Briefing

BURGES SALMON

Health and Safety

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Sentencing for breaches of Health and Safety by very large organisations

Sentencing guidelines for safety breaches and environmental breaches are changing and are likely to increase substantially for large organisations. Case law is now indicating the practical effect of these changes.

Ahead of the implementation of the Sentencing Guidelines for Health and Safety Offences and Corporate Manslaughter, expected in October 2015, an environmental prosecution (where similar sentencing guidelines have already been implemented) provides some guidance on their potential interpretation; in particular with respect to the sentencing of very large organisations.

In *R v Thames Water Utilities* [2015] EWCA 960 the Court held that very large organisations (those with a turnover of £50,000,000 or over) that are found to have caused harm in the worst possible way, deliberate action or inaction, could now face a fine of up to 100% of its pre-tax net profit for the relevant year. The Court stated that this would be the case *"even if this results in fines in excess of £100m."*

When considering the level of fine to be imposed on a very large organisation, the sentencing court did recognise that it must not simply multiply the level of fine by the incremental increases identified between other sizes of organisation (i.e. start with the fine for a large organisation and then multiply that range based on turnover.) as this would be an inappropriate *"mechanistic extrapolation."* The financial circumstances of the organisation must be considered in the round given that a very large organisation might have high turnover but a small profit margin. A caveat which sounds promising; however, the appeal against sentence was rejected.

Thames Water Utilities had a turnover of £1.9bn and profits of £346m, it was fined £250,000 on the basis that it had been negligent in not replacing pumps earlier allowing untreated sewage to leak into a Natural Trust nature reserve.

The court recognised the strength of the remedial measures implemented by the company since the discharge, but considered the level of fine already reflected this and that due to its size the fine must remain significant. The Court emphasised that even in the case of a large organisation with an impeccable record *"the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them."* This has been a message central to sentencing for some time, but was emphasised again here.

The prosecution attempted to provide a more precise definition for a 'very large organisation' as one with a *"turnover exceeding £150m per year on a three-yearly average."* This was rejected by the Court as it stressed *"it will be obvious that it either is or is not very large. Doubtful cases must be resolved as and when they arise."*

There remains uncertainty for very large organisations as to how they will be sentenced. The Court itself recognised this as a challenge and emphasised that *"sentencing very large organisations involves complex issues as is clear from this judgment."* Undoubtedly, however, fines, in particular for large companies will increase significantly and in certain circumstances be in the multi-millions, the Court of Appeal in this case stated that it *"…would have had no hesitation in upholding a very substantially higher fine".*

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