Off the scale: Sentencing very large companies for environmental crimes

By James Purnell and Lucy McCormick

Earlier this month judgment was handed down by the Court of Appeal in R v Thames Water Utilities Ltd [2015] EWCA Crim 960, examining what should be done when a corporate offender's turnover is so large that it falls outside the scale set down in the sentencing guidelines. This is the first case of its kind to come before the Court of Appeal since publication of the Definitive Guideline for Environmental Offences by the Sentencing Council in July 2014. Rejecting Thames Water's appeal against a £250,000 fine, the court said that fines levied against very large companies "*had to bring home the appropriate message to the directors and shareholders of the company*" and could go as high as 100% of pre-tax profits.

Facts

1. Between 29 August 2012 and 4 September 2012, untreated sewage was discharged from Broadlayings Sewage Pumping Station into a river which flows through a nature reserve owned by the National Trust in the North Wessex Downs Area of Outstanding Natural Beauty. Thames Water's staff did not respond to alarms. Action was only taken once a member of the public, walking by the river, reported the pollution to the National Trust, who in turn reported it to Thames Water.

2. Shortly afterwards, Thames Water replaced the equipment with pumps of a more robust specification. It emerged that in the five months before the incident, there had been at least 16 recorded instances of failure of one or both of the pumps.

Initial sentencing

3. This discharge into the river occurred otherwise than under an environmental permit, so Thames Water were charged with an offence contrary to regulations 38(1)(a) and 39(1) Environmental Permitting (England and Wales) Regulations 2010. Thames Water pleaded guilty at the first opportunity and the matter was committed to the Crown Court for sentence.

4. At Reading Crown Court, Mrs Recorder Arbuthnot noted that:

> *"The Crown and Thames Water agree that the culpability of Thames Water can be described as negligence. I agree with that assessment on the basis 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 they should have replaced the pumps before they had to in September after the sewage had run into the brook."*

5. She imposed a fine of £250,000 plus a victim surcharge of £120 and costs. Thames Water appealed against the amount of the fine.

The issue

6. The Sentencing Council's guidelines propose a step-by-step approach to calculation of a fine based upon the degree of culpability of the offender, the harm caused by the offence and upon the size of the offending organisation (assessed by reference to its turnover). Organisations are divided into four categories: "*micro*" (up to £2m), "*small*" (£2-10m), *"medium"* (£10-50m), and *"large"* (£50m+).

7. However, the guidelines make clear that the starting points and range of fines suggested do not apply to *"very large organisations*", stating that "*where a defendant company's turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence".* Thames Water, with a turnover of £1.9 billion, plainly fell into this category.

8. The Recorder was faced with a difficult sentencing decision. It appears that the figure of £250,000 was reached by making a mathematical extrapolation upwards from the levels of fine suggested for large companies.[1]

The Court of Appeal's view

9. The Court of Appeal rejected this "*mechanistic extrapolation*" from the guideline fines, setting out the appropriate considerations as follows **[40]**:

> *"i) In the worst cases, when great harm exemplified by Category 1 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. We have already outlined the approach by reference to the guideline – starting with turnover, 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.*** *Fines of such magnitude are imposed in the financial services market for breach of regulations. In a Category 1 harm case, the imposition of such a fine is a necessary and proper consequence of the importance to be attached to environmental protection.*
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> *ii) In the case of a Category 1 case resulting from recklessness, similar considerations will apply, albeit that the court will need to recognise that recklessness is a lower level of culpability than deliberate action or inaction.*
>
> *iii) Where the harm caused falls below Category 1, lesser, but nevertheless suitably proportionate, penalties which have regard to the financial circumstances of the organisation should be imposed. In an appropriate case, a court may well consider,*

[1] i.e. She noted that the incremental difference between the guideline categories was a factor of five – i.e. the maximum size of a "*medium*" company is five times the maximum size of a "*small*" company – and on that basis multiplied by five the starting point and range of fines for a "*large*" company to create a range of £175,000 - £750,000 for "*very large*" companies.

having regard to the financial circumstances of the organisation, that to achieve the objectives in s.143 of the CJA 2003, the fine imposed must be measured in millions of pounds, as we have already indicated."

10. The court emphasised that financial resources are not 'the be all and end all' for sentencing very large organisations. In the case of an offence which causes no harm and occurs without fault, "*it would be difficult to justify a significant difference in the level of fine imposed on two very large companies"* **[42]** with different turnover. Size "*becomes much more important*" when some harm is caused by negligence or greater fault, with a view to bringing "*home the appropriate message to the directors and shareholders of the company*" **[38].**

11. The Court of Appeal ultimately concluded that the £250,000 fine, against which Thames Water was appealing, was not excessive but was in fact "*lenient*". They "*would have had no hesitation in upholding a very substantially higher fine."* **[46]** The appeal was therefore dismissed.

Impact

12. The decision reflects the growing tendency of the courts to impose much higher levels of fines for environmental offences. It follows two other recent cases (R v Southern Water Services Ltd [2014] EWCA Crim 120 and R v Day [2014] EWCA Crim 2683) in which the court has indicated that it would not have interfered with fines "*very substantially greater*" or "*significantly greater*" than six figures, and reflects similar sentiments expressed in R v Sellafield Ltd [2014] EWCA Crim 49. The reference to possible "*fines in excess of £100 million*" is a distinct step further.

13. In rejecting a fixed range of fines for "*very large organisations*", the court appears to consider that it needs more flexibility to "*bring home to the management and shareholders the need to protect the environment*" **[35].** While understandable, this does leave offenders with less certainty over their potential sentence – and makes

the decision about whether or not to plead guilty at an early stage a more difficult one.

14. The comparison of potential fines to very large organisations in category 1 environmental cases with the magnitude of fines imposed in the financial services market (including reference to the overall annual pre-tax profit, even if this results in fines in excess of £100m) provides clear warning to organisations in future cases. It will be interesting to see whether similar comment is made in the anticipated forthcoming guidelines on Health & Safety, Corporate Manslaughter, and Food Safety & Hygiene which are expected to be published at the end of 2015.

15. Finally, as practice points:

    a. The Court of Appeal rejected Thames Water's application to adduce fresh evidence pursuant to s.23 of the Criminal Appeals Act 1968 (to show that Thames Water was not negligent in failing to replace the pumps sooner). The evidence which the appellant sought to adduce could and should have been set out in the basis of plea below, so that it could be the subject of detailed inquiry and challenge if disputed by the prosecution. This reinforces the need for defendants to ensure that its case as to any aggravating features is reflected in any *Friskies* schedule agreed with the Crown or clearly set out in any basis of plea.

    b. The Court of Appeal used this case to give a reminder that sentencing very large organisations must be tried either by a High Court judge or by another judge only where the Presiding Judge has released the case or the Resident judge has allocated the case to that judge [Crim PD XIII].

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