Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Home Office has opened an urgent consultation on proposed amendments to PACE Codes to manage the risk of Covid-19 transmission in police interviews with criminal suspects. There may be more to the proposals than appears on the surface.**

- **In a decision handed down a few weeks ago, McKechnie J. in the Irish Supreme Court significantly expanded the capacity of the criminal law to attach liability to "managers" who are most directly responsible for offences committed by a company.**

Police Interviews and Covid-19

Introduction

Traditionally, criminal investigation, prosecution and trial have been organised and conducted on the basis that the relevant participants are in each other's physical presence. Increasingly, however, some procedures are being conducted through the medium of a live audio-visual link or a telephone link, usually in the interests of prosecutorial and/or economic convenience. Even interviews with suspects in police custody have not been immune to these developments. So, for example, a police officer can participate in an interview or take decisions on a suspect's detention through such a link, rather than being physically present in the interview room or station concerned.

The risks presented by the spread of Covid-19 have provided the occasion to take these developments on to a wholly new level in England and Wales, with significant implications for the position of the suspect being interviewed. This entails the option for a solicitor to 'accompany' a suspect in an interview through a live or telephone link, rather than being physically present at the interview. Arrangements for that were put in place in April through a Protocol agreed by the National Police Chiefs Council, Crown Prosecution Service, Law Society, Criminal Law Solicitors' Association and London Criminal Courts Solicitors' Association.

The Protocol made several changes to PACE Code C (Detention, treatment and questioning of persons by police officers) and Code E (Audio recording of interviews with suspects). It seems that these were adopted on the questionable basis that they were covered by Coronavirus Act 2020 provisions pertaining to criminal procedure, law and evidence. On the 12th June, the Home Office moved to regularise the situation by opening an urgent public consultation on amendments to Codes C and E which would largely give effect to the terms of the Protocol. The consultation closes on the 3rd July. While there can be no doubt that practical measures need to be taken to limit the spread of the virus in

police interviews, there must be a concern that the proposed amendments may also be aimed at weakening important safeguards for suspects.

Context

Police interviews of suspects in a police station is a staple in the criminal investigation of most arrestable offences. In England and Wales, they are normally conducted in a small interview room in accordance with the terms of the Police and Criminal Evidence Act 1984 (PACE) and the associated Codes. The suspect has, among other things, a fundamental right of access to legal advice while detained in the station, and a right to have his or her solicitor present during an interview. It follows that one or more police officers, the suspect and the suspect's solicitor (among others) could be present in a small interview room for several hours while the suspect is questioned about his or her alleged involvement in a criminal offence.

Clearly, this situation entails an unacceptable risk of transmission of the virus. Eliminating that risk by dropping police interviews would have a major debilitating effect on the investigation and prosecution of serious crimes. Managing the risk will require a combination of: a more judicious selection of cases in which an interview is strictly necessary, the use of personal protection equipment by all parties physically present at interviews that do go ahead; and modifications to the PACE requirements for interviews. The proposed amendments focus on the last of these by adding an Annex AA to Code C and an Annex A to Code E.

Applicability

The amendments apply where a suspect in police custody requests the presence of a solicitor when he or she is being interviewed. They also apply where a suspect (not under arrest) wishes to have a solicitor present during a voluntary interview. In each of these situations, it is envisaged that the solicitor's 'presence' can be satisfied through a live audio-visual link or a telephone conference link to the interview. Additional provisions apply with respect to the interview of a juvenile or a "vulnerable" suspect, but they are not dealt with in this note.

The 'virtual presence' facility will be available where certain conditions are met. Superficially, they appear to give a veto to the suspect, but closer analysis conveys a sense that it is really the police and, to some extent, the solicitor that are in the driving seat.

Communication capacity

The police custody officer (or the interviewing officer in the case of a voluntary interview) must be satisfied that using the link would not adversely affect, or otherwise undermine or limit, the suspect's ability to communicate confidently and effectively with the solicitor for the purpose of the interview. The solicitor must also be satisfied that it will enable him or her to communicate effectively with the suspect for the purpose of interview. There is no requirement for the suspect to be similarly satisfied. The capacity of the link to serve his or her communication needs is exclusively a matter for the police and the solicitor, both of whom may be considered to have an interest (albeit different interests) in finding that it does.

Live or telephone link

From the suspect's perspective, a live link is likely to be more beneficial than a telephone link. Apart from the fact that it offers a more complete communication experience, it provides an opportunity for

external observation of the suspect's physical and mental condition. That is one of the important protections offered by the right to have a solicitor present during the interview. A telephone presence is a poor substitute. That is implicitly acknowledged in the proposed amendments by the requirement to record visually (in accordance with Code F) an interview in which the telephone link is used. Even that concession may prove ephemeral.

The visual recording requirement will not apply where an officer of inspector rank or above confirms that the necessary recording equipment in working order is not available at the time of the interview, and that he or she considers that the interview should not be delayed until such time as the equipment is available. Once again, it is the police who are in control of the application of important criminal justice protections for the suspect in their custody. Experience has shown that they do not always exercise such options to protect the interests of the suspect over their own.

Protections for the suspect

There are some potentially important protections for the suspect. Critically, the 'virtual' presence of a solicitor through a live or telephone link can only be used where both the solicitor and the suspect give their consent. Moreover, the custody officer (or the interviewer, as the case may be) must explain, and if practicable, demonstrate the operation of the live or telephone link to them. They can make representations that it should not be used. Where it is used, they may make representations that its operation should cease, and that the physical presence of solicitor should be arranged.

Consent

Superficially, these appear to be vital protections for the suspect. He or she can veto resort to the live or telephone links, with the likely result that the solicitor will have to be physically present or the interview cancelled. A suspect versed in the practice and procedure of police custody and interview may well have the experience and presence of mind to take full advantage of that option. The same might apply to suspects from privileged or 'white-collar' backgrounds who rely regularly on their solicitors to deal with their personal or business affairs. In practice, however, the protection could prove illusory in many cases.

Most suspects are likely to be less well equipped to deal with the interview environment because of fear, lack of experience, mental health issues, substance addiction, withdrawal symptoms, language difficulties, pressing childcare or family dependant responsibilities, and so on. They will be in a weak position to withstand the subtle (and not so subtle) pressures that may be applied by the police (and possibly the solicitor) to consent to use of the live or telephone link. Indeed, even an otherwise strong suspect could find it difficult to withstand such pressures while isolated and vulnerable in the police station.

Police pressure

There is also a real issue over whose interests are being protected by introduction of the link facility. Officially it is presented as an exercise in protecting the solicitor from the risk of exposure to the virus. There is reason to believe, however, that it is intended to benefit the police by undermining the value for the suspect of

having a solicitor physically present during an interview.

The wording of the proposed amendments envisages the suspect and/or solicitor making representations that the facility should not be used, or that it should cease being used. If their consent for its use was intended to operate as an important substantive safeguard for the suspect, the wording around the representations would be different. As it is, the wording seems to envisage the police (rather than the solicitor) applying pressure for resort to the link facility. The solicitor and the suspect are placed in the position of having to persuade the police that it should not be used. This raises a serious question over how much autonomy they actually have in consenting to use of the link. At the very least, under the proposed formulation, it is easy to see the police raising and dealing with the issue in a manner that applies heavy pressure on the suspect and solicitor to consent.

Conditioning the suspect

Another subtle device that can steer the vulnerable suspect away from withholding consent concerns the associated amendment of the Notice of Rights and Entitlements that must be given to detained suspects. This will be amended to qualify the right to have a solicitor physically present during interview to include the possibility of a virtual presence through a live or telephone link. The suggested wording of the qualification presents use of the link in neutral terms that do not expressly alert the suspect to the fact that it is a significant departure from standard practice and that he or she can veto it if he or she would prefer to have a solicitor physically present. It is easy to envisage this conditioning a vulnerable and anxious suspect into going along with the link facility without question when it is raised by the police.

Records

Further amendments are designed to ensure that a formal record is kept confirming compliance with the procedural requirements where a live or telephone link with the solicitor is used. They stipulate that if the interview is conducted and recorded in writing in accordance with Code C, the interviewer is required to confirm that consent to use the link has been given. He or she must also record that an interview in which the solicitor uses a telephone link, where applicable, is not to be visually recorded. In either event, the confirmation must be included in the interview record.

Moreover, at the commencement of an interview in which the solicitor uses a live or telephone link, the interviewer must confirm that the necessary consent to use the link has been given. In the case of a telephone link, he or she must also confirm, where applicable, that the interview is not to be visually recorded. Also, if a telephone link is used and equipment for remote monitoring is installed, he or she must state whether the light that illuminates automatically with remote monitoring is illuminated. The confirmations and statement (where applicable) must be included in the interview record. These measures seem aimed at producing a neat record of compliance to withstand any subsequent challenge.

Conclusion

There can be no doubt that the risk of transmission of Covid-19 has implications for the conduct of police interviews with criminal suspects. It seems entirely reasonable that measures should be taken to protect against that risk while, at the same time, retaining the capacity to

conduct interviews in those cases where interviews are a necessary and proportionate method of advancing a criminal investigation. There is a wide range of pragmatic and creative options that could be considered to that end. Care should be taken to avoid changes that directly or indirectly tilt the balance in the criminal process further in favour of the police to the prejudice of the suspect.

There are reasons to fear that the proposed amendments will impact adversely and unnecessarily on the suspect, even if that is not the intention. The police are given too much scope to influence or secure the removal of the physical presence of the solicitor from the interview room. While it may appear that the suspect (and the solicitor) have a veto, the logistics are carefully calibrated to enable the police steer the outcome in the direction they desire.

It is also a concern that steps are being taken to regularise these measures by amendments to the Codes at a time when the virus threat is supposed to have diminished sufficiently to allow the re-opening of other sectors of society. The fact that they are given a 12 month time limit (excessive in itself) does not inspire confidence that they will be temporary. Experience with the use of extreme measures introduced as a temporary device to deal with a specified threat in other areas is that they have a tendency to become normalised over time. Given the underlying drift towards 'virtual' criminal process in the interests of prosecutorial expediency and economy, it would hardly be too cynical to suspect that these changes will become permanent if adopted now.

Criminal liability behind the corporate entity

Introduction

The criminal law has always struggled to deal with breaches of the criminal law committed by persons acting in the capacity a corporate entity, such as a limited company. Since the company is recognised as a legal person separate and distinct from the person or persons behind it, the company will normally be liable for the criminal conduct carried out in its name. The culpable person, however, can be an individual or individuals managing the affairs of the company. Unless the criminal law can go behind the legal personality of the company to attach criminal liability on the person or persons directly responsible, they will escape the penal consequences of their culpable behaviour.

The standard device to address this limitation in the criminal law is a statutory provision which seeks to extend the company's criminal liability for a specified offence to a "director, manager, secretary or other similar officer of the body corporate" in question. Liability will attach where the offence was committed with the consent or connivance of, or where it was attributable to any neglect on the part of, the director, manager etc.

The capacity of this device to tackle the mischief at which it is aimed has been stunted by the judicial approach to its interpretation. In a long line of English authorities, dating at least since 1875, the courts have confined criminal liability to those persons who are in a position to exercise control over the affairs of the company. While that may have been appropriate for family business organisation models of the nineteenth

century, it lacks relevance for the much larger, complex, decentralised corporate structures of the 20th and 21st centuries. In a decision handed down a few weeks ago in *People (DPP) v T.N.* [2020] IESC 26, the Irish Supreme Court faced up to that reality and charted a different path.

The Facts

The appellant had been charged with offences under the Waste Management Act 1996 which stipulates that where an offence under the Act has been committed by a body corporate, a director, manager, secretary or other similar officer of the company shall also be guilty of the offence, if it was committed with his or her consent or connivance or was otherwise attributable to neglect on his or her part.

The offences were connected with alleged breaches of a waste disposal licence that had been granted to Neiphin Ltd in respect of a waste management facility on a specified site. Neiphin's business was concerned almost exclusively with waste disposal on that site, and the appellant was identified as the manager of the facility there for the purposes of the licence. He provided his services to Neiphin as an environmental consultant. Although he was not registered as a director, manager or other officer of Neiphin Ltd, that company was a wholly owned subsidiary of another waste management company which was in effect owned by the appellant. The key question was whether, in these circumstances, the appellant was a manager or other officer for the purpose of the statutory provision on personal criminal liability for offences of the company.

Th trial judge directed the appellant's acquittal. Applying the traditional interpretation of a "director, manager, secretary or other officer", the judge concluded that the appellant did not have sufficient control over the affairs of the company to qualify as a manager or other officer within the meaning of the Act. While he had a position of authority with respect to a core aspect of the company's business, he was not involved in other aspects of the company's overall management.

The directed acquittal was overturned in the Court of Appeal which took a broader interpretation of a manager or other officer of the company in this context. The appellant appealed to the Supreme Court which had to reconsider the established jurisprudence that appeared to confine a manager or other officer of the company to a person who could exercise control over the whole affairs of the company.

The established jurisprudence

The established jurisprudence that had been applied by the trial judge can be traced at least as far back as the English case of *Gibson v Barton* (1874-75). In that case Blackburn J. said that a manager is:

> "a person who has the management of the whole affairs of the company, not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole of the affairs of the company".

For the purposes of criminal liability for offences of the company, this confines a manager to a person who has the capacity to control the whole affairs of the company, as distinct from a particular section or area. It is sometimes referred to as the person who is the directing mind or will of the company; a decision-maker who has the power to decide company policy and strategy. This, of course, will often be

inadequate to reach company personnel who are most immediately responsible for regulatory offences committed in a large company where managerial responsibilities are organised on a subject or sectoral basis. So, for example, the senior manager responsible for safe systems would escape liability, even for serious breaches of health and safety standards of which he or she was aware or should have been aware. Since his or her remit is confined to health and safety, he or she cannot be said to control the whole affairs of the company. Moreover, those who do have overall control are unlikely to have sufficient awareness of the health and safety breach to attract liability.

Despite the obvious limitations in the traditional approach, it has been followed down through the years by the English courts in cases such as: *In re B. Johnson & Co (Builders) Ltd* (1955), *W.H. Smith & Son Ltd* (1969), *Tesco Supermarkets Ltd* (1972), *In re A Company* (1980), *Boal* (1992) and *Woodhouse* (1994). The Irish courts have tended to follow this line of authority, until the decision in *T.N.*

Irish Supreme Court approach

In the Supreme Court, McKechnie J. analysed the English line of jurisprudence and found that it reflected the very different circumstances pertaining to the formation of limited joint stock companies in the nineteenth century. In the circumstances prevailing then, it might have been reasonable to expect that decision-making authority over all aspects of a company's affairs and activities would be concentrated at the very top of the company. Today, and for a very long time, the situation is very different.

In larger, and even medium-sized, corporate structures decision-making authority is diffused or delegated much more widely. The range of necessary management specialisations required for the efficient performance of such organisations demands it. A person who is not the controlling mind of the company may nevertheless have real responsibility and decision-making authority over a certain aspect of its activities. An environmental compliance manager, for example, may not have the power to shape the whole direction of the company, but he or she may well be the person responsible for designing and signing off on the company's environmental policies. It would be strange if that person was not recognised as a manager for the purposes of the Waste Management Act 1996.

McKechnie J. concluded that the English line of authorities was out of step with the current reality of corporate structures and, as such, should not be followed in the interpretation of "manager" in the criminal liability provisions of the 1996 Act. A broader interpretation of that term is required to encompass those who exercise authority over that aspect of the company's activities in question:

> "To my mind, confining "manager" only to those at the very tip of the pyramid is not what the ordinary and natural meaning of the word, viewed in its statutory context, conveys. Moreover, when contemporary organisational structures are borne in mind, it seems to me that adopting the narrower interpretation of "manager" favoured in the older authorities would not accord with the purpose of the 1996 Act in reducing, controlling and preventing waste, this for the simple reason that in many organisations the person with primary responsibility to that end may be a mid-level manager rather than one at the

> highest level of the hierarchy. It would seem a most bizarre situation if a manager with overall responsibility for waste management could not be held liable under the Waste Management Act merely because he or she was not in charge of the overall running of the company; I am convinced that this could not have been the intention of the Oireachtas [Irish legislature] in using the word "manager"."

Accordingly, McKechnie J. concluded that the trial judge had erred by focusing on whether there was evidence that the appellant had the capacity to direct the whole affairs of the company. The question really should have been whether he was functioning as a senior manager with responsibility for environmental compliance. In answering that question, the court should not interpret the word "manager" too rigidly. It must be alive to the actual or practical state of affairs within the company. Formal title may be relevant, but not conclusive, as it is actual function and role that is important. Equally, express delegation is relevant but not essential, as what matters is whether the person possessed responsibility for putting procedures and policies in place in the area in question. Position on the hierarchical chain may also be important. He or she must have true authority in the matter, as distinct from reporting to a more senior member on his or her implementation of policies devised higher up the chain.

Interpreting criminal statutes

McKechnie J.'s interpretation of what is meant by a manager in the context of the criminal provisions of the 1996 Act (and other similar provisions) is eminently sensible and compellingly reasoned. It also, however, raises an important issue of interpretation of measures imposing criminal liability or punishment. The established principle here is that such measures should be interpreted strictly to ensure that a person is not found guilty of a statutory offence where the statute in question did not identify his or her conduct as criminal. That normally requires clear, direct and unambiguous words.

It is at least arguable that the word "manager" in the criminal provisions of the 1996 Act lacks the necessary clarity and precision required for the imposition of criminal liability. Indeed, the fact that it was interpreted narrowly for about 150 years, before suddenly being given a broader interpretation, would seem to lend support to that argument. Moreover, McKechnie J's interpretation of the term expressly acknowledges that it is context sensitive. Again, that raises a question over its appropriateness for a penal provision. Nevertheless, McKechnie J. was not persuaded that statutory imposition of criminal liability on a manager, without further statutory definition, would fall foul of the strict construction rule.

Although McKechnie J. expressly stated that it was not his intention to dilute the value of the strict construction in the interpretation of criminal statutes, that would appear to be a by-product of his approach. He viewed strict construction as merely one of a number of canons of construction which the courts will use in pursuit of the fundamental objective of discerning the intention of the legislature. It operates in addition to, and not in substitution for, the other canons of construction; even in a criminal statute. Indeed, it would appear that the other canons of constructions are given priority in that it should only be resorted to when ambiguity remains after they have been applied. In that event, the strict construction

approach will be applied to give the benefit of the ambiguity to the accused.

McKechnie J.'s elucidation makes it clear that the mere fact that there is ambiguity in a penal provision does not mean that that ambiguity will be resolved in favour of the accused. If the ambiguity can be resolved by discerning the intention of the legislature through the application of other canons of construction, then that is what will be done. Since words are always capable of multiple interpretations, there is undoubtedly merit in that approach. Problems can arise, however, where the ambiguity is more substantial. Allowing it to be resolved in the first instance by the application of other canons of interpretation, rather than strict construction, seems harsh on the accused.

Conclusion

McKechnie J.'s decision in *T.N.* should give a welcome boost to the enforcement of regulatory criminal law in the corporate sector. Too often, regulatory standards have gone under-enforced because the person most directly responsible did not have the status of a director, manager or other officer of the company in sense that those terms have been interpreted traditionally. Typically, this is the result of specialisations within the affairs of a company being compartmentalised to the extent that the person with the necessary authority over the matter in question cannot be said to have sufficient control over the whole of the company's affairs. It can also be the result of the affairs of a much smaller company being organised in a manner that produces a similar result. Either way, the new departure in the definition of "manager" provided by McKechnie J. in *T.N.* should enhance enforcement prospects.

It is worth noting that the decision in *T.N.* does not mean that the appellant in that case was a manager for the purposes of the criminal provisions in the 1996 Act. The Supreme Court still has to decide whether there should be a re-trial of the charges in which the broader interpretation of "manager" will be applied.