HENDERSON CHAMBERS

Alerter

Health & Safety

28.4.2023

Court of Appeal provides guidance on bad character evidence in H&S trials - *HSE v Evergreen Construction UK Limited* [2023] EWCA Crim 237

ISSUES AND SUMMARY

1. In the recent case of *HSE v Evergreen Construction UK Limited* ("***Evergreen***") the Court of Appeal has for the first time considered whether or not Enforcement Notices ("**ENs**") issued by the HSE can amount to evidence of bad character under s.98 Criminal Justice Act 2003, and on what basis they might be admitted during a trial. *Evergreen* is thus essential reading for all regulatory practitioners.

2. In short, Dingemans LJ giving the judgment of the Court held that:

    a) Prohibition Notices ("**PNs**") and Notices of Contravention ("**NoCs**") could amount to evidence of bad character where the underlying facts that gave rise to the Notices demonstrated "reprehensible conduct" within the definition of bad character – s112 CJA 2003.

    b) Evidence of PNs and NoCs issued in respect of two separate incidents was capable of establishing a propensity to offend (e.g., to undertake unsafe work activity) - s.101 (d) CJA 2003.

    c) Unless lack of safety was formally admitted as an agreed fact, evidence going to a propensity to undertake unsafe work activity was admissible as relevant to the creation of a foreseeable risk, so long as this remained in issue.

d) However, if safety failings were agreed evidence, and the trial concerned other issues (e.g., scope of undertaking), then bad character evidence derived from PNs and NoCs would not be relevant and would likely be inadmissible.

e) Even where PNs and NoCs and their underlying facts might amount to evidence of bad character, a tempered good character direction (see *R v Vye*; *R v Hunter*) might still be appropriate depending on the particular facts.

FACTS

4. The Appellant had been charged with breaches of duty contrary to section 3(1) of the Health and Safety at Work etc Act 1974 and regulation 4(1) of the Work at Height Regulations 2005, arising from the death of an employee who had suffered crushing injuries from falling materials unloaded from a lorry at a construction site ("**the accident**"). Three defendants were tried, with the central issue in Evergreen's case being whether or not it had been appointed in writing as the Principal Contractor ("**PC**") for the works. If Evergreen was the PC, then the unloading operation came within the scope of its duty under s3 (1) HSWA 74. On the other hand, if Evergreen was not the PC, then the accident was outside the scope of its undertaking.

5. Following a three-week trial at Birmingham Crown Court, and evidence from three experts, Evergreen was convicted by a majority verdict.

6. During the trial, HHJ Henderson admitted the following material as evidence of bad character under section 101(1)(d) of the CJA 2003, on the basis that it could demonstrate a propensity to commit the types of offences with which the Appellant was charged:

i. A NoC and two PNs issued by the HSE arising from risks from working at height at a construction site in London nine months before the accident;

ii. A NoC in relation to three alleged breaches of health and safety legislation, arising from risks of working at height at a different construction site in Essex six months before the accident;

iii. Correspondence between the Appellant and the HSE in which the Appellant proposed remedial action to cure the complaints made in respect of the London and Essex Notices ("**the Notices**"); and

iv. Pictures of the above construction sites showing apparent risks to health and safety.

ARGUMENTS ON APPEAL

Did the Notices establish propensity?

7. The Appellant' first ground was that the Notices did not amount to convictions or cautions and were analogous to fixed penalty notices ("**FPNs**"). The CoA has held FPNs are not admissible as evidence of bad character because they do not contain any admission of guilt. In *R v Hamer* [2010] EWCA Crim 2053 Judge LCJ held that:

> *"16. It is against that background that it seems to us to follow that the issue of such a notice was not admissible as an admission of an offence which would affect this appellant's good character. It did not impugn the good character of*

the appellant and had no effect on his entitlement to a good character direction. In short, it was irrelevant, and it should not have been admitted."

8. In giving the judgment of the CoA in *Evergreen* Dingemans LJ rejected this analysis. The Court looked behind the Notices to the underlying facts and apparent admissions made by the Appellant by way remedial action. So, at paragraph [24] the Court held that:

> *"A fixed penalty notice may not always imply an admission of bad character: see R v Gore [2009] EWCA Crim 1424, [2009] 1 WLR 2454 . But the relevant material that underlies the fixed penalty notice – or in this case prohibition notices – may show reprehensible conduct."*

9. There is some tension between these dicta and that in *R v Hamer*, where the court in effect held that a FPNs would *never* amount to bad character, whereas at [24] above the CoA held such a notice "may not always" imply an admission of bad character. In any event, this ground of appeal failed.

10. The Court then went on to say of the correspondence material between the Defendant and the HSE, at [25]:

> *"In this case the material went beyond evidence about an inspector's opinion of Evergreen's word. It included Evergreen's acceptance of the notice, their declared intention to put matters right in a letter dated 24th January 2017, and in photographs showing the excavations which were unguarded. In these circumstances this was evidence which was of bad character."*

11. It would appear that the court here recognised that the opinion of an HSE Inspector, taken without more, would not amount to bad character evidence—but crucially that the underlying evidence served with the NoC and PNs amounted to admissions by Evergreen of reprehensible conduct, In effect, by way of the remedial actions taken by the Appellant to satisfy the Notices the Appellant had admitted its shortcomings in so far as health and safety was concerned.

12. In these circumstances, the CoA treated the Notices in the manner of cautions containing admissions of guilt, rather than as unilateral notices akin to FPNs. Case law has long established that formal cautions are admissible as a species of bad character (see s101(1)(d) CJA 2003).

Can ENs establish a propensity?

13. The Appellant's second ground was that even if the Notices were bad character evidence, by themselves they did not establish a propensity which made the offences charged more likely. The facts were different, and no clear propensity could be inferred from the NoC and PNs even when taken together.

14. Again, the CoA did not agree. Having found that the Notices in Evergreen's case did amount to bad character evidence, at [28] of the judgment the Court went on to consider propensity and held that:

> *"It is recognised that one previous matter can establish a propensity – and here there were in fact two matters close in time which showed that Evergreen did not comply with safety critical duties. In our judgment, this was evidence of bad character. It was evidence that Evergreen had in the past committed offences of the type with which it had been charged while acting as main contractor, and it was capable of showing a propensity to breach health and safety laws when acting as main contractor*."

An important issue between the prosecution and defence?

15. Having concluded the Notices were bad character evidence and the underlying evidence established a propensity to "breach health and safety laws," the CoA then went on to consider whether the bad character went to an important issue between the prosecution and defence (ss 101 (d) and 103 CJA 2003). The Appellant's third ground of appeal and central submission was that the NoC and PNs were irrelevant to the issue in the trial, namely whether or not the prosecution had proved Evergreen was the PC.

16. The CoA found that even allowing for the fact that the central issue in the trial had been the identity of the PC, the offence charged still required the prosecution to prove to the criminal standard that the work at height had given rise to a foreseeable risk to health and safety. Given the existence of a risk was an essential element of the offence charged, the evidence of propensity to undertake unsafe work at height went to that issue in the trial. On this basis, the Notices were relevant evidence to an issue between the prosecution and defence, even if it was not the central issue at trial (see [29] and [30] of the judgment).

17. On this basis the third ground of appeal also failed. The CoA went on to conclude that there was also good evidence that Evergreen was appointed in writing as the PC and in these circumstances, the conviction was safe.

ANALYSIS

18. *Evergreen* poses a number of challenges for practitioners and their clients. Firstly, clients and their advisors will now need to consider very carefully how to respond to ENs. On the one hand, commercial interests often compel clients to take swift

remedial action to ensure work continues and a good relationship with the HSE is maintained, even if the breach alleged by the Notices is not admitted. On the other hand, *Evergreen* suggests this might be a naïve approach, and care will need to be taken by clients to ensure remedial action is completed without admitting that the Notices established failings of health and safety.

19. For example, post-*Evergreen* a client's response to an EN might include explicit statements that the alleged breaches in the Notices are not admitted, notwithstanding the remedial action taken. The client response could suggest that the remedial steps go beyond the standard of reasonable practicability but will be undertaken in any event in order to achieve best practice and enhance safety, without admitting an offence.

20. Secondly, post-*Evergreen* clients will need to consider carefully whether ENs should be appealed. Although the appeals procedure to the Employment Tribunal can be time consuming and expensive, where the client can foresee that the alleged breaches contained in a Notice may be evidence in a subsequent prosecution, an appeal against the Notice may be justified. Furthermore, if the Notice is not admitted by the client, then the prospect of re-litigating the facts giving rise to the Notice at a subsequent jury trial may itself deter the trial judge from admitting the evidence for fear of generating "satellite litigation."

21. Thirdly, any defendant having notice that the HSE will seek to admit bad character evidence may want to actively restrict the scope of the issues at trial to make such evidence irrelevant. For example, agreeing as a fact that the work activity in question gave rise to a foreseeable risk and taking sole with whether or the particular work activity that is the subject of trial was as safe reasonably practicable.

22. Finally, although this point was not part of the *Evergreen* appeal, HHJ Henderson did give Evergreen the benefit of a good character direction in his summing up, notwithstanding the admission of bad character evidence in the NoCs and PNs. This direction went both to Evergreen's credibility and also its propensity not to offend. This follows recent case law which established Judges have a broad discretion to give a good character direction where the evidence of bad character comes from sources other than convictions or cautions. Thus, in *R* v *Hunter* [2015] EWCA 683, Hallett VP held at [76] to [88]:

"Where a defendant has no previous convictions or cautions, but evidence is admitted and relied on by the Crown of other misconduct, the judge is obliged to give a bad character direction. He/she may consider that as a matter of fairness they should weave into their remarks a modified good character direction ...This too is a broad discretion ... Where the defendant has previous convictions and bad character is relied upon it is difficult to envisage a good character direction that would not offend the absurdity principle."

CONCLUSION

23. *Evergreen* was decided on its own facts, and in other cases the underlying evidence of bad character may not be clear cut giving other grounds to resist its admission. The defendant may also be able to frame the issues in the case so as to make the bad character evidence irrelevant or so overly complex that a judge does not admit it.

24. Even allowing for this, at a practical level *Evergreen* will probably make the distinction between HSE supervision and enforcement harder to manage. The

decision may lead to many further applications to admit bad character evidence, but does provide practitioners and judges with a clearer sense of how the wealth of case law on this subject might be applied to regulatory crime.

Tim Green KC, Counsel for Evergreen instructed by Kennedys Solicitors
Thomas Mallon
Henderson Chambers
28 April 2023