The Board therefore considers if the payment or part payment of the dividend reflects or would be consistent with the long-term social, financial and operational commitments made to stakeholders, including customers, employees and pension fund holders. In considering this issue, the Board has regard to the suite of Performance Commitments that the company has made, which include targets in relation to:

- Performance for customers (including, but not limited, to the customer measure of experience (CMeX) and the developer measure of experience (DMeX)).
- Operational commitments which are of importance to customers (including, but not limited to, commitments in relation to leakage, per capita consumption, water quality, interruptions to supply, and risk of low pressure).
- Wider social and environmental commitments (including, but not limited to, commitments in relation to vulnerable customers, sustainable abstraction, and community investment).

The overall amount of the company's ordinary dividends will not exceed the free cash flow (defined as operating cash flow less interest and capital maintenance payments) generated by Anglian Water, and in practice is limited by its current and forecast financial covenants. Special dividends may also be paid in addition to ordinary dividends, but these too are limited by specific financial covenant constraints. This policy is consistent with Condition F of the Licence. The full dividend policy is available on the Anglian Water website.

Continuing to deliver our AMP7 capital investment programme

2021/22 is the second year in the five-year AMP7 investment programme. Over the five years to 2025, we will invest a record £3 billion through our capital investment programme. This spend will help us achieve our Business Plan commitments and includes significant investments to ensure our region is resilient to the impacts of drought, climate change and population growth, alongside our largest ever programme of schemes delivering environmental protection.

Delivery against this investment programme remains strong, with gross annual capital expenditure across the appointed business increasing from £447.0 million to £577.7 million (£269.3 million on capital maintenance, £308.4 million on capital enhancement). This is broadly in line with management expectations and is particularly pleasing given the significant increase in the size of the programme compared to the previous five-year Business Plan, AMP6.

This has resulted in a £285.9 million increase in the value of property, plant and equipment and intangible assets, net of depreciation.

Financial needs and resources

As part of the company's financial restructure completed in July 2021, a principal aim of which was to stabilise the credit ratings, a total of £1,165.0 million was injected as equity by its immediate shareholders into Anglian Water. Following this, in September 2021, a proportion of these proceeds were used to prepay Anglian Water's Class B debt, comprising:

- $410 million 5.18 per cent Private Placement due Dec 2021;
- $160 million 4.99 per cent Private Placement due November 2023; and
- $47 million 5 per cent Private Placement due October 2022.

A make-whole payment of £14.5 million was made in respect of the early repayment in accordance with the debt terms and conditions. In addition, scheduled repayments were made in respect of the following debt:

- $160 million 4.52 per cent Private Placement debt repaid in June 2021;
- £33.5 million of amortising payments in respect of European Investment Bank (EIB) index-linked debt repaid in August 2021; and
- £35.0 million repaid in February 2022.

A repayment of £25 million was also made in respect of the remaining outstanding drawings on the £550 million syndicated revolving credit facility, which, in addition to the £50 million bilateral revolving credit facility, had been fully drawn down in March 2020 to provide a short-term liquidity buffer to cover Covid-19 uncertainty and (apart from the £25 million repaid this year), were fully repaid during the prior year.

During the year to 31 March 2022, Anglian Water also received £75 million of funds in respect of two forward-starting, fixed-rate notes with a coupon of 2.14 per cent and maturing in 2036 that were transacted in the prior year and c. £25 million in respect of a biodiversity bond. Anglian Water also received £25.5 million from a US$35 million private placement which has been swapped to sterling.

At 31 March 2022, Anglian Water had borrowings, net of cash, of £5,621.3 million (£6,783.3 million including the fair valuation of derivatives), a decrease of £1,028.5 million (£707.5 million including the fair value of derivatives) over the prior year. The fair value of derivative financial liabilities was £1,162.0 million, excluding derivative financial assets of £73.4 million in respect of energy derivatives. Net borrowings of £5,621.3 million comprised fixed, index-linked and variable-rate debt of £6,456.2 million, leases of £35.8 million and cash and deposits of £870.7 million. The decrease in net borrowings primarily reflects the impact of the £1,165 million equity injection and the ongoing capital investment programme. Net debt to RCV at year end was 64.8 per cent.

The business generated cash from operations of £749.9 million in the year (2021: £632.8 million). The increase primarily reflects improvements in EBITDA described above, strong customer cash collection, reduced pension scheme contributions in the current year, and the timing of supplier payments and VAT receipts.

The support of our shareholders is critical to the success of our business and to securing the investment that Anglian Water needs.

Liquidity

The company's objective is to maintain flexibility, diversification and continuity of funding through access to different markets and debt instruments. At 31 March 2022, Anglian Water held cash, deposits and current asset investments of £870.7 million (2021: £285.9 million). The increase in cash amounts held is primarily the result of the retention of the surplus from the capital injection of £1,165.0 million and the £100.0 million of new debt proceeds and the scheduled and early debt repayments of £607 million made during the year, and also the net of operational and residual investing and financing cashflows.

As at March 2022 Anglian Water has access to £600.0 million of undrawn facilities (March 2021: £575 million), to finance working capital and capital expenditure requirements. In addition, Anglian Water has access to a further £375.0 million of liquidity facilities (March 2021: £400.0 million), consisting of £254.0 million to finance debt service costs and £121.0 million to finance operating expenditure and maintenance capital expenditure in the event that the company was in an Event of Default on its debt obligations and had insufficient alternative sources of liquidity. See note 1 for further commentary over the liquidity requirements of the group in relation to going concern.

Directors are required to act in the way that is considered most likely to promote Anglian Water's purpose.

All bank facilities and debt capital market issuance are issued pursuant to the Global Secured Medium-Term Note Programme dated 30 July 2002 between the company, AWSF and Deutsche Trustee Company Ltd (as agent and trustee for itself and each of the finance parties). This agreement provides that any facilities drawn by AWSF will be passed directly on to the company upon utilisation of the facility.

Interest rates

The company's policy, as agreed by the Board, is to achieve a balanced mix of funding to inflation-linked, fixed and floating rates of interest. At the year end, taking into account interest rate swaps, 68.9 per cent (2021: 62.7 per cent) of the company's borrowings were at rates indexed to inflation, 25.1 per cent (2021: 32.1 per cent) were at fixed rates and 6.0 per cent (2021: 6.1 per cent) were at floating rates. At 31 March 2022, the proportion of inflation debt to regulated capital value was 51.4 per cent (2021: 53.4 per cent).

Pension funding

At 31 March 2022, the closed defined benefit scheme, excluding the unfunded pension liability, had an IAS 19 accounting pension surplus (before deferred tax) of £163.4 million, compared to a surplus of £10.0 million at 31 March 2021. This increase in surplus reflects an increase in the corporate bond rate used to discount the scheme's liabilities. During the year a deficit reduction payment of £14.6 million was made by the company, compared with £36.5 million in the prior year.

Annual Performance Report

Under Condition F of its Licence, Anglian Water is obliged to provide the Water Services Regulation Authority, Ofwat, with additional accounting information to that contained in the statutory financial statements. This information is presented in the Annual Performance Report, a copy of which is available on the Anglian Water Services website anglianwater.co.uk/our-reports.

Find out more at
anglianwater.co.uk/our-reports

The financial results have been prepared in accordance with International Financial Reporting Standards (IFRS)

Financial results

The financial results are summarised in the table below:

	2023 Total £m	2022 Total £m
Revenue (excluding grants and contributions)	1,388.9	1,299.7
Grants and contributions	106.0	100.1
Operating costs	(678.0)	(612.5)
Charge for bad and doubtful debts	(30.1)	(11.1)
Other operating income	16.0	12.3
EBITDA[1]	802.8	788.5
Depreciation and amortisation	(379.1)	(347.7)
Operating profit	423.7	440.8
Finance income	20.6	1.8
Finance costs[2]	(731.1)	(460.1)
Adjusted loss before tax[1]	(286.8)	(17.5)
Finance costs - fair value gains/(losses) on financial derivatives[2]	645.3	(115.1)
Profit/(loss) before tax on a statutory basis	358.5	(132.6)
Tax	(90.2)	(310.2)
Profit/(loss) after tax	268.3	(442.8)

1 As defined in note 30 financial measures or metrics used in this report that are not defined by IFRS are alternative performance measures. The group uses such measures for performance analysis because they provide additional useful information on the performance and position of the group. Since the group defines its own alternative performance measures, these might not be directly comparable to other companies' alternative performance measures. These measures are not intended to be a substitute for, or superior to, IFRS measurements, and have been consistently applied within each year presented in these financial statements.

2 In order to show pre-tax performance based on management's view of an underlying basis, the fair value gains and losses on financial derivatives have been shown separately in the table because these are volatile non-cash movements that distort the actual underlying economic performance.

Revenue

Revenue, excluding grants and contributions, for the year was £1,388.9 million (2022: £1,299.7 million), an increase of £89.2 million (6.9%) on last year. The increase in revenue is as a result of the following factors:

- The price increase for customers following the regulatory pricing formula, £87.7 million increase.
- A net decrease in demand of £13.4 million. Household consumption is down £21.8 million and non-household consumption up £8.4 million as we move back towards pre-Covid-19 levels of consumption.
- Increase in revenue of £8.4 million as a result of increase in customer numbers.
- Other increases in revenue of £6.5 million.

Grants and contributions represent the cash and asset contributions made principally by property developers and local authorities for connecting new property developments to the water and sewerage network, and for work on existing infrastructure needed to accommodate development. Over the year, these have increased by £5.9 million to £106.0 million. This is driven by the strong housing market and construction sector in our region.

Ofwat's price setting process, set out in our Final Determination, sets the level of customer bills and therefore how much is available to invest in our services.

Other operating income

Other operating income comprises primarily external income from power generation, bio-solid sales to farms, rents received and various other non-core activities; this was consistent with prior years.

Operating costs (including charges for bad and doubtful debts)

Operating costs including charges for bad and doubtful debt for the year increased by £84.5 million (13.6%) to £708.1 million. This increase is explained in the table below:

	Total £m
Prior period	623.6
In year movements:	
Funded by Final Determination (FD)	
Inflation	53.2
Capitalisation of replacement infrastructure assets	(9.1)
Weather related	
Investment in leakage to recover from hot weather and freeze-thaw	13.9
Bad debt provision	
Increase in base bad debt charge	6.3
Prior year reassessment of provision	6.0
Prior year change in macroeconomic outlook	6.6
Power	
Benefit of proactive hedging	(4.2)
Other significant items	
Fuel in excess of inflation	3.7
Chemicals in excess of inflation	9.4
Business rates	(10.1)
Other	8.8
Total increase	84.5
March 2023	708.1

Inflation

The inflationary increases formed part of the Final Determination and are therefore funded through the inflationary increases in revenues.

Capitalisation of replacement infrastructure assets

In order to improve efficiency, there was a change in the way we deliver boundary box and external meter chamber replacement in the second half of last year. As a result of the change in delivery, which has moved from individual jobs to a scheme of work, the cost of the scheme is above our de minimis threshold for capitalisation, resulting in the costs being treated as capital expenditure rather than operational. In addition, this year we have also expanded this process to include manhole covers and network fittings.

Weather related

The impacts of climate change are fundamental to our business and our climate-related financial disclosures can be found as an appendix to the paper presented to the Committee. As a result of the hot summer, the Board agreed to invest £13.9 million with a view to maintaining our industry-leading leakage position as we sought to recover from a number of weather-related events throughout the year.

The first six months of the year saw very little rainfall and as a result we saw exceptionally dry ground conditions. This was then compounded by two extremely cold spells in winter both followed by a rapid rise in temperatures. Fluctuations like this lead to ground movements which affect infrastructure such as pipes and valves, causing leaks, bursts and failure, resulting in additional costs to repair.

Bad debt provision

The increase in bad debt charge is primarily a result of three factors set out below but we continue to see stable cash collection with our base bad debt charge over the long term reducing as a percentage of revenue.

- An increase in our base bad debt charge of £6.3 million, partly a result of the increase in our revenue and partly due to a return to more typical levels after an exceptionally strong performance in the prior year.
- The prior year reassessment of provision in our debt over 48 months old, which resulted in a one off £6.0 million provision release in the prior year, as a result of continued positive collection in combination with a change to our write-off policy in April 2020.
- In addition, we estimate the impact of future macroeconomic factors on our collection performance as required by IFRS 9. In March 2022 we released £6.6 million of this provision as the projected impact of Covid-19 on unemployment subsided, thus reducing the charge in that year. The latest forecasts for unemployment are broadly the same as that at March 2022 and therefore we have maintained the same overlay provision as at March 2022, thus having no impact on the income statement. Further details can be found in note 2.

Power

Our OPEX reconciliation in the above table splits out the impact of inflation and as we operate a robust hedging strategy our energy costs rose slower than inflation in the year thus presenting as a real terms reduction. This strategy meant that we had locked in our energy prices prior to the start of the year and the war in Ukraine. As such our weighted average hedged price for the year was £58/MWh compared to an average day ahead price for the year of £187/MWh.

Other significant items

Other significant items primarily relate to costs that have risen above average inflation, such as fuel and chemicals.

In addition, following a rates review we received a refund of £10.1 million in the year.

EBITDA

Earnings before interest, taxes, depreciation and amortisation (EBITDA) is defined in note 30 and is the profit from continuing operations before interest, tax, depreciation and amortisation. This has increased by 1.8% to £802.8 million, which is consistent with the effect of the increases described above.

Depreciation and amortisation

Depreciation and amortisation is up 9.0% to £379.1 million, primarily as a result of higher fixed asset balances as we construct and commission assets in line with our capital investment programme.

Operating profit

Operating profit has decreased by 3.9% to £423.7 million. Whilst there have been significant inflationary costs pressures due to the mismatch in timing with revenue, our proactive energy hedging policy protected the business. In addition, the Board committed to invest £13.9 million with a view to ensuring we maintained our industry-leading leakage position as we sought to recover from a number of weather-related events throughout the year.

Financing costs and profit before tax

Adjusted net finance costs, which are finance income net of finance costs before fair value gains and losses on financial instruments, increased from £458.3 million in 2022 to £710.5 million in 2023. This was primarily the result of the non-cash impact of higher inflation on index-linked debt which increased by £306.4 million to £561.4 million. This increase was due to an increase in year-on-year average Retail Price Index (RPI) from 5.8% to 12.8% and year-on-year average Consumer Price Index (CPI) from 4.0% to 10.0%. We have both RPI-linked debt and CPI-linked debt to hedge the Regulated Capital Value (RCV). Finance income was £16.0 million, up £14.6 million as we benefited from these higher interest rates on our cash balances.

There was a fair value gain of £645.3 million on derivative financial instruments in 2023, compared to a loss of £115.1 million in 2022. The fair value gains in the current year are predominantly non-cash in nature and have no material effect on the underlying commercial operations of the business and have only partially reversed fair value losses experienced over the past 10-years in a falling interest rate environment. The driving factors for the gain in 2023 were primarily due to decreases in the average levels of forward inflation expectations, in combination with the rise in forward interest rates (decreasing the discounted present value of derivatives). During the period, forward inflation decreased by circa 90 basis points and forward interest rates increased by 200 basis points across the curves.

Taxation

	Year ended 31 March 2023 £m	Year ended 31 March 2022 £m
Current tax:		
In respect of the current period	(25.4)	(13.6)
Adjustments in respect of prior periods	0.7	(5.1)
Total current tax credit	(24.7)	(18.7)
Deferred tax:		
Origination and reversal of temporary differences	113.0	(25.9)
Adjustments in respect of previous periods	1.9	1.2
Increase in corporation tax rate	–	353.6
Total deferred tax charge	114.9	328.9
Total tax charge on profit on continuing operations	90.2	310.2

We are one of the largest private investors in infrastructure in our region, having invested over £1 billion in the last two years. The Government actively encourages infrastructure investment and grants us capital allowances, which defer some of our corporation tax liabilities until a later period. Our customers directly benefit from the deferral as it helps to keep their bills lower.

Total tax paid or collected in the year to 31 March 2023, other than corporation tax, amounted to £234 million (2022: £231 million), of which £100 million was collected on behalf of the authorities for value added tax (VAT) and employee payroll taxes. All of our taxes are paid as they become due.

Current and deferred tax

The current tax credit for the year was £24.7 million (2022: £18.7 million). The deferred tax charge has decreased by £214.0 million from £328.9 million in 2022 to £114.9 million this year.

The current tax credit for both years reflects receipts from other group companies for losses surrendered to those group companies. The tax losses arise mainly because capital allowances exceed the depreciation charged in the accounts, as well as some income not being taxable and the availability of tax relief on pension contributions paid in the year. This is offset by disallowable costs and interest. In the prior year there is also a one-off credit arising on a change of accounting treatment.

The deferred tax charge for this year mainly reflects capital allowances claimed in excess of the depreciation charge, a charge on the fair value gains on derivatives, offset by a credit on losses carried forward to future years. The prior year charge mainly reflects the effect of a corporation tax rate from 19% to 25% that comes into effect on 1 April 2023 but was legislated for in the Finance Bill 2021, capital allowances claimed in excess of the depreciation charge in the accounts offset by a credit on losses carried forward to future years.

The Finance Bill 2021 also introduced increased tax relief for capital expenditure incurred in the period up to 1 April 2023. This has increased the deferred tax charge in this year.

The current and deferred tax adjustments in respect of previous periods for both years relate mainly to the agreement of prior year tax computations.

The amounts included for tax liabilities in the financial statements include estimates and judgements. If the computations subsequently submitted to HMRC include different amounts then these differences are reflected as an adjustment in respect of prior years in the subsequent financial statements.

In addition to the £90.2 million tax charge on the income statement, there is a credit of £35.5 million (2022: charge of £40.7 million) in the statement of other comprehensive income in relation to tax on actuarial losses/(gains) on pension schemes and fair value gains on cash flow hedges.

Distributions available to the ultimate investors

In line with the approved dividend policy, the Board have proposed to pay a final dividend amounting to £79.9 million payable on 15 June 2023. The dividend has been adjusted with a £26 million deduction to reflect aspects of underperformance against ODIs, including the ODI penalty incurred. A £169.0 million prior year final dividend was paid in the period (2022: £96.3 million in relation to financial year 2021), reflecting the Company's dividend policy. A deduction was made to the base dividend of £9 million to reflect performance in 2021/22.

This dividend will be paid against a backdrop of an equity injection of £1,165.0 million in the prior period and results in a net equity injection for the AMP of £899.7 million. Through these capital injections the company continues to benefit from the strong support of shareholders.

Continuing to deliver our AMP7 capital investment programme

2022/23 is the third year in the five-year AMP7 investment programme. Over the five years to 2025, we will invest a record £3 billion through our capital investment programme. This spend will help us achieve our Business Plan commitments and includes significant investments to ensure our region is resilient to the impacts of drought, climate change and population growth, alongside our largest ever programme of schemes delivering environmental protection.

Delivery against this investment programme remains strong with gross annual capital expenditure on an accruals basis across the appointed business increasing from £635 million in 2021/22 to £725 million in 2022/23 (£326 million on capital maintenance, £399 million on capital enhancement).

This is broadly in line with management expectations and is particularly pleasing given the significant increase in the size of the programme compared to AMP6, in addition to the supply chain impacts from the war in Ukraine and other macroeconomic factors.

This has resulted in a £436.1 million increase in property, plant and equipment and intangible assets, net of depreciation.

Financial needs and resources

During the year to March 2023, Anglian Water raised new debt of £740.8 million. This comprised the following new issuances:

- 10-year Canadian Maple Bond amounting to circa $350.0 million which was swapped to a sterling equivalent of £224.8 million;
- £100 million 18-year CPIH linked bond. This was the first CPIH linked issuance by Anglian Water;
- £150 million drawdown on NatWest facility; and
- £266 million US private placement.

Repayments of £668.7 million were made in respect of maturing debt, which consisted of a £250 million 5.837% fixed rate debt, £15 million 1.37% index-linked private placement, £31.9 million 4% private placement, £22.3 million 4% private placement, amortising payments on EIB index-linked debt and £266.5 million early settlement of accretion due on 2.4% ILLS 2035 note.

At 31 March 2023, excluding derivatives, Anglian Water had borrowings net of cash of £6,247.9 million, an increase of £626.6 million over the prior year. Net borrowings comprised a mixture of fixed, index-linked and variable-rate debt of £6,845.1 million, leases of £36.4 million and cash and deposits of £633.1 million. Net debt increased as a result of indexation on debt as described above combined with our continuing capital investment programme. The increase in net borrowings, excluding the fair value of derivatives, primarily reflects the higher accretion on index-linked debt.

At 31 March 2023, Anglian Water had a derivative financial instrument liability of £697.7 million (excluding energy derivative assets of £0.7 million), down from £1,162.0 million in 2022 (excluding energy derivative assets of £73.4 million).

The business generated cash from operations of £710.9 million in the year (2022: £749.9 million). The decrease primarily reflects short-term timing differences on working capital more than offsetting improvements in relation to EBITDA described above.

Liquidity

The company's objective is to maintain flexibility, diversification and continuity of funding through access to different markets and debt instruments. At 31 March 2023, Anglian Water held cash, deposits and current asset investments of £633.1 million (2022: £870.7 million). The decrease in cash amounts held is reflective of the higher debt repayments than new debt issuances in the period, the payment of the March 2022 final dividend and also the net of operational and residual investing and financing cash flows.

As at March 2023 Anglian Water has access to £975.0 million of undrawn facilities (March 2022: £600 million), to finance working capital and capital expenditure requirements.

In addition, Anglian Water has access to a further £375.0 million of liquidity facilities (March 2021: £375.0 million), consisting of £244.0 million to finance debt service costs and £131.0 million to finance operating expenditure and maintenance capital expenditure in the event that the company was in an Event of Default on its debt obligations and had insufficient alternative sources of liquidity. See note 1 for further commentary over the liquidity requirements of the Group in relation to going concern.

All bank facilities and debt capital market issuance are issued pursuant to the Global Secured Medium-Term Note Programme dated 30 July 2002 between the company, AWSF and Deutsche Trustee Company Ltd (as agent and trustee for itself and each of the finance parties). This agreement provides that any facilities drawn by AWSF will be passed directly on to the company upon utilisation of the facility.

Interest rates

The company's policy, as agreed by the Board, is to achieve a balanced mix of funding to inflation-linked, fixed and floating rates of interest. At the year end, taking into account interest rate swaps, 66.6% (March 2022: 68.9%) of the company's borrowings were at rates indexed to inflation, 26.2% (March 2022: 25.1%) were at fixed rates and 7.2% (March 2022: 6.0%) were at floating rates. At 31 March 2023, the proportion of inflation debt to regulated capital value was 47.9% (2022: 51.4%).

Pension funding

At 31 March 2023, the closed defined benefit scheme had an IAS 19 accounting pension surplus (before deferred tax) of £51.1 million, compared to £163.4 million at 31 March 2022. This decrease in surplus reflects a decrease in the scheme's liabilities resulting from an increase in the corporate bond rate used to discount those liabilities on an accounting basis compared to a greater decrease in our assets which are hedging gilt-based liabilities.

Annual Performance Report

Under Condition F of its Licence, Anglian Water is obliged to provide the Water Services Regulation Authority, Ofwat, with additional accounting information to that contained in the statutory financial statements. This information is presented in the Annual Performance Report, a copy of which is available on the Anglian Water Services website anglianwater.co.uk/our-reports

A

Court of Appeal

*Regina *v* Whirlpool UK Appliances Ltd

Practice Note

[2017] EWCA Crim 2186

B

2017 Nov 21; Dec 20

Lord Burnett of Maldon CJ, Teare, Kerr JJ

Crime — Sentence — Health and safety offences — Level of fine where offender very large corporation — Breach of duty to conduct undertaking to ensure persons not in its employment not exposed to risks to health and safety — Breach resulting in death of self-employed contractor — Impact of death on level of sentence — Impact of relatively poor profitability where turnover substantial — Guidance as to levels of fines

C

Guidance on sentencing very large organisations which fail to discharge their duty to ensure, so far as reasonably practicable, that persons not in their employment are not exposed to risks to health and safety, and in particular as to the impact on the approach to the ranges set out in the relevant sentencing guideline of (i) a death and (ii) relatively poor profitability in the context of an organisation with a substantial turnover (post, paras 29–31, 34–43).

D

The following cases are referred to in the judgment of the court:

R v Sellafield Ltd [2014] EWCA Crim 49; [2014] Env LR 19, CA
R v Tata Steel UK Ltd [2017] EWCA Crim 704; [2017] 2 Cr App R (S) 29, CA
R v Thames Water Utilities Ltd (Practice Note) [2015] EWCA Crim 960; [2015] 1 WLR 4411; [2016] 3 All ER 919, CA

E

No additional cases were cited in argument.

APPEAL against sentence

On 6 February 2017 the defendant company, Whirlpool UK Appliances Ltd, pleaded guilty before Bristol Magistrates' Court to an offence contrary to section 3(1) of the Health and Safety at Work etc Act 1974 and was committed for sentence to the Crown Court, pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. On 21 March 2017 in the Crown Court at Bristol the company was sentenced by Judge Patrick to pay a fine of £700,000.

F

The defendant appealed against sentence on the ground that the judge had erred in his application of the Definitive Guideline on Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences, effective from February 2016, with the result that the sentence imposed was manifestly excessive.

G

The facts are stated in the judgment of the court.

Dominic Adamson (instructed by *Plexus Law*) for the defendant.

Alan Fuller (instructed by *Lester Aldridge llp*) for HM Inspectors of Health and Safety.

The court took time for consideration.

H

20 December 2017. **LORD BURNETT OF MALDON CJ** handed down the following judgment of the court.

1 On 21 March 2017 at the Crown Court at Bristol the defendant company was sentenced by Judge Patrick to pay a fine of £700,000 having earlier pleaded guilty to

an offence contrary to section 3(1) of the Health and Safety at Work etc Act 1974 ("the 1974 Act"). That imposes a duty on an employer to conduct its undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in its employment are not thereby exposed to risks to their health and safety. This prosecution was brought following the death of Mr Clive Dalley, a self-employed alarm and telecommunications contractor, who died as a result of an accident at the defendant's premises on 21 March 2015.

2 This appeal against sentence is brought with leave of the single judge. Mr Adamson, who appears for the defendant before us, as he did below, submits that the judge erred in his application of the Definitive Guideline on Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences, effective from February 2016, with the result that the sentence imposed was manifestly excessive. Three issues fall for particular consideration in this appeal. First, the impact of a death on the approach to the ranges set out in the Guideline. Secondly, how one identifies and then treats a "very large organisation" for the purposes of the Guideline. Thirdly, the impact of relatively poor profitability in the context of an organisation with a substantial turnover.

The facts in outline

3 Mr Dalley was a self-employed fire alarm and telecoms contractor of 30 years' experience who was frequently employed as a sub-contractor at the defendant's Indesit factory in Yate near Bristol. On 21 March 2015 he was working on the fire and heat detector systems from a mobile elevated working platform which he had manoeuvred into position between hanging baskets on the overhead conveyor system. The overhead conveyor system was set in motion by an employee of the defendant who was part of a maintenance team working elsewhere on the conveyor. One of the baskets knocked the working platform causing it to topple and Mr Dalley to fall. He suffered multiple fractures and died ten days later from complications arising from his injuries.

4 Both the defendant and Mr Dalley (who had comparable duties as a self-employed contractor as those imposed on the defendant under the 1974 Act) were aware of the risks involved of working at height and also that the maintenance work was to be carried out that morning. Two days before the accident, Mr Dalley had discussed the work with the maintenance co-ordinator at the factory and they walked through it. It was agreed that he would return on the Saturday when few people would be in the premises. It was explained that the maintenance team would be working on the conveyor system at the same time and that their work would take priority over his. A permit to work system was operated. Mr Dalley was issued with a permit. There was a risk assessment relating to working at height. It was agreed that Mr Dalley would tell the other workers when he wanted to do his work to enable them to turn off the conveyor system.

5 On the morning in question, Mr Dalley told the maintenance workers that he was going to have a cup of coffee before he started his work from the working platform. They continued with their tasks which required the overhead conveyor to be turned on and off intermittently. Unfortunately, they were unaware that Mr Dalley had returned and raised his working platform to a position vulnerable to being struck. It was in those circumstances that this tragedy occurred. It illustrates the importance of systems being devised which recognise human frailty and the possibility of a small oversight giving rise to serious potential consequences.

6 The failures which gave rise to the breach of section 3 of the 1974 Act were: (a) the defendant did not require Mr Dalley to prepare a job-specific risk assessment and method statement for the work he was to carry out on 21 March 2015; (b) the defendant could have prepared a more detailed Permit to Work which specifically identified the potential risk posed by a working platform being used in the vicinity of the overhead conveyor and the control measures required.

The Guideline

7 The Guideline provides a structure within which to sentence for breaches of health and safety legislation. At Step One, the court is enjoined to determine the offence category. As part of that exercise it must first decide "culpability". There are four levels of culpability: very high, high, medium and low. The conduct described in the Guideline to inform the assessment of culpability ranges from "deliberate breach of or flagrant disregard for the law", at one end, to "offender did not fall far short of the appropriate standard" at the other.

8 Consideration of "harm" follows in the context that the offences under sections 2 and 3 of the 1974 Act are ones of creating a risk of harm. The Guideline requires the court to determine both the seriousness of the harm risked and the likelihood of that harm arising. Each of those factors may be ascribed to one of three categories. The hierarchy of harm is then divided into four categories by the Guideline, as set out in the following table:

	Seriousness of harm risked		
	Level A • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy	*Level B* • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition	*Level C* • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

9 Having identified the appropriate level of harm, the Guideline then requires the court to consider whether the offence exposed a number of workers or members of the public to risk and whether the offence was a significant cause of actual harm. It continues:

"If one or both of these factors apply the court must consider moving up a harm category or substantially moving up within the category range at step two . . . The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified in the scale of seriousness . . ."

10 At Step Two a starting point and category range are determined by focussing on turnover, with aggravating and mitigating features influencing where in the range the starting point lies. The Guideline describes organisations as large (turnover £50m and over), medium (turnover £10 to £50m) small (turnover £2 to £10m) and micro (turnover up to £2m). In respect of each, there is a table bringing together the four possible levels of culpability and four possible harm categories. By way of illustration, and also because it is at the heart of the submissions we have heard, we reproduce the table applicable to large organisations:

Large *Turnover or equivalent: £50m and over*		
	Starting point	*Category range*
Very high culpability		
Harm category 1	£4m	£2·6m–£10m
Harm category 2	£2m	£1m–£5·25m
Harm category 3	£1m	£500,000–£2·7m
Harm category 4	£500,000	£240,000–£1·3m
High culpability		
Harm category 1	£2·4m	£1·5–£6m
Harm category 2	£1·1m	£550,000–£2·9m
Harm category 3	£540,000	£250,000–£1·45m
Harm category 4	£240,000	£120,000–£700,000
Medium culpability		
Harm category 1	£1·3m	£800,000–£3·25m
Harm category 2	£600,000	£300,000–£1·5m
Harm category 3	£300,000	£130,000–£750,000
Harm category 4	£130,000	£50,000–£350,000
Low culpability		
Harm category 1	£300,000	£180,000–£700,000
Harm category 2	£100,000	£35,000–£250,000
Harm category 3	£35,000	£10,000–£140,000
Harm category 4	£10,000	£3,000–£60,000

The Guideline provides for larger organisations in this way:

"Very large organisations. 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."

11 The Guideline includes a non-exhaustive list of factors both increasing seriousness and those reducing it, or reflecting mitigation. It explains that recent relevant previous convictions should result in a substantial upward adjustment. The impact of both aggravating and mitigation features may result in a move outside the category range identified in the Guideline.

12 We pause to observe that the features of the Guideline we have so far referred to reflect its inherent flexibility necessary to meet the broad range of circumstances

A that fall to be considered in breaches of sections 2 and 3 of the 1974 Act. In considering a guideline replete with so many figures there is a temptation to approach its application in an arithmetic way. In our opinion that should be resisted. In this area, as much as any, the court should not lose sight of the fact that it is engaged in an exercise of judgment appropriately structured by the Guideline but, as has often been observed, not straitjacketed by it.

13 Thus far the court will have taken account of culpability, harm (with its two B components as set out in the Guideline), the extent of those exposed to the material risk, the incidence of actual harm, the turnover of the organisation and aggravating and mitigating factors to determine a starting point. Mr Adamson submits that in addition to turnover, the broader financial health of the organisation could fall into account at Step Two for the purpose of the Guideline. We do not agree. It is clear from its terms that such factors come into play at Step Three.

14 Step Three requires the court to "check whether the proposed fine based on C turnover is proportionate to the overall means of the offender". It identifies three general principles affecting sentencing at this stage. It notes that section 164 of the Criminal Justice Act 2003 requires a fine to take account of the financial circumstances of the offender; that it must meet in a proportionate way the objectives of punishment, deterrence and removal of gain derived from the offending; and that it must be "sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation." It then enjoins the court to consider the financial circumstances of D the offender—the economic realities—with the result that in finalising the sentence the following factors are relevant:

- Profitability. Adjust downwards for a small profit margin and upwards for a larger profit margin.
- Any quantifiable benefit derived from the offence.
- Whether the fine will put the offender out of business.

15 Step Four, which has no relevance to this appeal, requires the court to consider E matters such as whether the fine will impair the offender's ability to make necessary improvements to its systems, make restitution to victims or adversely affect the economic interests of others. Step Five, also not in play in this appeal, concerns formal assistance to the prosecuting authorities in connection with other prosecutions. Step Six concerns reduction for guilty pleas.

Authority

F 16 This court considered the approach to fines for very large organisations in environmental cases, with a Definitive Guideline structured in a similar but not identical way, in *R v Thames Water Utilities Ltd (Practice Note)* [2015] 1 WLR 4411. In the judgment of the court delivered by Mitting J, at para 33, the general principles governing the sentencing of very large organisations run for profit which had been identified in *R v Sellafield Ltd* [2014] Env LR 19, para 3, were adopted:

G "It is important at the outset to recall the provisions which Parliament has enacted in the Criminal Justice Act 2003 ('CJA 2003') in relation to the duty of the courts in sentencing, as these principles are applicable to all offenders, including companies:

"(i) The courts must have regard in dealing with offenders to the purposes of sentencing which Parliament specified as (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and H rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences (section 142 of the CJA 2003).

"(ii) In considering the seriousness of the offence the court must have regard to the culpability of the offender and the harm caused or which might foreseeably be caused (section 143 of the CJA 2003).

"(iii) If a court decides on a fine it must approach the fixing of fines having regard not only to the purposes of sentencing and the seriousness of the offence, but must also take into account the criteria set out in section 164 of the CJA 2003: (1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances. (2) The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence. (3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court. (4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine."

17 The Guideline applicable in the appeal before us reflects this settled approach.

18 There was no doubt that Thames Water Utilities Ltd was a "very large organisation". At para 37 of the judgment, Mitting J records a submission to the effect that all organisations should be treated as very large if turnover exceeds £150m per year on a three yearly average and observed:

"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."

19 An obvious case concerning a very large organisation was *R v Tata Steel UK Ltd* [2017] 2 Cr App R (S) 29. The appellant had a turnover of about £4 billion a year, and although a going concern was not at the time profitable. The appeal concerned two offences under section 2 of the 1974 Act when on separate occasions employees had been seriously injured. At para 45 of the judgment of the court Gross LJ approved the approach of the sentencing judge to reflect the size of the appellant. By reference to the table we have set out in para 10 above, this was a "high culpability harm category 2" case which gave a starting point of a fine of £1·1m. But he moved up a category and proceeded from a starting point of £2·4m. The judge then enhanced it further at Step Three to bring the fine home to the management and shareholders because the senior management were inadequately focussed on day to day safety.

The sentencing remarks

20 The judge noted that the defendant had in place procedures to minimise risk although they had failed. He considered that there should have been a second person with Mr Dalley whilst he worked and that the Permit to Work should have been much more specific about the work to be done and the risks that it entailed. The risk that the maintenance workers posed to Mr Dalley had not been properly assessed, in particular as there was no line of sight between them and him.

21 The judge set out the review of policies and procedures undertaken by the defendant after the tragedy which had done everything possible to eliminate further problems. The defendant fully co-operated in the investigation.

22 There was a culture of commitment to safe systems and improvements in which all the employees were engaged. The judge summarised the range of safety systems and procedures in place, all of which tended to demonstrate that commitment. The company had an exemplary health and safety record, with no previous convictions. It profoundly regretted what had occurred. None of the aggravating features sometimes found in health and safety cases, for example deliberate cost-cutting or calculated risk-taking to enhance profit was present. On the contrary,

A "so far as the guideline is concerned . . . not only are there no aggravating features, every single mitigating feature arises . . . It has an excellent health and safety record . . . The company had also taken steps to ensure that [Mr Dalley] was aware of his duty to act under a code of practice which highlighted the risk of working at height, and the company was aware that he was qualified to undertake the work he was doing. It is accepted that there was no formal process to inform workers of contractors working on site. Mr Dalley had been asked to notify the
B workforce when he would be working at the site of the accident but did not do so."

23 The judge went on to consider the Guideline. He concluded that for the purpose of the Guideline the breach of duty was one of low culpability, because the defendant did not fall far short of the appropriate standard. He said:

"I have regard to the fact that there were systems in place; that there were
C systems for working at height; there was a lockout policy; there were policies for working with contractors, of which Mr Dalley was aware and in which he was conversant, he himself had been trained for working on platforms and had undergone retraining in 2015. The platforms themselves have an excellent safety record . . . While the permit to work could have been fuller and could have contained more detail, in fact it contained a significant amount of details to minimise a risk . . . it was only on the day of the incident itself that there was any
D risk . . . Whilst there was no document confirming the presence of Mr Dalley at the factory on Saturday and no one directly responsible at the time, it is clear that people were aware of his presence, and there had been a walk through to discuss risk only two days before the incident."

24 Turning to the question of harm, the judge said it was "plainly a level A case" because the risk of harm included death or serious injury. He recognised that he had to assess the risk of that harm materialising. That is because the gravamen of the
E offence under section 3 of the 1974 Act is to avoid the risk of harm. He concluded that there was no risk of harm to any other person that day because the factory was not in production and there were fewer than a dozen people on site. There was a low likelihood of harm materialising. In the result that was a "harm category 3" case for the purposes of the Guideline.

25 The judge then considered the appropriate starting point. He said that the defendant's turnover was £500m (whereas the tables in the Guidelines are based
F upon a turnover of £50m). He noted that the company had £500m of assets and that in the two years covered by the defendant's annual report for December 2015, in one year there was a profit and in the other year there was a loss. He then said this:

"I am told that manufacturing costs often amount to some 80% of the turnover and I am asked to contrast this company with those with lower operational costs. I have regard to that point but decline to draw a distinction between companies with high costs and those with low. In my judgment that appropriate starting
G point is £1·2m. I give credit for plea and also make allowance for good character and remorse. Other factors have been arrived at when arriving at low culpability and therefore I impose a fine of £700,000 . . ."

If we unpack that a little, the result is this. The starting figure of £1·2m was reduced by £150,000 for good character and remorse and then reduced by a third to reflect the guilty plea.

H *The financial position of the defendant*

26 Before considering the submissions made on this appeal, it is necessary to note in a little more detail the information revealed in the defendant's annual report for December 2015. Turnover in 2014 was £672,842,000 and in 2015 £710,798,000, rather than the £500m identified by the judge. In 2014 there was a

profit before tax of £24,738,000. But in 2015 there was a loss of £165,041,000. The reason for the loss was two exceptional items. One resulted from corrective action remedying certain safety and quality issues which required the recall of products. The other was an impairment to an investment in a related company. The former resulted in a provision for £178,577.000. In 2014 the company had assets of £546,518,000 and in 2015 assets of £567,548,000. Directors' remuneration was £579,000 in 2014 and £584,000 in 2015. The highest paid director received £480,000 in 2104 and £488,000 in 2015.

Discussion

27 On this appeal there are two principal criticisms of the judge's approach. First, Mr Adamson submits that the judge's starting point of £1·2m is far too high, by comparison with the starting points and category ranges in the Guideline for large organisations. The second main criticism is that the judge failed to examine the financial circumstances of the company at stage 3 which requires the court to consider whether the proposed fine based upon turnover is proportionate to the overall means of the offender. In particular the Guideline states that the profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover downward adjustment may be needed. In declining to draw a distinction between companies with high costs and those with low costs it is said that the judge erred.

28 We agree with the judge's conclusion that for the purposes of the Guideline at Step One the offence should be treated as one of "harm category 3". It is more than justified when one considers the circumstances that surrounded this tragedy and is not in issue before us.

29 In discussing the scheme of the Guideline in the context of this appeal we will begin by considering the approach to sentence for a large company with a turnover of £50m or so. The starting point for such an offence would be £35,000. Culpability has a marked impact on starting points, as the table we have reproduced shows. Had the culpability been very high the starting point would be £1m, £540,000 if the culpability were high and £300,000 if medium. The table also demonstrates that the harm category can have as profound an impact on starting points.

30 There was no question of exposing other workers or members of the public to harm, but the systemic failings were a significant cause of harm, indeed the most serious harm imaginable, namely death. That would justify an upward movement within the appropriate category range or a move into the next harm category. Were the defendant a £50m organisation the Guideline recognises that the fact of death would justify a substantial move away from the £35,000 starting point to the top of the category range (£140,000) or beyond.

31 A consistent feature of sentencing policy in recent years, reflected both in statute and judgments of this court, has been to treat the fact of death as something that substantially increases a sentence, as required by the second stage of the assessment of harm at Step One. Without more, we consider that the fact of death would justify a move not only into the next category but to the top of the next category range, suggesting a starting point of perhaps £250,000.

32 What impact on that starting point does the higher turnover of the defendant have? We note 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 Guideline. The Guideline does not apply the same arithmetic approach to define the boundary between a large and very large organisation. No upper limit is mentioned for a large organisation. Instead, the Guideline suggests that "very large organisations" will have a turnover that "very greatly exceeds" the threshold for large organisations. In such cases "it may be necessary to move outside the range to achieve a proportionate sentence." We remind ourselves that in para 40(iv) of *R v Thames Water Utilities Ltd* this court made clear that there should be no mechanistic extrapolation for levels for large companies.

A 33 Each of the category ranges in which the turnover limits are identified is designed to accommodate organisations with turnovers at both ends of the range. The language of the Guideline suggests that the category ranges identified for large organisations are designed to cater for turnovers which "exceed" £50m, indeed "greatly exceed" £50m. These first two examples do not fall within the definition of a very large organisation at all. Most organisations with a turnover which "very greatly exceeds £50m" will be treated as very large organisations. But even then the B Guideline retains flexibility to meet the individual circumstances by suggesting that it "may", not will, be necessary to move outside the range. The language of the Guideline suggests that a very large organisation is likely to have a turnover of multiples of £50m but we would not wish to create an artificial boundary. The turnover of the defendant was of the order of £700m. Although the judge did not say in terms that the defendant was therefore a very large organisation within the language of the Guideline it is clear to us that it must be; and indeed that must have C been the view of the judge. It was therefore permissible to move outside the appropriate range in order to achieve a proportionate sentence.

34 Having determined that an organisation is very large, the calculation of a fine through the structure of the Guideline does not at this stage dictate an arithmetic approach to turnover. There is no linear approach. That much is clear from the conclusion endorsed by this court in *R v Tata Steel UK Ltd* where a turnover of £4 billion, as opposed to £50m, led to a step change of one harm category rather than extravagant multiples.

D 35 As we have said, the range of recommended fines for a large company where there is low culpability and harm category 3 goes up to £140,000. But we have concluded that the fact of death, without taking account of turnover, should take the starting point to the top of the next category or about £250,000. That figure must be increased to reflect the large turnover the defendant and its status as a very large organisation. The next range up in the Guideline extends from £180,000 to £700,000.

E 36 We have reached the stage in the Guideline of having to take into account the following factors. First, culpability; secondly, risk of harm; thirdly, actual harm—in this case death, and fourthly, turnover. The judge's conclusion that there was low culpability and a low likelihood of harm underpins this part of the exercise. Were the culpability or harm category greater, then a substantially higher starting point would be appropriate. In our view the last of these four points, namely turnover, should result in the starting point moving to £500,000 before aggravating and mitigating F factors are taken into account.

37 The judge significantly reduced his starting point to reflect the strong mitigation he identified. In following his approach we arrive at a figure of £450,000.

38 The judge did not expressly consider Step Three of the Guideline. That step requires the court to consider the financial circumstances of the offender and the judge decided not to do so. There is a significant difference between an organisation trading on wafer-thin margins and another, perhaps a professional services company G where the profits shared between partners or shareholders is a substantial percentage of turnover. An organisation with a consistent recent history of losses is likely to be treated differently from one with consistent profitability. So too, an organisation where the directors and senior management are very handsomely paid when compared to turnover is likely to attract a higher penalty than one where the converse is the case.

39 However, when one has regard to the overall means of this defendant we do H not consider that the figure at which we have arrived requires adjustment. The defendant has an underlying profitability. The recent loss was the result of two exceptional items. Furthermore, the assets of the company both in 2014 and 2015 were about £550m. The fluctuations in the profitability did not affect the directors' remuneration. As required by the Guideline we have stepped back and reviewed the proposed level of fine. Having regard to the underlying culpability, risk of harm,

actual harm and turnover, in our view a starting point of £450,000 at Step Three is sufficient to have a real economic impact which will bring home to the management and shareholders the need to comply with health and safety legislation but it is also proportionate to the defendant's overall means. As the judge noted, this is an organisation with an impeccable safety record which has done everything possible to make good the deficiencies exposed by these events.

40 Step Three in the Guideline does not provide an invitation to the court to disregard what has gone before, but to adjust any conclusion to reflect the economic realities.

41 The final step is to reduce the fine to reflect the guilty plea. The Guideline dictates a reduction of a third with the result that, in our judgment, the appropriate fine in this case should be one of £300,000. It follows that we consider that the sentence imposed by the judge was manifestly excessive. We quash the fine of £700,000 and substitute one of £300,000. The remaining orders are unaffected.

42 Nothing in this judgment is intended to alter the policy in this court in recent times (consolidated by the Sentencing Council) of ensuring that organisations are made to pay fines that are properly proportionate to their means. That of course does not relieve the court of a duty to inquire carefully into the facts of each case so as fairly to reflect different levels of harm and culpability. The circumstances of this case are unusual in flowing from an offence of low culpability and low likelihood of harm. Had they involved any increased culpability or likelihood of harm the appropriate fine would have been very much larger. No two health and safety cases are the same. The Guideline provides for very substantial financial penalties in appropriate cases, particularly when the offender is a large or very large organisation. Yet it is subtle enough to recognise that culpability, likelihood of harm and harm itself should be properly reflected in any fine, as well as turnover. The same degree of actual harm following a breach of section 2 or 3 of the 1974 Act can deliver very different fines depending on the circumstances. That is obvious when one considers the table we have reproduced in para 10, with its wide range of potential fines for the same offence.

43 Large commercial entities in many areas of business are vulnerable to very substantial financial penalties for regulatory failings. The same is true for breaches of health and safety or environmental law in appropriate cases. A fine of the order imposed by the judge in this case would only have been appropriate if the factors weighing in the balance for the purposes of the Guideline had been different.

Appeal allowed.
£300,000 fine substituted.

CLARE BARSBY, Barrister

Sentencing Council

DEFINITIVE GUIDELINE

Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences

Definitive Guideline

Contents

Applicability of guidelines

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all organisations and offenders aged 18 and older, who are sentenced on or after 1 February 2016, regardless of the date of the offence.

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

"Every court –

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so."

For individuals, this guideline applies only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Guidelines Council's definitive guideline, *Overarching Principles – Sentencing Youths*.

Structure, ranges and starting points

For the purposes of section 125(3)–(4) of the Coroners and Justice Act 2009, the guideline specifies *offence ranges* – the range of sentences appropriate for each type of offence. Within each offence, the Council has specified a number of *categories* which reflect varying degrees of seriousness. The offence range is split into *category ranges* – sentences appropriate for each level of seriousness. The Council has also identified a starting point within each category.

Starting points define the position within a category range from which to start calculating the provisional sentence. The court should consider further features of the offence or the offender that warrant adjustment of the sentence within the range, including the aggravating and mitigating factors set out at step two. In this guideline, if the proposed sentence is a fine, having identified a provisional sentence within the range at step two the court is required to consider a further set of factors that may require a final adjustment to the sentence. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only after the appropriate sentence has been identified.

Information on fine bands and community orders is set out in the annex at pages 47 and 48.

Organisations

Breach of duty of employer towards employees and non-employees

Breach of duty of self-employed to others

Health and Safety at Work Act 1974 (section 33(1)(a) for breaches of sections 2 and 3)

Breach of Health and Safety regulations

Health and Safety at Work Act 1974 (section 33(1)(c))

Triable either way

Maximum: **when tried on indictment: unlimited fine**
when tried summarily: unlimited fine

Offence range: **£50 fine – £10 million fine**

STEP ONE
Determining the offence category

The court should determine the offence category using only the culpability and harm factors in the tables below.

Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Very high
Deliberate breach of or flagrant disregard for the law
High
Offender fell far short of the appropriate standard; for example, by: • failing to put in place measures that are recognised standards in the industry • ignoring concerns raised by employees or others • failing to make appropriate changes following prior incident(s) exposing risks to health and safety • allowing breaches to subsist over a long period of time
Serious and/or systemic failure within the organisation to address risks to health and safety
Medium
Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories
Systems were in place but these were not sufficiently adhered to or implemented
Low
Offender did not fall far short of the appropriate standard; for example, because: • significant efforts were made to address the risk although they were inadequate on this occasion • there was no warning/circumstance indicating a risk to health and safety
Failings were minor and occurred as an isolated incident

See page 5.

Harm

Health and safety offences are concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. **The offence is in creating a risk of harm.**

1) Use the table below to identify an initial harm category based on the **risk of harm created by the offence**. The assessment of harm requires a consideration of **both**:
– the seriousness of the harm risked (A, B or C) by the offender's breach; **and**
– the likelihood of that harm arising (high, medium or low).

	Seriousness of harm risked		
	Level A • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy	**Level B** • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition	**Level C** • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

2) Next, the court must consider if the following factors apply. These two factors should be considered in the round in assigning the final harm category.

i) **Whether the offence exposed a number of workers or members of the public to the risk of harm.** The greater the number of people, the greater the risk of harm.

ii) **Whether the offence was a significant cause of actual harm.** Consider whether the offender's breach was a **significant cause*** of actual harm and the extent to which other factors contributed to the harm caused. Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable.

If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range at step two overleaf. If already in harm category 1 and wishing to move higher, move up from the starting point at step two on the following pages. The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.

* A significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause.

STEP TWO
Starting point and category range

Having determined the offence category, the court should identify the relevant table for the offender on the following pages. There are tables for different sized organisations.

At step two, the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine. The court should then consider further adjustment within the category range for aggravating and mitigating features.

At step three, the court may be required to refer to other financial factors listed below to ensure that the proposed fine is proportionate.

Obtaining financial information

The offender is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, **which may include the inference that the offender can pay any fine**.

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.

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. **Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.**

2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. **If adequate accounts are not produced on request, see paragraph 1.**

3. *For local authorities, fire authorities and similar public bodies*: the Annual Revenue Budget ('ARB') is the equivalent of turnover and the best indication of the size of the organisation. It is unlikely to be necessary to analyse specific expenditure or reserves (where relevant) unless inappropriate expenditure is suggested.

4. *For health trusts*: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via **www.monitor-nhsft.gov.uk**. Detailed analysis of expenditure or reserves is unlikely to be called for.

5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

Very large organisation
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.

Large
Turnover or equivalent: £50 million and over

	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Medium
Turnover or equivalent: between £10 million and £50 million

	Starting point	Category range
Very high culpability		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
High culpability		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
Medium culpability		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
Low culpability		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000

Small
Turnover or equivalent: between £2 million and £10 million

	Starting point	Category range
Very high culpability		
Harm category 1	£450,000	£300,000 – £1,600,000
Harm category 2	£200,000	£100,000 – £800,000
Harm category 3	£100,000	£50,000 – £400,000
Harm category 4	£50,000	£20,000 – £190,000
High culpability		
Harm category 1	£250,000	£170,000 – £1,000,000
Harm category 2	£100,000	£50,000 – £450,000
Harm category 3	£54,000	£25,000 – £210,000
Harm category 4	£24,000	£12,000 – £100,000
Medium culpability		
Harm category 1	£160,000	£100,000 – £600,000
Harm category 2	£54,000	£25,000 – £230,000
Harm category 3	£24,000	£12,000 – £100,000
Harm category 4	£12,000	£4,000 – £50,000
Low culpability		
Harm category 1	£45,000	£25,000 – £130,000
Harm category 2	£9,000	£3,000 – £40,000
Harm category 3	£3,000	£700 – £14,000
Harm category 4	£700	£100 – £5,000

Micro
Turnover or equivalent: not more than £2 million

	Starting point	Category range
Very high culpability		
Harm category 1	£250,000	£150,000 – £450,000
Harm category 2	£100,000	£50,000 – £200,000
Harm category 3	£50,000	£25,000 – £100,000
Harm category 4	£24,000	£12,000 – £50,000
High culpability		
Harm category 1	£160,000	£100,000 – £250,000
Harm category 2	£54,000	£30,000 – £110,000
Harm category 3	£30,000	£12,000 – £54,000
Harm category 4	£12,000	£5,000 – £21,000
Medium culpability		
Harm category 1	£100,000	£60,000 – £160,000
Harm category 2	£30,000	£14,000 – £70,000
Harm category 3	£14,000	£6,000 – £25,000
Harm category 4	£6,000	£2,000 – £12,000
Low culpability		
Harm category 1	£30,000	£18,000 – £60,000
Harm category 2	£5,000	£1,000 – £20,000
Harm category 3	£1,200	£200 – £7,000
Harm category 4	£200	£50 – £2,000

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness
Statutory aggravating factor:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Other aggravating factors include:
Cost-cutting at the expense of safety
Deliberate concealment of illegal nature of activity
Breach of any court order
Obstruction of justice
Poor health and safety record
Falsification of documentation or licences
Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities
Targeting vulnerable victims

Factors reducing seriousness or reflecting mitigation
No previous convictions **or** no relevant/recent convictions
Evidence of steps taken voluntarily to remedy problem
High level of co-operation with the investigation, beyond that which will always be expected
Good health and safety record
Effective health and safety procedures in place
Self-reporting, co-operation and acceptance of responsibility

See page 10.

STEPS THREE AND FOUR

The court should 'step back', review and, if necessary, adjust the initial fine based on turnover to **ensure that it fulfils the objectives of sentencing** for these offences. The court may adjust the fine upwards or downwards, including outside the range.

STEP THREE

Check whether the proposed fine based on turnover is proportionate to the overall means of the offender

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation**.

Review of the fine based on turnover

The court should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors:

- The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the **power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years.

STEP FOUR

Consider other factors that may warrant adjustment of the proposed fine

The court should consider any wider impacts of the fine within the organisation or on innocent third parties; such as (but not limited to):

- the fine impairs offender's ability to make restitution to victims;
- impact of the fine on offender's ability to improve conditions in the organisation to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors).

Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of its services.

STEP FIVE

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SIX

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

See page 12.

STEP SEVEN

Compensation and ancillary orders

In all cases, the court must consider whether to make ancillary orders. These may include:

Remediation

Under section 42(1) of the Health and Safety at Work Act 1974, the court may impose a remedial order in addition to or instead of imposing any punishment on the offender.

An offender ought by the time of sentencing to have remedied any specific failings involved in the offence and if it has not, will be deprived of significant mitigation.

The cost of compliance with such an order should not ordinarily be taken into account in fixing the fine; the order requires only what should already have been done.

Forfeiture

Where the offence involves the acquisition or possession of an explosive article or substance, section 42(4) enables the court to order forfeiture of the explosive.

Compensation

Where the offence has resulted in loss or damage, the court must consider whether to make a compensation order. The assessment of compensation in cases involving death or serious injury will usually be complex and will ordinarily be covered by insurance. In the great majority of cases the court should conclude that compensation should be dealt with in the civil court, and should say that no order is made for that reason.

If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Where the offender does not have sufficient means to pay the total financial penalty considered appropriate by the court, compensation and fine take priority over prosecution costs.

STEP EIGHT

Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP NINE

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Individuals

Breach of duty of employer towards employees and non-employees

Breach of duty of self-employed to others

Breach of duty of employees at work

Health and Safety at Work Act 1974 (section 33(1)(a) for breaches of sections 2, 3 and 7)

Breach of Health and Safety regulations

Health and Safety at Work Act 1974 (section 33(1)(c))

Secondary liability

Health and Safety at Work Act 1974 (sections 36 and 37(1) for breaches of sections 2 and 3 and section 33(1)(c))

Triable either way

Maximum: **when tried on indictment: unlimited fine and/or 2 years' custody**
when tried summarily: unlimited fine and/or 6 months' custody

Offence range: **Conditional discharge – 2 years' custody**

STEP ONE
Determining the offence category

The court should determine the offence category using only the culpability and harm factors in the tables below.

Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender's culpability.

Very high
Where the offender intentionally breached, or flagrantly disregarded, the law
High
Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken
Medium
Offence committed through act or omission which a person exercising reasonable care would not commit
Low
Offence committed with little fault, for example, because: • significant efforts were made to address the risk although they were inadequate on this occasion • there was no warning/circumstance indicating a risk to health and safety • failings were minor and occurred as an isolated incident

See page 15.

Harm

Health and safety offences are concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. **The offence is in creating a risk of harm**.

1) Use the table below to identify an initial harm category based on the **risk of harm created by the offence**. The assessment of harm requires a consideration of **both**:
– the seriousness of the harm risked (A, B or C) by the offender's breach; **and**
– the likelihood of that harm arising (high, medium or low).

	Seriousness of harm risked		
	Level A • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy	**Level B** • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition	**Level C** • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

2) Next, the court must consider if the following factors apply. These two factors should be considered in the round in assigning the final harm category.

i) **Whether the offence exposed a number of workers or members of the public to the risk of harm.** The greater the number of people, the greater the risk of harm.

ii) **Whether the offence was a significant cause of actual harm.** Consider whether the offender's breach was a **significant cause*** of actual harm and the extent to which other factors contributed to the harm caused. Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way that is reasonably foreseeable.

If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range at step two overleaf. If already in harm category 1 and wishing to move higher, move up from the starting point at step two overleaf. The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.

* A significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principal cause.

STEP TWO
Starting point and category range

Having determined the category, the court should refer to the starting points on the following page to reach a sentence within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 18.

Obtaining financial information

In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case **which may include the inference that the offender can pay any fine**.

Starting points and ranges

Where the range includes a potential sentence of custody, the court should consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:

- has the community order threshold been passed?

Even where the community order threshold has been passed, a fine will normally be the most appropriate disposal where the offence was committed for economic benefit. Or, if wishing to remove economic benefit derived through the commission of the offence, consider combining a fine with a community order.

See page 17.

	Starting point	Category range
Very high culpability		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
High culpability		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
Medium culpability		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
Low culpability		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

See page 18.

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness
Statutory aggravating factors:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Offence committed whilst on bail
Other aggravating factors include:
Cost-cutting at the expense of safety
Deliberate concealment of illegal nature of activity
Breach of any court order
Obstruction of justice
Poor health and safety record
Falsification of documentation or licences
Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities
Targeting vulnerable victims

Factors reducing seriousness or reflecting personal mitigation
No previous convictions **or** no relevant/recent convictions
Evidence of steps taken voluntarily to remedy problem
High level of co-operation with the investigation, beyond that which will always be expected
Good health and safety record
Effective health and safety procedures in place
Self-reporting, co-operation and acceptance of responsibility
Good character and/or exemplary conduct
Inappropriate degree of trust or responsibility
Mental disorder or learning disability, where linked to the commission of the offence
Serious medical conditions requiring urgent, intensive or long term treatment
Age and/or lack of maturity where it affects the responsibility of the offender
Sole or primary carer for dependent relatives

See page 19.

STEP THREE

Review any financial element of the sentence

Where the sentence is or includes a fine, the court should 'step back' and, using the factors set out below, review whether the sentence as a whole meets the objectives of sentencing for these offences. The court may increase or reduce the proposed fine reached at step two, if necessary moving outside of the range.

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

Review of the fine

Where the court proposes to impose a fine it should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above.

Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.

In finalising the sentence, the court should have regard to the following factors relating to the wider impacts of the fine on innocent third parties; such as (but not limited to):

- impact of the fine on offender's ability to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy.

STEP FOUR

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SIX

Compensation and ancillary orders

In all cases, the court must consider whether to make ancillary orders. These may include:

Disqualification of director

An offender may be disqualified from being a director of a company in accordance with section 2 of the Company Directors Disqualification Act 1986. The maximum period of disqualification is 15 years (Crown Court) or 5 years (magistrates' court).

Remediation

Under section 42(1) of the Health and Safety at Work Act 1974, the court may impose a remedial order in addition to or instead of imposing any punishment on the offender.

An offender ought by the time of sentencing to have remedied any specific failings involved in the offence and if not, will be deprived of significant mitigation.

The cost of compliance with such an order should not ordinarily be taken into account in fixing the fine; the order requires only what should already have been done.

Forfeiture

Where the offence involves the acquisition or possession of an explosive article or substance, section 42(4) enables the court to order forfeiture of the explosive.

Compensation

Where the offence has resulted in loss or damage, the court must consider whether to make a compensation order. The assessment of compensation in cases involving death or serious injury will usually be complex and will ordinarily be covered by insurance. In the great majority of cases the court should conclude that compensation should be dealt with in the civil courts, and should say that no order is made for that reason.

If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Where the offender does not have sufficient means to pay the total financial penalty considered appropriate by the court, compensation and fine take priority over prosecution costs.

STEP SEVEN

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Corporate manslaughter

Corporate Manslaughter and Corporate Homicide Act 2007 (section 1)

Triable only on indictment

Maximum: unlimited fine

Offence range: £180,000 fine – £20 million fine

STEP ONE
Determining the seriousness of the offence

By definition, the **harm** and **culpability** involved in corporate manslaughter will be very serious. Every case will involve death and corporate fault at a high level. The court should assess factors affecting the seriousness of the offence within this context by asking:

(a) How foreseeable was serious injury?
Usually, the more foreseeable a serious injury was, the graver the offence. Failure to heed warnings or advice from the authorities, employees or others or to respond appropriately to 'near misses' arising in similar circumstances may be factors indicating greater foreseeability of serious injury.

(b) How far short of the appropriate standard did the offender fall?
Where an offender falls far short of the appropriate standard, the level of culpability is likely to be high. Lack of adherence to recognised standards in the industry or the inadequacy of training, supervision and reporting arrangements may be relevant factors to consider.

(c) How common is this kind of breach in this organisation?
How widespread was the non-compliance? Was it isolated in extent or, for example, indicative of a systematic departure from good practice across the offender's operations or representative of systemic failings? Widespread non-compliance is likely to indicate a more serious offence.

(d) Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?
The greater the number of deaths, very serious personal injuries or people put at high risk of death, the more serious the offence.

Offence Category A: Where answers to questions (a)–(d) indicate a high level of harm or culpability within the context of offence.

Offence Category B: Where answers to questions (a)–(d) indicate a lower level of culpability.

See page 23.

STEP TWO
Starting point and category range

Having determined the offence category, the court should identify the relevant table for the offender on the following pages. There are tables for different sized organisations.

At step two, the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine. The court should then consider further adjustment within the category range for aggravating and mitigating features.

At step three, the court may be required to refer to other financial factors listed below to ensure that the proposed fine is proportionate.

Obtaining financial information

The offender is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, **which may include the inference that the offender can pay any fine**.

Normally, only information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. **Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.**

2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. **If adequate accounts are not produced on request, see paragraph 1.**

3. *For local authorities, fire authorities and similar public bodies*: the Annual Revenue Budget ('ARB') is the equivalent of turnover and the best indication of the size of the organisation. It is unlikely to be necessary to analyse specific expenditure or reserves (where relevant) unless inappropriate expenditure is suggested.

4. *For health trusts*: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via **www.monitor-nhsft.gov.uk**. Detailed analysis of expenditure or reserves is unlikely to be called for.

5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

Very large organisation
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.

Large organisation
Turnover more than £50 million

Offence category	Starting point	Category range
A	£7,500,000	£4,800,000 – £20,000,000
B	£5,000,000	£3,000,000 – £12,500,000

Medium organisation
Turnover £10 million to £50 million

Offence category	Starting point	Category range
A	£3,000,000	£1,800,000 – £7,500,000
B	£2,000,000	£1,200,000 – £5,000,000

Small organisation
Turnover £2 million to £10 million

Offence category	Starting point	Category range
A	£800,000	£540,000 – £2,800,000
B	£540,000	£350,000 – £2,000,000

Micro organisation
Turnover up to £2 million

Offence category	Starting point	Category range
A	£450,000	£270,000 – £800,000
B	£300,000	£180,000 – £540,000

See page 25.

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness
Statutory aggravating factor:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Other aggravating factors include:
Cost-cutting at the expense of safety
Deliberate concealment of illegal nature of activity
Breach of any court order
Obstruction of justice
Poor health and safety record
Falsification of documentation or licences
Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities
Offender exploited vulnerable victims

Factors reducing seriousness or reflecting mitigation
No previous convictions **or** no relevant/recent convictions
Evidence of steps taken to remedy problem
High level of co-operation with the investigation, beyond that which will always be expected
Good health and safety record
Effective health and safety procedures in place
Self-reporting, co-operation and acceptance of responsibility
Other events beyond the responsibility of the offender contributed to the death (**however**, actions of victims are unlikely to be considered contributory events. Offenders are required to protect workers or others who are neglectful of their own safety in a way which is reasonably foreseeable)

STEPS THREE AND FOUR

The court should 'step back', review and, if necessary, adjust the initial fine based on turnover to **ensure that it fulfils the objectives of sentencing** for these offences. The court may adjust the fine upwards or downwards, including outside the range.

STEP THREE

Check whether the proposed fine based on turnover is proportionate to the overall means of the offender

General principles to follow in setting a fine

The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

Fines cannot and do not attempt to value a human life in money. The fine should meet the objectives of punishment, the reduction of offending through deterrence and removal of gain derived through the commission of the offence. The fine **must be sufficiently substantial to have a real economic impact which will bring home to management and shareholders the need to achieve a safe environment for workers and members of the public affected by their activities**.

Review of the fine based on turnover

The court should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors:

- The profitability of an organisation will be a relevant factor. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about general costs of operating within the law.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the **power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years.

STEP FOUR

Consider other factors that may warrant adjustment of the proposed fine

The court should consider any wider impacts of the fine within the organisation or on innocent third parties; such as (but not limited to):

- impact of the fine on offender's ability to improve conditions in the organisation to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors).

Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of their services.

STEP FIVE

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SIX

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SEVEN

Compensation and ancillary orders

In all cases, the court must consider whether to make ancillary orders. These may include:

Publicity Orders

(Section 10 Corporate Manslaughter and Corporate Homicide Act 2007)

A publicity order should ordinarily be imposed in a case of corporate manslaughter. It may require publication in a specified manner of:

a) the fact of conviction;
b) specified particulars of the offence;
c) the amount of any fine;
d) the terms of any remedial order.

The object of a publicity order is deterrence and punishment.

(i) The order should specify with particularity the matters to be published in accordance with section 10(1). Special care should be taken with the terms of the particulars of the offence committed.
(ii) The order should normally specify the place where public announcement is to be made, and consideration should be given to indicating the size of any notice or advertisement required. It should ordinarily contain a provision designed to ensure that the conviction becomes known to shareholders in the case of companies and local people in the case of public bodies. Consideration should be given to requiring a statement on the offender's website. A newspaper announcement may be unnecessary if the proceedings are certain to receive news coverage in any event, but if an order requires publication in a newspaper it should specify the paper, the form of announcement to be made and the number of insertions required.
(iii) The prosecution should provide the court in advance of the sentencing hearing, and should serve on the offender, a draft of the form of order suggested and the judge should personally endorse the final form of the order.
(iv) Consideration should be given to stipulating in the order that any comment placed by the offender alongside the required announcement should be separated from it and clearly identified as such.

A publicity order is part of the penalty. Any exceptional cost of compliance should be considered in fixing the fine. It is not, however, necessary to fix the fine first and then deduct the cost of compliance.

Remediation

(Section 9 Corporate Manslaughter and Corporate Homicide Act 2007)

An offender ought by the time of sentencing to have remedied any specific failings involved in the offence and if it has not, will be deprived of significant mitigation.

If, however, it has not, a remedial order should be considered if it can be made sufficiently specific to be enforceable. The prosecution is required by section 9(2) Corporate Manslaughter and Corporate Homicide Act 2007 to give notice of the form of any such order sought, which can only be made on its application. The judge should personally endorse the final form of such an order.

The cost of compliance with such an order should not ordinarily be taken into account in fixing the fine; the order requires only what should already have been done.

Compensation

Where the offence has resulted in loss or damage, the court must consider whether to make a compensation order. The assessment of compensation in cases involving death or serious injury will usually be complex and will ordinarily be covered by insurance. In the great majority of cases the court should conclude that compensation should be dealt with in the civil courts, and should say that no order is made for that reason.

If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Where the offender does not have sufficient means to pay the total financial penalty considered appropriate by the court, compensation and fine take priority over prosecution costs.

STEP EIGHT

Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP NINE

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

Organisations

Breach of food safety and food hygiene regulations

England

Food Safety and Hygiene (England) Regulations 2013 (regulation 19(1))

Triable either way

Maximum: **when tried on indictment: unlimited fine**
when tried summarily: unlimited fine

Wales

Food Hygiene (Wales) Regulations 2006 (regulation 17(1))
The General Food Regulations 2004 (regulation 4)

Triable either way

Maximum: **when tried on indictment: unlimited fine**
when tried summarily: unlimited fine

Offence range: **£100 fine – £3 million fine**

STEP ONE
Determining the offence category

The court should determine the offence category using only the culpability and harm factors in the tables below. Where an offence does not fall squarely into a category, individual factors may require a **degree of weighting** to make an overall assessment.

Culpability

Very high
Deliberate breach of or flagrant disregard for the law
High
Offender fell far short of the appropriate standard; for example, by: • failing to put in place measures that are recognised standards in the industry • ignoring concerns raised by regulators, employees or others • allowing breaches to subsist over a long period of time
Serious and/or systemic failure within the organisation to address risks to health and safety
Medium
Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories
Systems were in place but these were not sufficiently adhered to or implemented
Low
Offender did not fall far short of the appropriate standard; for example, because: • significant efforts were made to secure food safety although they were inadequate on this occasion • there was no warning/circumstance indicating a risk to food safety
Failings were minor and occurred as an isolated incident

Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a **risk of harm** involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Harm	
Category 1	• Serious adverse effect(s) on individual(s) and/or having a widespread impact • High risk of an adverse effect on individual(s) including where supply was to groups that are vulnerable
Category 2	• Adverse effect on individual(s) (not amounting to Category 1) • Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect • Regulator and/or legitimate industry substantially undermined by offender's activities • Relevant authorities unable to trace products in order to investigate risks to health, or are otherwise inhibited in identifying or addressing risks to health • Consumer misled regarding food's compliance with religious or personal beliefs
Category 3	• Low risk of an adverse effect on individual(s) • Public misled about the specific food consumed, but little or no risk of actual adverse effect on individual(s)

STEP TWO
Starting point and category range

Having determined the offence category, the court should identify the relevant table for the offender on the following pages. There are tables for different sized organisations.

At step two, the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine. The court should then consider further adjustment within the category range for aggravating and mitigating features.

At step three, the court may be required to refer to other financial factors listed below to ensure that the proposed fine is proportionate.

Obtaining financial information

Offenders which are companies, partnerships or bodies delivering a public or charitable service are expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case, **which may include the inference that the offender can pay any fine**.

Normally, only information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.

2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.

3. *For local authorities, police and fire authorities and similar public bodies*: the Annual Revenue Budget ('ARB') is the equivalent of turnover and the best indication of the size of the organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.

4. *For health trusts*: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via **www.monitor-nhsft.gov.uk**. Detailed analysis of expenditure or reserves is unlikely to be called for.

5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

Very large organisation
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.

Large
Turnover or equivalent: £50 million and over

	Starting point	Range
Very high culpability		
Harm category 1	£1,200,000	£500,000 – £3,000,000
Harm category 2	£500,000	£200,000 – £1,400,000
Harm category 3	£200,000	£90,000 – £500,000
High culpability		
Harm category 1	£500,000	£200,000 – £1,400,000
Harm category 2	£230,000	£90,000 – £600,000
Harm category 3	£90,000	£50,000 – £240,000
Medium culpability		
Harm category 1	£200,000	£80,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£20,000 – £100,000
Low culpability		
Harm category 1	£35,000	£18,000 – £90,000
Harm category 2	£18,000	£9,000 – £50,000
Harm category 3	£10,000	£6,000 – £25,000

Medium
Turnover or equivalent: between £10 million and £50 million

	Starting point	Range
Very high culpability		
Harm category 1	£450,000	£200,000 – £1,200,000
Harm category 2	£200,000	£80,000 – £500,000
Harm category 3	£80,000	£40,000 – £200,000
High culpability		
Harm category 1	£200,000	£90,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£18,000 – £90,000
Medium culpability		
Harm category 1	£80,000	£35,000 – £190,000
Harm category 2	£35,000	£14,000 – £90,000
Harm category 3	£14,000	£7,000 – £35,000
Low culpability		
Harm category 1	£12,000	£7,000 – £35,000
Harm category 2	£7,000	£3,500 – £18,000
Harm category 3	£3,500	£2,000 – £10,000

Small
Turnover or equivalent: between £2 million and £10 million

	Starting point	Range
Very high culpability		
Harm category 1	£120,000	£50,000 – £450,000
Harm category 2	£50,000	£18,000 – £200,000
Harm category 3	£18,000	£9,000 – £80,000
High culpability		
Harm category 1	£50,000	£22,000 – £200,000
Harm category 2	£24,000	£8,000 – £90,000
Harm category 3	£9,000	£4,000 – £35,000
Medium culpability		
Harm category 1	£18,000	£7,000 – £70,000
Harm category 2	£8,000	£3,000 – £35,000
Harm category 3	£3,000	£1,500 – £12,000
Low culpability		
Harm category 1	£3,000	£1,400 – £12,000
Harm category 2	£1,400	£700 – £7,000
Harm category 3	£700	£300 – £3,000

Micro
Turnover or equivalent: not more than £2 million

	Starting point	Range
Very high culpability		
Harm category 1	£60,000	£25,000 – £120,000
Harm category 2	£25,000	£10,000 – £50,000
Harm category 3	£10,000	£5,000 – £18,000
High culpability		
Harm category 1	£25,000	£10,000 – £50,000
Harm category 2	£12,000	£4,000 – £22,000
Harm category 3	£4,000	£2,000 – £9,000
Medium culpability		
Harm category 1	£10,000	£3,000 – £18,000
Harm category 2	£4,000	£1,400 – £8,000
Harm category 3	£1,400	£700 – £3,000
Low culpability		
Harm category 1	£1,200	£500 – £3,000
Harm category 2	£500	£200 – £1,400
Harm category 3	£200	£100 – £700

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness
Statutory aggravating factor:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Other aggravating factors include:
Motivated by financial gain
Deliberate concealment of illegal nature of activity
Established evidence of wider/community impact
Breach of any court order
Obstruction of justice
Poor food safety or hygiene record
Refusal of free advice or training

Factors reducing seriousness or reflecting mitigation
No previous convictions **or** no relevant/recent convictions
Steps taken voluntarily to remedy problem
High level of co-operation with the investigation, beyond that which will always be expected
Good food safety/hygiene record
Self-reporting, co-operation and acceptance of responsibility

STEPS THREE AND FOUR

The court should 'step back', review and, if necessary, adjust the initial fine based on turnover to **ensure that it fulfils the objectives of sentencing** for these offences. The court may adjust the fine upwards or downwards, including outside the range. Full regard should be given to the totality principle at step eight where multiple offences are involved.

STEP THREE
Check whether the proposed fine based on turnover is proportionate to the overall means of the offender

General principles to follow in setting a fine
The court should finalise the fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. **The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence;** it should not be cheaper to offend than to take the appropriate precautions.

The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to operate within the law.**

Review of the fine based on turnover

The court should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above. The court may adjust the fine upwards or downwards including outside of the range.

The court should examine the financial circumstances of the offender in the round to enable the court to assess the economic realities of the company and the most efficacious way of giving effect to the purposes of sentencing.

In finalising the sentence, the court should have regard to the following factors:

- The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the **power to allow time for payment or to order that the amount be paid in instalments**, if necessary over a number of years.

STEP FOUR

Consider other factors that may warrant adjustment of the proposed fine

Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of their services.

The court should consider any wider impacts of the fine within the organisation or on innocent third parties; such as (but not limited to):

- impact of the fine on offender's ability to improve conditions in the organisation to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors).

STEP FIVE

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SIX

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SEVEN

Compensation and ancillary orders

Hygiene Prohibition Order

These orders are available under both the Food Safety and Hygiene (England) Regulations 2013 and the Food Hygiene (Wales) Regulations 2006.

If the court is satisfied that the health risk condition in Regulation 7(2) is fulfilled it **shall** impose the appropriate prohibition order in Regulation 7(3).

Where a food business operator is convicted of an offence under the Regulations and the court thinks it is proper to do so in all the circumstances of the case, the court **may** impose a prohibition on the operator pursuant to Regulation 7(4). An order under Regulation 7(4) is not limited to cases whether there is an immediate risk to public health; the court might conclude that there is such a risk of some future breach of the regulations or the facts of any particular offence or combination of offences may alone justify the imposition of a Hygiene Prohibition Order. In deciding whether to impose an order, the court will want to consider the history of convictions or a failure to heed warnings or advice in deciding whether an order is proportionate to the facts of the case. Deterrence may also be an important consideration.

Compensation

Where the offence results in the loss or damage the court must consider whether to make a compensation order. If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Where the offender does not have sufficient means to pay the total financial penalty considered appropriate by the court, compensation and fine take priority over prosecution costs.

STEP EIGHT

Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline from which the following guidance is taken:

"The total fine is inevitably cumulative.

The court should determine the fine for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court.

The court should add up the fines for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.

For example:

- where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences;
- where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed.

Where separate fines are passed, the court must be careful to ensure that there is no double-counting.

Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders."

STEP NINE

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

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Individuals

Breach of food safety and food hygiene regulations

England

Food Safety and Hygiene (England) Regulations 2013 (regulation 19(1))

Triable either way

Maximum: **when tried on indictment: unlimited fine and/or 2 years' custody**
when tried summarily: unlimited fine

Wales

Food Hygiene (Wales) Regulations 2006 (regulation 17(1))

Triable either way

Maximum: **when tried on indictment: unlimited fine and/or 2 years' custody**
when tried summarily: unlimited fine

The General Food Regulations 2004 (regulation 4)

Triable either way

Maximum: **when tried on indictment: unlimited fine and/or 2 years' custody**
when tried summarily: unlimited fine and/or 6 months' custody

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Offence range: Conditional discharge – 18 months' custody

STEP ONE
Determining the offence category

The court should determine the offence category using only the culpability and harm factors in the tables below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment.

Culpability

Very high
Where the offender intentionally breached, or flagrantly disregarded, the law
High
Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken
Medium
Offence committed through act or omission which a person exercising reasonable care would not commit
Low
Offence committed with little fault, for example, because: • significant efforts were made to address the risk although they were inadequate on this occasion • there was no warning/circumstance indicating a risk to food safety • failings were minor and occurred as an isolated incident

Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a **risk of harm** involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Harm	
Category 1	• Serious adverse effect(s) on individual(s) and/or having a widespread impact • High risk of an adverse effect on individual(s) – including where supply was to persons that are vulnerable
Category 2	• Adverse effect on individual(s) (not amounting to Category 1) • Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect • Regulator and/or legitimate industry substantially undermined by offender's activities • Relevant authorities unable to trace products in order to investigate risks to health, or are otherwise inhibited in identifying or addressing risks to health • Consumer misled regarding food's compliance with religious or personal beliefs
Category 3	• Low risk of an adverse effect on individual(s) • Public misled about the specific food consumed, but little or no risk of actual adverse effect on individual(s)

STEP TWO
Starting point and category range

Having determined the category, the court should refer to the starting points on the next page to reach a sentence within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 42.

Obtaining financial information

In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case **which may include the inference that the offender can pay any fine**.

Starting points and ranges

Where the range includes a potential sentence of custody, the court should consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:

- has the community order threshold been passed?

Even where the community order threshold has been passed, a fine will normally be the most appropriate disposal. Or, consider, if wishing to remove economic benefit derived through the commission of the offence, combining a fine with a community order.

	Starting point	Range
Very high culpability		
Harm category 1	9 months' custody	Band F fine – 18 months' custody
Harm category 2	Band F fine	Band E fine – 9 months' custody
Harm category 3	Band E fine	Band D fine – 26 weeks' custody
High culpability		
Harm category 1	Band F fine	Band E fine – 9 months' custody
Harm category 2	Band E fine	Band D fine – 26 weeks' custody
Harm category 3	Band D fine	Band C fine – Band E fine
Medium culpability		
Harm category 1	Band E fine	Band D fine – Band F fine
Harm category 2	Band D fine	Band C fine – Band E fine
Harm category 3	Band C fine	Band B fine – Band C fine
Low culpability		
Harm category 1	Band C fine	Band B fine – Band C fine
Harm category 2	Band B fine	Band A fine – Band B fine
Harm category 3	Band A fine	Conditional discharge – Band A fine

Note on statutory maxima on summary conviction. For offences under *regulation 19(1) Food Safety and Hygiene (England) Regulations 2013* and *regulation 17(1) Food Hygiene (Wales) Regulations 2006*, the maximum sentence magistrates may pass on summary conviction is an unlimited fine; therefore for these offences, magistrates may not pass a community order. *Regulation 4* of *The General Food Regulations 2004* is in force in Wales but not in England. For offences under *regulation 4*, the maximum sentence on summary conviction is 6 months' custody and/or an unlimited fine.

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness
Statutory aggravating factors:
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Offence committed whilst on bail
Other aggravating factors include:
Motivated by financial gain
Deliberate concealment of illegal nature of activity
Established evidence of wider/community impact
Breach of any court order
Obstruction of justice
Poor food safety or hygiene record
Refusal of free advice or training

Factors reducing seriousness or reflecting personal mitigation
No previous convictions **or** no relevant/recent convictions
Steps voluntarily taken to remedy problem
High level of co-operation with the investigation, beyond that which will always be expected
Good food safety/hygiene record
Self-reporting, co-operation and acceptance of responsibility
Good character and/or exemplary conduct
Mental disorder or learning disability, where linked to the commission of the offence
Serious medical conditions requiring urgent, intensive or long-term treatment
Age and/or lack of maturity where it affects the responsibility of the offender
Sole or primary carer for dependent relatives

See page 43.

STEP THREE
Review any financial element of the sentence

Where the sentence is or includes a fine, the court should 'step back' and, using the factors set out in step three, review whether the sentence as a whole meets the objectives of sentencing for these offences. The court may increase or reduce the proposed fine reached at step two, if necessary moving outside of the range.

Full regard should be given to the totality principle at step seven where multiple offences are involved.

General principles to follow in setting a fine
The court should finalise the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. **The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence**; it should not be cheaper to offend than to take the appropriate precautions.

Review of the fine
Where the court proposes to impose a fine it should 'step back', review and, if necessary, adjust the initial fine reached at step two to **ensure that it fulfils the general principles** set out above.

Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.

In finalising the sentence, the court should have regard to the following factors relating to the wider impacts of the fine on innocent third parties; such as (but not limited to):

- impact of the fine on offender's ability to comply with the law;
- impact of the fine on employment of staff, service users, customers and local economy.

STEP FOUR

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SIX

Compensation and ancillary orders

Ancillary orders

In all cases the court must consider whether to make ancillary orders. These may include:

Hygiene Prohibition Order

These orders are available under both the Food Safety and Hygiene (England) Regulations 2013 and the Food Hygiene (Wales) Regulations 2006.

If the court is satisfied that the health risk condition in Regulation 7(2) is fulfilled it **shall** impose the appropriate prohibition order in Regulation 7(3).

Where a food business operator is convicted of an offence under the Regulations and the court thinks it proper to do so in all the circumstances of the case, the court **may** impose a prohibition on the operator pursuant to Regulation 7(4). An order under Regulation 7(4) is not limited to cases where there is an immediate risk to public health; the court might conclude that there is such a risk of some future breach of the regulations or the facts of any particular offence or combination of offences may alone justify the imposition of a Hygiene Prohibition Order. In deciding whether to impose an order the court will want to consider the history of convictions or a failure to heed warnings or advice in deciding whether an order is proportionate to the facts of the case. Deterrence may also be an important consideration.

Disqualification of director

An offender may be disqualified from being a director of a company in accordance with section 2 of the Company Directors Disqualification Act 1986. The maximum period of disqualification is 15 years (Crown Court) or 5 years (magistrates' court).

Compensation

Where the offence results in loss or damage the court must consider whether to make a compensation order. If compensation is awarded, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited.

Where the offender does not have sufficient means to pay the total financial penalty considered appropriate by the court, compensation and fine take priority over prosecution costs.

STEP SEVEN

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

Where the offender is convicted of more than one offence where a fine is appropriate, the court should consider the following guidance from the definitive guideline on *Offences Taken into Consideration and Totality*.

"The total fine is inevitably cumulative.

The court should determine the fine for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court.

The court should add up the fines for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.

For example:

- where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences;
- where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed.

Where separate fines are passed, the court must be careful to ensure that there is no double-counting.

Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders."

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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Annex
Fine bands and community orders

FINE BANDS

In this guideline, fines are expressed as one of six fine bands (A, B, C, D, E or F).

Fine Band	**Starting point** *(applicable to all offenders)*	**Category range** *(applicable to all offenders)*
Band A	50% of relevant weekly income	25–75% of relevant weekly income
Band B	100% of relevant weekly income	75–125% of relevant weekly income
Band C	150% of relevant weekly income	125–175% of relevant weekly income
Band D	250% of relevant weekly income	200–300% of relevant weekly income
Band E	400% of relevant weekly income	300–500% of relevant weekly income
Band F	600% of relevant weekly income	500–700% of relevant weekly income

Band F is provided as an alternative to a community order or custody in the context of this guideline.

See page 48.

COMMUNITY ORDERS

In this guideline, community sentences are expressed as one of three levels (low, medium or high). An illustrative description of examples of requirements that might be appropriate for each level is provided below.

Where two or more requirements are ordered, they must be compatible with each other. Save in exceptional circumstances, the court must impose at least one requirement for the purpose of punishment, or combine the community order with a fine, or both (see section 177 Criminal Justice Act 2003).

LOW	MEDIUM	HIGH
Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate	Offences that obviously fall within the community order band	Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
Suitable requirements might include: • 40–80 hours unpaid work • Curfew requirement within the lowest range (e.g. up to 16 hours per day for a few weeks) • Exclusion requirement, without electronic monitoring, for a few months • Prohibited activity requirement • Attendance centre requirement (where available)	Suitable requirements might include: • Greater number of hours of unpaid work (e.g. 80–150 hours) • Curfew requirement within the middle range (e.g. up to 16 hours for 2–3 months) • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement	Suitable requirements might include: • 150–300 hours unpaid work • Curfew requirement up to 16 hours per day for 4–12 months • Exclusion order lasting in the region of 12 months

The *Magistrates' Court Sentencing Guidelines* includes further guidance on fines and community orders.

Overview | [2015] EWCA Crim 960, | [2016] 3 All ER 919, | [2015] 1 WLR 4411, | [2015] 2 Cr App Rep (S) 439, | [2015] Crim LR 739, | 165 NLJ 7657, | (2015) Times, 21 August, | [2015] All ER (D) 31 (Jun)

*R v Thames Water Utilities Ltd [2015] EWCA Crim 960

Court of Appeal, Criminal Division

Lord Thomas CJ, Mitting and Lewis JJ

3 June 2015

Environment — Protection — Pollution — Fine of £250,000 being imposed on defendant company following unlawful discharge of sewage — Defendant appealing against amount of fine — Whether recorder creating new category of penalties for very large organisations — Consideration being given to Sentencing Council's definitive guideline on environmental offences — Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675.

Judgment

MR RICHARD HONEY AND MISS ALISON PRYOR (who did not appear at the Crown Court) (instructed by **BERWIN LEIGHTON PAISNER LLP**) for the **Appellant**

MR BARRY BERLIN AND MRS ROOMA HOREESORUN (instructed by **THE ENVIRONMENT AGENCY**) for the **Crown**

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR JUSTICE MITTING:

This is the judgment of the Court to which we have all contributed.

Facts

1. Between 29 August 2012 and 4 September 2012 untreated sewage was discharged from Broadlayings Sewage Pumping Station into the Chase Brook which flows through a 143 acre nature reserve owned by the National Trust in the North Wessex Downs Area of Outstanding Natural Beauty. The discharge occurred otherwise than under and to the extent permitted by an environmental permit. An offence was therefore committed, contrary to Regulations 38(1)(a) and 39(1) Environmental Permitting (England and Wales) Regulations 2010. Thames Water Utilities Limited (the Appellant), as the operator of the pumping station, was culpable.

2. On 18 July 2014 the Appellant pleaded guilty to that offence at the first opportunity at Reading Magistrates' Court. It was committed to the Crown Court for sentence.

3. On 29 August 2014 at Reading Crown Court, Mrs. Recorder Arbuthnot imposed a fine of £250,000 plus a victim surcharge of £120 and ordered the Appellant to pay costs of £6,887.48.

4. The Appellant appeals, with the permission of the single judge, against the amount of the fine only.

5. The function of Broadlayings Sewage Pumping Station was to receive untreated sewage from the surrounding area and from another upstream pumping station and to pump it to a downstream pumping station and thence to a sewage treatment works. Sewage was pumped by two pumps submersed in a "wet well". The cause of the discharge was the failure (by tripping) of both pumps. In consequence, sewage was not pumped to the downstream pumping station but discharged directly into the Chase Brook. The cause of the failure of the pumps was well known: they became clogged with "rag" inappropriately discarded into the sewage system by domestic and other users. When this occurred, an alarm was triggered which alerted the Appellant's staff to the failure. The Appellant laid down a response time to the failure of one pump of 24 hours and to the failure of both, manifested by the triggering of an alarm which signified that the liquid level in the wet well was rising, of four hours. In the five months before the incident, there had been at least 16 instances of failure of one or both of the pumps. Each incident was recorded in the Appellant's log.

6. On 29 August 2012 alarms signifying pump failure were triggered on 12 occasions between 7.20 am and 8.50 am. The alarms indicated that both pumps had failed and that the water level in the wet well was high. The Appellant's staff did not respond to the alarms on 29 August 2012 or at all. Further alarms were triggered on 4 September 2012 between 1.17 am and 2.57 am. Again, there was no response. The discharge was first discovered by a member of the public walking in the Chase, who reported it to the National Trust who, in turn, reported it to the Appellant. Once notified, the Appellant's staff attended and unblocked the pumps.

7. Soon afterwards the pumps were replaced by newer pumps with a more robust specification better able to cope with the ingestion of rag.

8. In her sentencing remarks, the Recorder said this:

> "The Crown and Thames Water agree that the culpability of Thames Water can be described as negligence. I agree with that assessment on the basis that the company had had a number of warnings that the pumps were breaking down. They were close to a very special nature site and they should have replaced the pumps before they had to in September after the sewage had run into the brook."

A central issue in this appeal is whether or not she was entitled to reach those conclusions.

Application to admit fresh evidence - principles

9. The Appellant seeks permission to adduce fresh evidence pursuant to s.23 of the Criminal Appeals Act 1968, for the stated purpose of correcting what are claimed to be errors of fact. The principal errors are said to be contained in the passage cited; but the application is not limited to them. The fresh evidence is contained in witness statements made by Nigel Membury, Christopher Ralph and Helen Newman which, together with appendices, run to 119 pages. As well as the stated purpose, they seek to demonstrate that the Appellant is a responsible organisation which conscientiously discharges its duties to the wider community.

10. The application raises questions as to the circumstances in which fresh evidence may be adduced on a sentence appeal. If the evidence is in essence fresh information about the offender, a court will normally not require the conditions and formalities of the governing statutory provision, s.23 of the Criminal Appeals Act 1968, to be complied: see *R v Roberts* [2007] 1 WLR 1109 at [44]. However outside that limited area, the provisions of s.23 must be met: see *Beesley, Coyle and Rehman* [2012] 1 Cr App R (S) 15 at [33] – [36]. Under s.23(1) the Court may receive evidence not admitted in proceedings from which the appeal lies if the court thinks it necessary or expedient in the interests of justice. The factors to which it must have regard are those set out in s.23(2),

> "The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –
>
> (a) whether the evidence appears to the court to be capable of belief;

(b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

11. In addressing those factors, in particular that identified in s.23(2)(d) in a sentence appeal, the court will have regard to CrimPD VII B – Determining the Factual Basis of Sentence. The relevant paragraphs are as follows:

"B.6 A defendant may put forward a plea of guilty without accepting all of the facts as alleged by the prosecution. The basis of plea offered may seek to limit the facts or the extent of the offending for which the defendant is to be sentenced. Depending on the view taken by the prosecution and content of the offered basis, the case will fall into one of four categories…

(a) A plea of guilty upon a basis of plea agreed by the prosecution and defence.

B.7 The prosecution may reach an agreement with the defendant as to the factual basis on which the defendant will plead guilty, often known as an "agreed basis of plea". It is always subject to the approval of the court, which will consider whether it adequately and appropriately reflects the evidence as disclosed on the papers, whether it is fair and whether it is in the interests of justice.

B.8 *R v Underwood*…outlines the principles to be applied where the defendant admits that he…is guilty, but disputes the basis of offending alleged by the prosecution;

(a) The prosecution may accept and agree the defendant's account of the disputed facts or reject it in its entirety, or in part; if the prosecution accepts the defendant's basis of plea, it must ensure that the basis of plea is factually accurate and enables the sentencing judge to impose a sentence appropriate to reflect the justice of the case;

(b) In resolving any disputed factual matters, the prosecution must consider its primary duty to the court and must not agree with or acquiesce in an agreement which contains material factual disputes;

(c) If the prosecution does accept the basis of plea, it must be reduced to writing, be signed by advocates for both sides, and made available to the judge prior to the prosecution's opening;

(d) An agreed basis of plea that has been reached between the parties should not contain matters which are in dispute and any aspects upon which there is not agreement should be clearly identified.

B.11 Where the defendant pleads guilty, but disputes the basis of offending alleged by the prosecution and agreement as to that has not been reached, the following procedure should be followed;

(a) The defendant's basis of plea must be set out in writing, identifying what is in dispute and must be signed by the defendant;

(b) The prosecution must respond in writing setting out their alternative contentions and indicating whether or not they submit that a Newton hearing is necessary;

(c) The court may invite the parties to make representations about whether the dispute is material to sentence; and

(d) If the court decides that it is a material dispute, the court will invite such further representations or evidence as it may require and resolve the dispute in accordance with the principles set out in *R v Newton*."

12. In environmental pollution cases, it is now routine for the Crown to produce a "*Friskies"* schedule of aggravating and mitigating factors (*R v. Friskies Petcare (UK) Limited* [2000] 2 CAR (S) 401). As from 23 July 2014 this practice is expressly endorsed by the Practice Direction: [2014] 1 WLR 3001 at 3019. Q.3 deals with a case in which the offence is of a character or against a prohibition with which the sentencing court is unlikely to be familiar,

> "…Save where the circumstances are very straightforward, it is likely that justice will best be served by the submission of the required information in writing: see *R v. Friskies Petcare (UK) Limited….* Though it is the prosecutor's responsibility to the court to prepare any such document, if the defendant pleads guilty, or indicates a guilty plea, then it is very highly desirable that such sentencing information should be agreed between the parties and jointly submitted. If agreement cannot be reached in all particulars, then the nature and extent of the disagreement should be indicated. If the court concludes that what is in issue is material to sentence, then it will give directions for resolution of the dispute, whether by hearing oral evidence or by other means…"

Case at first instance

13. The Practice Direction and the "*Friskies*" procedure were followed by the prosecution. In late June 2014 in advance of the hearing before the Magistrates' Court, they served a detailed 20 page case summary in which their contentions about the cause and effect of the sewage discharge and on the Appellant's culpability were fully set out. A "*Friskies*" schedule set out two agreed aggravating factors and nine agreed mitigating factors. One aggravating factor was identified by the prosecution which was not agreed by the Appellant,

> "3. Financial decisions may have been partly responsible for this incident as work to improve, upgrade or replace the two pumps at Broadlayings SPS would have had costs associated with them. In this instance Thames Water deemed it more effective to attend site and resolve each blockage as they occurred through activities being raised following activation of alarms."

Counsel for the prosecution opened the case to the Recorder on the basis of the facts and contentions set out in the case summary. The Appellant relied on a witness statement by Richard Aylard, External Affairs and Sustainability Director, which expanded upon the agreed mitigating factors.

14. Both sides rightly accepted that the step-by-step approach set out in the Sentencing Council's definitive guideline on environmental offences should be followed. The prosecution case was that the harm caused by the incident fell within category 2, because it had a significant adverse effect on water quality, amenity value and animal health; and that culpability fell into the negligent category:

> "Failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence."

15. In paragraph 16 of the case summary, the prosecution identified failings in the pumps revealed by the Appellant's records,

> "? Between 20/04/2012 and 04/09/2012 Thames Water attended Broadlayings SPS on 16 separate occasions to unblock both pumps and on a further three occasions to unblock a single pump.
>
> ? Between 21/06/2012 and 29/06/2012 Thames Water attended the Broadlayings SPS for three separate multiple pump failures and to unblock both pumps.

? On 31/07/2012 both pumps were pulling over-amps even when they had just been unblocked, and that pump number one was missing a ware ring (component of pump) with numerous quotes for spares raised over the past six months. Another job was raised for a new impellor (creates flow through pump) and ware ring that day.

? On the 04/09/2012 as part of the response to the pollution incident another job was raised for new impellors and ware rings for the SPS."

16. The thrust of Mr. Aylard's witness statement was that the Appellant took its duties seriously. It explained the cause of the blockage (rag deposited in the sewage system), what had been done to put it right and what expense the Appellant had incurred in consequence. The expense included a sum which the Appellant was under no legal liability to incur: funding a National Trust community warden for three years at a cost of £90,000. The statement also contained a balanced and detailed explanation of the financial and regulatory environment in which it undertook its activities.

17. Significantly, Mr. Aylard's statement did not dispute the proposition that the pumps required replacement before September 2012. In paragraph 3 he acknowledged "the severity of the incident and the need to do more to seek to reduce the risks of incidents such as this from occurring in the future". In paragraphs 11 and 12 he explained what had been done about the pumps,

"11. The station pumps were replaced shortly after the incident with models less susceptible to blocking by rag.

12. The emergency overflow into the Chase Brook has been sealed and a bunded area created around the pumping station….While we are confident that the actions we have taken will prevent failures of this kind from happening again, the bunding provides a further level of protection."

18. The thrust of the mitigation advanced by Mr. Bunyan, counsel for the Appellant, in oral submissions was that the harm caused by the offence fell within Category 3, not Category 2. When the Recorder indicated that she thought that it was a Category 3 case, albeit at the top end of the category, he said that he would not "take it any further".

19. He also expressly accepted on three occasions that culpability was correctly categorised as negligent, though he laid emphasis on the failure to respond adequately to the alarms triggered when the pumps failed and disclaimed any failure by the organisation to put proper systems in place.

20. During the course of Mr. Bunyan's submissions, the Recorder put to him her principal concern about the cause of the incident and the Appellant's responsibility for it, to which she got an unequivocal reply, as the following exchange demonstrates:

"The Recorder: I think the biggest problem is the fact that you had all these warnings that the parts were not operating properly, and I think that 16 or more – I think it is more than 16 – you know, is an indication that something should have been done rather sooner.

Mr. Bunyan: Well, I do not think….

The Recorder: I am not sure it makes all that much difference, but that is my view.

Mr. Bunyan: No, in fairness, I do not think the company would disagree with that."

21. On the basis of all of that material, the Recorder was, in our view, plainly entitled to conclude that,

i) The Appellant's culpability was correctly categorised as negligence.

ii) The Appellant's negligence lay in failing to replace failing pumps before September 2012 and in failing to respond timeously or at all to the pump alarms.

Fresh evidence - decision

22. Mr. Honey, who did not appear for the Appellant below, seeks to challenge those findings apart from the finding about the response to the alarms. On the material before the Recorder, he argues that the only failure in the pumps was a missing ware ring and that the admitted negligence was not, as Mr. Bunyan conceded, a "failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence". We reject those submissions. Nobody has suggested at any stage in the proceedings that the missing ware ring had any causative effect on the failure of the pumps. Its significance was that it demonstrated sloppiness in maintaining the pumps, an attitude consistent with the Recorder's finding that they should have been replaced sooner. Further, the two failings identified by the Recorder did demonstrate a failure by the Appellant as a whole to take reasonable care to put in place and enforce proper systems for avoiding the commission of the offence.

23. In an effort to persuade this court to reach a different conclusion from that in effect conceded by the Appellant at the sentencing hearing, it seeks to rely on the witness statement of Nigel Membury dated 7 November 2014. The central paragraphs of his statement are 18 – 23 and 32.

"18. In order to clear full rag blockages it is always necessary to attend site and physically unblock pumps.

19. In relation to Broadlayings SPS, this process had worked well previously, ensuring that blockages were cleared without any problem. There had been no particular problem with this SPS prior to this incident, as is shown by the maintenance records, which show a level of blockages which is not abnormally high and which are normally cleared without incident.

20. The is no general problem with C type pumps, as they are perfectly adequate at dealing with rag and pumping sewage, and there is no reason to seek to replace these pumps. C type pumps are widely used in thousands of SPSs across the water industry. These types of pumps are preferred as they only have one leading edge where solids can attach themselves….

21. The blockages occurring in the period of April to September 2012 were entirely normal in terms of frequency and are not indicative of any particular problem with this SPS. The blockage rate for this SPS is not unusual. For reasons unknown, there seems to be a lot of rag, rubble and brick debris in the network in this area, which all flows into the SPS. The management regime for this SPS was appropriate for these circumstances.

22. There was no underlying problem or deficiency with the pumps at this SPS. The Crown Court findings that: (1) "The company had had a number of warnings that the pumps were breaking down"; (2) Thames Water "should have replaced the pumps" before September 2012 (transcript at 32E) and (3) "had plenty of warning that the pumps were faulty" (transcript at 33E) are unfounded.

23. On (1) it is wrong to say that the pumps were "breaking down" as the pumps at this SPS did not have any operational problems. It is an inevitable consequence of having to deal with the content of modern day sewage that pumps will from time to time become blocked by rag, but this does not mean that they were "breaking down" – the normal outcome of a reported blockage is that the blockage is cleared and the pumps are returned to full working operation quickly and without incident. On (2) there was no need to replace the pumps as there was no problem with this SPS prior to this incident. On (3) the pumps were not faulty, and were brought back to full operation once the blockages had been cleared on all of the previous occasions between April and September 2012….

32. Action was taken following the incident to replace the existing C type pumps with N type pumps which are even less susceptible to blocking. This was done not because the C pumps required replacing, but on a precautionary basis, as a "belt and braces" approach with the aim of reducing the risk of repeat incidents in the area."

24. We indicated at the conclusion of submissions on the admission of new evidence that we would not receive Mr. Membury's witness statement under s.23. Our reasons for doing so can be simply stated. For the reasons which we have explained above, the case was conducted at the sentencing hearing by both sides on the basis that the Recorder could properly conclude that the pumps required replacement before September 2012. If the Appellant wished to demonstrate that that was not so, by evidence of the type given by Mr. Membury, it could and should have set it out in a basis of plea as required by B.11(a) of the Practice Direction, so that the prosecution were alerted to the need to deal with the issue. Further, it could and should have put in evidence to support its case. Had it done so, it might have been the subject of detailed inquiry and challenge by the prosecution in the light of the disputed aggravating feature cited above, not necessarily to the Appellant's advantage. The Appellant cannot now invite this court to consider the penalty imposed on it in the light of a case which it did not advance at the sentencing hearing.

25. The facts of this case emphasise the importance, both for the parties and the sentencing court, of complying strictly with the requirements set out in the Practice Direction. It can only be in the rarest of circumstances, far removed from the facts of this case, that this court would permit an Appellant in this type of case to advance a case on appeal which was not fully deployed below.

26. Various other alleged errors in the Recorder's sentencing remarks are identified in the Appellant's grounds of appeal and referred to in the witness statement of Mr. Ralph. While not resiling from them, Mr. Honey did not advance any oral submission about them. We can, accordingly, deal with them shortly. Mr. Ralph challenges the prosecution case that the discharge caused the death of a significant number of macro-invertebrates (spineless creatures visible to the naked eye, such as crayfish). He says that the cause was lack of water, not pollution. If, which we doubt, this was an issue of any importance, it should have been raised at the sentencing hearing. He criticises the Recorder for mis-identifying the Chase Brook as a "specially protected body of water" and the site into which the sewage was discharged as a "very special nature site". None of this matters at all. Sewage was discharged into the Brook before it reached the Alder Carr, a patch of marshland which was a sensitive site. He also draws attention to the fact that, according to a report prepared for the Appellant on 19 October 2012 recovery within the Chase Brook took six weeks, whereas the Recorder said that the worst of the pollution had been removed within two weeks with a complete recovery within six months. None of this could possibly have influenced the level of the fine imposed. If it was material at all, it should have been raised at the sentencing hearing.

27. The witness statement of Helen Newman adds nothing material to that of Mr. Aylard.

28. For the reasons given, we decline to receive the evidence of Mr. Ralph and Ms. Newman under s.23.

Sentencing

29. This was the first case of its kind to have come before a court since the Sentencing Council's definitive guideline came into effect. The Recorder was faced with a difficult sentencing decision, only partly informed by the contents of the guideline. The guideline proposes a step-by-step approach to calculation of a fine based upon the degree of culpability of the offender and the harm caused by the offence and upon the size of the offending organisation, assessed by reference to its turnover. Organisations are divided into four categories, micro, small, medium and large. Large organisations are identified as those with a turnover or equivalent of "£50 million and over". The Council, however, makes it clear that the starting points and range of fines suggested do not apply to very large organisations. Step 4 of the guidance states,

"Very large organisations

> Where a defendant company's turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence."

This is consistent with step 6,

> "Check whether the proposed fine based on turnover is proportionate to the means of the offender."

The approach to be adopted is set out in the text:

> "The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance.
>
> It will be necessary to examine the financial circumstances of the organisation in the round. If an organisation has a small profit margin in relation to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed."

30. The Recorder correctly recognised that the Appellant fell into the very large category of organisation: its turnover was £1.9 billion and profit for the year ending 2014, £346 million. Her solution to the problem was to multiply the starting point for a negligent Category 3 case - £60,000 for a large company – by five to £300,000 and the range - £35,000 - £150,000 – to £175,000 to £750,000. She did so by extrapolating the incremental increases between micro, small, medium and large companies set out in the guidelines. Taking into account the mitigating factors and the Appellant's plea of guilty at first opportunity, she arrived at a figure of £250,000. She did not explain the mathematical exercise, if any, undertaken to reach that outcome, but it is reasonable to suppose, that but for the mitigating factors and prompt plea of guilty, the fine which she would have imposed would have been not less than £500,000.

31. Mr. Honey submits that, by the approach which she adopted, the Recorder has established a new category of penalties in the case of very large companies which is not sanctioned by the Sentencing Council or by statute. Mr. Berlin, for the Environment Agency, does not seek to support a mechanistic approach to the assessment of fines on very large companies. Since the hearing of the appeal, we have received written submissions from the parties as to the approach which the court might adopt. We are grateful for those submissions. Although in our conclusions which we set out below, we set out the approach that should have been taken, we have very substantial sympathy for the position in which the Recorder was placed.

32. Before we turn to our conclusions, we deal with one further criticism by Mr. Honey of the Recorder's approach to sentencing. As we have noted, the Appellant agreed to pay for a National Trust warden for three years at a cost of £90,000. The Recorder acknowledged this by stating that,

> "Thames Water have given some voluntary compensation, in that they have financed a warden for three years and that compensates the public to some extent and also the National Trust for the lack of the use of the facilities for the time that they could not go to the Brook and areas nearby."

Mr. Honey submits that the Recorder mischaracterised the payment as "compensation" a word which suggested that it was monetary recompense for a civil wrong done and should have used the word "reparation", the word used by Sweeney J in *R v. Thames Water Utilities Ltd* [2010] 3 AER 47 at paragraph 53. There is nothing in this point. "Reparation" is, in any event, a synonym for compensation. The Recorder did not fall into error by referring to compensation. What matters is that the payment is voluntary and goes beyond what is required to discharge a civil obligation. This the Recorder identified by the words that she used.

The approach to be adopted in the case of very large commercial organisations run for profit

33. The starting point of the approach to be adopted for very large commercial organisations run for profit is the

statutory provision for all offenders in ss.142, 143 and 164 of the Criminal Justice Act 2003, as summarised in paragraph 3 of *R v. Sellafield Limited* [2014] EWCA Crim 49

> "**The general principles**
>
> 3. It is important at the outset to recall the provisions which Parliament has enacted in the Criminal Justice Act 2003 (CJA 2003) in relation to the duty of the courts in sentencing, as these principles are applicable to all offenders, including companies:
>
> i) The courts must have regard in dealing with offenders to the purposes of sentencing which Parliament specified as (a) the punishment of offenders (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making or reparation by offenders to persons affected by their offences (s.142 of the CJA 2003).
>
> ii) In considering the seriousness of the offence the court must have regard to the culpability of the offender and the harm caused or which might foreseeably be caused (s.143 of the CJA 2003).
>
> iii) If a court decides on a fine it must approach the fixing of fines having regard not only to the purposes of sentencing and the seriousness of the offence, but must also take into account the criteria set out in s.164 of the CJA 2003:
>
> (1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.
>
> (2) The amount of any fine fixed by a court must be as such as, in the opinion of the court, reflects the seriousness of the offence.
>
> (3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.
>
> (4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine."

34. As in every case, an assessment must be made of the seriousness of the offence. This is to be done be applying the guidance given in steps 3 and 4 of the Sentencing Council's definitive guideline on environmental offences.

35. The factors taken into account in steps 5 – 11 should also be followed, save where irrelevant, for example, the proviso relating to public or charitable bodies in step 7. It is of particular importance in the case of such very large commercial organisations to take into account the financial circumstances of the offender as required by s.164 of the CJA 2003. This should ensure that the penalty imposed is not only proportionate and just, but will bring home to the management and shareholders the need to protect the environment.

36. The Court is not bound by, or even bound to start with, the ranges of fines suggested by the Sentencing Council in the cases of organisations which are merely "large".

37. Mr. Berlin, for the Crown, suggests that an organisation should be treated as being "very large" if its turnover exceeds £150 million per year on a three–yearly average. 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.

38. The object of the sentence is to bring home the appropriate message to the directors and shareholders of the company: *Sellafield* paragraph 6 and step 6 of the Guideline. Sentences imposed hitherto in a large number of cases have not been adequate to achieve that object. This Court has on two occasions observed that it would not have interfered with fines "very substantially greater" or "significantly greater" than six figure fines imposed for environmental offences: *R v. Southern Water Services Limted* [2014] EWCA Crim 120 paragraph 21 and *R v. Day* [2014] EWCA Crim 2683 paragraph 46.

39. Previous convictions will always be relevant aggravating features and in the case of some, seriously aggravating features. Relatively limited weight may be given to offences committed with low or no culpability (in the Sentencing Council's definition in step 3); but offences which result from negligence or worse should count as significantly more serious. Repeated operational failures – suggestive of a lack of appropriate management attention to environmental obligations – fall into this category. For example, 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.

40. The court should therefore:

> i) In the worst cases, when great harm exemplified by Category 1 harm has been caused by deliberate action or inaction, the need to impose a just and proportionate penalty will necessitate a focus on the whole of the financial circumstances of the company. We have already outlined the approach by reference to the guideline – starting with turnover, but having regard to all the financial circumstances, including profitability. 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%, 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.
>
> ii) In the case of a Category 1 case resulting from recklessness, similar considerations will apply, albeit that the court will need to recognise that recklessness is a lower level of culpability than deliberate action or inaction.
>
> iii) Where the harm caused falls below Category 1, lesser, but nevertheless suitably proportionate, penalties which have regard to the financial circumstances of the organisation should be imposed. In an appropriate case, a court may well consider, having regard to the financial circumstances of the organisation, that to achieve the objectives in s.143 of the CJA 2003, the fine imposed must be measured in millions of pounds, as we have already indicated.
>
> iv) In the case of such an organisation, there must not be a mechanistic extrapolation from the levels of fine suggested at step 4 of the guideline for large companies. This is made clear by (1) the fact that by definition a very large commercial organisation's turnover very greatly exceeds the threshold for a large company, and (2) the requirement at step 6 of the guideline to examine the financial circumstances of the organisation in the round.

41. It is axiomatic that all relevant mitigating features must be taken into account. In environmental pollution cases these will include prompt and effective measures to rectify the harm caused by the offence and to prevent its recurrence, frankness and co-operation with the authorities, the prompt payment of full compensation to those harmed by the offence, and a prompt plea of guilty. In addition, significant expense voluntarily incurred – so-called "reparation" – in recognition of the public harm done should be taken into account in the manner explained in *R v.*

Thames Water Utilities Limited [2010] EWCA Crim 202 at paragraph 53. Clear and accepted evidence from the Chief Executive or Chairman of the main board that the main board was taking effective steps to secure substantial overall improvement in the company's fulfilment of its environmental duties would be a significant mitigating factor.

42. In the case of a large statutory undertaker, such as the Appellant, no amount of management effort can ensure that no unauthorised discharge can ever occur. In the case of an offence which causes no harm and which occurs without fault on the part of the undertaker, it would be difficult to justify a significant difference in the level of fine imposed on two very large organisations, merely because the infrastructure and turnover of one was twice as large as that of the other. Size becomes much more important when some harm is caused by negligence or greater fault. Even in the case of a large organisation with a hitherto impeccable record, the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them. In the case of repeat offenders, the fine 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.

Application of those principles to the facts of this case

43. The essential facts of this case have been described above. It was a case in which negligence caused localised harm.

44. The record of the offender was highly relevant. Since 1991, the Appellant has been convicted on 106 occasions of 162 environmental offences. For the purpose of determining an appropriate sentence for this offence, it would be desirable to distinguish between those past offences which resulted in little or no harm and occurred without fault on the part of the Appellant and those in which negligence caused harm. It is unfortunately not possible to state with certainty into which category of the Sentencing Council's guideline each offence would have been put if the guideline had applied at the time. A reasonable proxy for more serious offences – those in which at least some harm was caused by negligence – is the number of occasions on which fines greater than the maximum which could have been imposed by a Magistrates' Court for a single environmental offence until 6 April 2010 (£20,000) were imposed. From 1999 until 29 August 2014 there were 16 such occasions – just over one per year. In the four years before 29 August 2014, there were four. This record does not suggest routine disregard of environmental obligations by the Appellant, but it does leave room for substantial improvement.

45. But for the explanation given by Mr. Aylard to the Court in his witness statement of 27 August 2014, a combination of the facts of the offence and what can be extracted from the Appellant's record would, in our view, have required the Court to take a starting point for a fine significantly into seven figures. Mr. Aylard's explanation of what the main board has done to address the risk of environmental pollution from the Appellant's activities did show that they took it seriously and were spending substantial sums to modernise and improve their infrastructure. That went some way to justifying a starting point as low as that impliedly selected by the Recorder. Recent offences suggest that the steps taken by the Appellant may not have been sufficient and may, in the immediate future, require substantially higher fines to be imposed for similar offences. In 2014 alone, fines of £75,000, £250,000 and £100,000 have been imposed for environmental pollution offences. If, as is likely, the first and last (like the second) represent incidents in which some harm has been caused by negligence, the Appellant's recent record suggests that the appropriate message has not fully struck home.

46. In his written submissions Mr. Berlin suggested that the fine actually imposed by the Recorder was lenient. While we have every sympathy for the difficulty facing the Recorder, we agree that it was, even taking into account the significant mitigation afforded by Mr. Aylard's evidence. We would have had no hesitation in upholding a very substantially higher fine. This appeal is dismissed.

Concluding observation

47. 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.

End of Document

R v Sellafield Ltd R v Network Rail Infrastructure Ltd [2014] EWCA Crim 49

Court of Appeal, Criminal Division

Lord Thomas CJ, Mr Justice Mitting and Mrs Justice Thirlwall

17 January 2014

Criminal law — Company — Fine — Defendant companies being fined for breaches of safety and environmental protection legislation — Defendants appealing on basis fines manifestly excessive — Whether fines being manifestly excessive.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

LORD THOMAS CJ:

Introduction

1. These two appeals are being heard together as they raise issues of principle in relation to the level of fines to be imposed for breaches of safety and environmental protection legislation on very large companies –Sellafield Limited (Sellafield Ltd) with a turnover of £1.6bn and Network Rail Infrastructure Ltd (Network Rail) with a turnover of £6.2bn.

i) Sellafield Ltd was fined £700,000 at the Crown Court at Carlisle on 7 February 2013 for offences arising out of the disposal of radioactive waste.

ii) Network Rail was fined £500,000 in the Crown Court at Ipswich on 27 June 2013 for an offence arising out of a collision at an unmanned level crossing, causing very serious injuries to a child.

2. Both companies seek leave to appeal on the basis that the fines were manifestly excessive. We grant leave.

The general principles

3. It is important at the outset to recall the provisions which Parliament has enacted in the Criminal Justice Act 2003 (CJA 2003) in relation to the duty of the courts in sentencing, as these principles are applicable to all offenders, including companies:

i) The courts must have regard in dealing with offenders to the purposes of sentencing which Parliament specified as (a) the punishment of offenders (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences (s.142 of the CJA 2003).

ii) In considering the seriousness of the offence the court must have regard to the culpability of the offender and the harm caused or which might foreseeably be caused (s.143 of the CJA 2003).

iii) If a court decides on a fine it must approach the fixing of fines having regard not only to the purposes of sentencing and the seriousness of the offence, but must also take into account the criteria set out in s.164 of the CJA 2003:

(1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.

(2) The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence.

(3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.

(4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.

4. There can be no doubt as to the objective in applying these principles when sentencing a company for offences against health and safety and environmental legislation. As Scott Baker J stated in giving the judgment of this court *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 at 255, [1999] 2 Cr App R (S) 37 at 44

> "The objective of prosecutions for health and safety offences in the work place is to achieve a safe environment for those who work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders."

5. Where a fine is to be imposed a court will therefore first consider the seriousness of the offence and then the financial circumstances of the offender. The fact that the defendant to a criminal charge is a company with a turnover in excess of £1 billion makes no difference to that basic approach.

6. The fine must be fixed to meet the statutory purposes with the objective of ensuring that the message is brought home to the directors and members of the company (usually the shareholders). The importance of the application of s.164 in relation to corporate defendants was reinforced in the Definitive Guideline of the Sentencing Guidelines Council *Corporate Manslaughter & Health and Safety Offences Causing Death,* published in 2010. It has been reflected in more recent decisions of this court: see for example: *R v Tufnells Park Express Ltd* [2012] EWCA Crim 222 at para 43 (the fine after trial on a company with a turnover of £100m and profitability of £7.7m was £225,000; this represented, as the court noted, 2.9% of its operating profit).

7. It will therefore always be necessary in the case of companies with a turnover in excess of £1 billion to examine with great care and in some detail the structure of the company, its turnover and profitability as well as the remuneration of the directors. Although the appellant companies are similar in that they are companies with such a turnover, they differ considerably. Sellafield Ltd is an ordinary commercial company which makes profits for its shareholders who are large multinational companies. In contrast, the parent company of Network Rail, Network Rail Limited, has no shareholders who receive profits; its members derive no profit from the company. It invests its profit in the rail infrastructure. Both discharge important services of a public nature that have from time to time been directly undertaken by the State. This appeal illustrates the close analysis required. We turn to that analysis at paragraphs 52 and following after we have set out the facts and considered the seriousness of the offence; as this court has repeatedly stated, the size of the penalty will depend on the facts of each case.

1. THE SERIOUSNESS OF THE OFFENDING OF SELLAFIELD LTD

(1) The stringent standards of safety imposed by the legislative regime

8. The processing and storage of nuclear waste is a by-product of an activity of national economic importance: the generation of electricity by nuclear power.

9. It carries with it potentially grave risks. To mitigate those risks the most stringent standards have been adopted at national and international levels. In the United Kingdom they have been laid down in licences granted under the Radioactive Substances Acts 1948, 1960 and 1993 and, more recently, by the Environmental Permitting Regulations 2010. The UK is also a signatory to the European Agreement for the International Carriage of Dangerous Goods by Road – an agreement made under UN auspices – to which effect is given by the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. These instruments set out detailed and specific provision for the sorting, carriage and disposal of nuclear waste.

10. The public rightly expects strict compliance with those standards.

(2) The offences committed

11. Between 15 November 2008 and 19 April 2010 Sellafield Ltd breached those standards in a variety of ways in relation to the system for segregating non-radioactive waste from radioactive waste and for disposing of it.

12. On 7 February 2013, Sellafield Ltd had pleaded guilty at the Magistrates' Court at Workington to seven offences. The Magistrates committed Sellafield Ltd to the Crown Court as they considered their sentencing powers were insufficient; the maximum penalty they could have imposed was £230,000.

13. A fine of £700,000 was imposed on 14 June 2013 by HH Judge Peter Hughes QC at Carlisle Crown Court, being made up of a fine of £100,000 for each of the seven offences. Five contraventions of different statutory requirements were set out in seven charges. Two pairs of charges covered the same factual allegations, but were separately laid because of change in the statutory regime which took effect on 5 April 2010. Sellafield Ltd

i) Operated a regulated facility other than in accordance with an environmental permit on or about 12 April 2010 by disposing of radioactive waste at a landfill site contrary to Regulation 38(1) of the Environmental Permitting (England and Wales) Regulations 2010.

ii) Failed to comply with or contravened a condition of an authorisation or permit by failing to check the effectiveness of systems equipment and procedures for the disposal of radioactive waste contrary to Section 13 of the Radioactive Substances Act 1993 between 1 November 2009 and 5 April 2010 and Regulation 38(2) of the 2010 Regulations between 6 April and 19 April 2010.

iii) Failed to comply with or contravened a condition of an authorisation or permit by failing to have a management system, organisational structure and resources in place sufficient to achieve compliance with their conditions contrary to Section 13 of the 1993 Act between 15 November 2008 and 5 April 2010 and Regulation 38(2) of the 2010 Regulations between 6 April and 19 April 2010.

iv) Did not comply with a condition of an authorisation or permit by failing, prior to 5 April 2010, to comply with appropriate criteria for accepting monitoring equipment inter-service contrary to Section 13 of the 1993 Act.

v) On and before 12 April 2010 caused or permitted non-exempt radioactive waste to be carried in a manner which did not comply with the European Agreement for the International Carriage of Dangerous Goods by Road contrary to Regulation 5 of the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009.

(3) The processing of exempt waste and the failures by Sellafield Ltd

(i) Exempt waste

14. Sellafield Ltd generates substantial quantities of waste from its activities at its extensive site at Sellafield in Cumbria. Much of it is not radioactive. Such waste may be disposed of as non-toxic waste by ordinary means of waste disposal, principally in landfill sites. This is known as "exempt waste".

(ii) The new system for identifying exempt waste

15. In 2009 Sellafield Ltd set about establishing a means of identifying exempt waste gathered from all over the site for disposal as such. The template was a system already established in one of the buildings on site for waste generated within it – B222.5. Waste was to be sorted by a so-called "waste route" into radioactive and exempt waste. The first step was to identify categories of waste likely to be classifiable as exempt waste – for example mop-heads and office equipment. The next was to measure surface radioactivity by handheld monitors. The results were logged on a form known as "F116/Form 2". The waste was then taken in bags to a purpose-designated building F116.

16. In that building the waste was to be passed through two monitoring devices similar to those operating in B222.5: an Initial Segregation Monitor and an Exempt Waste Monitor. Each device contained two detector heads, set to measure the risk, if any, posed to humans by radiation in microsieverts per hour – the dosage of radiation: a G35 monitor head which measured radiation up to 20 microsieverts per hour, and a G64 head which measured radiation up to 100 microsieverts per hour. The G35 head was so configured that it could not measure a dosage greater than 20 microsieverts per hour. Waste with a dosage above that level was passed to the G64 head for measurement.

17. Any waste passed through the Initial Segregation Monitor with a dosage level greater than zero (or, perhaps, greater than a fraction above zero) should have been set aside as low level radioactive waste – non-exempt waste. Apparently exempt waste was then passed into the Exempt Waste Monitor for a second and final check. It produced an assay report, retrievable at the press of a button, for each bag of waste. If a bag was not radioactive, the measured dose should have been shown in microsieverts per hour as zero or near-zero. If the detector heads in both devices were properly calibrated, no waste other than exempt waste should have been passed for disposal as such.

18. Unfortunately they were not. The G35 monitors were correctly calibrated in both devices and performed their function satisfactorily; but the G64 monitors were not. For them to function effectively, their software had to be adjusted to apply an Activity Conversion Factor – i.e. a multiplier – to the dosage which they were measuring. As installed and delivered by the manufacturers, the multiplier was set at zero. It had to be re-calibrated to function effectively. It was not. Accordingly, whatever dosage was given off by waste bags passing the G64 heads, the dosage registered was zero. It was, accordingly, possible for waste with a dosage over 20 microsieverts per hour to be passed through the devices as if the dosage was zero and so set aside for disposal as exempt waste.

(iii) The extent of the failure in the system

19. The system was installed in May 2009 and brought into full operation in November 2009. The first batch of exempt waste was dispatched from the site on 12 April 2010 to a nearby landfill site. Four thousand further bags of supposedly exempt waste passed through the monitors with an apparent dosage of zero microsieverts per hour. In fact a small number of bags – five out of five thousand – had dosage levels in excess of 20 microsieverts per hour. The error in the setup of the devices was discovered by chance on 19 April 2010 when, during a training exercise, a bag of waste with a dosage of 41 microsieverts per hour was passed through them and wrongly classified as exempt waste.

20. The error was discovered when the operator checked the assay produced by the Exempt Waste Monitor and

saw the dosage level there recorded. This led to the taking of immediate steps to identify the problem and its extent and to alert the relevant authorities and the operators of the landfill site to which the first batch of one thousand bags had been dispatched.

21. Once alerted to the problem, Sellafield Ltd did all they could to ensure that no harm came to anyone. It is as near certain as can be that none has. Five bags were identified from the assay report with dosages of between 23 and 32 microsieverts per hour. Four had been dispatched to the landfill site and one retained on site. Measurements taken at the landfill site vastly exceeded the low level permitted to be deposited at the site – 0.4 bequerels per gram (a measure of the radiation emitted by an object). Three of the bags were within the lowest category of toxic waste – low level radioactive waste – and one was within the next category – intermediate level radioactive waste.

22. There was expert evidence that exposure to the four bags by anyone who might have handled them would have been no greater than a passenger would experience on a flight to Paris. There was agreed expert evidence that had the problem not been discovered for a long time – years – and non-exempt waste of this category had been regularly handled, there would have been a very small but perceptible increase in the risk of death from cancer to those handling it.

(iv) The errors should have been avoided

23. The prosecution case, which was not disputed, was that the errors which led to this state of affairs were readily avoidable and that Sellafield Ltd had numerous opportunities to avoid them, as follows:

i) There was an error in specification. Sellafield Ltd ordered two Exempt Waste Monitors instead of one Initial Segregation Monitor and one Exempt Waste Monitor. In consequence, the manufacturers did not calibrate the G64 detector head on the Initial Segregation Monitor to enable it to perform its function.

ii) The re-calibration necessary of the G64 head in the Initial Segregation Monitor (and as was carried out after 19 April 2010) of the G64 head in the Exempt Waste Monitor was not performed by the staff of Sellafield Ltd. There was no system in place to ensure that it would be.

iii) The G64 head in both monitors was not tested during trials. If a test similar to that performed on 19 April 2010 or a simulated exercise replicating the conditions of that test had been performed, the miscalibration would have been revealed.

iv) No comparison was ever made between the results produced by the handheld devices used to measure surface radiation on the bags recorded in F116/Form 2 and the results produced by the Exempt Waste Monitor.

v) No check of the assay reports produced by the Exempt Waste Monitor was made. If it had been, it would have alerted the operator to the dosage of the five bags of waste wrongly classified as exempt waste.

vi) No routine checking of the calibration of the detector heads was performed.

(v) Culpability and harm

24. The judge summarised the significance of the failures:

"The mistake that was made in this case was a fundamental one in the setting up, the testing and the subsequent monitoring of the equipment. That such a basic mistake could possibly occur in what needs to be an industry managed and operated with scrupulous care for public safety and the environment is bound to be a matter of grave concern to everyone and particularly local residents in Cumbria. What adds

significantly to the concern and the seriousness of the mistake is that it had been in existence and allowed to go undetected for the period of 4 months or so that the system had been in use."

25. The prosecution alleged, Sellafield Ltd accepted, and the judge found, that these failings

> "indicate basic management failures and a deeply concerning lack of procedures formally established and rigorously enforced to ensure that equipment was properly set up at the outset and regularly and routinely checked."

26. This led the judge to conclude that

> "The management failures are not confined to specific individuals or failures at certain levels to follow established procedures. They demonstrate…**a custom within the company which was too lax and…to a degree complacent**, and senior management must bear its share of responsibility." (Our emphasis).

27. He identified three aggravating features:

> i) The failure was not isolated but systemic.
>
> ii) It potentially exposed those who handled waste off-site and the public to unnecessary risk.
>
> iii) It was not a first offence. A prohibition notice had been served on 28 June 2008, one year before installation of the new monitors, by the Department of Transport for breach of Regulation 5 of the 2009 Regulations. Sellafield Ltd had been fined twice for incidents involving the emission of radioactive material in 2005 and 2007 - £500,000 and £75,000 respectively.

28. He also took into account the mitigating factors already mentioned. The breaches were not deliberate or reckless; no harm had been done and the actual risk of harm was relatively low; Sellafield Ltd had readily co-operated with the authorities and had pleaded guilty at the first opportunity.

(4) The grounds of the appeal

29. It was submitted that the fine was manifestly excessive. There was no actual harm and a very low risk of harm. No credit was given for the guilty pleas and the degree of co-operation with the Environment Agency and the Health and Safety Executive. The level of fine imposed equated with a major public disaster or loss of life, a significant nuclear event or an unmitigated environmental pollution incident. There was no appeal against the order for costs.

(5) Our conclusion on harm and culpability

30. There was in effect no actual harm, as we have explained at paragraph 22. There was a foreseeable risk of some perceptible harm if the failure had not been detected for a number of years; this risk can properly be characterised as very low. We therefore take into account, as s.143(1) requires us to do, the fact that there was in effect no actual harm but there was a very small risk of some harm.

31. The judge found that there had been a custom in the company Sellafield Ltd which was too lax and complacent; that senior management must bear a share of the responsibility. We can see no basis for criticising that finding. The failure was easily avoidable and could and should have been detected very quickly; there was the clearest negligence. We therefore conclude that for an incident of this kind the culpability was medium.

2. THE SERIOUSNESS OF THE OFFENDING OF NETWORK RAIL

(1) The accident

(i) The level crossing at Wright's Crossing

32. Network Rail took over the rail infrastructure in 2002 and has since then been responsible for the level crossings on that infrastructure. One of these crossings is Wright's Crossing on the East Suffolk line. It is what is known as a user worked crossing. It is on private land and provides access to a farm split into two distinct parts by the construction of the line. At Wright's Crossing the East Suffolk line is a single line with a speed limit for trains of 55mph. About 19 trains a day pass over the crossing.

33. The crossing is protected by gates across the road. To cross the line in a car the gates have to be opened before the vehicle crosses and closed when it has crossed. Safe use of the crossing depends on the user seeing an oncoming train. However the sight lines are not good, as the track is curved with high vegetation on each side. There was no telephone, but in bad weather or when large machinery was crossing the line, Mr Wright, the farmer whose farm was accessed by the crossing would telephone the signal box at Saxmundham.

(ii) 3 July 2010

34. On 3 July 2010 at about 8.30 in the evening, Mr Wright drove his 4x4 car to the crossing. He was accompanied by his 10 year old grandson and his dog. Mr Wright stopped at the crossing, opened the first gate looked both ways, crossed on foot and opened the second gate. He looked both ways again and then re-crossed the track back to his car. He told his grandson to get out of the driver's seat and back into the rear seats. His grandson did so after about 15-30 seconds. Mr Wright got into the car and drove towards the crossing.

35. As he was about to cross the line, he saw a train coming and braked, but the car slipped on the loose gravel and was hit by the train. The grandson was thrown out of the car and his head struck the track. Mr Wright was badly bruised but his grandson had suffered a brain stem bleed; despite extensive hospital treatment the accident has changed his life.

36. The victim impact statement in respect of the grandson sets out the devastating effect that the accident had had. The hospital had given him a 5% chance of survival. He had not had a normal childhood. He would need teaching support, a scribe and a reader throughout his education; his brain's processing speed was 50% of normal. He had right side blindness, his peripheral vision was damaged and he had to avoid all contact sports. He had a titanium plate in his head. His future prognosis would not be known until he was 21 or 22.

(2) The proceedings

(i) Network Rail's plea of guilty

37. Network Rail accepted that it was guilty of significant failings in relation to the risk assessment of Wright's Crossing; that, if a proper risk assessment of the crossing had been made prior to the accident, then a telephone connected to the signal box would have been installed. One had been installed at the crossing after the accident.

38. Network Rail therefore pleaded guilty, on a basis of plea, at the Lowestoft Magistrates Court on 13 March 2013 to an offence of failing to discharge a duty under s.3(1) of the Health and Safety at Work Act 1974. The basis of plea reflected the facts and aggravating and mitigating features to which we will refer. It apologised to the grandson and his family. The magistrates committed the case for sentence to the Crown Court at Ipswich, as the maximum fine it could impose was £20,000. On 27 June 2013 the sentencing hearing took place before Judge Holt sitting at the Crown Court at Ipswich.

(ii) The significant failures of Network Rail

39. In 1996 guidance was issued in the form of Railway Safety Principles and Guidance in respect of user worked crossings. The guidance set out a number of factors that had to be taken into account in any risk assessment of such a level crossing.

40. Prior to the accident there were risk assessments on 15 January 2000, 24 September 2003, 4 March 2007 and 12 April 2009. Those in 2007 and 2009 were carried out by Mobile Operations Managers for Network Rail. There was a maintenance inspection on 28 January 2010.

41. Elementary mistakes were made in the assessment. It should have been obvious to those conducting the risk inspections and to those more senior persons within Network Rail responsible for level crossings that, because of the nature of the use of the crossing and the sight lines, a telephone should have been installed so that anyone crossing the line could ring up and find out if a train was on its way. The sight lines were such that, given the time it would take to cross and the speed of the trains on the line, there was an obvious and serious risk of a collision. It is also of particular importance that in the risk assessment carried out in 2003 the assessor concluded that the crossing was not safe, but no steps were taken to remedy it over the following 6 years, particularly by installing a telephone. As we have noted, after the accident, a telephone was installed at Wright's Crossing.

42. The judge found that there was that obvious risk and it was readily reducible. He also found that the risk assessments were poorly done; there were repeated failures to follow the correct guidance. In 2007, Network Rail had installed a computer system; the risk assessments in 2007 and 2009 were inputted into it, but the programme used did not spot the inconsistencies. Network Rail were unable to explain this failure. We consider that these findings were amply justified on the evidence.

(iii) The aggravating and mitigating factors

43. In accordance with the decision of this Court in *R v Friskies Petcare UK Limited* [2000] 2 Cr App R (S) 401, aggravating and mitigating features were identified in what is commonly called a "*Friskies schedule*". The aggravating features were:-

i) The injuries to Mr Wright and his grandson resulted from exposure to risk at Wright's crossing.

ii) Serious injury was eminently foreseeable.

iii) The risk had been obvious for many years.

iv) Network Rail's assessment of the risk and its implementation of control measures fell substantially below the standard expected.

v) All users of the crossing had been exposed to risk.

44. There were the following mitigating features:-

i) Network Rail pleaded guilty at the first available opportunity.

ii) Network Rail has cooperated with the investigation.

iii) Network Rail acted after the accident to improve safety by implementing a speed restriction and the installation of telephones. It made changes to its level crossing teams and their approach to the assessment of risk and implementation of control measures after the accident.

iv) Network Rail had in recent years taken steps to improve safety at level crossings.

v) Network Rail took its health and safety responsibilities very seriously. Safety performance had improved significantly in recent years. In the context of its size and the complexity of its organisation, Network Rail had a good safety record.

vi) Network Rail's failings did not arise from an attempt to save money or place profit before safety.

vii) Network Rail's income came from public funds and profit was reinvested in the network to improve safety and performance.

45. In his very clear sentencing remarks, the judge carefully examined this schedule; the fact that it was agreed does not mean that the judge in performance of his duties should accept it uncritically. In our judgment, he was quite entitled to make the following observations in relation to the mitigating features relied on by Network Rail:

(a) As to (iii) that the accident was a poor indictment of the training of Network Rail's staff who had a very important role in assessing the safety of unmanned level crossings which was a recognised source of danger nationally.

(b) As to (iv), the judge found it difficult to accept that the installing of the computer system in respect of level crossings was a panacea on the basis of what had been explained to him. This conclusion was criticised by Network Rail as the computer system had been approved by the Office of the Rail Regulation. We do not consider this criticism of the judge's view was justified. It was no panacea. Network Rail had not, as we have set out at paragraph 42, explained how the use of the system had failed to expose the serious inconsistencies between the assessments, which would have demonstrated the lack of safety at Wright's Crossing. Moreover as the Crown rightly pointed out, the utility of the programme depended on the data inputted into it.

(c) As to (v), its safety record, the judge considered that that record had to be seen in the context of its previous convictions. He concluded that Network Rail's record was not unblemished; the size and complexity of an organisation was not much mitigation.

(d) As to (vi), he did not regard that as significant mitigation as tax payers and the public expected first call on public funds to be the safety of the public and those who used level crossings.

We see no basis for any possible criticism of these clear findings.

(iv) Network Rail's previous convictions

46. The list of previous convictions provided to the Crown Court and to us show a number of convictions for breach of the Health and Safety at Work Act over the years from 1997. Some were relatively minor such as inadequate maintenance of line side fencing and some very serious such as the fine of £3.5m imposed upon Network Rail in 2005 in respect of the deaths of 4 persons when a GNER passenger train derailed at Hatfield on 17 October 2000. Four convictions for breach of s.3 of the Health and Safety at Work Act were of particular relevance as the events had occurred prior to the accident at Wright's Crossing.

i) A conviction on 16 July 2009 in respect of an incident when a passenger train was derailed at Croxton AHB level crossing in September 2006; Network Rail was fined £70,000.

ii) A conviction on 26 November 2010 when Network Rail was fined £75,000 in respect of a fatal accident at West Lodge footpath crossing on 22 January 2008.

iii) A conviction on 15 March 2012 when Network Rail was fined £1m in respect of the killing of two teenage girls when crossing a station footpath in December 2005; Network Rail had failed to carry out proper assessment of the risk to safety of members of the public in the years 2001 and 2005.

iv) A conviction on 12 June 2012 when Network Rail was fined £356,250 in respect of its failure to act on evidence that pedestrians using a crossing in Wiltshire had insufficient sight of approaching trains. A death had resulted in May 2009.

(v) The sentence at the Crown Court

47. Network Rail was fined £500,000, ordered that they should pay £23,421.74 by way of costs and £15 victim's surcharge. The application for leave to appeal was only against the fine imposed.

(3) The grounds of the appeal

48. It was submitted that, as there had been a guilty plea at the first available opportunity, the starting point was far too high. The judge had failed to take into account previous cases; in *R v Network Rail* [2010] EWCA Crim 1225 where this court had observed that a fine of £666,667 imposed where two had been killed was severe. Reference was made to other cases where lower fines had been imposed such as *R v TDG (UL) Ltd* [2009] ICR 127, *R v John Pointon and Sons Ltd* [2008] 2 Cr App R (S) 82, *R v Merlin Attractions Operations Ltd* [2012] EWCA Crim 270. It was submitted that fines with a starting point of £750,000 would only be appropriate where there was more than one fatality (or there was some significant aggravating factor), or in cases involving a public disaster and where the defendant had been convicted of the offence of corporate manslaughter.

49. It was also submitted that the judge had also failed to give sufficient credit for Network Rail's record, its commitment to safety and that it had taken steps in recent years to improve safety.

(4) Our conclusion on harm and culpability

50. The actual harm caused in the present case was, as is evident from the facts we have set out, serious; much greater harm was foreseeable.

51. As to the level of culpability of Network Rail, there was no evidence of specific senior management failures. The failures, serious and persistent though they were, were at lower operational levels.

3. THE LEVEL OF FINE TO BE IMPOSED IN RESPECT OF THE SERIOUSNESS OF THE OFFENCES

52. We turn to consider how, in the light of our conclusions on the seriousness of the offences committed by the two offenders and their financial circumstances, each of the statutory purposes of sentencing can best be achieved.

(1) The provision of financial and corporate information to the sentencing court

53. To enable us to consider the financial circumstances of the offenders, we called for the accounts of both companies prior to the hearing of the appeal.

54. It is important that well in advance of the sentencing hearing there is provided to the sentencing court the accounts of the offending companies and any other information (including information about the corporate structure) necessary to enable the court to assess the financial circumstances of the company and the most efficacious way of giving effect to the purposes of sentencing. The provision of that information to the court and to counsel for the Crown will enable counsel for the Crown to present the information to the sentencing court so that it can carry out the analysis required.

(2) The corporate structure of Sellafield Ltd and its finances

55. The site at Sellafield, Cumbria is owned by the Nuclear Decommissioning Authority on behalf of the State. The Nuclear Decommissioning Authority has awarded Sellafield Ltd a contract to operate the relevant part of the site. Sellafield Ltd is a company owned by Nuclear Management Partners, a consortium of three major shareholders – the multinationals, URS Corporation, Amec plc and Areva Group. Sellafield Ltd holds the site licence.

56. Sellafield Ltd is therefore an ordinary company owned by corporate shareholders with a Board of Directors. It seeks like other commercial companies to make a profit for the benefit of its shareholders on the contract it has with the Nuclear Decommissioning Authority. In 2012, it had a revenue of £1.6bn and made a profit of £29m. Its profits go to its shareholders by way of dividend. A financial penalty will therefore directly affect the shareholders. As it is such a narrowly held company, there is no difficulty in the three shareholders holding the directors to account and requiring them to remedy the failures which resulted in the criminal convictions.

(3) The corporate structure of Network Rail and its finances

57. Network Rail is entirely owned by Network Rail Limited. Network Rail Limited is a "not for dividend company". It has members who appoint the directors and to whom the directors are accountable. As it has no shareholders who receive profits by way of dividend, it is in reality quite different from Sellafield Ltd.

58. Its revenue of £6.2bn in the year ended 31 March 2013 is derived almost entirely from fees paid by the train operating companies which utilise its track and from grants provided by the Department for Transport. The profit of £780m made is re-invested in the rail network.

59. The primary governance of Network Rail Limited is the responsibility of its Board which comprises substantially the same persons as the Board of its subsidiary Network Rail. The Board is appointed by the members. These are over 50 in number. The Department for Transport is a member with special rights; the other members are appointed members of the public. The members are responsible for holding the Board to account.

60. The executive directors were paid in the year beginning 1 July 2013 basic pay of between £577,000 and £348,000 with the addition of contributions to a pension scheme and performance related bonuses. According to the annual report, the purpose of a bonuses is to allow the business "to target, reward and recognise exceptional performance for stakeholders" through an annual incentive plan and a long term incentive plan. The amount of the additional remuneration (which can be up to 60% of annual salary under the annual incentive plan) is determined by the Remuneration Committee by reference to a number of factors such as passenger and freight performance, cost efficiency and passenger and customer satisfaction. As to safety, the position of the Board of Network Rail Limited, as set out in its annual report for the year ended 31 March 2013, is:

> "Safety of the workforce, passengers and general public remains the paramount consideration. We believe that it is not appropriate to include safety as a specific performance measure. The executive directors already treat safety measures as a priority as they strive to continuously improve performance in this area. Nevertheless the remuneration committee retains a wide discretion to adjust any award downwards for poor safety performance, particularly in the case of a catastrophic accident for which Network Rail was found culpable".

(4) Our conclusion

(a) Sellafield Ltd

61. We approach the fine imposed as an overall total fine for the course of conduct reflected in the offences charged.

62. We have set out at paragraphs 30-31 our conclusions on the seriousness of the offending by Sellafield Ltd – medium culpability extending to management but with no actual harm and a very low risk of harm. We take into account the guilty pleas made at the first available opportunity and the very considerable cooperation that Sellafield

Ltd displayed after the discovery of the failures. Both these factors deserve very considerable credit. We also take into account the previous offences.

63. It is not appropriate, as was submitted on behalf of Sellafield Ltd, to consider a fine of £1 million as apposite only to a major disaster. To accept that submission would be to ignore the court's obligation under s.164 of the CJA 2003 to have regard to the financial circumstances of the offender and the approach made clear in the Sentencing Guidelines Council Guideline to which we have referred at paragraph 6 above. There is no ceiling on the amount of a fine that can be imposed.

64. In considering those financial circumstances, we have regard to its turnover of £1.6 billion (or £30.7 million per week) and its annual profit of £29m (or £560,000 per week). It is clear that viewed in the light of the financial circumstances of this company, a fine of £700,000 after a guilty plea is a fine which reflects a case where the culpability was moderate, the actual harm in effect nil and the risk of harm very low. It must be viewed against the requirement that those engaged either as directors or shareholders of companies engaged in the nuclear industry must give the highest priority to safety as Parliament has directed.

65. A fine of the size imposed, even though only a little more than a week's profit and about 2% of its weekly income, would, in our view, in the circumstances achieve the statutory purposes of sentencing by bringing home to the directors of Sellafield Ltd and its professional shareholders the seriousness of the offences committed and provide a real incentive to the directors and shareholders to remedy the failures which the judge found existed at the site at Sellafield as we have set out at paragraphs 24-27, particularly the custom within the company which was too lax and to a degree complacent. If it does not have that effect, then, as in the case of any other offender, the sentence of a court for any further culpable failure would have to reflect that a fine of the size imposed for the current offences had not achieved some of the statutory purposes of sentencing.

66. We therefore see no grounds for in any way criticising the level of fine imposed by the judge. We dismiss the appeal.

(b) Network Rail

67. We have set out at paragraphs 50-51 our conclusion on the seriousness of the offending by Network Rail. The actual harm was serious and even greater harm was foreseeable. The culpability of local management was serious and persistent, but there was no specifically identified failure by senior management. However those failures must be judged in part in the context of Network Rail's poor previous offending in respect of level crossings (which reflect on the senior management) but also in the light of Network Rail's expenditure of £130m on level crossing safety – a fact that was agreed before us. We take into account the guilty plea, the remedying of the safety failures at Wright's Crossing and the other mitigating and aggravating factors we have set out.

68. We reject the submission made on behalf of Network Rail that a fine of £750,000 was appropriate only where there had been a fatality. As we have explained in respect of Sellafield Ltd that would be to ignore the statutory obligation to consider the means of the offender – in the case of Network Rail a turnover of £6.2 billion (or £119m per week) and annual profitability of £750m (or £14.4m per week).

69. However, a significant fine imposed on Network Rail would, unlike the case of Sellafield, in effect inflict no direct punishment on anyone; indeed it might be said to harm the public. That is because the company's profits are invested in the rail infrastructure for the public benefit; the profits make an addition to the state funds that are otherwise provided to meet the requirements of the provision of that infrastructure. It is likely that any shortfall in the requirements as a result of a fine will have to be met from public funds or in a reduction in the investment. That is a factor which a court must take into account: see *R v Milford Haven Port Authority* [2002] 2 Cr App R 423; *R v Network Rail* [2011] Cr App R (S) 44, [2010] EWCA Crim 1225 at para 24.

70. A fine will, nonetheless, serve three other purpose of sentencing if it reduces criminal offences of the kind committed by Network Rail, reforms and rehabilitates Network Rail as an offender and protects the public. To

ensure that a fine will achieve these statutory purposes of sentencing, the fine must be such that it will bring home to the directors and members of Network Rail these three purposes of sentencing.

i) We were told that the Members of Network Rail would not be involved with issues of safety at level crossings. However although the extent of the responsibility of the Members was unclear, it is clear that their responsibilities must include appointing to the Board executive and non-executive directors who put at the forefront of their duties compliance with Network Rail's responsibilities for the safety of people's lives from the risks of their operations and the reduction of offending by Network Rail.

ii) As we have set out at paragraph 67, Network Rail has invested substantial funds in level crossing safety. Nonetheless the record of Network Rail reflects the fact that accidents at level crossings were prevalent. That makes clear the necessity for all the directors to pay much greater attention to their duties in this respect.

iii) We have set out in paragraph 60 the statement by the non-executive directors as to how they will reduce bonuses if safety performance is poor; it appears to concentrate on a catastrophic accident and not accidents of the kind with which this appeal is concerned which has had such a devastating effect on a child. There was evidence before us (but not the judge) that the bonuses of the directors had been adjusted downwards to a minor (though inadequate) extent in part because of the poor level crossing safety record to which we have referred. Plainly the bonuses should have been very significantly reduced. For the future, it will be important for Network Rail to ensure that full information is provided to the sentencing court, as it is highly material to the assessment of the response of the board of the company to the statutory purposes of sentencing in a case where a fine inflicts no direct punishment on anyone. If, as is accepted by the board of Network Rail, a bonus incentivises an executive director to perform better, the prospect of a significant reduction of a bonus will incentivise the executive directors on the board of companies such as Network Rail to pay the highest attention to protecting the lives of those who are at real risk from its activities. In short, it will demonstrate to the court the company's efforts, at the level of those ultimately responsible, to address its offending behaviour, to reform and rehabilitate itself and to protect the public.

71. We can infer from the fact that Network Rail has invested £130m in level crossing safety and there was some minor adjustment downwards of the directors' bonuses that it is attempting to reduce its offending behaviour, is being reformed and rehabilitated in this aspect of its offending behaviour and is taking steps to protect the public whose lives have been at risk at level crossings.

72. Nonetheless, the fine of £500,000 imposed on a company of the size of Network Rail can only be viewed as representing a very generous discount for the mitigation advanced; we would observe that if the judge had imposed a materially greater fine, there would have been no basis for criticism of that fine. Indeed, were it not for the matters to which we have referred, a fine of the size imposed would have been very significantly below that which should be imposed for an offence committed by a company of this size where the harm was relatively serious and the culpability at local operational management was serious and persistent.

73. We therefore dismiss the appeal.

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