



**THE COURT OF APPEAL**

**Birmingham J.  
Mahon J.  
Edwards J.**

**The People at the Suit of the Director of Public Prosecutions**

**V**

**T.N.**

**[274/15]**

**Respondent**

**Appellant**

**JUDGMENT of the Court delivered on the 29th day of January 2018 by**

**Mr. Justice Birmingham**

1. On 27th October, 2015, following a lengthy trial the respondent, Mr T.N., was acquitted by direction of the trial judge in respect of two counts of holding or disposing of waste in a manner that causes or is likely to cause environmental pollution, and six counts of disposing of or undertaking the recovery of waste otherwise than under and in accordance with a waste license. The Director of Public Prosecutions has applied to this Court, pursuant to s. 23(3)(b) of the Criminal Procedure Act 2010, for a determination that the court of trial in directing a verdict of not guilty was wrong in law and that the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned. She has sought an order within the terms of s. 23(3)(b) of the Criminal Procedure Act 2010, an order that the subsequent acquittals be quashed, and an order that the respondent be re-tried in respect of all charges of which he had been acquitted by the jury in the court of trial.

2. Section 23 of the Criminal Procedure Act 2010, so far as material, provides as follows:

"23.— (1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director, if he or she is the prosecuting authority in the trial, may, subject to subsection (3) and section 24, appeal the acquittal in respect of the offence concerned on a question of law to the Supreme Court [now the Court of Appeal].

...

(3) An appeal under this section shall lie only where—

(a) a ruling was made by a court during the course of a trial referred to in subsection (1) or the hearing of an appeal referred to in subsection (2), as the case may be, which erroneously excluded compelling evidence, or

(b) a direction was given by a court during the course of a trial referred to in subsection (1), directing the jury in the trial to find the person not guilty where—

(i) the direction was wrong in law, and

(ii) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

...

(11) On hearing an appeal under this section the [Court of Appeal] may—

(a) quash the acquittal ... and order the person to be re-tried for the offence concerned if it is satisfied—

(i) that the requirements of subsection (3)(a) or (3)(b), as the case may be, are met, and

(ii) that, having regard to the matters referred to in subsection (12), it is, in all the circumstances, in the interests of justice to do so,

or

(b) if it is not so satisfied, affirm the acquittal ...

...

(12) In determining whether to make an order under subsection (11)(a), the Supreme Court shall have regard to—

(a) whether or not it is likely that any re-trial could be conducted fairly,

- (b) the amount of time that has passed since the act or omission that gave rise to the indictment,
- (c) the interest of any victim of the offence concerned, and
- (d) any other matter which it considers relevant to the appeal.

...

(14) In this section "compelling evidence", in relation to a person, means evidence which—

- (a) is reliable,
- (b) is of significant probative value, and
- (c) is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned."

3. The respondent has contended that his oral and written submissions can only address the issues raised by s. 23(3)(b)(i) of the Criminal Procedure Act i.e. the issue of whether the direction in the Circuit Court was wrong in law. The respondent says that if this Court finds in favour of the Director and concludes that the direction granted by the trial judge was wrong, it is only then that it would be possible to properly consider the issues raised by subs. (2), these being the adequacy of the evidence and whether in the light of what the Court has said about the applicable law, the evidence that was adduced was such that a jury might reasonably have been satisfied beyond a reasonable doubt of the guilt of Mr T.N. Furthermore, the respondent says that at this stage it is not possible for him to address the issues raised by subss. (11) and (12), the issue as to whether a retrial should be directed.

4. This Court accepts that there is merit in the procedural issues raised by the respondent and so this judgment will deal only with the question of whether the trial judge in the Circuit Court was correct to direct a verdict of not guilty. It will be necessary to say something about the evidence that was before the Circuit Court but what is said in that regard is tentative, and at this stage the reference to the evidence in the Circuit Court is only for the purpose of giving context to the legal arguments that were in issue in the Circuit Court and now on appeal.

#### **The charges faced by Mr T.N.**

5. At the outset, it should be explained that there were in fact two accused on the indictment, Mr. T.N. and Jenzsoph Limited. Jenzsoph Limited was not professionally represented and did not play an active part at trial. Its relevance to the matters in dispute will be referred to later. In all, Mr T.N. was charged with nine counts contrary to provisions of the Waste Management Act 1996. Counts 1 – 6 consisted of general charges of causing environmental pollution in the form of nuisance through odours between 1st November, 2007 and 25th November, 2008 and specific contravention of Condition 5.3 in Waste License W0047-02. It is to be noted that no evidence was offered in respect of Count 4. Counts 7, 8 and 9 related to the accumulation of waste in the northwest portion of the waste site in a manner likely to cause environmental pollution and otherwise than in accordance with the provision of two waste licences which regulated the operation of that facility between 22nd October, 2003 and 26th September, 2006 and then between 27th September, 2006 and 25th November, 2008. In general terms, all charges related to dumping and waste related activities at a facility at Kerdiffstown, Naas, County Kildare, between 22nd October, 2003 and 25th November, 2008. The lands where dumping and waste activity took place were owned by Jenzsoph Limited. There, dumping and waste activity was carried by Neiphin Limited which occupied the facility on foot of a licence from Jenzsoph Limited. Neiphin Limited was a wholly-owned subsidiary of Dean Waste Limited, which operated from a premises at Broomhill Road, Dublin 24. Dean Waste Limited traded as "A1 Waste" and it was in effect owned by Mr Tony Dean. It does not appear that either Neiphin Limited or Jenzsoph Limited had any employees. Neiphin's commercial transactions were limited to intercompany transactions involving itself and Dean Waste.

6. The Environmental Protection Agency (EPA) issued two waste licences to Neiphin Trading Limited governing the operation of the Kerdiffstown facility. The first was valid from mid-September, 2003 and the second from the 26th September, 2006 (Licence Reg. No. W0047-02). The words contained in the introduction to that licence are specifically stated not to be part of the licence, and do not amount to a legal interpretation of the licence. Notwithstanding that, it does however merit quotation as it gives an overview of what was happening in Kerdiffstown and the scale of the operation. The introduction states:

"This licence is for the operation of an integrated waste facility consisting of a composting facility, a non-hazardous waste landfill, inert waste land-filling and infrastructure for the processing and recovery of commercial/industrial/household waste and construction and demolition waste at Kerdiffstown, Naas, County Kildare. The facility covers an area of approximately 30.6 hectares. It is a sand and gravel pit, which has a history of various extractive and backfilling operations.

The licence allows up to 630,000 tonnes of waste per annum to be processed at the facility, providing adequate processing capacity is available. This waste includes commercial/industrial waste, household dry recyclables, construction and demolition waste, compostable waste and waste previously land-filled at the facility. A lined land-fill is proposed in the void created from the extracted waste. Only pre-treated residual waste and inert waste may be land-filled.

The licensee must manage and operate the facility to ensure that the activities do not cause environmental pollution. The licensee is required to carry out regular environmental monitoring and submit all monitoring results, and a wide range of reports on the operation and management of the facility to the Agency. The licence sets out in detail under which Neiphin Trading Limited will operate and manage the facility."

#### **The form of indictment and the statutory provision in issue at trial**

7. It is to be noted that the respondent was initially indicted as a principal. By way of example, Count 1 on the indictment stated:

##### **"Statement of offence**

Holding or disposing of waste in a manner that causes or is likely to cause environmental pollution, contrary to s. 32(1) and (6)(a) of the Waste Management Act 1996, and contrary also to s. 9(1) of the Waste Management Act 1996.

### **Particulars of offence**

T.D. (otherwise T.Y.) N. and Jenzsoph Limited at dates unknown between 1st February, 2007 and 25th November, 2008 (both dates inclusive) at Kerdiffstown in the County of Kildare held or disposed of waste in a manner that caused or was likely to cause environmental pollution in the form of nuisance through odours."

8. While the charge was stated to be contrary to s. 32(1) and (6)(a) of the Waste Management Act 1996, it will be seen that there was also reference to s. 9(1) of the Waste Management Act 1996.

9. At the start of the case, counsel for Mr T.N. raised issues about the form of the indictment. In responding to the issues raised, counsel for the prosecution made it clear that his case was that there had been breaches of a licence by Neiphin Trading Limited in that as the licence holder, in various ways it had failed to operate within the terms of the licence and secondly it had caused environmental pollution. His case in relation to T.N., the other defendant was that he was a manager or in fact held himself out as being a manager of Neiphin Trading Limited. Having heard that debate, the trial judge indicated that he was proposing to invite the prosecution to redraft the counts in order to show that Neiphin Trading Limited had a role and that the accused's culpability was alleged to arise because of his involvement with that company. Counsel for the prosecution agreed that the indictment would be redrafted over night. Again, by way of example the redrafted Count 1 read as follows:

### **"Statement of offence**

Holding or disposing of waste in a manner that causes or is likely to cause environmental pollution, contrary to s. 32(1) and (6)(a) of the Waste Management Act 1996, and contrary also to s. 9(1) of the Waste Management Act 1996.

### **Particulars of offence**

Jenzsoph Limited and Neiphin Trading Limited on diverse dates between 1st February, 2007 and 25th November, 2008 (both dates inclusive) at Kerdiffstown in the County of Kildare held or disposed of waste in a manner that caused environmental pollution in the form of nuisance through odours. T.D. (otherwise T.Y.) N. being during that period a director, manager or other similar officer of Neiphin Trading Limited or purporting to act in such capacity consented to or connived in the commission by Neiphin Trading Limited of the said offence."

10. The terms of s. 9(1) of the Waste Management Act 1996 were central to the proceedings in the Circuit Court and are now at the heart of the present with prejudice appeal brought by the director. Section 9(1) of the Waste Management Act 1996 provides as follows (so far as material):

"Where an offence ... has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer of the body corporate... that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence."

11. The application for a direction was on the basis that the prosecution evidence taken at its high water mark did not establish that T.N. was a director, manager, secretary or other similar officer of Neiphin Trading Limited.

12. Before coming to deal with the submissions that were addressed to the Circuit Court and indeed to this Court on the issue of who is a director, manager, secretary or other similar officer, it is appropriate to say just a little about the evidence that was before the Circuit Court. This is done simply to offer a degree of context for the legal issues that arise and as already indicated the respondent, T.N., has made clear that depending on the view the Court forms on the question of whether the judge was right or wrong to grant a direction, he may want to make further submissions in relation to the adequacy of the evidence and the appropriateness of a retrial. The fact that matters are mentioned at this stage does no more than establish that there was a reference to this at the trial and should not be misunderstood as an acceptance by the Court that a particular point was actually established in evidence. By the same token, the fact that a particular piece of evidence which one side or the other may regard as significant is not referred to at this stage does not in any way preclude reliance being placed on it at a later stage.

13. The licences issued by the Environmental Protection Agency required that the Kerdiffstown facility be under the control of a suitably qualified facility manager whose identity and qualifications were to be communicated to them. By letters of 19th March, 2004, and 7th June, 2004 which enclosed a management structure chart the Environmental Protection Agency were informed that T.N. was the facility manager of Kerdiffstown. His professional experience and employment history were also provided. This correspondence was cc'ed to T.N., Neiphin Trading Limited. Annual environmental reports referred to T.N. as the facility manager at the top of the management pyramid. T.N. corresponded frequently with the EPA in relation to the Kerdiffstown facility. Correspondence was sent on A1 Waste headed paper. From early 2004 to 2008 correspondence was signed "T.N. Director", from October, 2008 to mid 2009 letters were signed "T.N. Managing Director", and late in 2009 letters were signed simply "T.N." Subsequently letters, were signed "T.N. Environmental Consultant". Companies Registration Office documents indicate that he was a director of Dean Waste from late 2008 until mid 2009 but he has never been recorded as a director of either Neiphin or Jenzsoph.

14. The case for the respondent was that T.N. was neither a manager nor a director of Neiphin and had never purported to be one, that he was a consultant. T.N. was remunerated for his role by way of fees paid to N... Environment Services Limited, a company of which he and his wife were directors.

### **The application for a direction**

15. Following the conclusion of the prosecution evidence, counsel on behalf of T.N. indicated that he was first of all seeking a ruling from the Court in respect of the meaning of s. 9(1) of the Waste Management Act and clarity as to the ingredients of the offence with which his client was charged. Secondly, he submitted that there was insufficient evidence on which a jury could properly convict T.N. He drew attention to the fact that while s. 9(1) of the Waste Management Act spoke about consent or connivance or being attributable to neglect, here there was no allegation of neglect and the indictment was framed in terms of consent or connivance. He submitted that it was an essential proof that it be established that his client was a director, manager, secretary or other similar officer of the body corporate. He indicated that he would be referring the Court to authorities which suggested that it was not any management role that the legislation envisaged, but a management role central to the operation of the company, in effect the guiding mind of the company. He submitted that s. 9(1) was a penal provision and as such should be strictly construed. Dealing with the concept of a director, manager, secretary or other similar officer, he indicated that his main point was that the reference to a "similar

officer" limits the meaning of the word "manager". So, he submitted, the reference to "manager" cannot be interpreted as a reference to anyone involved in management at any level, it must be read in the context of the reference to a director, being an officer of the company, a secretary, being an officer of the company and the reference to other similar officers. Accordingly, it was his submission that the manager referred to had to be a manager at officer level with functions in respect of the body corporate as a whole.

16. He then referred to a number of authorities, some dating back to the 19th Century. In exchanges with the trial judge, he submitted that a manager is a person who has managerial control of the company, who has both the authority and the power to make decisions on behalf of the company. Further, management has to be at a high level within the company in respect of the general affairs of the company, approximating to a managing director role. In further exchanges, counsel submitted that running the operations at the waste site was not a sufficiently senior level. He responded to an interjection from the judge as to what the position would be sufficiently senior, if a company was doing nothing else other than running the site. Counsel responded, "Well, the company must be involved in financing, the company has other aspects to its existence." In response, counsel for the prosecution submitted that it was necessary for the Court to adopt a common sense view in relation to construction of the Act. He took the example of a company that had appointed a manager in relation to fire safety strategy. Counsel went on to submit that he did not accept that it was only those at the very top of a company who can be made responsible under s. 9 and he submitted that those who had roles of management in relation to a particular matter have responsibilities that go with the role. He gave the example of safety officers within a company and compliance officers in banks. Following the debate, the trial judge gave an ex tempore ruling as follows:

"The argument and submission being made by Mr Ó Briain [Senior Counsel for T.N.] at this juncture is a succinct and singular one, namely that the act under s. 9(1) describes a person answerable to the criminal law and sanctions under the provisions of the 1996 Act as being a person who is either a director, manager, secretary or other similar officer, or a person purporting to be such. And he says that in the evidence at its highest from the prosecution point of view does not establish those facts vis-à-vis Mr N. It is common case Mr N. was actively involved in the affairs of Kerdiffstown over a long number of years and through all the relevant times of the indictment. He was active to the extent that he was to be found in correspondence at the A1 Waste head office in Broomhill; he was on site at every occasion when a visit was announced; he dealt with the members of the public and the neighbours concerned; and he engaged in exhaustive correspondence with The Environmental Protection Agency on behalf of the operation of Kerdiffstown. Mr Ó Briain says that that does not amount to manager within the concept of s. 9, as defined by the authorities which he has opened to the Court. He says that if the Court was of a mind to say there was evidence there, it was ambiguous and incapable of being consistent with Mr N. acting as a consultant advisor and not a manager. The State's answer advocated very forcibly by Mr Owens [Senior Counsel for the Prosecution] is and can be succinctly put as this: common sense must be applied and that the narrow or strict interpretation sought to be put upon the section by Mr Ó Briain defies common sense, and that in all measure and means of appreciation of the role and position of Mr N. amounts to a man who was in charge, managing, making the big decisions, as Mr Owens would describe it. This is a penal statute. The views of Hardiman J., as outlined, apply. There can be no simple application of common sense, frankly. The statute has to be strictly construed, and in so construing it, one has to look then at the terminology, director, manager, or secretary: it is not argued that Mr N. was a director, he was for a very short time a director of A1 Waste, less than a year, approximately nine months in 2007/2008 period or thereabouts. He was not a secretary so it is in the capacity of manager and throughout it has been sought to ascribe him, in particular as a facility manager, in effect the man running the facility which is something defined within the Act under s. 5, Kerdiffstown. The authorities opened to the Court by Mr Ó Briain are, based on the principle of penal sanction where there are significant penalties potentially open to the Court to impose, that a strict interpretation is given. And all of the authorities from beginning to end say that it is not a provision that can be broadened, based upon common sense or any other basis, to in effect entrap in the penal structure of the section what is described colourfully in one as "underlings" and in others in effect as a matter of law, those who act as consultants, advisors or the like. It is to entrap those who are in charge of the whole of the company as the word is used. It is in *Gibson* we have to say, and I am quoting as has already been opened (p. 336):

'A person who has the management of the whole affairs of the company. In *WH Smyth* 'We have to say it is one who has considered a manager, a manager would be in ordinary talk, a person who has the management of the whole affairs of the company, not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is entrusted with power to transact the whole affairs of the company.'

In *Woodhouse*, perhaps the most illustrative one in terms of the role undertaken or given or ascribed to that man, outlined powers far beyond those of Mr N. on any account in this action, and in dealing with perhaps the common sense approach, as argued and advocated by Mr Owens merely to speak in real authority amounts to my judgment to nothing. They did not finish Simon Browne's sentence. Had they done so, it seems to me that they could not possibly have arrived at the conclusion that they did because there was nothing in the evidence which could properly have led them to conclude that the appellant was a decision maker within the company, having both the power and responsibility to decide corporate policy and strategy. In *Boal's* case, and again the phrase is used 'the management of the whole affairs of the company', was entrusted with power to transact the whole of the affairs. The intended scope of the section is to fix criminal liability only on those who are in a position of real authority, the decision makers within the company who have both the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place, it is not meant to strike at underlings. It seems to me that the constant line of authority is this: that a manager is as described in those judgments as a person who runs or holds authority over the whole of the affairs of the company. Similarly, officer, in my view does not in any way seek to dilute that status or position that is and must be proved. The principle of interpretation *ejusdem generis* applies so that when one comes to what a similar officer means, it has to be taken in the context of director, manager or secretary, someone, as I say who holds either an appointed position or a position effecting the whole affairs of the company, who has authority to lay strategy and to be answerable for it. The evidence in this case does not establish that Mr N. held such a position of management within Neiphin Trading Limited. He is described as the person with whom the authority, the Environmental Protection Agency, should liaise and correspond with. It is no doubt that he took a very active position, arguing trenchantly and, and it can often be said fairly, not disingenuously, dishonestly on behalf of the company to argue their position. When comes to mind the annual reports indicating over some four or five years that no landfill was taking place in the northwest section when it was happening almost on a daily basis, it would seem. But nevertheless, his involvement goes no further than that on the evidence. Mr Howley (EPA Inspector) himself says that there is no direct evidence available to him, the lead investigator, that Mr N. was in any way on a day-to-day basis directing operations on site, that he was playing the active daily role. It seems from the evidence of Mr Darcy [Chartered Accountant and expert witness] that the accounts show significant fees being paid, not to Mr N., but to his consultancy company, of which he was part owner with his wife. He was present on site whenever notification was sent that an audit inspection was to take place. There is finally, for what it's worth, the evidence of the three Lithuanian employees who say that the day-to-day running was in the hands of others, Mr Conway and the man known as John, never Mr N. And in the evidence of Mr Darcy, the corporate matrix mix and analysis does not place Mr N. in any role of any significance within the companies. I have to come to the conclusion that the submissions made by Mr Ó Briain, that in fact perhaps the wrong charge, if any, has been brought. The s. 9(1) was not designed to deal with someone in the position of Mr N. who could and might well have been made answerable for his conduct under a different charge or a different section. He does not, in my view, come within the terms of s. 9(1)

either in the director capacity, as manager, and that being so, as someone purporting to act as a manager. For these reasons I am satisfied that I must accede to the application or submission made by Mr Ó Briain that the case for the State has not been made out having regard to the provisions of s. 9(1) of the Act and that Mr N., therefore, is entitled to be discharged from each of the indictments to which he stands answerable."

17. The Director summarises the approach of the trial judge as having concluded that the prosecution had not established that the accused respondent was a manager or other similar of Neiphin or purported to act in such capacity because the evidence did not establish that he was a decision maker within the company "*with power to direct the whole of the affairs of the company*" and who had the "*power and responsibility to decide corporate strategy*". According to the Director, the trial judge took the view that "manager" was someone holding an appointed position in the company, one effecting its whole affairs and that it had not been proved that the accused/respondent had held "an appointed position or a position effecting the whole affairs of the company" or "was responsible for policy". The judge took the view that he was not the sort of manager contemplated by the statutory provisions and not being such, could not be considered to be purporting to act as such either. The judge felt that the purpose of this section was to catch those in charge of the company as a whole.

18. The Director criticises the trial judge's approach and says that it had insufficient regard to the fact that the evidence at trial suggested that the operation of the facility at Kerdiffstown and the business of Neiphin were in substance the same thing. The Director says that over the relevant period the respondent was and acted as manager of the Kerdiffstown facility and held himself out as such. The Director says that while there may have been some aspects of the company such as finance for which Mr N. did not bear responsibility the areas for which he had direct responsibility were all inextricably linked with an obligation to ensure compliance with the terms of the licenses.

19. As will be evident from the terms of the ruling quoted above, the judge was heavily influenced by his assessment of the state of the law based on a review of a number of authorities that were opened to him. Those authorities have also been opened in the course of this appeal and it is appropriate to refer to them at this stage even if only briefly.

20. The first case referred to was that of *Gibson v. Barton* [1875] L.R. 10 QB 329. The case related to the obligation pursuant to s. 26 of the Companies Act 1862 to furnish the registrar of joint stock companies with a list of all the members of the company within 14 days after the ordinary general meeting of the company. S. 27 provided that if a company made default it incurred a penalty and "every director and manager of the company who shall knowingly and willingly authorise or permit such default shall incur a like penalty." The appellant was the Secretary of the company involved. Its articles of association did not provide for the appointment of a manager and none had been appointed. In the course of his judgment, Blackburn J. commented:

"In what sense are the words "director" and "manager" used in that section? When the section says "director," it is plain enough a director is a director, but the words are "and manager." We have to say who is to be considered a manager. A manager would be, in ordinary talk, a person who has the management of the whole affairs of the company; not an agent who is to do a particular thing, or a servant who is to obey orders, but a person who is intrusted with power to transact the whole of the affairs of the company."

21. In *Registrar of Restrictive Trading Agreements v. WH Smith* [1969] 3 All E.R. 1065, the case arose from the ambitions of Mrs S. to sell newspapers from her dairy shop in Newport. It seems there were only three wholesale suppliers in Newport and all three refused to supply the dairy. The Registrar of Restrictive Trading Agreements served a notice on each of the three wholesalers requiring them to give particulars of the agreement. The Registrar applied to court for an order to examine C., an individual, one of the three wholesalers, and also for an order to examine the Branch Manager of WH Smith and Menzies, the third wholesaler. The Court of Appeal upheld the decision of the High Court declining to make an order against the branch managers of WH Smith and Menzies in Newport holding:

"... that orders for the examination of the branch managers could not be made. Manager meant a person managing the affairs of the company as a whole and officer had a similar quotation: accordingly, since the two branch managers were not concerned with the management of WH Smith and Menzies as such, they did not fall within the class of persons against whom orders could be made."

In the course of his judgment Lord Denning M.R. commented:

"I can understand the registrar's point of view; but I do not think that it is correct. It is not right in this section to give the word "manager" or "officer" an extended meaning. It is contrary to the spirit of our law. The law of England abhors inquisitorial powers. It does not like to compel a man to testify against himself. It never wants him to incriminate himself or to be faced with interrogation against his will. It prefers the case to be proved against him rather than that he should be condemned out of his own mouth. When Parliament thinks it right to give the power to administer questions, it should do so in clear terms, specifying who is the person to be interrogated: just as it should make clear who is the person to be made guilty of a criminal offence."

22. It must be said that the decision in *Registrar of Restrictive Trading Agreements v. WH Smith* [1969] 3 All E.R. 1065 is far from surprising. The Newport Branch Manager was no doubt just one of hundreds of similar managers across Britain, he was certainly not responsible for managing the affairs of the company as a whole or indeed any significant aspect of the company's affairs. He would have had no role in relation to formulating a strategy regarding restrictive practises. The case of *R. v. Boal* [1992] 3 All E.R. 177 involved Foyles, the famous bookshop on Charing Cross Road in London. The appellant was employed as an Assistant General Manager of the bookshop. He had responsibility for the day-to-day running of the shop but had been given no specific training in management, health and safety at work or fire precautions. On a day when he was in charge of the shop, while the General Manager was away on holidays, breaches of the requirements of the Fire Certificate were identified. Notwithstanding that Mr Boal pleaded guilty in the trial court, the Court of Appeal was prepared to entertain an appeal against conviction and indeed allowed the appeal.

23. The case of *Woodhouse v. Walsall Metropolitan Borough Council* [1994] 1 BCLC 435 was the case which the trial judge felt was most on point. Mr Woodhouse was the site manager and was charged with an offence under the Control of Pollution Act. He was convicted but his appeal was allowed, on the basis that the magistrates, in determining whether he was a manager within the meaning of s. 87 of the 1974 Act, had misdirected themselves by asking the question whether he was a person in real authority when he would only be criminally liable if it could be shown that he was a decision maker within the company having both the power and responsibility to decide corporate strategic policy and strategy. The appellant's job description was as General Manager of the Minworth site, which was the largest site within the company. He reported to the Special Waste Director, who was one of the directors of Caird Environmental Limited and was a member of the Group Executive Management Committee. Mr Woodhouse was not a member of this committee.

24. A case that goes the other way is the case of *In Re a Company* [1980] 1 All E.R. 284. That involved an application by the DPP for an order under s. 441 of the Companies Act 1948 authorising a police officer and civil servant to inspect all the books and records of the company. An affidavit supporting the application indicated that there was reasonable cause to believe that fraudulent statements were sent to customers of the company on the instructions of a departmental manager in which the company claimed more money than it was entitled to receive. Templeman L.J. felt the functions performed by the Departmental Manager were quite sufficient to constitute him a manager. However, it is to be noted that he observed that s. 441 did not convict anyone. It merely enabled a judge of the High Court on the application of experienced and responsible officials mentioned in the section to make quite sure that where there is a slightly unpleasant aroma hanging around, somebody should be sent in to trace the source and find out what is going on. It will be immediately apparent that what is in issue here goes far beyond sending someone to find out what is going on. Here, Mr N. was charged with serious offences carrying significant penalties.

25. The decision of the House of Lords in the case of *Tesco Supermarkets Limited v. Natrass* [1971] 2 All E.R. 127 involved a prosecution under the Trade Descriptions Act in a situation where washing powder was being sold in a particular Tesco store at a price higher than was advertised in the shop window. The appellants contended that they had a defence to the charge in that the commission of the offence was due to the act or default of another person, in this case the Store Manager. The House of Lords concluded that Mr Clement, the Store Manager, was one of several hundred store managers who could not be identified with the company. The case of *J. Armour v. Skeen* [1977] I.R.L.R. 310 related to a prosecution of the Director of Roads for Strathclyde Regional Council under various provisions of the Factories Act. It was argued, referring to cases such as *Tesco v. Natrass* that the appellant did not fall within the class of Manager, Secretary or other similar officer. However the High Court of Justiciary had no difficulty in holding that he came within the ambit of the class of persons referred to.

26. While the Court has taken some time to refer to some of the authorities that were opened to the trial court and to this Court, it is somewhat hesitant about the continuing relevance of some of the older authorities. The Waste Management Act 1996 is a modern statute. The phrase "Director, Manager, Secretary or other similar officer of a body corporate or a person who is purporting to act in any such capacity" must be seen in a modern context. It is to be noted that the section deals with directors, managers, secretaries or other similar officers of a body corporate. It is clear therefore that the individuals must hold responsibility at a corporate level. The manager of an individual branch of a bank is not to be equated with a manager of the bank. At the same time it must be appreciated that time has moved on since the discussions in *Gibson v. Barton* [1875] L.R. 10 QB 329. Nowadays it is not unusual to find Finance Directors, Human Resource Directors and IT Directors in large corporations, to give but some examples. In other companies the titles may vary, so one may have Finance Managers, Human Resources Managers and IT Managers. Other companies may have Chief Financial Officers or Chief Marketing Officers. Responsibilities may be distributed in such a way that it would be difficult to say that any one individual was responsible for the management of the whole affairs of the company. However, if the individual's role is a significant one then the fact that there may be some particular areas of the company activity with which he does not have an involvement does not mean that he is not to be regarded as a manager of the corporation. Very significant responsibilities can be entrusted to an Assistant General Manager, to regional managers but also individuals such as safety managers to whom very important areas of responsibility are entrusted. Such individuals may properly be regarded as "other similar officers" within the terms of s. 9(1) of the Waste Management Act 1996 and comparable provisions of other statutes where the same formula is used. The Court has already made the comment that the manager of a branch of a bank would not be regarded as a manager of the bank. This was with reference to a bank having a nationwide branch network. The situation would be quite different if the bank only had one place of business or a very small number of places of business. The phrase "other officer" as distinct from "Director" or "Secretary" of the company must refer to individuals having a similar stature and exercising similar responsibility to what might be expected of a company director or company secretary. Certainly, on one view of the evidence at least Mr N. was managing the Kerdiffstown facility which was Neiphin's core activity. It may not be to overstate matters to say that Kerdiffstown was Neiphin.

27. In the Court's view, the trial judge was in error in focusing his attention on whether there was evidence that Mr N. had the capacity to direct the whole of the affairs of the company and the power and responsibility to decide corporate strategy. The question, really, to have been asked was whether Mr N. was functioning as a Senior Manager, having functional responsibility for a significant part of the company's activities and having direct responsibility for the area in controversy, namely the management of the Kerdiffstown waste site. Having indicated its view that the trial judge was in error, the Court will, in accordance with the indications it gave at an earlier stage, hear counsel on both sides in relation to what further orders should follow.