges have arrived in the Crown Court, whether following an allocation or a sending, they cannot be amended.[10] Of course, on an application to dismiss, the Crown Court must take into account the evidence served by the prosecution and so even if the charge is vague as to the particulars of the conduct said to constitute the offence those particulars might emerge from a full consideration of that evidence.[11]

Where there is no material difference between the form of the proposed indictment and the charges that were sent to the Crown Court then the Crown Court judge would be entitled, it would seem, to determine the application to dismiss by reference to the proposed indictment[12] although it would still remain an application to dismiss the charges rather than the counts. What then of the situation where a vague and unparticularised charge of fraud is sent to the Crown Court

4 From [82] to [85].
5 From [86] to [90].
6 At [87].
7 At [229].

8 Rule 9.6.
9 See *R v K* [2005] 1 Cr App R 408 and *R v Goldshield Group plc* [2009] 1 W.L.R 458 at [18]. In *R v Evans (Eric)* [2014] 1 W.L.R 2817, at [3], Hickinbottom J said – "The particulars of the charge are required to set out clearly and unambiguously the case the defendants have to meet…and in an application to dismiss the charge such as this, they are of especial importance". At [96] he went on to add these words – "In a charge of conspiracy to defraud, the agreement entered into by the conspirators is, of course, crucial: and, in this regard, the particulars of charge are of particular importance. They must set out the agreement alleged with sufficient specificity so that the matters which the prosecution are setting out to prove…are clear." Finally, at [189] he said – "Any prosecution for [conspiracy to defraud] must be based on a proper analysis of the way in which the offence was committed, which must be laid out clearly in the particulars of charge…It is a vital requirement. Among other things it prevents the Crown from changing its core case against the defendant, within the wide parameters of the offence; and ensures that the defendants have a proper opportunity to respond to the charge."
10 *See Serious Fraud Office v Evans* [2015] 1 W.L.R 3526 at [91].
11 *See The Queen (on the application of John Preston Bentham v The Governor of Her Majesty's Prison Wandsworth* [2006] EWHC 121 (Admin) at [57].
12 *See Evans (Eric)* at [3].

and the evidence discloses a number of ways in which that fraud could have been carried out? It is conceivable that the judge in the Crown Court would require the prosecution to submit a document pinning its colours to the mast with regard to the manner in which, on the evidence served, the prosecution maintain the offence was committed[13] (a case statement) but it is inconceivable the judge would permit the prosecution to change the way it puts its case in response to the application to dismiss, at least not without the defence having had proper notice of the proposed change.

Alas, the judgment at first instance in *Barclays* does not set out what the charges were and, just as importantly, what the particulars of those charges were. *Barclays* might have been one of those cases where there was no material difference between the charges and the counts on the indictment (as was the position in the *Evans* case) but if so the judgment should have made that clear. In any event, no-one should be left with the impression that the application to dismiss related to the counts in the indictment. It was an application directed solely against the charges the defendants faced at the moment their case was allocated or sent to the Crown Court.

The problem of distinguishing between charges and counts could be resolved entirely if the law was changed to reflect one of the recommendations made by Auld LJ in 2001[14] and endorsed by Sir Brian Leveson in 2015,[15] that the same form of charge should be maintained throughout the case and be subject to the same procedural and drafting requirements at all stages. In this way, the charge that accompanies the defendant from the magistrates' court would remain in place in the Crown Court and be capable of amendment on the application of the prosecution in the same way that an indictment is. If that change ever came to pass then the process by which judges of the Crown Court undertake applications to dismiss would be much simpler.

13 So as to prevent the prosecution case "drifting around" in what could be a nebulous offence of fraud: *Evans (Eric)* at [126].

14 *Review of the Criminal Courts of England and Wales.*

15 *Review of Efficiency in Criminal Proceedings* at para.367.

SFO v Barclays: Elusive corporate criminal liability in the UK

By Helena Spector[1]

In December 2018 the attempt by the Serious Fraud Office (SFO) to prosecute the Barclays companies[2] for crimes of corporate dishonesty failed *in limine* because the courts held that the dishonest conduct it alleged could not be attributed to the companies.[3] This article discusses the implications of this ruling.

Background

The facts of the case related to the period immediately after the 2008 financial crisis, in which Barclays engaged in consecutive capital raising exercises to avoid a bailout by the UK government.

In June 2008, a first capital raising (CR1) secured a £4.4 billion investment from Qatari entities in exchange for shares issued at an agreed discount, plus a commission. This was set out in the public prospectus as 1.5%. Later a second and similar exercise in capital raising (CR2) later brought in a further £6.8 billion. This time Barclays publicly announced that the Qatari investors would variously receive between 2% and 4% commission in addition to an Arrangement Fee of £66 million. Further, on 8 October 2008, a Qatari loan to Barclays of US $2 billion was agreed which was later raised, on 29 October 2008, to US $3 billion.

The SFO alleged that the financial arrangements between Barclays and Qatar significantly differed from those publicly announced, authorised and warranted by the Bank in its prospectuses and subscription agreements. It alleged that Barclays had secretly paid much more by means of two subsidiary agreements called "Advisory Service Agreements" (ASAs). These were sham devices designed by the Barclays CEO (JV) and Group Finance Director (CL) Other individuals implicated were the Barclays Capital Executive Chairman of Investment Management in the Middle East and North Africa (RJ) and the Barclays Wealth Management Chief Executive Officer (TK). The SFO's case was that the Barclays Board of Directors and other relevant committees within the bank, including the sub-committee responsible for overseeing offers made (the BFC), were kept in the dark about the true intent behind the ASAs and the loan.

Over these transactions the SFO brought against the bank four charges: two counts of conspiring to commit offences of fraud contrary to s.2 of the Fraud Act 2006, and two counts of giving of unlawful financial assistance for the acquisition of its shares, contrary to s.151 of the Companies Act 1985. In response to this, the bank made a preliminary application to Jay J to dismiss the charges,[4] which he did.[5] The SFO then applied to prefer a voluntary bill of indictment against Barclays for the fraudulent actions of JV and CL.[6] The application was heard before Davis LJ, who concluded that Jay J had reached the right decision on the dismissal application: on the constitution of Barclays and on the facts of CR1 and CR2 negotiations, there was no way that the potential dishonesty on the part of JV and CL could be said to extend to the Barclays Board of Directors, and therefore extend to the company as a whole.[7]

1 Probationary tenant at Red Lion Chambers.

2 There were two Barclays defendants: Barclays plc, and Barclays Bank plc, which was added as a later defendant after Barclays plc had been charged. The application to dismiss concerned both Barclays defendants, collectively known as "the companies".

3 *Serious Fraud Office v Barclays plc* [2018] EWHC 3055 (QB).

4 Crime and Disorder Act 1998 Sch.3 para. 2(1).

5 *R v Barclays plc* (unreported, 21 May 2018) (Southwark Crown Court).

6 Although a prosecuting body may appeal to the Court of Appeal against a 'terminating ruling' once the case has gone to trial, where an application to dismiss succeeds the only possible remedy is an application apply to the High Court for a voluntary bill of indictment to try and recommence proceedings, which is only granted in exceptional circumstances. It is made explicit in the Practice Direction 10.B.4 that: "The preferment of a voluntary bill is an exceptional procedure." The prosecution in seeking the preferment of a voluntary bill must demonstrate that the tribunal "was obviously wrong or unreasonable" to dismiss the charge (*R v Davenport* [2005] EWHC 2828 at [22]).

7 *Serious Fraud Office v Barclays plc* [2018] EWHC 3055 (QB).

What is the position now for UK corporate liability for criminal offences?

In the wake of *Barclays,* it appears to be the case that in order for a company to be prosecuted for fraud or other offences that do not impose strict liability, the individual company agents conducting the wrongdoing must either be its "directing mind and will" for *all* purposes, or the directing mind and will for the purpose of performing the *particular function* in question.

Prima facie, this appears to be an impossibly high bar to achieve in anything other than a very small company. This is precisely because the organisational structure of almost all modern companies is *designed* to prevent any single individual from simultaneously having full discretion to act and no accountability to any others.

That the bar was raised in establishing the identification principle can be seen in the differentiation which Davis LJ made between *Barclays* and the civil case of *El Ajou*.[8] The issue in that case was whether the defendant company (DLH) was constituted a constructive trustee of large sums received and disbursed on the grounds of knowledge that such money represented the proceeds of a fraud. The board of DLH had no such knowledge, although the non-executive chairman (F) concerned in the receipt and disbursement of the money on its behalf did.

Davis LJ held that corporate liability could be established in *El Ajou* but not in *Barclays* as in the former the individual with the dishonest mens rea not only had entire control over negotiations but had also been permitted by the board of the company to exercise such control autonomously. Concurrently, it was held that there could be no defence to the proceedings that the board of directors had not known or authorised the non-executive chairman's unlawful activity precisely *because* it had delegated control of the entirety of the transaction.

Importantly, Davis LJ recognised that the board of directors in *El Ajou* had not given the non-executive chairman entire control by formal resolution, but rather that such control had been de facto surrendered and transferred. In theory, this leaves room in future cases to establish the identification principle based on the realities of a complex, delegated business environment.

Unfortunately, this is where Davis LJ's reasoning became slightly less cogent. He distinguished *Barclays* on the ground that the various resolutions of its Board of Directors indicated "the [limited] level of delegation sanctioned by the appropriate organs of the company." Dismissing claims to distinguish form from substance in accordance with notions of effective autonomy, Davis LJ remarked that in this case "the form *is* the substance." This sits uneasily with his earlier acceptance of the de facto decision making in *El Ajou*, in which the company did have a formal constitution ascribing overall control of the relevant transactions to motions passed by the board of directors rather than the relevant chairman.

As a matter of logic, it is hard to see how a theoretical distinction between the de jure and de facto can be maintained if Davis LJ was willing to accept that the de jure decision making structures can represent and legally constitute substantive control. Either the distinction is theoretically and evidentially material, or it is not. Under Davis LJ's approach, corporations can evade prosecution by simply evidencing that the board of directors retained ultimate control and/or exercised intermittent scrutiny, despite the fact that company executives were able to operate dishonestly *around* and possibly *by virtue of* these ultimately ineffective frameworks.

Indeed, Davis LJ points to the fact that the BFC could have prevented CR1 and CR2 from proceeding to conclusion, revealing the limits of executive control. It is hard if not impossible to imagine a scenario where a Board of Directors would wholesale empower a CEO to enter into significant financial contracts with investors without retaining any kind of power of veto, or at the very least control over the process by which any decision would come to be made (i.e. controlling who constitutes subordinate boards empowered to make such decisions). *Barclays* therefore sets a very high bar for prosecutors to prove corporate criminal liability, requiring the dishonest agents to have no less than "entire autonomy" over a deal.

> [T]hat the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question [122].

How can corporate liability for agent wrongdoing be established following *Barclays*?

The options open to bodies looking to prosecute corporations for fraudulent activities appear significantly narrowed following *Barclays*, in both a legal and evidential sense. This is a decision of the High Court and it remains to be seen whether in future the point is ever litigated at the Court of Appeal or Supreme Court. However, the decision was handed down by a Lord Justice of Appeal, unusually for an application to lodge a voluntary bill of indictment, which increases the likelihood that the decision will be met with a judicial consensus.

How then might a corporation be held liable for the fraud committed by its agents in its name? One remaining method would be through reserving charges of agent dishonesty for cases with a different factual nexus of agent autonomy. It does not seem from *Barclays* that this could only arise where the relevant agent is fully authorised to "do the deal" as in *El Ajou*, which is likely to be difficult. Instead, there is evidence from Davis LJ's judgment that it might be more conducive to shift the evidential focus from the CEO's or other officer's formal independence towards the factual input, oversight and interventionism of any given board of directors. Despite the difficulties with Davis LJ's reasoning, he does seemingly base his argument on an evidential distinction between rubber stamp exercises by a board of directors and their effective control.

For example, in support of his conclusion that the officers were not independent, Davis LJ places weight on the numerous resolutions passed by the Barclay's Board of Directors, including the decision to delegate authority to a sub-committee to oversee the placing of offers on behalf of the Board (i.e. the BFC), BFC meetings approving the various terms of the CR1 and CR2, the Board resolution that Barclays should pay "such fees, commissions and expenses" in connection with the Qatari subscription as seemed reasonable and the Board's approval of fees to be paid to the key subscribers (with the exception of the fur-

8 *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685.

ther unapproved £280 million). Not only did the Board and BFC retain ultimate control, but at each stage they implemented processes designed to regulate and, where necessary, delegate authority in strictly limited and controlled capacities. Absent these findings of control exercised in fact, he might have concluded, perhaps, that the officers had been "left to do the deal".

A second method could be through confining charges to regulatory or strict liability offences, such as those set out in the Companies Act 1985 or Bribery Act 2010. In his judgment, Davis LJ was quick to point out that the Fraud Act 2006 had not been drafted with the position of corporations in mind, as evidenced by the lack of strict liability or availability of a statutory defence that it had adequate protections in place (e.g. as per s.7 Bribery Act 2010). Accordingly, refusing to hold a company criminally dishonest by virtue of the dishonest actions of a CEO could not be said to frustrate the will of Parliament. On the other hand, under s.151 of the Companies Act 1985, a company may be criminally liable for unlawful financial assistance without needing to establish dishonesty on the part of any agent. As such, it is more evidentially straightforward to establish the actus reus of specific agents and attribute liability to the company as a whole under s.151. Indeed, Davis LJ commented that the SFO would have had a greater chance at succeeding on Counts 3 and 4, those concerned with s.151, had the charge *not* been particularised on the basis of the relevant agents' dishonesty (thereby rendering the issue a moot one in *Barclays*).

Third, greater precision might be required in the manner in which cases against companies are particularised, especially if dishonesty is alleged. Davis LJ focussed on the fact that the particularised allegations were linked to the accuracy and truthfulness not only of the specific ASA agreements but of the Prospectuses and Subscription Agreements for CR1 and CR2 as a whole, "to be viewed realistically in the round as one transaction" [at 115]. The problem was, however, that while the relevant agents had the authority to negotiate and conclude specific arrangements, they were not authorised to complete, conclude and issue the Subscription Agreements and Prospectuses. This was always and inevitably the remit of the BFC in the first instance and the Board of Directors in the second. As such, JV and CL could not have been authorised to "do the deal" and accordingly the case failed. A tighter and less ambitious focus when drafting the indictment might enable companies to be held liable for specific dishonest transactions.

However, the problems with this approach are twofold. First, the reason the SFO focussed as it did on the wider CR1 and CR2 transactions is because, particularised in the narrower alternative, Barclays could have defended itself on the basis that the company did not gain from the ASAs themselves, as distinct from agreements CRs 1 and 2 from which gain is self-evident. This is primarily an evidential issue. It is clear that JV, CL, RB and TK were cautious of clearly linking the ASAs to a wider context of investment by way of CRs 1 and 2. For example, a telephone conversation between RB and TK in June 2008 talks of doing a "side deal" with no further elaboration and elsewhere there was stated the need to discuss the ASAs by telephone rather than email. By a similar logic, a defendant company could also argue that these were rogue subsidiary deals, and the culpable individual agents could not have been the directing mind and will of the company as these were acts which the agents had no authority to do *and* about which the boards of the company had no knowledge nor awareness. Second and more pragmatically, limiting fraudulent activities to ancillary transactions of lesser value will have the likely effect of significantly diminishing the size of fines payable upon conviction. If the SFO intends to prosecute such offences to act as a deterrent, a low value fine arguably negates the purpose of pursuing a conviction in the first place.

Ultimately, Davis LJ recognised that the present difficulty with establishing corporate liability for fraud for the benefit of a company is one for Parliament to fix. As the law stands, the decision in *Barclays* seems likely to disincentivise charges being brought against companies for fraud committed by directors, even where the evidence of CEO dishonesty is strong and the company evidently profited from the fraud.

Corporate criminal liability: a problem to be fixed?

Much of the discussion on corporate criminal liability elides a central question: why should criminal liability be attached to the legal fiction of the company? Or, to paraphrase, why should stakeholders who have no criminal culpability suffer the financial and reputational repercussions resulting from a criminal conviction? The need for such liability was alluded to by the Privy Council in *Meridian*[9] but was not given sustained attention.[10] A common justification[11] is that the criminal law is *preventative*: the communicative function of a criminal law coveys that a criminally unlawful act is a paramount social problem on a par with other, more traditional social wrongs elevated to the status of crimes. As such, the criminal label attached to kinds of specifically corporate wrongdoing carries a stigma sufficient to disincentivise corporate complacency. A more persuasive justification is that it is *apposite*: corporate structures – organisational networks, markets and supply chains – permit and enable individuals to cause certain harms (on a certain scale) that would not be possible without them.[12] Human rights violations committed in explicitly corporate supply chains or networks of fraudulent insider trading with serious implications for people's pensions are both examples of this. The presence or absence of culpability is moot, especially given that it is well known that criminal law in England and Wales justifies the imposition of liability absent any mental element for an array of offences to provide protection and redress for social wrongs.[13] Economic crime conducted by corporate agents by virtue of the corporate context is one such wrong.

Where next for corporate criminal liability?

In light of the current difficulties with effectively regulating corporate wrongdoing, several options for legal reform

9 *Meridian Global Funds v Securities Commission* [1995] 2 A.C 500, [1995] UKPC 1.

10 However, it is noted that the *Meridian* decision had a highly limited practical impact on the identification principle or other judicially viable modes of attributing corporate criminal liability for economic crimes.

11 E.g. M. Dsouza, "The corporate agent in criminal law - an argument for comprehensive identification" (2020) C.L.J., 79(1), 91-119; M. Diamantis, "Corporate Criminal Minds" (2016) 91(5) *Notre Dame L.Rev*. 2049.

12 E. Sutherland, "The White-Collar Criminal" (1940) 5 *American Sociological Review* 1.

13 E.g. see discussion in *Sweet v Parsley* [1970] A.C. 132 at p.149; *Kirkland v Robinson* [1978] JP 3777.

have been suggested.[14] First is the extension of the "failure to prevent" (FTP) offences set out in the Bribery Act to be applied to a wider section of economic crimes.[15] Under this model, "economic crime" would be broadly defined to include a range of offences such as fraud, theft, false accounting, forgery, destroying company documents, money laundering and those offences covered under the Financial Services and Markets Act 2000 – a list based on those to which a Deferred Prosecution Agreement can be obtained as set out in Sch.17 of the Crime and Courts Act 2013. Although such FTP offences were subject to completed consultations in 2017 and considered at committee stage they were never enacted. The strengths of this model lie in the fact that FTP offers a broader capacity than the identification principle to penetrate the diverse and diffuse spread of corporate actors. It seeks to recognise that corporate activity exists upon private individuals acting by virtue of complex corporate structures, bodies, agents, subsidiaries and intermediaries: and targets the organisational cultures which create the conditions for economic crime to take place and generate profit. The argument runs that by reversing the burden of proof (as under s.7 Bribery Act), the extension of FTP would provide a powerful method for holding corporations liable for the wrongdoing of its agents in pursuit of contractual or commercial advantage.

There are two main problems with the enforcement of FTP liability, problems which pose particular challenges to prosecuting fraud offences. The first, which similarly plagues any model premised on an extension of the principles of vicarious liability, is that it relies upon a derivative liability: it is contingent on establishing the criminality of the relevant individuals which recent caselaw has struggled to do (e.g. *Barclays* and the case of *Sarclad*[16]). It is a shortcoming that has been identified by a number of recent commentators.[17] Although an individual at a lower organisational level in a company may be directly responsible for an act, they might not have sufficient knowledge of the circumstances to acquire the requisite mens rea – which for fraud would be dishonesty. Whereas prosecuting an offence such as bribery under FTP is underpinned by a substantive offence – that of inducing the improper performance of a function or activity having been committed by one or more employees - the only element of fraud which distinguishes it from otherwise lawful action is dishonesty. But dishonesty in the corporate context might not always attach to an underlying offence committed by individual agents, or possibly *should* not attach to the individual agents. The recent mis-selling scandals point towards a "criminogenic corporate culture"[18] which cannot be reducible to decisions made by "front line" employees but also which ignore sales targets, sale policies and risk aversion strategies. There are exceptions to this, notably the conviction in *Hayes*[19] for mis-selling LIBOR, yet there are clearly significant obstacles with this approach: only thirteen charges were brought in total by the SFO for LIBOR-rigging, resulting in four convictions. This suggests that it remains difficult to challenge the honesty of the relevant employees where the mis-selling was encouraged as part of employment contracts, unofficial corporate targets, or perhaps consistently with an industry-wide practice. Without dishonest agents, fraud cannot be established under FTP as there is no substantive offence upon which parasitic corporate liability can attach.

The second problem is that any legislation would also need to causally link the wrongdoing of the agent to gain intended for a specific corporation. As a corollary, under s.7 of the Bribery Act 2010 the associated Guidance stresses the need to establish that the associated person was "committing bribery on the organisation's behalf". Taking fraud again as a model, there could be an array of evidential and legal problems relating to whether (a) the wrongdoing was on behalf of any organisation and (b) what that organisation *is*, if the agent was a member of a subsidiary organisation. It is highly unlikely that any law would be drafted so that economic crimes committed on behalf of a subsidiary company by one of its employees or agents would automatically involve liability on the part of the parent company, or that liability could flow from subsidiary to parent company through straightforward corporate ownership or investment. Thus establishing intended benefit to a parent company could become a major stumbling block to bringing successful prosecutions under FTP.[20]

As a result of the first of these problems, that of derivative liability, Robin Lööf[21] has suggested a new model of corporate criminal liability based on *causation* for the criminal harms arising, regardless of whether any individual could be found criminally liable. Lööf proposes that corporations which occasion harm by means of any relevant actus reus for the "economic crime" offences would be strictly liable, subject to defences for which they would bear the legal burden of proof that there was no harm caused; namely that they were not a significant cause of the harm, or novus actus interveniens.

The causation model clearly has the advantage of better focussing prosecutions on instances of actual harm caused and removes the need to establish guilty intent for any relevant individuals. It certainly lifts a significant part of the evidential burden from the prosecuting body.

However, the main drawback of this model is that it would further complicate the way in which economic crime is prosecuted. Lööf clarifies that causation-based liability for economic crime is not relevant for offences such as bribery or fraud. Given that section 7 bribery is currently governed under an FTP model and fraud through the identification principle, a causation-based fraud model would lead to three starkly different approaches to criminalising corporate misfeasance. Moreover, the causation model is incapable of addressing the fundamental problem raised by *Barclays*:

14 In this article, I focus on three contemporary suggestions: "fail to prevent", criminal liability based on harm caused and the evidential presumption of a dishonest mens rea attributable to corporations charged with fraud. There are other possible approaches, including the compromise approach is taken in the context of corporate manslaughter; the principle of vicarious liability; and the 'organisational' model proposed by Celia Wells. See C. Wells, "Medical Manslaughter - Organisational Liability" in: Danielle Griffiths, Andrew Sanders (eds) *Bioethics, Medicine and Criminal Law* (2013). Cambridge University Press, pp. 192-209.

15 E.g. C. Wells, "Corporate failure to prevent economic crime - a proposal" (2017) Crim. L.R.6.; S.F. Copp and A. Cronin, "New models of corporate criminality: the development and relative effectiveness of "failure to prevent" offences" (2018) *Comp. Law*. 39(4); A. Ashworth, "A new generation of omissions offences?" (2018) Crim. L.R.5.

16 *Serious Fraud Office v XYZ Ltd* [2016] 7 WLUK 211; [2016] Lloyd's Rep. F.C. 517.

17 R. Lööf, "Corporate agency and white collar crime – an experience-led case for causation-based corporate liability for criminal harms" (2020) Crim. L.R.4.; S.F. Copp and A. Cronin, "New models of corporate criminality: the problem of corporate fraud – prevention or cure?" (2018) *Comp. Law*. 39(5).

18 S.F. Copp and A. Cronin, "New models of corporate criminality" p.146.

19 *R v Hayes* [2015] EWCA 1944. In that case, an individual was found guilty of conspiracy to defraud the LIBOR rate, as his behaviour was deemed dishonest according to the objective standard, i.e. the ordinary standards of reasonable and honest people.

20 Prosecutions could still be brought against the subsidiary company, but this would not allow the parent, high-value companies to be held to account.

21 R. Lööf, "Corporate agency and white-collar crime – an experience-led case for causation-based corporate liability for criminal harms" (2020) Crim. L.R.4.

how to prosecute corporations for the fraudulent conduct of its employees. As a matter of legal principle, the offence of fraud is complete regardless of whether the fraud was successful (as bribery is complete whether or not the bribe is accepted). The harm caused is irrelevant, so an approach based on harm caused would not catch the majority of fraud offences. As a result, a further mode of attributing liability would be required to prosecute corporate fraud.

This leaves a third option for prosecuting corporate liability, proposed by Stephen Copp and Alison Cronin: introducing an evidential presumption of a dishonest mens rea attributable to corporations charged with fraud.[22] Taking fraud by false representation, for example, an approach where dishonesty is presumed would allow a prosecution for fraud to be brought against a corporation where there has been a false or misleading statement made with a view to making a gain or causing another to suffer a loss, where an ordinary person would consider such a representation dishonest.[23] As with all evidential presumptions, this would operate to shift the evidential burden to the defence to establish that the allegedly fraudulent conduct was honest.[24] This approach has the advantage of assuming corporate dishonesty to commit fraud without the need of a metaphysical "mind", while not disturbing the formula of actus reus/mens rea formulating fraud as a criminal offence.

Although the evidential presumption for dishonesty would be the most effective and least complicated tool for prosecuting corporate fraud in the UK, it is clear that there is no one-size-fits-all answer. FTP is still likely to be a useful tool in the prosecution of the kinds of economic crime which involve the evidently culpable "rogue" employees and could apply effectively to offences such as theft, false accounting, forgery etc. Bringing a wider range of economic offences under the FTP model would likely permit the SFO or other bodies to indict more corporations. In terms of prosecuting corporate fraud, a mode of attributing liability through reversing the evidential burden of dishonesty appears to be the most pragmatic proposal and could embolden the SFO to bring charges of corporate fraud in the wake of *Barclays*. However, any reform of this area of the law requires a clear notion of the purpose of attaching criminal liability to corporations: the social impetus of tackling "corporate criminogenic culture". On this point, political inertia rather than legal inflexibility is likely to be the biggest obstacle to effectively criminalising corporate bodies.

22 S.F. Copp and A. Cronin, "New models of corporate criminality."

23 In line with the Supreme Court decision in *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67 as interpreted in *Barton and Booth* [2020] EWCA Crim 575.

24 It is conceivable that a straightforward amendment to the Criminal Practice Rules and clarified with a Criminal Practice Direction or guidance might suffice to enforce this proposal rather than a wholesale statutory change.

"The time has come to make a futile gesture…"

Some time ago I was surprised when the publishers of this journal asked me to sign a document certifying that I do not use slave labour in my work as editor. Unlike escort agencies, cut-price building firms and gang-masters supplying seasonal workers to harvest crops, law publishing is not an area much known for abusive labour practices that exploit the weak and vulnerable.

I was even more surprised when, before a paying me the agreed fee for translating a foreign-language article for a research project, a well-known University required me to sign a "Modern Slavery Supplier Compliance Statement". After proclaiming the University's "zero-tolerance approach to modern slavery" this document then required me to "*confirm that neither you, your employees, workers or organisation have been convicted of any offence involving slavery and human trafficking nor have been the subject of any investigation or enforcement proceedings regarding any such offence or alleged offence*" – and to agree that, if I was discovered to be lying about this, they could terminate the contract.

The legal background to documents of this sort is s.54 of the Modern Slavery Act 2015. This requires every business with a turnover above a certain size to prepare and publish "a slavery and human trafficking statement for each financial year" in which its sets out "its due diligence processes in relation to slavery and human trafficking in its business and supply chains". Requiring all "suppliers" to sign a form like this now appears to be a routine method of establishing "due diligence".

In the human slavery statement published on its website, the University in question records the number of instances of modern slavery or human trafficking reported in the previous year - which was nil. That this was so is unsurprising, because requiring all suppliers (including retired law professors translating C18 Italian texts as a side-line) to certify that they are not engaged in people-trafficking seems as likely to suppress human slavery in supply chains as asking the entire population of a town to certify that they did not commit a murder is likely to detect the person who committed it.

A national crime prevention policy which requires, or at any rate can be complied with, by this sort of futile exercise in box-ticking is not merely useless – it is harmful. Not only does it needlessly irritate the innocent while doing nothing to deter the guilty. It also causes businesses to waste administrative resources. And like other disproportionate measures aimed at problems that are real ones – for example, money-laundering – the irritation that it generates risks undermining public support for tackling it at all.

JRS

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Editorial inquiries: Victoria Smythe, House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.

Archbold Review is published in 2020 by Thomson Reuters, trading as Sweet & Maxwell.
Thomson Reuters is registered in England & Wales, company number 1679046.
Registered Office and address for service: 5 Canada Square, Canary Wharf, London E14 5AQ.

For further information on our products and services, visit
www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire, SO40 3WX

42672305