

Environmental sentencing: Bringing the message home

16 JUNE 2015

CATEGORY:
[ARTICLE](#)

The Court of Appeal, in its first judgment covering the sentencing of 'very large organisations' since the Environmental Sentencing Guideline ('ESG') came into force last year, has held that the previous level of fines in a large number of environmental cases was not adequate to bring the appropriate message home to company directors and shareholders, and therefore for the most serious cases a substantial increase in the level of fines would usually be appropriate. The Judgment should immediately be read by organisations who may be affected by the ESG. This summary can only attempt to convey the very powerful, clear and uncompromising message from the Court of Appeal.

In *R v Thames Water Utilities Limited [2015] EWCA Crim 960*, the court had to consider an appeal against the amount of the fine imposed on the operator of a sewage pumping station ('TWU') from which untreated sewage was discharged into a brook over the course of a week in 2012. Following a guilty plea by TWU, the judge applied the ESG, taking into account the level of harm caused, the culpability and turnover of the organisation involved.

'Large' organisations are defined by the ESG as those with a turnover of £50 million or more, which also states that for 'very large organisations' whose turnover very greatly exceeds that amount, 'it may be necessary to move outside the suggested range to achieve a proportionate sentence'. TWU's turnover at the time of sentencing was £1.9 billion and its profit for the year ending 2014 was £346 million. The trial judge fixed a fine of £250,000 by multiplying the fine for a large company roughly in proportion to the amount that TWU's turnover exceeded that of a large company.

In rejecting TWU's appeal the Court of Appeal stated that it would have upheld a very much more substantial fine and held that

- the level of fines for very large organisations must not be fixed merely by a mechanistic extrapolation from the ESG, but also by examining the financial circumstances of the organisation in the round
- there was no need to provide a definition of a very large organisation based on a financial figure as it would be obvious if an organisation was very large and doubtful cases could be assessed individually
- offences resulting from negligence or worse, including repeated operational failures, should count as significantly more serious
- to bring the message home to directors and shareholders of organisations which have offended negligently once or more before, a substantial increase in the level of fines sufficient to have a material impact on the finances of the company as a whole would ordinarily be appropriate, possibly resulting in fines measured in millions of pounds
- in the worst cases a focus on the whole financial circumstances of a company might result in fines of up to 100% of the company's pre-tax net profit, perhaps even fines in excess of £100 million
- even where the harm caused was less serious, fines should be in proportion to the financial circumstances of the organisation, and in appropriate cases must be measured in millions of pounds

Comment

This judgment, like the one in 'Sellafield and Network Rail' involving Health and Safety breaches, should leave no one under any illusions that high fines will be imposed for serious and systemic breaches, in order to bring home to directors and shareholders the seriousness of the offence and to provide an incentive to them to remedy failures. In the case of Network Rail the Lord Chief Justice stated that the directors' bonuses should have been very significantly reduced.

The message is plain – get it wrong and companies, directors and shareholders will be held to account and should expect a high fine. It is therefore time to focus on preventing incidents. US companies have been exposed to severe sentencing regimes in the US for years, and as a result are far more receptive to taking advice on how to avoid disasters.

If an incident cannot be avoided then far more focus will be required in future on considering every possible defence. In the event that there is none then there must be careful and thoughtful preparation of mitigation and a detailed analysis of a Company's financial position.

You have been warned!