Case in Detail

"Many Rivers to Cross" — Sentencing for environmental crimes

By Gerard Forlin, QC[1]

The recent case of *R v Thames Water Utilities Ltd*[2] appears to have "upped the ante" in relation to sentences imposed on large organisations for environmental offences. A collective judgment from a Court of Appeal comprising the Lord Chief Justice, Mitting and Lewis JJ makes it clear that fines for serious offences by large organisations should rise.

This case was the first major appeal since the sentencing Council's definitive guidelines relating to environmental offences came into effect in 2014 and it arose from a six-day discharge of untreated sewage into a river in an area of natural outstanding beauty in the North Wessex downs. The appellant had indicated a guilty plea to the one count under the Environmental Permitting (England and Wales) Regulations 2010 at the first hearing in the Magistrates' Court and the Crown Court had imposed a fine of £250,000 on the basis that the discharge was the result of negligence. At the appeal there was an application to introduce fresh evidence to challenge the finding of negligence, but that was refused by the court.

The Appeal Court set out the framework for Sentencing in cases of this sort, reiterating many of the principles already laid down in the *Sellafield* case last year.[3] From this restatement, and its application to the present facts, two factors emerge as particularly significant: the size of the organisation, and the degree of fault involved.

As to the first of these, a sentencing court, the Court of Appeal said, is not bound by, or even bound to start with, the ranges of fines suggested by the Sentencing Council when the defendant it is dealing with is large—or very large, *a fortiori*.

As to the second, it said that in the case of repeated operational failures, suggestive of a lack of appropriate management attention to environmental obligations:

"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 the "worst cases", where great harm has been caused by "deliberate action or inaction", it said that the sentencing court should "focus on the whole financial circumstances of the company".

"In such a case, the objectives of punishment, deterrence and the removal of gain (for example by the decision of the management not to expend sufficient resources in modernisation and improvement) must be achieved by the level of penalty imposed. This may well result in a fine equal to a substantial percentage, up to 100 per cent, of the company's pre-tax net profit for the year in question (or an average if there is more than one year involved), even if this results in fines in excess of £100 million. Fines of such magnitude are imposed in the financial services market for breach of regulations. 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."

Fines, it said, "must be large enough to bring the appropriate message home to the directors and shareholders and to punish them", and in the case of repeat offenders, they "should be far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures properly to reform themselves and ensure that they fulfil their environmental obligations." Dismissing the appeal against sentence in the present case, the Court added that it "would have had no hesitation in upholding a very substantially higher fine."

Finally the Court said:

"Sentencing very large organisations involves complex issues as is clear from this judgment. It is for that reason that special provision is made for such cases in Crim PD XIII, listing and classification. Such cases are categorised as class 2 C cases and must therefore be tried either by a High Court Judge or by another judge only where either the Presiding Judge has released the case or the Resident Judge has allocated the case to that judge. It is essential that the terms of this Practice Direction are strictly observed."

To these salutary words, it must further be recalled that Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into effect on March 12th 2015. This grants Magistrates' courts unlimited powers of fining for a wide range of offences triable either way.

Annex 3 of CPD XIII, relating to very large fines in the Magistrates' courts, signposts the proper approach. This states that an authorised District Judge must deal with any allocation decision, trial, and sentencing hearing in proceedings for either-way offences in which any of a list of factors are present. These include (*inter alia*):

- death or significant life-changing injury, or a high risk of either;
- substantial environmental damage or polluting material of a dangerous nature;
- major adverse effect on human health or quality of life, animal health or flora;
- where the defendant corporation has a turnover in excess of £250 million;
- where the court will be expected to analyse complex company accounts;
- high profile cases or ones of an exceptionally sensitive nature.

Although many of cases of this type are likely to be transferred to the Crown Court, some will be more borderline. Organisations and their legal advisors will face tough tactical decisions as to timing of pleas, submissions on criminality and Newton hearings. (The waiting list in certain Crown Courts is currently very long.)

For corporate defendants it looks as if the climate has significantly changed and they now face blizzard-like conditions when prosecuted for regulatory offences. The days of relatively small fines now seem to be a thing of the past![4]

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2 [2015] EWCA Crim 960. The Times Law Report, August 21 2015, p53.
3 *Sellafield Ltd* [2014] EWCA Crim 49.
4 It should also be remembered that the sentencing guidelines in relation to corporate manslaughter, health and safety, food safety and hygiene offences are expected to be published in November 2015 and come into effect in January 2016. (See *Archbold Review*, Issue 1 February 9th 2015).