# Pensions crimes and fines: Where a company is liable, what is the secondary person extension to third parties: "a director, manager, secretary or other similar officer"?

**by David Pollard and Sebastian Allen**

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# Pension crimes and fines: Where a company is liable, secondary person extension to "a director, manager, secretary or other similar officer"

## by David Pollard and Sebastian Allen[1]

## Introduction

1. This paper is the background paper for the first two sections of a seminar given by us on 30 June 2025 for the Association of Pension Lawyers (APL). It is based on, and updates, a paper given at the Nugee Memorial Lectures in June 2024.

2. The world of pensions has always stood out as a confluence of different areas of civil law; a legal fusion of trusts, equity, employment and company law, all underpinned by a vast array of statutory and regulatory provisions.

3. Since the Pension Schemes Act 2021 ("**PSA 2021**"), the more alien world of criminal law has been reinforced as part of this melting pot of legal principle and practice. Pensions practitioners throughout the industry have had to get to grips with a variety of criminal law issues, which most people will have thought they had safely left behind at law school.

4. This paper deals with one particular aspect of this "crimes and fines" approach, namely when what this paper calls a "***secondary person extension***" applies to make a "director, manager, secretary or other officer" of the body corporate (or company[2]) liable as well as the body corporate itself.

5. This paper considers:

> A An overview of the pensions crimes and fines?
> This section outlines some of the various crimes and fines provisions under the pensions legislation.
>
> B The secondary party extension - who
> This paper then looks at who it is that can commit these criminal offences or penalty provisions – not only in terms of those who are primarily responsible for particular conduct, but also in terms of when a secondary person (eg a director or manager of the company) can also be convicted or incur liability.
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> C The secondary party extension – when?

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[1] Barristers of Wilberforce Chambers, Lincoln's Inn, London. This paper is derived from a section of a paper given (with James McCreath) at the Wilberforce Chambers Nugee Memorial Lectures 2024 '*Criminal and civil sanctions in the pensions context*' (June 2024).

[2] This paper tends to use the term 'company', but much of the legislation refers to a "body corporate" and so will extend to such bodies even if not a company incorporated under the UK Companies Acts. Examples are limited liability partnerships (LLPs), overseas companies, companies incorporated by statute or royal charter etc.

# A What are the pensions crimes and fines?

6. There are variety of different pensions crimes and fines now embedded in the pensions legislation.

7. The main relevant statutes are the Pension Schemes Act 1993 (***PSA 1993***), Pensions Act 1995 (***PA 1995***), the Pensions Act 2004 (***PA 2004***), the Pensions Act 2008[3] (***PA 2008***) and the Pension Schemes Act 2021 (***PSA 2021***).

8. PSA 2021 in relation to the significant amendments and extensions made (from October 2021) by the inclusion in PA 2004 of (a) new crimes; and (b) an enhanced "financial penalty" regime (in PA 2004, s 88A).

9. There are now essentially three main levels of penal provision in the pensions legislation:

   9.1. crimes

   9.2. financial penalties (of currently up to £1m) – PA 2004, s 88A[4].

   9.3. civil penalties – where the legislation cross-refers to PA 1995, s 10[5]. The maximum penalty is currently £5,000 for an individual or £50,000 for a company.

10. There are also:

   - penalties under auto-enrolment legislation (Pensions Act 2008) and climate change regulations[6], sometimes following failure to comply with a compliance notice.

   - the Pensions Regulator (***TPR***) also has power to issue fixed and escalating penalties in relation to failure to comply with the auto-enrolment legislation or a failure to comply with the information provisions relating to TPR.[7]

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3 PA 2008 mainly relates to the employer duties in relation to auto-enrolment.

4 Inserted by PSA 2021, s 115, with effect on and from 1 October 2021 and only in relation to acts or omissions after that date - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

5 Slightly oddly, at least one of the civil penalty provisions is free-standing and does not just refer to s 10. The specific civil penalty in regulation 18A of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349, as amended). This was added into the 2006 consultation regulations on and from 6 April 2009 by SI 2009/615. The penalty looks similar to that in PA 1995, s 10, but the consultation regulations do not (unlike s 10) contain a secondary person extension.

6 The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (SI 2021/839), reg 9.

7 PA 2008, ss 40 and 41 (auto-enrolment) and, inserted by PSA 2021, PA 2004, ss 77A and 77B (failure to comply with s 72 information requests). PA 2004 incorporates, in PA 2004, ss 77A(5) and 77B(7), the provisions dealing with auto-enrolment penalties in PA 2008, ss 42 to 44.

- the Pension Schemes bill 2025 will, if enacted, include new escalating penalties on similar lines to the above in relation to superfunds[8]. The bill does not include any secondary liability extension.

## Pensions crimes

11. There were a number of well-known areas under pensions legislation where conduct could result in a criminal sanction even prior to the PA 2021. These remain in force.

12. The main examples of these include:

    12.1. failing to provide information required by the Pensions Regulator (***TPR***) by a formal notice under PA 2004, s 72 (PA 2004, s 77);

    12.2. obstructing any inspector exercising powers under ss 73, 74 or 75 of the PA 2004 (PA 2004, s 77);

    12.3. knowingly or recklessly providing[9] false or misleading information to TPR – PA 2004, s 80 or the Pension Protection Fund (***PPF***) (PA 2004, s 195);

    12.4. wilfully failing to comply with the auto-enrolment duty (PA 2008, s 45);

    12.5. knowingly to be concerned in the fraudulent evasion of the duty on the employer to pay to the relevant scheme any employee contributions which have been deducted at source by the employer from pay - PA 1995, s 49(11). A similar offence applies in relation to 'direct payment

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8 Pension Schemes Bill 2025, as introduced and ordered by the House of Commons to be printed on 5 June 2025 – see clauses 84 and 85 of the bill and paras 8 and 9 of the Schedule (amending ss77A and 77B of PA 2004).

9 The offences under ss80 and 195 relate to "any person" providing false or misleading information. It is not clear whether the primary information offence (a) is incurred by the individual person who actually supplies the information or (b) is incurred by the relevant company or entity for whom that individual is acting (using the usual attribution rules for corporate knowledge) or perhaps both. If (a), the potential for a secondary person extension is reduced; if (b) then a secondary person extension can arise.
On the potential for the person passing on information to be taken to have adopted it or made implicit representations, see *FoodCo UK LLF (t/a Muffin Break) v Henry Boot Development Ltd* [2010] EWHC 358 (Ch). Lewison J commented at [218],

> "If, in the course of negotiations, a person passes on information which has been supplied to him, he may simply pass it on as information, or he may adopt it as his own statement of fact. If he passes it on merely as information, he may be guilty of a misrepresentation if he does not fairly set out the information (e.g. where he passes on parts of a surveyor's report but omits qualifications to the surveyor's opinion). But otherwise he does not adopt it as his own. He may also make implicit representations by passing on the information. Thus where the audited accounts of a company were passed to potential buyers of the company, there was an implied representation by the person who passed on the accounts that the accounts had been prepared honestly; and that he was not aware of anything that prevented them from giving a true and fair view of the company's financial position: *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) (§79). Again, it all depends on context: there is no absolute rule of law."

arrangements' (eg with personal pensions) under the Pension Schemes Act 1993, s 111A(12);

12.6. a trustee or manager agreeing in the determination to make an investment in breach of the restrictions on employer-related investments (PA 1995, s 40(5)).[10] There have been a number of criminal prosecutions under this provision[11], and also one where a professional adviser to a scheme had been charged with four counts of assisting or encouraging prohibited loans[12].

13. There is a list of 'Criminal offences under workplace pensions legislation' in Appendix 1 of TPR's Prosecution policy[13].

14. The PSA 2021, with effect on and from 1 October 2021, amended PA 2004 to add various new crimes in relation to pensions and added new powers for TPR to levy (through a determination by its determinations panel) enhanced financial penalties (PA 2004, s 88A)[14].

15. The new 2021 crimes[15] now in PA 2004 include:

15.1. failure to pay a s 38 contribution notice (without reasonable excuse) – PA 2004, s 42A;

15.2. avoidance of an employer debt under PA 1995, s 75 – PA 2004, s 58A; and

15.3. conduct risking accrued scheme benefits – PA 2004, s 58B.

16. The first of these adds to what was previously just a civil law obligation to pay the statutory "debt" arising under a contribution notice into an obligation that has criminal sanctions attached to it if there is a failure to comply.

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10 A trustee who "fails to take all such steps as are reasonable to secure compliance" with the restrictions on employer-related investments can be liable to a civil penalty (under PA 1995, s 10) – PA 1995, s 40(4).

11 TPR's Compliance and enforcement bulletin July to December 2024 indicates 8 criminal cases based on Fraud by Abuse of Position under Section 4 of the Fraud Act 2006 and 9 criminal cases under s 40 up to the end of 2024. See https://www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/enforcement-bulletins/compliance-and-enforcement-bulletin-july-to-december-2024

12 TPR press release: *Former trustees face crown court over illegal pension loan and investment offences* Ref: PN22-30 Issued Thursday 20 October 2022. https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2022-press-releases/former-trustees-face-crown-court-over-illegal-pension-loan-and-investment-offences

13 TPR's Prosecution policy (published 25 October 2022). See https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-and-enforcement-policies/prosecution-policy.

14 For a review of the new financial penalties under s88A, see the talk at the APL Summer Conference in August 2021 by David Pollard and Edward Sawyer '*Financial Penalties under PSA 2021*' (2 Aug 2021).

15 There are broadly equivalent financial penalties as well – PA 2004, ss 42B, 58C and 58D.

17. The offence of "*avoidance of an employer debt*" is committed by engaging intentionally in a course of conduct (or an act or omission) that:

    17.1. prevents the recovery of the whole or any part of a s 75 debt due from the employer;

    17.2. prevents the debt becoming due;

    17.3. compromises or otherwise settles the debt; or

    17.4. reduces the amount of the debt which would otherwise become due,

    without a reasonable excuse.

18. The offence of "*conduct risking accrued scheme benefits*" is committed if a person:

    18.1. engages in a course of conduct (or an act or omission) that detrimentally affects in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise);

    18.2. knew or ought to have known that the course of conduct would have that effect; and

    18.3. did so without a reasonable excuse.

19. The offences can be committed by any person, not just those who have responsibility for the pension scheme or are associated or connected with the scheme's employer/sponsor[16].

20. For the *avoidance of an employer debt* and *conduct risking accrued scheme benefits* offences, the criminal sanctions are up to 7 years imprisonment and an unlimited fine.

21. TPR has highlighted[17] the fact that advisers and others, who are not party to the relevant transactions, may be considered for prosecution where they help or encourage someone else to commit an offence. But TPR notes a reasonable excuse defence: "*Therefore, an adviser, whose advice assisted or encouraged an act that had the effect described in either offence, will not be liable if they have a reasonable excuse for advising in the way that they did*."

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16 Unlike the targets for a contribution notice (CN) or financial support direction (FSD), which can only apply to someone who is or was so connected or associated with an employer.

17 Section D of TPR's *Criminal offences policy sections 58A and 58B of the Pensions Act 2004* (published 29 September 2021). https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-and-enforcement-policies/criminal-offences-policy.

22. An example is given of a reasonable excuse potential defence for an adviser[18]:

> "Where an adviser has acted in accordance with their professional duties, conduct obligations and ethical standards applicable to the type of the advice being given.
> The applicable duties, obligations and standards will ordinarily depend on the professional discipline and oversight by the appropriate regulatory body."

However, TPR said it may consider prosecution where "the conduct they helped or encouraged meets the 'act' test for the offence of conduct risking accrued scheme benefits" if they do so without a reasonable excuse[19].

23. What that means in practice is that *all* advisers have to understand and be particularly wary of the sorts of situations that might give rise to these new criminal sanctions.

24. The problem is that the statutory language is very broadly drafted and may in principle catch any course of dealing that reduces the resources available to fund the scheme or the scheme's recoveries in a default scenario. They may consequently cover a wide range of ordinary business or other activities, subject to an overriding exemption where there is a "reasonable excuse" (which is a matter ultimately for a fact decider in the relevant criminal court – often a jury - to decide).

25. Where is the line to be drawn as to what is permissible commercial conduct and what is criminal conduct?

26. TPR is the main prosecuting authority for these offences. Useful guidance notes have been issued by TPR, including:

- a criminal offences policy for ss58A and 58B of PA 2004[20]; and
- a note outlining TPR's approach to overlapping powers[21].

27. The essential message from TPR's guidance is that it is currently[22] not intending to target "ordinary commercial activity" but rather the most serious examples of intentional or reckless conduct that were already within the scope of their Contribution Notice power or would be in scope if the person were connected with

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18 Appendix 2 of TPR's *Criminal offences policy sections 58A and 58B of the Pensions Act 2004* (published 29 September 2021).

19 The references to "helped or encouraged" seem to be a reference to the extended criminal liability under the Accessories and Abettors Act 1861, s 8.

20 TPR's *Criminal offences policy sections 58A and 58B of the Pensions Act 2004* (published 29 September 2021). https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-and-enforcement-policies/criminal-offences-policy

21 TPR *Overlapping powers: our approach* (25 October 2022). https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-and-enforcement-policies/scheme-management-enforcement-policy/overlapping-powers/overlapping-powers-our-approach

22 Or at least when issued in 2021 was.

the scheme employer. The guidance provides quite a lot of detail and some worked examples to assist advisers in this area.

28. There are, however, a number of obvious difficulties with a criminal sanctions regime which on its face captures an extensive range of ordinary commercial conduct and which leaves it to the prosecting entity to determine on a case by case basis which claims to pursue.

29. Whilst TPR made it clear that their current policy is that prosecutions will target conduct that would previously have fallen within their Contribution Notice jurisdiction (but extended to apply to those who are outside that jurisdiction as not being connected or associated), the reality is that there has always been a great deal of uncertainty within the market as to what commercial conduct could legitimately trigger a Contribution Notice. There is still very little in the way of precedent in this area and so providing advice as to what conduct could or could not trigger a Contribution Notice being issued remains very difficult in practice.

30. The difficulties caused by that uncertainty are compounded by the fact that:

    30.1. Just because something is "ordinary commercial conduct" in the market, does not mean that it will be considered by TPR to be acceptable where pension scheme rights have (in its view) been under prioritised within those ordinary commercial practices.

    30.2. TPR has made it clear that criminal sanctions (ie prosecutions) will not be limited (as Contribution Notices are) to those who are connected or associated with the employer of the scheme, so that criminal sanctions may lie against people even where no Contribution Notice would be available, such as against lenders, suppliers or insurance companies – and potentially others eg trade unions and contractors.

    30.3. The "mental element" required for s 58A (avoidance of an employer debt) is "intention" but for s 58B (conduct risking accrued benefits) it is both intention and recklessness. This means that prosecution can lie against people who are not connected or associated with the scheme even where they did not intend to risk accrued benefits but it is considered by TPR that they ought to have known that their conduct risked accrued benefits.

    30.4. There is no s 42 equivalent clearance application that can be made to shield people from criminal sanctions under ss 58A and 58B. Whilst it would be expected that a successful clearance application would count for something in any decision to be taken by TPR as to whether or not to prosecute, there are no guarantees.

31. It is likely in practice – given the breadth of the offences that have been drafted by the legislature – that considerable weight will have to be placed by TPR on what is a "reasonable excuse" for the purposes of delimiting the ambit of its

prosecutions in the same way that a great deal of weight is put on the concept of "reasonableness" in the Contribution Notice jurisdiction to ascertain whether a Contribution Notice ought to be issued.

32. The guidance issued by TPR[23] explains the sort of factors that TPR will take into account when considering what amounts to a "reasonable excuse". A clear focus in that guidance is the objective of the particular acts involved and the message being given is that the more disconnected or attenuated any potential damage to the scheme is from the "objectives" of those involved in the acts, the more likely it is that TPR will consider that there is a "reasonable excuse" for the purposes of the legislative framework and so may decide not to prosecute.

## Pensions: financial penalties

33. Under the amendments to PA 2004 (made by PSA 2021 on and from 1 October 2021), there is a potential for TPR to levy financial penalties (under PA 2004, s 88A) on a person, including an employer. The penalties can be for up to £1m (but this limit can be increased by the Secretary of State).

34. These can arise in circumstances which include:

    34.1. failure to pay a contribution notice under PA 2004, s 38 without reasonable excuse – PA 2004, s 40B;

    34.2. avoidance of an employer debt under PA 1995, s 75 – PA 2004, s 58C;

    34.3. conduct risking accrued scheme benefits – PA 2004, s 58D;

    34.4. failure to notify TPR of a 'notifiable event' - PA 2004, ss 69[24] and 69A[25];

    34.5. knowingly or recklessly providing false or misleading information to TPR – PA 2004, s 80A; and

    34.6. knowingly or recklessly providing false or misleading information to pension scheme trustees - PA 2004, s 80B.

35. The Pension Schemes bill 2025[26], currently before Parliament, will, if enacted, add:

    35.1. a new criminal offence (and financial penalty under PA 2004, s88A) in relation to various matters involving a superfund transfer (including

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23 TPR's *Criminal offences policy sections 58A and 58B of the Pensions Act 2004* (published 29 September 2021). https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-and-enforcement-policies/criminal-offences-policy

24 Before 1 October 2021, failure to notify TPR of a notifiable event under s 69 could incur a civil penalty under PA 1995, s 10.

25 PA 2004, s 69A envisages extended notifiable events, but as at the date of writing is not yet in force.

26 Pension Schemes Bill 2025, as introduced and ordered by the House of Commons to be printed on 5 June 2025.

promoting a pension scheme which is not a superfund with a view to it receiving a superfund transfer) - clause 54 of the 2025 bill[27]; and

35.2. a new criminal offence (and financial penalty under s88A) that "A person may not make or receive a superfund transfer, or cause or permit a superfund transfer to be made or received, unless the superfund transfer is approved" by TPR under Chapter 3 of Part 3 – clause 57 of the 2025 bill[28].

## Pensions: civil penalties

36. The examples of potential pensions civil penalties (under PA 1995, s 10) on an employer include:

36.1. failing to pay across employee contributions within the required time without a reasonable excuse - PA 1995, s 49;

36.2. failing to report a breach of law to TPR – PA 2004, s 70; and

36.3. failing without reasonable excuse to pay contributions under the schedule of contributions – PA 2004, s 228(4)(b).

37. The *Pensions Law Handbook*[29] used to contain a useful list of potential criminal and civil penalties under the pensions legislation[30], but this has been dropped in recent editions.

## Pensions fixed penalty and escalating penalties

38. TPR also has power to issue fixed penalty notices and escalating penalty notices.[31] The climate change regulations 2021[32] include penalty notice provisions.

39. These are broadly for failure to comply with auto-enrolment requirements or information or investigation notices from TPR under PA 2004, ss 72–75. However, these provisions do not include any secondary party (e.g. director or officer) extensions, unlike those applicable to crimes, financial penalties or other civil penalties.

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27 Pension Schemes Bill 2025, as introduced and ordered by the House of Commons to be printed on 5 June 2025.

28 Pension Schemes Bill 2025, as introduced and ordered by the House of Commons to be printed on 5 June 2025.

29 Current edition is the 16th edition by CMS Pensions Team (Bloomsbury Professional, 2023).

30 For example, the 12th edition (2015), Appendix I.

31 PA 2008, ss 40 and 41 (auto-enrolment) and, inserted by PSA 2021, PA 2004, ss 77A and 77B (failure to comply with s 72 information requests). PA 2004 incorporates, in PA 2004, ss 77A(5) and 77B(7), the provisions dealing with auto-enrolment penalties in PA 2008, ss 42 to 44.

32 The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (SI 2021/839), reg 9.

**40.** Similar powers in relation to superfunds will be added by the Pension Schemes bill 2025, if enacted (see 10 above).

# B Whose criminal offence or penalty is it?

41. Where crimes or fines apply to a "body corporate" – eg an employer or a trustee company – various persons involved in the company can also be potentially guilty of a crime (or incur a financial or civil penalty) where they are involved in the relevant crime (or penalty action) committed by the company.

42. In common with much other legislation, the 'crimes and fines' provisions in the pensions legislation each usually contain an extension allowing a secondary party – **a "director, manager, secretary or other similar officer of the body corporate"** – to be guilty of the same offence as the company (or also liable for a penalty). This is subject to other conditions being satisfied, in particular the need for the offence (fine) to have involved the consent or connivance of, or (in most cases) neglect by, the secondary party.

43. This section of the paper looks at the position of such secondary parties under the extension provisions in the pensions crimes and fines legislation.

44. This is a fairly complex area – for example the issue of whether an insolvency practitioner is an "officer" of the company over which he or she has been appointed is the subject of the recent decision of the Supreme Court in *R (Palmer) v Northern Derbyshire*[33].

45. This section looks in more detail[34] at two areas:

    45.1. Who falls within the secondary class - ie who is a director or officer or manager?; and

    45.2. For those who fall within the class, what more is needed for a liability?

## Other criminal accessory liability

46. In the case of criminal offences, third parties (including directors etc) can also be guilty of a criminal offence under the general legal accessory provisions. These are not dealt with in this paper, but an outline is below:

| |
|---|
| Where a corporate entity is guilty of a crime (but not a financial or civil penalty), general legislation provides for involved third parties potentially also to incur a liability in some circumstances. This includes:<br>(a) **Accessories and Abettors Act 1861**: a person aiding, abetting, counselling or procuring the company in committing a criminal offence – the Accessories and Abettors Act 1861, s 8. |

[33] *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288. Discussed in more detail in the note in Appendix 1 to this paper.

[34] Drawing from, and updating extracts from the commentary in, David Pollard's books: '*Connected and Associated: Insolvency and Pensions Law*' (2021, Bloomsbury Professional) and '*Corporate Insolvency: Employment and Pension Rights*' (7th edn, 2022, Bloomsbury Professional).

(b) **Serious Crime Act 2007**: under Part 2 of the Serious Crime Act 2007, third parties can be guilty of an offence if they intentionally encourage or assist a criminal offence (whether or not the offence is actually committed).
(c) **Direct criminal offence or civil penalty:** Third parties could incur direct criminal liability under the relevant provisions if they committed the offence themselves (even though they may be acting on behalf of the company). For example, if the crime involved the director or manager agreeing to it being carried out (eg the conspiracy offence under Criminal Law Act 1977, s 1). Usually this would require specific intent.

The potential secondary criminal liabilities under the Accessories and Abettors Act 1861 or the Serious Crime Act 2007 only apply to crimes (or potential crimes) of the company. They do not as such apply where the company is liable for civil penalties or financial penalties which are not crimes.

## Using decisions on other statutes

47. There is little reported caselaw on the pensions crimes and fines provisions and even less on the secondary person extension extensions in the pensions legislation. But the extension provisions follow a similar form to that used in many other statutes.

48. There is commentary in the caselaw generally on statutory interpretation that there is "danger" in construing words in one statute by reference to a decision on similar words in another statute[35]. But other caselaw holds that decisions on other statutes can be considered where they are "instructive by analogy" and can be "strongly supportive"[36].

49. In practice the decisions on secondary party provisions in other legislation are, in our view, likely to be applied in relation to the pensions legislation as well – at least in the absence of a convincing reason why to distinguish a decision in a pensions context.

## Pensions crimes and fines and secondary parties

50. Pensions legislation contains increasing numbers of criminal, financial penalty and civil penalty provisions. To date, these have been seemingly little used (aside from the auto-enrolment penalty provisions and prosecutions for failure to provide

[35] See eg *Hastie & Jenkinson v McMahon* [1991] 1 All ER 255, CA per Woolf LJ at p261g:
"There is always danger in seeking to apply decisions on specific statutory provisions to different situations….";
and *Stephens v Cuckfield RDC* [1960] 2 All ER 716, CA per Upjohn LJ at p719G:
"Authorities on rather similar words in other Acts passed for entirely different purposes … do not assist us."

[36] For example, Lord Lloyd-Jones in *R (KBR Inc) v SFO* [2021] UKSC 35, [2022] AC 519 at [46] and [53].

information to TPR[37]), but they have potentially wide effect. Part A of this paper gives a general outline of the pensions crimes and fines regime.

51. The primary target for a criminal or penalty process is usually a trustee or employer who fails to comply with some requirement[38]. But where the relevant target is a body corporate (ie a company incorporated under the Companies Acts, but also other corporate bodies and foreign corporations), the pensions legislation, in common with much other legislation[39], also usually provides that a secondary class of persons - a "*director, manager, secretary or other similar officer of the body corporate*" - can also be guilty of the offence (or incur a penalty).

52. The England and Wales Law Commission commented in its 2022 paper 'Corporate Criminal Liability: an options paper' (10 June 2022) that there seemed to be well over a thousand legislative instruments creating criminal liability on this basis. A Westlaw search on 30 June 2025 got over 1790 hits for "consent or connivance".

53. This secondary person extension is subject to some other conditions, in particular that the relevant offence/penalty was incurred by the relevant offending company[40] due to the consent, connivance or (in most cases) neglect of the secondary party[41].

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37 See eg TPR press release "Former sports centre director fined for withholding information in pensions probe" (31 May 2024) https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2024-press-releases/former-sports-centre-director-fined-for-withholding-information-in-pensions-probe. Stated to be a prosecution under s77(5), Pensions Act 2004. It is not clear from the press release whether the prosecution was based on a direct request for information served by TPR on the director or whether the request was made to the company and the director was being prosecuted under the secondary person extension provisions discussed in this paper.
Dominic Chappell was convicted in 2018 of failing to comply with s72 information requests served on him personally – see *The Pensions Regulator v Chappell* [2018] EW Misc B1 (MagC) see https://www.bailii.org/ew/cases/Misc/2018/B1.html. An appeal was reported as dismissed (The Times 15 December 2018). See TPR press release: Dominic Chappell ordered to pay more than £124,000 for failing to reveal information about the sale of BHS (Ref: PN18-67: 14 December 2018). https://webarchive.nationalarchives.gov.uk/ukgwa/20190701111603/https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/chappell-ordered-to-pay-124000-for-failing-to-reveal-information-about-bhs

38 In some cases the primary target can be an individual, without any need for the secondary party provisions to apply. For example:
- TPR's powers to request information from a wide category of persons (PA 2004, s72(2)(d): "any other person appearing to the Regulator to be a person who holds or is likely to hold information relevant to the exercise of the Regulator's functions"), with offences under s 77(1) for neglecting or refusing to comply (without reasonable excuse) and s 77(5) for intentional destruction of a document which he is liable to produce under s 72.
- Knowingly or recklessly providing TPR with false or misleading information in a material particular is an offence for "any person" – PA 2004, s 80(1)(a).

39 Irish legislation contains similar provisions – see *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635.

40 This paper uses the term "offending company' to refer to the primary body corporate target. The secondary parties listed must be within the relevant class (director, manager, secretary, officer) and "of the body corporate", meaning of the offending company.

41 For an example of a director being fined for a failure by a company to provide information to TPR, see TPR's press release: *Brewery and its chairman admit failing to hand over information to The Pensions Regulator* (Ref: PN18-25, 15 May 2018), which states that [The director] "was charged on the basis that he consented to or connived in the offence by the company, or caused it by his neglect." - see https://webarchive.nationalarchives.gov.uk/ukgwa/20180702133219/http://www.thepensionsregulator.

54. There seems to be no requirement in these types of secondary offences for the offending company actually to have been convicted of the relevant offence[42], but it will be necessary to show that the company has committed the offence[43]. It seems likely that the same analysis will apply to pensions criminal offences and to civil and financial penalties.

55. This is an important area for such secondary parties. They may well not be able to shelter behind the corporate nature of the offending company. It is easy to surmise that the intention of Parliament is to catch potential secondary parties who were involved in the commission of the offence (or fine), perhaps particularly where the offending company is insolvent and so cannot meet the relevant fine or penalty.

56. As outlined in Part A of this paper, there are now four levels of penal provision in the pensions legislation:

- **crimes**
- **financial penalties** (of up to £1m) – PA 2004, s 88A[44].
- **civil penalties** – where the legislation cross-refers to PA 1995, s 10[45]. The maximum penalty is £5,000 for an individual or £50,000 for a company. The civil penalty provisions are scattered liberally throughout the pensions legislation.
- **Fixed and escalating penalties** – TPR can issue fixed and escalating penalties in relation to failure to comply with the auto-enrolment legislation or a failure to comply with the information provisions[46].

57. As outlined in Part A of this paper, there are now four levels of penal provision in the pensions legislation:

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gov.uk/press/brewery-and-its-chairman-admit-failing-to-hand-over-information-to-the-pensions-regulator.aspx

42 *R v Dickson* (1992) 94 Cr App R 7, [1991] BCC 719 per Leggatt LJ at 722G (a case relating to convictions for supplying goods to which a false trade description was applied); and in Ireland: *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635.

43 The simplest way of showing this would be if the company itself had already been convicted. But where the company has entered some insolvency processes (eg administration), leave to bring a prosecution would be needed. And it seems that a conviction does not bind third parties, so in theory they could argue that the conviction of the company was somehow to be ignored – see eg *Hui Chi-Ming v R* [1992] 1 AC 34, PC.

44 Inserted by PSA 2021, s 115, with effect on and from 1 October 2021 and only in relation to acts or omissions after that date - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

45 Slightly oddly, at least one of the civil penalty provisions is free-standing and does not just refer to s 10. The specific civil penalty in regulation 18A of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349, as amended). This was added into the 2006 consultation regulations on and from 6 April 2009 by SI 2009/615. The penalty looks similar to that in PA 1995, s 10, but the consultation regulations do not (unlike s 10) contain a secondary person extension.

46 See 10 above.

| Type of pensions crime or fine | prosecutor | Deciding body |
|---|---|---|
| crimes | General law,<br>but proceedings in England and Wales under PA 2004, ss 42A, 58A and 58B limited to TPR or DPP or Secretary of State (or with consent of DPP) | Criminal courts |
| financial penalties | TPR | TPR determinations panel |
| civil penalties | TPR | TPR determinations panel |
| fixed and escalating penalties | TPR | TPR |

## Who falls within the extended class?: Director, manager and officer, etc extension wording

58. Where the offending company has committed an offence then the relevant legislation creating the offence often[47] includes extension wording providing that a "director, manager, secretary and other similar officer" of the offending company can also be guilty of that offence.

    The pensions legislation includes an extension provision in relation to financial penalties (although not including the "neglect" limb) and civil penalties as well. But an extension provision does not apply to fixed or escalating penalties.

59. This section of this paper focuses on the phrase defining the class at risk. This looks quite simple, "*director, manager, secretary or other similar officer of the body corporate*", but its interpretation is complex. Who is a "manager"? Who is a "similar officer"?

60. If the offence was committed by the offending company "with the consent or connivance of, or to 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 capacity", that person is also guilty of that offence.[48]

[47] See, eg in the employment and pensions statutes, TULRCA 1992, s 194(3); Social Security Administration Act 1992; s 115; PSA 1993, ss 157, 168, 169; PA 1995, s 115; Employment Rights Act 1996, ss 180 and 190; PA 2004, s 309; and PA 2008, s 47.

[48] Similar provisions appear in other statutes such as the Fire Precautions Act 1971, s 23(1); the Health and Safety at Work etc Act 1974, s 37(1); and the Environmental Protection Act 1990, s 157(1).

## Pensions legislation: crimes

61. PA 1995 includes a general extension provision in s 115.

> **Pensions Act 1995**
> **115.— Offences by bodies corporate and partnerships.**
> (1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
> (2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as to a director of a body corporate.
> (3) Where an offence under this Part committed by a Scottish partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

62. Other pensions legislation has substantially identical criminal extensions to secondary parties, in particular: PSA 1993, s 169; PA 2004, s 309 and PA 2008, s 46.

## Pensions: financial penalties (PA 2004, s 88A, inserted by PSA 2021)

63. TPR (acting through its determinations panel) also has power to require the payment of civil penalties and (from October 2021 under PSA 2021) financial penalties.[49] These can be levied by TPR against employers and others under the pensions legislation.

64. The financial and civil penalty provisions contain a similar extension[50] to directors, managers and officers etc as applies to crimes. These provisions render a "director, manager, secretary or other similar officer" of a company potentially individually liable for any financial or civil penalties levied under the relevant pension legislation by TPR on the company for failure to comply with a relevant provision of PSA 1993, PA 1995, PA 2004, PA 2008, PSA 2021 and any relevant regulations.

65. In relation to financial penalties under PA 2004, s 88A the extension to secondary parties only applies to cases of consent or connivance and does not refer to 'neglect'[51]. The exclusion of "neglect" from s 88A(6) may perhaps reflect that the

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49 The power in PA 2004, s 88A for TPR to impose financial penalties (initially of up to £1m) for breach of specified provisions in PA 2004 was inserted by PSA 2021 with effect on and from 1 October 2021 - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

50 PSA 1993, s 168(6) and (7); PA 1995, s 10(5) and (6); PA 2004, s 88A(6) and (7); and PA 2008, s 46.

51 This omission of 'neglect' occurs in other legislation as well, for example: Bribery Act 2010, s 14; Theft Act 1968, s 18; Public Order Act 1986, s 28; and Copyright Designs and Patents Act 1988, s 110 (the last three cited in *Blackstone's Criminal Practice 2021* at A6.25). Blackstone comments that the offence still remains wider than aiding or abetting in that a positive act is not required. 'A conscious failure to prevent or report a fellow director committing an offence would seem to be enough, even though there

financial penalties under s 88A can be much larger in amount that those for the civil penalties in PA 1995, s 10. Section 88A(6) to (8) provides:

**Pensions Act 2004, s 88A**

(6) Where—

(a) a penalty under this section may, apart from this subsection, be imposed on a body corporate, and

(b) the act in question was done with the consent or connivance of a director, manager, secretary or other similar officer of the body or a person purporting to act in any such capacity,

this section applies to that person.

(7). Where the affairs of a body corporate are managed by its members, subsection (6) applies in relation to the acts of a member in connection with the member's functions of management as to a director of a body corporate.

(8) Where

(a) a penalty under this section may, apart from this subsection, be imposed on a Scottish partnership, and

(b) the act in question was does with the consent or connivance of a partner,

this section applies to that person.

## Pensions: civil penalties (PA 1995, s 10)

66. TPR[52] (acting through its determinations panel) also has power to require the payment of civil penalties under PA 1995, s 10. These civil penalties have a smaller maximum than the new financial penalties under PA 2004, s 88A. The smaller civil penalties are of up to £50,000 for a company and £5,000 for an individual[53].

67. The secondary party extensions under PA 1995, s 10(5) to (6) are very similarly expressed to those in PA 2004, s 88A, save that the extensions in s 10 apply to 'neglect', as well as to consent or connivance.

**Pensions Act 1995, s 10**

(5) Where

(a) apart from this subsection, a penalty under this section is recoverable from a body corporate or Scottish partnership by reason of any act or omission of the body or partnership […] 1 , and

(b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned in subsection (6), this section applies to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable.

(6) The persons referred to in subsection (5)(b)—

(a) in relation to a body corporate, are—

(i) any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and

(ii) where the affairs of a body corporate are managed by its members, any member in connection with his functions of management, and

is not a sufficiently clear or immediate right of control over the fellow director to give rise to liability as an accessory'.

52 Before 2005, the Occupational Pensions Regulatory Authority (OPRA).

53 These maximum figures can be increased by an order by the Secretary of State under PA 1995, s 10(2), but no such order has been made to date and the maxima have not increased since enacted in 1995.

> (b) in relation to a Scottish partnership, are the partners.
> (7) Where the Authority requires any person to pay a penalty by virtue of subsection (5), they may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission.

68. Similar secondary person extensions apply to the criminal provisions under the auto enrolment[54] and to the pensions climate change penalty provisions[55].

## Other pensions penalties

69. But a secondary person extension is not universal in relation to penalties in the pensions legislation. There is no secondary person extension in the fixed penalty and escalating penalty notices provisions:
    - applicable to auto-enrolment (PA 2008, ss40 and 41); nor
    - those applicable in relation to failure to comply with TPR's information gathering powers under PA 2004, ss72 to 75 (PA 2004, ss77A and 77B, inserted by PSA 2021); nor
    - those applicable to superfunds under the Pension Schemes bill 2025 (if enacted).

[54] PA 2008, s 46 (Offences by bodies corporate) contains the common secondary person extension wording in relation to offences under s 45 (Offences of failing to comply).

[55] The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (SI 2021/839), reg 11 (Penalty notices: recovery from bodies corporate and Scottish partnerships) contains the common secondary person extension wording in relation to penalties under reg 9.

# C Consent/connivance/neglect liability: 3 requirements for a secondary party to be criminally liable or penalised

70. In order for a secondary party (eg a director) also potentially to be liable, under a consent, connivance or neglect provision, whether for civil penalties, financial penalties or crimes, three requirements need to be met:

**(1) offence by the company:** There must have been an offence committed by (or penalty could be imposed on or recoverable from) the company. So if there are any defences available to the company (eg that it was not reasonably practicable for the company to avoid the offence), then the secondary party may seek to rely on these too. But the company does not have to have been convicted of the offence (or probably have had the penalty imposed) – see D below.

**(2) secondary party within the class:** The secondary party must be within the class of being 'any director, manager, secretary or other similar officer of the body corporate' or 'a person purporting to act in any such capacity' – see E below.

**(3) consent connivance and neglect by secondary party:** Although the underlying offence by the company may be absolute or have its own knowledge or intention requirements, the secondary person extension provision generally imposes additional requirements as to either:

(a) in consent or connivance cases: the state of mind of the secondary party in order to show their 'consent' or 'connivance' or

(b) in 'neglect' cases[56] by the secondary party to which the main offence by the company is attributable

– see F below.

[56] Financial penalties (PA 2004, s88A) do not include a neglect limb.

71. A chart[57] summarising the three applicable limbs for the secondary liability is below:

| **Limb** | **Secondary person in body corporate** | **External element of the offence.** | **Fault element or mental attitude which must be proved on the secondary party** |
|---|---|---|---|
| **consent** | director, manager, secretary or other similar officer of the body corporate<br>or a person who was purporting to act in any such capacity | Secondary person has **consented** to the commission of an offence by the body corporate | Intention or recklessness |
| **connivance** | director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity | Secondary person has **connived** in the commission of an offence by the body corporate. | Intention or recklessness |
| **neglect** | director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity | Offence by the body corporate is **attributable to the neglect** of the secondary person has committed offence | Negligence and causation |

[57] Adapted from the chart in the 2016 Irish Law Reform Commission issues paper on 'Regulatory Enforcement and Corporate Offences (LRC IP8, 2016) in ch 8 'Liability of Corporate Officers' at 8.31.

# D Offence by the company

## No need for prior company conviction

72. In relation to the first element, the need for the company to have committed the relevant offence (or incurred a penalty), there is no need for the company actually to have been convicted (or penalised) before a claim can be made against a secondary party (eg a director or officer). But it is obviously more difficult for the prosecution to succeed in a prosecution (or penalisation) of secondary party if there has been no underlying conviction against the company - *R v Dickson*[58].

73. If the company has not been convicted, the onus will be on the prosecution in a case against a secondary party to show that the company would have been convicted.

74. In *R v Dickson*[59] Leggatt LJ commented:

> 'We however accept Mr Dagg's [counsel for the Crown] submission that the appellants could, even in the absence of the company, have been found guilty of the relevant offences upon proof that the company had committed the substantive offences. In many cases, if not most, that would be an undesirable course for the prosecution to adopt, because it would involve proof of the commission of an offence by what, on that footing, would be an absent party.'

75. In *DPP v Hegarty*[60] the Irish Supreme Court considered *R v Dickson* and held similarly that the company does not have to be convicted first before a senior officer can be convicted (in *Hegarty* of authorising or consenting to the company acting in an anti-competitive manner).

76. The simplest way of showing that the company has committed the offence this would be if the company itself had already been convicted by a court. But where the company has entered some insolvency processes (eg administration), leave to bring a prosecution would be needed (see 84 below). And it seems that a conviction does not bind third parties, so in theory they could argue that the conviction of the company was somehow to be ignored. Perhaps on the basis that a relevant defence was not raised in the prosecution of the company or that it was undefended or not defended properly? –see *Hui Chi-Ming v R*[61].

## Probably same principle for financial and civil penalties

77. A similar principle seems likely to apply in relation to financial penalties and civil penalties – namely that there is no need for a prior determination to have been made (by the TPR determinations panel) that the company should pay a relevant penalty.

78. For financial penalties, s 88A(6) envisages a potential secondary liability "*Where ... a penalty under this section may, apart from this subsection, be imposed on a body corporate*".

    This language obviously differs from that in the secondary criminal provisions in the pensions legislation and those being considered in *R v Dickson*[62] and the other

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58 *R v Dickson* [1991] BCC 719, CA.
59 *R v Dickson* [1991] BCC 719, CA per Leggatt LJ at p 722G.
60 *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635 Irish Supreme Court.
61 *Hui Chi-Ming v R* [1992] 1 AC 34, PC.
62 *R v Dickson* [1991] BCC 719, CA.

cases mentioned above. The criminal provisions tend to refer to "*Where an offence … committed by a body corporate is proved to have been committed …*".

For example Pensions Act 1995, s 115:

> (1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of, …..

79. The secondary criminal offences refer to an offence having been "*committed by a body corporate*". But the secondary penalty provisions in s 88A(6) refer to where a penalty "*may… be imposed on a body corporate*".

80. It seems likely that a court would not find any difference in effect between the two different types of secondary liability provision. So it is unlikely that there is any requirement for a penalty to have been determined against the company in advance of any proceedings or determination against the secondary party

81. A prior determination of a penalty against a company does not expressly prohibit a later penalty against a secondary party.

82. However, a penalty determination against a secondary party can affect the potential for a claim against the company in respect of the same act or omission. As discussed in Part G below, both the financial penalty in PA 2004, s 88A and the civil penalty provisions in PA 1995, s 10 state that the relevant penalties cannot be charged against the company if they have already been charged against a secondary party (director or officer, etc) in respect of the same act or omission[63].

83. For example PA 2004, s 88A(9):

> *If the Regulator requires a person to pay a penalty by virtue of subsection (6) …, it may not also require the body corporate … in question to pay a penalty under this section in respect of the same act.*[64]

## Insolvency moratorium

84. Where the company is in an insolvency process involving court liquidation or administration, the stay on court proceedings[65] (without leave of the court or the liquidator or administrator) applies to criminal proceedings against the company - *In re Rhondda Waste Disposal Ltd*[66]. A similar stay applies if a company enters a moratorium under Part A1 of the Insolvency Act 1986[67].

85. In suitable cases this may not matter as the secondary party can still be convicted (or penalised) even if the company has not been. But the onus will be on the prosecution to show that the company would have been convicted.

86. Under the common law on accessory liability, an acquittal of an alleged principal at an earlier trial is no bar to the subsequent conviction of an accessory and is even

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63 PA 2004, s 88A(9) and PA 1995, s 10(7)

64 In PA 2004, s 88A, the term 'act' includes omission – s 88A(12).

65 Insolvency Act 1986, s 130(2) (court liquidation) and Sch B1, para 43(6) (administration).

66 *In re Rhondda Waste Disposal Ltd* [2001] Ch 57, CA.

67 Insolvency Act 1986, s A21.

inadmissible as merely being evidence of the opinion of the first jury and so irrelevant – *Hui Chi-Ming v R*[68].

[68] *Hui Chi-Ming v R* [1992] 1 AC 34, PC.

# E Who is within the secondary party class?

87. This section of this paper focuses on the phrase defining the class at risk. This looks quite simple: "*director, manager, secretary or other similar officer of the body corporate*", but its interpretation is complex. Who is a "manager"? Who is a "similar officer"?

88. The extension wording in the pensions crimes and fines provisions each refer to a secondary party as only being someone who is a:

- director;
- manager;
- secretary;
- other similar officer, or
- a person purporting to act in any such capacity,

in each case "of the body corporate".

89. In some cases, the provisions also extend the secondary class to include:

89.1. **Managed by the members**: a member of a body corporate, where "the affairs of a body corporate are managed by its members" ; and

89.2. **Scottish partnership**: partners of a Scottish partnership[69].

90. The use of the term "body corporate" indicates that the provisions will apply where the offending company is not incorporated in the UK or is not incorporated under the UK Companies Acts.

91. In practice most cases will involve the offending company being a UK incorporated company, so these further classes of corporate body are not discussed further in this paper.

92. The issue of whether an insolvency practitioner (IP) appointed under the insolvency legislation – eg an administrator- could be a secondary party in relation to a criminal offence (failing to notify the secretary of state of proposed redundancies) was considered by the Supreme Court in 2023 in *R (Palmer)*[70]. The position of IPs was discussed in more depth in a paper by David Pollard on the Wilberforce and Pensions Barrister websites[71] – see also Appendix 1 to this paper.

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69 A Scottish partnership (unlike an English partnership) is a "legal person distinct from the partners of whom it is composed" – Partnership Act 1890, s 4(2).

70 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

71 David Pollard '*Pensions Crimes and Fines and Insolvency Practitioners: The impact of the Supreme Court decision in R (Palmer)*' (April 2024) Pensions Barrister. https://www.wilberforce.co.uk/article/pension-crimes-fines-and-insolvency-practitioners/

## Director or secretary

93. The terms 'director' and 'secretary' are not specifically defined in the pensions legislation. In practice, in relation to a company incorporated under the UK companies legislation, they are likely to have their usual meanings as under the companies legislation[72]. For example, in *R (Palmer)*[73], the Supreme Court looked to the meaning of 'officer' in the insolvency legislation in deciding whether or not an administrator was an 'officer" of the company under employment legislation (TULRCA 1992)[74], although there the insolvency legislation is "the statute which created and governs the process of administration and the position of an administrator".

94. Someone having the title of "director", but not actually on the board of directors is unlikely to be a "director" within the secondary class. But they could still be a manager or officer - see for example *Armour v Skeen*[75] where a "Director of Roads" for a Scottish local authority was prosecuted and found guilty of an offence under the secondary extension provision in s 37 of the Health and Safety at Work etc Act 1974. The Lord Justice-Clerk held that he was not a "director", but was within the secondary class, holding:

> "It was then argued that the appellant was not within the purview of s37. 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] AC 153. It was held in that case that the manager of one of many stores within a large organisation was not a 'manager' within a similar provision to s.37(1) in the Trades Descriptions Act 1968. 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 s.37(1)."

95. Under the UK companies legislation[76], in particular the Companies Act 2006 (***CA 2006***):
    95.1. A 'director' "includes any person occupying the position of director, by whatever name called" (CA 2006, s 250).

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72 See *DPP v TN* [2020] IESC 26 at [20].

73 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

74 *R (Palmer)* [2023] UKSC 38 per Lord Richards at [20]:
> "Neither TULRCA nor any other enactment defines "officer" for the purposes of section 194(3), nor is there any clear statement in any authority of which I am aware which can be taken as a definition of what is generally understood to be an officer. I will return to that question, but in those circumstances the first recourse must be to the IA 1986, as the statute which created and governs the process of administration and the position of an administrator, to determine whether, as a matter of statutory interpretation, an administrator of a company should be classified as an officer of that company."

75 1977 SLT 71, [1977] IRLR 310 (High Court of Justiciary) at[10] (p312). In *Woodhouse v Walsall MBC* [1994] 1 BCLC 435, DC, McCowan LJ did not find *Armour v Skeen* "to be of any assistance", stating "It was clearly a question of fact" (at p442g).
However, *Armour v Skeen* was cited in *R (Palmer)* [2023] UKSC 38 by Lord Richards at [20] and quoted by the Irish Supreme Court in *DPP v TN* [2020] IESC 26 at [76].

76 Also Insolvency Act 1986, s 251.

- This will include a 'de facto' director, even though not formally appointed as a director.
- In the UK directors are usually individuals, but it is currently possible for a company or other corporation to itself be appointed a director[77].

95.2. A 'shadow director' means "a person in accordance with whose directions or instructions the directors are accustomed to act", with some specific exclusions for (i) professional advice, (ii) instructions etc given in the exercise of a function under an enactment and (iii) guidance or advice given by a Minister of the Crown (CA 2006, s 251).

95.3. The term 'secretary' is not defined. A public company is required to have one (CA 2006, s 271) and they need to appear to have the requisite knowledge and experience and a relevant qualification (CA 2006, s 273). Private companies are no longer required to have a secretary (CA 2006, s 270).

95.4. An 'officer' is defined in CA 2006 as including a director, manager or secretary - CA 2006, s 1173(1).

95.5. The term "manager" is not expressly defined further.

96. Caselaw generally makes it clear that terms such as 'director' and 'officer' take colour from their context. In *Allianz Global Investors GmbH v G4S Ltd*[78] Miles J held that for the purposes of assessing whether there had been a breach of the Financial Services and Markets Act 2000 s 90A in relation to the publication of information, the "persons discharging managerial responsibility" within an issuer of publicly traded securities included de facto and shadow directors as well as de jure directors of the issuer. Miles J held:

> "132. Sixthly, it is irrelevant that the definition in paragraph 8(5) of Schedule 10A is exhaustive. Terms such as "director" and "officer" take colour from their context: see *Revenue and Customs Comrs v Holland* [2011] Bus LR 111, para 103 and *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340, para 35 . Under section 90A there is no personal liability. There is thus no call for a predisposition towards a narrow or technical approach to "director" in paragraph 8(5) . Rather, the court should step back and consider the purpose of the section and how its contours can fairly be drawn so as to further that purpose."

97. See also the Irish Supreme Court in *DPP v TN*[79] at [106]:

> 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

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77 For an example, see *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430. Companies Act 2006, s 156A will, when it comes into force under the Small Business, Enterprise and Employment Act 2015, s 87, prohibit corporate directors of a company incorporated in Great Britain, but subject to exceptions in regulations.

78 [2022] EWHC 1081 (Ch), [2022] Bus LR 566 (Miles J) at [132], citing *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430 at [103] and *Secretary of State v Deverell* [2001] Ch 340, CA at [35].

79 *DPP v TN* [2020] IESC 26 per McKechnie J (O'Donnell, Dunne, Charleton and O'Malley JJ agreeing) at [106].

> 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."

98. Looking further at the application of the criminal (and penalty) extension provisions in the pensions legislation in relation to directors, it seems likely to catch a de facto director but not a shadow director (unless also a de facto director or a manager):

    98.1. **De facto director**: The criminal (and penalty) extension provisions in the pensions legislation also include "a person purporting to act in any such capacity". Although the language is different to the wording in CA 2006, s 250, it seems likely that a s 250 de facto director will in practice be caught by this wording in the criminal extension provisions.

    98.2. **Shadow director**: The criminal (and penalty) extension provisions in the pensions legislation do not expressly cover a shadow director of the offending company. Such a person could (depending on the facts) perhaps fall within the secondary party provisions as being either:
    - a "person purporting to act in any such capacity" limb or
    - considered to be a "manager' of the company.

## Officer

99. It may not be obvious whether or not a particular person is an officer or manager of a company[80]. The identity of current and former directors (and secretaries) should be simpler to determine (at least for a company incorporated in part of the UK), given that their details should have been registered at the companies registry.

100. Some statutes (but not the pensions legislation) include a definition of "officer" – for example Companies Act 2006, s 1173(1) and Insolvency Act 1986, s 251:

> *"officer" in relation to a body corporate, includes a director, manager or secretary*".

However often this definition is inclusive and not exclusive and leaves it open as to who is a "manager" (which is not a defined term).

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[80] For discussion of 'officer' or 'manager', before the decision in *R(Palmer)*, see Chapter 25 in David Pollard '*Connected and Associated: Insolvency and Pensions Law*' (7th edn, 2021, Bloomsbury Professional). See also Hofler '*Elephants and officers: problems of definition*' (1996) 17 Company Lawyer 258.

## *R (Palmer)*

101. In *R (Palmer)*[81], the Supreme Court considered whether an administrator (appointed under the Insolvency Act 1986) fell within the class of secondary parties under the Trade Union and Labour Relations (Consolidation) Act 1992 (***TULRCA 1992***), s 194 as being an "other similar officer of the body corporate". Lord Richards gave the sole judgment, reversing the decision of the divisional court.

102. Lord Richards held that the meaning of "officer" (at least for the purposes of TULRCA 1992, s 194) was "essentially a constitutional test". Does "the person hold an office within the constitutional structure of the body corporate, as is the case with directors, manager and secretaries?". Lord Richards held (at [55]):

> 55. What then is meant by an "officer" of the body corporate in the context of a provision such as section 194? In my judgment, the answer is tolerably clear. It is essentially a constitutional test. Does the person hold an office within the constitutional structure of the body corporate, as is the case with directors, managers and secretaries? That is the normal meaning of an officer of a company or other institution, and the normal meaning is emphasised by the prior reference to directors, managers and secretaries, all of whom are officers in the conventional sense, together for good measure with the words "other similar" before "officers". It is possible, but generally unlikely that registered companies will have other types of officer, but a "body corporate" may take many forms – statutory companies, bodies incorporated by royal charter (which include a wide variety of educational, charitable and other not for profit organisations, as well as a small number of older commercial concerns) and foreign bodies corporate. The officers of these bodies will have a wide variety of titles and functions, and those who are similar to directors, managers and secretaries will be potentially liable under section 194(3). The director of roads of a local authority has been held to be an officer for the purposes of a similar provision in the Health and Safety at Work etc Act 1974: *Armour v Skeen* 1977 SLT 71.

103. The reference by Lord Richards to "managers" as "holding office within the corporate structure" is less easy to follow than directors or secretaries. In practice it is usual for company constitutions to provide for the board of directors to manage the business of the company[82]. It is much less common for a specific role of "manager" to be found in a company's constitution (save perhaps for a managing director).

104. A constitutional test, at least in relation to officers, seems to be consistent with the earlier cases. In *DPP v TN*, the Irish Supreme Court referred (at [106], quoted above) to this test, referring to offices of "a treasurer or president".

105. In 1897 in *Re Western Counties Steam Bakeries and Milling Company*[83], a case dealing with whether a firm of accountants fell within a class of "any director, manager, liquidator or other officer", Lindley LJ held (at p627) that:

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81 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288. Lord Richards gave the only judgment. Lord Reed, Lord Hodge, Lord Burrows and Lady Rose agreed.

82 For example article 3 of Table A: "the directors are responsible for the management of the company's business…" – Schedule 1 in the Companies (Model Articles) Regulations 2008 (SI 2008/3229). See the discussion in *DPP v TN* [2020] IESC 26 at [146].

83 [1897] 1 Ch 617, CA. See also *Re London and General Bank* [1895] 2 Ch 166, CA and *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell* [1997] 1 BCLC 1, CA.

> "to be an officer there must be an office, and an office imports a recognised position with rights and duties annexed to it... it would be an abuse of words to call a person an officer who fills no such position either de jure or de facto, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word".

106. The expressions "officer" and "manager" were considered in 1980 in *Re Racal Communications; Re a Company No 009966 of 1979*[84], a case about the obtaining of evidence from an officer (defined in the same way as in IA 1986, s251 to include a 'manager') under the Companies Act 1948. In an unreserved judgment, Lord Denning MR noted (at p144) that, in relation to an officer:

> "Its meaning may depend on the context in which it is used"[85].

Shaw LJ commented (at p144) that the term 'manager' should not be too narrowly construed as being limited to a director or general manager, but includes someone who "exercises a supervisory control which reflects the general policy of the company or which is "related to the general administration of the company".

## Examples of officers

107. Examples of officers are:

- **Auditors** once appointed are generally officers: *Re London and General Bank*[86] and *Re Western Counties Steam Bakeries and Milling Company*[87], unless appointed on an ad hoc basis for a limited period – *R v Shacter*[88]. However, it is more doubtful that auditors are a "similar" officer within the standard extension wording. They do not look "similar" to a "director, manager or secretary".
- The **company secretary** is likely to be an officer, being expressly within the definition in CA 2006 and in IA 1986, s 251 – although this does not in fact matter given that the secretary is expressly within the secondary person extension class anyway.
- The **administrators** of a company appointed under IA 1986 are probably not officers of the company, following the decision of the Supreme Court in *R (Palmer)*[89]. Although strictly only a binding authority in relation to administrators (and not other insolvency practitioners) and to TULRCA 1992 (and not other statutes), in practice it is difficult to see a future court distinguishing the pensions legislation on this point.

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84 [1980] Ch 138, CA.

85 Other cases make it clear that terms such as 'director' and 'officer' take colour from their context: see *Allianz Global Investors GmbH v G4S Ltd* [2022] EWHC 1081 (Ch) (Miles J) at [132], citing *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430 and *Secretary of State v Deverell* [2001] Ch 340, CA.

86 *Re London and General Bank* [1895] 2 Ch 166, CA. Also *Re Kingston Cotton Mill Co* [1896] 1 Ch 6, CA and *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell* [1997] 1 BCLC 1, CA.

87 [1897] 1 Ch 617.

88 [1960] 2 QB, 252, CCA. See also *Sasea Finance Limited v KPMG* [1998] BCC 216 (Robert Walker J) and *Dale v BDP LLP* [2025] EWHC 446 (Ch) (ICCJ Burton).

89 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

- **Bankers, solicitors and other professional advisers** are not, as such, officers (unless appointed to an office under the company): *Re Imperial Land Co of Marseilles, Re National Bank*[90] and *Re Western Counties Steam Bakeries and Milling Company*[91].
- **An agent** is not, as such, an officer. An example (albeit for another statute) is s 219(3) of IA 1986, which refers to "every officer and agent of the company" being obliged to give reasonable assistance to a prosecutor, drawing a distinction, at least for that provision, between an officer and an agent.
- It seems likely that a director (Mr A) of a company (B Co) which is itself a director of another company (C Co) is not, just by acting as a director of B Co, also an officer of that other company. That is, Mr A is not an officer of C Co: *Masri v Consolidated Contractors International Co SAL (No 4)*[92] discussing the meaning of "officer" in the context of examination of an officer of a company.

## Manager

108. The term 'manager' means someone who manages: *Gibson v Barton*[93] and *Re Western Counties Steam Bakeries and Milling Company*[94]. This is not hugely helpful in working out the meaning of the expression.

109. However the term "manager' is vague and must be construed in context: *R v Boal*[95] and *DPP v TN*[96]. It may be that the term "manager' is given a wider view for cases where the end result is not a criminal conviction on the manager[97] – contrast:

- *In re a Company*[98] (wide view - judge power to require documents to be produced); with
- *Registrar of Restrictive Trading Agreements v W H Smith & Son Ltd*[99] (narrow view: order for attendance) or *R v Boal*[100] (narrow view: criminal conviction).

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90 (1870) LR Eq 298.
91 [1897] 1 Ch 617 at p627.
92 [2008] EWCA Civ 876, [2009] 2 WLR 699 at [19] and [20]. The decision of the Court of Appeal was overturned on appeal, but this point was not discussed.
93 (1875) LR 10 QB 329 (Blackburn J). Discussed by the Irish Supreme Court in *DPP v TN* [2020] IESC 26 at [53] and [129] where McKechnie J commented:
> "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."

94 [1897] 1 Ch 617 per Rigby LJ at p632.
95 [1992] QB 591, CA at 597E.
96 [2020] IESC 26 at [144].
97 In *DPP v TN* [2020] IESC 26, following an extensive discussion of the Irish and UK cases, the Irish Supreme Court made this point at [80].
98 [1980] Ch 138, CA.
99 [1969] 1 WLR 1460, CA.
100 [1992] QB 591, CA at 596 to 598.

110. By analogy with those cases, it could be argued that the UK cases point to a narrow test that in order to be a "manager", for the criminal (and penal) secondary extension purposes, a person must actually be involved in running substantially all of the company[101].

111. In *R v Boal*[102] the Court of Appeal held that the deputy manager of a bookshop was not a manager for these purposes as he "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".

112. In *Woodhouse v Walsall MBC*[103] McCowan LJ (in the Divisional Court) discussed *Boal* and *Armour v Skeen*[104], but restricted the term "manager" to someone who "was a decision-maker within the company having both the power and responsibility to decide corporate policy and strategy." (at p443h).

113. In 2022 in its paper "*Corporate Criminal Liability: an options paper*"[105] the Law Commission of England & Wales commented at 9.10:

> "Director, manager, secretary or other similar officer" has been said to include people who have "the management of the whole affairs of the company"265 and "real authority, the decision-makers".266 In *R v Boal*, it was held that the deputy manager of a bookstore was not a manager for these purposes as he "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". Lord Denning said the term "officer of the company" can be used "whenever anyone in a superior position in a company encourages, directs or acquiesces"267 in fraudulent activity. "Secretary" is understood to refer narrowly to the Company Secretary.268.
>
> 265 *Gibson v Barton* (1875) LR 10 QB 329.
>
> 266 *R v Boal* [1992] QB 591, [1992] 2 WLR 890.
>
> 267 *Re A Company* [1980] 2 WLR 241, [1980] Ch 138.
>
> 268 In the Irish case of *DPP v TN* [2020] IESC 26, it was held ""Director" and "secretary" are of course official positions within a company, mandated by statute ... as the office of "director" and "secretary" are statutory positions with statutory functions; they should be given the definition as provided for by the Companies Acts". This was based on Denning MR's analysis in *Registrar of Restrictive Practices v WH Smith* [1969] 1 WLR 1460, which had held that the terms "officer", "manager", "director" and "secretary" should be interpreted in line with their interpretation for the purposes of the Companies Acts. However, the Irish Supreme Court noted that while "director", "secretary" are statutory officers and "officer" is defined in the Companies Act, "manager" is not. This is also true for the UK, where Part 12 of the Companies Act 2006 deals with company secretaries.

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[101] See eg *R v Boal* [1992] QB 591 (Fire Precautions Act 1971), *Armour v Skeen* [1977] IRLR 310 (Health and Safety at Work etc Act 1974) and *Woodhouse v Walsall MBC* [1994] 1 BCLC 435 (Control of Pollution Act 1974). See also "*Corporate Criminal Liability: an options paper*" (Law Commission. June 2022) at 9.10.

[102] [1992] QB 591, CA at 596 to 598.

[103] *Woodhouse v Walsall MBC* [1994] 1 BCLC 435, DC a case on the Control of Pollution Act 1974.

[104] *Armour v Skeen* [1977] IRLR 310 (Health and Safety at Work etc Act 1974).

[105] "*Corporate Criminal Liability: an options paper*" (Law Commission of England & Wales, 10 June 2022).

## *DPP v TN*

114. In *DPP v TN*[106] having considered the UK cases in detail, the Irish Supreme Court doubted the narrow test in *Boal* and *Woodhouse* in relation to a "manager" and referred back to the criminal court whether an individual described as a facility manager or environmental consultant could be a 'manager' within the Waste Management Act 1996. In *TN*, McKechnie J considered the narrow approach in *Boal*, *Woodhouse* and other UK cases as being outdated. He held:

> "28. *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."

McKechnie J continued that to set the test as excluding a mid-level manager was not appropriate:

> [129] …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".

McKechnie J concluded:

> "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,

[106] *DPP v TN* [2020] IESC 26.

> 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."

## Manager: Other jurisdictions

115. Examples from other jurisdictions are that the term "manager" has been held not to include:

- a hotel front desk employee in Hong Kong who "carries out essentially non-discretionary functions under the direct supervision of another on the premises" - *HKSAR v Chui Shu Shing*[107]; nor
- an outback station manager in Australia - *Windbox Pty Ltd v Daguragu Aboriginal Land Trust (No 3)* [108].

116. In *HKSAR v Chui Shu Shing*, French NPJ[109], with whom the other justices agreed, discussed the meaning of the word manager, looking at the Oxford English Dictionary definition. French NPJ considered that a manager did not, in context, extend to "a person who carries out essentially non-discretionary functions under the direct supervision of another on the premises. Like each of the terms in the collocation, it incorporates the idea of authority over that which is managed." He summarised "In a colloquial sense, a manager is a person who can answer "yes" to the question "are you in charge here?"

117. French NPJ held:

> 44. Beginning with the text, the word "manage", according to the Oxford English Dictionary, relevantly means "to conduct or carry on (a war, a business, an undertaking, an operation) …". It may also mean "to control and direct the affairs of (a household, institution, state etc)". It appears in a particular context, namely the collocation "operates, keeps, manages or otherwise has control of". The words "otherwise has control of" suggests that the other terms in the collocation are used as species of the genus "has control of". A wider context is provided by those provisions of the HGAO previously mentioned which contemplate management as conduct of a kind done by the person to whom a certificate of exemption or a licence is issued, or a person doing similar things under the continuous and personal supervision of a licence holder.

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107 [2017] HKCFA 43, dealing with a criminal provision that stated:
> "(1) Any person who on any occasion operates, keeps, manages or otherwise has control of a hotel or a guesthouse in respect of which neither of the conditions indicated in subsection (2) has been satisfied commits an offence …."

108 [2020] NTSC 21 (Hiley J). There was an appeal against Hiley J's decision to the Court of Appeal of the Northern Territory, but Hiley J's decision on this point was upheld - *Windbox Pty Ltd v JACT Pastoral Pty Ltd* [2022] NTCA 2 at [66] to [89].

109 French NPJ is a former Chief Justice of Australia.

> 45. The concept of "manage" according to its ordinary meaning read in the context of the HGAO and having regard to its purpose does not extend to a person who carries out essentially non-discretionary functions under the direct supervision of another on the premises. Like each of the terms in the collocation, it incorporates the idea of authority over that which is managed. The precise nature and content of that authority will vary according to the circumstances of the case. As a general proposition, a person manages a hotel or a guesthouse when he or she, in the exercise of an authority assumed by or conferred upon them, carries out the business or undertaking of the hotel. In the case of a small guesthouse that criterion may be satisfied by a single person who operates the checking in and checking out of guests, the receipt and recording of their payments and the maintenance of the accommodation at the appropriate standard. It does not matter whether that person is full-time, part-time, temporary, or a relief manager for the purposes of section 5 so long as they are exercising a degree of managerial authority in relation to the conduct of the hotel or guesthouse. In a colloquial sense, a manager is a person who can answer "yes" to the question "are you in charge here?".

118. The Australian caselaw generally flows from differently framed statutes[110], but focuses (in relation to both the term "manager" and "officer") to those involved in the policy formation and decision making for the whole company.

[110] The different approach is noted in *R (Palmer)* [2023] UKSC 38 at [52].

# F Consent, connivance or neglect

## Chart on consent, requirement or neglect limb in the pensions legislation

119. A chart looking at the applicable limbs in the pensions legislation for the secondary liability is below. As mentioned above, in the pensions legislation, the "neglect" limb does not apply for financial penalties, but does for crimes or civil penalties:

| **Pensions** Crime/fine | **Director/manager/officer etc liable if:** | | |
|---|---|---|---|
| | Consent? | Connivance? | Attributable to Neglect? |
| Crime | Yes | Yes | Yes |
| Financial penalty | Yes | Yes | **No** |
| Civil penalty | Yes | Yes | Yes |

## Knowledge

120. In deciding whether or not a person has consented to the commission of an offence, it is unclear whether knowledge of the relevant act that constitutes the offence is needed[111] (compare *Re Caughey, ex p Ford*[112] and *Lamb v Wright & Co*[113] with *James & Son Ltd v Smee*[114] and *Mallon v Allon*[115]).

121. In *R v Hutchins*[116] it was held that there was no need for the prosecution to prove specific knowledge of each individual offence. Rix LJ commented:

> '25. In our judgment, the nature of these regulatory statutes with their provisions for secondary person extension by directors and managers in accordance with their consent, connivance or neglect is to ensure that they are held to proper standards of supervision and that the size of the company and the distance of directors and managers from the coal face of individual acts should not, where there is consent, connivance or neglect, afford directors or managers with the necessary knowledge a defence.
>
> 26. In our judgment, that Mr Hardy's alleged need for specific knowledge of each individual offence is not required is, in our judgment, shown by the broadness of the terms connivance and neglect.'

122. Separately to this, knowledge that the relevant facts constitute an offence is not needed – see 'Ignorance of the law' below.

123. It has been commented[117] that:

- consent requires both knowledge and positive approval;

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[111] There is a good discussion of this area in Matthews and Ageros *Health and Safety Enforcement* (3rd edn, OUP, 2010), Chapter 5 at paras 5.46ff.
[112] (1876) 1 ChD 521, CA.
[113] [1924] 1 KB 857 (McCardie J).
[114] [1955] 1 QB 78, DC.
[115] [1964] 1 QB 385, DC.
[116] [2011] EWCA Crim 1056 per Rix LJ at [25].
[117] *Tolley's Insolvency Law*, chapter on Environmental law at E5016. See also the summary in the Irish Law Reform Commission issues paper on '*Regulatory Enforcement and Corporate Offences'* (LRC IP8, 2016) on Issue 8 'Liability of Corporate Officers'.

- connivance requires knowledge (including wilful blindness) and negligent failure to prevent; and
- neglect is wider and requires a failure to perform a duty that the person knows or ought to know.

See *Huckerby v Elliot*[118].

Ashworth J citing the magistrate:

> 'where a director consents to the commission of an offence by his company, he is well aware of what is going on and agrees to it.'

## Law Commission

124. The Law Commission of England & Wales commented in its 2010 consultation paper (No 195) on '*Criminal Liability in Regulatory Contexts'* at para 7.31 that (footnotes included):

> 'We have explored what may be quite subtle differences between consent and connivance and complicity (though aiding, abetting, counselling or procuring) elsewhere.[119] In essence, consent and connivance provisions ensure that individual directors who are fully aware of, and approve of (or, for example, sign papers consenting to) criminal wrongdoing can themselves be convicted of the crime, even though their approval or consent does not as such encourage or assist the commission of the crime committed, assisted or instigated by other directors or equivalent persons.'[120]

125. The Law Commission 2007 consultation paper (No 185) on *Reforming Bribery* commented (at para 9.35):

> '9.35 The key differences between the modes of liability are thus that:
>
> (i) Like complicity, the consent and connivance doctrine involves liability for the offence itself, and hence such liability cannot arise unless the offence has been committed by the company. Liability for assisting and encouraging crime involves freestanding inchoate liability, and hence does not require the principal offence to have been committed.
>
> (ii) The consent and connivance doctrine is restricted in its application to high-ranking members of an organisation whereas, by virtue of the doctrines of complicity and of assisting and encouraging, criminal liability can attach to any person.
>
> (iii) 'Connivance' provides a wider basis for imposing individual liability than complicity. Connivance at the culpable actions of the corporate perpetrator

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118 [1970] 1 All ER 189, DC at 194. Cited in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [99].

119 'Reforming Bribery' (2007) Law Commission Consultation Paper No 185, at para 9.35.

120 Although the position is complicated by the fact that there can at common law be duties to intervene to prevent offending, in circumstances where non-intervention will result in a finding that the party who failed to intervene was complicit in the offence: *Tuck v Robson* [1970] 1 WLR 741.

may be reckless on the part of a high-ranking member of an organisation, as well as intentional or knowing. Complicity requires intention or knowledge that the perpetrator will act with the fault element.

(iv) It is possible to connive at offending without assisting or encouraging it, making it easier to prove the former as opposed to the latter. Accordingly, it is also easier to prove connivance at offending as opposed to complicity in offending.

(v) The consent and connivance doctrine makes high-ranking members of an organisation liable only for the offence committed by the company, not for an offence committed by individual employees. Complicity and assisting or encouraging crime cover both possibilities, although the latter imposes liability only for a separate inchoate offence.'

126. The Law Commission discussion paper on '*Corporate Criminal Liability*' (issued in June 2021) discusses these consent, connivance or neglect provisions at 8.5 to 8.18, commenting:

| Law Commission discussion paper (June 2021) on '*Corporate Criminal Liability*' (June 2021) |
|---|
| 8.10 "Consent or connivance" goes further than encouragement. While "consent" requires proof of both awareness and a positive action, connivance (from the Latin "to close the eyes") can include circumstances where the director is "well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it"8 and "wilful blindness" (where the person has suspicion but deliberately avoids acquiring positive knowledge.)9 |
| 8.11 Blackstone's Criminal Practice suggests that liability under these provisions:<br>Is potentially wider than that of an accessory since a positive act of aiding and abetting is not necessarily required.10 A conscious failure to prevent or report a director committing an offence would seem to be enough even though there is not a sufficiently clear or immediate right of control over the fellow director to give rise to liability as an accessory.11 |
| 8.12 For some offences, the provision extends to liability on the basis of consent, connivance or *neglect*.12 In most cases, the choice of whether to extend the individual liability of directors and similar officers to include neglect would appear to reflect the fault element of the underlying offence. Where the offence is one which the company may commit by negligence or on the basis of strict liability, it might not seem inappropriate that a director could be found individually liable on the basis that their neglect caused or contributed to the commission of the offence. |
| 8. *Huckerby v Elliott* [1970] 1 All ER 189, p194. |
| 9. Robin Charlow, "Wilful Ignorance and Criminal Culpability" (1992) 70 (6) Texas Law Review 1361, fn 6. |
| 10 There are some circumstances where wilful omission might constitute a positive act of encouragement, and thereby make the superior liable as an accessory. In *R v Gaunt* [2003] EWCA Crim 3925, the Court of Appeal considered the case of a Managing Director who had pleaded guilty to a charge of racial harassment on the basis that he was (indirectly) aware of harassment by his employees and that "by reason of his inaction those responsible may have taken the inaction as encouragement of his conduct". |

| Law Commission discussion paper (June 2021) on '*Corporate Criminal Liability*' (June 2021) | |
|---|---|
| | The Court of Appeal reduced the sentence to reflect his lesser culpability than the main offenders, but did not interfere with his guilty plea. However, this was only capable of amounting to encouragement of the harassers because those staff knew that the Managing Director knew of their harassment and knew he was taking no action. Connivance could potentially cover a situation in which the MD wilfully refrained from taking no action but, because the staff were unaware of his knowledge, this did not amount to encouragement. |
| 11 | *Blackstone's Criminal Practice* 2020, A6.26. |
| 12 | In our report on Criminal Liability in Regulatory Contexts, we noted that this wider basis of liability could be found in offences created in legislation including s 18(1) of the Safeguarding Vulnerable Groups Act 2006; s 110 of the Agriculture Act 1970; s 9 of the Knives Act 1997; s 400(1) of the Financial Services and Markets Act 2000; and s 20 of the Gangmasters (Licensing) Act 2004. See Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper 195, paras. 7.35-7.52.' |

## Consent

127. Consent requires more explicit an agreement for the illegal conduct to take place[121].

128. In *Huckerby v Elliot*[122] the Divisional Court was essentially concerned with whether the appellant had committed an offence by reason of her neglect, However, Ashworth J noted that a fellow director of the company had pleaded guilty to a charge under the "consent" limb and he expressed his approval for some remarks which had featured in the magistrate's judgment being appealed:

> It would seem that where a director consents to the commission of an offence by his company, he is well aware of what is going on and agrees to it … Where he connives at the offence committed by the company he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it.

129. In *Attorney General's Reference No 1 of 1995*[123] the Court of Appeal was asked to answer the question as to what was required to be proved against a director to show "consent". Lord Taylor of Gosforth CJ concluded that a director must be shown to have known the material facts that constituted the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts (at 981). Subsequently, Lord Hope in *R v Chargot Ltd (t/a Contract*

[121] *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [99].
[122] [1970] 1 All ER 189 at 194. Cited in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [99].
[123] [1996] 1 WLR 970, CA. Cited in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [99].

*Services)*[124] endorsed this test, adding that consent can be established by either inference or proof of an express agreement.

## Connivance

130. 'Connivance' is defined in the Oxford English Dictionary as:

> 'The action of conniving; the action of winking at, overlooking or ignoring (an offence, fault, etc); often implying secret sympathy or approval; tacit permission or sanction; encouragement by forbearing to condemn.'

131. In practice connivance means encouragement or consent. The House of Lords discussed connivance (in a matrimonial context) in *Godfrey v Godfrey*.[125] Also in a matrimonial context, the Court of Appeal in *Churchman v Churchman*[126] held that:

> 'Connivance implies that the husband has been accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission'.

132. In *R v Waters*[127] the Court of Appeal held that connivance can occur where a director personally sends a letter to a customer as part of an aggressive commercial practice which is criminal under the Consumer Protection from Unfair Trading Regulations 2008.

## Neglect

133. Neglect implies a failure to perform a duty. The person concerned must know (or ought to know) of the duty – see (in a different context) the discussion of 'neglect' in *Re Hughes*, *Rea v Black*.[128]

134. Examples of cases discussing offences attributable to a director's neglect, see *Crickitt v Kursaal Casino Ltd (No 2)*[129] and contrast *Huckerby v Elliot*.[130]

135. In 1968 in *Kursaal*[131], the House of Lords upheld the director's conviction on an extended liability provision based on their neglect: Lord Pearson held (at p68):

> "The other director charged under this section 32(4) was convicted under it by virtue of section 53 (1). The prosecution argument before the magistrates was that, since there had been systematic gaming for at least the three months covered by the summonses and this accused person had been a director of the company which owned the club in which the gaming was carried on, such systematic gaming could only have been carried on as a result of some neglect of duty on her part. The magistrates accepted this argument and held there was a case to answer and ultimately convicted. In my opinion, there was good ground for the inference that was drawn, and the conviction was right and should be restored."

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124 [2008] UKHL 73; [2009] 1 WLR 1, [2009] 2 All ER 645, HL at [34]. Case discussed by Victoria Howes in 'Duties and Liabilities under the Health and Safety at Work Act 1974: A Step Forward?' (2009) 38 ILJ 306.

125 [1965] AC 444, HL. See also *Gipps v Gipps and Hume* (1861) 11 HL Cas 1 at 14; and *Manning v Manning* [1950] 1 All ER 602, CA.

126 [1945] P 44, CA, at p 51.

127 *R v Waters and Westminster Recliners Ltd* [2016] EWCA Crim 1112, [2017] ECC 5 per Lord Thomas LCJ at [35]:

> 'The director himself sent the letter. In this case there can be little doubt, as the jury concluded that the letter was an aggressive commercial practice, that the director had connived in that practice.'

128 [1943] Ch 296 (Simonds J). See also *R v R McMillan Aviation Ltd and McMillan* [1981] Crim LR 785.

129 [1968] 1 All ER 139, HL.

130 [1970] 1 All ER 189, DC.

131 *Crickitt v Kursaal Casino Ltd (No 2)* [1968] 1 All ER 139, HL.

136. By contrast, in 1970 in *Huckerby*[132] the Divisional Court was considering a standard extended liability provision. The company was convicted of an offence of being a provider of premises used for the purpose of gaming without a licence. A director, Ms Huckerby, was also convicted on the basis of her neglect. The evidence was that she knew little of the conduct of the premises in question but left this in the hands of her fellow director and the manager. Although she was aware that a gaming licence was required she had no knowledge of whether or not the relevant gaming licence had been obtained. Her conviction was overturned by the DC on appeal. It was held that a director could properly leave matters to another and she could not be said to have neglected her duty merely because she failed to make a specific enquiry as to whether a gaming licence had been obtained.

137. It may be that there is no duty to check the conduct of an experienced member of staff whom the officer should be able to expect to act in accordance with his instructions, unless there is something to prompt him to check.[133]

138. In 1978 in *Wotherspoon v HM Advocate*[134], the applicant had been found guilty of two charges under s 37(1) of the Health and Safety at Work etc Act 1974 in respect of the absence of fencing around certain parts of several machines in a factory run by a company of which he was the managing director. He appealed on the ground that the presiding judge had misdirected the jury by failing to give it any adequate guidance as to the meaning of the words "attributable to any neglect". In dismissing the appeal, the Lord Justice-General, Lord Emslie observed (at 78):

> … that the word "neglect" in its natural meaning pre-supposes the existence of some obligation or duty on the part of the person charged with neglect. Where that word appears in section 37(1) it is associated with certain specified officers of a body corporate or with persons "purporting to act in any such capacity". It is any neglect on their part to which the commission of an offence within a specified category by a body corporate is attributable which attracts the penal sanction. … [I]t seems clear that the section as a whole is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of a relevant offence by an artificial persona, a body corporate. Accordingly, in considering in a given case whether there has been neglect within the meaning of section 37(1) on the part of a particular director or other particular officer charged, the search must be to discover whether the accused has failed to take some steps to prevent the commission of an offence by the corporation to which he belongs if the taking of those steps either expressly falls or should be held to fall within the scope of the functions of the office which he holds. In all cases accordingly the functions of the office of a person charged with a contravention of section 37(1) will be a highly relevant consideration for any Judge or jury and the question whether there was on his part, as the holder of his particular office, a failure to take a step which he could and should have taken will fall to be answered in light of the whole circumstances of the case including his state of knowledge of the need for action, or the existence of a state of fact requiring action to be taken of which he ought to have been aware.

139. More recently, in 2008 in *R v Chargot Ltd (t/a Contract Services)*[135] the House of Lords held that the test (in a health and safety context):

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[132] [1970] 1 All ER 189, DC.
[133] *Lewin v Bland* [1985] RTR 171 (D), cited in Card, Cross and Jones, *Criminal Law* (14th edn, 1998) at p 697.
[134] *Wotherspoon v HM Advocate* [1978] JC 74, CSIH.
[135] [2008] UKHL 73; [2009] 1 WLR 1, [2009] 2 All ER 645, HL. Discussed by Victoria Howes in 'Duties and Liabilities under the Health and Safety at Work Act 1974: A Step Forward?' (2009) 38 ILJ 306.

'in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place.'

140. *R v Chargot Ltd* was also a case on s 37 of the Health and Safety at Work, etc Act 1974. Lord Hope (with whom the other members of the House of Lords agreed) followed the Court of Appeal decision in *R v P*[136] and held:

'Liability of officers

32. The prosecution of a director, manager, secretary or other similar officer under section 37 requires it first to be established that a body corporate of which he is an officer has committed an offence under one of the other provisions in that Part of the Act. Where the offence that is alleged against it is a breach of section 2(1) or section 3(1) the considerations mentioned above will, of course, all apply. So he can say in his defence that there was no breach of that provision by the body corporate or, if there was, that it was not reasonably practicable for the body corporate to avoid it. It is only when it is proved that an offence under one of those provisions has been committed that the question can arise [as] to whether the breach was something for which the officer too can be held criminally responsible. Then there are some additional facts and circumstances that must be established. The offence which section 37 creates is not an absolute offence. The officer commits an offence under this section only if the body corporate committed it with his consent or connivance or its commission was attributable to any neglect on his part. These are things relating to his state of mind that must be proved against him.

33. Here too the circumstances will vary from case to case. So no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance or neglect. In some cases, as where the officer's place of activity was remote from the work place or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done there, very little more may be needed. In *Wotherspoon v HM Advocate* 1978 JC 74, 78 Lord Justice General Emslie said the section is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of the offence by a body corporate, and that the functions of the office which he holds will be a highly relevant consideration. In *R v P Ltd* [2008] ICR 96 Latham LJ endorsed the Lord Justice General's observation that the question, in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place. I would too. The fact that the penalties that may be imposed for a breach of this section have been increased does not require any alteration in this test. On the contrary, it emphasises the importance that is attached, in the public interest, to the performance of the duty that section 37 imposes on the officer.

34. … The offences that are created by sections 2(1) and 3(1) are directed to the result that must be achieved by the body corporate. Where it is shown that the body corporate failed to achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference.'

141. The observations made in *Wotherspoon* and *Chargot* have been adopted and applied in Australia[137] and Singapore[138] in relation to similar secondary liability provisions.

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136 [2007] EWCA Crim 1937, [2008] ICR 96, [2007] All ER (D) 173 (Jul), CA.

137 See s 55(1) of the Occupational Safety and Health Act 1984 (WA) and the decision of the Court of Appeal of the Western Australian Supreme Court in *Fry v Keating* [2013] WASCA 109 at [28]–[31].

138 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [62].

142. In Singapore in *Abdul Ghani bin Tahir v Public Prosecutor*[139] Chan Seng Ong J commented that a neglect limb also included recklessness, where the relevant person was aware of the risk:

> [102] To add further complication, there is also the possibility of a fourth mens rea, that of recklessness, being encompassed within the rubric of "neglect". Conceptually speaking, recklessness may be regarded as a more culpable form of neglect. If the essence of neglect lies in the failure to do something which the officer ought to have done, it stands to reason that an officer who fails to do so despite being aware of the risk is more culpable than one who failed to appreciate what these risks were in the first place. The concept of recklessness must thus be encompassed as part of "neglect" in order for the offence to cover all intermediate forms of mens rea on the spectrum leading up to "connivance" and "consent".

## Ignorance of the law

143. It is clear that an officer will be liable under these extended director and officer provisions if he or she consents to (or perhaps or connives in) a particular action, whether or not he or she was aware that the action was a breach of the relevant legislation. In effect ignorance of the law is not a defence here – see the decision of the Court of Appeal in *Attorney-General's Reference (No 1 of 1995)*[140] and similarly the House of Lords (in relation to a different offence) in *Grant v Borg*.[141]

144. In *R v Chargot Ltd (t/a Contract Services)*,[142] Lord Hope approved this point, commenting (at [34]):

> '34. In *Attorney-General's Reference (No 1 of 1995)* [1996] 1 WLR 970 the questions were directed to the effect of section 96(1) of the Banking Act 1987 which is in identical terms to section 37 of the 1974 Act. Lord Taylor of Gosforth CJ said at p 980 that where "consent" is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts. I agree, although I would add that consent can be established by inference as well as by proof of an express agreement. The state of mind that the words "connivance" and "neglect" contemplate is one that may also be established by inference.'

145. It is unclear if the relevant knowledge extends to any mental element applicable to the company. Taking an examples from the pensions legislation, if the primary offence was one of avoiding employer debt (PA 2004, s 58A) or conduct risking accrued scheme benefits (PA 2004, s 58B) then in both cases the primary offence would require both:

- the company to intend the relevant act to have the prohibited effect (PA 2004, s 58A); or know (or ought to have known) that the relevant act would have the prohibited effect (PA 2004, s 58B); and
- for there to be no reasonable excuse.

146. It is unclear if the relevant secondary party (eg director or officer) knowledge in a consent or connivance case has to extend beyond the relevant act to include all the relevant facts (including the presence of intent and absence of a reasonable excuse).

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139 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [102].

140 [1996] 1 WLR 970, CA, discussed by Joanna Gray in B Rider (Ed), *The Corporate Dimension* (Jordan Publishing, 1998). Followed in *R v P* [2007] EWCA Crim 1937, [2008] ICR 96 and *R v Waters* [2016] EWCA Crim 1112.

141 [1982] 2 All ER 257, HL.

142 [2008] UKHL 73, [2009] 1 WLR 1.

147. In practice, it may be that this issue has not arisen in many cases in the past, given that the relevant secondary party (eg director or officer) is in many cases likely to be a senior decision maker and to have the same degree of knowledge as the company.

## Neglect: 'attributable to"

148. The neglect limb (but not the consent or connivance limbs) require that the relevant offence by the body corporate be "attributable to" the neglect of the secondary party.

149. There are several possible interpretations[143] that can be accorded to the words "attributable to":

(a) primary causation;

(b) "but for" causation; or

(c) mere simple causation, ie, one of the reasons for the eventuality.

150. In *Wotherspoon*[144] the Inner House preferred the interpretation of a mere simple causation (at 78):

> … the words "attributable to" … are not qualified in the subsection or the statute by such words as "wholly or mainly" or in any other way. In our opinion any degree of attributability will suffice and in that sense it is evident that the commission of a relevant offence by a body corporate may well be found to be attributable to failure on the part of each of a number of directors, managers or other officers to take certain steps which he could and should have taken in the discharge of the particular functions of his particular office.

[143] *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [74].
[144] *Wotherspoon v HM Advocate* [1978] JC 74, CSIH. Followed in Singapore: *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [76].

# G Amount of fine or penalty

## Penalties against both the company and the secondary party?

151. There is nothing preventing criminal proceedings against both the company and one or more secondary parties. No doubt the level of fines levied or previously levied against one party may influence how great a fine is levied against another party.

152. Both the financial penalty in PA 2004, s 88A and the civil penalty provisions in PA 1995, s 10 state that the relevant penalties cannot be charged against the company if they have already been charged against a director or officer, etc in respect of the same act or omission[145]. This provision strictly does not seem to prevent the converse, i.e. TPR could conceivably require a director or officer to pay a penalty even after the company has been so required.

153. For example PA 2004, s 88A(9):

> *If the Regulator requires a person to pay a penalty by virtue of subsection (6) …, it may not also require the body corporate … in question to pay a penalty under this section in respect of the same act.*[146]

## Who receives any fines or penalties paid?

154. Financial penalties and civil penalties under the pensions legislation are recoverable by TPR[147]. Once received by TPR, the amount recovered must be paid to the Secretary of State[148] or into the consolidated fund[149]. The amount of the penalty does not therefore help TPR's funding or the relevant pension scheme.

## Amount of penalties: culpability

155. On general principles, the amount of any fine or penalty is likely to vary depending on the culpability (in the round) of the relevant target person. This may mean that a greater fine is levied against a secondary party where they are within the "consent or connive" limbs, on the basis that there is a greater element of intent and knowledge, compared with a secondary party within the "neglect" limb.

156. In *Huckerby v Elliot*[150], although the Divisional Court was essentially concerned with whether the appellant had committed an offence by reason of her neglect, Ashworth J noted that a fellow director of the company had pleaded guilty to a

145 PA 2004, s 88A(9) and PA 1995, s 10(7)
146 In PA 2004, s 88A, the term 'act' includes omission – s 88A(12).
147 PA 1995, s 10(8) and PA 2004, s 88C(1).
148 PA 1995, s 10(9).
149 PA 2004, s 88C(4).
150 [1970] 1 All ER 189, DC at 194. Cited in Singapore in *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J) at [99].

charge under the "consent" limb. In this connection, he expressed his approval for the following remarks which had featured in the magistrate's judgment from whose decision the appeal arose (at 194):

> It would seem that where a director consents to the commission of an offence by his company, he is well aware of what is going on and agrees to it … Where he connives at the offence committed by the company he is equally well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it.

157. In Singapore, in *Abdul Ghani bin Tahir v Public Prosecutor*[151] the High Court dealt with a secondary liability offence under the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act (CDSA), involving a non-executive director.

158. CDSA, s 47(1)(b), provides for an offence for any person to transfer the benefits of criminal conduct. CDSA, s 59(1) provides for a secondary person offence, in similar terms to that in the UK discussed above, providing that where an offence by a body corporate is proved to have been committed with the consent or connivance of an officer, or to be attributable to any neglect on their part, the officer as well as the body corporate shall be guilty of the offence.

159. In the Singapore High Court, Chan Seng Onn J provided sentencing guidelines for the CDSA charge, including:

(i) Where the charge is for "consent or connivance", the starting point should be a custodial sentence.

(ii) Where the charge is for "neglect", the starting point should be a fine. However, relevant aggravating factors could warrant the imposition of a custodial sentence, such as reckless conduct, financial gain, a series of lapses, serious consequences, and the nature of the officer's role and responsibilities.

## Applying any cap amongst offenders

160. In the case of criminal offences (or civil penalties) with a cap on the individual amount of fines, the Court of Appeal has held that the cap applies separately to fines payable by a company and by a third party (eg a director) also made the subject of a linked criminal offence (by reason of consenting or conniving in the relevant act or omission etc) – *Sutton v Norwich City Council*[152] (a civil penalty case concerning penalties under s 249A of the Housing Act 2004[153]).

161. The relevant factors to be considered when:

- fixing the level of any fine or penalty; or
- how it is split between the company and its directors or officers,

include considering the solvency of the company.

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151 *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125 (Chan Seng Onn J).

152 [2021] EWCA Civ 20, [2021] 1 WLR 1691 at [46].

153 For breaches of the Licensing and Management of Houses in Multiple Occupation (Additional Provisions) (England) Regulations 2007.

162. In *Sutton v Norwich City Council*[154], Newey LJ held that the level of fine or penalty was very fact sensitive, and the ultimate economic impact on the relevant third party should be considered, in particular where he or she was a shareholder in the company. He held at [43]:

> 'Where the company is already insolvent, there may be no risk of double punishment: his shares being worthless, a director-shareholder should be no worse off as a result of a penalty on the company unless, say, it somehow served to increase his exposure on a guarantee he had given for company indebtedness.'

163. A similar approach seems to apply in Australia. In *Fry v Keating*[155] the Court of Appeal of Western Australia dealt with a prosecution of directors based on their neglect[156]. Murphy JA[157] held that it was not right to apportion a minimum fine between the directors, but instead each person criminally liable would be liable separately, holding at [50]:

> Where there are two or more persons criminally liable for an act by virtue of a legal relationship between them, for example, through co-ownership of property, apportionment will operate so as to avoid the situation where punishment is meted out multiple times where there is, in substance, only one offender. However, where multiple offenders are liable because of an act or omission that each is said to have done or not done, it may be seen as appropriate to assess the extent of each offender's liability against their act or omission.

164. Murphy JA held (at [56]):

> The directors' counsel accepted at the hearing of the appeal that the directors and the Company were not joint offenders within the meaning of s 55(1) of the Sentencing Act. For the reasons given above, that concession was correct. The result is that it was not open to the primary judge to apportion the Company's fine amongst the Company and the directors. The directors' further submission to the effect that, somehow, the primary judge's apportionment between the Company and the directors could be upheld because the directors were purportedly in a legal relationship with each other and purportedly owed each other fiduciary duties, is plainly untenable, not least for its misconception as to the beneficiary of the fiduciary duties of a director.

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**2 July 2025**

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154 [2021] EWCA Civ 20, [2021] 1 WLR 1691 at [33] to [46], considering *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr App R (S) 436, CA; *R v Snaresbrook Crown Court ex p Patel* [2000] COD 255, DC; and *R v Western Trading Ltd* [2020] EWCA Crim 1234.

155 *Fry v Keating* [2013] WASCA 109.

156 The relevant offence under the Occupational Safety and Health Act 1984 (WA), s 55 was based on similar secondary liability wording as in the UK – see [2013] WASCA 109 at [26].

157 Newnes JA and Pullin JA agreeing.

# Appendix 1: Position of Insolvency Practitioners

This appendix looks at the position of insolvency practitioners (IPs) under the pensions crimes and fines legislation following the decision in 2023 of the Supreme Court in ***R (Palmer***): *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

### *R (Palmer)*

In *R (Palmer)* the Supreme Court unanimously held that an administrator (appointed to a company under the Insolvency Act 1986) was not a "similar officer of the body corporate" and so did not fall within the secondary class and could not be prosecuted under the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA 1992**), s 194 for the (alleged) failure of the company to give notice to the Secretary of State of proposed collective redundancies.

The primary offence in TULRCA 1992 is in s 194(1), with s 194(3) providing for the secondary offence in the following terms:

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

This appendix considers how far the decision in *R (Palmer)* affects the position in relation to the various crimes and fines in the pensions legislation, in particular whether IPs can rely on the decision in *R (Palmer)* to assume they have no potential for committing a crime or incur a fine under the similar secondary provisions in the pensions legislation where they are appointed over a company.

### Insolvency Practitioners?

The issue arises, in particular, whether insolvency practitioners (IPs) appointed over the company are within the secondary party category in relation to the company. IPs, in practice mainly liquidators or administrators[158], on appointment, tend to take control of the company to the exclusion of its directors (save in some limited respects). If at the time of appointment the company is already committing or starts later to potentially commit an offence (or incur a penalty), can the IP end up as a secondary party also committing an offence (or incurring a penalty)? This is likely to be a serious issue for the IP, particularly if the company continues to trade. Although a successful prosecution (or fine) would still require the further elements to be shown on the part of the IP – e.g. consent, connivance or (usually) neglect.

This potential for a criminal offence (or penalty) on the IP personally would add a significant complication to the IP's decisions – for example whether or not to continue to operate the company's business - if this could give rise to a potential personal liability

[158] Administrative receivers must also be IPs, but from September 2003 appointments have been restricted by the Enterprise Act 2002, broadly to appointments under charges created before 15 September 2003 or in certain capital market arrangements (see Insolvency Act 1986 (**IA 1986**), ss 72A to 72H).

on the IP. This is to be compared with a triggering of a money claim (for a fine or penalty) against the company itself – which from the IP's perspective may impact the company and the recovery by creditors in the insolvency, but could rank as an unsecured debt (or might in some cases be preferential) or could in some cases be an insolvency expense[159] (and so be usually payable in advance of most other claims on the company).

**IP express exemptions**

IPs do have some express exemptions[160] from the moral hazard provisions in PA 2004, and from some (but not all) the primary crimes and fines in the pensions legislation. However these exemptions are from the primary liability and do not expressly exclude IPs from any potential secondary person extension, where the primary liability falls on a company.

A table with some of the more important pensions provisions, and whether they have an express IP exemption, is below:

| Provision | IP exemption? |
|---|---|
| **Moral hazard powers (CNs and FSDs)** | |
| FSD:<br>PA 2004, s 43 | No<br>(but not needed as FSD cannot apply to an individual, if a corporate employer) |
| CN:<br>PA 2004, s 38 | Yes<br>Exemption only if the Pensions Regulator (**TPR**) is of the opinion that IP is acting in accordance with his or her functions |
| Enforcement CN (re FSD):<br>PA 2004, s 45 | No<br>(but not needed as can only apply to the target of an FSD) |
| **Crimes** | |
| PA 2004,s 40A:<br>Failing to comply with a s 38 CN[161] | No express exclusion |
| PA 2004, s 58A:<br>Avoidance of employer debt | Yes |
| PA 2004, s 58B:<br>Conduct risking scheme benefits | Yes |
| PA 2004, s 80:<br>providing false or | No |

159 Claims against a company under a pensions moral hazard order for a contribution notice (**CN**) or financial support direction (**FSD**) under the Pensions Act 2004 (**PA 2004**) are unlikely to be an insolvency expense, at least where the relevant order is based on pre-insolvency facts: see *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209; and Pollard '*Corporate Insolvency: Employment and Pension Rights*' (7th edn, 2022, Bloomsbury Professional) at ch 36 (Categorising claims: Re Nortel).

160 See *Corporate Insolvency: Employment and Pension Rights* at ch 20 (IPs and Pensions Liability).

161 Note that this criminal provision only applies to a CN issued under PA 2004, s38 and not to an FSD or a CN issued as an FSD enforcement matter under PA 2004, s 47.

| Provision | IP exemption? |
|---|---|
| misleading information to TPR | |
| Pensions Act 1995 (**PA 1995**), s 49(8) and (11) and Pension Schemes Act 1993 (**PSA 1993**), s 111A: knowingly to be concerned in the fraudulent evasion of the obligation on an employer to pay contributions within a period after deduction from pay[162] | No |
| Pensions Act 2008 (**PA 2008**), s 45: deliberate failure to comply with AE requirements | No<br>but AE duties broadly cease if relevant scheme enters a PPF assessment period (PA 2008, s 31) |
| **Financial Penalties – PA 2004, s 88A** | |
| PA 2004, s 40B: Failing to comply with a s 38 CN[163] | No express exclusion |
| PA 2004, s 58C: Avoidance of employer debt | Yes<br>Exemption only if TPR is of the opinion that IP is acting in accordance with his or her functions |
| PA 2004, s 58D: Conduct risking scheme benefits | Yes<br>Exemption only if TPR is of the opinion that IP is acting in accordance with his or her functions |
| PA 2004, s 80A: providing false or misleading information to TPR | No |
| PA 2004, s 80B: providing false or misleading information to trustees | No<br>Specified provisions within the sanction include PA 1995, s 26 (IP to give information to trustees) |
| PA 2004, s 69/69A: failure to notify TPR | No |

[162] PA 1995, s 49(8): Contributions deducted from pay must be paid to the scheme within 19 days (22 days if paid by electronic communication) of the end of the month in which they are deducted: reg 16 of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (SI 1996/1715). An employer failing to pay members' contributions within the prescribed time may be subject to a civil penalty under PA 1995, s 10 – PA 1995, s 49(9)(a).

[163] NB not an FSD enforcement CN under PA 2004, s 47.

## Does the decision in *R (Palmer)* mean that IPs do not now have to worry about secondary crimes or fines under the pensions legislation?

Broadly the answer is probably a qualified yes. Strictly the decision of the Supreme Court in *R (Palmer)* is only a binding authority in relation to cases where both:

(a) the potential offences are under the collective redundancy provisions in TULRCA 1992, s 194(3); and

(b) the IPs concerned are administrators.

These two issues are discussed further below.

## Application of *R (Palmer)* to other legislation?

In relation to (a), strictly the decision in *R (Palmer)* was only dealing with interpretation of the secondary class language in TULRCA 1992. There is commentary in the caselaw that there is "danger" in construing words in one statute by reference to a decision on similar words in another statute[164]. But decisions on other statutes can be considered where they are "instructive by analogy" and can be "strongly supportive" [165].

In practice where there is such statutory wording dealing with a secondary criminal liability and it has been construed (as in *R (Palmer)*) in a very similar context in relation to another statute, it seems likely that it will be very difficult to distinguish the result.

Conceivably the result in a case construing the secondary criminal (and penalty provisions) in another statute, for example the pensions legislation, could differ from that in *R (Palmer)*, but some fairly compelling distinguishing factor is likely to be needed. It seems much more likely that courts will consider that secondary criminal (and civil penalty) liability provisions with the same (or similar) wording to that in TULRCA 1992 are all intended to be penal and should have the same meaning.

## Application to other IPs?

*R (Palmer)* is a decision in relation to administrators appointed under IA 1986. The decision needs to be examined in some detail in order to decide whether a similar result should apply to a different IP, for example a court-appointed liquidator, a voluntary liquidator or an administrative receiver.

All three categories have similarities with administrators – for example, they take over control of the company in place of its directors[166] and they need to be licensed IPs[167]. But there are differences: administrators are officers of the court[168], as are court-appointed liquidators; but voluntary liquidators and administrative receivers are not. Administrators and administrative receivers have many similar powers[169], including that they can arrange for the company to continue to trade. Liquidators have different

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164 See e.g. *Hastie & Jenkinson v McMahon* [1991] 1 All ER 255, CA per Woolf LJ at p261g: "There is always danger in seeking to apply decisions on specific statutory provisions to different situations…."; and *Stephens v Cuckfield RDC* [1960] 2 All ER 716, CA per Upjohn LJ at p719G: "Authorities on rather similar words in other Acts passed for entirely different purposes … do not assist us."

165 Lord Lloyd-Jones in *R (KBR Inc) v SFO* [2021] UKSC 35, [2022] AC 519 at [46] and [53].

166 IA 1986, s 87 (voluntary liquidations) and s 167 and Sch 4, para 5 (court liquidations).

167 IA 1986, ss 230 and 388.

168 IA 1986, Sch B1, para 5.

169 IA 1986, Sch 1.

powers and their power to arrange for a company to continue to trade is much more limited.[170]

Lord Richards, who gave the only judgment in *R (Palmer)*, considered that it was appropriate in relation to administrators to follow an earlier (unreserved) Court of Appeal decision, *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634, to the effect that receivers are not "officers of the company" for the purposes of the then Companies Act 1948, s 333. He held that this was appropriate on the basis that administrators were much more similar to receivers.

Ultimately the analysis of Lord Richards in *R (Palmer)*, based on the treatment under various provisions of IA 1986 of IPs as contrasting with officers of the company, is likely to be held to apply to other IPs as well as to administrators.

## No discussion in *R (Palmer)* of why administrators are not "managers"?

One notable aspect of the Supreme Court's decision in *R (Palmer)* is that it does not deal with the potential issue of why an administrator is not a 'manager' of the company , so falling within the secondary category class, regardless of whether or not an administrator also falls within the "other similar officer of the body corporate" category. It may be that this point was not argued, although the Divisional Court in the decision under appeal (and overturned) in *R (Palmer)* had discussed the manager/officer distinction[171].

## Conclusion

Lord Richards in the Supreme Court in *R (Palmer)* acknowledged that the effect of the decision was to exclude administrators from the secondary person extension under TULCRA 1992 despite the administrator being the person in control of the company at the relevant time. He held that the secondary class wording was not clear enough to cover administrators – there was "no scope for such an extended reading" (at [42]). Lord Richards held that Parliament could easily have adopted a more functional test (at [51]).

Lord Richards held that the term "officer" (at least in TULRCA 1992) is "essentially a constitutional test. Does the person hold an office within the constitutional structure of the body corporate as is the case with directors, managers and secretaries?" (at [55]). The reference to "managers" as holding office within a corporate structure is perhaps less easy to follow than directors or secretaries.

Given the large number of legislative provisions using similar secondary wording, it may be that future legislation seeks to clarify that IPs are included within the secondary class – on the basis that once in office they are the real managers and decision-makers within the company. This remains to be seen.

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170 This may be a reason why liquidators may in practical terms be less likely to be caught up in a secondary person extension as they may be less likely to be within the "consent, connive or neglect" test.

171 *R (Palmer) v Northern Derbyshire Magistrates Court* [2021] EWHC 3013 (Admin), [2022] ICR 531, DC at [106] to [112].