“CEOs, crimes, and corporate responsibility”

It is a real pleasure to be here this evening and a double honour to be delivering this lecture, first because I am a huge supporter of BACFI, and secondly, because it is a privilege to be delivering a Denning lecture following such illustrious predecessors. Bearing in mind the upheaval of the last two years, I wondered what topic I should address in 2021.

Of the many things that the past few years has changed, the burgeoning of corporate responsibility is a thread that many BACFI members doubtless have to consider when advising their CEOs, Boards or clients. That corporate crime is now the subject of public debate reflects an increasing anxiety about public safety, corporate governance, and possibly a lack of trust in companies. Regulatory regimes are rife in modern British life. We may consider current corporate responsibilities to be more onerous than before – but a glimpse at history makes one wonder whether accountability has really changed much. So, this evening I will be exploring the extent to which changes to corporate criminal law, both for the company and individual Board members, have and should have altered the landscape of corporate responsibility

To begin: A little history

Let us go back a century, long after the law of England and Wales first acknowledged that legal persons have enforceable rights and responsibilities:

Just short of 110 years ago, on Sunday April 14, 1912, a dinner was held in the First Class Restaurant of *RMS Titanic* in honour of the Captain, Edward J. Smith. At 9pm New York time, Captain Smith excused himself and went up to the bridge. During the day, warnings had been received of ice in the region of the Atlantic in which the ship was sailing. Captain Smith ordered a sharp lookout to be kept and then retired for the night. At 9:05pm, a message was received from *SS California*: “We are stopped and surrounded by ice”, to which the radio operator of the *Titanic* replied: “Keep out. I am busy.” The *California*’s warning was never passed onto the bridge.

That Sunday night was clear but moonless. At about 11:30pm, the lookout, Fred Fleet, high up in the crow’s nest, noticed a slight haze in the distance. He had not been provided with binoculars to help him spot icebergs. He later gave evidence in the Wreck Commissioner’s Court that, had his employer followed its normal practice and provided them, the disaster would have been averted. His alarm to the bridge: “*Iceberg. Right ahead.*” came too late for the ship

to change course. Within seconds, the *Titanic* had scraped alongside an iceberg which tore a gaping hole on the starboard side below the waterline. Of the 2,201 passengers and crew aboard, only 711 survived. Huge loss of life was inevitable because there were only sufficient lifeboats for 1,178 people.[1] Of the lifeboats launched – and not all were - few were filled to capacity.[2]

The *Titanic* was the flagship of the White Star Line whose Managing Director, Joseph Ismay, was on board and survived the wreck. It was generally suspected that Ismay and the board wanted the *Titanic* to beat the transatlantic crossing record. Despite the Wreck Commissioner finding that "[t]he loss of the ship was due to collision with an iceberg, brought about by the excessive speed at which the ship was being navigated" the court did not blame White Star Line for permitting the reckless practice of sailing at speed near ice, nor Captain Smith. The *Titanic* disaster claimed 1,490 lives. Although the White Star Line paid out more than $2.5m in civil settlements and cases, no one was ever prosecuted.[3]

What lessons were learned is hard to say. 75 years later little had changed. In March 1987, the *Herald of Free Enterprise,* a cross-Channel vehicle ferry under the command of Captain Lewry, sailed out of the harbour at Zeebrugge with her bow doors open, trimmed by the head (i.e. with her nose down). There was a light breeze and very little swell. Within a few minutes, the *Herald* had accelerated from 14 up to 18 knots; at 18.24, a steward heard water on the stairs. At 18:28, close to land, the ship lurched 30 degrees to port, and began to capsize. By 18:30, the *Herald* had capsized in shallow water. 150 passengers and 38 members of the crew drowned.[4]

This time, the formal investigation into the disaster put the blame for it squarely with the company. Sheen J stating:

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[1] A capacity of 216 more than the 962 required under the Merchant Shipping Act 1894 for a vessel above 10,000 tons— the *Titanic* was of 46,328 tons.

[2] The first lifeboat launched, No.7, had only 28 occupants; it had a capacity of 65. Not all the lifeboats were even launched, but of the 19 that were, only six were filled to capacity or near it.

[3] Although Horatio Bottomley MP raised the question of criminal proceeding against White Star; Hansard 5 Vol:5 ser 37, col 1204. A successful civil action brought by the family of a child that had drowned led to the White Star Line settling all other claims for over $2.5m.

[4] paras 1.1 and 1.2 M.V. Herald of Free Enterprise Report of the Court, No.8074, Dept. of Transport.

> "At first sight the faults that led to this disaster were… errors of omission on the part of the Master, the Chief Officer and the assistant bosun, and also by the failure of Captain Kirby to issue and enforce clear orders. But a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the company. … All concerned in the management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault…. From top to bottom the body corporate was infected by the disease of sloppiness."[5]

And yet, the prosecution of that company was unsuccessful. The identification doctrine - that a corporation can only be liable for a crime when a person who is the directing mind and will of the company does the necessary acts with the necessary state of mind, as the company - has proved time and again too narrow a method for the successful prosecution of corporates.

The doctrine of identification

The doctrine of identification was articulated by the House of Lords in *Tesco v Nattrass*[6]:

Despite being 50 years old this year, decided in a completely different era in terms of accountability, human rights and corporate governance, *Tesco v Nattrass* continues to be the lodestone for interpreting corporate criminal liability.

Most recently, it was explained in *SFO v Barclays plc*[7], in the prosecution of Barclays and senior bank executives including two directors, in respect of capital raisings to support the bank following the banking crisis in 2008. The question was whether the allegedly dishonest acts and state of mind of four very senior executives, could be attributed to the bank, rendering it criminally liable – in other words, they were acting as the directing mind and will of Barclays. The SFO alleged that the four men secretly agreed with various Qatari entities to give them a higher commission and greater discount than was being offered or disclosed to other investors and that they concealed the true position from the board. The first challenge was to the criminal liability of Barclays at all. In the Crown Court, the judge, Jay J., concluded that none of the

[5] Sheen Report 1987: para.14.1.

[6] [1972] AC 153

[7] [2018] EWHC3055 (QB); [2020] 1 Cr App R 28

executives were the directing mind and will of Barclays. The constitution clearly stated that it was the board that had authority to exercise "all powers of the company". Subject to express delegation that was absent on the evidence, the directing mind and will remained the board.

The judge accepted that the Fraud Act 2006's purpose was to prevent or deter fraud and that it applied to companies. He rejected the need for a special rule of attribution because it was possible on appropriate facts for the Fraud Act to apply to a company using the ordinary rule of attribution – the doctrine of identification.

When considering an application for a voluntary bill to indict the companies again, Davies LJ set out the principles that currently apply to corporate criminal liability. They include that *Tesco v Nattrass* represents the law; that there is no principle of vicarious liability in crime, unlike civil law; that the knowledge and approval of a single director is not necessarily and for all purposes to be regarded as the knowledge and approval of the board of directors and, therefore, of the company; and that companies may delegate their powers and responsibilities to an individual or group of individuals – and then their acts and knowledge would attach to the company. All these principles must be applied to the facts. If a wider approach was considered necessary, the legislature must change the law.

Although *Barclays* was determined in 2018, because of the subsequent prosecution of the senior executives it only became public last year. I pause to observe that this, in itself, may demonstrate a problem with the two-pronged approach to prosecution of companies and individuals often taken at the moment.

Corporate manslaughter

Back to those cases involving the loss of many lives: between the Herald of Free Enterprise prosecution and a change in the law, several manslaughter prosecutions for rail disasters failed – but, and it is an important but, every company had pleaded guilty to Health and Safety at Work Act 1974 offences and each was fined very substantial sums. This was apparently not enough to assuage public opprobrium. Political parties of every hue promised change in their manifestos, election after election. Only a conviction spelling out that an unlawful death had resulted from the corporate's failings was apparently sufficient. It took the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007, for manslaughter prosecutions of all but the smallest companies to be viable.

Criminal Failings in Corporate Arrangements

At its most basic the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007 was an answer to the question: should corporations continue to be treated as if they were humans or, do complex, devolved and multi-national corporations require a different approach?

That different approach has been creeping into the statute book. Parliament has been driven to legislate in respect of specific corporate crimes; for example, in order to comply with our OECD international obligations concerning anti-corruption, the Bribery Act 2010 was passed. It was after the implementation of that statute and, specifically, the s7 failing to prevent bribery offence, in force following publication of the statutory guidance in July 2011, that successful prosecutions or deferred prosecution agreements against companies have been seen in any numbers.

Another example of a reactive corporate offence followed the Panama Papers scandal in April 2016. It was estimated that the Exchequer lost £4.4bn in a single year from unpaid tax. Something had to be done. The answer Parliament chose was to introduce corporate offences of failure to prevent facilitation of tax evasion in the Criminal Finances Act 2017. That statute requires companies to put in place reasonable procedures to prevent those providing services for or on its behalf, from deliberately and dishonestly facilitating tax evasion. The statutory defence, which the corporate must prove, of putting in place reasonable procedures to prevent the offence being committed is similar, but not identical, to that in s.7 of the Bribery Act 2010 which does not use the term reasonable but adequate. (However, in the Bribery Act Post Legislative Scrutiny report of 2019, the House of Lords Committee suggested there was no difference between the two, and in the context of the Bribery Act, adequate procedures must mean reasonable procedures)[8].

Legislative change has been slow and, as these two examples demonstrate, piecemeal[9]. The fact that the executive is yet again considering different models for corporate liability for economic crime is another illustration of this disjointed approach. To my mind, it is unsatisfactory for the law to develop in this way, when it affects so much of daily life. Most companies are already regulated in some way in their specific area of business: almost all by

[8] https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf

[9] For example the offence of ill treatment or wilful neglect by a care provider s20 Criminal Justice and Courts Act 2015

the Health and Safety at Work Act, a vast swathe of businesses by money laundering requirements under the Proceeds of Crime Act 2002 frameworks, financial companies by the FCA, and many businesses by Trading Standards to name but a few. And rightly so – if a corporation choses to enter a particular sphere of business, public protection and fair competition require minimum standards. Especially so when those running or owning the business are opaque due to the corporate structure. But is it the job of the criminal law to change ethical mores?

In 2014, reacting to the accusation that there had been very few prosecutions since the Bribery Act came into force, the SFO described it as representing "a major commitment to ethical corporate culture"[10]. Whether that is true is difficult to gauge with confidence. And published HMRC answer to FOI requests, in May 2021 reveals that, since the 2017 statute came into force, not a single charge has been laid of failure to prevent facilitation of tax evasion offences, let alone a prosecution brought. Does this make the legislation a success or not? Does it indicate a change in corporate behaviour for the better? Evidence is hard to gather and frankly, it is difficult to assess.

What one can say is that business needs certainty to survive and if the law applicable to its operations are unclear or at odds with each other, decent businesses and Boards, doing their best to comply with their obligations, will falter and suffer. That is why this Parliamentary approach – enacting reactive and fragmentary corporate offences in the recent past - is, in my view, flawed.

What should we actually be aiming to achieve? Extending criminal liability, putting in place more regulation, or nothing at all? *Looking at the last couple of years in terms of the criminal liability of companies and their senior officers, we may get one answer to the question from cases contested in court and another from the perspective of DPAs.*

It is worth noting that in the Government's Response to the Corporate Liability for Economic Crime Call for Evidence, published in November 2020[11], just over half of respondents did not believe that the existing criminal and regulatory framework provided sufficient deterrence for

[10] Enforcing the UK Bribery Act – The UK Serious Fraud Office's Perspective, https://www.sfo.gov.uk/2014/11/17/stuart-alford-qc-enforcing-uk-bribery-act-uk-serious-fraud-offices-perspective/

[11] https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/results/corporate-liability-economic-crime-call-evidence-government-response.pdf

corporate misconduct. In other words almost half were satisfied it did. It is unsurprising that the Minister found "no conclusive evidence base on which to justify reform"[12] despite it raising important questions about the doctrine of identification. More surprisingly, a response by government departments, regulators, prosecutors and law enforcement agencies also proved inconclusive[13].

And that is no doubt how the Law Commission[14] came to be considering whether the identification doctrine needs to be overhauled and replaced or whether, in fact, it strikes, if not the right note, then, the least worst note, for corporate criminal liability; and if it is to be replaced, should expansion of the 'failing to prevent model' be adopted or is regulation or 'civil penalties' the solution? None is straightforward.

In a commercial context, bribery, tax evasion and fraud are all economic offences which focus on a corporation's benefit from the wrongdoing of associated individuals, whether in pursuit of contractual or commercial advantage or tax limitation. As each is intended for corporate gain, a consistent framework for holding corporations liable is attractive and in the public interest. No doubt to the frustration of business, CEOs and their legal advisors, the tests for and defences in the existing "failure to prevent" offences are different. Whereas large corporate entities can pour resources into corporate governance, it is unhelpful to business, I suggest, particularly small and medium sized enterprises, to impose extra burdens on the organisation of business by the imposition of different requirements depending on the statutory crime. If failing to prevent economic crime is more widely applied, in the interests of good corporate governance, consistency in the formulation of criminal liability, and of approach is vital.

But, in practice, it is difficult to apply, particularly where economic loss involves the company as a victim; should the corporate be criminally liable for a rogue director's conduct from which it may itself suffer? Which economic crimes should any failing to prevent offences attach to? We hardly need remind ourselves that we are only talking about criminal liability, so the civil

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[12] "Corporate Liability for Economic Crime Call for Evidence: Government Response", p.12. Available at: https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/results/corporate-liability-economic-crime-call-evidence-government-response.pdf.

[13] "Corporate Liability for Economic Crime Call for Evidence: Government Response", p.3

[14] https://www.lawcom.gov.uk/law-commission-begins-project-on-corporate-criminal-liability/.

and regulatory consequences for the company of those acting in or for it, remain the corporate's responsibility, regardless of the formulation of the criminal law.

DPAs

At the same time that the limitations on the identification doctrine have been explored by academics, government and legal community, corporate criminal outcomes have been changing in another way. In 2013 s.45 and Schedule 17 of the Crime and Courts Act introduced Deferred Prosecution Agreements ("DPAs") to the UK. DPAs, an agreement between a prosecutor and a company facing prosecution for certain economic or financial offences, have had an extraordinary effect on the prosecution not just of companies but of directors, senior managers and employees of the company – and not always as the government or prosecuting authority might have predicted.

According to the DPA Code of Practice agreed by the SFO and CPS, a DPA is a viable disposal, as long as there is "a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test"[15]. It can immediately be seen that the evidential test is lower than that required to prosecute a case.

By entering into a DPA, both the prosecutor and the company benefit. The prosecuting authority reduces the resources necessary to investigate and prosecute a company, and enables it to agree a financial penalty, disgorgement of profit and its own costs; and the company benefits from far more control over the process, its reputational risk and the ultimate outcome, including its market position and its ability to bid for future contracts; far greater control than it would have, if prosecuted.

Overseen by the court (but on the basis of a statement of facts agreed between the prosecutor and the company which the Judge has no real opportunity to explore), it is in the interests of both parties to the agreement to present a united front to the court.

[15] https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf

DPAs had a slow start, as one might expect. But in the last couple of years more have been agreed and they have evolved: originally, the SFO said that a self-report was vital – now it is optional; what started as a maximum of 30% discount, is now routinely at 50%, even where there was no initial self-report[16]. And this year, a DPA between Amec Foster Wheeler Energy Ltd ("AFWEL") and the SFO was endorsed by the court as being in the interests of justice and the public. It tells an interesting tale of the current position of DPAs: it was agreed in respect of 10 offences of corruption (including one s7 failing to prevent bribery offence) covering 18 years of offending, across 5 continents. Although an internal investigation uncovering corruption was reported to their board in 2007-2009, nothing was done to report the conduct to the authorities. Even this did not prevent a DPA being the appropriate outcome.

The court held a DPA was in the public interest. What makes this DPA all the more fascinating is that the parent company of AFWEL, John Wood Group plc undertook to be responsible for paying the penalties and for the performance of AFWEL's obligations under the DPA even though it was described as "twice removed"[17]. In other words, a company that had done nothing wrong itself, would – and could - ultimately ''carry the can' for its subsidiary's criminal conduct, all of which occurred before it bought it and of which it was unaware when it bought it. Is this really where and how we want our criminal law to operate?

What of the CEO and board members?

Giving judgment endorsing the AFWEL DPA, Edis LJ said: " In my judgment the proper course for it [the board] to have adopted, not as a matter of legal duty, but as a matter of ethical corporate governance was to report the known facts to the SFO…I accept that there was no legal requirement to report suspected crime to the authorities, but there is a moral duty on all citizens in this respect which extends at least equally to corporations." Although one can well sympathise with the conundrum the court faced, it is questionable whether this is correct as a matter of law.

It is the duty of every director of a company to promote the success of the company according to s172 of the Companies Act 2006:

[16] Serious Fraud Office v Rolls-Royce Plc [2017] Lloyd's Rep. F.C. 249

[17] there having been two corporate takeovers between the offending and the DPA

> (1)A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
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> (a)the likely consequences of any decision in the long term,
>
> (b)the interests of the company's employees,
>
> (c)the need to foster the company's business relationships with suppliers, customers and others,
>
> (d)the impact of the company's operations on the community and the environment,
>
> (e)the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f)the need to act fairly as between members of the company.
>
> (2)Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3)The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

Ethics or morals do not come into it.

In the UK, DPAs are not available for individuals. And individuals have no standing or ability to intervene in the agreement of a DPA. Whether named in the agreed statement of facts (as they originally were) or supposedly unidentifiable (as the practice has now become), those against whom there appears to be evidence of commission of a crime in the corporate's internal investigation or the prosecutor's examination of the facts, are entirely left out of the process. That process, as we have seen, may be driven by business imperatives that are at odds with likely outcomes in court. The last few DPAs and prosecutions of companies – such as Barclays – have been followed by the acquittal of individuals subsequently prosecuted. This does nothing legally to undermine the standing of the DPA with the corporate, endorsed by the Court. But it appears odd at best and contradictory at worst to the public. And either way, it demonstrates a profound difference in approach from traditional prosecuting. It is unsurprising that there are difficulties for the prosecutor pursuing individuals when the foundation of a DPA is on a lesser and different evidential test; with a party engaged in obtaining a cooperative result, rather than an adversarial process; one in which it agrees matters on a pragmatic, rather than an evidential, basis. What is in the interests of the business and the shareholders of the

company, may very well not be what is in the interest of those senior managers who have acted for the company, or indeed the company itself, many years before.

Liability of senior managers

So how should the CEO and those advising her or him, approach individual liability? One thing is clear: despite the fact that a DPA may have provided an evidential foundation – often skewed for the reasons we have noted - it is inadmissible in a subsequent criminal trial of those who are not party to its agreement.

The Law Commission was tasked with considering questions such as which principles should govern the criminal liability of an individual director for the actions of corporates bodies? Were statutory "consent, connivance or neglect" provisions necessary? Or is the general law of secondary liability sufficient to prosecute directors where they bear some responsibility for a company's criminal conduct?

Although there are numerous provisions extending liability to officers or others whose consent, connivance or neglect leads to corporate crimes, they are not invoked often; conviction is dependant on proof of an offence against the corporate – easy to do in a regulatory field where strict liability is the norm but, far harder where the identification principle is the route to proof. In my opinion, where there is an adequate regulatory regime to address individual conduct that falls below that required in business, and risks the protection of the public, but falls short of the standards we set for our criminal law, a regulatory or civil disposal should be sufficient. Directors' disqualification proceedings in the Chancery Division provide another example of civil protective measures.

Conclusion

In the end, we may conclude that the best approach to corporate criminal liability requires answers to a series of far deeper questions for which evidence may be thin on the ground: is the public declaratory nature of the criminal law necessary to encourage better corporate behaviour and that of senior managers, or are civil and regulatory regimes just as, or even more, effective? Is a narrow interpretation of criminal liability in fact in the public interest? In my opinion, society should not criminalise a person (including a company) when there is no criminal state of mind. Nor should Parliament water down the test of what is criminal, to reduce the number of failed prosecutions against companies. It is not a principled way forward, simply to stop the media from shouting a misinformed headline that those at the top

have ‘got away with’ something or a corporation has been ‘let off’. Unless there is actual criminal conduct accompanied by the requisite mental state, I do not believe we ought to be criminalising behaviour. Regulation is one thing, criminalisation, another.

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8 DECEMBER 2021