HENDERSON CHAMBERS

Alerter

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Sentencing very large organisations - you will know one when you see it

The Court of Appeal has re-visited the vexed question of what is, and what is not, a very large organisation for the purpose of the Sentencing Guidelines for Health & Safety, Corporate Manslaughter and Food Safety offences in the recent case *R v Places for People Homes Ltd* [2021] EWCA Crim 410. This article summarises the state of the law on the crucial issue of how practitioners recognise a very large organisation.

THE ISSUE

1. As practitioners are by now very well aware, the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences – Definitive Guideline ('**the Guideline**') sets out, *inter alia*, a nine-step approach which the court must follow when sentencing organisations.

2. Step One involves the assessment of culpability and harm (see Chambers' alerter on likelihood of harm available here[1]). Step Two involves assessing the size of the defendant organisation. Keeping culpability and harm constant, the larger the organisation the larger the applicable fine. There are four basic sizes into which organisations are categorized:

[1] https://3yf6pp3bqg8c3rycgf1gbn9w-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/Alerter-Likelihood-of-Harm.pdf

i) Micro: turnover or equivalent not more than £2 million;

ii) Small: turnover or equivalent between £2 million and £10 million;

iii) Medium: turnover or equivalent between £10 million and £50 million;

iv) Large: turnover or equivalent £50 million and over.

3. So far, so clear. There is, however, a fifth category of organisation which the court is entitled to consider. The Guideline provides exceptionally for the existence of 'very large organisations' stating, "*where an offending organisation's 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.*"

4. There is thus no clear boundary between large and very large organisations, and no figures within the Guideline as to what would be the commensurate fine for a VLO. Having provided a formula for assessing the appropriate financial penalty for all other organisations, the Guideline then reverts to allowing Judges to exercise almost unfettered discretion as to what would be a lawful sentence for a VLO. It is an understatement to say this presents practitioners with obvious difficulties advising clients on plea and consequences.

5. In *Places for People Homes* the Court of Appeal re-visited guidance given in *R v Thames Water* [2015] EWCA 960 *and R v Thames Water* [2019] EWCA Crim 1244 to explain both the reasoning behind the seemingly opaque boundary between large and very large organisations, and to provide guidance of factors to look when identifying a VLO. The Court of Appeal turned to well established sentencing principles to find that the level of fine lies on a spectrum depending on the size of the organisation.

HEADLINES

6. The following key points emerge from the Judgement (paras 29 to 32):

(1) There has been a conscious choice by the Sentencing Council not to seek to define or provide a table for organisations with a turnover above £50m. It is not for the Court to seek to impose one.

(2) There is in fact no precise level of turnover at which an organisation becomes "very large". In the case of most organisations it will be obvious if it either is or is not very large.

(3) In the case of VLOs, the starting points and ranges for categorized organsiations do not apply. The Court should return to the first principles contained in s142, 143 and 164 CJA 2003 with particular emphasis on the need to ensure the penalty is proportionate to the means of the offender and to bring home to management and shareholders the need for compliance.

(4) When sentencing a VLO, the Court should take the figures in Step Two for large organisations and increase the fine in accordance with well-established sentencing principles until the fine is sufficient to constitute the commensurate punishment but also proportionate with the means of the offender.

(5) There should be no mechanistic extrapolation form the figures in the table for large or very large companies.

(6) There is not, and there should not be, a bright dividing line between large and very large companies. The size of the organisation lies on a spectrum—the larger the company, the greater the fine may need to be, depending on the facts of the particular offender.

DISCUSSION

R v Thames Water Utilities Limited

7. The analysis of sentencing very large organisations starts with *R v Thames Water Utilities Limited*[2]. This case was an appeal on the determination of corporate size involving the breach of environmental protection legislation.

8. Mitting J rejected a general submission by counsel for the HSE that any company with a turnover in excess of £150 million, three times the threshold for a large organisation, should be treated as a very large organisation, stating, "*We do not think there is any advantage to be gained by such a definition. In the case of most organisations, it will be obvious that it either is or is not very large. Doubtful cases must be resolved as and when they arise [37].*"

9. In many ways this set the ground for the court's flexible, even deliberately opaque approach to what is and is not a very large organisation that was applied in *Places for People Homes*. While there was perhaps no reason to accept the arguably low ceiling of £150 million, the court declined the opportunity to offer clearer guidance, or to establish a likely tipping point of any degree. For practitioners it really did seem as if the Court was saying you will know a very large organisation when you see it.

Whirlpool v HSE

10. The *Thames Water* judgement was the cited with approval of the Lord Chief Justice in *Whirlpool v HSE*[3]. *Whirlpool* concerned an appeal arising out of a sentence for a single health and safety offence. An employee fell from a mobile working platform after another employee knocked it with baskets moving on an

[2] [2015] EWCA Crim 960
[3] [2017] EWCA Crim 2186.

overhead conveyer system. The appeal focused primarily on how the courts should approach the overall financial position of a defendant corporation when assessing the proportionality of any fine. Whirlpool was financially sound but had suffered a large loss in the financial year just prior to the offence. In deciding the question, the court also found it necessary to answer the question as to whether the defendant was a 'large' or a 'very large' organisation. The court observed at paragraph [32] that, "*there is a five-fold difference in turnover between the smallest and largest organisations falling within both the 'small' and 'medium' categories for the purposes of the Guidelin*e." While noting that the Guideline does not apply an "arithmetic approach" to the boundary between large and very large, the court did recognize that an assessment of the rough order of magnitude of the turnover of a company is used by the Guideline to delineate corporate size, and thus the starting point for any fine.

11. The Judgement also reminded practitioners that 'large' organisations are those which do not just 'exceed' £50 million, but indeed 'greatly exceed' £50 million. The court also emphasized that the Guidelines are permissive, allowing the sentencing court to go beyond the brackets for very large organisation, but without the obligation to do. At paragraph [33] of the judgement the Lord Chief Justice stated, "*These first two examples do not fall within the definition of a very large organisation at all…But even then the Guideline retains flexibility to meet the individual circumstances by suggesting that it "may", not will, be necessary to move outside the range."*

12. The court concluded that a defendant company with turnover in the order of £700 million was clearly 'very large.' As a rule of thumb, *Whirlpool* would indicate an organisation with a turnover of less than £250m, or five times the threshold for a large organisation, is unlikely to be deemed very large. While certainly not at odds with the judgement in *Thames Water*, this did mark a temporary move towards a more rigorous threshold dividing large and very large organisations.

R v Tata Steel UK Limited

13. On the other hand, a case where the appellant was clearly a very large organisation was considered by the Court of Appeal in *R v Tata Steel UK Limited.* This concerned an appeal against sentence for two health and safety offences. The offences involved incidents in which employees suffered amputation of fingers in unguarded machinery. The defendant had turnover in the order of £4 billion. The appeal focused on the likelihood of harm arising under Step 1, but the court also addressed how the courts should increase the amount of any fine in circumstances where the defendant is a 'very large' organisation. Tata Steel was clearly very large, and clearly at the very top end of organisation turnover. The court increased the starting point by one full harm category—from £1.1 million to £2.4 million—more than doubling that starting point to reflect the defendant's very large organisation status. In *Whirlpool* the court took the same approach when dealing with an organisation with turnover of £700 million. The relationship between fine and turnover is not purely arithmetic.

14. Turning back to the Guidelines, an increase in a harm category multiplies any relevant starting point by a factor of about three for lower culpabilities, and by a factor of two for the higher culpabilities. Whilst there are no starting points in the Guideline for very large organisations, it does follow that the fine is unlikely to be less than 200% of the equivalent figure (for culpability and harm) that would be applicable for a large organisation.

15. There can also be the separate and vexed question of whether the resources of parent company should or should not be taken into account by the sentencer. In *Tata Steel* the Court of Appeal at paragraph [57] found that due to the financial support Tata Steel UK received from its parent company (Tata Steel Group

Europe) it could disapply a downward adjustment proposed on the basis that the defendant itself was not profitable—an issue to which we now turn.

R v NPS London Ltd

16. The question of taking into account a parent company's resources leads us to *R v NPS London*[4]. This was an appeal against a finding that the defendant company was a 'large' organisation. NPS London was a joint venture company, owned as to 80% by NPS Property Consultants Ltd and as to 20% by the London Borough of Waltham Forest. NPS London had turnover in the range of £6 million, but its parent organisations had turnover in excess of £125 million. At first instance in the Crown Court, the sentencing judge had cited the resources of NPS London's parent companies and taking this into account, the Judge decided to treat the appellant as a 'large' rather than a 'small' organisation.

17. The Court of Appeal was critical of the sentencing court on the issue of the resources of the linked organisation. At paragraph [15] the Court of Appeal held that "*It is the offending organisation's turnover, and not that of any linked organisation, which, at step two of the guideline, is to be used to identify the relevant table. This reflects 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).*"

18. In *NPS London* the Court of Appeal then went on to recognize that the defendant was loss-making, and that the parent company*, "had confirmed that it would continue to provide any financial support required for a period of at least 12 months*." On that particular basis the Court declined to *reduce* the amount of any fine due to the defendant's low profitability. In other words, the parent company's resources should not be used to deem the appellant a very large organisation,

[4] [2019] EWCA Crim 228

but could be taken into account at steps 3 and 4 of the Guideline when considering proportionality and affordability of the fine. This was a position the Court of Appeal repeated in the later appeal of *R v Faltec Europe Ltd*, at paragraph [92].

19. Again, whilst a case which centered primarily on assessing culpability and likelihood of harm, the court considered the financial implications of the defendant's subsidiary status. Faltec Europe Ltd had a turnover of approximately £35 million, whilst its holding company had turnover of approximately £600.

R v University College London

20. One final case worth considering is *R v University College London*[5], where the defendant was a charitable organisation. University College London was the part owner of the London Centre of Nanotechnology ("LCN"), a department which employed approximately 130 staff. Within the centre was a group called the Diamond Electronics Group which employed the victim, who suffered injuries to her face and eye after a glass viewing port shattered. UCL had aggregate turnover in excess of £1 billion.

21. University College London was prosecuted and entered a guilty plea. The sentencing judge did take into account UCL's charitable status, considering it 'large' rather than 'very large' on that basis. The Court of Appeal supported this approach, stating at paragraph [17], "*we infer that he concluded that in the circumstances of the case UCL, although in fact a very large organisation, could properly be sentenced in accordance with the table of penalties appropriate to a large organisation*." The case emphases again the discretion sentencing judges still hold even within the Guideline when considering the particular facts and means of a

[5] [2018] EWCA 835 (Crim)

defendant. In circumstances where a defendant company is a charitable organisation, then notwithstanding it very large, *University College London* is authority that for sentencing purposes, the defendant should be moved down one size category as a means of achieving proportionality.

CONCLUSIONS

22. Taking the above into consideration, determining the commensurate fine for an organisation that does not fit neatly in the Guideline will remain very firmly a matter for the sentencing judge's discretion. This is true of an organisation that is very large, as well as for organisations dependent on the resources of parent companies and charities. *Places for People Homes* reminds Judges to address the whole of an organisation's means, and not just its turnover when considering the commensurate penalty.

23. The Court of Appeal has repeatedly emphasized that there is no "*bright line*" between large and very large organisations. The boundary is deliberately left elastic to allow Crown Court judges to apply their discretion to the particular facts of a particular case. The means that the opportunity for an advocate to persuade a Judge that a particular penalty is not proportionate or lawful in any particular case also comes with the uncertainty as to how the Judge might respond. High quality written and oral advocacy has never been more important than for large organisations in the criminal courts for health and safety offences.

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