



## **Guidance on the relevance of a parent company's resources when sentencing a subsidiary for a health and safety offence**

**By Toby Riley-Smith QC and Abigail Cohen**

In *R v NPS London Ltd* [2019] EWCA Crim 228 the Court of Appeal (Criminal Division) have confirmed the relevance of an offender's parent company (or any linked organisation) to sentencing under the Definitive Guidelines for Health and Safety Offences. It is the offending organisation's turnover, not that of any linked organisation, which should be used at Step 2 to identify an organisation's size. However, such resources can be taken into account at Step 3 when examining the financial circumstances of the offender in the round and assessing "the economic realities of the organisation".

### **Overview of prosecution**

1. The prosecution arose from the same factual matrix as *R v Squibb Group Ltd* [2019] EWCA Crim 227 (see previous Alert).
2. NPS London Ltd were engaged to manage the refurbishment of a school in South London on behalf of the local authority. It was a joint venture

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company, owned as to 80% by NPS Property Consultants Ltd ("the NPS parent") and as to 20% by the London Borough of Waltham Forest ("the Borough").

3. Following the discovery of asbestos on site, NPS London pleaded guilty to a breach of the duty under s.3(1) of the Health and Safety at Work Act 1974.
4. The sentencing Judge had been provided with the accounts of both NPS London and the NPS parent. NPS London had an annual turnover of £5-6m making it a "small" organisation under the Guidelines. However, the NPS parent had a turnover of around £125m which qualified it as "large". The Judge concluded that the offender was a "large organisation" within the meaning of the sentencing guidelines. The fine was £370,000.

### The Appeal

5. NPS London appealed against sentence. It contended that the sentencing Judge had been wrong to treat NPS as a "large organisation".
6. When considering Step 2 in the Guidelines, and in particular when deciding the organisation's annual turnover or equivalent to reach a starting point for a fine, the Judge had relied on the passage on page 6 in the Guidelines which states that "*Normally, only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account*". For this reason, he had taken into account the resources of the NPS parent as a linked organisation when deciding that NPS London was a "large organisation".
7. The Appeal Court concluded that the sentencing judge had been wrong to read the guideline in this way. It is the turnover of the offending organisation,

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and not that of any linked organisation, which should be used at Step 2. This reflected the basic principle of company law that a corporation is to be treated as a separate legal person with separate assets from its shareholder(s).

8. There are circumstances, restated by the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, in which it is permissible to 'lift the corporate veil', for example, it can be appropriate in criminal confiscation proceedings: see *R v Boyle Transport (Northern Ireland) Ltd* [2016] 2 Cr App R (S) 11.
9. The mere fact, however, that the offender is a wholly owned subsidiary of a larger corporation or that a parent company (or other "linked" organisation) is in practice likely to make funds available to enable the offender to pay a fine is not a reason to depart from established principles of company law or to treat the turnover of the linked organisation as if it were the offending organisation's turnover at Step 2.
10. However, the Appeal Court went on to say that the resources of a linked organisation is a factor which may more readily be taken into account at Step 3 when examining the financial circumstances of the offender in the round and assessing "the economic realities of the organisation". It may certainly be relevant at that stage, when checking whether the proposed fine is proportionate to the overall means of the offender, to take into account the economic reality - if it is demonstrated to the court's satisfaction that it is indeed the reality - that the offender will not be dependent on its own financial resources to pay the fine but can rely on a linked organisation to provide the requisite funds.
11. The Court emphasised that this approach was consistent with that in *R v Tata Steel UK Ltd* [2017] EWCA Crim 704.

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12. The fine was substituted to a fine in the sum of £50,000.

### Comment

13. This decision confirms an important point for organisations which have linked organisations. The Court confirmed that it is not appropriate to take the resources of such a linked organisation into account at Step 2 when determining the size of the organisation.

14. The Court may, however, consider this factor at steps 3 and 4 when it “steps back” and checks whether the proposed fine based on turnover is proportionate to the overall means of the offender and whether there are any other factors that warrant adjustment of the proposed fine.

15. The stage at which this issue is considered in the sentencing exercise is not just of academic interest; it can have a real and significant impact on the level of fine. As the *NPS* decision demonstrates, if the resources of a linked organisation are taken into account at step 2 as the trial Judge did, this can significantly affect the starting point for the fine. In *NPS*' case it meant a starting point of £1.1 million (large organisation) as against £100,000 (small organisation).

16. Defendant companies and their representatives will be reassured at the definitive answer provided by the Court on this issue.

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