

Insights and Commentary from Dentons

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This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

When Is A Company Dishonest?

Sam Boileau and **Helen Bowdren** of SNR Denton UK LLP, look at environmental offences requiring dishonesty – and how this type of offence could apply to your company

Many regulatory offences under environment and safety law are "strict liability" offences. If an offence is strict liability, a person can be convicted whether or not they intended to commit the offence. This is different from most criminal offences, which require the defendant to have intended to commit a wrongful act. Well known examples of strict liability offences under environmental and safety law include causing pollution of controlled waters; breaching the conditions of an environmental permit; failing to take reasonably practicable steps to ensure the safety of employees; and failing to carry out risk assessments of tasks in the workplace.

There are, however, some offences under environmental and safety law

which do require an intention to commit a wrongful act – though these are relatively rare. Examples include offences under the environmental permitting regime relating to the dishonest submission of false information to the Environment Agency; and the law of manslaughter, which can require gross negligence.

In this article we look at a recent case dealing with environmental offences requiring dishonesty – and how this type of offence applies to companies. This is important for waste management companies and public bodies alike, as it is relevant to the circumstances in which a corporate body can be found criminally culpable, and liable to fines at the high end of the scale.

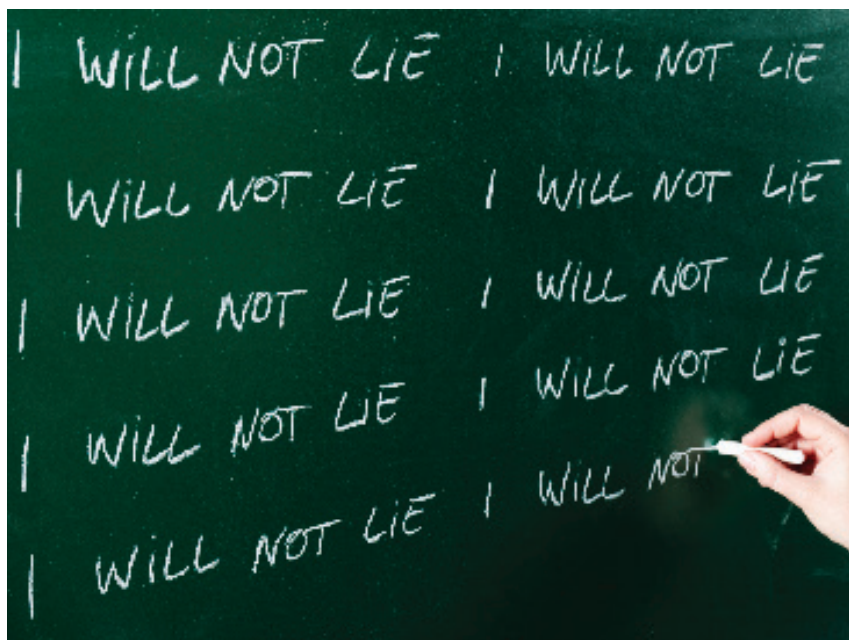
The conventional approach to liability for companies for this type

of offence was established by the House of Lords in a case called *Tesco Supermarkets Ltd v Natrass*. According to this approach, liability arises where the guilty intention was that of the board of directors, the managing director and perhaps other superior officers who carried out the company's functions and management and spoke and acted as the company. This is because figures of seniority within the company are, in effect, the controlling mind and will of the company, and as such, their intention can be attributed to the company.

The Controlling Mind

THE CONTROLLING mind principle is a useful court solution to the underlying conceptual problem that companies are artificial entities in law, and it is difficult to see how they can be morally culpable. By focusing on the intentions of the authority figures behind the company, it is easier to reconcile the notion of a company committing a criminal offence. The point at which an employee gains sufficient superiority to act as the controlling mind is a matter of debate. According to Lord Hoffman, in the *Tesco* case the general principle is to identify a senior company officer with the requisite intention, although there may be cases where the conduct of less senior employees might still attribute criminal intention to the company itself.

The principle in the *Tesco* case came under consideration again in the recent criminal case *St Regis Company Ltd v The Crown*. *St Regis* owned five paper mills and the technical site manager of



one of the smaller mills was required to produce daily environmental report sheets in respect of suspended solids in the outflow from the plant into the nearby river. False readings were recorded and misleading reports returned to the Environment Agency. St Regis was charged with a number of offences under the Pollution Prevention and Control (England and Wales) Regulations 2000, including both strict liability offences and offences requiring dishonesty. St Regis pleaded guilty to the strict liability offences but denied liability for offences under reg.32 (1)(b), by which it was an offence "intentionally to make a false entry in any record required under the condition of a permit".

At the trial the jury were directed that under the regulation, a company could be liable for the dishonest acts of an employee who was not the controlling mind and will of the company, but who carried out management functions. This was because the act of data recording and reporting was not likely to be done by a director or senior official. Since the technical manager had been entrusted by the management of the company with managing the disposal of St Regis' waste products, his mind could be identified as the controlling mind of St Regis. St Regis was convicted on this basis.

A New Approach

THIS DECISION marked a departure from the approach taken in the Tesco case and opened up the possibility that any employee, even a very junior employee, engaged in work of a similar nature could represent the controlling mind and will of the company. The judge in the Crown Court reasoned that the purpose of environmental law was to control the activities of companies in order to ensure adequate environmental protection, and the law would be ineffective if companies were not liable for the actions of their employees.

On appeal the conviction was quashed. The Court of Appeal held that the traditional approach from the Tesco case should be applied. The regulations clearly distinguished between strict liability offences and those requiring proof of intention. There was no evidence that the regime as a whole would be undermined if the traditional principles on corporate liability for

intentional offences were applied. The court considered that the manager who had been found to have been falsifying entries could not be described as part of the controlling mind of the company. He was the technical and environmental manager of the smallest of the five mills owned by the company and reported to the operations manager who, in turn, reported to the managing director. The managing director then reported to divisional technical managers. In essence, he was too far removed from key decision-making to form part of the controlling mind of the company.

A Reassuring Decision?

WHILST THIS may seem like a reassuring decision for large companies, it is not impossible that the law will change on this point in the future. The whole question of criminal liability and regulatory offences has recently been reviewed by the Law Commission. In a 2010 consultation paper, the Law Commission expressed concern about strict liability offences, and the controlling mind principle, especially as in practice it favours prosecution of small companies (where managing directors are more likely to be involved in day-to-day operations) over larger ones.

These same concerns in another area of law – manslaughter – led to a hugely significant change in the law five years ago. The introduction of the Corporate Manslaughter legislation in 2007 was designed to get rid of the "controlling mind" principle, which had made it almost impossible to secure convictions for manslaughter against large companies with complex management structures.

These concerns, insofar as they apply to environmental offences, do not perhaps have the same political significance as the historic problems with corporate manslaughter. However, it is not impossible that we will see changes in environmental law to deal with these concerns, making it easier to convict large companies of criminal offences requiring a mental element.

The final Law Commission report, which we understand is due later this year, could lay the foundations for a change in the direction of environmental regulation and its enforcement. [CIWM](#)

All waste water discharged from Hinkley Point, Somerset, will have to undergo effluent treatment under strict new controls announced by the Environment Agency.

It has issued a permit to NNB Generation Company Limited (NNB) for waste water discharges arising from site preparations for the proposed new nuclear power station at Hinkley Point C. The permit also covers the waste water discharges that would arise from construction of the station if it obtains full planning permission. The permit's requirements include the company having to construct Water Management Zones across the site to collect and control discharges; implement new site drainage systems; use modern effluent treatment units; and monitor and report its discharges and the performance of its treatment systems. Guidance on decision-making under the Regulations can be found at www.environment-agency.gov.uk/hinkleypoint.

Two businesses that illegally exported almost 260 tonnes of mixed waste to China have been fined the maximum possible amount.

The containers were stopped at Felixstowe port and were found to not be suitable for export. Colin Riddle, a partner in vehicle dismantling and metal recycling business, BW Riddle, was fined £5 000 for illegal shipment and £4 000 for failing in his duty of care. Chungs UK Ltd, a metals and plastics exporter, also pleaded guilty to breaching regulations and was fined £5 000, with both being ordered to pay £6 500 towards costs. There had been no agreement from China to accept the waste, there was no description of the contents and both businesses admitted that this was not the first occasion they had exported waste without notification or consent.

A Fife skip hire operator has been given 140 hours community service for a number of waste offences at his site in Saline.

Mr Ronald Noble Mentiplay, trading as Murray Mentiplay, pleaded guilty to knowingly permitting controlled waste to be deposited without a waste management licence in place, accepting items of special waste onto the site and failing to provide information on waste carried and transferred. Mentiplay had the waste management licence for his site suspended by SEPA in September 2009 but frequent inspections showed that new loads of waste were being brought onto the site and there was still a large stockpile of waste there.

The stockpile extended beyond the area covered by the waste management licence.