

HEALTH & SAFETY FINES FOR VERY LARGE ORGANISATIONS COULD BE IN EXCESS OF £100MILLION – IMPORTANT LESSONS FROM THE COURT OF APPEAL JUDGEMENT AGAINST THAMES WATER

The Court of Appeal's judgement on 3 June 2015, declining Thames Water's appeal against a £250,000 fine for an environmental breach, contains some important messages for how health & safety fines against very large companies are going to develop and how to avoid a £100m fine (R v Thames Water Utilities Ltd [2015] EWCA Crim 960).

The Sentencing Council's proposed guidelines on fines for health & safety offences, including corporate manslaughter, are expected to apply to all sentences handed down from January 2016. The proposed approach for health & safety fines is similar in format to the sentencing guidelines that are already in place for environmental offences, so the Court of Appeal's decision against Thames Water gives us some important information as to what is in the pipeline for health & safety fines against *very large* organisations.

Note the definitions here:

- **Large organisations** are those with a turnover exceeding £50m.
- **Very large organisations** are those whose turnover 'very greatly exceeds' £50m.

The proposed health & safety guideline fines for *large* organisations committing the worst Health & Safety at Work Act 1974 breaches would have a starting point fine of £4m and a range of £2.6m to £10m. For the worst corporate manslaughter offences, the starting point is £7.5m with a range of £4.8m to £20m.

Similar tariffs are not given for *very large* organisations. Instead the proposed guidance is that "*it may be necessary to move outside the suggested range to achieve a proportionate sentence*". How should this be calculated? Those of us keeping a close eye on developments have been concerned that courts would apply a simple multiplier – e.g. if the turnover is 6 times £50m, all the tariffs should be multiplied by 6.

The Thames Water case assists us in understanding how these fines should be extrapolated for *very large* organisations. The lower Court looked at the Thames Water turnover of £1.9billion and used it to multiply up the starting point and fines range that would have applied if Thames had a £50m turnover. The Court of Appeal looked at this approach and said that such a "*mechanistic extrapolation*" was wrong, which looks initially like good news for defendants. However, the Court of Appeal went on to decline Thames Water's appeal against the £250,000 environmental fine and made some very important comments:

- "*We would have had no hesitation in upholding a very substantially higher fine*".

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- It is particularly important in the case of *very large* organisations to take into account their financial circumstances to bring the message home to management and shareholders.
- Sentences in a large number of cases have not previously been adequate (the Court of Appeal made this comment in a way that suggested it applies equally to health & safety and environmental fines).
- For *very large* organisations the court is not bound to stick to the starting points and ranges that are stipulated for *large* organisations.
- ***"This may well result in a fine equal to a substantial percentage, up to 100% of the company's pre-tax net profit..., even if this results in fines in excess of £100m. Fines of such magnitude are imposed in the financial services market for breach of regulations.... the imposition of such a fine is a necessary and proper consequence of the importance to be attached to environmental protection"***.

When the Sentencing Council continue their work over the next few months to finalize the health & safety sentencing guidelines, they will take this important judgement on board. Whether we like it or not, the judgement will reassure them that their proposed escalation of sentences for larger organisations is supported and even desired by the Court of Appeal for these types of regulatory offences.

Just like the Sentencing Council, lower courts cannot ignore the Court of Appeal. So, the judgement will doubtless now be used by prosecutors to encourage courts to hand down fines in excess of £100m for the most serious health & safety offences committed by *very large* organisations. This is a radical change.

The judgement did offer a glimmer of light and a **practical recommendation** that many of us can apply, to seek to protect all organisations from the very worst fines: *"Clear and accepted evidence from the Chief Executive or Chairman of the main board that the main board was taking effective steps to secure substantial overall improvement in the company's fulfilment of its environmental duties would be a significant mitigating factor."*

The same would certainly apply to health & safety. This means that more than ever before, organisations need to **ensure the best health & safety law training is in place for senior executives**, so they understand what the law requires each of them to do and the importance of leadership in health & safety to set the right 'tone at the top'. **Records should be kept as part of this compliance, to show that the whole board has received the training.** There are also some simple legal preventive steps to reduce the likelihood of prosecution.

Simon Joyston-Bechal
June 2015

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