

■ ■ Guidelines for sentencing under the Corporate manslaughter and Corporate Homicide Act 2007

On 27 October the Sentencing Guidelines Council (SGC) published consultation guidelines for sentencing companies/organisations convicted under the Corporate Manslaughter and Corporate Homicide Act 2007. The guidelines will be finalised in time for the Cotswolds Geotechnical Holdings Ltd Trial set to commence on 23 February 2010, the first trial under the Act.

Prior to issuing the guidelines, the SGC received advice from the Sentencing Advisory Council (SAC). One of the key considerations was establishing the appropriate level of fines. Following consultation, the SAC advised fine levels should be determined by average annual turnover. Where there had been a gross breach of a duty of care creating a very high risk of death, the starting point of any fine should be 5% of average annual turnover, with a range of 2.5% to 10% depending upon any aggravating and mitigating features present.

This was widely debated within the media and it was generally accepted this approach would result in huge fines for the largest companies convicted of the offence, running into tens of millions. The SGC have rejected this approach on the grounds that the circumstances of defendant organisations and the financial consequences of a fine would vary too much and lead to injustice. The guidelines states *“Similar offences committed by companies structured in different ways ought not to attract fines which are vastly different; a fixed correlation might provide a perverse incentive to manipulation of corporate structure”*. The SGC has emphasised that fines must be punitive and sufficient to have an impact upon the defendant. They may run into millions of pounds and will seldom be less than £500,000.

The guidelines include factors that will aggravate the offence and result in a

greater fine such as foreseeability of serious injury, how far short of the appropriate standard the defendant fell, how common the breach was within the organisation and if responsibility for the breach was at high level. Other aggravating features include offences resulting in multiple deaths, a failure to heed advice, warnings from regulators and from within the organisation and cost cutting at the expense of safety.

Factors such as an early guilty plea, prompt acceptance of responsibility and a high level of cooperation with the investigation are likely to mitigate the offence and reduce the level of the fine.

The size of the organisation will not be treated as an aggravating/mitigating factor - the same standards are expected from large and small organisations. Significantly, the guidelines make clear that fines must be capable of being paid. In this respect the size and means of a defendant is relevant with fines tailored not only to culpability but also individual circumstances eg the likelihood of innocent employees losing their jobs and the possibility of putting an organisation out of business.

The level of fines for health and safety offences resulting in death is also considered within the guidelines. In these cases, fines should rarely be below £100,000 but once again the fine must be capable of being paid.

Publicity Orders will be introduced to punish and deter by making the conviction known to shareholders and the public. Orders will specify that the conviction, particulars of the offence, the level of the fine and terms of any remedial order be published on the defendant's website and within the media. The SGC has also adopted proposals for Remedial Orders, although any failings will almost certainly have been remedied before trial, often in

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response to enforcement action taken by the HSE.

The SGC makes clear that courts should adopt a different approach for public organisations such as local authorities and hospital trusts where fines will be paid with public money and may have a detrimental effect on public services. Public organisations may therefore attract lower fines and publicity and Remedial Orders play a greater role.

The current guidelines will give comfort to larger organisations that may have been facing fines running into tens of millions. The new proposals allow the courts much greater flexibility with an emphasis on ability to pay the fine and possible consequences.

The guidelines require defendants to provide published audited accounts or financial statements to assist courts in setting a fine. Organisations convicted of health and safety offences have been doing this since 1998 following the landmark Judgment in **R v F. Howe & Son (Engineers) Limited** when The Court of Appeal made clear that any fine “*should reflect not only the gravity of the offence but also the means of the offender.*”

The Corporate Manslaughter and Corporate Homicide Act 2007 was ten years in the making and many pressure groups and unions were unhappy with the final product. These guidelines, if adopted,

may therefore present a further disappointment to those looking to the courts to hand down fines on a par with those incurred by companies found to be in breach of competition law. Courts will continue to look at culpability and financial circumstances when determining fines and the ability of a defendant to pay a fine without jeopardising its survival. Although the figure of £500,000 is expressed as a minimum fine in most cases, it may become a benchmark.

It is difficult to determine at this stage how large fines will be with only limited guidelines on actual figures and no specific tariffs. Fines for very large companies are likely to run into the millions as they occasionally have done in the past for significant breaches of health and safety legislation resulting in multiple deaths. We are unlikely to get much guidance following the trial in March; Cotswold Geotechnical Holdings is a very small company unlikely to be in a position to pay any fine. We will have to wait for a prosecution and conviction of a large corporation to get a clearer picture.

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