IN THE MANCHESTER CROWN COURT

T 2011 7411

Date: 20TH July 2012

Before:

HIS HONOUR JUDGE GILBART QC

HONORARY RECORDER OF MANCHESTER

- -

REGINA

V

LION STEEL EQUIPMENT LIMITED

SENTENCING REMARKS

1. The Defendant Lion Steel has pleaded guilty to the offence of corporate manslaughter, arising out of the death of its employee Steven Berry on 29th May 2008. at the factory premises in Hyde of the Defendant. Mr Berry fell some 13 metres to his death through a skylight in a roof, on to which roof he had gone to repair a leak. I shall say more about the circumstances of his death in a moment.

2. Before I say anything else, I should deal with the effect of his tragic death on his family. This awful accident happened while his wife was on holiday with her mother and daughter. She has now lost her husband after 20 years of being together. It has left a gaping void in her life and that of his children. Mrs Berry and other members of the family sat here throughout the trial, and behaved throughout with the utmost dignity.

3. Lion Steel is not a large firm. I had material put before me showing that there are many members of the same families working there, and the workforce is close knit. I have no doubt that his death was a tragedy also felt by everyone there, including those who run the company.

History of the case

4. I must deal with this to set in context some observations which I shall make about the Crown's case in due course.
5. There was originally an indictment containing 5 counts. That indictment alleged the following

   (a) Count 1; corporate manslaughter against Lion Steel contrary to section 1 of the *Corporate Manslaughter and Corporate Homicide Act 2007*. It alleged that on 29th May 2008, the Defendant " ……being an organisation, namely a corporation, and because of the way in which the organisations' activities were managed or organised by its senior management, caused the death of…..Steven Berry by failing to ensure that a safe system of work was in place in respect of work undertaken at roof height, which failure amounted to a gross breach of a relevant duty of care owed by it, to the deceased."

(b) Count 2 alleged manslaughter against three directors of the Defendant, Mr Palliser, Mr Williams, and Mr Coupe. It was the Crown's contention that each was under a personal duty of care towards the company's employee Mr Berry, and that he died as the result of what the Crown say was their gross negligence, or to put it another way, the gross breach of the duty of care the Crown asserted was owed by them as directors to him as an employee.

(c) Count 3 alleged that Lion Steel failed to discharge a duty pursuant to section 2 of the Health and Safety at Work Act 1974 (" HSWA"). It is alleged that as Mr Berry's employer, it failed to ensure so far as was reasonably practicable the safety of employees working at height.

(d) Count 4 alleged that the three director Defendants committed the offence of neglect, contrary to section 37 of HSWA. It alleged that the failure by Lion Steel in Count 3 was attributable to their neglect.

(e) Count 5 alleged against Lion Steel that there was a contravention of the Work at Height Regulations 2005 (and therefore an offence was alleged under section 33 of HSWA) because no suitable and sufficient measures were taken to prevent, so far as was reasonably practicable, persons falling a distance likely to cause injury.

6. On 4th May 2012 at a preparatory hearing, I severed Count 1 from the indictment. I did so because it would have been difficult in the extreme to try it alongside the count of manslaughter against the three directors, for reasons connected with the fact that the Act is not retrospective. That requires some explanation.

7. The Crown contended before me that while the Crown would call evidence of failures in management and gross breaches of duty which occurred before the commencement date, it based its case on Count 1 on what occurred or did not occur after 6th April 2008. In a nutshell it said that the duty of care existed before and after the commencement date, and that what had been a gross breach by omission continued thereafter. It contended that in considering whether the duty was complied with after 6th April 2008, and in considering whether any

breach of it was gross, it was entitled to call evidence of the history before the commencement date, and to refer to the length of time that had elapsed since matters were first brought to the company's and managers' attention.

8. I ruled that the Crown could not look to evidence of activities or whether they involved a breach or a gross breach, where such activities, breach or gross breach occurred before the date of commencement, save insofar as they were relevant to the existence of a duty on and after that date, or whether a breach after that date was a "gross breach." However I also ruled that, when considering whether that gross breach had occurred after the commencement date, evidence of events or knowledge before that were relevant insofar as they went to whether the breach was gross. My ruling contained this passage

> "(Count 1 may proceed) providing that the jury is only asked to consider events before 6th April 2008 in the context of
>
> (a) informing their decision as to whether the senior management knew of facts as at 6th April 2008 or later, or
>
> (b) whether their knowledge of past events rendered their conduct as at 6th April 2008 or afterwards as amounting to a gross breach of the duty upon them.
>
> Section 27 of the Act is not an exercise in amnesia, but <u>it is</u> an exercise in preventing the punishment as criminal of activities which occurred before the Act came into force."

9. However while evidence of matters capable of constituting conduct amounting to gross negligence by the director Defendants, but occurring before the commencement of the 2007 Act, was not admissible for the purposes of that count, it was admissible in the context of the allegation in Count 2 against the director Defendants. I ruled that a joint trial would have required directions to the jury of baffling complexity, which directions would probably have been ineffective. A copy of the ruling is attached as an appendix to these remarks. I also stayed the last count. There was no appeal against that ruling.

10. The result was that a jury was empanelled to hear the trial of the three directors for manslaughter at common law and the statutory offence of neglect, and of Lion Steel for breach of the Health and Safety at Work Act. That trial heard the prosecution's case on those three counts over some three weeks. In fact, the prosecution's case against Lion Steel for corporate manslaughter was effectively the case it ran against the three directors. But I must be careful at the sentencing

stage to adhere to the ruling I gave, and only deal with any gross breach occurring from the date of commencement.

11. There was no appeal by any party against my rulings. I should add for completeness that I had on 29th February 2012 refused to dismiss the charges against Mr Coupe on an application pursuant to paragraph 2 of Schedule 5 of the *Crime and Disorder Act 1998.*

12. Once the trial was under way, the Crown called its evidence on what had occurred, including the evidence it said showed gross negligence by the director Defendants. On 2nd July 2012, I gave my ruling on submissions of no case to answer made by the three directors. I ruled that in the cases of two directors (Williams and Coupe) there was no case to answer on the manslaughter count, and in the case of Mr Williams also no case to answer on the count of neglect. In the case of the prosecution of Mr Williams, I considered then, and do now, that it was a case that should never have been brought. In the case of Mr Coupe a weak but arguable case on manslaughter disappeared during the prosecution case, and there just remained a case on neglect. I should add for completeness that prosecuting authorities in cases of gross negligence manslaughter alleged against individuals would be well advised to grapple with the height of the bar set by the House of Lords and the Court of Appeal; see *R v Adomako* [1995] 1 AC 171, *R v Singh (Gurphal)* [1999] CLR 582, *Misra* [2004] EWCA Crim 2375 and *Yaqoob* [2005] EWCA Crim 2169. I also derived great assistance from the ruling of Mackay J in the prosecution of those individuals alleged to have committed gross negligence manslaughter in connection with the fatal Hatfield train crash. It appears that his wise words may not have received the attention from this prosecuting authority which they deserved.

13. After I had delivered my ruling, the prosecution informed me that it would not seek to appeal my ruling. All parties asked for time. Lion Steel then pleaded guilty to the count alleging corporate manslaughter, and the prosecution offered no evidence against Messrs Palliser or Coupe on the remaining counts. Williams and Coupe were to be acquitted on my direction anyway on the manslaughter count. Not Guilty verdicts were entered against the directors on all counts.

14. I am bound by those verdicts, and the personal levels of fault of those named directors is irrelevant, save insofar as it falls within the purview of what has to be shown to establish corporate manslaughter. I shall also pass comment in due

course on some other claims made by the Crown about the responsibilities of the Directors, some of which are wide of the mark.

The facts of the accident, and the nature of the breach of duty by the company

15. Mr Berry was employed as a maintenance man at Lion Steel equipment in Hyde. The factory was one of two owned by Lion Steel Equipment Limited. One was at Hyde in eastern Greater Manchester about 4 ½ miles from the Derbyshire border, and the other was about 50 miles away at Saltney which lies on the Welsh border with Cheshire, just west of Chester.

16. Mr Berry worked at Hyde doing maintenance work. Parts of the roof had been replaced in the recent years before the incident, and parts had not. The parts that had not been replaced included a section of metal roof running up at a pitch of about 22 degrees to a ridge. To one side of the roof (which I shall call Side A) lay a valley between it and a parallel section of ridged roof. On the opposite side (Side B) it ran down to a valley against a wall , in which were two office windows. At one end was a gable wall, with asphalt flashing covering the joint. Further from the wall- about 15 metres away- the roof consisted of fairly new metal sheeting with a trapezoidal cross section. Set into it were fibreglass skylights, but each was separated by the width of about 3 to 4 metal panels. However nearer the gable wall the roof consisted of older metal corrugated sheeting which was sinusoidal in cross section, being less sturdy that then the trapezoidal kind. Within that older section, which is about 15 metres long, there was a rectangular area on Side A below the ridge, but running parallel to it. In that section, the roof panels consisted of translucent fibreglass roof panels, each about 600 mm wide and 2.4 metres long . The first panel lay 700mm from the wall, but of that 700mm, 300mm was covered by felt forming part of the covering of the angle between wall and roof. The panels' bottom edge lay 2.3 metres measured over the roof surface from the valley gutter. A large circular vent pipe was situated about 2 metres from the wall, rising vertically through the second fibreglass panel along on Side A. The other end of this 15 metre section was abutted by the new trapezoidal roofing, with a space of at least 2 metres before the first rooflight.

17. The metal and fibreglass panels needed repairs from time to time, and there is evidence of holes where leaks occurred down into the works below through small holes being patched with strips of tape. There is also evidence that the flashing was in need of repair. Access to the roof, for whatever purpose, was gained by a door from the press shop which led via a roof valley along to the return gable end, where it met the valley running below Side A. The valley gutter running along Section A was 280 mm, against a recognised standard of 600mm. The narrowness was compounded by the fact that the roof on the opposite side (the new section) protruded out over the edge at a higher level, reducing the effective width of the gutter. The unchallenged photographic evidence called by the Crown also shows that at the point where the gutter passes below the new section of roofing below Section A, the new roofing projects across the gutter, almost entirely covering it, from the point where the older section finishes.

18. At one point the prosecution seemed to be suggesting that the fact that the roof needed repair or patching, or that tape was used, was somehow a matter for criticism. However its expert Mr James made no criticism on that ground. The significance of the fact that the roof had leaks, or that parts needed repairs or patching is restricted to one, but one important issue, which is that the fact that the roof needed attention from time to time. This case is emphatically <u>not</u> about standards of building maintenance; it is about whether the method of carrying it out was causative of Mr Berry's death, and the criminal responsibility attaching to the company for that death occurring.

19. Mr Berry had made his way on to the roof of part of a building at the Lion Steel Equipment Limited premises at Hyde on 29th May 2008. He did so in the course of his work, and there is evidence that he did so because there were leaks of water into the building below. There is also evidence that the director who was works manager knew of him doing that job that day. His exact route is not known, and the location of the part of the roof he was to visit has not been exactly described in evidence adduced by the Crown, but he had certainly made his way from the press shop along to the area I have referred to where Section A abuts the valley. While he was on the roof, he fell 13 metres to the floor below, suffering fatal injuries. There is evidence that while his weight was upon it, a fibreglass rooflight became detached from some of its fixings, twisted, and he

fell through the gap thereby created. The panel in question lay between the gable wall and the vent pipe. It is in issue whether he came to that panel having walked up the roof from the valley alongside the gable wall or up the roof slope further from it, or whether he had walked along the valley to the new part, gone up and over it, and had then walked back at the foot of Side B to do a repair, before coming back to the valley below Side A by taking a short cut over the ridge.

20. The prosecution evidence from their expert Mr James was that

(a) The older section of metal roof should have been assumed to be fragile unless a test (which could be on one panel) had shown that it was not. ("Fragile" in this context includes something which could give way as well as something which is fragile in the usual sense of that word). There is no evidence that any part of the metal roof failed;

(b) The rooflights should have been treated as fragile in any event;

(c) No-one should have been permitted to work on that section of ridged roof without adequate precautions being taken which would include as a minimum boards to lay over areas where he would be walking or standing, and the use of a line and safety harness, so that any fall would be arrested;

(d) It was not safe to walk or be working within 2 metres of a fragile area. It follows that it was unsafe to walk on the roof light, or to walk between it and the rooflight, unless protective measures were taken, including the wearing of a harness to arrest a fall;

(e) The valleys were themselves too narrow;

(f) At the time of the accident no boards or guards existed alongside the gutter to discourage persons leaving it to walk on the older section of roof;

(g) While he accepted that a route along the valley, and up over the new section would be a safe route to adopt to gain access to the other side, he said that there is always a danger in a workman working on his own wandering away from the designated route, and especially so given the obstructions described already. On the prosecution evidence that must be compounded if the valley is unguarded or other measures not adopted to prevent or deter access (including the use of this part of the roof as a short cut to get back to the valley near the gable corner). There were no warning notices, nor any barriers erected alongside the gutter to discourage access

(for example of the type shown in Figure 14 and described in paragraph 67 of " Health and Safety in Roof Work" HSG 33 published in 1998);

(h) A workman doing work on a roof must be properly trained, as must his supervisor.

21. The evidence is, and I find, that Mr Berry was not trained as a roofer. He was if anything a general maintenance man. He and another man, Mr Baines (who was not called as a witness) would do small repairs. If they were in any doubt about their ability to carry them out, they were instructed to ask for independent outside contractors to attend. The prosecution has called a great deal of evidence that someone doing such work required proper training, and that only a properly trained man should be on a roof on his own. The fact that Mr Berry, in the course of his employment, was up on the roof on his own, with no protective equipment, and with no measures taken to guard against falls showed that the system adopted for dealing with repairs was inadequate.

22. In my judgement the risk of a fall through the roof was an obvious one, and those running the company should have appreciated it. There is also abundant evidence that relevant HSE guidance and codes of practice warns of the danger of fragile roofs, and emphasises the need for proper supervision and training. There is evidence that Lion Steel had been warned by an HSE Inspector in 2006 that warning notices should be erected to keep persons away from fragile roofs. That knowledge was with the company's senior management when the 2007 Act came into force.

23. I accept that the company had devised a way of working, intended to keep Mr Berry and others off the fragile areas. Mr James accepted that such a system could be proper. But what the company did not do is to train Mr Berry properly, or to equip him or others with equipment, in the form of a harness and line, which would protect him should an accident occur. The absence of boards, or barriers defining routes, meant that there was nothing to dissuade a workman from taking a short cut, when any deficiency in the roof would cause him to plunge 13 metres to the floor below.

24. If that was not in focus already as the result of the various codes of practice and guidance documents, it became crystal clear as the result of the passage of the 2005 Regulations. Effectively, the system involved the untrained and inexpert

Mr Berry being asked to work on and around a fragile roof with no precautions being taken to guard against something going wrong, or him taking a short cut.

25. The Prosecution spent a great deal of time at trial, and have spent some again today, arguing that the company's insurance brokers and insurers warned it of the need for proper risk assessments, and that this was causative of the accident. All of this material relates to events occurring before the commencement date of the Act, and therefore if it is material now, it is so only to the question of whether a breach after 1st April 2008 was gross. But even if that were not the case, so far as the merits are concerned, I dealt at length with this aspect of the Crown's arguments in my ruling at the close of the prosecution case. I regard some of the Crown's case as unrealistic. I say that for these reasons

(a) It was clearly established at the trial that the insurer's requirements for risk assessments relating to roof work did not require a written assessment

(b) No insurer ever refused cover on the ground that the precautions for working on the roof at Hyde were inadequate. I shall quote part of my ruling

> "Indeed one should note Mrs Barton's visits to Hyde in February 2005 and April 2007. Her evidence (which was based on her notes made for internal AXA use) said nothing about any issue relating to roofs at Hyde, except that in 2007 she noted that large parts of the roof had been replaced.
>
> Her evidence showed also that the general health and safety situation at Hyde had improved substantially between 2002 and 2007. In 2007 she described the overall situation as "acceptable subject to risk requirements being completed within appropriate timescales." None related to roof work. There was no point at which AXA ever refused to insure the premises."

(c) In my judgement, the insurers and insurance brokers were also less than thorough in their assessments about the roof. The only point on what the insurance brokers, insurers and risk assessors advised is that the company should have been aware of the need for training, and for a proper assessment of risk, including the risk of working at heights. That proper assessment would have applied and considered HSE and other relevant guidance. But what is absent in this case is anyone saying that the system for dealing with the roof at Hyde was inadequate, or that it was an obvious

source of danger. Indeed at the trial, it was established that no-one from any of those bodies ever even drew attention to it. The highest the case can be put on warnings is that Mr Norton of the HSE said that there should be notices warning of fragile roofs. He also gave no warning that men should not work on the roof.

26. I also rejected (and do so now) the Crown's case on the relevance of what was happening at Chester, save in one respect. I accept that the Chester experience showed that Lion Steel had experience of properly conducted risk assessments and of having health and safety advice. But as was established beyond argument at trial, the assessments for working at height at Chester had nothing to do with roofs, but only with working internally on platforms or ladders. It is a source of concern to me that the Crown have continued to argue as they have.

27. I do not consider that any blame attaches to Mr Berry. He was getting on with his work, and met his death when he took just the sort of chance which the advice and regulations are designed to protect against.

28. It follows that while there was a gross breach of duty by the company, it is that this company, while doing something to deal with the obvious risks, did far less than was required. That is what transpired from Mr James' evidence in the witness box, which I accept. But what I do not accept is that it did so in the knowledge that its insurers and others were arguing that it should adopt a different system for the repair of roofs at Hyde.

The Guideline

29. I refer to the definitive guideline published by the Sentencing Guidelines Council in February 2010. By section 125 of the *Coroners and Justice Act 2009*, this court must, in sentencing the Defendant, follow any sentencing guidelines which are relevant to the case. unless the court is satisfied that it would be contrary to the interests of justice to do so.

30. I shall refer in particular to sections B (factors likely to affect seriousness), C (Financial information) , D (level of Fine) F (costs), before considering the effect of the plea of guilty.

Applying the tests of seriousness in the definitive guideline

31. By definition (see paragraph 5) the level of harm is serious, because a death was caused. But beyond that there is a wide range of factors assessing the seriousness of the offence (paragraph 6). I take them in turn

    (a) Foreseeability. Given the fact that any accident on a fragile roof would expose a workman to falling 13 metres, the risk of serious injury or death was obvious;

    (b) If I apply Mr James' evidence in the witness box, the company fell short of the required standard, but had done something to address the risk, albeit not nearly enough. The measures required to address it (training, boards, barriers and a harness or line) would not have been expensive to install;

    (c) The standards of safety were generally reasonable at the time of the accident, as the AXA report showed.. However I accept that at the Hyde works, there was less attention to the requirements of risk assessment and training generally than at Chester;

    (d) The responsibilities for the breach lie at the door of the director in charge of the Hyde works. Having heard evidence at the trial on this issue, I regard the other directors as bearing no or little responsibility for the failure to set up a proper system at Hyde.

32. As to the factors in paragraph 7- aggravating factors- I find those I have already identified, but no others. I should make it plain that I regard the failures by the company as serious, and that much of the prosecutions case on dealings with others added nothing to it. Indeed if anything it served to cloud a very straightforward issue.

33. I turn now to mitigating factors, as set out at paragraph 8. Lion Steel has a reasonable Health and Safety record. Since the accident happened it has stopped using its own workmen for roof repairs. It had shown in the past that it would take advice on health and safety, by the use of advisers at Chester, and the obtaining of advice from the risk assessment arm of its brokers. It could have done more, and had similar advice at Hyde.

34. I must also note the delays in bringing this case to court. It is now over 4 years since Mr Berry died. Although the last 12 months' delay was caused by the search for a date for the trial convenient to all parties, most of the previous delay was caused by the failure of the prosecuting authorities to act promptly. It took over three years for any charges to be brought, a delay which I find

unreasonable, and especially so when at that stage individuals were facing prosecution. It is relevant, but less so, in the case of a corporate Defendant. It is a matter which does not mitigate the level of fine, but may be relevant to questions of costs.

Financial position of the company

35. I turn now to the financial position of the company (paragraphs 12- 21). I have been provided with 3 years' accounts, and with an expert accountant's report.
36. The company manufactures lockers at its two sites in Hyde and Chester . In its current form it was set up in 1998 as a management buyout to prevent closure of the company and the loss of 150 jobs. It has 142 employees. Over the three years from 1st October 2008 to 30th September 2011 its turnover has been of the order of £ 10 million per annum, with a profit before tax of between £187,000 to £317,000. Its directors have been paid a total of £336,000 in each of the last two years, with the highest figure being £ 88,000. It follows that this is not a case of a company where the directors are creaming off large salaries.
37. Its cash flow analysis shows that cash generated by the company is used for payment of loan interest, payment of taxes, ongoing capital expenditure, lease payments, and repayment of loans. No dividends have been paid to shareholders in the last three years.
38. The balance sheets have also been produced. As one would expect the only substantial asset relates to the land and buildings, and the equipment, which are used to secure bank loans. The total value in the books is given as £ 1.67 million. A loan already exists on the Hyde premises. It was for £ 1 million, but after repayments has now been reduced to £ 283,000. I accept that in the current climate older factory buildings (as the Hyde works is) do not have a ready market, and that the machinery cannot be sold without risking the future of the business. The company also has its goodwill as an asset. It is of course of the nature of goodwill that it only retains that value if a business is sold as a going concern. Otherwise the company raises loans against the value of its trade debts to provide working capital.
39. In terms of its future business, reductions in public expenditure generally, and on schools in particular, may affect its ability to sustain its current turnover.

There are also commercial rivals here and in other parts of the world who provide stiff competition.

40. It follows from the above that this is a company which is holding its own financially, but as one would expect has to rely on loans and cashflow to keep going. It is also quite apparent from the material put before me that this is not a company which has engaged in extravagance.

41. The accountant's report provides very helpful information on how any fine could be paid. If a substantial fine were imposed with a short payment period, it would have a potentially severe impact on the company's ability to sustain itself in business.

42. I am very mindful of the 142 people who work at Lion Steel. I would regard it as a most regrettable consequence, which would add to the terrible consequences of Mr Berry's death, if the effect of an order of this court were to imperil the employment of his former colleagues and those who would have been had he lived. The Guideline refers to a fine of less than £ 500,000 seldom being appropriate after a trial. The accountant's report has satisfied me that a fine of over £ 100,000, if ordered to be paid in a short period, could have a serious effect on the ability of the company to pay its way and sustain its business.

43. On the other hand, the commission of this offence requires significant punishment, and I am quite satisfied that, with a longer payment period, that a loan can be raised on the buildings.

Timeliness of the plea of guilty

44. The plea came before the trial of Lion Steel for corporate manslaughter was due to start. I am told that a plea had been offered in April 2012, but in fact the company had denied the lesser charge at trial. The offer of a plea was on the basis that the charges against the directors would not be proceeded with. It was refused because the Crown wished to pursue the directors as well

45. The acceptability of the plea to the Crown altered after its main case against the directors had encountered real difficulty at trial. I have already commented on the view I take of the Crown's approach to the liability of two of the individual

directors. On the other hand, Lion Steel could have entered this plea a long time before.

46. Taking all those matters into account, I consider that the fine should be mitigated by a figure of 20% from that which would have obtained after trial.

Level of Fine

47. I have had regard to section D of the guideline. Having regard to the seriousness of the breach, but also to the other matters to which I have drawn attention, and to the company's financial position, I consider that the appropriate fine, after allowing 20% discount, is one of £ 480,000. It is to be paid in instalments as follows

(a)	By 30th September 2012	£ 100,000
(b)	By 30th September 2013	£ 150,000
(c)	By 30th September 2014	£ 150,000.
(d)	By 30th September 2015	£ 80,000

Other Orders

48. I make no order as to compensation. I am satisfied that the compensation to which Mr Berry's estate and dependants must be entitled can be dealt with through the civil process.

49. A publicity order was not asked for. It would achieve nothing which will not be achieved by the reporting of these sentencing remarks.

50. No remedial order was sought. I am satisfied that all necessary remedial steps have been taken.

51. There will be a victim surcharge of £ 15.

Costs

52. The Crown has claimed £ 163,857 in costs, made up as to £127,640 CPS costs (including counsel's fees), and £ 36,217 HSE investigation costs. Of those the figures incurred before April 2012 were £ 103,000 and £ 17,000 respectively, plus some part of counsel's fees (which total £ 74,274.19)

53. Mr Turner QC asked me to make no order as to costs, or to attribute no more than 25% of the costs to the case against Lion Steel. I reject that approach. I shall adopt a broad brush approach which reflects the facts that

(a) most of the preparation of the case would have been undertaken anyway

(b) the time spent in preparation over 3 years was excessive, and some of the case presented was unnecessary and irrelevant

(c) the fact is that the Crown has now effectively conceded that the offer made to it in April should have been accepted.

54. I shall therefore order that Lion Steel pay the Crown 60% of its costs incurred until April 2012. If I treat the total figure as £ 140,000 (so some counsel's fees are included) the result is an order for £ 84,000. That figure must be paid within 2 years of today's date.

APPENDIX

IN THE MANCHESTER CROWN COURT

T 2011 7411

Date: 4 May 2012

Before :

HIS HONOUR JUDGE GILBART QC
HONORARY RECORDER OF MANCHESTER

- - - - - - - - - - - - - - - - - - - -

REGINA

and

LION STEEL EQUIPMENT LIMITED	**First Defendant**
KEVIN PALLISER	**Second Defendant**
RICHARD VAUGHAN WILLIAMS	**Third Defendant**
GRAHAM COUPE	**Fourth Defendant**

- - - - - - - - - - - - - - - - - - - -

1. This is a ruling following a preparatory hearing, held pursuant to section 31 of the Criminal Procedure and Investigations Act 1996, and Rule 15.1 of the Criminal Procedure Rules.. The trial of the Defendants on this indictment is listed to start on 12th June 2012. This preparatory hearing has been ordered by consent, because the issues raised by the First Defendant about the first count raise questions relating to the law relating to the case, to the admissibility of evidence, and to questions of severance. Some additional matters have also been raised (listed below). I have been assisted by skeleton arguments provided by both Prosecution and First Defendant, albeit that I did not receive them until 3rd May (and 4th May in respect of some supplementary submissions).

2. In this case, the four Defendants face various charges arising out of the tragic death of Steven Berry on 29th May 2008 at the factory premises in Dukinfield of the First Defendant Lion Steel Equipment Limited (" LSEL"). Mr Berry, who was an employee of the company, fell some 40 feet to his death through a skylight in a roof, on to which roof he had gone to repair a leak.

3. The indictment alleges the following

   i) Count 1; corporate manslaughter against LSEL. It alleges that on 29th May 2008, the Defendant LSEL " ……being an organisation, namely a

corporation, and because of the way in which the organisations' activities were managed or organised by its senior management, caused the death of…..Steven Berry by failing to ensure that a safe system of work was in place in respect of work undertaken at roof height, which failure amounted to a gross breach of a relevant duty of care owed by it, to the deceased."

ii) Count 2 alleges manslaughter against three directors of the Defendant LSEL, Mr Palliser, Mr Williams, and Mr Coupe. It is the Crown's contention that each was under a personal duty of care towards the company's employee Mr Berry, and that he died as the result of what the Crown say was their gross negligence, or to put it another way, the gross breach of the duty of care the Crown asserts was owed by them as directors to him as an employee.

iii) Count 3 alleges that LSEL failed to discharge a duty pursuant to section 2 of the Health and Safety at Work Act 1974 (" HSWA"). It is alleged that as Mr Berry's employer, it failed to ensure so far as was reasonably practicable the safety of employees working at height.

iv) Count 4 alleges that the Second, Third and Fourth Defendants committed the offence of neglect, contrary to section 37 of HSWA. It is alleged that the failure by LSEL in Count 3 was attributable to their neglect.

v) Count 5 alleges against LSEL that there was a contravention of the Work at Height Regulations 2005 (and therefore an offence is alleged under section 33 of HSWA) because no suitable and sufficient measures were taken to prevent, so far as was reasonably practicable, persons falling a distance likely to cause injury.

4. The following arguments were addressed to me by Mr Turner QC on behalf of LSEL

i) In the light of how the Crown puts its case, Count 1 could not be proceeded with, and should be stayed or severed

ii) If the Crown wished to proceed with an allegation of manslaughter against LSEL, it could only do so by means of an allegation of manslaughter at common law

iii) Count 5 was unnecessary, and added nothing to Count 3. In addition it contained no adequate allegation because it did not specify the Regulation whose breach was alleged

iv) In any event, proper case management required that the advocate for LSEL should cross examine after the advocates for the other Defendants, and should present its case last.

5. The Crown, through Mr Jackson QC, resists arguments (i) and (iii). In the case of (ii) while he accepts that it could have been charged, he defends the Crown's use of the statutory charge of corporate manslaughter.

6. The starting point for consideration of the arguments about Count 1 is the effect of the the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA). It came into force on 6th April 2008, shortly before the tragic death of Mr Berry, and the Crown contend that there was a considerable history before the commencement date of the company and the three named directors

   i) failing to implement a safe system of working in respect of working on the roof, both generally, and with specific regard to Mr Berry, who, it is alleged, was not trained in working on roofs;

   ii) failed over a number of years to act on warnings given to them by others dealing with their insurance, or with health and safety advice, that their system of working was deficient.

7. A matter vigorously debated before me was the degree to which the history of dealings by the company and its directors before the date of commencement could be relied on when considering events after that date. It is therefore necessary to start with the law as it stood before the commencement of the Act.

8. A company could commit the offence of manslaughter by gross negligence. To be guilty of the common law offence of gross negligence manslaughter, there must have been a gross breach of a duty of care owed to the victim. Before a company could be convicted of manslaughter, a "directing mind" of the organisation (that is, a senior individual who can be said to embody the company in his actions and decisions) had to be shown to be guilty of the offence. It follows that for liability for manslaughter to be established, the Crown had to prove that

   i) There was a death, and

   ii) That death was caused by the gross negligence of a directing mind within the company.

9. CMCHA was enacted because of the problems that could occur in identifying a person who was the directing mind, whose conduct or omissions could be treated as grossly negligent.

10. Section 1(1) and (6) of CMCHA defines the offence of corporate manslaughter as follows

> "An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
> (a) causes a person's death, and
> (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."

11. Section 1(3) and (4) state that

"(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1)."

(4) For the purposes of this Act—

(a) "relevant duty of care" has the meaning given by section 2, read with sections 3 to 7;

(b) a breach of a duty of care by an organisation is a "gross" breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

(c) "senior management", in relation to an organisation, means the persons who play significant roles in—

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

12. It is helpful also to refer to section 2 at this stage. For the purposes of this case, it defines the "relevant duty of care" as

" (1) in relation to an organisation, …..any of the following duties owed by it under the law of negligence—

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;

(b) …….

(c) …….

(d) …….

(2)……

(3) ……

(4) A reference in subsection (1) to a duty owed under the law of negligence includes a reference to a duty that would be owed under the law of negligence but for any statutory provision under which liability is imposed in place of liability under that law.

13. By section 20

" the common law offence of manslaughter by gross negligence is abolished in its application to corporations……".

14. By section 27 (Commencement and Savings)

"(1) …….

(2)……..

(3) Section 1 does not apply in relation to anything done or omitted before the commencement of that section.

(4) Section 20 does not affect any liability, investigation, legal proceeding or penalty for or in respect of an offence committed wholly or partly before the commencement of that section.

(5) For the purposes of subsection (4) an offence is committed wholly or partly before the commencement of section 20 if any of the conduct or events alleged to constitute the offence occurred before that commencement."

15. The Crown's case against LSEL has always been that the three named directors and co-Defendants were the "senior management" of the company of the purposes of section 1(3) and (4) of the CMCHA. It follows that the Crown alleges that the gross breaches of the duty of care owed by the three men was a substantial element in the gross breach of the relevant duty of care for which the Crown contends.

16. The Crown has served particulars of the alleged offence under Count 1. It can be summarised thus: over a period of some years, the Company and its senior managers had been on notice that its system for dealing with work on the roof at Dukinfield was inadequate, if it existed at all, and that the roof required inspection, and that they failed to act on warnings which they had been given. The Crown's case is also that Mr Berry had had no adequate training, and was not a roofer by qualification or experience. For the purposes of this ruling, I shall assume that that case is made out, and that the senior managers concerned were each on notice. It contends that the duty on the company and on its directors to take reasonable care for the safety of its employees, and of Mr Berry, was a continuing one, and that the failures to take the appropriate measures amounted to gross breaches.

17. The argument advanced by LSEL on Count 1 is, in summary, that

i) The Crown's case relies on acts and omissions in the management and organisation of the company's activities, including breaches of duty, taking place before 6th April 2008, which is the date when CMCHA came into force;

ii) By virtue of sections 20 and 27(3), (4) and (5) the prosecution of an offence under CMCHA does not permit the Crown to ask the Court, when addressing whether the ingredients of the offence have been established, to look to acts or omissions which occurred before the date of commencement;

iii) The Crown's case, however it is dressed up, actually involves examination of the three named directors' conduct over the years before commencement;

iv) That therefore the count is wrong in law or must be stayed or must be severed.

18. The Crown contends, in summary, that while the Crown will call evidence of failures in management and gross breaches of duty which occurred before the commencement date, it bases its case on Count 1 on what occurred or did not occur after 6th April 2008. In a nutshell it says that the duty of care existed before and after the commencement date, and that what had been a gross breach by omission continued thereafter. It contends that in considering whether the duty was complied with after 6th April 2008, and in considering whether any breach of it was gross, it is entitled to call evidence of the history before the commencement date, and to refer to the length of time that had elapsed since matters were first brought to the company's and managers' attention.

19. Before turning to the nuts and bolts of that argument, it is right to observe that no-one appears to have addressed it as an issue until Mr Mark Turner QC was instructed, and raised it at the hearing on 24th February 2012. There is no doubt in my mind, having read the particulars supplied by the Crown before that date, in its further particulars ordered to be filed thereafter, and in its case summaries, that it was approaching this case on the basis that, in the context of Count 1, as well as Counts 2-5, it could rely on any evidence of what occurred beforehand in terms of management failures.

20. In my judgement, the following issues arise

    i) What are the ingredients of the offence of corporate manslaughter ?

    ii) To what extent can the jury consider evidence of what occurred before the commencement date, when addressing the "management or organisation of its activities" by LSEL ?

    iii) What are the sources of evidence of past relevant activities or gross breaches?

    iv) What will the effect be of Count 1 being tried alongside Count 2, where evidence of earlier activities is undoubtedly admissible against the three directors ?

    v) If it discloses an offence known to law, should the count be severed ?

(1) <u>What are the ingredients of the offence of corporate manslaughter ?</u>

21. In my judgement the Crown has to prove the following

    i) That LSEL is an organisation

    ii) That the way in which the activities of LSEL were managed or organised caused the death

    iii) That LSEL owed a duty at common law to take reasonable care to provide a safe system of working to its employee Mr Berry

iv) That Mr Berry's death was caused by a failure within the scope of the management and organisation of the activities of LSEL to perform that duty

v) That the breach of duty amounted to a gross breach of that duty of care, because the conduct alleged to constitute a failure fell far below what could reasonably be expected of LSEL in the circumstances

vi) That the way in which its activities were managed or organised by its senior management is a substantial element in the gross breach alleged.

vii) It is to be noted that it would not have been possible to charge the Second, Third or Fourth Defendants with any offence related to Count 1. By section 18

> "an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter."

22. There can be no doubt that CMCHA created a new offence. The offence has three fundamental elements

i) The death must have been caused by the way in which the its activities were managed or organised

ii) The death was caused by a gross breach of the common law duty of care imposed by the law of negligence on LSEL

iii) That gross breach was attributable wholly or substantially to the way in which its activities were managed or organised by its senior management.

23. Can the prosecution rely on evidence of what occurred before the commencement date in support of its case? In other words, are conduct or omissions forming part of the relevant " way in activities were managed or organised" so as to give rise to the gross breach of common law duty, but which occurred before the commencement date, capable of forming the subject matter of prosecution ?

24. One starts with general principle. A statute cannot render conduct unlawful retrospectively in the absence of clear words : ***Phillips v Eyre*** [1870] LR 6 QB 1 per Willes J and ***Yew Bon Tew v Kenderaan Bas Mara*** [1983] 1 AC 553 @ 558 per Lord Brightman.

25. This statute is dealing, among other situations, with the kind of case where omissions or conduct in the activities of senior management within a company over a period of time can create a set of circumstances in which the risk of accidental injury is increased. If death is caused as a result, then a criminal offence is committed. It follows that the law has the effect of rendering liable to criminal penalty conduct or omissions which were not the subject of criminal penalty before it came into force.

26. The situation before 6th April 2008 was different. LSEL was subject to criminal penalty if it committed the common law offence of manslaughter by gross negligence. It is of course common knowledge that prosecutions of companies for that offence were rarely brought, and succeeded even more rarely, because of the requirement that it had to be shown that the controlling mind of the company had been grossly negligent. It is significant in my judgement that the effect of the CMCHA is not a procedural or evidential one of introducing different rules on what evidence may be admitted to show what formed the controlling mind, but one of actually introducing a new substantive offence.

27. It follows in my judgement that the Crown cannot look to evidence of "activities" or whether they involved a "breach" or a " gross breach," where such activities, breach or gross breach occurred before the date of commencement, save insofar as they are relevant to the existence of a duty on and after that date, or whether a breach after that date was a "gross breach."

28. That interpretation, which I have arrived at after my own analysis, assisted by the submissions of counsel, is supported by academic opinion (see Ferguson at S.L.T [2007] 35 @ 251-260), and by the explanatory notes to the 2007 Act, and by the Health and Safety Executive.

29. Explanatory Note 66 to the statute refers to section 27(3)

> "Subsection (3) makes it clear that the legislation is not retrospective. Subsection (4) makes provision for the common law offence of manslaughter by gross negligence to remain in place in respect to corporations for conduct and events that occur prior to commencement. Proceedings in respect of the common law offence (whether started before or after the new offence is brought into force) and arising out of the conduct and events occurring prior to commencement will not be affected by the Act."

30. The Health and Safety Executive, in its publication "http://www.hse.gov.uk/enforce/enforcementguide/wrdeaths/investigation.htm #Manslaughter" (update 14th November 2011) include this passage (my italics):

> **"Corporate Manslaughter and Corporate Homicide Act 2007**
>
> 14. On 6th April 2008 the Corporate Manslaughter and Corporate Homicide Act 2007 came into force throughout the UK and created a new statutory offence. In England and Wales and Northern Ireland, the new offence is called corporate manslaughter (CM), and in Scotland it is called corporate homicide (CH).
>
> 15. *Where any of the conduct or events alleged to constitute the offence occurred before 6 April, the pre-existing common law will apply. Therefore, the Act will only apply to deaths where the conduct or harm, leading to the death, occurs on or after 6 April.*

16. CM/CH is investigated by the police and prosecutions are determined, and taken, by CPS. In England and Wales proceedings may not be instituted without the consent of the Director of Public Prosecutions.

17. The new offence is intended to work in conjunction with other forms of accountability such as gross negligent manslaughter for individuals and breaches of duties owed under the Health and Safety at Work Act and relevant statutory provisions. Consequently an organisation facing a charge of corporate manslaughter may, in relation to the same fatality and at the same time, also face a charge or charges of breaching the Health and Safety at Work etc. Act 1974.

18. A corporate body, such as a company, is a legal 'person' and can be prosecuted for a wide range of criminal offences. Until the corporate manslaughter/homicide Act came into force, this included manslaughter by gross negligence. To be guilty of the common law offence of gross negligence manslaughter, there must have been a gross breach of a duty of care owed to the victim. Before a company could have been convicted of manslaughter, a "directing mind" of the organisation (that is, a senior individual who can be said to embody the company in his actions and decisions) must also be guilty of the offence. This is known as the "identification principle", and it made it extremely difficult for organisations, other than the very small ones, to be prosecuted for manslaughter.

19. The government was therefore minded to update the law on manslaughter as it relates to corporations, and to bring in legislation that overcomes the problems created by the identification principle. This places responsibility on the working practices of the organisation, as set by senior management, rather than limiting investigations to questions of individual gross negligence by company bosses. The new law therefore removes the need to identify the 'controlling or directing mind' of the company, which is intended to make it easier to prosecute a company, or other employing organisation, for a corporate manslaughter/homicide offence."

(2) <u>To what extent can the jury consider evidence of what occurred before the commencement date, when addressing the "management or organisation of its activities" by LSEL ?</u>

31. Given my conclusion that the CMCHA is not of retrospective effect, and that what occurred before commencement cannot form activities for the purposes of the offence created by section 1, one must then consider whether evidence of such pre-commencement activities is admissible in a trial of a Defendant for the offence created by section 1.

32. Mr Turner QC, in a very able argument, submits that the effect of sections 20, 27(3) (4) and (5) is to prevent consideration of pre commencement activities. He says that while knowledge held at the commencement date is relevant, the court is prevented , when assessing whether a breach has occurred or is gross,

from considering what occurred before commencement . Thus for example, if a breach of the duty occurred after the date of commencement, and there was evidence that the managers were on notice that their system was inadequate, and one is considering whether it was a gross breach, he says that one is prevented from considering whether the inadequacy or knowledge of it was recent or long standing.

33. As a matter of first impression such an argument seems unpersuasive. Leaving the effect of sections 20 and 27 aside, one can test that by comparing two examples

    i) Suppose Company A has been warned on 1st April 2004, and at six monthly intervals thereafter, that its system for maintaining its heavy lifting gear was inadequate. The last warning had been on 1st April 2008, 6 days before the Act came into force. On 1st July 2008 the lifting gear failed while lifting a load as a result of its being inadequately maintained, causing the death of an employee standing beneath it.

    ii) By contrast Company B received a similar warning for the first time on 1st April 2008, before a similar accident on 1st July 2008.

34. In considering whether the breach by Company A to maintain its heavy lifting gear after 6th April 2008 was gross, it would in my judgement be wrong, and indeed entirely unrealistic, to exclude from consideration the fact that the failure was a long standing one and had been the subject of repeated warnings, one as recently as 3 months before the accident.

35. Mr Turner contends that the effect of section 27 (3)-(5) prevents that. He says, with his usual frankness, that the clock stopped ticking on 5th April 2008, and that a new clock started ticking again on 6th April. On his argument, Company A would be in no worse position than Company B if facing a charge under section 1.

36. It is part of his argument that pre-commencement date activities, including failures to perform its duty of care, can still be relevant if the charge brought is one of common law manslaughter by gross negligence. He contends that the effect of section 27(3) to (5) preserves liability for manslaughter caused by gross negligence before the commencement date, albeit that the death occurred afterwards.

37. Sections 27(3)-(5) are directed to "any liability, investigation, legal proceeding or penalty for or in respect of an offence." (subs (4). In the context of the issue being discussed here, the only relevant concept is " liability." Subs (5) does not extend the meaning of subs (4) but seeks to define it. The offences referred to are not specified in the section, but even if "offence" only refers to manslaughter, in my judgement in a case such as the present one it only has meaning in relation to an offence committed by then. I say that because, while a failure to take care by LSEL before 6th April 2008 could have constituted an offence under the Health and Safety at Work Act, no liability *for manslaughter* could exist until the death occurred. It follows in my judgement

that no liability for manslaughter at common law could have occurred in this case before 6th April 2008. It follows that there was nothing to be kept by section 27 as unaffected by the passage of section 20. Given the terms of section 20 (which abolished liability for the common law offence of manslaughter by gross negligence as from 6th April 2008) no liability on LSEL for common law manslaughter existed before that date, and none could be created thereafter.

38. I can conceive of some factual situations where the activities all occurred before the date of commencement, but the death occurred afterwards. If a company manufactures and sells a car with a fuel tank susceptible to explosion, the gross negligence would occur some time before the death. The same could also occur where a hospital permits, in a grossly negligent manner, some poisonous substance to be ingested by a patient, which causes death some time later. Let us assume that in both cases, the commencement date intervened. But those are cases where all the causative acts have occurred before the commencement date. If the result flowing from those pre commencements acts or omissions is a death after the commencement date, then the potential liability to be guilty of manslaughter has already been created. Even though I am not persuaded that the effect of the terms of sections 20 and 27 saves the ability for the car manufacturer or the hospital to be charged with gross negligence manslaughter at common law, there is a very substantial difference between those cases and the present, where the sending of Mr Berry up to the roof on the day of his death is an essential part of the acts/omissions which created the situation which caused his death.

39. It is right to say that the Crown seemed to accept that LSEL could have been charged with an offence at common law. I do not accept the common view of the Crown and of LSEL that, in the circumstances of this case, LSEL could be prosecuted at common law for a manslaughter where the death only occurred after the common law offence had been abolished. (And it should be noted that section 20 does not just prevent prosecution; it abolishes the offence in its application to corporations). In my judgement nothing in section 27 enables a prosecution to be brought against a company in the circumstances of this case for the common law offence of manslaughter by gross negligence, where the death occurred after the commencement date.

40. If that approach be correct, does section 27(3) to (5) prevent the adduction of evidence of what happened before the commencement date ? I do not consider that subsection (3) is concerned with the admissibility of evidence, but with the existence of liability, or by its reference to investigation, penalties etcetera, to clarify that an offence committed before then can still be investigated, charged and indicted under the common law.

41. Its purpose and effect is to define the date after which the matters described in section 1 constitute an offence- i.e whether “the way in which its activities are managed or organise causes a person's death” and whether that amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. It does not seek to prescribe or proscribe the evidence which may

be called to prove that a duty of care existed, nor whether any breach was gross.

42. I accept (and agree) that section 1 does not bite on activities or gross breaches occurring before the commencement date. But that is a different question from the admissibility of evidence about the nature or qualitative assessment of those breaches (i.e whether gross or not). Nothing in section 20 or 27 prevents such evidence being adduced, if relevant and otherwise admissible.

43. LSEL was of course under the same continuing common law duty of care to its employee Mr Berry in the civil law of negligence both before and after the commencement date. A breach of that duty arising after the commencement date is relevant to the offence under section 1. If there is evidence that as at the 6th April 2008 or thereafter the management had not taken steps to put into practice protective measures for employees which they had known for some years should be taken, the fact that a commencement date occurred on 6th April does not affect the nature of the duty at all, nor the existence of their accumulated knowledge. The conduct complained of would be that occurring after the commencement date, but , if established, would consist of a failure to implement a requirement or advice or good practice of which the senior management had known since before then.

44. But it must be remembered that a fundamental part of the Crown's case must also be to show that any breach was gross. On the interpretation of the statute which I have found, the breach in question can only be one occurring in the period from the 6th April onwards. Again, in my judgement, and subject always to the evidence that is adduced, a breach may be considered as gross in late April 2008 because (for example) it consisted of a failure at that time to act on knowledge gained long before.

45. But this is not a simple cosmetic point. There is no doubt that until the Crown sat down and thought about Mr Turner's point, it was relying on a long chronology of failings going back over several years, and it still relies on them under Count 2. Mr Turner is quite right when he says that the case now being argued by the Crown against him (i.e that it does not look to earlier breaches, but just looks at the response to the continuing duty but in its historical context) is an attempt to execute a neat volte face.

46. But that would not be fatal as a matter of substantive law to Count 1 proceeding, providing that the jury is only asked to consider events before 6th April 2008 in the context of

i) informing their decision as to whether the senior management knew of facts as at 6th April 2008 or later, or

ii) whether their knowledge of past events rendered their conduct as at 6th April 2008 or afterwards as amounting to a gross breach of the duty upon them.

Section 27 of the Act is not an exercise in amnesia, but it is an exercise in preventing the punishment as criminal of activities which occurred before the Act came into force.

47. However the route by which evidence of past dealings is admitted is not without difficulty. I shall consider that next.

(3) **Sources of evidence of past activities or gross breaches**

48. The discussion in the last section has shown that evidence of the accumulated knowledge and of past activities may be admissible under Count 1, so the fact that the Act is prospective in effect may not therefore exclude evidence of past misconduct.

49. But one must be careful to address the route to admissibility of such evidence. Evidence of gross breaches of duty on the part of the three other Defendants is to be called by the Crown, as part of its case against those Defendants that they are guilty of manslaughter under Count 2. (Note: I am here dealing with *gross breaches* not breaches which are relevant to Counts 3-5)

50. If those Defendants were not being tried together with LSEL, that evidence would not be admissible in the trial of LSEL, unless an application were made under sections 98 ff of the Criminal Justice Act 2003. Given that the Crown's case is that the conduct of the other three Defendants was reprehensible (and is therefore evidence of bad character within section 98) , it must follow that it could only be admitted against LSEL if it passed through a gateway in section 100 of the Act. Section 101 is not relevant as none of them would be a Defendant if LSEL were tried alone. Similarly, as the evidence of past conduct is by definition not conduct falling within "activities" in section 1, it is not excluded from the scope of " bad character" by section 98(b) of the 2003 Act.

51. I am prepared to accept that it could amount to important explanatory evidence under section 100 (1) (a) or (b), which read

> "100 (1) (a) it is important explanatory evidence,
> (b) it has substantial probative value in relation to a matter which—
> (i)is a matter in issue in the proceedings, and
> (ii)is of substantial importance in the context of the case as a whole"

52. But its relevance is not unrestricted. It only passes muster if it goes to an issue germane to Count 1, i.e. whether the directors had the relevant knowledge on or after 6th April 2008, and whether any breach on or after 6th April 2008 was gross.

53. But now one asks what happens when Count 1 is tried with Count 2. It is important to note that the issue in a general sense of whether there was or were a gross breach/breaches of duty by those directors is common to all four Defendants . The critical difference between LSEL on the one hand, and the Second to Fourth Defendants on the other, is that the court is not concerned in the case of Count 1 whether the breaches before April 2008 are to be regarded as gross; indeed they are irrelevant, save for the purposes I have referred to already. It follows that the jury will have to be directed that while it can and must consider whether the conduct of the any or all of the Second to Fourth Defendants on Count 2 in the years before April 2008 amounted to a gross breach insofar as the case against him or them is concerned, it must not treat that as determinative of whether there was a gross breach after 6th April 2008, and because of the terms of section 1(3) about senior management, must

consider separately what the state of mind was of the same Defendants as at 6th April 2008 and subsequently.

54. There are of course cases where juries are routinely directed that they must set aside part of the evidence when considering the case of one or some of a number of Defendants. A commonplace example involves the direction to the jury in the trial of A, B and C that what A and B told the Police C had done is not evidence against C. That is not a difficult concept to grasp; juries are well used to discounting allegations made by A against C in the absence of C, although there are (albeit fairly rare) cases where the effect of what one Defendant has said is so prejudicial that there should be separate trials of one co-Defendant from another. But this is different. Here the jury are required to consider the conduct of the directors P W and C on Count 2, including their conduct both before and after 6th April 2008, and on Count 1 consider their conduct, but only insofar as it happened after 6th April 2008, and exclude what happened before, and exclude consideration of whether what happened before amounted to a gross breach, save for considering if what occurred later was a gross breach.

55. On any view that requires a direction to the jury which might, even with a substantial amount of optimism, be said to be one of considerable complexity. But it also generates the potential for unfairness to the First Defendant, because it could easily lead to the jury effectively treating *pre commencement* conduct of a type criminalised by the 2007 Act if it occurred *after commencement* as conduct falling within the ambit of Count 1. That is in part the consequence of the legislation electing to create a new offence rather than dealing with the nature of the evidence admissible to prove the existing common law offence. But whatever the reason, it runs a considerable risk that, as actually tried by a jury, the offence in Count 1 would be looked at as if its ambit was of retrospective effect.

56. Unlike the situation relating to a Defendant's bad character under gateway (d) in section 101(1) (see section 101(3)) , the Court has no power to exclude evidence admissible under section 100, save for the general power of exclusion under section 78 of the Police and Criminal Evidence Act 1984. However a judge could not exclude such evidence for one purpose but allow its inclusion for another. Either the evidence will be called and heard, or it will not.

(4) <u>What will the effect be of Count 1 being tried alongside Count 2, where evidence of earlier activities is undoubtedly admissible against the three directors ?</u>

57. As already indicated, I consider that the situation created here has the potential for unfairness. I have the power to order Count 1 to be stayed or severed from the other counts.

58. Before deciding whether or not to prevent Count 1 being tried with the other counts, I must look to see whether there are any countervailing considerations. LSEL is charged with corporate manslaughter, and with offences under the HSWA. All of the material upon which the Crown seeks to rely is admissible in the context of Count 3. Those who control this company – the three other Defendants- are all charged with manslaughter and with specific offences under the 1974 Act. It is a matter for the prosecuting authority what offences it

alleges, but the fact is that those who were in charge already face serious charges, and the company is charged with serious regulatory offences, which would attract significant financial penalty in the event of a conviction, albeit less than would be likely should it be convicted of corporate manslaughter.

59. The trial of Counts 2 to 5 without Count 1 will not limit the Crown in the evidence it can call, and, if convictions occur on Counts 3 and/or 5, will still expose LSEL to substantial penalty. If they are tried together, I consider that it creates a real risk of unfairness to LSEL. It will also create a formidably difficult task for the jury, who will have to deal with evidence of direct relevance to the causation of the death if considered under Count 2, but which they will be directed to ignore, save for limited purposes, when addressing Count 1. I regard that as simply unrealistic.

60. For that reason, and in exercise of my case management powers, I order that Count 1 be severed from the indictment and, should the Crown wish to pursue it to trial, tried separately.

Other applications

61. Mr Turner objects to the inclusion of Count 5 in the indictment, on the basis that it adds nothing to Count 3. He also points out that Count 5 does not specify the Regulation whose breach is asserted. Mr Jackson contends that the allegation of the Working at Height Regulations relates to a number of different breaches. He says that all those breaches go also to the allegation in Count 3.

62. One must be realistic here. The prosecution case on breach of the statutory duties of LSEL is that Mr Berry was asked to go onto a roof to do repair work when he was untrained, and when proper precautions had not been taken. That is fully dealt with in Count 3. If LSEL was also convicted under Count 5, it would not make any difference to sentence. I could detect nothing in what Mr Jackson put before me which showed that Count 5 added anything to Count 3.

63. Count 5 is currently not particularised. Given that it adds nothing, I shall stay it, and the trial can proceed on Counts 2 to 4.

64. Lastly Mr Turner argues that LSEL should not be first on the indictment, and in particular that he should cross examine last, and present his case last.

65. Mr Jackson did not take any real objection to this application, which was also supported by the other Defendants. I am of the view that it is logical if LSEL goes last. The allegations made by the Crown relate largely to the conduct of the three directors who are the other Defendants, which is then regarded as the company's conduct in the context of Count 3. It would have been even more important if Count 1 were tried with the other counts, when factual cross examination on events may be required.