THE SUPREME COURT

Supreme Court Record No. 2018 / 134

Court of Appeal Record No. 2015 / 274

O'Donnell J.

McKechnie J.

Dunne J.

Charleton J.

O'Malley J.

IN THE MATTER OF SECTION 23 OF THE CRIMINAL PROCEDURE ACT 2010

Between /

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Prosecutor/Appellant/Respondent

-and-

T.N.

Accused/Respondent/Appellant

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 28th day of May, 2020

Introduction

1. On the 27th October, 2015, following a trial in the Dublin Circuit Criminal Court presided over by His Honour Judge Patrick McCartan, the appellant, Mr. T.N., was acquitted, by direction of the learned trial judge, of nine charges under various provisions (sections

32(1), 6(a) and also 9(1)) of the Waste Management Act 1996 ("the 1996 Act"). The Director of Public Prosecutions then appealed to the Court of Appeal, pursuant to section 23(3)(b) of the Criminal Procedure Act 2010 ("the 2010 Act"), on the basis that the trial court had been wrong in law to direct a verdict of not guilty and that the evidence adduced in the trial had been such that a jury might reasonably have been satisfied beyond a reasonable doubt of the appellant's guilt in respect of the alleged offences. The relief sought reflected the wording of that subsection, and also subsections 23(11) and (12), pursuant to which a retrial of the respondent was prayed for.

2. The Court of Appeal (Birmingham J. (as he then was), Mahon and Edwards JJ. concurring) delivered two judgments in the matter: one on the 29th January, 2018, in which the court found the trial judge had indeed erred in law, and a second on the 20th June, 2018, in which, having heard further submissions from both parties, it quashed the acquittal and ordered a retrial. As can therefore be seen, the court considered the application in two parts: first, whether the trial judge had erred in the manner suggested and, if so, secondly, whether the direction should be quashed and a retrial ordered. The latter reflects the wording of section 23(11) of the 2010 Act. The appellant contended that it was appropriate for him to deal solely with the first issue in his oral and written submissions: only if and when the court found that the trial judge had indeed erred would it be possible to consider and make submissions on the second issue. The Court of Appeal accepted the merit in this argument, and it is for this reason that the issues were dealt with in separate judgments. The Court's decision of the 29th January, 2018, and its order dated the 20th June, 2018, which was perfected on the 24th August, 2018, were the subject of the application for leave filed by the appellant.

3. Having considered both the application made and the notice of opposition filed in response, the following question was identified in the Determination of this Court as being appropriate for a further appeal ([2018] IESCDET 200):

> *"Where, as in section 9(1) of the Waste Management Act 1996, a statute provides that where an offence 'has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer of the body corporate' then that person will also be liable similarly, what degree of responsibility is required to meet such a statutory definition?"*
>
> (Emphasis added)

Therefore, the central issue is the correct interpretation of section 9(1) of the 1996 Act.

4. It is not necessary to give lengthy detail as to the evidence adduced before the Circuit Court over the course of the trial; however, it is helpful to provide context for the decisions which have been made thus far. As such, an overview of the factual background and the appellant's trial is necessary.

Factual Background

5. In order to grasp the main issue under consideration it is necessary to clearly set out the various actors at play in this appeal. Mr T.N. was one of two listed on the initial indictment (though this was changed at the outset of the trial: see paras. 9 and 10 below); the other was Jenzsoph Limited ("**Jenzsoph**"). This company owned the lands where dumping and waste activity took place in Kerdiffstown, County Kildare but was not professionally represented and played no active role in the trial. The dumping and waste activity was carried out by Neiphin Trading Limited ("**Neiphin**") which occupied the facility on foot of a licence from Jenzsoph. Neiphin was a wholly-owned subsidiary of Dean Waste Limited, which

operated from a premises in Dublin 24 and traded as A1 Waste. This company was in effect owned by a Mr. Tony Dean. Neither Neiphin nor Jenzsoph appeared to have any employees and Neiphin's commercial transactions were limited to intercompany transactions with Dean Waste.

6. As mentioned above, the site of the waste management facility in issue is situated at Kerdiffstown, County Kildare and is owned by Jenzsoph. The Environmental Protection Agency ("**the EPA**") issued two waste licences to Neiphin which were to govern the operation of the facility. The first was valid from the 22nd October, 2003 until the 26th September, 2006, and the second was valid from the 27th September, 2006, until the 25th November, 2008.

7. There are introductory words at the beginning of each waste licence which specifically state that they do not form part of the licence itself and are therefore not capable of being the subject of any legal significance or interpretation; however, the description given is instructive for our purposes in order to understand the nature of the business carried out by Neiphin at the facility:

> *"This licence is for the operation of an integrated waste facility consisting of a composting facility, a non-hazardous waste landfill, inert waste land-filling and infrastructure for the processing and recovery of commercial/industrial/household waste and construction and demolition waste at Kerdiffstown, Naas, County Kildare. The facility covers an area of approximately 30.6 hectares. It is a sand and gravel pit, which has a history of various extractive and backfilling operations.*
>
> *The licence allows up to 630,000 tonnes of waste per annum to be processed at the facility, providing adequate processing capacity is available. This waste includes commercial/industrial waste, household dry recyclables, construction and demolition*

waste, compostable waste and waste previously land-filled at the facility. A lined land-fill is proposed in the void created from the extracted waste. Only pre-treated residual waste and inert waste may be land-filled.

The licensee must manage and operate the facility to ensure that the activities do not cause environmental pollution. The licensee is required to carry out regular environmental monitoring and submit all monitoring results, and a wide range of reports on the operation and management of the facility to the Agency. The licence sets out in detail under which Neiphin Trading Limited will operate and manage the facility."

8. Mr. T.N. was charged with a total of nine offences under the Waste Management Act 1996 ("**the 1996 Act**"). Charges 1-6 were general charges of causing environmental pollution in the form of nuisance through odours between the 1st November, 2007 and the 25th November, 2008 allegedly in contravention of Condition 5.3 of Waste Licence W0047-02. There was no evidence offered at trial in respect of Charge No. 4. The remainder of the charges, 7-9, related to the accumulation of waste in the northwest portion of the waste site in a manner likely to cause environmental pollution and otherwise than in accordance with that the licence, which was first in point of time bearing No. W0047-01 and as stated was valid between the 22nd October, 2003, and the 26th September, 2006.

9. The trial was a lengthy one, stretching over a 12-day period in October, 2015. At the outset of the trial, counsel for Mr. T.N. raised an issue in relation to the form of the indictment, in which his client was indicted, alongside Jenzsoph, as a principal accused. In response, prosecuting counsel clarified that the DPP's case was that there had been breaches of the EPA licences held by Neiphin, that it had failed to operate within the terms of its licences and that it had caused environmental pollution. Their case in relation to Mr. T.N.

was that he was a manager or had purported to be a manager of Neiphin and that therefore he could be charged with an offence under section 9(1) of the Waste Management Act 1996. The trial judge, on foot of this, invited the prosecution to redraft the indictment so as to accurately reflect the case being made against Mr. T.N., namely, that his culpability was alleged to arise because of his involvement in the company. Mr. T.N.'s role in Neiphin is detailed below in para. 11. The explanation given by prosecuting counsel reflected the terms of section 9(1) of the 1996 Act. This provision is central to the within appeal and reads as follows:

> *"9.—(1) Where an offence under this Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence."*

10. The redrafted indictment, upon which the trial proceeded, therefore read as follows in respect of Count 1, which is illustrative of the approach taken in respect of the other counts:

> ***"Statement of offence***
>
> *Holding or disposing of waste in a manner that causes or is likely to cause environmental pollution, contrary to s. 32(1) and (6)(a) of the Waste Management Act 1996, and contrary also to s. 9(1) of the Waste Management Act 1996.*
>
> ***Particulars of offence***
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> *Jenzsoph Limited and Neiphin Trading Limited on diverse dates between 1st February, 2007 and 25th November, 2008 (both dates inclusive) at Kerdiffstown in the County of Kildare held or disposed of waste in a manner*

that caused environmental pollution in the form of nuisance through odours. T.D. (otherwise T.Y.) N. being during that period a director, manager or other similar officer of Neiphin Trading Limited or purporting to act in such capacity consented to or connived in the commission by Neiphin Trading Limited of the said offence."

11. The essence of the evidence tendered at trial by the DPP can briefly be described as follows. The waste licences issued by the EPA required that the facility be under the control of a suitably qualified facility manager whose identity and qualifications were to be communicated to them. On the 19th March, 2004, and 17th June, 2004, the EPA received letters from an entity, titled Environment & Resource Management, on behalf of Neiphin, identifying Mr. T.N. as being this person, along with information about his professional experience and employment history. In each of the annual reports which are required to be submitted to the EPA under the terms of the licences, that company listed the appellant as the facility manager and positioned him at the top of the management chart; further, the appellant himself corresponded regularly with the EPA in regard to the Kerdiffstown facility. This correspondence, written on A1 Waste headed notepaper, contained the signature of the appellant, but expressed in slightly different ways. From early 2004-2008, he signed it "T.N., Director"; then from October 2008 to mid-2009, the letters were signed "T.N., Managing Director". Some letters in late 2009 were signed with just the appellant's name and subsequent to those the letters were signed with "T.N., Environmental Consultant". Documents from the Companies Registration Office record him as being a director of Dean Waste Limited from late 2008 until mid-2009, although he has never been recorded as a director of either Neiphin or Jenzsoph.

12. At trial, it was argued on behalf of Mr. T.N. that he did not come within the terms of section 9(1) of the 1996 Act as he was not a manager, director or other similar officer of

Neiphin and had never purported to be one: rather, he was a consultant, as was evidenced by the fact that he had been remunerated for his role by way of fees paid to a company called 'N... Environment Services Limited', of which he and his wife were named directors.

13. At the conclusion of the prosecution's evidence, counsel for the appellant sought clarification as to the meaning of section 9(1) of the 1996 Act and as to the ingredients of the offences his client was charged with. Secondly, he made an application for a direction, submitting that the prosecution's evidence, taken at its high-water mark, was such that a properly directed jury could not properly convict upon it, as there was no evidence from which such a jury could conclude that Mr. T.N. was a director, manager, secretary or other similar officer of Neiphin for the purposes of that provision. The prosecution countered that the section should not be accorded the narrow construction being urged by the accused and that there was evidence on which a jury could find that Mr T.N. was a manager or other similar officer within the meaning of section 9(1). Many of the submissions made by counsel are repeated below and as such it is not necessary to go into any further detail on them at this point.

Ruling of the Circuit Criminal Court

14. Following the submissions referred to, the learned trial judge, on the 27th October, 2015, delivered an *ex tempore* ruling in which he said that, based on the evidence which had been put forth by the prosecution, he was not confident that the necessary fundamental evidence of the appellant's "qualifying" position at Neiphin had been established. Judge McCartan engaged with many of the authorities which will be referred to later and concluded that while Mr. T.N. was doubtless a person in a position of authority in the company, he could not be said to be a " director", "manager", "secretary" or "other similar officer" in the

sense intended by the provision. He stated that all of the authorities open to the court were to the effect that when dealing with a provision such as section 9(1) of the 1996 Act, a penal provision, there was no scope for broadening its interpretation in order to entrap what he described as "underlings", such as consultants, advisors and those who are not in charge of "the whole of the affairs of the company". He proposed, therefore, to direct the jury to find the accused not guilty on all charges.

15. In this ruling, the trial judge went on to say that while Mr. T.N. took an active position and was a significant player in Neiphin, nonetheless he did not take any active role in directing the operations of this particular site. There were certain pieces of evidence tendered which seemed particularly persuasive to the trial judge on this issue. First, there was the evidence given by Mr. Donal Howley, an EPA inspector who said that there was no direct evidence available to him about Mr. T.N's directing daily operations on the site; second, the evidence of Mr. Patrick Darcy, a chartered accountant and expert witness who testified as to the fees which were paid to the appellant's consultancy company, as opposed to being paid directly to him as an employee of Neiphin; finally, there was the evidence of three site employees who all stated that the day-to-day running of the site was done by others.

Court of Appeal

16. Following the decision of the trial judge, the DPP appealed to the Court of Appeal pursuant to section 23(3)(b) of the 2010 Act, seeking to establish that the conclusions reached by the trial judge were wrong as a matter of law and that the evidence tendered was such that a jury might reasonably find the accused guilty beyond a reasonable doubt. As part of this submission the DPP criticised the trial judge's approach as having insufficient regard to the fact that the evidence at trial suggested that the operation of the facility at Kerdiffstown and

the business of Neiphin were in substance the same thing. The Director also said that while there may have been aspects of the company – such as finance – which the appellant did not bear responsibility for, the areas for which he had direct responsibility were all inextricably linked with an obligation to ensure compliance with the terms of the licences.

17. The Court of Appeal, in its first judgment which was delivered on the 29th January, 2018, indicated that it would only be dealing with the issue raised under section 23(3)(b)(i), *i.e*. the issue of whether the directed acquittal in the Circuit Court was wrong in law. The judgment of the court deals with each authority raised and it was noted that the trial judge appeared to have been heavily influenced in his decision by these authorities, most of which are from English jurisprudence. Since these cases have been cited again by both parties in their submissions to this Court it seems to make the most amount of sense to give a summary of each at the beginning of the discussion section of this judgment, at para. 53.

18. The Court of Appeal expressed hesitation over placing any great amount of weight on these cases, in particular the oldest of them. The reasoning for this was simple: the Waste Management Act 1996 is a modern statute which must be viewed in a modern context. Given that the section explicitly states that it intends to capture managers, directors or other similar officer of bodies corporate, any individual who may be found liable under this statute must hold responsibility at a corporate level and against the backdrop of modern corporate structures which have progressed significantly in their operation since, say, 1875, which was when one of the authorities relied on at trial had been decided. The Court of Appeal recognised the reality of large modern corporations which have different departments and different layers of responsibility, all assigned to various directors, managers and secretaries in such a way as to make it difficult to assign to one or a few individuals the responsibility of managing the affairs of the company as a whole. The relevant passages of the Court of Appeal's decision are set out at para. 131, *infra*.

19. In the Court of Appeal's view, if a corporation has an individual tasked with managing safety, their role is significant enough to be classified as a manager or other similar officer under the statutory scheme, even though there are several areas of management in which they will have no input whatsoever. In this respect, regard would clearly be had the nature and size of the corporation in question. The example given by Birmingham J. was that of a branch manager of a bank, whose position clearly could not be equated with the manager of the bank as a whole (this in a situation where that bank had a nationwide branch network). However, if the branch manager was one of a bank which only had one or very few locations it is more conceivable that they could be considered as coming within the scope of section 9(1).

20. In relation to the appellant's case, the Court of Appeal was not in doubt that it was possible to take the view that on the evidence presented to them Mr. T.N. was managing the Kerdiffstown facility, which represented the core of Neiphin's activity. In fact, Birmingham J. said it would not be to overstate matters to say that the facility in Kerdiffstown represented the entirety of Neiphin. The trial judge, in his view, had erred in focusing his attention on whether there was evidence that Mr. T.N had the capacity to direct the whole of the affairs of the company and had the power and responsibility to decide corporate strategy. The question to be asked, in the view of the Court of Appeal, was in fact whether Mr. T.N. was functioning as a senior manager, having functional responsibility for a significant part of the company's activities and having direct responsibility for the area in controversy, namely, the Kerdiffstown waste site.

21. The Court went on to hear further submissions on the follow-on issues, by virtue of section 23(3)(b)(ii) and section 23(11)(a), at a hearing on the 11th June, 2018, being first whether there had been evidence adduced at trial on which a jury might reasonably have been satisfied beyond a reasonable doubt of the appellant's guilt in respect of the alleged offences

and, second, whether in all circumstances it would be in the interests of justice to order a retrial. Their second judgment in the matter was delivered on the 20th June, 2018.

22. In relation to the first question as to the sufficiency of the evidence adduced, the Court commented that simply because the defence could point to evidence which would support their position and offer alternate interpretations of the evidence adduced by the prosecution to further support their case did not mean that the case was not suitable for a retrial. They considered carefully the arguments which had been made in relation to whether there was evidence on which a jury could conclude that Mr. T.N. was a manager or other similar officer or had purported to act in such a manner and concluded that this was indeed the case and that, in fact, the position was so clear as to be almost beyond argument. Any arguments canvassed by the defence or any further arguments they wished to canvass could be done if a retrial was ordered.

23. The Court then moved to consider whether a retrial, having regard to all circumstances, would be in the interests of justice pursuant to section 23(11)(a)(ii). Factors which are to be taken into account in this regard are set out in section 23(12):

a) *Whether or not it is likely that any re-trial could be conducted fairly;*

b) *The amount of time that has passed since the act or omission that gave rise to the indictment;*

c) *The interest of any victim of the offence concerned; and*

d) *Any other matter which it considers relevant to the appeal.*

24. The DPP had urged in this regard that the alleged offences were very serious and carried severe penalties including a possible ten-year custodial sentence. This, coupled with the prolonged nature of the offending behaviour, was submitted by the DPP as warranting a

retrial in the interests of justice. The Director submitted that the retrial could be conducted fairly notwithstanding any difficulties which had arisen and the length of time which had passed since the alleged offences took place. On this point, the appellant very strongly challenged the contention that the lapse of time would not affect his chances of having a fair trial, given that the offences occurred between 2003-2008, the first trial was in 2015 and his appeals process was now taking place throughout 2018-2019, meaning it was likely that it would be at least 2020 before a retrial would take place.

25. Birmingham J. noted that there were no individual victims of the offences, bar those individuals living in the locale who had testified as to the environmental damage and pollution to the community as a whole. Both sides, in particular the appellant, referred to the decision of this Court in *DPP v JC (No. 2)* [2017] 3 I.R. 417 on the basis that Mr T.N.'s situation had much in common with that of *JC*, in that the Court's application of the statutory provision transcends the facts of the present case and is one of widespread application. The Court of Appeal, however, distinguished that case for several reasons and did not see it as analogous: the charge *JC* faced, while by no means trivial, was fairly routine and the law in that area was settled; the trial judge applied the law as she was expected to do and the result was that *JC* was acquitted. The retrial would have taken place against a backdrop in which the legal landscape had changed. That was not the situation here. Here, counsel for Mr. T.N. argued for a particular interpretation of a statutory provision which persuaded the judge with the result that he was acquitted. Following the Court of Appeal's finding that the trial judge was wrong to be persuaded by these legal arguments, they further took the view that the matter should be re-tried and the merits of the case should be determined by a jury.

Appellant's Submissions

26. The first submission made by the appellant relates to the distinction between secondary and derivative liability. Having quoted section 7(1) of the Criminal Law Act 1997, which sets out the ingredients for secondary liability ("any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender"), it is said that section 9(1) creates a separate and distinct offence by virtue of the fact that the required *mens rea* is passive as opposed to active, as would be required for an offence of secondary liability. *The People (DPP) v Hegarty* [2011] 4 I.R. 635 is referred to in support of this argument. It is denied that the trial judge's interpretation of section 9(1) defeats the purpose of the 1996 Act, because section 7 of the 1997 Act enables a person in a supervisory role to be prosecuted as a principal where they have "aided, abetted, counselled or procured" the commission of the offence in question (see para. 97, *infra*). Section 9(1) and other similar provisions impose a form of derivative liability which does not preclude individuals from being prosecuted as principal offenders.

27. It is submitted that the expression "committed with the consent or connivance of or to be attributable to the neglect on the part of a person" should be taken to mean that the offence is one of omission or failure to act and consequently is not directed at persons who are in immediate control such as supervisors, health and safety officers and environmental compliance officers, but rather those who have overriding control over the decisions made by the body corporate.

28. The appellant makes submissions on the English authorities; again, as these have been detailed and summarised in the discussion section below (see para. 53 et *seq*.) it is only necessary to briefly note the submissions which have been made in relation to each of them. The appellant points to *Gibson v. Barton* (1874-75) L.R. 10 Q.B. 329 and Blackburn J.'s understanding of a manager being someone who is entrusted with the power to transact the whole affairs of the company. In *The Registrar of Restrictive Trading Agreements v. W.H.*

Smith [1969] 3 All E.R., [1969] 1 W.L.R. 1460, Lord Denning M.R. cited with approval the decision in *Gibson* and the meaning of the word "manager" ascribed in that case. It is submitted that the phrase used in *Woodhouse v Walsall Metropolitan Borough Council* [1994] Env. L.R. 30, where the relevant statutory provision was for all essential purposes the same as in the instant case, in regard to a decision maker who "had both the power and responsibility to decide corporate policy and strategy", is instructive as it implies that a manager's function must go beyond a specific area of expertise and relates to the functioning of the body corporate as a whole. The appellant submits that the line of authority which commences with *Gibson* and includes *R v. Boal* [1992] Q.B. 591 and *Woodhouse* is the settled line of authority and position in the United Kingdom. The only countervailing authority, *Armour v. Skeen* [1977] I.R.L.R 310, 1977 J.C. 15, is submitted as being confined to its own facts and out of line with the other authorities. This much was noted by McCowan L.J. in *Woodhouse*, where he described *Armour* as providing no assistance.

29. It is said that the Court of Appeal's views runs contrary to those principles and creates a situation whereby section 9(1) is vague and unclear. It is submitted that the rules in relation to the construction of penal statutes are well settled, and the dicta of Hardiman J. in *Motemuino v Minister for Communications and others* [2013] 4 I.R. 120 is quoted in this regard. It is further claimed that another well-established principle is the presumption against doubtful penalisation, considered by Kearns J. in *DPP v Moorehouse* [2005] IESC 52, [2006] 1 I.R. 421 and by Finlay Geoghegan J. in *Dunnes Stores v Director of Consumer Affairs* [2006] 1 I.R. 355. It is then submitted that the approach taken by this Court while considering an almost identical provision to that under consideration in this case in *DPP v Hegarty* [2011] 4 I.R. 635, in a judgment which I delivered, was a strict one, which reflected the principles established in the authorities above mentioned.

30. It is the appellant's submission that a strict interpretation of the subject provision would lead to a reading which is consistent with the older English authorities which have been referred to. The appellant submits that if one was to apply the principles of *noscitur a sociis* and *ejusdem generis* both would lead to the meaning of "manager" being in accordance with the English authorities. Quoting from *Dodd on Statutory Interpretation in Ireland* (2008, Bloomsbury Professional, Dublin) at para [5.68], the authors have said that *ejusdem generis* is a particular aspect of *noscitur a sociis*. Where there is a list of genus-describing terms followed by wider, residuary or sweeping words, the ordinary or wide meaning of those residuary words is presumed to be limited to things of that class or genus. The appellant's submission is that the expression "or other similar officer" which comes at the end of the list "director, manager, secretary" is to be limited to the scope of the list and thus is limited to a person who holds high office within a body corporate. It is also submitted that the addition of this phrase "of the body corporate" requires that the person in question be operating at the level of the company and not an individual unit thereof.

31. The Court of Appeal's definition, in the appellant's view, sets at nought the expression "of the body corporate" in favour of "a significant part of the company's activities", and as a result the potential liability under the section has been vastly extended. This definition would mean that in fact a person's liability would be determined by virtue of the size of the corporation in question; for example, a facility manager would potentially be liable if working in a company which only operated one facility, whereas might not be in a company which operated multiple facilities.

32. The appellant has also made submissions about the expression "other similar officer" which, he submits, is not universally used in statute. He points to certain provisions of other Acts to demonstrate this. Section 58 of the Criminal Justice (Theft and Fraud Offences) Act 2001 refers to "a director, manager, secretary or other officer of the body corporate" which in

the appellant's view implies a wider definition of "officer". Furthermore, it is pointed out that the approach of using the expression "other similar officer" prevails in the United Kingdom and that had the Oireachtas intended to depart from the settled definition of the expression and the relevant line of authorities, it would have used a different construction or expression. In support of this the appellant points to section 79(4) of the Investment Intermediaries Act 1995, which also has an offence which is committed by way of consent, connivance or facilitation by any neglect of a person; however, this offence can be committed by "any officer or employee" of the investment business in question. The appellant submits that the Oireachtas clearly intended that normal employees, as opposed to high officers only, could be guilty of an offence under that section. Similarly, section 19 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 provides that the offence under that section may be committed by a "director, manager, secretary, member of any committee of management or other controlling authority of such body or official of such body".

33. The next submission made by the appellant is that the test set out by the Court of Appeal, if adopted, would introduce an impermissible uncertainty and vagueness into the law. In support of their submission that the criminal law should always be certain they have quoted passages from numerous cases including *King v. The Attorney General* [1981] I.R. 233, *People v. Cagney and McGrath* [2008] 2 I.R. 111 and *Attorney General v. Cunningham* [1932] I.R. 28. The appellant's submission based on this principle is that, as a matter of constitutional importance, a person should know with some certainty in advance of their acting a certain way whether they are in a category of persons who might be liable in criminal law for those acts. It is submitted that the Court of Appeal's test is uncertain by virtue of it being based more on the kind of organisation in question and the manner in which its corporate structures are organised. It is also submitted that there is a clear connection between the vagueness doctrine and the duty of the Oireachtas to articulate such principles

and policies in legislation creating criminal offences in order to satisfy the requirements of Article 15.2.1° of the Constitution.

34. In conclusion, it is submitted that the manner in which the Court of Appeal has defined the expression "director, manager, secretary or other similar officer" is contrary to the established authorities and doctrines of statutory interpretation and has greatly expanded the categories of person potentially facing criminal sanction, while simultaneously narrowing the scope of the section by inserting a condition precedent which is not included in the wording of the section: "having direct responsibility for the area in controversy". Furthermore, it is said that the judgment of the Court of Appeal is unsatisfactory as it leaves the interpretation of the section uncertain and open for arbitrary application, thus offending the requirement for certainty in the criminal law. The appellant submits that this Court should allow the appeal herein and reverse the order made the Court of Appeal.

Respondent Submissions

35. The respondent submits that the decisions of the Court of Appeal were fully correct and that the trial judge was incorrect in law when he gave the direction which he did. The DPP's written submissions set out in very considerable detail the evidence put before the trial court, this in support of the respondent's position that there was enough evidence available to prove to a jury, beyond a reasonable doubt, that the appellant is guilty of the alleged offences.

36. The DPP's submissions focus on the meaning of the word "manager" as it appears in section 9(1) and the authorities which have been central to the discussion thus far. The respondent points out at the outset that sections 9(1) is analogous to other provisions found in many pieces of legislation: section 80(1) of the Safety Health and Welfare at Work Act 2005, section 869(2) of the Companies Act 2014 and section 1078(5) of the Taxes Consolidation

Act 1997. The respondent disputes the helpfulness of section 79(4) of the Investment Intermediaries Act 1995, relied upon by the appellant, because in her view it imposes criminal liability on a much larger class of persons and as such is not comparable to section 9(1) of the 1996 Act.

37. The respondent contends that if the appellant's submission as to the meaning of "manager" in the legislation is correct then it would follow that any senior person entrusted by a body corporate with overall responsibility for safety in a factory, such as a safety manager, would not be liable for breaches of safety occurring with his consent, connivance or neglect within the factory, purely on the basis that he had no role in managing the affairs of the body corporate as a whole. The same could be said for those who are managers responsible for regulatory compliance within a financial institution. The respondent submits that contrary to the appellant's submission, the meaning of section 9(1) accords with a meaning of managerial function, which includes a supervisory control over a portion of the body corporate's affairs even though the manager in question does not have supervisory control or managerial power over every aspect of the affairs of the company. This, in the prosecution's submission, supports the correct view of a proper corporate governance structure which typically involves delegation of large elements of responsibility. Different elements of management responsibility are delegated to different managers.

38. Further to this, the respondent points to the evidence relating to the appellant's position at Neiphin, including his correspondence with the EPA on behalf of Neiphin on A1 Waste headed paper, which the respondent submits is a clear demonstration of his managerial authority. The respondent claims that there was ample evidence from which a jury could infer that he was a manager or other officer of Neiphin with responsibility for overseeing all compliance issues relating to the licence and exercising power to give direction on behalf of Neiphin.

39. The respondent submits that, when the provisions of the Waste Management Acts are looked at as a whole, it is clear that it would be contrary to the objectives of the Oireachtas, as derived from the plain language of the Acts, to exempt those who are acting as managers within a body corporate with responsibility for overseeing environmental compliance from criminal liability on the basis that such persons are not entrusted to transact the whole affairs of the company. Specifically, in relation to section 9(1), the respondent makes the point that the wording does not require the person purporting to act as a manager or other officer to be "entrusted" with anything, it only requires an assumption of responsibility by that person.

40. Furthermore, it is submitted that the language of the Act contemplates that there may be a degree of informality within corporate structures and that this is true of the appellant's case, wherein he was acting as director of A1 Waste and acting as manager of its subsidiary's waste facility, giving orders on its behalf, making agreements and giving assurances to the EPA without formally being a director or even an employee of Neiphin. In support of this, the respondent has cited *Chaudhry v. HM Revenue & Customs* [2007] EWHC 1805 as an example of a person incurring liability by functioning as a director though he was not the person running the company. In that case, Chaudry rendered himself liable for prosecution in relation to company accounts by functioning as a director, though he was not formally running the company and was not a named director.

41. The statutory provision's reference to a director is explained by the respondent as possibly meaning a range of different roles and responsibilities within a company. Article 80 of Table A Part I of the Companies Act 1963 regulates the powers of directors of limited liability companies which incorporate that article into their articles of association. A director in such a company may have no independent decision-making power, the day-to-day management powers may have been delegated by the board to a managing director or to one of a number of general managers who are not directors but who are officers of the company.

In such a situation a director may be liable under provisions such as section 9(1) as a result of either active participation in bad management or neglect in exercising oversight. Criminal responsibility may depend on the management role which any given director exercises or purports to exercise within the company and whether the offence of the body corporate was attributable to his consent, connivance or neglect.

42. Again in relation to the specific wording of section 9(1), the respondent highlights the fact that the provision refers to "a manager" and not "the manager" and that the wording does not limit the meaning of officer to that of a statutory officer. The respondent submits that the section intends to capture both those who hold formal appointments and those who purport to act in such capacity. A fact-finding tribunal must examine the evidence as to the position of the person alleged to be a "director, manager, secretary or other similar officer … or purporting to act in any such capacity" and determine whether he is such. If the tribunal concludes that the person is acting as a "manager" within the meaning of the Act then they may ignore the fact that there is no evidence of a contract of employment or that the arrangement for payment is by means of transfers to a company purportedly providing consultancy services, as the appellant alleges was the case for him. In short, the respondent submits that the terms used in section 9(1) relate to management functions, not employment situations.

43. The next submissions are in relation to the authorities relied upon by the appellant, some of which the respondent has submitted were decided in different factual and legislative contexts to the present scenario, dealing with the use of expressions such as "director and manager" in legislation involving joint stock or limited liability companies established in the United Kingdom as far back as 1862. On this point the respondent points out that the 1996 Act is not confined in this way: it applies to all bodies corporate, such as local authorities, friendly societies and so forth.

44. The respondent first deals with *Gibson v. Barton* and submits that in that factual scenario, the filing of company returns was a function of central management and that if the situation had occurred within a large, modern corporate structure wherein central management had delegated the role to some senior figure exercising a managerial function within a particular department, the result could well have been different. The respondent distinguishes *R v. Boal* on the basis that Mr. T.N. had, in her submission, specific managerial responsibility for overseeing compliance with waste management legislation.

45. The respondent does not accept that it is necessary that the manager or other similar officer needs to be a decision-maker within the company with power and responsibility to decide corporate policy and strategy, as was required in *Woodhouse*, which the appellant has also relied upon. The decision in *Woodhouse* was to the effect that there was insufficient evidence to show that the manager was a decision-maker within the company. The court concluded that the magistrates had been incorrect in recording a conviction where it had not in fact been open to them to determine that the appellant was in "real authority". The liability in question stemmed from section 87(2) of the Control of Pollution Act 1974, which provided that if the commission by any person of any offence under the Act was due to the fault of another person, then that other person would also be guilty of the offence and could be charged regardless of whether there was a prosecution of any other person for the offence. The respondent submits that in that context, "other person" was clearly construed as having a different meaning to "any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in such capacity".

46. It is submitted that much of the reasoning in *Woodhouse* was based on *Tesco Supermarkets Ltd v. Nattrass* [1972] A.C. 153, which concerned the issue of whether corporate responsibility could be placed on Tesco for acts of a manager of one its supermarkets. It is submitted that the *Tesco* case in fact focused on whether the company had

taken all reasonable precautions and exercised due diligence to avoid the commission of an offence which was due to the act or default of "another person". The respondent submits that the House of Lords, in their consideration of the case, clearly recognised the delegation of responsibility in corporate structures both formally and informally. In particular, the DPP cites a passage from Lord Reid in which he stated that he does not see any difficulty with a delegation of management functions by a board of directors to someone who is then entitled to act with full discretion and independently of any instruction from them, essentially so that the delegate may act as the company. The respondent submits that these views are not inconsistent with those espoused by the Court of Appeal in this case.

47. The respondent submits that the factual scenario of the within case is in fact much more akin to that which occurred in *Armour v. Skeen*. The respondent submits that the relevant section in that case was virtually identical to section 9(1) and that there was sufficient evidence to conclude that the defendant was acting as a manager, having regard to his position within the Council and the duty imposed on him in connection with the provision of a general safety policy for his department.

48. The respondent then turns to consider *DPP v Hegarty*. That was a decision in which this Court discussed an equivalent provision in the Competition (Amendment) Act 1996, in which influential position holders within a company could be found guilty of an offence without the body corporate itself being prosecuted. The respondent has submitted that it is instructive that the decision refers to those without whose involvement the offending conduct could not be endorsed or approved and did not refer to those people needing to have the power to direct the whole of the company's affairs. The respondent submits that the appellant, in his position and performing his function at Neiphin, was precisely the sort of person the Court had in mind in *Hegarty*.

49. The DPP further submits that the test which was laid down by the Court of Appeal in this case is consistent with the interpretation given by this Court in *Hegarty* at para. 31 (see the quote at para. 94, *infra*). The respondent contends that had this interpretation and the test as set out by the Court of Appeal been applied in each of the English authorities mentioned thus far then the outcomes would not have been any different. In the case of Mr. Boal, no official function had been delegated to him and the prosecution would not have been successful. The manager of the W.H. Smith branch in question would not have come within the section, nor would the manager of the Tesco supermarket. However, the respondent submits that the person delegated to manage Tesco's compliance with environmental legislation would not escape criminal liability in a relevant prosecution merely because he or she had no role in determining the terms upon which Tesco would do business with its suppliers or where the company would locate its next store. Finally, the DPP submits that the Director of Roads for Strathclyde Council would still have been liable in *Armour v. Skeen*.

50. In relation to the appellant's submission about rules of strict construction of penal statutes, the respondent does not dispute that penal statutes are certainly to be construed strictly; however, she does not agree that these rules can form a basis for a restricted interpretation of section 9(1) or indeed that they are relevant to the Court's consideration of the provision. She submits that there is nothing vague or uncertain about the provision, nor is the test set out by the Court of Appeal as narrow as the appellant has submitted. The respondent does not agree with the appellant's submission that the test laid down by the Court of Appeal potentially extends liability to a compliance manager responsible for an individual unit; it is submitted that the Court of Appeal in fact made it clear that their test was not intended to capture what has been termed by the respondent as "middle management". No such manager of an individual unit would be captured by the section unless their unit was itself a significant part of the body corporate's activities. It is submitted that it is in no way

objectionable that a court would have regard, when analysing the degree of responsibility afforded to a manager, to the nature and extent of the activities of the body corporate in question.

51. It is further submitted in relation to the Court of Appeal's test that the standard set out in it is the appropriate level of responsibility required of a person in a managerial position in respect of a prosecution under the relevant section. Finally, it is submitted that simply because there may be an alternative avenue open to the respondent by way of section 7(1) of the Criminal Procedure Act 1997 does not of itself mean that section 9(1) of the 1996 Act and analogous sections should be construed as narrowly as is urged by the appellant.

52. In conclusion, the respondent's position is that the trial judge's acquittal of the appellant arose from an error of law and the application of an incorrect test. She contends that there was most certainly enough evidence to satisfy a jury beyond a reasonable doubt that Neiphin had committed the alleged offences and that the appellant had consented to or connived in this in his capacity as a manager or other similar officer of Neiphin.

Decision/Discussion

Central Authorities

***Gibson v. Barton* (1874-75) L.R. 10 Q.B. 329**

53. This is the oldest authority which has been referred to by the parties. It related to the obligation of a company, under section 26 of the Companies Act 1862, to furnish the registrar of joint stock companies, at least once a year, with a list of all its members within 14 days following the holding of the ordinary general meeting of the company. In the event of non-compliance, section 27 of that Act created a penalty for which "every director and manager of

the company who shall knowingly and willingly authorise or permit such default" was liable. The appellant in the case was the company's secretary. There had been no manager appointed and the articles of association did not provide for the appointment of one. No ordinary general meeting of shareholders had been held in the year 1873, and the applicant had taken no steps in this respect: accordingly, no list of shareholders had been forwarded to the registrar as required by section 26 of the Act. He was convicted on an information charging him, as manager, with authorizing such default.

54. The appellant appealed his conviction. One of the questions for the court was whether there was evidence on which to find as a fact that the appellant was the manager of the company in question. Blackburn J. gave the judgment of the majority. In his view, this first question involved two things: whether there was evidence that the appellant was a manager in any sense, and if so whether the sense in which he is shown to be a manager was a sense that would make him liable to the penalty under section 27. He was of the view that in both respects the Lord Mayor (who had made the decision at first instance) was right and that his judgment should be affirmed. In addressing this first question the learned judge stated as follows:

> "Sect. 27 enacts, if the company makes default, and does not forward a list of members, the company shall incur a penalty, 'and every director and manager of the company who shall knowingly and wilfully authorize or permit such default, shall incur the like penalty.' In what sense are the words 'director' and 'manager' used in that section? When the section says 'director,' it is plain enough a director is a director, but the words are 'and manager.' We have to say who is to be considered a manager. A manager would be, in ordinary talk, 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 intrusted with power to transact the whole of the affairs of the company." (Emphasis added)

Mr T.N. has placed much emphasis on the underlined portion of the above extract; indeed, it is central to his case. In his submission, the word "manager" as appearing in section 9(1) of the 1996 Act ought to be afforded the same meaning as that outlined.

55. It should be noted that the appellant's conviction was nonetheless affirmed; there was evidence that he was manager *de facto*, and therefore a manager within section 27; as he took no steps in 1873 to call a meeting, and thereby made it impossible for the company to forward to the registrar a list of its members, there was evidence that he had knowingly and wilfully authorized a default within the meaning of section 27. Quain J, dissenting on this point, took the view that being a *de facto* manager was not enough; in his view, in order to be liable under the section, one would need to be a manager "in the statutable sense".

***In Re B. Johnson & Co. (Builders) Ld.* [1955] Ch. 634; [1955] 3 W.L.R. 269**

56. One of the issues in this case was whether a bank-appointed "receiver and manager" of a company was a "manager" or "officer of the company" for the purpose of misfeasance proceedings under section 333(1) of the Companies Act 1948, which permitted of an examination into the conduct of any "director, manager or liquidator, or any officer of the company" who appeared to have misapplied any property of the company in the course of its winding up. The term "officer" was defined in section 455 of the Act as including a director, manager, or secretary. The applicant, who had been chairman and manager of the company, sought an order for the investigation of the conduct of the receiver, against whom he alleged several acts of negligence.

57. At first instance Sir Leonard Stone V.-C. directed that the matter could proceed against the receiver. He appealed, arguing that he (having been receiver and manager appointed by the bank under the terms of a debenture) was not within the category of persons to whom section 333 was applicable. The Court of Appeal allowed his appeal, with the leading judgment being delivered by Evershed M.R. He noted that where a person is appointed as receiver and manager, he, in such circumstances, is not carrying on the business for the benefit of the company, but rather for the benefit of the mortgagee bank, which is to realize the underlying security. In rejecting the proposition that the appellant was a "manager" for the purposes of the section, the learned Master of the Rolls stated as follows:

> "The question remains, however, whether any person of Mr. Aizlewood's position is a 'manager,' as that word is itself used in the subsection. Contrary to the view of the Vice-Chancellor, I have come to the conclusion that he is not. I have already indicated (as is well known) that a person in Mr. Aizlewood's position, though called a 'receiver and manager,' is, in fact, one who is appointed a receiver, not with any duties to carry on the business of the company, in the best interests of the company, but in order to realize, for the debenture holders or mortgagees, the security which they have got; and only for that limited purpose is he given powers of management.
>
> …
>
> The distinction may at first sight seem fine between a receiver and manager of the property of a company, on the one hand, and a manager of the company, on the other, being the formula found in section 333; but the logic of it and the substance of it is that which is to be found in what I have already said – that a person appointed receiver and manager, so-called, is not managing on the company's behalf but is managing in order to facilitate the exercise by him, for the mortgagees, of the mortgagees' power to enforce the security. … In short, the word 'manager' in this

section, to my mind, excludes one who is only a manager because he is, as receiver (which is his real capacity), endowed for the purposes of his receivership with certain powers of management." (pp. 646-647)

58. In his concurring judgment, Jenkins L.J. stated as follows:

"These indications, for what they are worth, suggest that the Act regards the receiver and manager of the property of a company as in a special category, distinct from that of a manager of a company. But the decisive consideration, to my mind, is that the phrase 'manager of the company,' *prima facie*, according to the ordinary meaning of the words, connotes a person holding, whether *de jure* or *de facto*, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit; whereas a receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture, and, as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture holders." (p. 661)

59. With respect, though the decision is sometimes referred to in the later cases, I do not consider it to be of much, if any, assistance to the within appeal. It addresses the rather precise question of whether a receiver, appointed by a debenture holder or mortgagee, was a manager within the meaning of the specific malfeasance provision in question; while the discussion on that point is interesting, it is only of very little relevance beyond those confines.

Registrar of Restrictive Trading Agreements v. W.H. Smith & Son Ltd & Others **[1969] 1 W.L.R. 1460, [1969] 3 All E.R. 1065**

60. Next in time of the cases referred to was *Registrar of Restrictive Trading Agreements v. W.H. Smith & Ors*. At issue in this case was a suggested restrictive trading agreement involving three wholesale newspaper suppliers in Newport, South East Wales. A complaint was made by a retailer of a dairy shop in that city to the Registrar to the effect that she had been denied supplies of national newspapers by the only three wholesalers in the area. The registrar commenced inquiries into the existence of a possible registrable agreement or arrangement between the wholesalers which had not been registered and as part thereof served the three of them with a notice requiring each to provide details of their agreement. All three denied, either orally or in writing, that they were involved in any such arrangement. The registrar, seeking to investigate the matter further, then applied to the High Court for an order to examine on oath certain of the people involved, including the branch managers in Newport for W.H. Smith and Menzies, two of the wholesalers involved. The High Court refused to grant such orders and the Court of Appeal upheld this decision on an appeal thereto. In short, their reasoning was that these branch managers, though each bearing the title of a manager, clearly had no business in the management of the company as a whole and as such were not in any way concerned with restrictive trading agreements. On the facts the Court of Appeal further held that in any event there was no reasonable cause for believing that they had made a registrable agreement or arrangement when each of them had good economic reasons for its refusal to supply and, in addition, also held that the orders should have been refused in light of the registrar's delay in applying for them.

61. The provision in question was section 15(3) of the Restrictive Trade Practices Act 1956, which provided as follows:

> "Where notice under section 14 of this Act has been given to a body corporate, an order may be made under this section for the attendance and examination of any director, manager, secretary or other officer of that body corporate."

62. What is significant, of course, is what was said about the meaning of the words "manager" and "other officer". The question was whether these words included the branch managers. The registrar argued that the word "manager" should be given an extended meaning. He said that it was wide enough to cover not only the general manager of a company, but also a divisional manager, a branch manager, a local manager, and even a shop manager. Such a manager, it was argued, is the very person who may make a restrictive agreement: he is, for this purpose, the mind and will of the company. Therefore, according to the registrar, he is the person who should be interrogated.

63. However, Lord Denning M.R. was not persuaded by this argument. Based on the legislative history of section 15, he was satisfied that those terms had the same meaning as in the Companies Acts. He said:

> "I can understand the registrar's point of view; but I do not think that it is correct. It is not right in this section to give the word 'manager' or 'officer' an extended meaning. It is contrary to the spirit of our law. The law of England abhors inquisitorial powers. It does not like to compel a man to testify against himself. It never wants him to incriminate himself or to be faced with interrogation against his will. It prefers the case to be proved against him rather than that he should be condemned out of his own mouth. When Parliament thinks it right to give the power to administer questions, it should do so in clear terms, specifying who is the person to be interrogated: just as it should make clear who is the person to be made guilty of a criminal offence."

64. Denning M.R. referred to the passage from *Gibson v. Barton* underlined at para. 54, *supra*, and also to the extract from the judgment of Jenkins L.J. in *In re B. Johnson & Co. (Builders) Ltd.* quoted at para. 58, *supra*. He therefore concluded as follows on this point:

"That [referring to the judgment of Jenkins L.J.] is the meaning of the word 'manager' in the Companies Acts 1862 – 1967 and we should apply it here also. The word 'manager' means a person who is managing the affairs of the company as a whole.

The word 'officer' has a similar connotation. 'Officer' may include, of course, a person who is not a manager. It includes a secretary. It would also include an auditor, and some others. But the only relevant 'officer' here is an officer who is a 'manager'. In this context it means a person who is managing in a governing role the affairs of the company itself.

Applying this interpretation, the local managers, Mr. Walker [Menzies] and Mr. Vaughan [W.H. Smith], do not manage the affairs of the company. They are only local. They do not come within the description of 'any director, manager, secretary or other officer' of either of these two companies. No order can be made against them under section 15 of the Act. I agree with Cross J. on this point. I do not see that this need impede the registrar in doing his work. If he gives notice under section 14 to a company, it should be answered by a director, manager, secretary or other officer of the company. The person who answers must answer for all concerned in the company. … If the secretary of the company answers them, he must make inquiries of all those employed by the company, so as to see that the questions are answered truly … Similarly, if a manager or officer is ordered to attend and be examined under section 15(1), he should gather information beforehand so as to be able to answer all relevant questions." (Emphasis added).

65. With the greatest of respect, I doubt very much that the quote of Jenkins L.J. relied upon by Denning M.R. necessarily supports the reading which he gave it. First, he never used the words managing the "whole affairs of the company" or "the affairs of the company as a

whole"; but of much more significance is the fact that the decisive point in *In re B. Johnson & Co. (Builders) Ltd.* was the distinction between managing a company *for the benefit of the company*, which a receiver does not do, and managing the company for the benefit of the debenture holders, which is the receiver's function. So read, I have great reservations that Jenkins L.J. was importing the definition of "manager" set out in *Gibson*. Nonetheless, that clearly is the definition which Denning M.R. felt should be attributed to the section.

***Tesco Supermarkets Limited v. Nattrass* [1972] A.C. 153, [1971] 2 All E.R. 127**

66. Tesco were charged with an offence under section 11(2) of the Trade Descriptions Act 1968. Two other provisions of that Act, however, are the real focus of the case. First, section 20(1), which provided that "[w]here an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of … any director, manager, secretary or other similar officer of the body corporate … he, as well as the body corporate shall be guilty of that offence." The other is section 24(1), which read:

> "In any proceedings for an offence under this Act it shall … be a defence for the person charged to prove:
>
> (a) that the commission of the offence was due to … the act or default of another person … and
>
> (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any other person under his control."

67. Tesco sought to raise a defence under section 24(1) that the commission of the offence was due to the act or default of "another person", namely, the manager of the store at which the offence was committed. The offence in question was the selling of washing powder in one of Tesco's stores for a higher price than that advertised in the shop window. This, it was accepted, was due to the store manager's failure to keep proper account of stock and the appropriate pricing for stock on special offer.

68. At first instance the justices were of the opinion that the defence failed because the manager could not be "another person" within section 24(1)(a), though they were satisfied that the requirements of section 24(1)(b) had been established. On appeal, the Divisional Court disagreed on both fronts: it held that although the manager was "another person" within section 24(1)(a), the defendants, in the circumstances, had not complied with the requirements of section 24(1)(b), and therefore dismissed the appeal.

69. Tesco successfully appealed this decision to the House of Lords. Referring to what had occurred in the court below, Lord Morris stated at p. 178 that *"it was accepted by the respondent in the Divisional Court, and it was common ground, that the manager was 'another person' within the meaning of section 24 (1) (a). It was said that where a defendant is an individual then any other individual could be 'another person' and that where a defendant is a company or corporate body then any individual could be 'another person' provided that he is not a person within section 20 carrying out functions as such person.*" The Lords held that Tesco had devised a careful system to ensure that incidents of this nature did not occur and found that in such a large-scale business it was not possible to personally supervise the actions of all employees at all times: the manager, although he had failed in his supervisory capacity, was not a directing mind of the company and therefore was "another person" for the purposes of section 24(1)(a) of the 1968 Act. In order to succeed on the second limb of the defence under section 24(1) it was held that Tesco had to establish, as a

matter of fact, that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence, which, in the circumstances, they had succeeded in doing. As such, they were acquitted.

70. Speeches were delivered by all five members of the House: Lord Reid, Lord Morris of Borth-Y-Gest, Viscount Dilhorne, Lord Pearson and Lord Diplock. There is much to ponder in their opinions. The Appellant points to the speech of Viscount Dilhorne, where he stated that:

> "Section 20 provides that where an offence under the Act has been committed by a body corporate and is proved to have been committed with the consent or connivance or be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in such a capacity, he, as well as the company is to be guilty of the offence. Parliament by this Section may have attempted to identify those who normally constitute the directing mind and will of a company and by this section have sought to make it clear that although they are not other persons coming within s. 23 and 24 (1)(a), they may still be convicted." (pp. 187-188) (Emphasis added)

Also relevant is the preceding passage, where Viscount Dilhorne stated that:

> "[O]ne has in relation to a company to determine who is or who are, for it may be more than one, in actual control of the operations of the company, and the answer to be given to that question may vary from company to company depending on its organisation. In my view, a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under

his orders, cannot be regarded as 'another person' within the meaning of sections 23 and 24 (1)(a)."

71. The Respondent, in turn, points to the following passage from the speech of Lord Reid, which is said to be consistent with the test set down by the Court of Appeal in this case:

> "Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn." (p. 171) (Emphasis added)

Lord Reid went on to note, however, that the Divisional Court had given far too wide a meaning to "delegation":

> "I have said that a board of directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here the board never delegated any of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself." (pp. 174-175)

72. Lord Morris agreed that there had been no delegation of the duty of taking precautions and exercising diligence to the manager of the particular store:

> "He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed, but he was not a delegate to whom the company passed on its responsibility … To make the company automatically liable for an offence committed by him would be to ignore the subsection. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it. Nor was he within what has been called the 'brain area' of the company." (pp. 180-181).

73. One final reference, to the speech of Lord Pearson at pp. 190-191:

> "The reference in section 20 of the Trade Descriptions Act 1968 to 'any director, manager, secretary or other similar officer of the body corporate' affords a useful indication of the grades of officers who may for some purposes be identifiable with the company, although in any particular case the constitution of the company concerned should be taken into account. With regard to the word 'manager' I agree with Fisher J. [1971] 1 Q.B. 133 who said, in his judgment in the present case, at p. 142, that the word refers to someone in the position of managing the affairs of the company, and would not extend to include a person in the position of Mr. Clement. In the present case the company has some hundreds of retail shops, and it would be far from reasonable to say that every one of its shop managers is the same person as the company." (Emphasis added)

Though he does not refer to this passage specifically, this would seem to accord with the general position adopted by the Appellant.

***Armour v. Skeen* 1977 J.C. 15, [1977] I.R.L.R. 310**

74. This is a Scottish case and is relied upon by the DPP rather than by the Appellant. The Director of Roads for Strathclyde Regional Council was prosecuted and found guilty of an offence under section 37(1) the Health and Safety at Work Act 1974. This provision is practically identical in substance to section 9(1) of the 1996 Act:

> "Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly"

75. The prosecution arose after a workman, repainting a bridge over the River Clyde, tragically fell to his death. The Council and Mr. Armour had failed to put in place any safety system for work of this kind and had not notified the local inspector that the bridge was being repainted. Furthermore, Mr. Armour had not drawn up any written safety policy for supervising the Council's workers which would inform everyone in the Department of the implications and training requirements of the Health and Safety at Work Act 1974. Having been found guilty in the Sherriff's Court, he appealed his conviction on the basis that he had no personal duty to carry out the Council's statutory duty of providing a safe system of work. His argument was that since section 2(1) of the 1974 Act imposed on the employers, i.e. the Council, the duty to ensure the safety at work of the employees, the members of the Council, who were the policy makers, were alone responsible for the safety policy, and the function of

the employees was simply to carry out that policy. He thus said that there was no duty on him to carry out the policy, and if there was no duty there was no neglect.

76. However, this was rejected by the Scottish High Court of Justiciary, who found him personally liable, being the director in charge of roads and having failed to carry out the specific duty of providing a written safety policy. As to whether the appellant was a person within the purview of section 37, the Court stated as follows:

> "There is no question of equiparating a director of roads with the term 'director' as used in that section. It was said, however, that the appellant did not fall within the class of 'manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity.' Reference was made to *Tesco (Supermarkets) Ltd. v. Natrass* [1972] A.C. 153 … Each case will depend on its particular facts, and on this issue will turn on the actual part played in the organisation. Having regard to the position of the appellant in the organisation of the council and the duty which was imposed on him in connection with the provision of a general safety policy in respect of the work of his department I have no difficulty in holding that he came within the ambit of the class of persons referred to in section 37(1)." (pp. 22-23)

As can be seen, the Court was careful to state that each case of this nature would turn on its particular facts and that the factual scenario of that case had been specific.

***In re A Company* [1980] Ch. 138**

77. The DPP applied for an order under section 441 of the Companies Act 1948 authorising a police officer and a civil servant to inspect all books, records, *etc*, belonging to or under the control of a named company; pursuant to that section, such an order could be

made where there was "reasonable cause to believe that any person has, while an officer of a company, committed an offence in connection with the management of the company's affairs and that evidence of the commission of the offence is to be found in any books or papers of or under the control of the company".

78. The application was dismissed at first instance on the basis that "an offence in connection with the management of the company's affairs" within the meaning of that section, was limited to a breach "against the laws regulating the management of a company's affairs." The DPP appealed. Allowing the appeal, Denning M.R. stated as follows:

> "[I]t is necessary to consider the meaning of the words 'an officer of a company.' The word 'officer' in relation to a body corporate is defined in section 455 of the Act. Not really 'defined': for it only 'includes a director, manager or secretary.' Its meaning may depend on the context in which it is used and in this case on the whole phrase '... while an officer of a company, committed an offence in connection with the management of the company's affairs ...' The officer here referred to is a person in a managerial situation in regard to the company's affairs. I would not restrict these words too closely. The general object of the Act is to enable the important officers of the state to get at the books of the company when there has been a fraud or wrongdoing. It seems to me that whenever anyone in a superior position in a company encourages, directs or acquiesces in defrauding creditors, customers, shareholders or the like, then there is an offence being committed by an officer of the company in connection with the company's affairs." (p. 143)

79. Shaw L.J., in his concurring judgment, stated as follows:

> "[The High Court] also considered that the party said to be an officer of the company of whom it was alleged that he had committed some offence in connection with the

management of the company's affairs was not to be regarded as an officer or a manager within the definition in section 455 of the Companies Act 1948 . The expression 'manager' should not be too narrowly construed. It is not to be equated with a managing or other director or a general manager. As I see it, any person who in the affairs of the company exercises a supervisory control which reflects the general policy of the company for the time being or which is related to the general administration of the company is in the sphere of management. He need not be a member of the board of directors. He need not be subject to specific instructions from the board. If he fulfils a function which touches the central administration of the company, that is sufficient in my view to constitute him an 'officer' or 'manager' of the company for the purposes of section 441 of the Act." (p. 144)

80. While the judges acknowledged that the section conferred "an extensive and weighty power" (per Templeman L.J.) which was "analogous to a search warrant" (per Lord Denning M.R.), it is undoubtedly fair to observe, as later decisions did, that the context here was different to the earlier cases, for section 441 did not impose criminal liability. Indeed, Templeman L.J. noted as much in his short concurring judgment, stating at p. 145:

> "Section 441 does not convict anybody. It merely enables a judge of the High Court on the application of the experienced and responsible officials who are mentioned in the section to make quite sure that when there is a slightly unpleasant aroma hanging around somebody should be sent in to trace the source and find out what is going on."

This difference in context largely explains the seemingly more expansive definition of "officer" as compared to the earlier decisions; as explained in the next judgment to be discussed, *R v. Boal*, the judges in *In re A Company* "were recognising that the words 'officer' and 'manager' take on different meanings depending upon the context in which they

are used". In any event, the meaning of "officer" had to be heavily influenced by the context of the offence, which could only be committed "in connection with the management of the company's affairs".

***R v Boal* [1992] Q.B. 591, [1992] 3 All E.R. 177**

81. The appellant in this case was the assistant general manager of the famous Foyles bookshop on Charing Cross Road, London. His responsibilities centred around the day-to-day running of the shop but, at a general level, he had been given no training in management skills, health and safety at work or fire safety. A fire safety inspection was carried out while the general manager was on holidays, making the appellant the most senior member of staff and therefore in charge of the shop for this period of time. Serious breaches of the Fire Safety Precautions Act 1971 were identified during the inspection.

82. The company and the appellant were arraigned on an indictment containing counts which charged offences under section 7(4) of the Fire Precautions Act 1971, and which alleged that the appellant was criminally liable as a "manager" within section 23(1) of the Act of 1971. He was given legal advice which assumed that he was incontestably a manager within the meaning of the section with the result that he pleaded guilty to some counts, was convicted on others and acquitted on one. He sought leave to appeal against sentence (a suspended sentence of imprisonment), which was refused by a single judge; he then renewed his application before the full court, which expressed doubt as to whether the appellant was in fact a "manager of the body corporate" within section 23; rather unusually, therefore, he was granted leave to appeal not merely against sentence but also, out of time, against conviction. The Court of Appeal, unsurprisingly, given the views expressed at the leave application,

allowed his appeal against conviction on the basis that it was clear that he did not have the necessary scope of managerial function to bring him within the Act.

83. Section 23 of the 1971 Act used familiar wording; it provided as follows:

> "Where an offence under this Act committed by a body corporate is proved … to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate … he as well as the body corporate shall be guilty of that offence …"

The counts against the appellant charged that he was "a manager" of Foyles when the relevant offences were committed by their company and that such offences were attributable to his neglect.

84. The judgment of the Court of Appeal was delivered by Simon Brown J. He referred to the passages from *Gibson* (para. 54, *supra*) and *W.H. Smith* (para. 64, *supra*), as well as to *In re A Company*. He took the view that the fire safety provision fell to be construed in a markedly similar context to those in *Gibson* and *W.H. Smith*, but very different to *In re A Company (*paras. 77-80, *supra*), as the statutory provision in question there did not "convict anybody". Finding the earlier authorities more relevant and applicable, the learned judge stated as follows:

> "It follows from all this that the appellant was only properly to be regarded as imperilled by section 23 if, as the assistant general manager of the shop, he had 'the management of the whole affairs of the company,' was 'intrusted with power to transact the whole of the affairs of the company,' and was 'managing in a governing role the affairs of the company itself.' The intended scope of section 23 is, we accept, to fix with criminal liability only those who are in a position of real authority, the decision-makers within the company who have both the power and responsibility to

decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place; it is not meant to strike at underlings." (pp. 597-598)

85. The judgment then turns to consider the appellant's "real position in the company". It sets out his duties as he described them in evidence, including being chief buyer, counting money, assisting staff and other general managerial functions. Simon Brown J notes that it appeared that the appellant was not given any management training, least of all in health and safety matters or fire precautions. The judgment continues:

> "When, however, asked at trial 'Who is generally responsible on the premises within your organisation for fire safety?' he answered in the broadest terms that he and the general manager 'both have responsibility for the whole thing really,' and accepted that he was aware of the general responsibilities imposed by the fire certificate." (p. 598)

86. The Court of Appeal then considered whether these admissions were sufficient to indicate that, even on a narrow interpretation of section 23, the appellant was properly to be regarded as a "manager" of the company. The Court did not think so, dismissing the prosecutor's submission that *W.H. Smith* could be distinguished as "those in question were merely remote branch managers of a substantial public company", whereas the appellant was number four in the hierarchy at Foyles:

> "[W]e are certainly disposed to agree [with counsel for the appellant] that this appellant could well have been regarded as responsible only for the day to day running of the bookshop rather than enjoying any sort of governing role in respect of the affairs of the company itself. Whether or not such a defence, had it been advanced at the trial, must inevitably have prospered, it is frankly not possible to say. The issue would clearly have needed to be explored a good deal further than it was. But we do

> conclude not merely that such defence would have had a realistic prospect of success but that in all likelihood it would have prevailed." (p. 598)

The court was therefore prepared, rather exceptionally in my experience and to my knowledge, to allow the appeal on the basis that the appellant had been "deprived of what was in all likelihood a good defence in law", a defence that "would quite probably have succeeded". The conviction was quashed and the sentence set aside. Could I be forgiven for thinking that the view taken on the leave application was highly influential on the ultimate outcome.

Woodhouse v Walsall Metropolitan Borough Council **[1994] Env. L.R. 30; [1994] 1 BCLC 435**

87. *Woodhouse*, on its facts, has an undeniable similarity to the present case. He was the general manager of a waste disposal site; the company which operated the site was charged and convicted of the disposal of waste other than in a prescribed manner, contrary to section 3(1) of the Control of Pollution Act 1974. Mr Woodhouse was convicted of an offence under section 87(1) of the same Act, which said section was almost identical to section 9(1) of the 1996 Act. The magistrates, in coming to this decision, had based their reasoning on the fact that he was a person in "real authority".

88. An appeal by way of case stated to the High Court raised, *inter alia*, two issues: first, whether the magistrates were right in law to find that the appellant was a manager within the meaning of section 87(1) of 1974 Act and, second, whether there was sufficient evidence to support such a finding. The judgment of the High Court was delivered by McCowan L.J., who held that the magistrates had taken an incorrect approach. The question that in fact should have been asked was whether Mr. Woodhouse was a decision-maker in the company,

with power and responsibility to decide corporate strategy and policy. An examination of the corporate structure, in which Mr. Woodhouse reported to more senior directors and where he was not a member of the executive committee, led the High Court to the conclusion that he was not in fact criminally liable for the offences alleged.

89. McCowan L.J. referred to *Armour v. Skeen*, *R v. Boal* and, in particular, to *Tesco v. Nattrass*. He did not consider *Armour* (para. 74, *supra*) to be relevant:

> "I am abound to say I do not find that this authority is of any assistance to me. It was clearly a question of fact. It was held there, as I have said, that the duties which were imposed upon him in connection with his work brought him within the ambit of the class of persons referred to in section 37, although he was not a director." (pp. 38-39)

90. The learned judge took the view that the justices at first instance, in deciding the case on the basis of the accused person having been in a position of "real authority", must clearly have been relying on the judgment of Simon Brown J in *Boal* where he used that expression. However, McCowan L.J. pointed out that Simon Brown J had expanded on this by stating that he was referring to the "decision makers within the company who have both the power and the responsibility to decide corporate policy and strategy". The justices had not gone on to consider the effect of the full statement and therefore had not made any such finding as regards Mr Woodhouse; they found that he was "a person in real authority" but left it at that. He continued:

> "One has to ask these questions. In real authority to do what? Over whom?
>
> Merely to speak of "in real authority" amounts, in my judgment, to nothing. They did not finish Simon Brown L.J.'s sentence. Had they done so it seems to me that they could not possibly have arrived at the conclusion that they did, because there was nothing in the evidence which could properly have led them to conclude that the

> appellant was a decision-maker within the company having both the power and responsibility to decide corporate policy and strategy.
>
> …
>
> In my judgment, it is apparent that, although [the justices] were referred to [*Boal* and *Tesco*] and apparently took them into account, they must have misunderstood them; the clearest indication of that being that they stopped short in Simon Brown L.J.'s sentence at '. . . he was a person in real authority.'"

He therefore concluded that the justices had erred in holding that the appellant was a manager within the meaning of section 87(1) of the 1974 Act and allowed the appeal.

***DPP v. Hegarty* [2011] IESC 32, [2011] 4 I.R. 635**

91. Section 3(4)(a) of the Competition (Amendment) Act 1996 provided, *inter alia*, that:

> "Where an offence under section 2 of this Act has been committed by an undertaking and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as the undertaking shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence."

92. Mr Hegarty was charged under this section with the offence of being a manager or officer of an undertaking which entered into a price fixing arrangement with other undertakings. He argued that a successful conviction against him was contingent on the company having committed a criminal offence contrary to section 2 of that Act, which could only be established by a conviction being secured against it. The company in question was

not prosecuted for any such offence. The prosecutor accepted that that contingency was an ingredient of the offence but argued that same could be established otherwise than by a formal conviction of the company. The Circuit Criminal Court stated a case for the opinion of this Court as to whether a director of an undertaking could be convicted in the absence of a prosecution against the undertaking itself.

93. Delivering the judgment of this Court, I held that that the true meaning of section 3(4)(a) was that the undertaking referred to did not have to be convicted of a section 2 offence before the director or manager could be found guilty of the offence created thereby; rather section 3(4)(a) required a finding of fact by the jury that an offence pursuant to section 2 had been committed by the undertaking. This could be established by the prosecution placing evidence of such a section 2 offence before the jury, which evidence would of course be open to challenge by the defence in the ordinary fashion.

94. The Appellant refers to para. 31 of the reported judgment, where I stated, *inter alia*, as follows:

> "As natural persons are directly instrumental in the actions of a body corporate, the Competition (Amendment) Act 1996 also created offences against certain influential position holders within a company, being essentially those without whose involvement the offending conduct could not be endorsed or approved. Culpability in this regard was confined to persons with a high level of responsibility for decision making:- i.e. directors, managers, other similar officers, and those who hold themselves out as such. … Therefore, in principle, there is nothing surprising in the concept of both non-personal undertakings and their managers/officers and like persons, being exposed to criminal prosecution arising out of the same abusive conduct."

95. This passage, in Mr T.N.'s view, supports the interpretation of section 9(1) of the 1996 Act which he is urging this Court to adopt. The DPP, however, contends in turn that this very same passage in fact comports with the test laid down by the Court of Appeal in this case. She notes that while the judgment in *Hegarty* refers to those "with a high level of responsibility for decision-making", it does not refer to those having power to direct the whole of the affairs of the company. Therefore, it is submitted that the Appellant is exactly the sort of person that this Court had in mind in that case.

96. I will return to consider the relevance, individually and collectively, of these decisions below. Before doing so, I will first address some discrete points arising from the Appellant's submissions.

The Appellant's argument concerning the so-called distinction between secondary liability and derivative liability

97. Quite evidently, a number of different persons may have different levels of involvement in the commission of the same crime. The most direct participation will be by those who have committed the *actus reus* of the crime or have been part of a joint enterprise to carry that crime out. Such persons, on that basis, will be considered primarily liable for such crime. But others, who may not have actually participated in the commission of the crime as principals, may also have a liability, for example, if they assisted or encouraged the commission of that crime. To reflect this distinction, the common law largely operated at four levels of participation: principal offenders in the first degree, principal offenders in the second degree, accessories before the fact and accessories after the fact. However, these concepts were contingent on the distinction between felonies and misdemeanours and

stemmed, in part, from the terms of the Accessories and Abettors Act 1861, both of which were abolished by the Criminal Law Act 1997 (Cooney & Foley, *The Judge's Charge in Criminal Trials* (Round Hall, Dublin, 2008), para. 602). It is against this background that Mr. T.N. relies on the section which is next quoted.

98. As noted above, the Appellant has urged the Court to have regard, in construing section 9(1), to what he refers to as the distinction between secondary liability and derivative liability. Counsel pointed to section 7(1) of the Criminal Law Act 1997 ("the 1997 Act"), which provides that:

> "Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender."

99. The Appellant argues that this section enables a person in a managerial or supervisory role and who has sufficient authority and power to direct the manner in which an activity is carried out, to be prosecuted as principal in respect of that activity. Thus, he says, it was open to the DPP to charge him on the basis that he "aided, abetted, counselled or procured" the commission of the corporate offence. It is submitted that there is no precedent for extending liability for neglect (section 9(1) of the 1996 Act), as opposed to involvement (section 7(1) of the 1997 Act), to persons occupying a middle ranking or low position within a body corporate.

100. The Appellant submits that an active *mens rea* is required for secondary participation under the common law or when aiding, abetting, counselling or procuring under section 7(1) of the 1997 Act, whereas the *mens rea* of the section 9(1) offence is passive ("committed with the consent or connivance of or to be attributable to any neglect on the part of"). Referring to the words last quoted, he says that it is clear that the section 9(1) offence is an offence of omission or failure to act and consequently is not directed at persons who are in

immediate control, such as supervisors, health and safety officers or environmental compliance officers, but rather persons who have overriding control over the management of a body corporate: the persons who make the "big decisions". Thus it is submitted that the delegation of responsibility which is common place within the corporate world does not require an expansive definition to be given to the word "manager" as the issue which thereby arises is addressed by the distinction between derivative and secondary liability, such as provided by section 9(1) of the 1996 Act and by section 7(1) of the 1997 Act and/or the common law.

101. It seems that, terminologically, depending on which textbook one consults the terms "secondary liability" and "derivative liability" are used almost interchangeably, so the categorical distinction is not necessarily a helpful one. Nonetheless, the crux of the submission is clear: given that it is open to the prosecution to charge what may be called a "mid-level" manager with aiding/abetting etc. pursuant to section 7(1) of the 1997 Act, there is no fear of such persons being immune from criminal responsibility if "manager" is interpreted narrowly in line with the earlier English authorities. In a sense, the submission attempts to pre-empt any sort of purposive interpretation of the section.

102. With respect, I cannot agree with this submission. I do not consider that the potential availability of an alternative mode of liability (under section 7(1) of the 1997 Act) can be of particular significance when it comes to the interpretation of section 9(1) of the 1996 Act, or *vice versa* for that matter. Evidently the trial which would unfold would be different depending on whether the charge was a section 7 or a section 9 charge. The proofs are different: the prosecution's task is considerably different when seeking to prove that someone aided or abetted an offence, as opposed to the offence having been committed with his or her consent or connivance. It may be that a particular accused might, on given facts, escape liability under one mode but not the other. I cannot see, however, that the sections can be

parcelled off for use only in respect of certain categories of defendant such that section 7(1) would be available for the mid-level supervisors, safety managers and compliance officers, with section 9(1) reserved solely for the overarching, top-level management. The plain wording of the provisions do not in any way support such a proposition, as, for example, section 7(1) refers to "any person". Further, just because the Appellant could have been proceeded against on the basis of section 7(1) does not mean that section 9(1) was an inherently inappropriate route to pursue. Therefore, I agree with the Respondent that the mere fact that the section 7(1) avenue may also have been available does not, of itself, mean that section 9(1) should be construed as narrowly as is urged by the Appellant.

Specific principles of statutory interpretation invoked by the Appellant

103. Mr. T.N. says that the Court of Appeal erred in failing to construe section 9(1) of the 1996 Act in accordance with certain well-known principles of statutory interpretation, and that its interpretation was otherwise unsatisfactory for failing to account for all of the words used in the provision. As his submissions will also apply to the interpretive task facing this Court, it is worth dealing with them at this juncture.

Linguistic context: noscitur a sociis and ejusdem generis

104. The Appellant has submitted that the interpretive principles of *noscitur a sociis* and *ejusdem generis* ought to be applied and that they point to a definition of "manager" which is in accordance with the English authorities. *Noscitur a sociis* means that a word or expression is known from its companions; it is the principle of interpretation according to which the meaning of an unclear or ambiguous word should be determined by considering the words with which it is contextually associated. That canon of construction "expresses the point that

statutory words are liable to be affected by other words with which they are associated" (per Dodd, *Statutory Interpretation in Ireland* (1st Ed., Bloomsbury Professional, Dublin, 2008) ("Dodd") at para. [5.64]). In *United States Tobacco International Inc. v. Minister for Health* [1990] 1 I.R. 394, Hamilton P (as he then was) endorsed the following statement of Stamp J in *Bourne v. Norwich Crematorium Ltd.* [1967] 1 W.L.R. 691 where he stated at p. 696 that:

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which one has assigned to them as separate words . . ."

As for *ejusdem generis*, Dodd states as follows:

> "[5.68] *Ejusdem generis* is a particular aspect of *noscitur a sociis*. Where a list or string of genus-describing terms are followed by wider residuary or sweeping-up words, the ordinary or wide meaning of the residuary words is presumed to be limited to things of that class or genus. In the *Irish Fertilizer Industries Ltd v Commissioner of Valuation* (High Court, unreported judgment of the 31st July 2002), Cross's statement of the rule was quoted with approval:
>
> > Where words are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification. [Cross, Statutory Interpretation (OUP, 1995) at 116.]

[5.69] The inclusion of a concluding general phrase is a fail-safe to ensure that any specific member of the intended category that may have been omitted is caught by the provision. As the general words are included to catch unenumerated objects in the category, it follows that they are not intended to be given a meaning broader than that of the category. The maxim, when applied, deviates from the normal rule that words and phrases be given their ordinary and plain meaning."

105. Applying these principles of interpretation, the Appellant submits that the meaning of the word "manager" within section 9(1) is defined by the surrounding words and the expression "other similar officer", both of which place a manager within the rubric of director, secretary, or other similar officer; thus it must mean a person holding a high office within a body corporate. He says that director, secretary and other similar officer are clearly of the same *genus* and consequently the principle of *ejusdem generis* applies.

106. "Officer" is given a non-exhaustive definition within the Companies Act 2014: "'officer', in relation to a body corporate, includes a director or secretary" (section 2(1)). "Director" and "secretary" are of course official positions within a company, mandated by statute (see sections 128 and 129 of the Act of 2014, previously sections 174 and 175 of the Companies Act 1963). These positions may also be created under the constitution of the company; further offices formed in such manner may include a treasurer or president, although such are infrequently found within a limited company. Whilst one may ask why the company law definitions should necessarily apply to section 9, the answer is I think twofold. First, the very essence of the section relates to the commission of an offence by a "body corporate", which in the vast majority of cases will now be one of the eight companies provided for under the 2014 Act, or a company under its predecessors. Secondly, the individual intended to be captured by the section will be inextricably linked to the body corporate. Accordingly, in the absence of any contrary argument, I am satisfied that, in

principle, such an approach is justified. That being so, as the office of "director" and "secretary" are statutory positions with statutory functions; they should be given the definitions as provided for in the Companies Acts; there seems to be very little scope for departing from such meaning.

107. However, there is no statutory definition of "manager", as such, nor could a manager ordinarily be described as being an official officer of a company in the statutory sense. In this respect it is unlike the other members of the *genus* suggested to be present in section 9(1). The interpretive canon of *ejusdem generis* applies where general words follow specific words, not where they precede the specific words (see *Application of Quinn* [1974] I.R. 19 at pp. 30-31). Perhaps, if section 9(1) referred only to " … neglect on the part of a person being a director, secretary or other similar officer", omitting "manager", an argument could be made that *ejusdem generis* could apply and that only "official" officeholders of this nature should come within the section. However, I do not see that the principle has any application to section 9(1) as drafted. The word "manager" is unlike "director" and "secretary" in the sense described: accordingly, I do not consider that the statutory description of those other roles provides a basis to use *ejusdem generis* so as to "read up" the meaning of "manager" to a different and higher level than it would ordinarily attract in this context.

The words "of the body corporate"

108. Mr T.N. further submits that the word "manager" is defined by the expression "of the body corporate", which requires that the person in question is operating at the level of the whole or entire company rather than at the level of an individual unit thereof. He says that the Court of Appeal's definition sets at nought the words "of the body corporate" by focusing instead on the tests of "a significant part of the company's activities" and "the area in

controversy", thereby potentially extending liability to somebody who might be characterised as a compliance manager responsible for part or a section only of the company's business, such as the facility manager of a waste treatment facility. The Appellant submits that with such an approach, a person's liability is determined by the size of the corporation in question, e.g. the facility manager would potentially be culpable where a company only operated one site, but not where it operated multiple sites.

109. I cannot accept that the meaning of "manager" should necessarily be constrained in this way by virtue of the reference to "… the body corporate". At the risk of repetition, the section provides that "[w]here an offence under this Act has been committed *by a body corporate* and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer *of the body corporate*, or a person who was purporting to act in any such capacity, that person as well as *the body corporate* shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence" (emphasis added). There are three references to the "body corporate" in the section. The Appellant suggests that the reference to "a person being a … manager … of the body corporate" must mean that the person in question must hold a managerial role at the highest level within the company – someone with responsibility for overseeing the affairs of the body corporate as a whole, rather than some smaller aspect thereof. In my view, the reference to "the body corporate" does not have this effect on the interpretation of the provision. The same merely refers back to the entity referred to in the first line of the section, the one which has committed the offence under the 1996 Act; its importance is that it means the section applies to a manager of, or purporting to act on behalf of, that body corporate, but it does not suggest that such person must be responsible for running the whole affairs of that body. For this reason, I reject the Appellant's submission on this point.

The Appellant's argument that other formulations were open to the Oireachtas

110. Additionally, Mr T.N. argues that the Oireachtas does not universally use the formulation of "director, manager, secretary or other similar officer". For example, section 58(1)(b) of the Criminal Justice (Theft and Fraud Offences) Act 2001 omits the word "similar", referring simply to "a director, manager, secretary or other officer of the body corporate".

111. The Appellant argues that if the Oireachtas had intended to depart from the settled definition of the expression "director, manager, secretary or other similar officer of the body corporate" prevailing in the United Kingdom (as per the authorities cited on his behalf) it would have elected to use some different expression or form of wording. In this regard he points to section 79(4) of the Investment Intermediaries Act 1995, which refers to an offence committed by an investment business firm and which is proved to have been committed with "the consent or connivance of, or to be attributable to, or to have been facilitated by any neglect on the part of, *any officer or employee* of that investment business firm [or person purporting to so act]" (emphasis added). It is said that here the legislature clearly intended that any employee, as opposed to high officeholders only, could be guilty of an offence. Also referred to with like effect is section 19 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, which provides as follows:

> "Where an offence under this Part is committed by a body corporate and is proved to have been so committed with the consent or approval of, or to have been facilitated by any wilful neglect on the part of any person *being a director, manager, secretary, member of any committee of management or other controlling authority of such body*

or official of such body, that person shall also be guilty of an offence." (Emphasis added)

112. I accept of course that the Oireachtas could have framed section 9(1) in a different way, and could have used some descriptive terms more appropriately akin to, say, a mid-level manager. However, I do not accept that simply because such an option was open and not taken, the Oireachtas must therefore have intended "manager" to refer only to the uppermost level of management, or to have necessarily intended to import the definition running through the UK authorities. Irish statutes frequently echo the wording of their UK counterparts. On occasion such UK legislation may already have been the subject of judicial interpretation in that jurisdiction. Such may of course be of persuasive authority to an Irish court, though obviously could not be binding. In fairness Mr T.N. is not suggesting that such case law is binding as such: rather he is saying that the Oireachtas must have known what meaning the UK courts have given to the same or similar provisions and therefore, in choosing the same formulation, it must be taken to have intended to adopt the same definition. This in my view is not a sound basis of interpretation. The Oireachtas, in choosing the words which it did, must have known that they would fall to be construed by the Irish courts in accordance with the usual principles, canons and maxims of interpretation. The Court cannot substitute, for this approach, the assumption urged on behalf of the Appellant. Therefore, I do not accept that the use of this formulation establishes that the legislature intended for the section to be construed in line with the UK authorities.

Statutory interpretation and the criminal law

113. The Appellant has submitted that the Court of Appeal's interpretation of section 9(1) of the 1996 Act runs contrary to many of the well-established canons of statutory

interpretation when interfacing with the criminal law. He points out that particular rules apply to the construction of penal statutes. In this regard he refers, *inter alia*, to the judgment of Hardiman J in *Montemuino v. Minister for Communications and Others* [2013] 4 I.R. 120, where the learned judge, under the heading of "Penal Statute" said the following:

> "[18] It seems very well established that particular rules apply to the construction of penal enactments. I agree with what is said in Dodd, *Statutory Interpretation in Ireland* (Tottel, Dublin, 2008), at pp. 305 and 306. There, the learned author has this to say:
>
> > '[11.54] It is presumed that an enactment creating a penal, or taxation, liability or other detriment should be construed strictly so as to prevent the imposition of penal liability unfairly by the use of oblique or slack language [*C.W. Shipping v. Limerick Harbour Comm.* [1989] I.L.R.M. 416]. It is said that nobody should suffer a detriment by the application of a doubtful law and that a person should not be found guilty of a statutory offence where the words of the statute have not plainly indicated that the conduct in question will amount to an offence…'
>
> [19] In *DPP v. Flanagan* [1979] I.R. 265, Henchy J. said at pp. 280 and 281:
>
> > 'It is, in my view, a cardinal principle in the judicial interpretation of statutes that the range of criminal liability should not be held to have been statutorily extended except by clear, direct and unambiguous words ... No man should be found guilty of a statutory offence when the words of the statute have not plainly indicated that the conduct in question will amount to an offence …'"

114. Also referred to by the Appellant is the decision of Finlay Geoghegan J in *Dunnes Stores v. Director of Consumer Affairs* [2006] 1 I.R. 355 at p. 361, quoting the judgment of

Henchy J in *Inspector of Taxes v Kiernan* [1981] I.R. 117 at p. 122 ("if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language"). Mr T.N. further refers to the judgment of Kearns J (as he then was) for the majority of this Court in *DPP v Bridget Moorehouse* [2006] 1 I.R. 421 at p. 443.

115. Finally, the Appellant has also made reference to my judgment for this Court in *DPP v. Hegarty* [2011] 4 I.R. 635, where at p. 646 I stated that:

> "[37] There is no doubt but that s. 3(4)(a) of the [Competition] (Amendment) Act of 1996 is a provision creating a criminal offence and, therefore, must be strictly construed. There can be no creation or extension of penal liability by implication by the use of obscure or imprecise language, or by the application of interpretive aids which otherwise would be available in a civil setting. As a result, the provision in question, expressly and in clear and unambiguous language, must have, by literal construction, the meaning contended for by the prosecutor. That provision, however, must be viewed and its true meaning ascertained by reference to its immediate context, properly derived from the scheme of the Act, or more accurately from that part of the Act which criminalised behaviour previously not so declared. It is only, if in accordance with this approach and if the ordinary meaning of the words can be so understood, that the result suggested by the prosecutor can stand."

116. While these authorities did not convince the Court of Appeal, the Appellant's submissions found favour with the learned trial judge, who, in his ruling on the issue, stated that:

> "There can be no simple application of common sense, frankly. The statute has to be strictly construed … The authorities opened to the Court by [Counsel for the Appellant] are, based on the principle of penal sanction where there are significant penalties potentially open to the Court to impose, that a strict interpretation is given."

117. It is clear, on the basis of the above authorities, that the rule of strict construction of criminal and penal statutes has frequently and repeatedly featured in our jurisprudence. For my part, I would not wish in any way to dilute the value of this approach. The point which I am about to make is completely different in that it endeavours to properly position within the overall interpretive exercise those diverse principles which loosely are said to give rise to this method of construction.

118. To that end, it is important to understand that this principle of interpretation operates in addition to, and not in substitution for, the other canons of construction: see, for example, the judgment of O'Higgins C.J. in *Mullins v. Harnett* [1998] 4 I.R. 426 at pp. 239-240. Thus understood, the principle does not alter the fundamental objective of the Court in construing legislation, which is to ascertain the will or intention of the legislature. As stated by Kelly J., as he then was, in *Macks Bakeries Ltd v. O'Connor* [2003] 2 I.R. 396 at p. 400: "[t]he object of all statutory interpretation is to discern the intention of the legislature". Accordingly, while undoubtedly playing a role in many cases, and an important one in some, the principle of strict construction of a criminal statute does not automatically supplant or trump all other interpretive approaches. It is one of many canons, maxims, principles, presumptions and rules of interpretation which are utilised by the judiciary when viewing legislation. The primary route by which the intention of the legislature is ascertained is by ascribing to the words used in the statute their ordinary and natural meaning.

119. Therefore, while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused; it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation.

The older authorities and the proper interpretation of section 9(1)

120. It is against this backdrop that I now turn to consider the old authorities cited above and the question of whether the Court of Appeal was correct in the interpretation which it gave to section 9(1) of the 1996 Act. The only Irish authority cited was my judgment in *Hegarty*. It should be noted that the precise point in issue in the instant proceedings did not arise there; that case was not about who is a manager (for this issue was not contested by Mr Hegarty) but rather whether the formal conviction of the "undertaking" was a necessary prerequisite to bringing home a conviction of the accused. The comments made in the passage as cited above (para. 115) were made as part of the general background context to that particular issue. Moreover, while reference was made to "certain influential position holders" and "those with a high level of responsibility for decision making", I do not consider

that this is in any way inconsistent with the test set out by the Court of Appeal in this case. These comments in *Hegarty* cannot, in my view, be equated in any way with a *Gibson, Boal* or *Woodhouse*-style definition of managers as being only those responsible for running or transacting "the whole of the affairs" of the company, or being responsible for the company's corporate policy or strategy. As explored below, it is no longer accurate to say of many organisations that decision-making responsibility is to be found only at the very top of the management hierarchy. Accordingly, I do not consider that *Hegarty* is directly on point relative to this case.

121. The point at issue in the House of Lords in *Tesco* concerned section 24(1)(b) of the Trade Descriptions Act 1968 and whether "another person" had taken "all reasonable precautions" to avoid the commission of an offence. Relevant to that case was the interaction between sections 20(1) and 24(1). It had been held by the Divisional Court that where the defendant was a corporate body then any individual could be "another person" (under section 24(1)(a)) provided that he is not a person within section 20 carrying out functions as such person. Section 20 contained that familiar phrase, "director, manager, secretary or other similar officer". The Divisional Court held that the word "manager" denoted someone managing the affairs of the company rather than an individual branch or store manager. As to whether the store manager was "another person", the prosecutor had not appealed from the decision of the Divisional Court that he was, though Lord Reid did note that this decision of the Divisional Court was "plainly right" and it is clear that the other Lords were similarly minded.

122. I would note at this point that neither *Tesco* nor *W.H. Smith* would have had a different outcome if "manager" was defined according to what was stated by the Court of Appeal in the instant case. The threshold set in its test is lower than a requirement that the person in question manages "the whole affairs of the company", but nonetheless it is apparent

from paragraphs 26 and 27 of the judgment of Birmingham J that the level of responsibility contemplated was significantly higher than that of store manager (at least in the case of a corporation which had branches across the country); this is clear from the learned judge's comment that "the manager of a branch of a bank would not be regarded as a manager of the bank". Without any need to stray into the evidence or specific findings of fact, it seems apparent that on any view of Mr. T.N.'s role within Neiphin it could not be equated to the role of a manager of an individual branch within, say, a network of a few hundred.

123. For the reasons given above, I do not consider *In Re B. Johnson & Co.* to shine any great light on the issue facing this Court (see paras. 59 and 65, *supra*). *In re A Company*, as has been observed elsewhere, arose in a different context: the provision in question (section 441 of the Companies Act 1948) did not impose any criminal liability and further, by its express wording, linked the offence to a person "in a managerial situation in regard to the company's affairs": in subsequent cases both of these matters were said by the UK courts to explain the broader meaning attributed to the term "manager" in that judgment. I would agree that context is critically important. It should not be assumed that the term "manager" will necessarily have a uniform definition across all statutes. I accept in principle that the object and effect of the section may have a role to play, and that a broader definition may be more appropriate where no criminal responsibility is imposed by the provision. So too may the provision's purpose or, to use an older term, the "mischief" at which it is aimed.

124. Then there are the cases of *Gibson*, *Boal* and *Woodhouse*. Whilst one can attempt to distinguish them at a factual level, to do so would, in my view, be somewhat unpersuasive. Whatever way one characterises the facts of those cases, it must be acknowledged that the definition of "manager" adopted in those judgments is a much narrower one than was favoured by the Court of Appeal in the instant case.

125. I agree with the Court of Appeal that caution should be exercised in adopting the description used in some of these older authorities. As stated in the court below, the 1996 Act must be interpreted in a modern context. It seems to me that *Gibson* was embraced too warmly and too liberally, with very few of the follow on cases even discussing why they felt that responsibility could reside in only the highest stratum of management, with all others being relegated to effectively having no autonomy or power within the organisation. 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. If, for example, the evidence had been that *Boal* was expressly responsible within Foyles for formulating and implementing fire management procedures, would the outcome have remained the same simply because he still was not in charge of running "the whole of the affairs" of the company? On the reasoning in *Woodhouse*, this would have made no difference at all to the outcome: it would seem that even the manager within a company with specific responsibility for fire safety would not be liable for breaches of the underlying fire safety regulations if he or she was not also involved in the overall running and strategy of the company. This certainly seems a strange policy for the legislature to have adopted.

126. I very much doubt that this *Gibson*-type perspective of how corporate bodies operate translates in any way fluently to the present day, for this apparent all-or-nothing view of corporate governance seems to be entirely out of step with the realities of modern corporate structures. According to that outlook, either a person is responsible for the whole affairs of the company, and thus liable, or else they should be regarded as an "underling", and thus not liable. Manifestly this is not how large or even medium size companies operate in the 21st Century, nor has that been the situation for a considerable period of time.

127. This was recognised by Murphy J, albeit in a different context, in *The Director of Corporate Enforcement v. Boner* [2008] IEHC 151, where he said: "The court has to

recognise the reality of the power and responsibility of senior management in large public or private companies who have particular expertise and authority, as distinct from the division between directors of companies formed under the Joint Stock Companies Act in the 19th Century who employed administrators to implement their bidding." Inevitably, there has had to be a diffusion of responsibility away from the top of the hierarchy, with an allocation of power or control for specific or individual sectors of the company's activities. Delegation of authority – real authority – is now commonplace. The reason for such surely stems from the recognition that the complexity of many modern organisations requires that there be various persons – if you like, managers – often possessing specialised expertise and a particular skillset, each with responsibility for discrete aspects of the entity's operation and structure; to take an example close at hand, an environmental compliance manager may not have the power to influence the whole direction of the company, but could well be the very person responsible for designing and signing off on the company's environmental policies.

128. *Boal* is the most far reaching of the authorities relied upon by the Appellant, it being a Court of Appeal decision, whereas *Woodhouse* is a High Court decision. In the former, Simon Brown J., who gave the court's judgment, spoke of the intended scope of the section in question being "to fix with criminal liability only those who are in a position of real authority"; continuing, he said this meant "[t]he decision makers within the company who have both the power and the responsibility to decide corporate policy and strategy". It was on this precise basis that the appeal in *Woodhouse* was allowed: whilst the accused person may well have been in a position of real authority, he had no power or responsibility to decide corporate policy or strategy. It is difficult to see how this requirement can be justified. Later in his judgment, the learned judge spoke of the purpose of the section in question being "to catch those responsible for putting proper procedures in place"; this, it seems to me, may be entirely apt to describe a fire safety manager, or a health and safety officer, or an

environmental compliance manager. To suggest that such persons do not have real authority simply because they do not run "the whole affairs of the company", does not represent a realistic assessment of how such entities operate. In my view, therefore, any approach which views only the very uppermost management level of a company as having "real authority" or the power to "put proper procedures in place" does not comport with the modern reality of such bodies, nor is it warranted by the proper interpretation of the section itself.

129. For these reasons, I do not think that any great reliance can be put on the older authorities. It is fair to point out that some of them, such as *Boal* and *Woodhouse*, are not exactly pieces of antiquity; they hail from the 1990s. Companies then already looked markedly different to the *Gibson*-era entities of the 1870s. However, the line of authority running through these cases undoubtedly starts with *Gibson*, a decision which, in my respectful view, has been over-read in some of the subsequent judgments. But even if it once represented a fair reflection of corporate management, I do not think that that is still the case today. Therefore, with the greatest of respect to those decisions, I do not consider that, in interpreting section 9(1), it is correct to construe "manager" as meaning only a person with responsibility for running the whole affairs of the company, or for overall management of the corporate entity as a whole. 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 in using the word "manager".

130. To be sure, there must be some limit to the meaning of "manager"; a certain level of responsibility and authority is undoubtedly required. I do not consider that a person's contractual title or even job description could be decisive in the analysis. Not just anyone with subordinates whom they manage is necessarily a "manager" for the purposes of the section. However, if the older authorities are not to be followed, what then should be the test?

131. The Court of Appeal concluded as follows on this issue:

> "26. While the Court has taken some time to refer to some of the authorities that were opened to the trial court and to this Court, it is somewhat hesitant about the continuing relevance of some of the older authorities. The Waste Management Act 1996 is a modern statute. The phrase "Director, Manager, Secretary or other similar officer of **a body corporate** or a person who is purporting to act in any such a capacity" must be seen in a modern context. It is to be noted that the section deals with directors, managers, secretaries or other similar officers of a body corporate. It is clear therefore that the individuals must hold responsibility at a corporate level. The manager of an individual branch of a bank is not to be equated with a manager of the bank. At the same time it must be appreciated that time has moved on since the discussions in *Gibson v. Barton* [1875] L.R. 10 QB 329. Nowadays it is not unusual to find Finance Directors, Human Resource Directors and IT Directors in large corporations, to give but some examples. In other companies the titles may vary, so one may have Finance Managers, Human Resources Managers and IT Managers. Other companies may have Chief Financial Officers or Chief Marketing Officers. Responsibilities may be

distributed in such a way that it would be difficult to say that any one individual was responsible for the management of the whole affairs of the company. However, if the individual's role is a significant one then the fact that there may be some particular areas of the company activity with which he does not have an involvement does not mean that he is not to be regarded as a manager of the corporation. Very significant responsibilities can be entrusted to an Assistant General Manager, to regional managers but also individuals such as safety managers to whom very important areas of responsibility are entrusted. Such individuals may properly be regarded as "other similar officers" within the terms of s. 9(1) of the Waste Management Act 1996 and comparable provisions of other statutes where the same formula is used. The Court has already made the comment that the manager of a branch of a bank would not be regarded as a manager of the bank. This was with reference to a bank having a nationwide branch network. The situation would be quite different if the bank only had one place of business or a very small number of places of business. The phrase "other officer" as distinct from "Director" or "Secretary" of the company must refer to individuals having a similar stature and exercising similar responsibility to what might be expected of a company director or company secretary. Certainly, on one view of the evidence at least Mr N. was managing the Kerdiffstown facility which was Neiphin's core activity. It may not be to overstate matters to say that Kerdiffstown was Neiphin.

27. In the Court's view, the trial judge was in error in focusing his attention on whether there was evidence that Mr N. had the capacity to direct the whole of the affairs of the company and the power and responsibility to decide corporate strategy. The question, really, to have been asked was whether Mr N. was functioning as a Senior Manager, having functional responsibility for a significant part of the

company's activities and having direct responsibility for the area in controversy, namely the management of the Kerdiffstown waste site. Having indicated its view that the trial judge was in error, the Court will, in accordance with the indications it gave at an earlier stage, hear counsel on both sides in relation to what further orders should follow." (Bold emphasis in original; underlined emphasis is my own)

132. I am in agreement with much of what was said by the Court of Appeal in these passages. As is clear from the above discussion, I agree entirely that the older authorities are not a sound foundation to ascertain what the Oireachtas intended by the phrase used in section 9 of the 1996 Act, and also how the section must be viewed. The requirement identified by the trial judge, of the person having to have the capacity to direct the whole affairs of the company and the power and responsibility to decide corporate strategy, was, in my view, incorrect. However, that is not an end to the matter: there are some aspects of the test set out by the Court of Appeal which require some refinement.

133. Towards the beginning of para. 26, Birmingham J speaks of the need for the individual in question "to hold responsibility at corporate level". Taken on its own, what is meant by this requirement is somewhat unclear, although the subsequent discussion clarifies the point somewhat. Ultimately, the Court of Appeal described the issue as coming down to whether "Mr N. was functioning as a Senior Manager, having functional responsibility for a significant part of the company's activities and having *direct responsibility* for the area in controversy" (emphasis added). It is the Appellant who points out that this requirement for direct responsibility in fact narrows the scope of the section, in that, for example, a Chief Executive would be absolved of responsibility where he was aware of breaches of health and safety but had no direct responsibility for its implementation. If what is meant by the term is that the environmental compliance manager may be criminally responsible for breaches of environmental legislation but the official in charge of, say, the freedom of information

department will not, then I agree, but equally I am of the view that this reference to "direct" responsibility should not exonerate from liability in the example suggested by the Appellant.

134. Towards the end of paragraph 26, Birmingham J suggests that persons such as regional managers or safety managers may be entrusted with very important areas of responsibility and therefore may properly be regarded as "other similar officers"; in the preceding sentence, however, the focus seems to be on the fact that an individual with a significant management role may be regarded as a "manager" of the organisation. In this respect it is at least somewhat unclear whether the analysis is being conducted through the prism of the word "manager" or of the terms "other similar officer". The terms are disjunctive and cannot be treated as being coterminous. Courtney, in his work *The Law of Companies* (Fourth Ed., Bloomsbury Professional, 2016), suggests at para. [13.007] that the definition of "officer" within this jurisdiction must remain that as set out in *Glover v. BLN Ltd* [1973] I.R. 388, subject to any statutory modification, where Kenny J. said at p. 414:

> "The characteristic features of an office are that it is created by Act of the National Parliament, charter, statutory regulation, articles of association of a company or of a body corporate formed under the authority of a statute, deed of trust, grant or by prescription, and that the holder of it may be removed if the instrument creating the office authorises this."

The learned author expresses the view that there is no scope for equating a person in an elevated management position with an "officer" of the company within the meaning of sections 2 and 837 of the Companies Act 2014. In para. [13.008] he goes on to note that while the courts have remarked on the change in the internal organisational structures of companies since the late 19th Century, this would not "justify a court finding that a person who was neither a director or secretary or held a position created by the company's

constitution is an officer so as to impose penalties, whether in the nature of a disqualification or of a criminal conviction." While there may be some merit to this view, such must be considered in light of the judgments of the High Court in *Director of Corporate Enforcement v. D'Arcy* [2006] 2 I.R. 163 and particularly in *Director of Corporate Enforcement v. Boner* [2008] IEHC 151, which suggest that, at least in the context of disqualification proceedings, the more expansive definition of "officer" favoured in *In Re A Company* should perhaps be preferred. The statutory provisions therein considered are, of course, differently worded and of a different nature to that now being considered. In any event, in my view, the focus of the present case, and what very much appears to have been the thrust of the prosecution's case at trial and now on appeal, should be on what is meant by the word "manager" as appears in section 9(1).

135. In my view, the diversity of organisational structures within entities the subject of section 9(1) is such that it would be foolish to attempt to define the word "manager" too rigidly. The trial court, when dealing with such issue, must be alive to the actual, practical state of affairs within the company. Formal titles may be relevant, even highly relevant, but it is the person's real-world function and role which will be decisive, not their nominal job title. It is not necessary, to be a "manager" within the meaning of the section, that the person manages "the whole affairs of the company". They must, however, have real authority and responsibility over the area in question. Express delegation of such responsibility would be highly relevant, though such delegation may not need to be express if it is clear that in practice the person possessed responsibility for that area. What, then, is meant by "responsibility"? The individual's authority to make relevant decisions should be considered. The court should have regard to whether he or she is the person responsible for putting relevant procedures and policies in place, or similarly whether such task is performed by staff under his/her direction and control and in respect of which he/she has the final word. The

person's role in the hierarchical chain may be important: the more senior, the more likely to he or she is to come within the meaning of "manager" as used in the section. However, if he or she has no true authority for that aspect of company's affairs, and does no more than report to a more senior member on his activities of overseeing staff in implementing the policies devised higher up the chain, that would tend to suggest that he does not have the level of responsibility required.

"Vagueness" and the requirement for certainty in the criminal law

136. The Appellant has submitted that the interpretation favoured by the Court of Appeal introduces impermissible uncertainty and vagueness into the criminal law. Presumably, then, his position is that the test now articulated by this Court has a similar flaw. Before I explain why I do not consider this submission to be made out, I should first make some reference to the case law relied upon by the Appellant. He points back as far as the judgment of O'Byrne J for the Court of Criminal Appeal in *Attorney General v. Cunningham* [1932] I.R. 28, where the learned judge referred to "the fundamental doctrine recognised in these Courts that the criminal law must be certain and specific, and that no person is to be punished unless and until he has been convicted of an offence recognised by law as a crime and punishable as such" (p. 32).

137. The most famous articulation of the doctrine in this jurisdiction was in *King v Attorney General* [1981] I.R. 233, where this Court upheld the decision of the High Court declaring inconsistent with the Constitution aspects of section 4 of the Vagrancy Act 1824 which, *inter alia*, created the offence of the frequenting by "every suspected person or reputed thief" of any of the places therein described with the intention of committing a felony. The plaintiff was convicted in the District Court at the hearing of a complaint that on

a certain occasion he, being a suspected person, was found loitering in a public place with intent to steal, contrary to section 4 of the 1824 Act. He brought an action in the High Court seeking a declaration that the provisions in question were inconsistent with the Constitution. In the course of his judgment on the State's appeal, Henchy J memorably remarked that:

> "In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance." (p. 257)

138. In his view, the ingredients of the offence and its mode of commission violated Articles 38.1 (trial in due course of law), 40.4 (liberty of the person), 40.1 (guarantee of equality before the law) and 40.3 (guarantee of protection of personal rights of the citizen) of the Constitution. Kenny J, in his judgment in the same case, referred to the "fundamental

feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by statute, are expressed without ambiguity … In my opinion, both governing phrases 'suspected person' and 'reputed thief' are so uncertain that they cannot form the foundation for a criminal offence" (p. 263).

139. The Appellant also refers to the judgment of Hardiman J in *DPP v. Cagney and McGrath* [2008] 2 I.R. 111, where the learned judge stated that "[f]rom a legal and constitutional point of view, it is a fundamental value that a citizen should know, or at least be able to find out, with some considerable measure of certainty, what precisely is prohibited and what is lawful" (pp. 121-122). To similar effect he cites the judgment of Kearns P in *Dokie v. DPP (Garda Morley) and Others* [2011] 1 I.R. 805:

> "[30] I am of the view that the failure to define the term 'satisfactory explanation' within s. 12 of the Act does give rise to vagueness and uncertainty. The section as worded has considerable potential for arbitrariness in its application by any individual member of An Garda Síochána. There is no requirement in s. 12 that the demanding officer should have formed any reasonable suspicion that the non-national has committed a crime, is about to commit a crime or is otherwise behaving unlawfully before he/she can require the non-national to provide a 'satisfactory' explanation for the absent documents.
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> …
>
> [34] In my view s. 12 of the Act of 2004 is not sufficiently precise to reasonably enable an individual to foresee the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution. Furthermore,

there is no requirement in the section to warn of the possible consequences of any failure to provide a 'satisfactory' explanation."

140. There have been a number of constitutional challenges on grounds of vagueness and uncertainty in recent years. In *Douglas v. DPP* [2014] 1 I.R. 510, Hogan J. considered whether the offences of "causing scandal" and "injuring the morals of the community" created by section 18 of the Section 18 of the Criminal Law Amendment Act 1935 were so vague and uncertain as to be contrary to the principle of legal certainty in criminal matters. The learned judge, in declaring that the offences were inconsistent with the Constitution, commented at p. 527 that:

> "It would have to be acknowledged that the *actus reus* of the two offences, public scandal and injuring the morals of the community, are totally unclear. As already noted, these terms have no defined legal meaning and no clear legal principles and policies are thereby articulated. The term 'scandal' is perhaps an overused word, not least in this country. But it is highly subjective in its application and meaning. The passerby who, for example, happened to encounter an adult couple engaged in overt sexual activity in a public park might well find the conduct objectionable and perhaps even highly offensive without necessarily thinking that any scandal was thereby created. Others might think that the word 'scandal' was really a synonym for conduct deemed by them to be objectionable and unacceptable."

The learned judge stated his conclusion as follows:

> "[57] … The offences of causing scandal and injuring the morals of the community are hopelessly and irremediably vague; they lack any clear principles and policies in relation to the scope of what conduct is prohibited and they intrinsically lend themselves to arbitrary and inconsistent application. In these circumstances the

conclusion that the offences offend the guarantees of trial in due course of law in Article 38.1 of the Constitution, the guarantee of equality before the law in Article 40.1 thereof and the protection of personal liberty in Article 40.4.1° is inescapable.

[58] For good measure, I would add that the section also fails the *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381 test inasmuch as the Oireachtas has failed to articulate clear principles and policies which mark out that conduct which is prohibited and that which is not. To that extent, therefore, I would hold that the relevant offences contravene Article 15.2.1° and, for that matter, Article 15.5.1°."

141. There have been many other challenges brought to like effect, with varying success: see, for example, *McInerney v. DPP* [2014] 1 I.R. 536, *Cox v. DPP* [2015] 3 I.R. 601, *Douglas v. DPP (No. 2)* [2017] IEHC 248 and, most recently, *Bita v. DPP* [2020] IECA 69.

142. The Appellant's argument is that it is a matter of high constitutional importance that a person should know with some certainty, in advance of his or her acting in a particular way, whether they are in a category of persons who might be liable in the criminal law for those acts. He submits that any application of the Court of Appeal's judgment – and, by extension, this Court's judgment – would be uncertain and unsure and would give rise to grave risk that certain persons in one organisation might be liable in criminal law whereas persons in other organisational structures might not, thus leading to uncertainty as to who exactly is potentially liable for crime. He says that a law cannot stand where it ascribes liability on an arbitrary or vague basis and that the dangers inherent in the loose and vague determination of liability intrinsic in the Court of Appeal's judgment would offend the principles set out above.

143. With respect, I do not accept that the section is vague or uncertain simply because the term "manager" cannot be defined with absolute precision. I do not believe that the same

could be achieved by a court, given the broad range of entities to whom section 9(1) might apply and the diversity of management structures and hierarchies within them. There is nothing inherently vague in the elements of the offence. I have attempted in this judgment to lay down a test to be applied and I do not consider that this should lead to any subjective application in the manner that the terms "suspected person" or "reputed thief" inevitably would have done, as discussed in *King*. It will of course be open to an accused to argue that he did not possess the requisite degree of control and responsibility to come within the terms of such test, as will always be a part of any criminal trial, but merely because there may be a factual argument at trial as to whether the accused possessed the requisite degree of responsibility does not mean that the section gives rise to uncertainty in the *King* sense. In many cases a very similar type of argument would surely ensue even were the "whole affairs of the company" test to be utilised instead. It is true that the size and structure of the organisation in question will factor into the application of the test and will have a bearing on its outcome, but this is simply an inevitable consequence of any test which has at its focus the degree of functional responsibility and control of the individual over the activity or area in question.

Conclusion

144. In a phrase such as that in issue in this case, a distinction must be kept in mind between words which have a statutory meaning such as a "director", "secretary" and "other similar officer", where the principle of *ejusdem generis* may apply, and a separate description word such as "manager". The latter must be construed, above all, in context: factors such as the nature of the legislation in question, and its object, purpose and intent, will be instructive; what is the liability being created and how, within the applicable rules of construction, can

compliance with the underlying provision be implemented. In the absence of a statutory definition, a word such as "manager" will also be informed by the nature, business and activities of the relevant body corporate, and of course by his or her role within that body generally, and also being that specific to the impugned activity.

145. The UK authorities are not persuasive for the reasons above set out. Neither the *Gibson*-style approach nor that adopted by the Court of Appeal in *Boal* are attractive: they do not reflect what is, in my view, the ordinary meaning of the section and in many instances, if such decisions were followed, it would be very difficult to give effect to the clear policy of a provision like section 9 of the 1996 Act, which is to impose personal liability where the act or omission of certain persons have been directly influential in the commission of the corporate offence.

146. It has frequently been said that shareholders own the company and that the Board of Directors manage the business of the company. Shareholders meet at general meeting, whether special, extraordinary, annual or otherwise. In principle, they could formulate strategy and the policy and the future direction of the company's activities. This might be suitable for some companies, but in many instances will not be. Subject to a vast array of regulatory compliance and other legislative obligations, duties and responsibilities, and also subject to the constitution of the company, the directors, that is those who comprise the Board of Directors, are generally entrusted with the responsibility of running the business of the company. Again, subject to the type of company which it is, the Board may have a very significant role to play in policy formation and strategic planning in a wide variety of matters. Evidently, companies, in their formation, their setup, and how they operate or function, will differ greatly, from two-person entities to international and transcontinental giants. It would therefore not only be foolish, but also impossible, to set out a precise formula which in all circumstances could be utilised as the interpretative tool.

147. Consequently, it is sufficient to say at this juncture that for a person to be a "manager" they must fit the description above ascribed to that term, and in particular what is stated at para. 135, *supra*.

Section 23 of the 2010 Act – whether section 23(3)(b) has been satisfied and whether the Court should order a retrial

148. This matter comes before the Court by way of a "with prejudice" appeal by the prosecutor pursuant to section 23 of the 2010 Act. It was agreed between the parties that this Court should adopt the same overall approach to the case, as did the Court of Appeal, i.e. that the Court would first consider the substantive issue of whether the learned trial judge had erred in law in the direction which he gave, and that if such issue were to be decided in favour of the prosecution the Court would then hear from the parties as to the issues arising under section 23(3)(b) and the further subsections (11), (12) and (14) of that section of the 2010 Act. Accordingly, the legal point having been decided in favour of the DPP, this Court will leave open the question as to whether in addition to the direction being wrong in law, there was evidence adduced in the proceedings such that a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned, and whether there should be a re-trial. In those circumstances, the making of a final order should be deferred until submissions have been heard from the parties on these matters.