Health & Safety Lawyers Association

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IN THIS ISSUE

The Court of Appeal reiterates that high fines will be applied against repeat and serious corporate offenders

On the 3rd June the Court of Appeal handed down judgment in the case of R. v Thames Water Utilities Ltd[2015] EWCA Crim960. This important case, presided over by the Lord Chief Justice has recently been heralded as a sign of the intention of the higher courts to impose higher fines on large corporate offenders.

Thames Water had pleaded guilty to an offence arising from the discharge of untreated sewage into a brook flowing through a nature reserve, an offence contrary to Regulations 38(1)(a) and 39(1) Environmental Permitting (England and Wales) Regulations 2010. Regulation 38 (1) provides that contravention of Regualtion 12 (1) is an offence. Regulation 12 (1) provides:

> 12.—(1) A person must not, except under and to the extent authorised by an environmental permit—
>
> (a) operate a regulated facility; or
>
> (b) cause or knowingly permit a water discharge activity or groundwater activity.

The company appealed against a fine of £250,000. The discharge had occurred from a sewage pumping station operated by Thames Water. The function of the pumping station was to receive untreated sewage from the surrounding area and from another pumping station and to transfer it downstream to a sewage treatment works. The cause of the discharge was the failure of two pumps whose role it was, was to transfer the waste further downstream. The pumps failed through an absence of routine maintenance, rendering the suction side of the pumps unserviceable. In the five months before the incident, there had been at approximately 16 instances of failures of the pump set. Prior to the waste discharge, alarms had activated indicating that the pump set had failed. Soon afterwards, the pumps were stripped out andupgraded to a specification that was better suited to deal with the environment in which they were placed. The recorder, who imposed the fine, found that the appellant had been negligent: The recorder held that the company had had a number of warnings that the pumps were breaking down; they were close to a very special nature site and should have been replaced earlier. Negligence plays no part in the commission of an offence contrary to Regulation 12 of the Permitting Regulations, it was merely the term of art used by the recorder, and subsequently adopted by the Court of Appeal, to characterise the rather lacklustre approach to pump maintenance admitted by the appellant; the appellant's counsel did not demur from the description.

This was the first case of its kind to come before a court since the Sentencing Council's definitive guideline on environmental offences came into effect. The proposed non-fatal sentencing guidelines for health and safety offences follow a very similar approach to the definitive environmental offences guideline which came into force in early 2014. It follows that the approach taken by the Court of Appeal in this case is likely to be indicative of the approach that would be taken by the court in a large corporate health and safety case.

The Council had made it clear that the starting points and range of fines in the environmental offences guideline did not apply to very large organisations such as the appellant. The effect of this judgment was to give guidance on the approach to be adopted in the case of very large commercial organisations ran for profit.

The court stated that the provisions in the Criminal Justice Act 2003 s.142, s.143 and s.164 were a starting point. The aim of the sentence was to bring home the appropriate message to the directors and shareholders of the company in question. Sentences imposed prior to the guideline were largely considered not to achieve that object. One cannot fail to see the comparison for health and safety practitioners. The stated aim of the Sentencing Council when developing the draft health and safety guidelines was very similar. The effect being that sentences are likely to rise considerably for large corporate offenders.

To put the judgment into perspective the court spent 10 out of 16 pages of the transcript dealing with the correct approach that should be taken to the admission of fresh evidence on appeal and on how counsel and sentencing judges should approach basis of plea and *R v Newton* hearings. This was not a judgment that exclusively concentrated on the appeal against sentence. That said the court laid out in clear and express terms the approach to take when sentencing large corporates.

The court indicated that the starting point for the sentencing of large corporate offenders ran for profit is ss.142, 143 and 164 of the Criminal Justice Act 2003, as summarised in paragraph 3 of R v. *Sellafield* Limited [2014] EWCA Crim 49. After having considered the various purposes of sentencingfollowed by the culpability of the offender and the harm caused, the courts attention then turned to the approach for the fixing of fines.

Mr. Justice Mitting then went onto state that:

"It is of particular importance in the case of such very large commercial organisations to take into account the financial circumstances of the offender as required by s.164 of the CJA 2003. This should ensure that the penalty imposed is not only proportionate and just, but will bring home to the management and shareholders the need to protect the environment."

The judge then went onto consider the provisions of S 164 CJA 2003, namely:

"(1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.

(2) The amount of any fine fixed by a court must be as such as, in the opinion of the court, reflects the seriousness of the offence.

(3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.

(4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine."

However when considering very large organisations it was held in clear and unambiguous terms that:

"The Court is not bound by, or even bound to start with, the ranges of fines suggested by the Sentencing Council in the cases of organisations which are merely "large"".

The particular approach taken

The court indicated that in the worst cases when great harm has been

"caused by deliberate action or inaction, the need to impose a just and proportionate penalty will necessitate a focus on the whole of the financial circumstances of the company."

The starting point, by reference to the guideline, is the turnover of the company,

"but having regard to all the financial circumstances, including profitability. In such a case, the objectives of punishment, deterrence and the removal of gain (for example by the decision of the management not to expend sufficient resources in modernisation and improvement) must be achieved by the level of penalty imposed. This may well result in a fine equal to a substantial percentage, up to 100%, of the company's pre-tax net profit for the year in question (or an average if there is more than one year involved), even if this results in fines in excess of £100 million."

The corporate size of the offender becomes much more important when some harm is caused by negligence or greater fault. Even in the case of a

large organisation with an impeccable record, the fine is designed to be large enough to bring the appropriate message home to the directors and shareholders and to punish them.

The court on two occasions observed that it would not have interfered with fines *"very substantially greater"* or *"significantly greater"* than six-figure fines imposed for environmental offences. It was axiomatic that all relevant mitigating features had to be taken into account. In environmental pollution cases, those would include prompt and effective measures to rectify the harm caused by the offence and to prevent its recurrence, frankness and co-operation with the authorities, the prompt payment of full compensation to those harmed by the offence and a prompt plea of guilty. In addition, significant expense voluntarily incurred inrecognition of the public harm done should be taken into account. Clear and accepted evidence from the chief executive or chairman of the main board that the board was taking effective steps to secure substantial overall improvement in the company's fulfillment of its environmental duties would be a significant mitigating factor.
The size of the company became much more important when harm was caused by negligence or greater fault. Even in the case of a large organisation with an impeccable record, the fine had to be large enough to bring the appropriate message home to the directors and shareholders and to punish them. In the case of repeat offenders, the fine should be far higher and should rise to the level necessary to ensure that the directors and shareholders took effective measures properly to reform themselves and ensure that they met their environmental obligations. In the instant case, the appellant's record over the years did not suggest a routine disregard of environmental obligations, but it did leave room for substantial improvement; its recent record suggested that the appropriate message had not fully struck home. On the other hand, a statement from one of the appellant's senior officers showed that the appellant was taking the issue of environmental pollution seriously and was spending substantial sums to modernise and improve its infrastructure. That represented significant mitigation. Nevertheless, the fine of £250,000 was lenient. The court held it would have had no hesitation in upholding a very substantially higher fine.

However, in concentrating on the company`s profitability the court has moved away from the approach taken for other offences. The draft Health and Safety Guideline focuses on company turnover, as does the sentencing approach for other financial crime such as fraud, and money laundering.
The court appears to have followed the approach taken for penalties handed down in the financial services markets where substantial breaches are based on an organisations profitability. The approach in financial services being more reparation based so as to ensure that organisations do not financial benefit from any particular breach. Profit used as the datum upon which a fine is based is riddled with difficulty. What would be the situation where a large unprofitable organisation ran at a loss where to offend? After all a percentage of less than nothing is less than nothing.

The court appears not to have been particularly concerned with the reinvestment of Thames Waters profits back into the company to improve services, notwithstanding that the company is providing a public service. This was held by the court in the *Sellafield* case to have been a significant mitigating factor which the court adverted to when it held that Network Rail's fine should be less than *Sellafield*'s. The approach taken by the Court of Appeal was one of 'look at all the financial circumstances'. Both Network Rail Infrastructure Ltd and *Sellafield Ltd* were of a similar profitability at the time of the time of sentence in that case to Thames Water Utilities in this case. Yet notwithstanding that the court in Thames Water took a more profitability biased approach.

Save for a complete change of direction by the Sentencing Council for Health and Safety Offences it is likely that the definitive guideline when published will retain as its sentencing focus the turnover of the company. However, in light of the judgment in this case it may well now be that the guidelines have a caveat for large corporate offenders to the extent that a sentencing judge is not fettered by the sentencing brackets contained within the guideline when sentencing corporations with very large turnovers.

Novation and the Construction (Design and Management) Regulations 2015

Imagine a scenario whereby at the start of a building project, an architect is engaged by the employer (who, for the purposes of the CDM Regulations 2015, is the Client) and appointed to act as Principal Designer in accordance with the CDM Regulations. The project is being procured via a design and build contract. Upon execution of the building contract by the employer and design and build contractor, the architect is novated to the contractor.

There are many different types of contract in the construction industry which a company may enter into to procure a building or facility. The different contract forms have generally become known as: traditional contracts, design and build contracts, management contracts, and integrated contracts.

Design and Build procurement works on the basis that the main contractor is responsible for undertaking both the design and construction work on a project, for an agreed fixed price.

Design and build projects can vary depending on the extent of the contractor's design responsibility and how much initial design is sought in the employer's requirements. The level of design responsibility and the input from the contractor is much greater on design and build projects than in standard contracts where the responsibilities of the designer builder are distinct and separate.

Adequate time must be allowed to prepare the employer's requirements (the employer usually appoints consultants to facilitate this), as well as time for the contractor to prepare their proposal and tender price. It is vital that the proposal matches all of the employer's requirements before any contract is entered into.

The employer has control over the design brief and the project requirements, but once the contract is agreed the responsibility over design passes to the contractor, so the employer has less direct control over the contractor's detailed design.

The contractor can carry out the design in a number of ways. Often they will appoint their own consultants or use their own in-house team. It is also common practice for the contractor to take on the employer's consultants and continue to use them to complete the detailed design under what is known as a novation agreement.

Novation transfers both the rights and obligations of the outgoing party to the incoming party, whereas assignment is the transfer of rights only. It is not possible to assign contractual obligations to another party. Novation requires the consent of all parties in order for it to be valid (normally by way of a tripartite agreement). Conversely a contract may be assigned without consent, save for where there is an express contractual provision to the contrary. Novation gives rise to a new agreement on the same terms as the original agreement, with the original agreement being discharged. Once an assignment occurs, the original contract is not extinguished and, consequently, the assigner will remain bound by any prospect of obligations and liabilities under it.

The Health and Safety Executive (HSE)(Legal) Series guidance on the regulations states that a designer may be the architect, quantity surveyor, consulting engineer, interior designer, temporary work engineer, chartered engineer or anyone else who specifies or alters the design. The principal

designer also has *"control over the pre-construction phase of the project"*. The change is intended to encourage an integrated approach to risk management and increased co-ordination at the pre-construction phase of design and build projects.

Under the regulations, the client has a continuing duty to ensure arrangements are put in place to manage health and safety risks. Under the regulations it is not permissible for a client to discharge the principal designer prior to project completion. The HSE (Legal) Series guidance suggests that the role of principal designer will continue for the duration of the project. So what happens when the architect's appointment (acting as principal designer) is novated to the contractor, which is an often desirable way of retaining project experience on a design and build project? An architect or any other professional appointed as the principal designer can be appointed in two separate roles as both the designer and the principal designer. When the designer appointment is then novated to that of contractor the client continues to fulfill their obligations under the regulations by ensuring that the principal designer's responsibilitiesare discharged.

An alternative approach after novation of the designer is to choose a consultant whose appointment is not intended to be novated to the contractor to act as principal designer however, to satisfy the regulations they would have to be a 'designer' with "control" of the pre-construction phase. This approach is perhaps less desirable as it incurs cost in addition to instructing the same professional on a designer and principle designer basis.

Unlike its predecessor, the Constructor (Design and Management) Regulations 2007, at the time of writing there is no ACOP for CDM 2015 and no guidance in any of the helpful HSE publications as to a course of action approved or suggested by the HSE to overcome novation based problems. In order to avoid inadvertent non compliance by contractors and construction management professionals the industry would welcome guidance in this area, possibly following a short but focused consultation period with design and build professionals.

Proposed exemptions and partial exemptions of the self-employed under health and safety legislation; more to confuse than illuminate

The government recently announced that they were considering exempting certain self employed individuals and sole trading entities from liability under the Health and Safety at Work Act 1974. The proposal arose following a recommendation in Professor Ragnar Löfstedt's 2011 report Reclaiming Health and Safety For All. The mere suggestion attracted wide spread criticism from many quarters including: the TUC, the Confederation of British Industry; local authorities, and the Institution of Occupational Safety and Health; all of whom expressed serious concern about the proposed changes.

The government has developed a plan to exempt all self employed people, except for those deemed to be undertaking high risk activities, as part of its Deregulation Bill. The HSE ran an eight week consultation from July to August last year. The consultative document included a list of activities that would still be covered by the HSW Act and asked four main questions: whether the definitions of the activities where the self employed will continue to have duties were clear; whether or not a self-employed person would understand if the exemption applied to them; whether the assumptions made in the impact assessment were valid; and what would be the best method of communicating the change in law to the self employed.

246 responses were received, mostly from contractor consultants. Key concerns raised included that many self employed people would simply assume they were exempt, regardless of the nature of their work and that a list of high risk activities could never be definitive. The result of which would be that some people, whose work poses a risk to others would be exempt from the ambit of the legislation.

Many responses expressed concern that the change would increase rather than decrease bureaucracy and cost because the self employed would be obliged to check several regulations or hire a consultant to advise them whether they were liable under the HSWA 1974 or other subordinate legislation.

A new set of regulations that refers to existing regulations is not a simplification of the law, and would cause more trouble than it is worth.

How can we change health & safety enforcement to improve occupational health & safety?

England and Wales is on the verge of a revolution in sentencing for health & safety criminal offences. The combined effect of the Court of Appeal's June 2015 judgement against Thames Water Utilities and the proposed new guidelines from the Sentencing Council are set to increase dramatically the level of fines for very large organisations beyond the £100 million mark.

There are respectable arguments on both sides as to whether ratcheting up the level of fines will lead organisations to improve their health & safety performance. Whatever the case, criminal fines are a blunt tool to achieve the goal of behaviour change and accident prevention. So, do the forthcoming sentencing guidelines present us with a practical opportunity to make a real difference and save lives? I believe they might.

The sentencing guidelines could be used to encourage offenders to get together with prosecutors and agree appropriate remedial measures ahead of the sentencing hearing. This would gain traction in an environment of increasing fines if, subject to the discretion of the court, such an agreement would be a factor pointing towards a reduction or suspension of the sentence in combination with a remedial order.

How would this change be achieved?

The currently proposed sentencing guidelines already make reference to remediation and remedial orders. For example, for health & safety offences by organisations, the draft states that in all cases the court must consider whether to make ancillary orders and these may include remedial orders "in addition to or instead of imposing any punishment" on the offender.

This route would be taken up more often and more constructively if the guidelines went a little further. The problem is that in almost all cases the court does not have the time or the experience to initiate an appropriately worded remedial order. In the run up to sentencing, the prosecutors are focusing on getting a 'respectable' fine and the defence are focusing on keeping the fine down. However, if the offender had a real incentive to agree a remediation plan with the prosecutor, things might be different. The guidelines should create such an incentive.

For example, the existing wording in the guidelines could be supplemented as follows:

> *"Where the enforcement authority and the offender have agreed a remedial measure or measures that are sufficiently specific to be enforceable, then a remedial order may be imposed and the sentence may be reduced, or the sentence may besuspended in whole or in part subject to compliance with the remedial order. Without limitation, examples of such remedial measures might include completion of recognised training for holders of specific positions within the defendant organisation, or recruitment or engagement and retention of health & safety personnel with recognised qualifications. In appropriate cases, the required remit for such personnel could include: assessing weaknesses in the offender's health & safety arrangements and*

culture; then developing and overseeing the implementation of suitable and sufficient measures to remedy weaknesses; and finally reporting back to the enforcement authority."

This approach would also work for sentencing of individuals and for sentencing of corporate manslaughter with minor modifications. It should be enough to bring the parties to the negotiating table before many sentencing hearings and allow the HSE or other enforcement authority to make a real difference to the offender's behaviour in a much more targeted manner than the blunt instrument of a large fine. It could also provide a 'safety valve' for prosecutors as well as defendants against the negative publicity that might arise from the highest fines under the new regime.

In summary, if the Sentencing Council can be persuaded to incentivise intelligent remedial measures that can be discussed and agreed ahead of the sentencing hearing and converted into a remedial order, then the new tougher enforcement regime will stand a much better chance of improving health & safety performance by offenders and gaining public approval.

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A repeat fatality results in a high fine for an animal processing company

John Pointon and Sons of Cheddleton, Staffordshire an animal processing company have been ordered to pay £660,000 and substantial costs after a welder died working on an industrial oven.

On the 5th November 2011 Mark Bullock, a self-employed welder, was trying to repair an oven at the company`s premises. The company had not undertaken any operational studies of the equipment, as a result the risk assessment was not properly grounded and failed to deal with all the possibly operational eventualities.

The oven that the welder was working on was adjacent to and shared utilities with another oven.

The root cause of the failure was that none of the company's studies had addressed the effect of work being carried out on one oven when the other oven was being worked on.

Both ovens shared a collection vessel for the processed waste. That vessel exhausted the waste air into two oxidisers. Superheated steam from the functional oven entered the mutual shared collection vessel and passed into the oven Mr. Bullock was working on. The superheated steam was designed to purge and sanitise both ovens. Steam was cycled into the oven that Mr. Bullock was working on. He was badly scalded and as a result died in hospital the next day.

The company had relied on a generic risk assessment drafted to cover boiler operation for the safe system of work for entering the oven. In short the company had not properly understood or had in any event not reduced to writing a scheme of operation or method statement for the work being undertaken.

On 29 June, Stafford Crown Court fined John Pointon& Sons £660,000 and ordered it to pay £187,632 in costs after it entered a guilty plea to breaching Section 3(1) of the Health and Safety at Work Act.

In 2007, Pointon was fined £620,000 after a worker died when he fell into a pit of animal waste while trying to rescue a colleague who had slipped into a machine rendering animal carcasses.

Austin Stoton, 2 Bedford Row, and Colin Moore (DAC Beachcroft) are the editor and deputy editor of the HSLA bulletin. Members are encouraged to write a piece of interest and submit them to for inclusion (to hilary@hradmin.co.uk) in forthcoming editions.