

White Paper Conference - Environmental Law & Practice:

Shaping New Developments into Solution-Focused Answers for Clients

Introduction

1. Historically environmental law in the UK has developed largely on the basis of criminal penalties for breach of regulatory requirements. As a consequence the UK's current legal landscape is somewhat fragmented with a range of laws variously seeking to protect the environment from harm, prevent further damage, and imposing a mix of regulatory powers and criminal and administrative penalties for non-compliance.
2. In recent years, however, there has been an increase in ambition and action on the part of environmental regulators both domestically and internationally, in the enforcement of existing laws and the development of new legal regimes.
3. In this talk I will provide a brief overview of that regulatory landscape, focussing in particular on the vulnerability of culpable companies and their directors to criminal sanction in the event of environmental harm.

In particular, I will offer:

- a. An outline of the current law regarding criminal liability for both companies and directors.
- b. A case study of the Environment Agency's ("EA") prosecution of offences committed by water companies.
- c. A glance at legal developments in Europe.
- d. Some concluding remarks.

Summary of corporate liability in criminal law

4. A fundamental aspect of corporate law is of course that a company has its own legal personality or legal identity (first formally recognised in The Limited Liability Act of 1855), separate from the identities of its directors, shareholders and parent or subsidiary companies: *Salomon v Salomon and Co Ltd* [1897] AC 22.

5. In civil law, the acts or omissions of a director in the ordinary course of business will be the acts or omissions of the company, so that under ordinary principles of agency the company is liable for what the director does or fails to do on its behalf. The fact that the acts or omissions of the director are attributed to the company means that the director will not normally be personally liable for those matters, though they may have their own liabilities as directors, arising from breach of their obligations.
6. Liability for a criminal offence can attach to a corporate entity in the UK in several ways, which include:
 - a. **Doctrine of vicarious liability** - this holds that a company can be held criminally liable for the acts of its employees or agents committed in the course or scope of the employee's employment or are closely connected with what the employee is authorised by the employer to do (see e.g. *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15).

Vicarious liability generally applies to strict liability offences and many environmental offences fall into this category. A strict liability offence requires no intention to commit the criminal act or dishonesty on the part of the offender and is committed irrespective of whether the person committing the offence is at fault.

- b. **Principle of identification.** For serious offences that do not impose strict liability, a company will only normally be criminally liable where the commission of the offence can be attributed to someone who at the material time was the "directing mind and will" of the company or "an embodiment of the company;" *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, applied in *Woodhouse v Walsall Metropolitan Borough Council* [1994] Env. L.R. 30). In June 2023, the government indicated that it would reform the identification principle by bringing senior managers within the scope of who can be considered the "directing mind and will." This follows a Law Commission review of corporate criminal liability.

However, the principle of identification is not usually relevant to environmental breaches as they are generally strict liability offences.

Key types of corporate environmental offences

7. There is a wide range of offences for breach of environmental legislation. Some of the most common environmental offences relate to:
- **Environmental Permitting** – Environmental Permitting is the main regime for regulating the environmental impacts of a wide range of industrial activities. The main offences are:
 - a. Carrying out an activity that requires a permit without said permit (regulation 38(1) of the Environmental Permitting (England and Wales) Regulations 2016);
 - b. Breaching permit conditions (regulation 38(2));
 - c. Several other offences relating to compliance with notices, record-keeping and provision of information (regulation 38(3)).
 - **Waste.** The main ‘waste offences’ are:
 - a. Carrying out a waste operation without an environmental permit;
 - b. The unauthorised deposit of waste (section 33(1) Environmental Protection Act 1990); or
 - c. Waste duty of care offences (section 34).
 - **Water discharges.** It is an offence to discharge pollutants into controlled waters or groundwater without an environmental permit.

Directors’ liability for environmental offences

Director personally commits an offence

8. A director can commit and be liable for an environmental offence if they are themselves responsible for the act or default leading to the offence.
9. This is particularly relevant in a small company, where the directors are closely involved in the day-to-day operations of the company.

10. Often, the company and the director will be jointly charged with the offence. The director could be liable as principal or accessory, or liable for an inchoate offence (preparing for or seeking to commit another crime).

Consent, connivance or neglect

11. Under several environmental regimes, a director or other officer commits an offence, as well as the company, if the offence committed by the company was either:

- a. Committed with the consent or connivance of the director or officer.
- b. Attributable to the neglect of the director or other officer.

Scope of consent, connivance or neglect

12. The courts have given the following clarification of the terms consent, connivance and neglect, although these are not environmental cases:

- a. **Consent.** A director is taken to have consented to the commission of an offence by the company when they are well aware of what is going on and agree to it; *Huckerby v Elliott* [1970] 1 All ER 189.
- b. **Connivance.** A director who connives in an offence will be aware of what is going on, but give tacit agreement only, not actively encouraging what happens but letting it continue and saying nothing about it; *Huckerby*.
- c. **Neglect.** Neglect occurs where the person fails to perform a duty that they know or ought to have known about; *Re Hughes* [1943] 2 All ER 269.

13. A director's duty is not absolute and some act or omission constituting neglect must be shown; *Huckerby*. This could be by reference to the director's express duties, or responsibilities set out in the company's articles of association, or environmental management requirements.

14. The Court of Appeal stated in relation to the Health and Safety at Work etc Act 1974 that the correct question was whether or not a defendant ought to have been aware that a particular practise occurred, not whether they knew of the practice but turned a blind eye – *R v P* [2007] EWCA Crim 1937, at [11]-[13].

Relevant offences

15. Environmental regimes that have the consent, connivance and neglect wording include:

- Environmental permitting offences, waste offences, water discharge offences and other offences under the permitting regime (**regulation 41**, Environmental Permitting (England and Wales) Regulations 2016).
- Environmental damage offences (**regulation 34**, Environmental Damage (Prevention and Remediation) (England) Regulations 2015).
- Packaging offences (**section 95(2)**, Environment Act 1995).

16. The EA publishes, as part of its enforcement policy guidance, a document setting out the enforcement options for different offences.¹ This includes information about whether a director or other officer can be liable for a particular offence if it is committed with the officer or director's consent, connivance or neglect.

Enforcement, prosecution and sentencing

Environmental regulators and prosecutors

17. The principal environmental regulators are:

- a. The Environment Agency ('EA');
- b. Natural Resources Wales;
- c. Local authorities;
- d. Natural England;
- e. Marine Management Organisation;
- f. CPS.

¹ <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy#:~:text=We%20will%20have%20regard%20to,rather%20than%20hinders%20legitimate%20business.>

18. When prosecuting offences, the regulators are expected to follow the 2014 Sentencing Council's sentencing guideline for environmental offences.²
19. The Court of Appeal applied the environmental offences sentencing Guideline to a director in *R v Anderson (Gordon)* [2022] EWCA Crim 1465.

R v Anderson

20. Gordon Anderson, sole director of waste and recycling company Paperback Collection and Recycling ("PCR"), pleaded guilty to offences of excess storage and depositing of waste, contrary to the Environmental Permitting (England and Wales) Regulations 2016. PCR were convicted of an offence contrary to regulation 38 and Mr Anderson was convicted of an offence contrary to regulation 41; [1]-[18].
21. Following the guilty pleas, Mr Anderson was sentenced to 15 months' imprisonment, suspended for 18 months, a 15-year directors disqualification order, together with 250 hours of unpaid work; [3].
22. Anderson appealed against the sentence of 15 months imprisonment and the 15 year directors disqualification order
23. Mr Anderson had a variety of grounds of appeal, one of which was that the judge had impermissibly pierced the corporate veil in treating the liability of PCR as the financial gain of himself personally; [33]. The 'corporate veil' is a metaphorical concept that the rights and duties of a corporation are solely the responsibility of the company alone, having its own 'legal personality'. It is generally prohibited to 'pierce the corporate veil' and disregard this concept in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone.
24. The Court rejected this argument as "*misconceived*;" [64]. The judge was assessing the correct punishment to be imposed as a consequence of Anderson's criminality and the concept of piercing the corporate veil "*had no relevance to the fact-finding exercise the judge needed to undertake in assessing culpability and harm regarding the particular director's conduct.*" The sentencing judge was entirely correct to have regard to the

² <https://www.sentencingcouncil.org.uk/wp-content/uploads/Environmental-offences-definitive-guideline-Web.pdf>

motives, intent and conduct of the director in the context of the business activities of the company.

25. The Court applied the Guidelines, noting that the judge was enjoined by them to take into account the appellant's motive as director of the company, namely whether he was acting altruistically or for commercial advantage. They again, rejected Anderson's argument, stating that to take these considerations into account does not pierce the corporate veil but is an appropriate consideration in making a correct assessment of the nature of the offending and therefore extent of the punishment that is appropriate; [63].
26. Mr Anderson also argued that the disqualification period of 15 years was excessive. The Court agreed and, in giving their judgment, cited *Re Sevenoaks Stationers (Retail) Ltd* [1990] 3 WLR 1165 which identified three brackets in relation to disqualifications under section 6 of the Company Directors Disqualification Act 1986: Top (over 10 years), Middle (6 – 10 years) and Minimum (2 – 5 years); [45].
27. 15 years is the maximum disqualification period and should be “reserved for particularly serious cases.” Anderson was a man of otherwise good character who, albeit late in the day, pleaded guilty and who had never previously been subject to a disqualification order. The Court therefore decided that his sentence should fall in the middle bracket and a period of 6 years' disqualification was considered appropriate; [66].
28. Therefore, directors will not be able to hide behind the “corporate veil” when being sentenced by a court. However, courts will be reluctant to impose too heavy a disqualification on a director, subject to it being shown that the director was already of bad character.

Case Study - EA Prosecutions of Water Companies

29. The ongoing saga concerning the nationwide pollution of waterways by statutorily recognised companies will be familiar to everyone in the audience. It therefore serves as a useful case study to determine the vulnerability of companies and directors to criminal sanction in the face of well-known environmental non-compliance.

30. In 2021 the EA published its Environmental Performance Report, in which it reviewed the environmental performance of the nine water and sewerage companies in England. It reported a shocking deterioration in performance.³
31. The then Chair made clear that EA wanted tougher action to reverse negative trends and placed the blame for the most recent statistics at the door of company directors. These strong words sat alongside the EA's recently opened investigation into environmental crime, reviewing the activities of all the water companies to establish whether they have knowingly and deliberately broken environmental law.
32. The report promised to prosecute water pollution incidents more readily in the future and stated that the EA would push for prison sentences for Chief Executives and Board members whose companies were responsible for the most serious incidents. They would also like to see the directors of those companies struck off.
33. Similar sentiments were expressed in the EA's 2023 report, published on 23 July 2024.⁴ The current Chair makes clear that they will increase enforcement activity, on the back of increased government funding.
34. Such sentiments are expressed in recent EA action against water companies, such as a landmark £90 million fine against Southern Water, imposed on 9 July 2021,⁵ and a total of £141 million in fines secured against water and sewerage companies between 2015 and 2022.
35. However, such actions do not represent the broader picture. Research carried out by the journal the "ENDS Report" revealed a steep decline in EA prosecutions through analysis of two decades' worth of industry prosecution data. The data shows a substantial 76.4% decrease in prosecutions from 2000 to 2010 and 2011 to 2021 respectively.⁶

³ <https://www.gov.uk/government/publications/water-and-sewerage-companies-in-england-environmental-performance-report-2021/water-and-sewerage-companies-in-england-environmental-performance-report-2021>

⁴ <https://www.gov.uk/government/publications/water-and-sewerage-companies-in-england-environmental-performance-report-2023/water-and-sewerage-companies-in-england-environmental-performance-report-2023>

⁵ [https://www.gov.uk/government/news/record-90m-fine-for-southern-water-following-ea-prosecution#:~:text=Southern%20Water%20has%20today%20\(Friday,in%20Kent%2C%20Hampshire%20and%20Sussex.](https://www.gov.uk/government/news/record-90m-fine-for-southern-water-following-ea-prosecution#:~:text=Southern%20Water%20has%20today%20(Friday,in%20Kent%2C%20Hampshire%20and%20Sussex.)

⁶ <https://www.endsreport.com/article/1803690/76-drop-environment-agency-prosecutions-last-decade-ends-analysis-shows>

36. In light of such a decline, the EA has looked to alternative methods of punishing offenders. Following the implementation of the Environmental Civil Sanctions (England) (Amendment) Order 2023 and the Environmental Permitting (England and Wales) (Amendment) (England) (No 2) Regulations 2023, the previous £250,000 limit on variable monetary penalties (“VMPs”, a form of discretionary civil fine) that the EA could impose directly on operators was lifted and the range of offences for which VMPs can be imposed has been expanded.
37. Further, instead of prosecution, the EA may also consider accepting a voluntary offer made by an offender to put right both the effects of their offending and the impact on third parties, in an effort to make sure the offence cannot happen again. The EA confirmed it will only consider accepting an enforcement undertaking where it considers:
- It is not in the public interest to prosecute.
 - The offer itself addresses the cause and effect of the offending.
 - The offer protects, restores or enhances the natural capital of England.⁷
38. As published recently on 14 August 2024, the EA has increasingly used this method of enforcement for suitable cases to restore the environment, improve practices of the offending company and avoid longer criminal court cases. Indeed, data published by the EA shows that between 1 November 2023 and 26 July 2024 alone, the EA accepted 39 Enforcement Undertakings (and 12 alone in respect of water discharge) ranging from £5,604.34 in the case of Professor Puzzle Limited, to £600,000 in the case of Severn Trent Water Limited.
39. However, despite the apparent increase in the use of enforcement undertakings and the amendment to the civil sanctions regime, the EA has warned that it will continue to prosecute in appropriate cases. Further, the Water (Special Measures) Bill is presently at the report stage in the House of Lords, which seeks to make provision about the regulation, governance and special administration of water companies. Regulators may therefore soon benefit from increased enforcement powers.

⁷ <https://www.gov.uk/government/publications/environment-agencys-use-of-civil-sanctions/enforcement-undertakings-accepted-by-the-environment-agency-1-june-2022-to-30-september-2022>

The European Perspective

The EU's Environmental Crime Directive

40. The Environmental Crime Directive was adopted by the European Parliament on 27 February 2024 and eventually approved by the Council on 26 March 2024. It entered into force on 20 May 2024 and has to be implemented by Member States within two years (Article 28).
41. The Environmental Crime Directive aims at establishing minimum rules on the definition of criminal offences and penalties in order to improve the protection of the environment.
42. While an offence titled “ecocide” was not introduced by the Environmental Crime Directive, the accompanying recitals refer to “cases comparable to ecocide”, which indicates the EU intends to tackle “ecocide-level crimes”.⁸
43. For example, the Environmental Crime Directive introduces so-called qualified offences (Article 3(3)), namely, offences causing the destruction of, or widespread and substantial damage to, an ecosystem or a habitat within a protected site, or widespread and substantial damage to air, soil, or water quality. According to the accompanying recitals, this would include offences comparable to ecocide with catastrophic results, such as widespread pollution or large-scale forest fires.
44. Member States will have to ensure that they have in place effective, proportionate and dissuasive criminal penalties against individuals (Article 5). These will have to include a maximum term of imprisonment of at least ten years in the event that specific offences cause the death of any person. Qualified offences, i.e., cases comparable to ecocide, shall have to be punishable by a maximum term of imprisonment of at least eight years.
45. Further, other penalties under the Environmental Crime Directive, such as fines and an obligation to reinstate the damaged environment or compensate for the damage caused, may apply to individuals, but also to companies (Article 7). In addition, companies could

⁸ The term “ecocide” refers to unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts; <https://www.stopecocide.earth/legal-definition>.

face penalties such as the withdrawal of licences, bans on access to public funding, or closure (Article 7(2)).

France and Belgium

46. In 2021, France introduced the Climate Resilience Act which lays down criminal offences for causing “*serious and lasting damage to health, flora, fauna or the quality of the air, soil or water*”.

47. On 22 February 2024, Belgium became the first European country to legally recognise ecocide as a national and international crime. Just a few days before the EU Parliament adopted the Environmental Crime Directive, the Belgian Federal Parliament adopted a new Belgian Criminal Code (which will enter into force in two years, in 2026), specifically addressing significant environmental damage and listing ecocide as a new crime.

UK equivalents

48. At present, there has been no indication of a government-backed legislative bill to introduce the crime of ecocide into UK law.

49. However, in November 2023, Baroness Boycott proposed a new private members Bill (“the Ecocide Bill”) to the UK House of Lords, just weeks after Scottish Labour and Co-op MSP, Monica Lennon, introduced a similar private members’ Bill (“the Ecocide Prevention Bill”) in the Scottish Parliament. Both Bills sought to deter mass environmental damage and destruction and aim to protect all natural resources such as air, water, soil, habitats, and wild flora and fauna.

50. However, neither Bill was carried over to the current Parliament following July’s general election and the likelihood of the government introducing such a Bill within its present legislative agenda appear slim.

Concluding Remarks

51. The UK legal framework for prosecuting companies and directors currently consists of a variety of different regulatory regimes, each addressing different forms of environmental non-compliance.

52. There has been a noticeable increase in ambition to enforce existing laws and introduce new regimes, particularly by the EA in light of the water pollution scandal which has generated so much press attention. Other examples include specific sentencing guidelines that have been introduced and, following *Anderson*, directors will not be able to hide behind the “corporate veil” when being sentenced for environmental offences.
53. However, statistics demonstrate that prosecutions remain low and the EA have had to make do with alternative sanctions, such as civil fines and enforcement undertakings by companies.
54. Further, the UK has also arguably fallen behind our European neighbours in terms of ambition. The Environmental Crime Directive is perhaps the high watermark of environmental crime legislation, to which companies operating on the continent would do well to pay heed.
55. To conclude, presently companies and directors are indeed vulnerable to criminal sanction for environmental non-compliance, though enforcement remains low and likelihood of civil sanction being applied, or an enforcement undertaking being agreed, is greater. That said, ambition is building for significant legislative change, though more so in Europe than domestically. Companies should therefore pay attention to legislative updates to be sure of their legal duties towards the environment.
56. One of the best ways for companies to protect themselves and their directors and officers alike from liability for environmental contraventions is to have in place a properly functioning environmental management system. Directors and senior people need to play an active role in ensuring that duties are discharged otherwise they risk being found guilty of neglect in the event of an environmental breach.

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