Neutral Citation Number: [2021] EWHC 3013 (Admin)

Case Nos: CO/3316/2018
and CO/1696/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2021

Before:

LADY JUSTICE ANDREWS
MR JUSTICE LINDEN

- -

Between:

THE QUEEN (on the application of ROBERT PALMER)	**Claimant**
- and -	
NORTHERN DERBYSHIRE MAGISTRATES' COURT	**Defendant**
- and -	
(1) SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Interested Parties**
(2) DAVID FORSEY	

And between:

THE QUEEN (on the application of DAVID FORSEY)	**Claimant**
- and -	
NORTHERN DERBYSHIRE MAGISTRATES' COURT	**Defendant**
- and -	
(1) SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY	**Interested Parties**
(2) ROBERT PALMER	

- -
- -

David Reade QC and James McWilliams (instructed by **Sonn Macmillan Walker**) for **the Claimant in CO/3316/2018, Mr Palmer**
Richard Lissack QC, Andrew Smith QC and Joseph Farmer (instructed by **DWF Law LLP**) for the **Claimant in CO/1696/2020, Mr Forsey**
Paul Ozin QC (instructed by **Legal Services Directorate, Insolvency Service**) for the **First Interested Party, the Secretary of State**

The Defendant was not represented.

Hearing dates: 11 and 12 October 2021

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Approved Judgment

LADY JUSTICE ANDREWS (giving the judgment of the Court):

INTRODUCTION

1. This is the judgment of the Court, to which both members have contributed. These claims for Judicial Review concern distinct legal issues arising from the same criminal prosecution, brought by the first interested party ("the Secretary of State") against the claimants, Mr Robert Palmer and Mr David Forsey. The charges against Mr Forsey and Mr Palmer are that, contrary to s.194 (3) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), as director and administrator respectively of the company, they connived in or consented to a failure by West Coast Capital (USC) Limited ("USC") to give notice of proposed collective redundancies at USC's warehouse in Dundonald in Scotland in accordance with s.193 (1) TULRCA and/or that USC's failure to give such notice was attributable to their neglect. They have entered "not guilty" pleas. The offences are triable summarily, and an offender is liable to a fine not exceeding level 5 on the standard scale.

2. Mr Palmer and Mr Forsey challenge decisions of District Judge Andrew Davison, sitting in the Northern Derbyshire Magistrates' Court, on two preliminary issues in the criminal proceedings. The decisions were made in reserved judgments handed down on 29 May 2018 (in the Palmer case) and on 4 February 2020 (in the Forsey case). The criminal proceedings, which began as long ago as July 2015, have been adjourned pending determination of these claims. This is understandable, since if Mr Forsey's claim succeeds, the criminal prosecution cannot proceed in the English courts, and it will be left to the Lord Advocate to determine whether to commence a criminal prosecution in Scotland. If Mr Palmer's claim succeeds, he cannot be prosecuted for an offence under s.194 (3) in either jurisdiction.

3. The claim for judicial review brought by Mr Palmer was the first in time, and followed an earlier unsuccessful claim brought by Mr Forsey on the basis that the prosecution infringed the *Carltona* principle (see *R (Forsey) v The Northern Derbyshire Magistrates' Court* [2017] EWHC 1152 (QB)). Permission to proceed was granted by Nicol J on 18 January 2019. Mr Palmer contends that as an administrator of USC, he cannot properly be made the subject of a prosecution for an offence under s.194(3) because an administrator is not a "*director, manager, secretary or other similar officer*" of the company. This argument was referred to before us as "the officer argument." Mr Forsey was joined as an interested party to the Palmer claim, but made no separate submissions in relation to it.

4. Mr Forsey's claim was issued on 11 May 2020. He contends that the English Court has no jurisdiction to entertain the prosecution, which should have been brought in Scotland ("the jurisdiction argument"). At an oral hearing on 2 November 2020, Dove J granted permission to proceed, and directed that the claim be linked with Mr Palmer's claim and that both should be heard at a single substantive hearing. Mr Palmer was joined to Mr Forsey's claim as an Interested Party. Mr Reade QC, who appeared with Mr McWilliams on behalf of Mr Palmer, indicated that he supported Mr Forsey's challenge, but he made no submissions which were specific to Mr Palmer's position in relation to the jurisdiction issue.

5. Before turning to consider the merits of the claims, we wish to make some preliminary observations about the skeleton arguments that were served in both these claims.

6. Comprehensive case management directions were given in each case, including directions for the filing and service of skeleton arguments. Paragraph 19 of the Administrative Court Judicial Review Guide 2021 helpfully draws the attention of parties to judicial review proceedings to the essential provisions of paragraph 14 of the Practice Direction to CPR 54A relating to skeleton arguments. Paragraph 19.2.2 of the Guide states, inter alia, that a skeleton argument should define and confine the areas of controversy, be cross-referenced to any relevant document in the bundle, and be self-contained. It should not include extensive quotations from documents or authorities (CPR 54A PD para 14.2(1)).

7. Paragraph 19.3 of the Guide draws attention to the requirement to obtain the Court's permission to serve a skeleton argument exceeding 25 pages (CPR 54A PD para 14.3). It emphasises that skeleton arguments should be as short as possible, and states that in most cases there should be no need for the skeleton argument to exceed 20 pages. Paragraph 19.3.6 warns parties that a skeleton argument which does not comply with those requirements may be returned to its author by the Administrative Court Office, and may not be re-filed unless and until it does comply. It also warns them that the Court may disallow the costs of preparing a non-compliant skeleton argument.

8. Unfortunately in this case, despite that clear guidance, the Practice Direction was not complied with in various respects. All the skeleton arguments exceeded the 25 page maximum - one was over 40 pages long. Another replicated lengthy passages from a textbook (including the footnotes), instead of simply stating the proposition(s) of law for which the book was cited, and providing cross-references to the relevant extracts in the authorities bundle. Versions of the skeleton arguments containing cross-references to the hearing bundles were lodged with the Court too late to be of practical use in our preparations. We had no choice but to use the documents that were already in the core bundles, which we had already marked up by the time the replacement versions were produced.

9. We recognise that there are cases in which, despite the service of the Statement of Facts and Grounds and Detailed Grounds of Defence, the number, range and/or complexity of the issues involved will justify the service of a skeleton argument which is longer than 25 pages, and in which the Court will find such documents of assistance. However, these cases did not fall into that category. The single issue in the Palmer case is a short point of statutory interpretation which requires consideration of the mischief that Parliament was seeking to address, and of the role and duties of an administrator. There were a handful of relevant authorities. The Forsey case raised three related grounds, the first of which concerned the true characterisation of the nature of the offence, again a matter of statutory interpretation. The second and third were matters of legal principle which, it transpired, turned on consideration of what was said in three authorities, two English and one Scottish.

10. The Guide and the Practice Direction serve a useful purpose, and we wish to stress how important it is that they be followed. They help the parties to produce documents which assist the Court (and opposing parties) to prepare for a hearing of the claim for judicial review by focusing on what is really in issue.

11. Admittedly, two of the parties (including the Secretary of State) did seek permission to serve a skeleton argument that was longer than 25 pages, but they did so informally by letter to the Administrative Court office, apparently at the same time as serving the

documents in question. By then it was almost certainly too late for the requests to be considered by a judge and, if refused, for shorter documents to be prepared and lodged in time. As a general rule, an application for permission for a longer skeleton argument should be made to a judge as soon as it is anticipated that one will be required. Whilst it is impossible to cater for all eventualities, in the normal course one would expect that to be shortly after the Detailed Grounds of Defence are served.

12. Although the claim in the Palmer case was the first in time, the jurisdiction issue logically arises first and therefore we will consider the issues in that order. Before doing so, however, we must say something about the legal and factual context in which they arise.

THE LEGISLATION

Introduction

13. The original impetus for the domestic legislation with which this case is concerned was Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies. The 1975 Directive was implemented by the United Kingdom in the form of Part IV of the Employment Protection Act 1975. The relevant provisions of the 1975 Act were then replaced by Part IV, Chapter II, of TULRCA and the 1975 Directive was amended by Directive 92/56/EC and then replaced by consolidating Directive 98/59/EC, known as the Collective Redundancies Directive ("the CRD").

14. The provisions of the 1975 Act and the 1992 Act have undergone extensive judicial consideration and significant amendments over the years, but it is sufficient for present purposes to focus on the CRD and TULRCA, albeit in the terms in which they were cast at the time(s) when the offences were alleged to have been committed in this case, i.e. as at the end of 2014/beginning of 2015.

The Collective Redundancies Directive

15. The central purpose of the CRD is encapsulated in Recital (2) to the Directive:

> *"(2) Whereas it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community;.."*

16. In broad outline, Article 2 of the CRD required the Member States of the European Union to implement measures which ensured that where an employer is contemplating collective redundancies, the representatives of the affected workers are consulted in relation to those proposals and are provided with the information which is necessary to ensure that the consultation is meaningful. Article 1 of the CRD specifies threshold numbers of workers to be made redundant over specified periods of time if the contemplated redundancies are to constitute *"collective redundancies"*. Article 2 requires consultation *"in good time with a view to reaching agreement"* and specifies the subject matter of the consultation as follows:

> *"2 These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant."* (emphasis added)

17. Article 2(3) of the CRD requires the employer to provide the workers' representatives with all relevant information *"in good time during the course of the consultations"* and specifies information which must be provided to them in any event including, under Article 2(3)(b):

> *"(i) the reasons for the projected redundancies;*
>
> *(ii) the number of categories of workers to be made redundant;*
>
> *(iii) the number and categories of workers normally employed;*
>
> *(iv) the period over which the projected redundancies are to be effected;….*
>
> *(v) the criteria proposed for the selection of the workers to be made redundant in so far as national legislation and/or practice confers the power therefor upon the employer…."*

18. Article 2(3)(b) goes on to state that:

> *"The employer shall forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v)."*

19. Section III of the CRD, which comprises Articles 3 and 4, then deals with *"Procedure for collective redundancies"*. Article 3 provides, so far as material, that:

> *"1. Employers shall notify the competent public authority in writing of any projected collective redundancies.*
>
> ……
>
> *This notification shall contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives provided for in Article 2, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.*
>
> *2. Employers shall forward to the workers' representatives a copy of the notification provided for in paragraph 1.*
>
> *The workers' representatives may send any comments they may have to the competent public authority."* (Emphasis added.)

20. Article 4 provides as follows:

> *"1. Projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification referred to in Article 3(1) without prejudice to any provisions governing individual rights with regard to notice of dismissal.*
>
> *Member States may grant the competent public authority the power to reduce the period provided for in the preceding subparagraph.*
>
> *2. The period provided for in paragraph 1 shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies.*
>
> *3. Where the initial period provided for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.*
>
> *Member States may grant the competent public authority wider powers of extension.*
>
> *The employer must be informed of the extension and the grounds for it before expiry of the initial period provided for in paragraph 1.*
>
> *4. Member States need not apply this Article to collective redundancies arising from termination of the establishment's activities where this is the result of a judicial decision."*
>
> (Emphasis added).

21. Article 5 of the CRD then provides that it is open to the Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to workers than is required by the CRD.

22. It is clear that the CRD contemplates that the employer, the workers' representatives and the competent authority (here, the Secretary of State) are all kept fully in the picture so far as the contemplated redundancies are concerned, and are thus able to make informed contributions to the process of consultation and consideration of *"solutions to the problems raised by the projected redundancies"*. On a fair reading of the CRD, these solutions may include avoiding the redundancies altogether or reducing the number of redundancies, as well as mitigating the impact of any redundancies which do take place.

23. Fundamental to achieving these aims is the requirement that the worker's representatives and the competent authority are notified of the projected redundancies and provided by the employer with certain basic information in good time to allow them to act before any dismissals take effect.

The relevant provisions of TULRCA 1992

24. An important starting point, given the issue as to jurisdiction, is that the 1992 Act applies in Scotland. Section 301 provides that *"This Act extends to England and Wales and apart from section 212A(6) to Scotland"*, and s. 285 states that it does not apply to employment outside "Great Britain" as defined.

25. Part IV of TULRCA deals with *"Industrial Relations"* and Chapter II is concerned with the *"Procedure for Handling Redundancies"*. Chapter II contains a number of provisions which deal with the obligations of the employer vis à vis the representatives of the workforce and the Secretary of State where redundancies are proposed. Sections 188(1) and (1A) provide as follows:

> *"(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.*
>
> *(1A) The consultation shall begin in good time and in any event—*
>
> *(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 45 days, and*
>
> *(b) otherwise, at least 30 days,*
>
> *before the first of the dismissals takes effect."*
>
> (Emphasis added)

26. We note that in *E Green & Son (Castings) Ltd v Association of Scientific Technical and Managerial Staffs* [1984] ICR 352 (EAT) Nolan J and colleagues held that the date referred to in the predecessor of s.188(1A) under the 1975 Act is the proposed date on which the first dismissal will take effect, rather than the date on which the first dismissal actually took effect. This decision was followed in, amongst others, *Transport & General Workers Union v Ledbury Preserves* [1986] ICR 855 (EAT). This means, for example, that an employer will not be liable, provided it begins consultation at least the required period of time before the date of the first *proposed* dismissal, if employees who wish to do so are permitted to leave earlier.

27. The emphasis in s.188 on what is *proposed*, as opposed to what ultimately occurs, is illustrated by the fact that a proposal to restructure which affected 26 staff, of whom 14 would be re-engaged on different contracts and 12 would actually lose their jobs, triggered the duty to consult, given that the proposal was to terminate the existing contracts of the 26: see *Hardy v Tourism South East* [2005] IRLR 242 (EAT). Similarly, in *Optare Group Ltd v TGWU* [2007] IRLR 931 (EAT) it was held that there was a proposal to dismiss 20 employees on a given site where, in the event, 3 took voluntary redundancy and only 17 were dismissed. The duty to consult was triggered by the proposal.

28. In broad terms, the *"appropriate representatives"* for the purposes of the required consultation are any independent trade union which is recognised in relation to the affected members of the workforce or, where there is no such trade union for any affected workers, representatives who have been appointed or elected by the affected members of the workforce. These are known as *"employee representatives"*: s.188(1B). Where there are no appropriate representatives, the employer effectively has a duty to invite affected employees to appoint or elect them and, in the latter case, to organise an election for this purpose: s.188A and *R v Secretary of State for Trade and Industry, ex p UNISON* [1996] ICR 1003 (Divisional Court).

29. The aim and subject matter of the consultation under TULRCA is as required by Article 2(2) of the CRD (s.188(2)). It therefore includes consultation about ways of avoiding the dismissals and reducing the number of dismissals (s.188(2)(a) and (b)) as well as mitigating the consequences of the dismissals. There is also a duty to provide information to the appropriate representatives for the purposes of the consultation, the terms of which reflect the requirements of the CRD (see s.188(4) TULRCA). Section 188(7) affords a defence to the employer for failure to comply with its duties where *"there are special circumstances which render it not reasonably practicable for [it] to comply with a* [relevant requirement]" provided the employer takes *"all such steps towards compliance …as are reasonably practicable in those circumstances"*.

30. Complaints about breaches of ss.188 and 188A are brought in the employment tribunal (s.189). Save for complaints about a failure relating to the election or appointment of employee representatives, where there are appropriate representatives the right to complain to an employment tribunal is conferred exclusively on them: s.189(1) and *Northgate HR Ltd v Mercy* [2008] ICR 410 (CA). The remedy which the appropriate representative is able to obtain benefits only those whom they represent, through recognition (in the case of a union) and through election or appointment (in the case of employee representatives), even if other employees are made redundant without consultation: see *TGWU v Brauer Coley Ltd* [2007] ICR 226 (EAT). These points reflect the collective nature of the obligations and "rights" in issue: they are primarily rights of the *representatives* to be informed and consulted, as opposed to rights of the individual workers, although the workers whom they represent benefit from the consultation and/or where a remedy is obtained.

31. The remedy for breach of s.188 or 188A is a declaration that the complaint is well founded and, where appropriate, a protective award: s.189(2). As part of a protective award the employment tribunal declares a protected period beginning *"with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier"* (s.189(4)(a), emphasis added), and lasting for a period of up to 90 days. Subject to this maximum, the length of the protected period is such *"as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default"* (s.189(4(b)). The approach is essentially punitive rather than the focus being on any loss which the employees may have suffered: see *Susie Radin Limited v GMB* [2004] ICR 893 CA.

32. Again, these points reflect the importance of the obligations to consult and inform, the fact that these obligations relate to the *proposal* to make redundancies, and the fact that the rights and obligations in question are collective in nature and owed to the

appropriate representatives. Information and consultation are ends in themselves, whether or not failure to inform and consult causes loss to the workers.

33. We also note that s.189(4)(a) envisages that a complaint to the employment tribunal may be made and determined before any dismissal has taken effect, although this will rarely occur in practice given the demands on the employment tribunal system: see *Howlett Marine Services Ltd v Bowlam* [2001] IRLR 201 (EAT). Consistently with this, the effect of the protective award is that those employees who have been dismissed *"or whom it is proposed to dismiss as redundant"* (s.189(3)(a)) are entitled to be paid during the protected period in accordance with s.190, subject to s.191 which deals with termination of an employee's employment during the protected period. Again, these points reflect the centrality of the duties to inform and consult in relation to the proposal, as opposed to the question whether dismissals ultimately occur and, if so, how many. S.192 then gives an employee a right to complain to an employment tribunal that they are covered by a protective award but have not been paid in accordance with s.191.

34. It is in this context that we turn to the specific provisions of Part IV, Chapter II TULRCA which are in issue in this case. S.193 provides as follows:

> *"**193 Duty of employer to notify Secretary of State of certain redundancies.***
>
> *(1) An employer proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less shall notify the Secretary of State, in writing, of his proposal:*
>
> > *(a) before giving notice to terminate an employee's contract of employment in respect of any of those dismissals, and*
> >
> > *(b) at least 45 days before the first of those dismissals takes effect.*
>
> *(2) An employer proposing to dismiss as redundant 20 or more employees at one establishment within such a period shall notify the Secretary of State, in writing, of his proposal:*
>
> > *(a) before giving notice to terminate an employee's contract of employment in respect of any of those dismissals, and*
> >
> > *(b) at least 30 days before the first of those dismissals takes effect.*
>
> *(3)….*
>
> *(4) A notice under this section shall—*
>
> > *(a) be given to the Secretary of State by delivery to him or by sending it by post to him, at such address as the Secretary of State may direct in relation to the establishment where the employees proposed to be dismissed are employed,*
> >
> > *(b) where there are representatives to be consulted under section 188, identify them and state the date when consultation with them under that section began,*

(c) be in such form and contain such particulars, in addition to those required by paragraph (b), as the Secretary of State may direct.

(5) After receiving a notice under this section from an employer the Secretary of State may by written notice require the employer to give him such further information as may be specified in the notice.

(6) Where there are representatives to be consulted under section 188 the employer shall give to each of them a copy of any notice given under subsection (1) or (2). The copy shall be delivered to them or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.

(7) If in any case there are special circumstances rendering it not reasonably practicable for the employer to comply with any of the requirements of subsections (1) to (6), he shall take all such steps towards compliance with that requirement as are reasonably practicable in the circumstances. Where the decision leading to the proposed dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with any of those requirements." (Emphasis added.)

35. Section 194 provides as follows:

*"**194 Offence of failure to notify***

(1) An employer who fails to give notice to the Secretary of State in accordance with section 193 commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) Proceedings in England or Wales for such an offence shall be instituted only by or with the consent of the Secretary of State or by an officer authorised for that purpose by special or general directions of the Secretary of State. An officer so authorised may, although not of counsel or a solicitor, prosecute or conduct proceedings for such an offence before a magistrates' court.

(3) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

> *(4) Where the affairs of a body corporate are managed by its members, subsection (3) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate."* (Emphasis added.)

36. The similarity of the wording of s.193 to that of s.188 is obvious. This, the fact that it forms part of the same Chapter of TULRCA, and the express links to s.188 which we have highlighted in ss.193(4)(b) and 193(6), mean that it is informative to read s.193 in the context of the detailed consideration which has been given to ss.188-192 in the case law.

37. We note that the standard HR1 form for the purposes of s.193(4)(c) which was in use at the relevant time in the present case required the employer to identify the nature of the business, the establishment affected and the reasons for the proposal, as well as to state the dates of the first and last proposed dismissals, the numbers of employees affected (broken down into occupations) and the method of selection. The form was also required to be returned to the Secretary of State at an address in Birmingham.

THE CASE AGAINST MR FORSEY AND MR PALMER.

38. The case against Mr Forsey and Mr Palmer in the criminal proceedings is set out in a detailed Prosecution Case Summary dated 1 July 2015. The parties agreed that, for present purposes, that case should be taken at its highest. What follows is therefore a summary of the facts set out in the Case Summary, which is assumed for these purposes to be correct.

39. USC was a company incorporated in England which traded as a retailer of clothing, footwear and accessories under the USC brand from premises located predominantly in the north of England as well as in Scotland. The operations in Scotland included an office and a warehouse in Dundonald. USC's registered office was in Shirebrook in Derbyshire, where the central management of the company was located, and from where ultimate control was exercised. At all material times, Mr Forsey was its sole registered director.

40. USC was wholly owned by Sports Direct.com Retail Ltd ("Sports Direct") which is part of a group of companies which were also based at Shirebrook in Derbyshire. The person with ultimate control of the group was Mr Mike Ashley. At all material times, Mr Forsey was also a director of Sports Direct.

41. On 10 December 2014 a company known as Diesel (London) Limited, which was a supplier of USC, issued a statutory demand for £1,288,866 which was received by USC by 17 December 2014. On 23 December 2014 Mr Forsey, in his capacity as director, resolved to take steps to place USC into administration and to appoint the three administrators who were subsequently appointed, including Mr Palmer. On 5 January 2015, at Shirebrook, he then signed a notice of an intention to appoint administrators which was filed with the Companies Court in England on the following day.

42. From 6 January 2015 steps were taken, pursuant to instructions emanating from Shirebrook, to remove all stock and other equipment, including IT equipment, shelving, fixtures and fittings from the Dundonald warehouse, and to cease operations there. The deadline set for doing so was Sunday 11 January 2015 and this was met. Indeed, the

case against Mr Forsey is that the closure of the warehouse was inevitable by 8 January 2015 at the latest. The proposal to make the 84 employees who worked there redundant had therefore also been formed by 8 January at the latest, given that the termination of their employment was an inevitable consequence of closure (see *UK Coal Mining Limited v National Union of Mineworkers (Northumberland Area)* [2008] ICR 163 (EAT)), though it was probably formed earlier.

43. On 13 January 2015, which was the earliest possible date after the 5 January 2015 notice, USC went into administration and Mr Forsey appointed Mr Palmer of The Gallagher Partnership LLP as a joint administrator, together with Mr Duffy and Mr Bouchier of Duff and Phelps Limited. The business addresses of the joint Administrators were in London. Mr Palmer's responsibility was *"Preferential Claims/EE's"* (employees are, of course, the principal category of creditors capable of becoming preferential creditors). On the same day as the administration, there was a "pre-pack" sale of the whole of the business of USC, other than its warehouse at Dundonald, to another company owned by Sports Direct, namely Republic.com Retail Ltd ("Republic"), of which Mr Forsey was also a director.

44. On the following day, 14 January 2015, the employees of USC at the Dundonald warehouse were each handed a letter on behalf of the joint administrators by Mr Norvell of The Gallagher Partnership LLP. The letter was signed by Mr Palmer and it informed the employees that they were at risk of redundancy, and of USC's intention to consult with them at a staff meeting that day *"insofar as possible within the timeframes"*. The letter invited them to make suggestions at the meeting about ways to avoid redundancies. They were given around 15 minutes to read and digest the letter, and were then handed a further letter from the joint administrators, also signed by Mr Palmer, which informed them that, following consultation, *"the Company was unfortunately unable to identify any alternative to your redundancy"*. The letter stated that they were dismissed with effect from that day.

45. On 30 January 2015, following reports in the media, staff at the Redundancy Payments Service ("RPS") of the Insolvency Service (an Executive Agency of the then Department for Business, Innovation and Skills) contacted the joint administrators and asked whether the required form HR1 had been sent. On 4 February 2015, a form HR1 was then received by email at the RPS. It was signed by Mr Palmer and dated 14 January 2015. Mr Palmer subsequently said that the form had been signed and largely completed on 14 January 2015, which was when the joint administrators intended to provide it to the RPS. However, the form was held on file awaiting further information and the fact that it had not been completed and returned had been overlooked until the RPS contacted them.

46. In July 2015, Mr Forsey and Mr Palmer were charged by postal requisition issued by the Secretary of State. As noted above, it is the prosecution case that the proposal by USC to make collective redundancies at the Dundonald warehouse was in existence by 8 January 2015 at the latest. It is alleged that both Mr Forsey and Mr Palmer consented to, connived in, or neglected to prevent the failure by USC to notify the Secretary of State of the proposed redundancies, contrary to s.194(3) TULRCA. In the case of Mr Forsey, this was in the period from early January until USC went into administration on 13 January 2015; and in the case of Mr Palmer it was in the period after USC went into administration up until the receipt of the HR1 on 4 February 2015.

THE JURISDICTION ISSUE.

Outline of the legal arguments

47. At the hearing, oral submissions were made on behalf of Mr Forsey by Mr Lissack QC and Mr Smith QC, who appeared with Mr Farmer.

48. The parties agreed that the central issue in relation to jurisdiction is *"whether the offence with which Mr Forsey has been charged is one that could only have been prosecuted in Scotland"*: see e.g. paragraph 12 of the Agreed List of Issues (emphasis added). Mr Lissack therefore implicitly accepted that the hurdle for his client is a high one. The essentials of Mr Lissack's argument, as set out in his skeleton argument and developed orally, were as follows.

49. First, the test in this case is set out in *R v Smith (Wallace Duncan) (No 4)* [2004] QB 1418 CA ("*Smith")* namely:

    i) whether a substantial measure of the activities constituting the alleged offence occurred in England; and, if so,

    ii) whether there is any constitutional objection to the alleged offence being tried in England.

50. Second, in relation to the first limb of the *Smith* test, this depends primarily on how the *actus reus* of the offence is characterised, although the location of where the harm caused by the offence is suffered is also relevant. In this regard, the offence under s.194(1) TULRCA is properly characterised as one of making dismissals without first notifying the Secretary of State. As Mr Lissack put it at paragraph 26 of his skeleton argument: *"The offence is not failure to notify per se. Rather, it is the making of the redundancies without notifying the SoS in accordance with s193"*. Consistently with this thesis, he argued that *"the duty to notify is not triggered on the existence of a proposal"* (paragraph 37.1) and that *"the existence of a proposal is entirely peripheral and of no significance until it is executed"* (paragraph 34.2). On this argument, the *actus reus* of the offence is only committed when the dismissals, or at least the first of them, take(s) effect. Here, the dismissals took place and took effect in Scotland where the affected employees were both employed and domiciled. They were also the real victims of the offence, and the fact that the harm to them was suffered in Scotland is highly significant.

51. Mr Lissack also submitted that the case has other significant connections with Scotland and no such connections with England. In this regard, he pointed to the fact that it was the Scottish institutions which involved themselves when the issue of redundancies arose:

    i) On 7 January 2015, Skills Development Scotland intervened and provided assistance to the affected employees when it became aware of the likely redundancies;

    ii) On 13 January 2015, the Scottish Government sought to intervene;

iii) The redundancy payments which were made to the employees were processed by the Edinburgh office of the RPS;

iv) The Scottish Affairs Committee of the UK Parliament investigated the relevant events subsequently;

v) 50 of the employees brought proceedings in the Glasgow Employment Tribunal and were awarded compensation by that tribunal.

52. Third, Mr Lissack submitted, in the alternative, that even if he was wrong in his characterisation of the offence, and a substantial measure of the alleged criminal activities took place in England, there is a significant constitutional objection to the case being tried in England: *"Because the offence was committed in Scotland it was for the Lord Advocate alone to have decided whether to institute the relevant criminal proceedings".* His skeleton argument went on to emphasise that Scotland has a separate and distinct criminal justice system as if it is a separate country (*Montgomery v HM Advocate* [2003] 1 AC 641, 654); that there is a bar on English intervention on matters which are justiciable in Scotland (Article XIX Union with England Act 1707 and *R v Cowle* 97 ER 587); that Scotland and England have long had arrangements for mutual extradition of suspects; and that decision-making as to prosecutions in Scotland is exclusively a matter for the Lord Advocate. Mr Smith, who is a member of the Bar in Scotland as well as in England, made oral submissions on this topic at the hearing.

53. Mr Ozin QC, who appeared on behalf of the Secretary of State in both cases, submitted that:

i) Mr Lissack is wrong about the test. The test in *Smith* applies to cross-border international crime, whereas the issue in this case is whether the English courts have jurisdiction to try an offence which is alleged to have been committed in the United Kingdom in breach of a law which applies to Great Britain as a whole. The correct position is that, in a domestic setting, it is sufficient that some part of the criminal conduct or the harm resulting from that conduct occurred in England: see *Clements v HM Advocate* (1991) JC 62.

ii) Although the *actus reus* of the s.194 offence is completed when dismissals take effect, the gravamen of the offence is the failure to notify the Secretary of State of the proposal to make the redundancies. Here, the proposal was formed in England and the decision not to notify the Secretary of State and/or the failure to do so took place there.

iii) Unquestionably the English courts have jurisdiction to try the case whether the test is as Mr Ozin submitted it is, or the *Smith* test, given that, on any view, a substantial measure of the activities constituting the alleged offence in the present case occurred in England.

iv) There is no constitutional objection or practice which prevents the case from being tried in England.

v) The conclusion of District Judge Davison was therefore correct in law.

54. The parties agree that the issue is primarily one of law. The reasoning of District Judge Davison is therefore not of central importance and, with no disrespect to the careful consideration which he gave to the issues, we will therefore concentrate on his conclusions.

The test

55. With respect to Mr Lissack, we consider that his reliance on *Smith* was misplaced.

56. The starting point is that in civil litigation there is a well-established distinction between the questions whether (i) a court has jurisdiction (in the sense that it is competent to determine a given dispute) and (ii) if so, whether it should accept jurisdiction, on the one hand, and the question whether, having exercised its jurisdiction, the relevant breach of duty under the applicable law is established. The same is broadly true in the criminal context.

57. As far as venue is concerned, subject to certain provisions in relation to particular offences, the default position is that there are no longer territorial limitations on the competence of the Crown Court or the Magistrates Court to determine charges against defendants:

i) Section 46(2) Senior Courts Act 1981 provides:

> *"**46. Exclusive jurisdiction of Crown Court in trial on indictment***
>
> ...
>
> *(2) The jurisdiction of the Crown Court with respect to proceedings on indictment shall include jurisdiction in proceedings on indictment for offences wherever committed, and in particular proceedings on indictment for offences within the jurisdiction of the Admiralty of England."*

ii) Similarly, section 2(1) of the Magistrates Court Act 1980 provides, for example, that:

> *"A magistrates' court has jurisdiction to try any summary offence."*

58. Of course, this begs the question whether the offence charged is an offence under the law which the Court is required to apply, and it will be for the Crown Court or the Magistrates Court, as the case may be, to decide that question. If the offence charged in an English court is not an offence under English law, the Court will be bound to dismiss the charge. It is this, second, question which is the subject of *R v Treacy* [1971] AC 537 and *Smith* (above).

59. In *Treacy*, Lord Diplock explained the point with characteristic clarity. The parties raised the question whether a Crown Court in England had *"jurisdiction"* to convict Mr Treacy of blackmail, contrary to section 21 Theft Act 1968, given that the blackmail letter was posted by him on the Isle of White to the complainant, Mrs X, in Germany. At 559B-D Lord Diplock said this:

> *"In view of the way in which the question is framed and the wide-ranging argument about "jurisdiction" before your Lordships' House, I am prompted to state at the outset that the question in this appeal is not whether the Central Criminal Court had jurisdiction to try the defendant on that charge but whether the facts alleged and proved against him amounted to a criminal offence under the English Act of Parliament.*
>
> *This is a different question from that involved in the old cases about venue which have been relied on by each of the parties in this appeal. In the venue cases, the facts alleged against the prisoner unquestionably amounted to a criminal offence in English law. The only question was whether under the technical rules of venue he was liable to be tried before a court whose jurors were drawn from one locality rather than another."*

60. At 559F/G Lord Diplock pointed out that:

> *"The fact that the appellant was arrested in Greater London and committed for trial at the Central Criminal Court unquestionably gave to that court jurisdiction to determine whether or not he was guilty of the offence of which he was indicted."*

He went on to explain that, the technicalities of venue having been abolished, (561F/G) the various cases *"on internal venue in England are not in point"* (562E/F).

61. The question for the House was therefore as to the territorial effect of s.21 Theft Act 1968, which was essentially a question of statutory construction taking into account the rules of international comity and the presumption against extra-territorial effect. At 561F Lord Diplock said:

> *"When Parliament, as in the Theft Act 1968, defines new crimes in words which, as a matter of language, do not contain any geographical limitation either as to where a person's punishable conduct took place or, when the definition requires that the conduct shall be followed by specified consequences, as to where those consequences took effect, what reason have we to suppose that Parliament intended any geographical limitation to be understood?*
>
> *The only relevant reason, now that the technicalities of venue have long since been abolished, is to be found in the international rules of comity which, in the absence of express provision to the contrary, it is presumed that Parliament did not intend to break. It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences there. But I see no reason in comity for requiring any wider limitation than that upon the exercise by Parliament of its legislative power in the field of criminal law."*
>
> (Emphasis added.)

62. Lord Diplock went on to develop this point, but it is unnecessary to summarise what he said, given that it is quite apparent that the type of issue under consideration in *Treacy* was different to the issue in the present case. There is a material difference between the question whether, conduct and its consequences having occurred in more than one state, the criminal law of one of these states has been broken; and the question whether alleged conduct and consequences which took place in Great Britain and are contrary to the law of Great Britain may be prosecuted in England, Wales, or Scotland. The former is a question of statutory construction taking into account international comity, whereas the latter is not. Suffice it to note that this point is confirmed by the following remark of Lord Diplock, at 564D/E:

> *"I can leave aside the question of territorial limitation as between the different jurisdictions (England and Wales, Scotland and Northern Ireland, etc.) within the United Kingdom, for this depends on constitutional practice, not on international comity."*

63. Moreover, and contrary to Mr Smith's attempt to give a broad meaning to the term "comity" so that it simply refers to respect for the machinery of justice between jurisdictions, international comity and constitutional practice are not the same thing. The former is concerned with leaving *other sovereign states* to punish persons for conduct, and/or the harmful effects of such conduct, which take place within their territories. The latter is the practice of the courts within a given state in the context of the constitutional structures in that state.

64. *Smith* was concerned with essentially the same type of issue as *Treacy*. There, the appellant had been convicted of obtaining property by deception, contrary to s.15 Theft Act 1968. Following certain developments in the law, it was apparent that these convictions could not stand and the question was whether offences of obtaining services by deception, contrary to s.1 Theft Act 1968, could be substituted by the Court of Appeal. This was an issue because the deception had taken place in England, but the obtaining had taken place in New York, when monies were paid into an account there. No issue was taken as to the competence of the Central Criminal Court to try the matter, if the offence was actionable in England.

65. The question turned on the construction and territorial effect of s.1 of the 1968 Act and the Court of Appeal had to resolve a conflict, in terms of the approach to construction, as between that of Buxton LJ in *R v Manning* [1999] QB 980 and Rose LJ in *Smith (Wallace Duncan)(No 1)* [1996] 2 Cr App R 1. In very brief summary, the former had adopted, as the decisive test, the *"last act"* or terminatory theory. The latter had adopted an approach, described by him as *"the comity approach"*, which drew on various authorities including *Treacy*, and which meant that an offence was committed under English law if the last act took place in England or if a substantial part of the crime was committed in England, and there was no reason of international comity why it should not be tried here. In particular, Rose LJ cited with approval the following passage from the judgment of LA Forest J in *Libman v The Queen* (1985) 21 DLR (4th) 174, 221:

> *"The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single 'situs' of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law*

> *where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country.."*
>
> (Emphasis added)

66. In *Smith* the Court of Appeal followed the approach of Rose LJ. Like *Treacy*, *Smith* therefore has little directly to do with the present case, in which there is no dispute that the relevant provisions of TULRCA applied equally to England, Scotland and Wales. Nor is there any real dispute that the facts on which the prosecution is based occurred in England and Scotland and, if proved, would amount to an offence under s.194 of the 1992 Act.

67. The real question is therefore whether, that being so, and there being no issue as to venue, there is any rule, principle or constitutional practice which would prevent the English courts from considering the charges in this case: in effect, to decline to exercise a jurisdiction which they undoubtedly have. Mr Lissack did not identify any such principle and nor did Mr Smith.

68. Mr Ozin did, however, draw our attention to the case of *Clements v HM Advocate* (above) in which the question was whether the Scottish courts had jurisdiction to try two of six defendants who had been convicted by the High Court in Edinburgh of being concerned in the supply of a controlled drug to another, contrary to s. 4(3)(b) of the Misuse of Drugs Act 1971. This question arose because the conduct on which the charges were based took place in London, in a train from London to Edinburgh, and in Edinburgh itself where the drugs were supplied to users, but the two defendants in question had only taken part in the operation in England and had not been in Scotland or done anything there on the dates in question. The High Court of Justiciary proceeded on the basis that, in the absence of legislation to the contrary, the jurisdiction of the Scottish criminal courts is limited to crimes committed in Scotland (per Lord Coulsfield at page 73). It held that the offences had been committed in Scotland for relevant purposes, essentially because Scotland was the place where the drugs were supplied.

69. It will be appreciated that *Clements* is a case in which the issue was whether the Scottish courts could determine the charges against the two defendants, rather than whether the English courts could not do so, and so we proceed with caution given that the case does not directly address the issue with which we are concerned. But we note that our earlier observations about the relevance of the cases on international crime echo the approach taken by Lord Justice-General Hope (as he then was). At page 116 he said this in relation to the presumption against extra-territorial effect:

> *"I do not think that we are concerned here at all with the 'extra-territorial effect', if any, of the Misuse of Drugs Act 1971 . All the activities in this case took place in the United Kingdom, within the jurisdiction of the United Kingdom Parliament. The problem in this case is one as to territorial limitation as between the different jurisdictions within the United Kingdom. This depends on constitutional practice, not on international comity: see R. v. Treacy per Lord Diplock at p. 564."*

70. He went on to say:

> *"I accept that questions of comity could arise if the physical activities of the appellants had taken place outside the United Kingdom, such as were envisaged by Lord Diplock in his discussion of this topic in that case at p. 562. But for the purposes of the present case it is, I think, sufficient to look only to the situation within the United Kingdom and to ask why the courts of one part of it should be denied jurisdiction if the activities of persons elsewhere in the United Kingdom are seen to have their harmful effects in that part. …."*
>
> (Emphasis added.)

71. At page 71 he said:

> *"The underlying mischief at which these provisions are directed is the supply or offer to supply of a controlled drug to another, and to look to the place of the mischief as the place where jurisdiction can be established against all those involved would be consistent with the idea that the courts of the place where the harmful acts occur may exercise jurisdiction over those whose acts elsewhere have these consequences: see Lord Diplock's discussion of this point in R. v. Treacy at p. 562. This is not to say that the courts of other parts in the United Kingdom might not also have jurisdiction in an appropriate case. But, as Lord Diplock pointed out, the risk of double jeopardy is avoided by the common law doctrines in bar of trial, in England, of autrefois convict and, in Scotland, that the accused has tholed his assize".*
>
> (Emphasis added.)

72. As we read these passages, Lord Hope was purporting to identify the basis on which the Scottish courts *could* exercise jurisdiction over all six defendants, rather than a basis for establishing that they had *exclusive* jurisdiction over any or all of them. The basis was to ask whether Scotland was the place where the mischief occurred, i.e. to consider where the gravamen of the offences occurred. The fact that this was Scotland meant that the Scottish courts could exercise jurisdiction over two of the defendants, despite the fact that their involvement in the supply of the drugs had only occurred in England. We do not read *Clements* as in any way challenging the proposition that where a criminal offence is alleged to have been committed partly in England and partly in Scotland it is *sufficient*, for the courts of either to exercise jurisdiction to try the defendant, that at least part of the conduct which forms the basis of the offence and/or the harm which it causes, occurs in that jurisdiction. But we do not say that this is *necessary,* given that there is no need to reach a definitive view on this point and given, with respect, that this question was not fully explored in argument.

73. We also note that Lord Hope appears to have accepted that it is perfectly feasible for the courts of both England and Scotland to be competent to determine the same case. He did not suggest that the two "English defendants" whose role in the offence took place exclusively in England, could not have been tried in England: the question was whether they could be tried with their fellow offenders in Scotland. In the event of parallel prosecutions of the same defendants in both jurisdictions, the question which

should be stayed would no doubt be resolved by co-operation between the authorities or, alternatively, case management decisions based on the overriding objective.

The nature of the s.194 offence

74. Given that a defendant may only be liable under s.194(3) if *the employer* has committed an offence under s.194(1), the starting point is an analysis of the offence which is committed by the employer under s.194(1). As highlighted above, this provides, in terms, that the offence is committed when the employer *"fails to give notice to the Secretary of State in accordance with section 193"*. S.193, in turn, enacts a duty on the part of the employer to notify the Secretary of State of any *proposal* to dismiss the requisite number of employees within the specified period (90 days), and to do so (i) before the date of service of any redundancy notice and (ii) no later than the specified periods (45 days or 30 days, as the case may be) before the first of the dismissals takes effect. The emphasis of the statutory language is on the failure to give notice of what is proposed, not on the dismissal of the employees.

75. As a matter of straightforward construction and reasoning, the employer fails to give notice in accordance with s.193 either if a relevant proposal comes into being and no notice is given, or if a notice *is* given, but it is either given after the first redundancy notice, or given less than the relevant specified period before the first dismissal "takes effect", and (in any of these situations) the requirements of the "special circumstances" defence under s.193(7) are not satisfied. We will consider what is meant by "takes effect" a little later in this judgment. The offence, or at least the gravamen of the offence, is therefore committed before the first dismissal takes effect, indeed, before the first redundancy notice is served; and the offence is committed by virtue of the fact that the employer has failed to give notice of the proposal as and when required to do so in advance of any dismissals. The present case is an example of a situation in which no notice was given to the Secretary of State at any time prior to the service of the redundancy notices.

76. It follows from this that in the present case, subject to proof, at the very least the conduct amounting to the gravamen of the s.194(1) offence was committed before the notices of redundancy were served and the dismissals were effected in Scotland on 14 January 2015. Moreover, it was committed in England where the proposal was formed, and where those who formed it failed to give notice to the Secretary of State in accordance with s.193. What happened in England cannot be described as "mere background" or "incidental material" as Mr Lissack sought to characterise it.

77. That is sufficient to dispose of the Jurisdiction point. However, submissions were made to us on the question whether it is a necessary ingredient of the s.194(1) offence that one or more of the proposed dismissals ultimately do take effect. It appears that this was a matter of common ground before the District Judge. If it is a necessary ingredient, there would be no problem in proving that element in the present case, because USC made redundant the number of employees it proposed to make redundant.

78. Given that the contention that the *actus reus* of the offence was only completed when the first dismissal took place was a central feature of Mr Lissack's submissions on the jurisdiction issue, although it is not strictly necessary for us to determine this point in order to decide the claim, we feel that we should make some observations about it.

79. Mr Ozin conceded that dismissal was a necessary ingredient and, indeed, appeared to take the position that the number of actual dismissals required for the offence to be committed would have to be at least the same as the number of proposed dismissals required to trigger the obligation to notify i.e. there would need to be at least 20 actual dismissals for the 30 day period to apply, and 100 or more for the 45 day period to apply. Mr Lissack's position, which appeared to be more consistent with the language of s.193(1), was that at least one dismissal had to take effect. He accepted that this would be sufficient: it need not be more than 20, or more than 100, as the case may be.

80. We appreciate the linguistic point that s.193 proceeds on the basis that a dismissal or dismissals *"take effect"*. We also accept that it is unlikely that civil or criminal liability will in practice be an issue where ultimately there are no dismissals. That said, we have some doubts about the correctness of the positions adopted by both counsel that the offence of failing to give notice "in accordance with s.193" requires the proposal to be acted upon in whole or in part.

81. On the face of it, and looking at the language of s.193 in isolation, the date on which the first of the proposed dismissals "takes effect" is one of the specified yardsticks for ascertaining the *latest* date for service of the notice of the proposal by the employer, by counting back 30 or 45 days as the case may be. This is subject to s.193(2)(a), which neither counsel addressed, and which sets a further and separate deadline, namely, the giving of a notice of termination of any relevant employee's contract. Either way, the argument is that the employer cannot be shown to have committed the offence until the time for giving the notice to the Secretary of State has expired, and that cannot be ascertained unless and until he acts upon the proposal. But even if that is correct, it does not mean that a dismissal (or the giving of a notice of termination) is a necessary ingredient of the offence itself. The argument confuses the essential elements of the offence (which is defined as "*failure to give notice to the Secretary of State in accordance with s.193"*) with the means of identifying whether the requirements of s.193 have been complied with in a given case. The relevance of the dismissal "taking effect" is purely to the computation of the latest date for service of the notice.

82. In any event, it is unnecessary for there to be any actual redundancy in order to ascertain the time limits. Typically, the employer's proposal will include dates on which it is intended that notice of redundancy will be given to the employees and take effect, or this will be implicit in the proposal, and the minimum period of notice will be capable of calculation on this basis. That is how the courts and tribunals have approached the matter when considering the parallel provisions relating to notices to trade unions and employee representatives: see paragraphs 26-27 above. In answer to questions from the Court, Mr Lissack accepted that, at least in the event that the date of the dismissals was brought forward, the relevant provisions of s.193(1) and (2) should be interpreted as referring to the *proposed* date on which the first dismissal would take effect.

83. Without definitively deciding the point, it seems to us that there is no real difficulty with concluding that, as a matter of construction, the offence is in principle capable of being committed at the point at which the employer fails to notify in accordance with the timetable he has specified in, or which is inherent in the proposal. In other words, the phrase "before the first of those dismissals takes effect" means "before the first of those dismissals takes effect *under the proposal*". This view is consistent with the case law on ss.188-192 TULRCA which, as we have pointed out, emphasises that what matters in terms of triggering the employer's obligations to inform and consult

appropriate representatives is the *proposal*, rather than what ultimately transpires. It is also consistent with how the EAT has interpreted the identical phrase in s.188A. Moreover, the legislation contemplates that there may be a protective award even before any employee has been dismissed, as has been pointed out above. One would expect there to be a consistency of approach in the interpretation of ss.188 and 193.

84. Our view is also consistent with the point that the purpose of the notice under s.193 is to enable the Secretary of State to become involved, including with a view to avoiding or reducing the number of dismissals. Although there is a degree of circularity to the point, this purpose is better served by requiring notice to be given where there is a relevant proposal even if ultimately there are no dismissals, or fewer dismissals occur than initially intended.

85. We do not need to decide the issue definitively, however, because whether or not a dismissal actually taking effect is part of the *actus reus* of the offence, the gravamen of the offence, the mischief aimed at, is the failure to give notice to the Secretary of State so as to enable them to "*seek solutions to the problems raised by the projected collective redundancies"*. Contrary to Mr Lissack's submissions, we do not accept that the true nature of the offence is causing the dismissals to take effect without having given the notice. Indeed, the fact that his analysis leads him to argue that "*the duty to notify is not triggered on the existence of a proposal"* and that *"the existence of a proposal is entirely peripheral and of no significance until it is executed"* tends to illustrate how wide of the mark that analysis is. The duty to notify *is* triggered on the existence of the proposal, but the time limit for discharging that duty will depend on the circumstances of the given case.

86. Nor do we accept Mr Lissack's analysis of who is the complainant and who suffers harm in relation to the s.194(1) offence. We agree with Mr Ozin that the Secretary of State is rightly regarded as the complainant, not just because the proceedings may only be instituted with his or her consent (s.194(2)) but also because the Secretary of State has a real interest in being given notice as this enables them to explore solutions to the redundancy situation. The Secretary of State also has an interest in that, at least in an insolvency situation, the employees are likely to make claims against them for relevant outstanding employment liabilities, including redundancy pay (s.166 Employment Rights Act 1996) and debts owed by the employer to the employees (s.184 of the 1996 Act), including remuneration under any protective award (s.184(2)(d)). In a very real sense, then, the notice enables the Secretary of State to safeguard the public interest, including the interests of the affected employees.

87. By analogy with the point that s.188 enacts an entitlement on the part of appropriate representatives to be informed and consulted in relation to proposed collective redundancies, s.193 enacts an entitlement on the part of the Secretary of State to be notified so that they may take steps to protect relevant interests. By the same token, although it is true that ultimately the affected employees are harmed by the failure to notify, the immediate harm resulting from the employer's failure to give notice is to the ability of the Secretary of State to act.

88. Quite apart from this, the offence with which Mr Forsey is charged is consenting to or conniving in USC's failure to notify in accordance with s.193(1) or neglecting to ensure compliance by USC. To our mind, this roots the alleged offence even more firmly in England, given that it is alleged that any such connivance etc. took place in England, in

the course of Mr Forsey's role as the director of an English company. The same is true of the behaviour of Mr Palmer, as administrator of that company, which led to his being charged with an offence under s.194(3).

Constitutional practice

89. Our attention was not drawn to any constitutional objection or practice which would lead to the conclusion that, despite the gravamen of the offence having been committed in England, the English courts could not or should not exercise jurisdiction in this case – let alone that Scotland has exclusive jurisdiction. No question of international comity arises, as we have pointed out. Mr Smith emphasised the separateness of the Scottish criminal justice system, and the role of the Lord Advocate within that system, but he did not even point to any constitutional practice whereby an offence which was committed under the law applicable in Great Britain as a result of conduct which occurred partly in England and partly in Scotland and resulted in harmful consequences in Scotland (taking Mr Forsey's case at its highest) could not be prosecuted in England. The reasoning of the decision in *Clements* suggests the contrary.

90. None of the cases cited to us supported the proposition that at one point Mr Smith appeared to be advancing, by analogy with the principles of private international law, that where two courts of different parts of Great Britain have concurrent jurisdiction over the same criminal offence, one of them should decline jurisdiction in favour of the other on the basis that the latter is the more appropriate forum, adumbrating and weighing up the factors connecting the crime each of the rival jurisdictions – particularly if the prosecution is already taking place in England and there is no indication that if the English court declined jurisdiction, a decision to prosecute would ever be taken in Scotland. Once it is established that there is jurisdiction to try the defendants, there is no policy reason why the prosecution should not continue in England. In any event, as we have said, Mr Forsey's case was put fairly and squarely on the basis that the Scottish courts have exclusive jurisdiction, and they do not.

Conclusion on the jurisdiction point

91. Whichever approach is adopted as between *Smith* and *Clements*, then, we have no doubt that the Northern Derbyshire Magistrates Court was entitled to exercise jurisdiction in this case:

    i) a substantial measure of the activities constituting the alleged offence took place in England; and/or

    ii) the mischief of the offence, namely the failure to notify the Secretary of State, took place in England; and/or

    iii) at least part of the conduct on which the alleged offence was based took place in England; and/or

    iv) there is no constitutional objection or practice which would prevent the English courts from exercising jurisdiction.

THE CIRCULARITY ARGUMENT

92. Mr Lissack also raised an unpleaded and unheralded argument in his skeleton argument which he referred to as "the circularity argument". Essentially this was that since Mr Forsey's decisions were said to be the basis of USC's offence under s.194(1) of TULRCA, he could not logically have consented to, connived in or neglected to prevent what were in effect his own actions so as to commit an offence personally for the purposes of s.194(3).

93. A highly unattractive feature of Mr Lissack's argument was that it would mean that those officers of the company who were personally responsible for the commission of the offence by the company could never themselves be criminally liable, whereas another individual falling within the scope of s.194(3) who went along with what they proposed, would be.

94. Mr Ozin's position was that this argument should not be entertained because it was not pleaded. But he also submitted that, in any event, it was misconceived.

95. In fairness to Mr Forsey, we decided that we should consider the circularity argument. However, it seemed to us to be a false point. Clearly, where the employer is a body corporate the employer and its directors, managers etc. are different legal personalities. The employer is criminally liable under s.193(1) as a result of the acts or omissions of its agents, but there is no requirement to prove any particular *mens rea* on their part: the existence of the triggering proposal and the failure to notify the Secretary of State are sufficient. We therefore see no difficulty with the proposition that those agents may also be liable, under s.193(3), if they have consented, connived etc. in the offence committed by the employer under s.193(1). This is not to make them liable for conniving in their own acts; it is to make them liable for conniving in or consenting to or failing to prevent the offence committed by the corporate entity. The language of s.194(3) and (4) supports that view, in that the focus appears to be on making any and all of the persons responsible for corporate management (and thus for taking the relevant decisions) personally liable as well as the body corporate which they manage.

THE OFFICER ISSUE

96. Once again the issue which arises is a pure question of law and, again without any disrespect to District Judge Davison, and acknowledging the careful consideration which he gave to the rival arguments in his reserved judgment, we propose to consider whether he reached the correct answer, without reference to his reasoning.

97. The office of administrator of a company is the creation of statute, namely Part II of the Insolvency Act 1986 (though the original provisions of that Act have been substantially expanded by subsequent legislation, particularly the Enterprise Act 2002). Thus the office did not exist at the time when TULRCA was enacted. At that time, it was only possible for certain types of secured creditor (essentially, mortgagees and debenture holders) to appoint a receiver and manager of charged property themselves, without asking the Court to do so, for the purpose of realising the security. Administrative receivers can still be appointed in this way, although such appointments have been largely superseded by appointments made under the Insolvency Act 1986.

98. A licensed insolvency practitioner may be appointed "out of court" as an administrator by certain qualifying creditors, by the company itself, or by its directors. In the present case, Mr Palmer was appointed by Mr Forsey, acting as sole director of USC, who gave the requisite statutory notice to the Court of his proposed appointment (and that of his joint administrators).

99. Unlike an administrative receiver appointed out of court under a mortgage or debenture, an administrator is an officer of the court, whether appointed in or out of court. As such, they are subject to the Court's general supervisory jurisdiction, and have a duty to act fairly and honourably as well as lawfully (in accordance with the rule in *In Re Condon, ex parte James* (1873-4) LR 9 Ch App. 609). Deliberate and unjustified interference with the performance of their duties may constitute a contempt of court.

100. Unlike a receiver, an administrator does not act in the interests of any specific creditor, but manages the company and its affairs in the interests of the general body of creditors. Once in office, he (or she) has extensive statutory powers of management of the company's business and affairs as agent for the company under Schedule B1 to the Insolvency Act. These include a specific power to appoint and dismiss the directors and the company's employees. The directors may not exercise any powers which might interfere with the exercise by the administrator of his powers, without his permission.

101. The obligations of an administrator are set out in Paragraph 3 of Schedule B1:

> "*(1) The administrator of a company must perform his functions with the objective of –*
>
> *(a) Rescuing the company as a going concern, or*
>
> *(b) Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or*
>
> *(c) Realising property in order to make a distribution to one or more secured or preferential creditors.*
>
> *(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.*
>
> *(3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either*
>
> *(a) that it is not reasonably practicable to achieve that objective, or*
>
> *(b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.*
>
> *(4) The administrator may perform his functions with the objective specified in sub-paragraph 1(c) only if –*

> *(a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and*
>
> *(b) he does not unnecessarily harm the interests of the creditors of the company as a whole.*

102. The hierarchical structure of the duties set out above makes it plain that the administrator should try, if at all possible, to rescue the company as a going concern, and it is only if he considers that that course would not produce the best result for its creditors, that he should pursue alternative strategies. However, his powers of management are undoubtedly exercised for the benefit of the body of creditors, rather than the shareholders. Mr Reade submitted that the language of s.194 (3) of TULRCA should be construed with this in mind. He submitted that an administrator is not a "manager… or similar officer of the company". Whilst he does have wide powers of management of the whole of the company's business, he is not an "officer of the company". Nor is he in a position "similar to" those of the identified officers, i.e. a director, manager or company secretary, because although he is managing the company's affairs and taking all the same types of decisions as a director would have taken prior to the company going into administration, and he is an agent for the company, he is not subject to the same duties. He is an officer of the court, irrespective of the identity of the person who appointed him, and his rights and duties are circumscribed by statute. Moreover, unlike the directors, he is obliged to act in the interests of external parties (the creditors) and treat them as paramount, whereas a company director must always act in the best interests of the company.

103. Mr Reade accepted that, once USC had been placed into administration, the only people who could have given notice to the Secretary of State of the proposed collective redundancies were the joint administrators. However, he submitted that an obligation on an administrator to give 30 days' notice of the proposed redundancies (a period which the Secretary of State could extend) could have serious ramifications and place the administrator in a position of conflict. If the business was fundamentally untenable, so that it was not possible to continue it as a going concern, it would plainly be in the best interests of the body of creditors to cease trading immediately and realise the assets. Paying the wages of the staff for another 30 days in such circumstances (assuming that there were sufficient funds to do so) would benefit them at the expense of the other creditors. This would put the administrator in the invidious situation where he had to choose between breaching his statutory duties or (subject to the statutory defence of "special circumstances") committing a criminal offence. Faced with that prospect, insolvency practitioners would be reluctant to take on an out of court appointment as an administrator.

104. Mr Reade further pointed out that waiting for more than 14 days before laying off the staff would result in their claims against the company ranking preferentially above even the administrators' claims for their costs and expenses of the administration. The House of Lords in *Powdrill v Watson* [1995] 2 AC 394 held that if an administrator caused the company to continue the employment of an employee for more than 14 days after his appointment, that inevitably meant he had adopted the contract of employment and elected to treat it as giving rise to a separate liability in the administration. That consequence could not be avoided unilaterally by the administrator telling the employee that he was not adopting his contract or was only doing so on terms.

105. If he knew that he would be forced to wait for 30 days or risk criminal sanctions, Mr Reade submitted that the administrator would be likely to invite the Court to wind the company up, instead of proceeding with the administration, as the administration would be unlikely to achieve a better objective for the company's creditors than putting the company into liquidation. The power of the administrator to seek directions from the Court did not provide a solution, as the court has no power to relieve him from criminal liability.

106. In support of his proposed construction of the statute, Mr Reade relied upon the decision of the Court of Appeal in *In Re Johnson & Co (Builders) Ltd* [1955] Ch 634. The issue in that case was whether an administrative receiver of a company, appointed by a debenture holder, was a "manager or officer of the company" for the purposes of what was then s.333(1) of the Companies Act 1948. That section provided, so far as is relevant, that:

> *"If in the course of winding up a company it appears that any… director, manager, or liquidator, or any officer of the company has misapplied … any property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may …. examine into such conduct."*

107. The Vice-Chancellor had held that although the receiver was not an officer of the company, he fell within s.333 because he was a manager. The receiver's appeal succeeded on the basis that he was not a manager of the company, but rather of the company's property. Lord Evershed MR, who delivered the leading judgment, pointed out that whilst a receiver is treated as an agent of the company, so that he can deal effectively with third parties, he is concerned to realise the security not for the benefit of the company but for the benefit of the appointing creditor (the mortgagee bank). This, he said, appeared to negative the proposition that he owed some duty to the company to carry on the business of the company and to preserve its goodwill.

108. At page 645, Lord Evershed considered the argument that because the definition of "officer" in s.455(1) of the Companies Act 1948 expressly included a director, manager or secretary unless the context otherwise required, the express reference to both an "officer" and a "manager" in s.333 pointed to the word "manager" denoting someone who was a manager, in the natural sense, but who was not an officer. He said that there would have been much force in that argument if the 1948 Act had been the first statute to regulate the affairs of companies, but the language of s.333 replicated the language used in earlier Companies Acts, and the 1948 Act was the first to provide a definition of "officer". He was not persuaded that by including that definition, Parliament had intended to give the word "manager" a wider signification than it had previously possessed.

109. Considering the word "manager" independently of the definition section, Lord Evershed took the view that, because the receiver had limited powers of management, to be exercised only for the purposes of realising the security for the benefit of the appointing creditor, he was not a manager of the company but a manager of the property of the company. In realising the security, he owed no duty of care to see to it that there was as much as possible left over for those who were interested in the residual equity. That view was supported by the consideration that if the construction adopted by the Vice-Chancellor were right, a *court-appointed* receiver would also have to be held a

"manager" within the meaning of s.333, even though he would be an officer of the court and not an agent of the company for any purpose.

110. In his concurring judgment, Jenkins LJ relied on the reasoning of North J in *Astley v New Tivoli Ltd* [1899] 1 Ch 151 to find that a person appointed under the power in a debenture or mortgage deed, as opposed to being appointed by the company itself, cannot be treated as an "officer of the company". The question whether the receiver was a "manager" was more difficult, but he pointed to other provisions of the Companies Act 1948 which referred to receivers as managers of property rather than as managers of the company, subjected them to specific obligations, and treated them as distinct from officers of the company. He also relied on the different duties owed by a receiver, and to the absence of any obligation on him to carry on the company's business at the expense of the debenture holders.

111. Parker LJ observed at p.663 that:

> *"No doubt a person who, in fact, manages is a manager within [the definition in s.455] provided, and provided always, that he does so by virtue of some office which he holds in the company. But any work of management done by a receiver, though done as agent, is not done by virtue of any office that he holds in the company; and this is so whether he is appointed by the court or out of court".*

He went on to reject the argument based upon the definition of the word "officer" as including "manager" and the presence of both expressions in s.333 both on the basis of the history of that section and on the basis of the functions of a receiver. He said, at p.664:

> *"What, however, in my judgment, is decisive of the case is that any work of management done by a receiver is not done as manager of the company. The powers of management are ancillary to his position as receiver, and, in exercising those powers, he is not acting as manager of the company but as manager of the whole or part of the property of the company. This distinction is, as it were, underlined by the Act itself."* (Emphasis added.)

112. The upshot of Mr Palmer's proposed construction, as Mr Reade frankly acknowledged, is that the company itself as the employer would be guilty of a criminal offence, but the person with day to day conduct of its affairs, who decided to make the redundancies and signed the redundancy notices, would not be liable for *"conniving in, consenting to or neglecting to prevent"* the failure by the company to give the requisite statutory notice to the Secretary of State for which he was in fact responsible. That would be the case whether the administrator went along with a prior proposal by the director(s) to make the employees redundant, or whether he took that decision for himself upon assuming his office and taking stock of the situation.

113. This would mean that in practice, in circumstances in which the notice would have served a useful purpose, there would be nothing to deter non-compliance, and the criminal sanction would be meaningless. The classic example of a situation in which collective redundancies are likely to take place is where a company runs into the kind of financial problems which lead it to appoint an administrator. When a company is in

severe financial difficulty but winding-up is not (or not immediately) inevitable, slimming down the business, and running what is left of it, or selling off the viable aspects of it, is generally considered a more attractive option. If administrators are not caught by s.194(3) it would (as Mr Ozin put it) leave a vacuum in responsibility that would fail to protect the interests of workers and, we would add, the interests of their representatives and the Secretary of State.

114. Mr Ozin pointed to a different line of authority in which an administrator or liquidator has been treated as an "officer of the company". The earliest case, *Re X Company Ltd* [1907] Ch 92, appears to have proceeded on an assumption that the phrase *might* extend to a liquidator of the company so as to render him potentially liable for payment of stamp duty. On an application for directions, Parker J gave him permission to pay the duty, on the footing that he was an officer of the company and might be liable to penalties if he did not do so. In the course of argument, the judge observed that the liquidator *"has all the powers of the company subject to certain statutory limitations."*

115. *In Re Home Treat Ltd* [1991] BCC 705 concerned a company in administration whose business was being run by the administrators. They were concerned that the business might be *ultra vires* the company, and applied to the Court for directions under s.14 of the Insolvency Act. Harman J considered whether the Court's power under s.727 of the Companies Act 1985, in proceedings for negligence, default, breach of duty or breach of trust against an officer of the company or person employed by the company, to relieve that person from liability if they have acted "*honestly and reasonably and ought fairly to be excused"* could be used to protect the administrators, and concluded that it could. He accepted counsel's submission that an administrator appointed by the Court to conduct the business of the company with a view to a better realisation of its assets, or with a view to the survival of the undertaking or part thereof as a going concern, must surely, even more than a liquidator, be a person properly within the context an officer of the company.

116. At page 711 Harman J analysed the position thus:

> *"[The administrator] is an officer of the court, that is undoubtedly correct. He is also, by conducting the business of the company, it seems to me, an officer of the company. He is appointed under s.8(2) of the 1986 Act by an order directing that the affairs, business and property of the company shall be managed by the administrator.*
>
> *It seems to me quite clear that the word "officer", which merely means somebody who holds an office, and an office in relation to the company, can apply to an administrator. That is so even though he is also an officer of the court, there being in that context no conflict of duties between his duty as officer of the company and his duty as an officer of the court. In both capacities his duties are to manage the business and property of the company for the better effecting of the purpose for which the court made the order in the interests of the creditors and it may be eventually of the contributories of the company."*

117. More recently, in *Re Powertrain Ltd (in liquidation)* [2015] EWHC 3998 (Ch), [2017] 1 BCLC 95, Newey J (as he then was) held that the same statutory power to relieve an "officer of a company" from liability, which is now embodied in section 1157 of the

Companies Act 2006, applied to a liquidator. He decided at [13] that Harman J's reasoning in *Home Treat* appeared to be equally applicable to the position of a liquidator.

118. The decision of the Court of Appeal in *In Re Johnson & Co (Builders) Ltd* was not cited to the Court in *Home Treat* or *Powertrain*, but it is easily distinguishable. The section of the Companies Act under consideration in *Re Johnson* expressly applied to a liquidator, and a receiver has far more limited functions and responsibilities than either a liquidator or an administrator. In any event, the specific impediment in *Johnson* to the Court calling a receiver to account for misfeasance in the course of the performance of his duties has since been cured by statute.

119. In this case it was not suggested, nor could it sensibly be suggested, that the question whether an administrator is an officer of the company turns on whether he was appointed by the Court or out of court, and if he was appointed out of court whether he was appointed by the company itself, its directors or a qualifying creditor.

120. The phrase "*director, manager… or other similar officer"* appears in a number of other statutory provisions which have been interpreted as dealing with the liability of those in positions of senior managerial responsibility, as opposed to those acting under them. We have been shown a number of such provisions, but they do not appear to us to take the argument any further.

121. Mr Ozin submitted that the concerns expressed on behalf of the community of insolvency practitioners about the consequences of being exposed to liability under s.194(3) were overstated. An administrator could not connive in, consent to or neglect to prevent the company's failure to give notice to the Secretary of State until he assumed office. On coming into office, the administrator's first task would be to reach a view about whether the company or part of its business should be kept running as a going concern, what to do with the assets, and whether the plan which made most sense would lead to redundancies of more than 20 employees. If the administrator inherited a situation in which the directors had already proposed to make redundancies, he would have to make his own decision about whether to implement the plan or do something else. If he decided to go ahead with that proposal, he should check to see if the requisite notice had been given to the Secretary of State and if it had not, he should give the notice himself.

122. Mr Ozin submitted that if the exigencies of the situation facing the administrator were such that he needed to take a decision swiftly, in principle that would be capable of constituting "special circumstances" affording both him and the company a defence under s.193(7), provided that he gave the Secretary of State such notice as was reasonably practicable before serving the first of the redundancy notices.

123. Mr Reade did not accept that this provided a solution to the problem he had identified. He pointed out that "special circumstances" has been narrowly interpreted in this context, referring to the decision of the Court of Appeal in *Clarks of Hove Ltd v Baker's Union* [1978] 1 WLR 1207. That case specifically concerned the statutory duty of an employer (under the equivalent provisions of the Employment Protection Act 1975) to notify and consult the trade union or other representatives of the employees a specified time before making collective redundancies (although the statutory duty to notify the Secretary of State was also referred to by Geoffrey Lane LJ in his judgment).

124. The industrial tribunal had found that it was not reasonably practicable for the employers in that case to have given the requisite notice. However, it found that the insolvency of the company and the factors which led to it were not special circumstances. It said that "special" meant something out of the ordinary run of events, including commercial and financial events, such as the destruction of the plant, a general trading boycott, or the sudden withdrawal of supplies from the main supplier. The hope that money would be raised by the sale of assets or a loan on the security of the assets to meet high overheads and wages, and to reduce a large indebtedness, was not a special circumstance, any more than the failure of that hope to materialise.

125. The Court of Appeal endorsed that approach. Geoffrey Lane LJ (with whom Roskill LJ and Stephenson LJ agreed) said at page 1215 F-H:

> *"It seems to me that the way in which the phrase was interpreted by the industrial tribunal is correct. What they said, in effect, was this, that insolvency is, on its own, neither here nor there. It may be a special circumstance, it may not be a special circumstance. It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which was capable of being a special circumstance; and that is so whether the disaster is physical or financial. If the insolvency, however, were merely due to a gradual run-down of the company, as it was in this case, then those are facts on which the industrial tribunal can come to the conclusion that the circumstances were not special. In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word "special" in the context of this Act."*

126. It is therefore a question of fact in each case whether the "special circumstances" defence would be available to the company and therefore provide a defence for the person who might otherwise be liable under section 194(3) for consenting to, conniving in or neglecting to prevent the commission of an offence by the company under s.194(1). We appreciate that there will be situations in which it would not be available, even though the company is in administration, redundancies are a necessary feature of a plan to keep the business going, or a plan to run it down in an orderly fashion which would achieve better results for the creditors than a winding-up, and it is not reasonably practicable to give the prescribed amount of notice before making the redundancies.

127. That means that Mr Reade is correct in stating that there may be cases in which an administrator might find himself in the unenviable position of either committing a criminal offence or (at least arguably) breaching his statutory duties. Mr Ozin accepted this in oral argument. It is no answer to this unpalatable consequence of construing s.194(3) in the manner contended for by the Secretary of State, to say that if the administrator gave such notice as was reasonably practicable in those circumstances, it is unlikely that a prosecution would follow. An administrator should not have to rely on the exercise of prosecutorial discretion, and in any event the proper construction of the statute and who falls within the categories of individuals who may be liable to prosecution cannot depend on the availability of such a discretion.

128. On the other hand, the fact that interpreting the statute in a particular way could put an administrator into difficulties, whilst obviously relevant, cannot be decisive. It is also possible to conceive of situations in which a director of the company would be obliged to serve the notice on the company's behalf but, by doing so, would arguably be in breach of his duty to act in the best interests of the company. That dilemma would not preclude the director from being liable under s.193(4). In any event, the statute must be given a purposive construction, bearing in mind the underlying aims, even if that could lead to difficulties in certain cases.

129. Considering the statutory context, the aims of the CRD, and the purposes to be served in giving the requisite notice to the employees' representatives and the Secretary of State, Parliament must have intended that in principle anyone with responsibility for the day to day management and control of the corporate entity should be capable of being fixed with personal liability for the employer's failure to give the statutory notices which they had brought about. Harman J's analysis of the role of the administrator in *Home Treat*, and his reasons for concluding that an administrator is an "officer of the company" in the context of the relevant provisions of the Companies Acts with which he was concerned, seem to us to apply with equal force in the context of ss.193 and 194 of TULRCA. The administrator is both an officer of the court and an officer of the company; as Harman J explained, the two roles are not mutually inconsistent. An administrator manages the company itself, and its business, by virtue of the office, and has the specific power to dismiss the company's employees. He is not in an analogous position to an administrative receiver.

130. In s.194(3) the word "similar" qualifies "officer" and, as a matter of ordinary language, would naturally be understood to refer to someone who carries out the types of functions undertaken by the officers of the company who are expressly identified in the same sentence. We agree with Mr Ozin's submission that the focus of Parliament in this part of TULRCA is on the functions undertaken by the individual concerned, not on the duties which they owe. An administrator would naturally be understood to be a "similar officer" to a director or manager, as he is responsible for conducting or managing the business of the company as a whole and the functions he undertakes are similar. In practical terms, once the administrator assumes office there is no-one else who could give the statutory notices on behalf of the company, unless they do so under his direction. It is unnecessary to decide whether an administrator is also a "manager of the company" although in real and practical terms he is undoubtedly carrying out a managerial function in place of the directors, even if all he is managing is the orderly disposal of company assets and the laying off of the workforce.

131. It is clear from the language of s.194(3), reinforced by s.194(4), that the focus is upon any individual acting in a sufficiently senior managerial capacity who could be regarded as bearing some responsibility, in practical terms, for the corporate body's failure to give the requisite notice to the Secretary of State. We cannot accept that Parliament intended that a person who assumes a managerial role in succession to the directors, and who has all the same powers, including an express power of dismissal of the company's employees, should be excluded merely because their duties are not identical to those of a director nor owed to the same persons.

132. The construction advocated by Mr Reade would lead to an unacceptable lacuna which could deprive the section of much of its force. If the natural and proper construction of s.194(3) as including an administrator were to give rise to the kinds of problems

foreshadowed by Mr Reade, and leads to a surge in windings-up, or to wholesale refusals by insolvency practitioners to take on the role of administrator, that will be a matter for Parliament to address.

133. For those reasons, we reject the construction advocated on behalf of Mr Palmer. The District Judge was correct to find that an administrator can be prosecuted for an offence under s.194(3).

CONCLUSION

134. Accordingly, both these claims for judicial review are dismissed.