

DEFENDING A REGULATORY PROSECUTION

A basic guide

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RFPG: 02/02/16

WHAT IS A REGULATORY PROSECUTION?

- Typically where company/organisation/charity or its owners/directors/employees/trustees are prosecuted by COPFS following upon an investigation conducted by a statutory regulator, most typically the Health and Safety Executive (HSE)
- Scottish Environmental Protection Agency (SEPA)
- Local Authority (waste control)
- FSA or Police Scotland Economic Crime Unit



TYPICAL STATUTES

- Health and Safety at Work Act 1974 (HSWA) – UK
- Environmental Protection Act 1990 (EPA) – UK
- Companies Act 2006 – UK
- Waste (Scotland) Regulations 2012



IMPORTANT CONSIDERATIONS

- Now there is specialist Health and Safety prosecution unit based in Glasgow
- Reverse onus: S.40 of the HSWA
- Prosecutions very difficult to defence – HSWA affords “reasonably practicable” defence: “six-pack regulations” enjoy strict culpability with their own specifications
- Fines are substantial (compared with prosecuting an individual)
- Defence lawyers’ skills – this is criminal defence work



WHO ARE THE ACCUSED?

- A company/organisation (exclusively in Corporate Homicide)
- Its directors
- Its owners
- Its managers
- Its employees
- Even its external advisors



DIFFERENCES IN DEFENDING

- Investigation
- Interviews
- Negotiation pre-prosecution
- Comparative lack of evolving case law – because strict culpability?



INVESTIGATION

- Starting point is often in minutes or hours after the incident occurred.
- Distinguishable from many other types of offence as element of crisis management – solicitor can be at the locus, or on site, within hours of the incident providing advice to the client at the point when investigations begin – both HSE's and company's
- Establish who is being investigated, by whom and in relation to which suspected criminal offence(s)?



INVESTIGATION

- HSE and Police have separate and distinct powers
- S.20 of HSWA allows HSE to take statements and seize productions – but not the police
- S.14 of CP(S)A 1995 interview in relation to an imprisonable offence can only be conducted by the police
- Confusion possible as sometimes same person can be interviewed as a witness to one offence but as a suspect for another offence which has arisen from the same facts and circumstances

INTERVIEWS

- HSE may allow work colleagues to be present during witness interviews. Witness can refuse to be interviewed and HSE most likely will invoke S.20 of the HSWA 1974
- S.20 gives a right to a witness to give statement to HSE whilst accompanied by solicitor. Such a statement cannot subsequently be used (against witness?) at court. Witness will also receive signed copy of the statement at conclusion of interview
- Cadder little impact as HSE allowed solicitors to be present for suspect interviews



INVESTIGATION - GENERALLY

- Not as reactive. Advising client of evidence as it emerges, not as disclosed.
- Company or individual not put on petition so no time limits apply.

PROSECUTION BY NEGOTIATION?

- HSE reports to COPFS
- No real petition or summary warrant procedure
- Fiscal writes to company to inform of prosecution
- Disclosure
- Pre-indictment/complaint negotiations
- Indictment served/complaint cited



STATUTORY DEFENCE

- Did the company/individual do all that was possible “in so far as it was reasonably practicable” to avoid the incident that led to prosecution? If not, “guilty” and the rest is mitigation...
- “Reasonably practicable”, despite its wording, is a very subjective test that accused has to satisfy – reverse onus
- Has been stated (R v Nelson Group (Maintenance Services) Ltd 1998 4 All ER 331) that if employer can show the following:

REASONABLY PRACTICABLE

- That the company has done everything reasonably practicable to ensure the worker involved in task which led to incident had appropriate skills, training and instruction; that safe system of work established; that worker adequately supervised and provided with proper plant and equipment
- Often an economic test: cost of training/plant/supervision v exposed risk

REASONABLY PRACTICABLE



CORPORATE HOMICIDE

- CMCHA 2007 introduced new offence of Corporate Homicide – for companies/organisations only, not individuals
- If individuals culpable then potential prosecution for culpable homicide at common law (as co-accused to the organisation?)
- Crown must prove:



PROOF OF CORPORATE HOMICIDE

- Organisation owed relevant duty of care to the deceased
- That relevant duty of care was breached
- That management failures was a substantial element in that breach of duty
- Management failure itself must have been a gross breach of duty which fell far below what could have been reasonably expected in the circumstances
- Gross breach of duty must have caused the death

CORPORATE HOMICIDE OUTCOMES

- Low volume of prosecutions
- Fines unlimited
- Reputational damage to organisation



HOMICIDE CASE COMPARISON: MURDER/CULPABLE HOMICIDE

- Police investigation immediate and urgent. Efficient? Swift?
- S.14 of suspect normally within hours/days of death
- Appearance on Petition within days of death
- Defence investigation begins
- Trial time limit begins



HOMICIDE CASE COMPARISON: CORPORATE HOMICIDE

- HSE Work related deaths: a protocol for liaison (June 2006)
- Joint investigation
- Police will secure scene in similar fashion to any homicide/murder enquiry
- Thereafter, HSE investigate, take statements but role cross over
- Can be years before suspects interviewed and charged



EMERGING ISSUES

- FFI
- “Material Breach”
- Paying to be investigated!
- Accused paying for collection of evidence to be used against the company/individual in a subsequent prosecution?
- Article 6?
- Untested (for economic reasons?)
- Scottish Sentencing Council

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