
Briefing

Job Titles Aren't Everything When It Comes To Wrong- doing



INSTITUTE OF DIRECTORS
IN IRELAND

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Where a company is found to have committed a crime, personal criminal liability can follow. In this factsheet we consider the test devised in the Supreme Court to identify a “manager” for the purpose of prosecuting waste offences in a judgment with implications for offences in other areas of law.

What Makes a Manager?

In May 2020 in *DPP v TN*¹ the Supreme Court was asked to consider the degree of responsibility required for an individual to be considered a “manager” capable of being found guilty of committing environmental offences under the Waste Management Act 1996 (as amended) (the “1996 Act”). The 1996 Act states that where an offence has been committed by a body corporate, a person can be found similarly liable where two conditions are fulfilled:

- that person must be a “director, manager, secretary or other similar officer of the body corporate”; and
- it must be proved that the offence was committed with their consent or connivance or as a result of their neglect.

Similar provisions govern offences relating to theft and fraud, investment, health, safety and welfare at work, company law and tax. In coming to its decision, the Supreme Court affirmed and expanded upon the preceding judgment of the Court of Appeal². To be found to be a “manager” capable of being found guilty of offences under the 1996 Act, a person did not have to be shown to have control over every aspect of the affairs of the company. Rather, that person had to have

¹ *DPP v TN* [2020] IESC 26

² Details of which are in the IoD Factsheet “Corporate “Manager”: It could be you” (July 2018).

real authority and responsibility for the area or activity in controversy. In establishing this test, the Supreme Court elaborated on the preceding decision of the Court of Appeal which had required the person to have “direct responsibility” over the activity or area in which the offence was committed.

The Case

The background to the decision is that Jenzsoph Limited (“Jenzsoph”) owned lands where dumping and waste activity took place. The dumping and waste activity was carried out by Neiphin Trading Limited (“Neiphin”) which occupied the facility on foot of a licence from Jenzsoph. The Environmental Protection Agency (“the EPA”) also issued a waste licence to Neiphin to govern the operation of the facility. This licence required the facility to be under the control of a suitably qualified facility manager whose identity and qualifications were to be communicated to them.

Neiphin identified Mr TN as this person, and provided information about his professional experience and employment history. In each of the annual reports submitted to the EPA, Mr TN was listed as the facility manager and positioned at the top of the management chart. Further, Mr TN corresponded regularly with the EPA about the facility in which correspondence his title varied from Director to Managing Director to Environmental Consultant. Documents from the Companies Registration Office identified him as having been director of Neiphin’s parent company during the time the environmental pollution occurred in breach of Neiphin’s waste licence.

Both Neiphin and Mr TN were charged with offences under various provisions of the 1996 Act. The DPP’s case against Neiphin was that there had been breaches of the EPA licence it held. It had failed to operate within the terms of the licence and had caused environmental pollution. The DPP’s case against Mr TN fell under s 9(1) of the Waste Management Act. This allowed the DPP to prosecute him and for him to be found guilty of offences under the 1996 Act where it could demonstrate that:

- an offence had been committed by Neiphin with the consent or connivance of Mr TN or due to his neglect; and
- Mr TN was a “director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity”.

The Person’s Real-World Function and Role is Decisive

The Supreme Court affirmed much of what was said by the Court of Appeal, but refined certain aspects of the test. It stressed that the term “other similar officers” should be considered separately and focused on the specific meaning of the term

“manager”. In addition, the Supreme Court clarified that the requirement for direct responsibility for the area in question should not exonerate someone from liability who was in a senior position (such as a Chief Executive), who was aware of breaches of the law/procedures (e.g. relating to health and safety) but had no direct responsibility for their implementation. To determine whether someone was a “manager” the Supreme Court found that:

- the person’s real-world function and role would be decisive, not their nominal job title;
- the person did not have to be in charge of running “the whole affairs of the company” to be a “manager” within the meaning of section 9 of the 1996 Act;
- the person must have real authority and responsibility over the area in question. Express delegation of responsibility would be highly relevant but did not need to be express if it was clear that, in practice, the person possessed responsibility for the area in controversy;
- responsibility could be assessed by reference to a person’s authority to make relevant decisions;
- regard should be had as to whether the person in question was responsible for putting relevant procedures and policies in place, or similarly whether that task was performed by staff under his or her direction and control, and, in respect of which he had the final word;
- the person’s role in the hierarchical chain could be important, so, the more senior, the more likely he or she would be to fall within the term “manager” as used in section 9 of the 1996 Act. However, if he or she had no true authority for that aspect of the company’s affairs, and did no more than report to a more senior member on his or her activities of overseeing staff in implementing the policies devised higher up the chain, that would tend to suggest that he or she did not have the level of responsibility required.³

Conclusion

Increasingly, regulators and enforcement authorities are scrutinising the conduct of companies and so the issue of liability for offences is an important one. Internal controls in companies have never been so important but companies also need to know who are its “managers”, what are their respective roles and responsibilities and, that those managers are aware of their potential liability for the actions of the company.

³ For completeness, in a related decision from the Supreme Court in July 2020 (*DPP v TN* [2020] IESC 53) on the issue of whether to uphold the finding by the Court of Appeal that TN should be retried on the offences with which he was charged, the court did not direct a re-trial of the accused. The delay between the events and the final appeal outcome was so long that the court did not consider that fair to the accused.

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