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Dealing with the controlling mind

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HSW Section 37(1): Points to prove

- An offence has been committed by a body corporate
- It was committed with the **consent** or **connivance** of, or was attributable to any **neglect** on the part of, any
- director, manager, secretary or other similar officer of the body corporate



Consent, connivance or neglect?

- **Consent:** the person was aware of what was going on and agreed to it,
- **Connivance:** the person was aware of what was going on
- **Neglect:** The person neglected an obligation or duty regarding what was going on



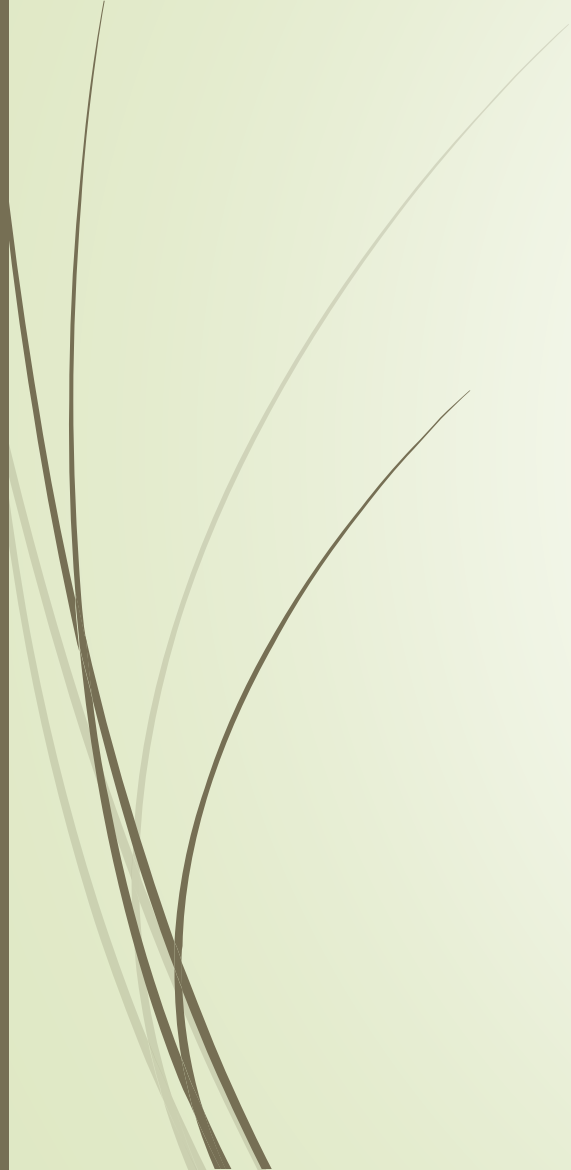
Why should we use S.37?

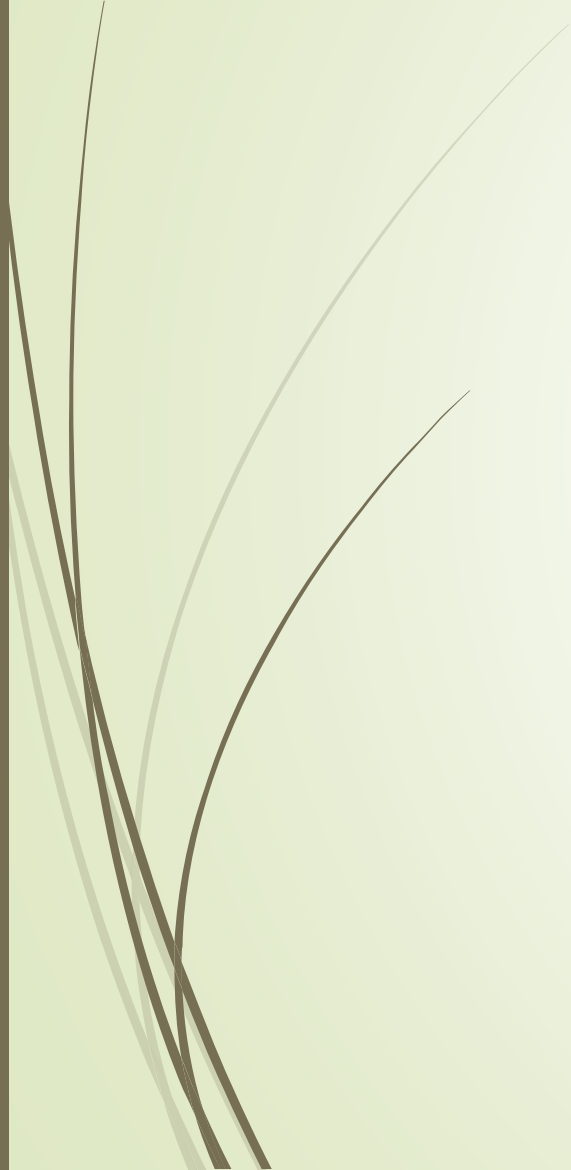
- ▶ Intent of the Health and Safety at Work Act
 - ▶ Risk and harm to others
 - ▶ Vulnerable persons
 - ▶ Accountability
 - ▶ Proportionality
 - ▶ Sustained compliance
- 

Celtic-Leather and Fabric Upholstery Ltd











Celtic-Leather and Fabric Upholstery Ltd

- Notices
- Partial compliance – notice extensions
- No sustained compliance - legal proceedings initiated

- Company liquidated and phoenixed
- Celtic-Leather prosecuted in liquidation



Liquidation and prosecution

- ▶ New name, same number = same legal entity
Different number = new legal entity
- ▶ Put the company on watch from Companies House
- ▶ Contact the liquidator and give notice of your interest and action
- ▶ Other interests of company officers
- ▶ Antecedent companies with same officers

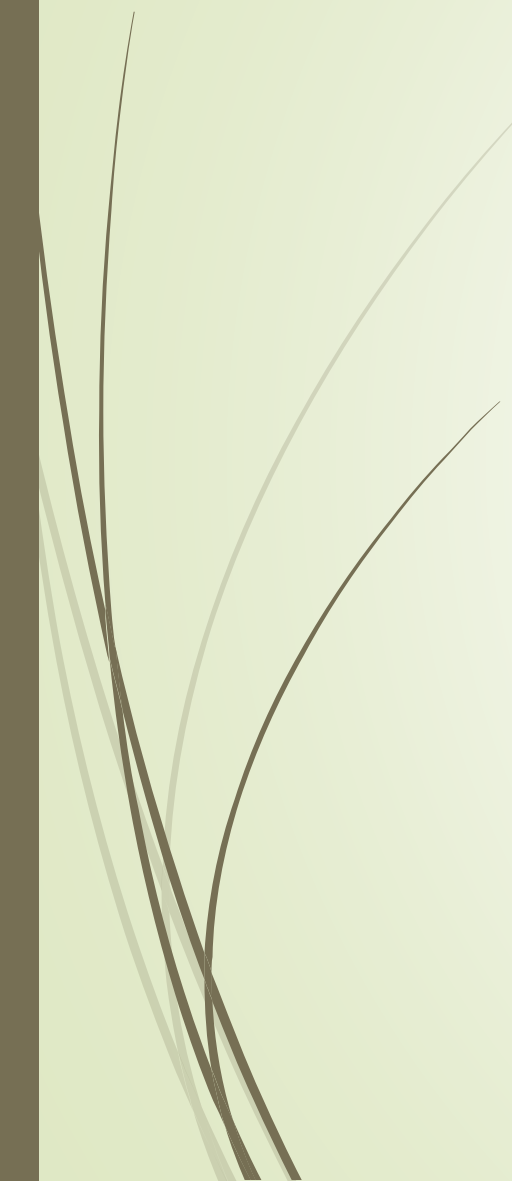


Liquidation and prosecution

- ▶ Public interest test: aggravating
 - ▶ seriousness of the offences / harm
 - ▶ level of culpability
 - ▶ history of the company's compliance
 - ▶ failure to comply with other enforcement action
- ▶ Public interest test: mitigating
 - ▶ unlikely to recover costs
 - ▶ nominal penalty may be imposed;
 - ▶ court may be reluctant to proceed in absence

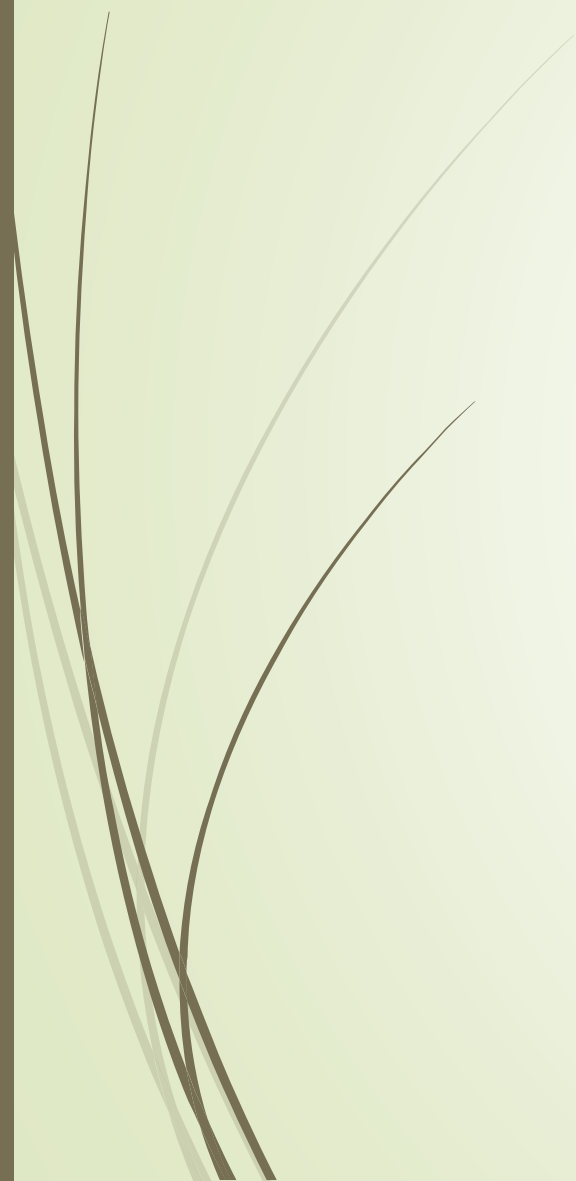


Celtic Leather - Court issues

- ▶ Liquidator declined to engage
 - ▶ New company declined to engage
 - ▶ No company representation
 - ▶ No plea entered
 - ▶ Court unwilling to proceed in absence of defendant
- 

Margam Hall Upholstery Ltd








Evidence of the controlling mind?

- ▶ Officer of the body corporate
 - ▶ Consent, connivance or neglect
- 



The controlling mind

- ▶ Director, Company Secretary:
 - ▶ Companies House, Articles of Association, other documentary evidence e.g. Board minutes
- ▶ Manager, secretary or other similar officer
 - ▶ Position and responsibilities in organisation
 - ▶ Scope of actual authority:
 - ▶ Decision making?
 - ▶ Investment, staffing, other resources?
 - ▶ Policies and procedures?
 - ▶ Take on new projects, direct work activity?



The controlling mind - Section 37 or Section 7?


- How is responsibility shared?
- Decision making?
- Effective control?
- Knowledge of the circumstances?
- Directing work activity?

- Fail to take obvious steps?
- Previous advice/warnings?



Margam Hall – practical issues

- Personal safety
- No home addresses for 3 defendants
- Use of S.20 powers to request information
- Service of summonses
 - Addresses from antecedent company information
 - Council Tax register
 - Process server
 - Tracing service



Margam Hall – Court issues

- ▶ Liquidator declined to become involved – offence dates
- ▶ No company representation
- ▶ No plea entered
- ▶ Court unwilling to proceed in absence of company defendant
- ▶ Crown Court – jury trial of company in absence of company defendant?



Sentencing Guidelines - individuals

- ▶ Culpability:
 - ▶ Very high – Intentionally breached or flagrantly disregarded the law
 - ▶ High - Actual foresight of or wilful blindness to risk of offending but risk nevertheless taken
 - ▶ Medium – Offence committed through act or omission which a person exercising reasonable care would not commit
- ▶ Aggravating factors:
 - ▶ Cost cutting at the expense of safety
 - ▶ Poor health and safety record
 - ▶ Falsification of documentation



Director disqualification

- ▶ Company Directors Disqualification Act 1986 (Section 2):
'Disqualification on conviction of indictable offence'



Prosecuting under S.37

- ▶ Do I have to prosecute the body corporate?
- ▶ What if the company and the individual are the same (e.g. sole Director)?
- ▶ When does the individual become a suspect?

Crofty Point Metals Ltd



Crofty Point Metals Ltd



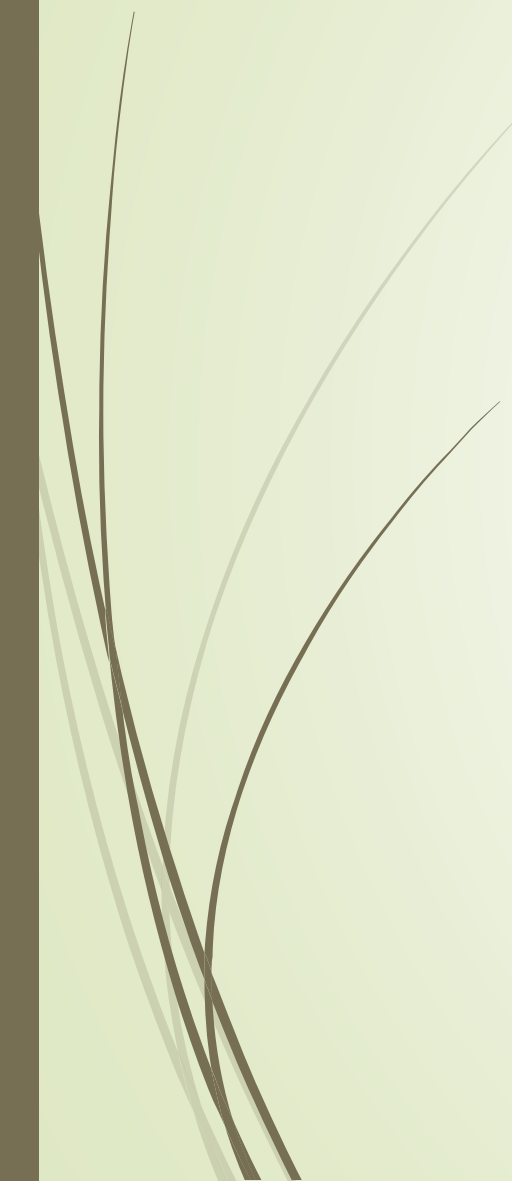


Crofty Point Metals Ltd

- Sole Director, 100% shareholder and owner of the land
- Told of NRW pending prosecution – change of Director
- HSE enforcement notices against company
- Director tried to comply on behalf of company but was stopped by his father
- Told of HSE pending prosecution – change of Director
- Proceedings by NRW and HSE against company, Director and individual
- Remedial order



Consequences of S.37 prosecutions (positive and negative)

- Defendants
 - Corporate body
 - Employees
 - Enforcers
 - Others
- 



Learning points

- Joint visits – corroboration and evidence gathering
- Tenacity
- Record attitude and behaviour
- Early legal advice
- Liaison with other enforcers
- Regular review, challenge and confirmation
- Process server
- Sustainable improvement

Thank you



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