



Senior corporate officers – consent or connivance

Various legislation contains specific provisions to enable the prosecution of senior officers when a corporate body commits an offence with the consent or connivance of such officers. These include the Bribery Act 2010, the Fraud Act 2006, various health and safety legislation and food safety legislation.

In this article, we consider what the prosecution will need to prove in order to establish consent, connivance or neglect by a director, manager, secretary or other senior officer.

State of mind

It must be proved that that the corporate body has committed an offence before the prosecution can consider whether a senior officer should also be held criminally responsible. Consent and connivance relate to an officer's state of mind and must be proved against them.

In the case of *R v Chargot Ltd (trading as Contract Services) and others [2008]*, it was stated that as the circumstances will vary from case to case, there is no fixed rule 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. It may be that the officer's place of activity was remote from the workplace or what was done there was not under their immediate direction and control; this would require detailed evidence by the prosecution. On the contrary, little evidence may be required where the officer was in day to day contact with what was done there.

Consent

Consent covers those situations where permission is given by the officer to do something constituting a criminal offence. In *Attorney General's Reference (No 1 of 1995) [1996]* (concerning an offence under the Banking Act 1987), the Court of Appeal concluded that where consent is alleged, the accused has to be proved to know the material facts which constitute the offence and to have agreed to conduct the business on the basis of those facts. The prosecution, therefore, must prove both that the senior officer was aware of the state of affairs and agreed to it.

This was confirmed in *R v Chargot* albeit it was additionally stated that consent can be established by inference as well as by proof of an express agreement.

Connivance

Connivance covers those situations where an employee or employees are allowed, tacitly or secretly, to do something constituting an offence, without having obtained direct approval from the senior officer. This can sometimes be known as "blind eye knowledge". In the case of *Huckerby v Elliott [1970]*, the court considered that a person has connived in an offence where they are aware of what is going on and let it continue, even though they have not actively agreed or encouraged it. Instead, they are shutting their eyes to the obvious.

In *R v Chargot*, it was stated that the state of mind for connivance may be established by inference, particularly if the matter was under the direction or control of the officer. The more remote the officer's area of responsibility from the matter, the harder it will be to draw the inference.

Neglect

While some statutory provisions refer to consent and connivance only, certain legislation is explicit regarding offences being attributable to neglect by senior officers.

In the case of *Wotherspoon v HM Advocate [1978]* (concerning a health and safety offence), it was stated that when considering whether there has been neglect, the search must be to discover whether the accused has failed to take some steps they could and should have taken to prevent the commission of the relevant offences by the company. That will depend in every case on the evidence.

It is unclear whether, if only one manager is charged, that manager can escape liability by arguing that responsibility was shared with other managers (who have not been charged) and without their support the faults could not have been rectified. In such circumstances, the manager may be liable under consent or connivance.

In the matter of *R v P Ltd and another [2007]*, the court confirmed the approach in *Wotherspoon*, pointing out that the statutory provision in question did not refer to “wilful” neglect. The question was not whether the accused ought to have been aware in the sense that he had “turned a blind eye”. That would equate the test to connivance and Parliament has chosen quite plainly that there should be a distinction between consent, connivance and neglect. Instead, where there is no actual knowledge of the state of facts, the question is whether the officer should have, by reason of the surrounding circumstances, been put on enquiry to require that officer to check that relevant procedures were in place.

Finally, it should be noted that a director can delegate particular matters to a fellow director or company officer and cannot be held to be neglectful for the failure of the other party, even when the company was guilty of an offence (*Huckerby v Elliott [1970]*).



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