Adverse inferences and bodies corporate: a golden silence?

By Tim Green and William Moody

It is well-established that adverse inferences may be drawn from a defendant's silence during trial, often providing powerful evidence for the prosecution. In this alerter, we consider the vexed question of whether adverse inferences from silence can be drawn against corporate defendants, and if so, in what circumstances.

The starting point - adverse inferences against natural persons

1. The Criminal Justice and Public Order Act 1994 ("**CJPOA**") introduced a number of statutory "exceptions" to the right to silence, by greatly expanding the circumstances in which an inference may be drawn against persons either under investigation or on trial. The circumstances in which an inference can arise are fourfold:

    a. **Section 34**: a defendant's ("**D**") failure to mention facts when questioned or charged under caution. Whilst D has a right to silence, a jury may make an adverse inference against him or her when they fail to mention facts during the investigation later relied upon in their defence. The facts must be those which D would reasonably have been expected to mention when so questioned, charged or informed, and the inference that can be drawn is that D is guilty of the offence charged having no defence to advance.

b. **Section 35**: D's silence at trial. Where D is deemed to be in a physical and mental condition that makes it desirable to give evidence, and D chooses not to do so, the jury may draw an adverse inference. The Court must be satisfied that D is aware that the stage has been reached at which evidence can be given for the defence and that they can, if they wish, give evidence. The Court must also be satisfied that if he or she chooses to give evidence and without good cause refuses to answer a question, an adverse inference may be drawn against him or her, typically that D has no explanation for the evidence admitted.

c. **Section 36**: D's failure to account for objects, substances or marks. This applies where D is arrested and cannot, at the time of arrest, give an explanation for a particular object, substance or mark in his or her vicinity that may be attributable to them.

d. **Section 37**: D's failure or refusal to account for their presence at a particular place. This applies where D is found at a place and during the time at which the offence for which he or she is arrested occurs and fails or refuses to account for his or her presence there.

2. In this alerter, we focus on section 35: adverse inferences from D's silence at trial, although the discussion that follows could equally apply to the four adverse inferences that might arise.

3. It is important to remember that s. 35 CJPOA provides protection for a D who either lacks the physical or mental condition for it to be "desirable" to give evidence (importing a level of discretion for a Judge in deciding what is desirable), or who is not aware that an inference may be drawn if they do not give evidence. S. 35 grants D further protection by not permitting an adverse inference to be drawn where there is "good cause" for silence, or for refusing to answer a question. Case law has defined what constitutes a "good cause" to refuse to answer a question at trial, but remains sparse on adverse inferences against bodies corporate.

Adverse inferences against bodies corporate – the original intention of Parliament in framing s. 35 CJPOA

4. It is a well-established principle of the common law that a corporation is a separate legal personality from the shareholders and officers of the said corporation. Practitioners will know that it is frequently the case that a corporate D will call evidence on its behalf during a trial for a health and safety offence, for example an expert, but not call evidence that purports to be from the company itself.

5. Surprisingly, the wording of s. 35 CJPOA does not indicate whether an adverse inference may be applied to individual defendants only or to all Ds, including corporates, where they do not call evidence from the corporation itself. What is more, in the 27 years since the CJPOA came into force, there is no appellate authority which resolves the question of the scope of adverse inferences and corporations. Blackstone's *Criminal Practice* (2021) and Phipson on Evidence (19th ed.) do not consider the issue of bodies corporate and adverse inferences at all, suggesting a sincere lack of consideration for the issue across the board.

6. On the other hand, Archbold's *Criminal Pleading, Evidence and Practice* (2021) does deal with the matter but only in very short order. Under the heading of "Bodies Corporate" (at §4-380a), the editors write:

> *Whilst a corporate defendant can call evidence, it cannot give evidence. Although, unless the contrary intention appears, "person" includes a body of persons corporate or unincorporate (Interpretation Act 1978, s.5, and Sch.1), as originally enacted s. 35 applied to the trial of any person "who has attained the age of fourteen years"; these words were removed by the Crime and Disorder Act 1998, s. 35, under the heading "Effect of child's silence at trial"; thus it is submitted that the contrary intention does indeed appear, and that the warning should not be given to corporate defendants* (emphasis added).

7. In our view, the admittedly terse assessment made by Archbold—that the intention of Parliament when framing s. 35 CJPOA was for it to apply only to natural persons—is probably correct.

8. Schedule 1 of the Interpretation Act 1978 provides that when the term "*person*" is deployed in a statute, it is to be defined broadly to include both natural and legal persons. This is so unless the contrary intention appears (as per section 5), which is arguably the case in s. 35 CJPOA as originally implemented. Thus when s. 35 CJPOA was first in force, it was drafted to only be applicable to persons who had attained the age of 14 years or older. This limitation on the age at which an adverse inference can be drawn against D has since been amended, but the obvious conclusion from this caveat in the original legislation is that s. 35 CJPOA was only ever intended to apply to natural persons and not to corporations.

9. This interpretation can also be inferred from the in-built protections for a D subject to s. 35, namely that he or she must be of sound physical and mental condition and so able to answer questions at trial before an adverse inference may be drawn. It follows that on the basis of its original construction, an adverse inference on the basis of s. 35 CJPOA is not lawful against bodies corporate for failure to give evidence at trial under s. 35 CJPOA.

Adverse inferences and the directing mind and will of the company

10. If we are wrong in our interpretation of s. 35 CJPOA, and a body corporate should be treated as an individual for the purpose of adverse inferences consistent with the Interpretation Act 1978, then one question requires an answer before all else: how exactly does a company speak for itself? It is easy

enough for managers, directors and experts to speak on behalf of the company: but who speaks **as** the company?

11. The issue of attributing a guilty mind to a body corporate is normally solved by reference to the concept of a body's "*directing mind and will*" ("**DMW**"), under the principle of "*identification*". As experienced practitioners know, the concept of DMW was designed to overcome the difficulties of establishing *mens rea* in convicting bodies corporate of general criminal offences like fraud or money laundering. The law is well established that the DMW of companies, like natural persons, must have a guilty mind for all elements of a crime to be established.[1]

12. The principle of identification of the DMW was recently restated in *Serious Fraud Office v Barclays Plc* [2018] EWHC 3055 (QB); [2020] 1 Cr. App. R. 28, in which it was emphasised that there should be no assumption that a company's director, or most senior officer, is the DMW for all purposes. The question of who constitutes the DMW of a company is answered by reference to the question above: whose act (or knowledge or state of mind) was intended to count as the act of the company *in this particular instance*? The question is inherently fact-specific, and not necessarily straightforward, as the Law Commission has recognised with its current consultation on reforming the identification rule.[2]

13. As an interesting aside, in health and safety law, the identification issue is largely avoided thanks to the wording of the Health and Safety at Work etc. Act 1974 ("**HSWA**"). Duties regarding safety at work are placed directly on employers, subject to the statutory defence, meaning there is

[1] *A-G's Ref (No. 2 of 1999)* [2000] QB 796. Referenced in Blackstone's *Criminal Practice*, at §A6.2.
[2] Law Commission, *Corporate Criminal Liability: a discussion paper* (June 2021). The discussion paper can be accessed through this link: https://www.lawcom.gov.uk/project/corporate-criminal-liability/.

no need to prove a *mens rea* on behalf of the DMW for the said duty to be breached. This is relevant to the discussion about adverse inferences because there is no need for the prosecution to even identify the DMW, let alone prove its state of mind, for an organisation to be guilty of an offence contrary to the HSWA. This arguably makes an adverse inference that might arise from silence less relevant in a HSWA context because the company's state of mind is much less relevant to the elements of the offence and the statutory defence of "reasonable practicability". Nonetheless, where bodies corporate accused of HSWA offences stray into other areas of criminal liability , the DMW will be of prime importance.

Alstom – a partial answer from the Court of Appeal

14. In the recent Court of Appeal judgment *R v Alstom Network UK Ltd* [2019] 2 Cr. App. R. 34, Gross LJ considered the issue of adverse inferences being drawn against a corporate D who did not give evidence during trial. *Alstom* and its two directors were jointly charged with conspiracy to bribe public officials in Tunisia. An issue related to whether or not a company could be convicted without its DMWs, i.e. the directors, being present for the trial – both of whom were absent for different reasons. The Court of Appeal found that it could be convicted despite the absence of all 3 Ds at the trial. In comments that were obiter to the issues on appeal, the Court of Appeal considered that any adverse inference arising from the failure of the Ds to give evidence, including the company, could only be held against the individuals themselves. In particular, at paragraph 57, Gross LJ stated:

> *The DMW, if indicted, cannot be compelled to give evidence. While a resulting adverse inference (from the DMW's silence) may be confined to the individual DMW (not the corporate defendant), it would certainly be of no assistance to the corporate defendant.*

15. To summarise, *Alstom* is authority that adverse inferences may not be drawn against bodies corporate where its DMW is indicted and fails to give evidence at trial. *Alstom* is also some authority that where a company is indicted for a criminal offence, an adverse inference pursuant to s. 35 CJPOA cannot be drawn where the company does not give evidence itself.

16. Even though that section of the judgment dealing with s. 35 CJPOA was obiter to the issues in the appeal, it also worth noting that it is consistent with the practical difficulty that any corporation or organisation has in giving evidence in its own right. Again, we come back to the question: who is the company's voice?

The issue of a "common voice"

17. Bodies corporate, unlike individuals, do not necessarily have a common voice to speak for them. In a trial for a HSWA offence there will often be witnesses called by either the prosecution or defence who can give evidence as to the company's conduct, but they cannot be said to speak for the company on trial. In this context, and because of the practical difficulties in the DMW giving evidence in a trial for a HSWA offence, the pragmatic course would be for the Judge to decline to give an adverse inferences direction. A corporate D cannot be truly said to have a voice for itself, let alone decide not to exercise that voice. Equally, it cannot be said that a body corporate is "aware" of a potential adverse inference where nobody makes the decision to not give evidence, because it cannot give evidence on its own behalf even if it wanted to.

Directions to the Jury

18. If, despite these fundamental obstacles—including the drafting of s. 35 CJPOA and the difficulty of the DMW having its own voice to give evidence—a Judge were nonetheless considering an adverse inference direction against a corporate defendant, the next step is to see how this engages with the standard directions to a jury.

19. The Crown Court Compendium (2020) instructs Judges to give an adverse inference direction to the jury only where (at §17-5, summarising s. 35 CJPOA):

> *(1) D's guilt is in issue;*
>
> *(2) It does not appear to the judge that the physical or mental condition of D makes it undesirable for the defendant to give evidence;*
>
> *(3) The trial judge has satisfied him/herself in the presence of the jury that D was aware that:*
>
> > *(a) the stage had been reached at which evidence could be given for the defence;*
> >
> > *(b) D could if he/she wished give evidence;*
> >
> > *(c) if D chose not to give evidence or, having been sworn, without good cause, refused to answer questions it would be permissible for the jury to draw such inferences as appear proper;*
>
> *(4) D declined to give evidence or refused, without good cause, to answer questions.*

20. In practice then, the trial Judge applying the standard directions could not be satisfied that the company could give evidence even if it wanted to because of the problem identifying the company's voice discussed above. The conditions precedent for allowing the jury to draw an adverse inference are

unlikely to be satisfied in any corporate trial whether for a HSWA offence or any other crime.

21. The Crown Court Compendium[3] goes on to clarify that even when the adverse inference direction is given, the direction must include a statement that:

    a. D had an absolute right not to give evidence.

    b. The burden of proving the case rests throughout upon the prosecution.

    c. The fact that D did not give evidence means that there is no evidence from D to rebut, contradict or explain the evidence of prosecution witnesses.

    d. The jury should be reminded of the warning given to D at the time his/her opportunity to give evidence arose.

    e. If they are sure that:

        i. the prosecution case is sufficiently strong to call for an answer; and

        ii. there is no sensible reason for D not to have given evidence, other than that D has no answer to the prosecution case or none that would stand up to cross examination.

22. Thus even where the adverse inference direction is given, there are various conditions that must be satisfied before the inference can be drawn. It is easy to see how a jury could be driven to conclude that there is in fact sensible reason for D not to have given evidence: namely identifying who is its voice and who is the DMW so that voice can speak for the company.

[3] Drawing on Lord Taylor CJ in *Cowan* [2003] EWCA Crim 2668.

23. It is also to be remembered that an adverse inference should only be drawn where it is fair to do so. The jury should only draw an adverse inference "*if satisfied that the applicants' silence... could only sensibly be attributed to their having no answer or none that would stand up to cross-examination.*"[4] This emphasises the need for the Court to ascertain that the lack of an answer at trial is due to the D's own choice, and they are aware of the consequences of not doing so.

24. Thus, even if the Judge were minded to give the adverse inference direction, it is hard to see how a jury being faithful to the proper direction could draw an adverse inference from a company's silence. The practical difficulties in the company giving evidence mean the jury could only very rarely be satisfied that its silence was attributable to having no answer to the evidence, as opposed to having no voice.

25. A common theme in the Crown Court Compendium, and underlining the case law on adverse inferences, is that fairness is satisfied where a defendant makes a choice to not give evidence. This is reflected in the fact that the D must be warned in advance of their right to give evidence, and the risk of an adverse inference being drawn in their failure to do so. With a body corporate lacking that sort of common choice and common voice of an individual, an adverse inference would unlikely be fair in most circumstances.

Does the CJPOA merit reconsideration?

26. On the basis of the above, a company does not have one voice (save, perhaps, where it aligns with an individual person). As a result, it will be difficult—if not impossible—for a jury to be *sure* that its failure to give

[4] Crown Court Compendium, at 17-3(11); *Condron v UK* [2001] 31 EHRR 1 at [61].

evidence can be attributed to having decided not to use that voice and conclude its failure to give evidence was because it had no defence.

27. This might reasonably be said to reflect a gap in the CJPOA, which makes the fairness requirement an insurmountable hurdle for adverse inference directions to be made against bodies corporate. This is perhaps an issue which the Law Commission should consider in their ongoing review of corporate criminal liability. Explicit changes to section 34 to 37 CJPOA which permitted adverse inferences against companies would undoubtedly strengthen the hand of prosecutors, albeit the practical problem of identifying the common voice of the corporate defendant is likely to need wider reform.

Conclusions

28. Section 35 CJPOA was originally drafted to include only natural persons. *Alstom* seems to emphasise that where the DMW of a company does not give evidence, an adverse inference should not be drawn, and is some authority that adverse inferences from silence cannot be drawn against a company.

29. In short, defence practitioners are well armed to resist any application to draw an adverse inference against a corporate defendant tried for HSWA offences, or indeed any other offence. However, until the Court of Appeal unequivocally considers this question, the answer remains opaque—an outcome which is unsatisfactory for all sides of a corporate prosecution.

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