



## Very large organisations and regulatory offending: is it still a question of you will know one when you see it?

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Three years ago, we looked at the question of what is a “very large organisation” (“VLO”) for the purposes of sentencing regulatory offences. In *R v Places for People Homes Ltd* [2021] EWCA Crim 410, the Court of Appeal provided guidance on how to identify a very large organisation for the purpose of the Sentencing Guideline for Health & Safety, Corporate Manslaughter and Food Safety and Hygiene Offences (“the Guideline”). The distinction between a large organisation, and VLO, is significant and can lead to a multiplication of the fine by three or four times. The question of whether a defendant is, or is not, a VLO is thus of crucial significance to clients and practitioners.

This note examines the case law since *Places for People Homes Ltd*. In our view, whilst there is no change in principle, a fuzzy dividing line between large organisations and VLOs is becoming visible.

## BACKGROUND

1. In *Places for People Homes Ltd* the Court of Appeal repeated guidance, standard since *Thames Water* in 2017, noted that it would be obvious when an organisation was very large, as opposed to large, and stated that there is not and should not be a bright dividing line between these categories.
2. Practitioners will by now be familiar with step I of the Guideline by which organisations are categorised by turnover for the purposes of sentencing into:
  - i. Micro Organisations (up to £2 million in turnover or equivalent);
  - ii. Small Organisations (between £2 million to £10 million in turnover or equivalent);
  - iii. Medium Organisations (between £10 million to £50 million in turnover or equivalent); and
  - iv. Large Organisations (£50 million and over in turnover or equivalent).
2. There is a fifth category of organisation: the “very large organisation” (“**VLO**”). The Guideline states that where the “turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.” (emphasis added).

## CASE LAW SINCE PLACE FOR PEOPLE HOMES

3. In broad terms, the Court of Appeal has followed its own guidance since *Places for People Homes Ltd*, simply finding that companies are either VLOs or

large organisations but with little explanation. The adage that the court will know a VLOs when it sees one still seems to hold true.

4. Below is a table of six cases in chronological order with the newest first. All the Court of Appeal decisions dealing with companies that appealed their sentences under either the Health and Safety Guideline or Sentencing Guidelines for Environmental Offences, heard since *Places for People Homes*. In all six cases the Court of Appeal had no hesitation in agreeing with the sentencing judges' categorisations of the companies, be that large or VLO. This of itself indicates the wide discretion the Court of Appeal allows Crown Court judges in making this assessment.

Table 1

Case	Categorisation	T/O	Fine
<i>R. v Kier Infrastructure and Overseas Ltd</i> [2023] EWCA Crim 1564	<b>Very Large</b>	£427,983,000	£4,415,000
<i>R v Malcom Ltd</i> [2022] EWCA Crim 613	<b>Large</b>	£184,581,000	£6,500,000
<i>R v Associated Waste Management Ltd</i> [2022] EWCA Crim 785	<b>Large</b>	£53,000,000	£760,000
<i>R. v Bellway Homes Ltd</i> [2021] EWCA Crim 2031	<b>Very Large</b>	£3.2 billion	£600,000
<i>R v Nestle UK</i> [2021] EWCA Crim 1728; [2022] 4 WLR 3	<b>Very Large</b>	£1.675 billion	£640,000

<i>R v Modus Workspace</i> [2021] EWCA Crim 1728; [2022] 1 Cr. App. R. (S.) 44	<b>Large</b>	£69 million	£1,100,000
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5. The most important of these individual decisions is *Kier Infrastructure and Overseas Ltd*. In this case the Court of Appeal upheld the Crown Court’s finding that an average turnover of £427m was sufficient for the appellant to be an VLO. That represents the lowest dividing line between large organisations and VLOs affirmed by the Court of Appeal in cases heard since *Places for People Homes*.

### **A COMPARISON WITH EARLIER APPEALS HEARD BETWEEN 2016 & 2021**

6. A comparison between the recent cases and the older authorities decided since the Guideline came into force can be made by examining Table 2 (see below). This sets out the earlier Court of Appeal decisions heard between the Guidelines coming into force in February 2016 and *Places for People Homes*, and where organisations have been on or close to the threshold for becoming a VLO.

Table 2

<b>Case</b>	<b>Categorisation</b>	<b>T/O</b>	<b>Fine</b>
<i>R. v Thames Water Utilities Ltd</i> [2015] EWCA Crim 960	<b>Very Large</b>	£1.9 billion	£250,000

<i>R v. Ineos Chlorvinyls Ltd</i> [2016] EWCA Crim 607	<b>Very Large</b>	£588 million to £904 million	£166,650
<i>R v Conocophillips (UK) Ltd</i> [2016] EWCA Crim 1594	<b>Very Large</b>	£4.8 billion to £8.2 billion	£3 million
<i>R v Tata Steel UK Ltd</i> [2017] EWCA Crim 704	<b>Very Large</b>	£4.17 billion to £4.49 billion	£1,985,000
<i>R v Whirlpool UK Appliances Ltd</i> [2017] EWCA Crim 2186	<b>Very Large</b>	£672,842,000 to £710,798,000	£700,000
<i>R v University College London</i> [2018] EWCA Crim 835	<b>Large</b>	Over £1 billion	£300,000
<i>R v NPS London Ltd</i> [2019] EWCA Crim 228	<b>Large</b>	£54 million to £131 million	£334,000
<i>R v Places for People Homes</i> [2021] EWCA Crim 410	<b>Very Large</b>	£256 million to £357 million	£400,000

7. A comparison between the more recent cases in Table 2, and the older cases in Table 1, shows that the Court of Appeal has continued to apply an approach consistent with its reasoning in *Thames Water*. In particular, it has declined to apply a particular number or multiplier to the boundary of £50m set in the Guidelines for large organisations. A turnover in the range of £256 million (*Places for People Homes*) to £427 million (*Kier Infrastructure*) should be taken as the lowest level of turnover at which an organisation is likely to

be categorised as a VLO. This is subject to the particular assessment of means made by the sentencing judge, which includes the overall means of the defendant organisation at Step 2 of the Guidelines.

### **WHEN “SIGNIFICANTLY IN EXCESS” OF £50m IS NOT “GREATLY” IN EXCESS OF £50m**

8. In making the distinction between a large organisation, and a VLO, the Court of Appeal has emphasised that the turnover must greatly exceed £50. In *R v Malcolm Ltd* [2022] EWCA Crim 613 the Court of Appeal found that a turnover of £184,581,000 was “significantly in excess of £50 million” (at [42]). However, this was not commensurate with a value which “greatly” exceeded the £50 million threshold. The appellant had been correctly categorised as a large organisation, and not a VLO.
9. When making that assessment of the overall financial circumstances of a company, in *R v Modus Workspace* [2021] EWCA Crim 1728, the Court of Appeal held that it was correct for the sentencing judge to focus on the organisation that was before it, and not the future potential performance of the company. Accordingly, the sentencing judge was entitled to disregard the possible negative financial impacts of COVID-19 on the means of the appellant. The law allows adjustments to be made, extending the time to pay to reflect such concerns.

### **AS YOU WERE**

10. In summary, an opaque line has emerged between organisations which are large, and VLOs. It is ill-defined and subject to a careful assessment of the overall financial circumstances of the defendant. Whilst it is probably safe

to say that an organisation with a turnover of less than £300m will not be considered a VLO, there may be exceptions depending on the overall assessment of the organisation's means. On the other hand, applying *Kier Infrastructure*, an organisation with a turnover in excess £400m will probably be deemed on the cusp of "greatly exceeding" £50m and depending on all the circumstances, may well be VLO for the purposes of sentence.

11. We hope that this guidance, heavily qualified as it is, will offer some modest comfort and assistance to practitioners.

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