

THE SUPREME COURT

**MURRAY C.J.
O'DONNELL J.
McKECHNIE J.**

[2008 Appeal No. 350]

IN THE MATTER OF

SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

PROSECUTOR

AND

PAT HEGARTY

ACCUSED

JUDGMENT of Mr. Justice William M. McKechnie dated the 28th day of July, 2011.

1. This is a consultative case stated by His Honour Judge Groarke of the Western Circuit, pursuant to s. 16 of the Courts of Justice Act 1947, wherein, by reference to the circumstances so outlined, he seeks the opinion of this Court on two questions. The facts, as agreed or so found, and upon which the case is stated, are as follows.

2. On the 21st May, 2008, Mr. Hegarty, the accused person, attended at Galway Circuit Criminal Court to answer two charges preferred against him on Bill No. MS 55/04, the first of which reads as follows:-

“Statement of Offence:

Being a Manager or Officer of an undertaking which entered into an agreement which had as its object the prevention, restriction or distortion of competition, contrary to s. 4(1) of the Competition Act 1991 and s. 2 of the Competition (Amendment) Act 1996, as provided for by s. 3(4)(a) of the said Act.

Particulars of Offence:

Patrick Hegarty, between the 1st day of January, 2001, and the 11th day of February, 2002, both dates inclusive, in the County of Galway, were a Manager or Officer of Fate Park Limited t/a Sweeney Oil/Rabbit Oil, an undertaking within the meaning of s. 3 of the Competition Act 1991, such company having committed an offence, (emphasis added) namely entering into an agreement with other undertakings again within the meaning of s. 3 of the Competition Act 1991, which had as its object the prevention, restriction or distortion of competition in the trade of gas oil in Galway city and county, by directly or indirectly fixing the selling price of gas oil, and authorised or consented to the doing of the acts constituting that offence.”

Count No. 2 on the indictment is in identical form, save that the trading product was kerosene.

3. On a previous occasion, namely the 9th May, 2007, Mr. Hegarty was also called upon to answer the same charges, but on that occasion, a company named Sweeney Oil Limited t/a Rabbit Oil was cited on the indictment as his co-accused. That company faced two charges arising out of the same set of circumstances. The first was that it had entered into an agreement with other undertakings, which had as its object the prevention, restriction or distortion of competition by directly or

indirectly fixing the selling price of gas oil in Galway city and county, contrary to s. 2(2) of the Competition (Amendment) Act 1996 (“the 1996 Act”).

Again, count No. 2 on the indictment was in identical form, save that the product was kerosene.

4. For reasons which have never been evidentially explained, but described in submissions as being technical in nature, the Director of Public Prosecutions (“the D.P.P.”) on that occasion (the 9th May, 2007,) entered a *nolle prosequi* in respect of the company. The prosecution against the accused was then adjourned so that an abridged book of evidence could be served; hence the new trial date of the 21st May, 2008, was fixed.

5. At the commencement of that trial, counsel on behalf of the accused moved a motion under s. 4(E) of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999, to quash the indictment on the basis that any successful prosecution against his client was contingent on Fate Park Ltd. having committed a particular criminal offence. (See “Particulars of Offence” at para. 2 *supra*). This could only be established by a conviction being secured against it. Since that company had never been prosecuted for such an offence, it was therefore not possible for the jury to return a guilty verdict against Mr. Hegarty. The D.P.P. disagreed with this proposition. Whilst accepting the contingency as an ingredient of the offence, the D.P.P. argued that the same could be established otherwise than by formal conviction.

6. Having heard submissions from Mr. Edward S. Walsh S.C., on behalf of the accused, and Mr. Denis Vaughan-Buckley S.C., on behalf of the D.P.P., the trial judge

rejected the submissions of the prosecution. Being dissatisfied with such ruling, expressed whilst the matter was still pending, the learned judge agreed to submit by way of case stated the following two questions for the opinion of this Court:-

“Where an individual is prosecuted pursuant to s. 3(4)(a) of the Competition Act 1996 [*sic*]:

- (a) whether an adjudication as to whether the relevant undertaking has committed an offence can be undertaken when no prosecution has been initiated against the undertaking, and
- (b) whether it is necessary that the undertaking be convicted of the offence before the individual can be convicted.”

7. The submissions made before the Circuit Criminal Court have largely been repeated before this Court and can be summarised in the manner following. First, however, it is convenient to refer to the relevant statutory provisions.

8. Section 4 of the Competition Act 1991 (“the 1991 Act”) provides, *inter alia*, that all agreements between undertakings, which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services, are prohibited and void. Price fixing is a notorious example of such “hard core” activity. Any entity engaged for gain, *inter alia*, in the supply or distribution of goods, is an undertaking (s. 3 of 1991 Act) – that remains the law as provided by s. 3 of the Competition Act 2002. There is no doubt but that “Fate Park Limited t/a Sweeney Oil/Rabbit Oil”, being the company referred to in the indictment, is such an undertaking and hereinafter will be referred to either as such or, as heretofore, “the company”.

9. Pursuant to s. 2 of the Competition (Amendment) Act 1996, an undertaking which enters into the type of agreement previously referred to is guilty of an offence (the “sec. 2 offence”). Section 3(4)(a) of this Act reads:-

“3(4)(a) Where an offence under Section 2 of the Act has been committed by an undertaking [*emphasis added*] and the doing of the acts that constituted the offence has been authorised, or consented to, by a person, being a director, manager, or other similar officer of the undertaking, or a person who purports to act in any such capacity, that person as well as the undertaking 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 [the “sec. 3(4) offence”].”

It is essentially under this section that the accused stands charged. For ease of reference I have termed the offence referable to the undertaking the “sec. 2 offence” or “the offence under s. 2” of the 1996 Act and that referable to the individual as the “sec. 3(4) offence” or “the offence under s. 3(4)” of the 1996 Act.

10. On behalf of the accused it is accepted that, by virtue of s. 4(1) of the 1991 Act and s. 2 of the 1996 Act, it is an offence in certain circumstances for two or more “undertakings” to agree with each other to fix the selling price of trading goods (the “sec. 2 offence”), and that by virtue of s. 3(4) of the 1996 Act, where such an offence has been committed, any director, manager or similar officer, or a person purporting to act as such, of any party, who authorises or consents to the underlying acts, is also guilty of an offence (the “sec. 3(4) offence”). It should be noted that these are separate and distinct offences involving different parties.

11. By reference to such provisions, however, it is submitted that before Mr. Hegarty can be found guilty of the offences as charged, it is necessary for the D.P.P. to establish that Fate Park Ltd., being the undertaking in question, has been prosecuted and successfully convicted of a sec. 2 offence, as otherwise it will not be possible to prove this essential fact. Such a prosecution, against a company which is entitled to its good name and character, can only be conducted in accordance with law, guided by Article 38.1 and Article 40.3 of the Constitution. As no such prosecution, let alone conviction, has been taken or recorded against that company, it must follow in such circumstances that the accused cannot be convicted of an offence under s. 3(4) of the 1996 Act.

12. It is asserted that this proposition is the only construction permitted by a constitutional interpretation of the section. A recorded conviction against the company is a *sine qua non* to a personal conviction. Any criminal liability, which s. 3(4) of the 1996 Act imposes on a specified person, is "*quo terminus (sic)* with and contingent upon the criminal liability" of the company. Personal liability is purely collateral to that of corporate liability; the section does not envisage a prosecution against the former but not the latter, whatever the reasons. The words "as well as", used in the section, are supportive of this submission.

13. Any contrary view of the section leads to unacceptable consequences. It could mean that, in practice, when a person is called upon to defend himself he would also have to rebut the allegations referable to the company, perhaps in circumstances where he would not have access to material evidence which otherwise would be

available to that entity. (See s. 2 of the 1996 Act). Given the severity of the sanctions available following conviction, any such trial in those circumstances would of necessity be unfair.

14. Further, when considering the position of any personal accused, such as Mr. Hegarty in these proceedings, the position of the company or undertaking must also be considered. The duty of a court is not confined to individual protection, but also extends to corporate protection. To rely on the company's rights, as the accused does in support of his individual position, is not a *jus tertii*, as suggested by the prosecution. Rather, it is and should be a legitimate concern for the court, given its role in the administration of justice. The question is asked, how can it be constitutionally permissible to allow the D.P.P. to invite a jury to find an undertaking guilty of a criminal offence where no formal complaint of misconduct has been made in that regard and, in consequence, where there has been no investigation where the entity has not been charged and where, save 'perchance', it would be unaware of and unrepresented in the trial process. This, it is said, cannot be correct.

15. In such circumstances, this Court is urged to answer the first question in the negative and the second affirmatively.

16. On behalf of the D.P.P., it is said that the submissions of the accused person, as properly understood, are fundamentally incorrect. Whilst it is conceded that before the accused can be convicted it is necessary for the prosecution to establish that the company has committed an offence under s. 2 of the 1996 Act, nevertheless, that requirement can be satisfied without the corporate entity being charged much less

formally convicted. Once the jury is satisfied that the company has committed a sec. 2 offence, it is open to it to convict the accused of the offences levelled against him. This is the true construction of the statutory provision under scrutiny.

17. It is claimed that there are many examples of offences within the *corpus* of traditional criminal law where a person's conviction is predicated upon the commission of an offence by another whom, for whatever reason, has neither been charged nor previously convicted. For this purpose, there is a clear distinction between a conviction and a finding that an offence has been committed. Offences such as conspiracy, aiding and abetting are examples. (See *R. v. Donald* [1986] 83 Cr. App. R. 49). There are several others grounded in both common law and in statute, including, as in this case, the Competition Acts 1991-2002.

18. In the context of the statutory framework establishing the sec. 3(4) offence, it is submitted that there may be many reasons to explain why the undertaking named on the indictment has not been prosecuted. The company may be in liquidation, wound up or struck off: some technical legal difficulty may exist; the evidence against the individual may be convincing or persuasive; or, it may consist of admissions or be supported by confessions which are not available against the company. If by reason of these, or other like circumstances, an individual could not be charged, such would result in that person enjoying an undeserving immunity from prosecution, despite the creation of statutory offences particular to him.

19. It is strongly claimed that the accused cannot rely, as part of his own defence, on the rights of the company or plead any prejudice which it could assert. Rather, he

is confined to examining the charges as these affect him, not their impact on the company. The concept of *jus tertii* applies. *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 is referred to.

20. This last mentioned submission is responsive to the views of the trial judge which are adopted by the accused. As outlined in the case stated, the learned judge stressed that in the absence of the named undertaking, having previously been convicted in due course of law of a sec. 2 offence, the prosecution against the accused person could not succeed. His reasoning for such, which is summarised at para. 20 of the case stated, is more fully outlined in the ruling which he gave on the 21st May, 2008. From the transcript, it appears that the trial judge's major concern was to the effect that a finding of 'guilt' could be returned by a jury against the undertaking, without that undertaking having been charged or having been afforded an opportunity of defending itself in court. He felt "alarmed" at such a proposition given the constitutional rights of all legal entities, including the company's right to its good name and reputation. He was not impressed with the suggested distinction between "conviction and a finding of guilt" (sic). In consequence, the trial judge's *prima facie* view would be to refuse to allow the indictment to proceed against Mr. Hegarty.

21. The D.P.P. submits that the question of inconsistent verdicts is entirely separate and in any event does not arise on the facts of this case.

22. Case law in other jurisdictions was cited as being fully supportive of the D.P.P.'s position. (See *R. v. Dickson* [1991] B.C.C. 719 and *R. v. Ontario Chrysler 1997 Ltd.* 1994 CanLII 8758 (ON C.A.)). In addition, a passage quoted in Pinto and

Evans, *Corporate Criminal Liability* (2nd Ed., 2008) at p. 80, when referring to s. 18 of the English Theft Act 1967, is also relied upon.

23. In conclusion, it is submitted that the questions posed in the case stated should be answered as to the first in the affirmative and the second, negatively.

24. Against the statutory background outlined above, and in the particular circumstances of this case, either established or so found, the learned Circuit Court judge has submitted in the case stated two questions (para. 6 *supra*) on which he seeks the opinion of this Court. In essence, question (a) asks whether, for the purposes of the charges standing against the accused, a jury can lawfully find that the undertaking has committed an offence under s. 2 of the 1996 Act, in circumstances where that undertaking has not been prosecuted for such offence, and question (b) seeks to ascertain whether a conviction formally secured and recorded against that undertaking for a sec. 2 offence is a necessary pre-condition for the successful prosecution of the accused person for a sec. 3(4) offence.

25. In considering these questions, the position of Sweeney Oil Ltd. t/a Rabbit Oil does not arise for consideration. That was the undertaking joined as a co-accused on the original indictment (para. 3 *supra*), and the one in respect of which the *nolle prosequi* was entered. The effect of that *nolle* and, in particular, whether it amounts to an *autrefois acquit*, is irrelevant as the undertaking which the accused is concerned with is Fate Park Ltd.; that being the company specified in the amended indictment for the purpose of the sec. 3(4) offence. Consequently, the relevant undertaking is the latter and not the former. Incidentally, it is not readily apparent why the identity of

the co-accused in the original indictment should differ from that of the undertaking named in the current indictment.

26. In any event, one must proceed on the basis that Fate Park Ltd. has not been prosecuted for a sec. 2 offence. The reasons for this are not material. The fact is that no prosecution exists and no conviction has been recorded against that undertaking. The latter is really the point, not the former. It is not suggested that this situation will change. In fact, the submission of the D.P.P. is entirely based on the *status quo* remaining. He says that the prosecution of the accused can continue regardless of the position of the undertaking.

27. Prior to 1991 the regulation of competition in Ireland, insofar as it existed, was essentially governed by the Restrictive Trade Practices Act 1953, as amended and subsequently replaced by the Restrictive Practices Act 1972 (which was in turn repealed by the Competition (Amendment) Act 2006). The system thus established can be described as being one of "abuse control" within particular sectors or trades, on a case by case basis. That changed with the enactment of the Competition Act 1991, which adopted a prohibition-style regime based on Articles 81 and 82 of the E.C. Treaty (now Article 101 and Article 102 of TFEU), which provisions were applied to the domestic market. In essence s. 4, dealing with cartels, and s. 5, dealing with abuse of dominance, of the 1991 Act, replicated Articles 81 and 82 of the Treaty.

28. The consequences of such development, relevant to this case, were that by virtue of s. 4 of the Act, certain agreements between undertakings and other activities of such bodies, which adversely affected competition in the supply of goods or in the

provision of services, were prohibited and rendered void. However, the actions captured by this provision were not declared criminal in nature. Sanctions for breach were civil only. Not surprisingly, this lack of an effective method of public enforcement quickly emerged as a major weakness in the 1991 legislation. Hence, the enactment of the amending Act of 1996. The scheme of that Act, insofar as is relevant, criminalised the activities previously prohibited by s. 4 of the 1991 Act. Thereafter, undertakings involved in such activities committed criminal offences. Both the 1991 Act and the 1996 Act have been repealed and replaced by the consolidation act of 2002. Note, however, that the repealed legislation applies to this case as the offences took place prior to the enactment of the Competition Act 2002.

29. An “undertaking” for competition purposes (para. 8 *supra*) can be a person, a body corporate, or an unincorporated body. This original definition continues to apply, (sec. 3 of the Competition Act 2002). As natural persons are directly instrumental in the actions of a body corporate, the 1996 Act also created offences against certain influential position holders within a company, being essentially those without whose involvement the offending conduct could not be endorsed or approved. Culpability in this regard was confined to persons with a high level of responsibility for decision making: *i.e.* directors, managers, other similar officers, and those who hold themselves out as such. The result was that, arising out of the same set of circumstances, any one of such persons, if not an undertaking in his/her own right, as well as an undertaking so defined, could each be guilty of a criminal offence. That was the scheme of the Act, with its justification being enforcement driven. If the Act criminalised one player but not the other, responsibility by way of effective sanction and deterrent could be skilfully and freely avoided, or at least substantially

diminished, by any number of expedient devices, such as, in the case of a body corporate, liquidation, and in the case of an individual being impecunious. That would not have addressed the weakness mentioned above; it would have made enforcement arduous and avoidance, affordable and undemanding. Therefore, in principle, there is nothing surprising in the concept of both non-personal undertakings and their managers/officers and like persons, being exposed to criminal prosecution arising out of the same abusive conduct. Such persons are separate and distinct legal personalities and therefore no question of double punishment arises. Analogous provisions are contained in other Acts such as sec. 297 of the Companies Act 1963 as inserted by s. 137 of the Companies Act 1990 and the Safety, Health and Welfare at Work Act 2005 (see *D.P.P. v. Roseberry Construction Ltd.* [2003] 4 I.R. 338).

30. The question remains, however, as to whether, and if so to what extent, the Oireachtas has implemented such policy, in particular the issue is whether s. 3(4) of the 1996 Act permits the prosecution and conviction of the accused in the circumstances outlined.

31. The case law referred to in support of the D.P.P's position, at least in some respects, is of interest but provision must be made to reflect the fact that, where the offence in question is statutory based, the wording of the relevant provision may differ from s. 3(4) of the 1996 Act, and where common law based is of course devoid of legislative intervention. Notwithstanding, some comment is desirable. The issue in *R. v. Donald* [1986] 83 Cr. App. R. 49 arose out of an allegation that the appellants had sheltered, without lawful authority or reasonable excuse, a post office robber, knowing that he had committed such offence with the intention of impeding his

apprehension. The wording of s. 4(1) of the Criminal Law Act 1967, which created the offence, reads:-

“Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.”

(Emphasis added).

At the time of their conviction the principal offender, whom it was alleged had committed the arrestable offence, had not stood trial as he had absconded. The issue on appeal, relevant to the instant case, was described by the court as being:-

“...can it ever be right, in the absence of a prior conviction of a principal, for a person to be brought to trial upon a charge under section 4(1) and for the prosecution to endeavour to prove that the principal, though not being tried, is nevertheless guilty of the arrestable offence about which those charged under section 4(1) are alleged to have known and to have assisted the offender upon after the commission of the offence?”

Whilst the Court of Appeal essentially concerned itself with the adequacy of the judge's charge, nonetheless, it was quite satisfied that the s. 4 charge, in principle, could proceed without the principal offender having previously been charged.

32. Another example might be found in the United Kingdom case of *R. v. Dickson* [1991] B.C.C. (British Company Law Cases) 719. In that case directors of a certain company had been charged with offences under s. 20(1) of the Trade Descriptions Act 1968, which reads:-

“Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and 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 any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.” (*Emphasis added*).

Note the similarity between that provision and s. 3(4) of the 1996 Act. Whilst the facts are not of direct relevance to the instant case, what should be noted is the following comment by the Court of Appeal in *Dickson's* case at p. 722 on the section:-

“We however, accept Mr. Daggs 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.”

33. On the common law side several offences readily come to mind which, for their successful prosecution, depend, in a variety of ways, upon some third party having committed an offence. Conspiracy is one where it is necessary to establish that at least one other person was criminally involved. Aiding and abetting is obviously another. (See *R. v. Cogan* [1976] Q.B. 217). Receiving stolen goods is a third. There are many others but of course each is individual to that specific offence.

34. The above references, on both the statutory and common law side, are of relevance only to demonstrate what, in any event, is otherwise commonly known - namely that many offences exist which have as an essential ingredient the commission

by a third party of that or some other offence. So, in general, the structure and parameters of the statutory provisions in the instant case are not unusual.

35. There is no doubt but that s. 3(4)(a) of the 1996 Act is a provision creating a criminal offence and, therefore, must be strictly construed. There can be no creation or extension of penal liability by implication by the use of obscure or imprecise language, or by the application of interpretive aids which otherwise would be available in a civil setting. As a result, the provision in question, expressly and in clear and unambiguous language, must have, by literal construction, the meaning contended for by the D.P.P. That provision, however, must be viewed and its true meaning ascertained by reference to its immediate context, properly derived from the scheme of the Act, or more accurately from that part of the Act which criminalised behaviour previously not so declared. It is only, if in accordance with this approach and if the ordinary meaning of the words can be so understood, that the result suggested by the D.P.P. can stand.

36. It is self evident from the section, which in this respect is quite clear, that before Mr. Hegarty can be convicted of either or both offences the D.P.P. must establish at the relevant time:-

- (a) that Fate Park Ltd. t/a Sweeney Oil/Rabbit Oil was an undertaking;
- (b) that as such, it has committed a sec. 2 offence;
- (c) that the accused was a manager or officer of that undertaking, as per the indictment; and

- (d) that the acts constituting the sec. 2 offence have been authorised or consented to by the accused in such capacity. (Note the statutory presumption in s. 3(4)(b) of the 1996 Act).

In addition to these and any other essential requirements individual to the particular offences, the D.P.P. must discharge, to the required standard of proof, all other prosecutorial obligations common to an indictable offence. Unless, therefore, the D.P.P. can satisfy the jury of these matters, the accused person cannot be duly convicted.

37. It should be noted that the offence referable to the individual is not the same offence as that which an undertaking may be guilty of. As stated, the former is a sec. 3(4) offence with the latter being an offence under s. 2 of the 1996 Act. It is not a situation of joint liability on the same facts. What the former has in common with the latter is the fact that the penalty for both offences is the same.

38. I do not consider that there is any controversy about the matters outlined at para. 36 *supra*, save for that referred to at subpara. (b) above, which is the essence of the question raised in the case stated. What does this requirement of s. 3(4) mean and how and by what process can it be established?

39. The answer submitted on behalf of the accused is that the undertaking, following prosecution and a trial in due course of law, must be duly convicted of a sec. 2 offence – nothing short of this process would suffice. As a matter of generality, I know of no principle of law, when dealing with like or related circumstances, which would support this viewpoint. On the contrary, what authority there is, is against it.

(See paras. 31 – 34 *supra*). As a matter specific to this case, to so hold, in my view, would require a rewriting of the section to read something like: “Where an undertaking has been convicted of...” or “Where a conviction has been obtained against on undertaking...for an offence under s. 2 of the Act and the doing of the acts...”. The actual wording is clearly far removed from this. It speaks of “where an offence under s. 2 of this Act has been committed by an undertaking...”. There is no reference to a conviction and in my view there is no interpretative basis for importing into the provision such a condition. The Oireachtas could expressly have done so but did not. As previously explained, there may well have been good reason for this.

40. This position becomes clearer when the distinction between a formal conviction and a finding that an offence has been committed, is understood. The former needs little attention. As part of a trial in due course of law a court or jury, having and remaining within jurisdiction, may record a guilty verdict against an accused person. Such trial attracts to it all legal and constitutional rights which the issues in the case may give rise to. Otherwise, any trial or purported conviction would be devoid of legality.

41. However, as I have said, what the section requires is a finding of fact by the jury that a sec 2 offence “has been committed by the undertaking”. Such a finding, if it were to be made, would have the following significant differences than a conviction would have in the process envisaged in the preceding paragraph. These would include the fact that the undertaking:-

- (i) is not on trial or the subject of any charge;
- (ii) is therefore not an accused person;

- (iii) is not exposed to any criminal sanction; and
- (iv) cannot have a conviction recorded against it;

Moreover, any such finding by the jury:-

- (v) could not be referred to or relied upon if the undertaking was subsequently charged or became an accused person;
- (vi) could not amount to an *autrefois convict* or give rise to any form of estoppel if the undertaking was subsequently put on trial;
- (vii) could not form the basis of either a restriction application under s. 150 of the Companies Act 1990, or a disqualification application under s. 160 thereof.

Finally, the undertaking, if subsequently tried, would be entitled to all appropriate rights and safeguards and could challenge any evidence, including that relied upon to obtain any finding in the earlier proceedings. Therefore, it is clear to me that the undertaking is wholly removed from the position it would be in if it was on trial for a criminal offence.

42. As a result, I am satisfied that, by applying the principles set forth above, the true meaning of s. 3(4) of the 1996 Act is that the undertaking so referred to does not have to be convicted of a s. 2 offence before the director or manager so referred to can be found guilty of the offence created thereby. Rather, it is an essential ingredient of this offence that the company itself must have committed an offence. This can be established, like all other necessary facts, by placing before the jury such credible evidence as would, when properly charged and directed, enable it to find that a s. 2 offence has been committed. Such evidence is fully open to challenge by the accused.

The jury would approach this task in exactly the same way as all other matters within its purview. The ultimate decision is, of course, a matter for the jury.

43. The accused also submits that the statutory condition in the subsection may be said to expose the undertaking to a finding that it has committed a criminal offence and, therefore, in the absence of having the same rights as an accused person, its good name and reputation may be exposed. He goes on to suggest, by some unspecified route, that this proposition supports his construction of the section in question, relying in the process on the trial judge's views on this matter. As previously stated, the trial judge was heavily influenced by concerns regarding the undertaking, its position and its rights. He was of the view that were a jury to find the undertaking guilty of an offence without a trial in due course of law, the same would constitute a violation of its constitutional and legal rights. Disregarding the issue of guilt *vis-à-vis* conviction for a moment, it is quite clear that these comments were specifically focused on the company and whatever rights it might have and any prejudice it may suffer, they were not addressed to the accused or his position. It is, therefore, difficult to see how these could have been determinative of his decision. It has not been suggested that the failure to prosecute or obtain a conviction against the company, or the absence of its presence by representation in court, are factors which affected the trial process itself, in that by some means the right of the accused to a fair trial will be jeopardised. The accused retains the right of due process in respect of the charges which he faces. It is the duty of the trial court, which duty remains and continues throughout the trial, to ensure that such rights are not violated; if they are, they must be protected and vindicated. The nature and circumstances of any violation will determine the nature and scope of the protection. So, on the evidence, as disclosed on the case stated, the

essence of the judge's opinion is not one sourced on process, impact or detriment, but rather one founded on principle. For the reasons given I cannot, with respect, agree with this.

44. There is another aspect to this point which must be mentioned, which is that the accused person cannot, in my view, advance the company's position as being that of his own. The latter would be a classic illustration of the *jus tertii* principle which Hardiman J. in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, at p. 165, described as "...the operation of the *jus tertii* rule [is that] a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see *Cahill v. Sutton* [1980] I.R. 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better."

45. Accordingly, the accused must respond to the charges as these affect him and cannot assert a prejudice, or plead a detriment, which is that of the company's alone.

46. The conclusions arrived at in this judgment derive solely from the true interpretation of the statutory provisions mentioned in the indictment and, in particular, of ss. 2 and 3(4) of the 1996 Act.

47. In consequence, and for the reasons set forth above, I would answer the questions posed in the case stated as follows:-

1) Question A: Yes;

2) Question B: No.