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Environmental Sentencing Update: Very Large Fines for Very Large Companies

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Following a recent Court of Appeal case, very large companies who are involved in cases of serious environmental crime (i.e. cases of Category 1 harm where the cause is deliberate) could face fines of up to 100% of the company's pre-tax net profits – even if this results in fines of £100+ million.

On the 3 June 2015, Thames Water (***R. v. Thames Water Utilities Ltd*** [2015] EWCA Crim 960 (CA (Crim Div)) lost an appeal against the fine that was given under the Environmental Offences – Definitive Guidelines ("Guidelines"), which are applicable to organisations sentenced on or after 1 July 2014, regardless of the date of the offence. The Court of Appeal upheld the original £250,000 fine imposed by the Crown Court in relation to the discharging of untreated sewage into a National Trust nature reserve by Thames Water due to the clogging of faulty pumps. The Crown Court found that Thames Water had been negligent and should have replaced the pumps earlier. This month's case was the first time the Court of Appeal has considered the use of the new Guidelines.

Under the new Guidelines, the starting point and range for a fine should be identified by looking at firstly, the levels of culpability and harm and secondly, the size of the organisation. A large organisation is defined as one with a turnover of £50,000 or more. There is no definition of very large organisation; however the Guidelines do state that where a defendant's turnover or equivalent greatly exceeds the large company threshold "it may be necessary to move outside the suggested range to achieve a proportionate sentence."

In Thames Water, the Court of Appeal held that there is no need to define "very large" organisations by reference to a turnover threshold as very large organisations will usually be easily identifiable. If there is doubt as to whether a company is large or very large, it should be looked at on a case by case basis. The Court also rejected the use of a simple mechanical approach to establishing the value of fines to be imposed on very large organisations, which involved calculating a fine-band for very large companies by reference to the incremental fine-bands for small, medium and large companies provided in the Guidelines.

With a turnover of £1.9 billion and an annual profit of £346 million, the Court of Appeal agreed with the Crown Court and confirmed that Thames Water was a "very large organisation". The Court confirmed that the guidance in the case of Sellafield (***R v. Sellafield Ltd*** and ***R v. Network Rail Infrastructure Ltd*** [2014] EWCA Crim 49) can be relied on and reiterated that the courts' aim was to

impose fines that are proportionate and large enough to both educate and punish. The need for such proportionality is especially relevant when the harm is caused by negligence or greater fault. In Sellafield the sentencing principals were reviewed and clarification was provided setting out factors that judges should bear in mind when imposing fines:

1. to consider the seriousness of the offence; and

2. consider the financial circumstances of the offence.

Interestingly, Sellafield confirmed that fines must ensure that the “message is brought home to the directors and members of the company (usually the shareholders)” and that there is no upper limit on the amount that can be imposed in the context of very large company. The Court advised that to establish an appropriate sentence an examination should be undertaken of the company structure, turnover, profitability and the remuneration of directors.

In Thames Water, the Court of Appeal commented that in some circumstances it might be difficult to justify a significant difference in the level of fine imposed on two very large organisations purely because the turnover of one company was twice the size of the other; especially for an offence without harm and committed without fault. However, offences that are deliberate or reckless should be classed as significantly more serious. When harm is caused, and it is caused by negligence or fault on the part of the organisation, the size of the company will come into play. Thames Water had been negligent and should have replaced the faulty pumps which allowed the sewage to pollute the brook.

An aggravating factor explicitly mentioned in the decision was that the record of Thames Water, which although did not suggest a routine disregard for environmental duties and obligations, left considerable room for improvement (the company had been convicted of 162 Environmental Offences, of differing levels of culpability and harm since 1991). The Court of Appeal also commented on mitigating factors and recognised that evidence from a Chief Executive or Chairman which shows that the board was taking effective measures to ensure a general improvement in relation to environmental duties would be a significant mitigating factor.

The Court of Appeal made an interesting comparison with fines levied in the financial services market; and expressed its hope to increase the fines in relation to environmental offences. The Court aimed to: “bring the message home to the directors and shareholders of organisations which have offended negligently once or more than once before, a substantial increase in the level of fines, sufficient to have a material impact on the finances of the company as a whole, will ordinarily be appropriate. This may therefore result in fines measured in millions of pounds”. In fact, the Court of Appeal stated that very large companies that are involved in cases of serious environmental crime (i.e. cases of Category 1 harm where the cause is deliberate) could face fines of up to 100% of the company’s pre-tax net profits – even if this results in fines over £100 million, commenting that:

“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.” and “the objectives of punishment, deterrence and the removal of gain…must be achieved by the level of penalty imposed”.

Anne Brosnan, Chief Prosecutor for the Environment Agency made the following statement:

“We welcome the Court of Appeal’s decision to uphold this significant prosecution result, which

demonstrates that businesses need to prevent pollution or their profits could take a hit.

Under the new environmental sentencing guideline, very large companies who risk causing serious environmental damage could now face very large fines. In this instance the company did not act swiftly enough to stop sewage damaging the nature reserve and a significant clean-up operation was needed. This sentence should act as a deterrent."

The Guidelines have been drafted in a very similar way to that of proposed sentencing guidelines for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene, expected to come into force in late 2015. Following Thames Water, it seems likely that the fines imposed in these cases, are likely to be at least as high.

Mr Justice Mitting commented in Thames Water that: "We would have no hesitation in upholding a very substantially higher fine". This paves the way for Magistrates' and Crown Courts to impose significantly higher fines with the confidence that if they were to be appealed, it is likely that they would be upheld. If there was ever a time for companies to do all they can to comply with environmental / health and safety law, this is it.

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