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Albion Chambers REGULATORY NEWSLETTER

One door closes – and other door opens

In *R v AB and others* [2017] 1 WLR 4071, the Court of Appeal gave an important judgement in respect of section 222 of the Local Government Act 1972, which empowers local authorities to prosecute. The facts of the case were novel (a factor that needs to be remembered). In order to create revenue, Thurrock Council had set up a fraud prosecution service for external enforcement agencies (in this case it was the Legal Aid Authority), taking on cases not prosecuted by the CPS (for whatever reason).

Section 222 of the LGA 1972 specifies that prosecutions can be brought when the local authority considers "it expedient for the promotion or protection of the interests of the inhabitants of their area". Thurrock had argued that raising revenue did promote the interests of their region, however the Court of Appeal disagreed and ruled that the prosecution brought by Thurrock was unlawful because the local authority did not have jurisdiction, applying the test in section 222 set out above. In short, the Court stated that it cannot have been Parliament's intention that section 222 would empower any local authority to offer a prosecution service to any individual organisation prepared to pay for it.

This ruling, on the one hand, did make it clear that the factors relevant to the application of this test were not strictly limited by geography (the Appellants had argued that there was no local connection underpinning the prosecution). The Court upheld the case of *Oldham v Worldwide Marketing Solutions* [2014] EWHC 1910 in which it was said "the local authority can properly take into account broader considerations how to promote or protect the interests of its inhabitants, not limited to situations where an unlawful activity is continuing or contemplated within its area…". The ruling in AB also endorsed previous cases specifying that courts should be slow to interfere when a local authority considers that the "…expediency" criterion is met".

However, the Court did focus its interpretation of the "expediency" test on matters that have a direct effect on the inhabitants of the local authority as opposed to citizens more generally. In this way the ruling in AB arguably provides a narrower interpretation than that which had previously been applied by the courts and local authorities alike.

This decision is highly relevant for trading-standards teams that operate from a local-authority base, but investigate and prosecute offences committed outside their own area. Thankfully, in a large number of cases the answer is most likely to be found in paragraph 46 of schedule 5 of the Consumer Rights Act 2015. The explanatory notes to the CRA 2015 state "it consolidates enforcers' powers… to investigate potential breaches of consumer law and clarifies that certain enforcers (Trading Standards) can operate across local authority boundaries". This extends the jurisdiction of local authorities to bring criminal prosecutions for offences committed outside their area if (a) the prosecution is for a consumer offence, primarily those listed in paragraphs 10 and 11 of schedule 5 of the CRA 2015; or, the prosecution is for an offence originating from investigation into a breach of the scheduled consumer offence legislation, even if the offence that is ultimately prosecuted is not a listed consumer offence.

This emphasises the limitations of the application of this extended jurisdiction. If the local authority has commenced an investigation into offences that are not scheduled consumer offences they will not be able to bring the case within the authority created by the CRA 2015 and will have to resort to the power found in section 222 of the LGA 1972. To this extent, the ruling in AB remains relevant and potentially limits the breadth of some enforcement operations. It is for this reason that the novel facts of AB should be remembered, in order to found an argument that it be distinguished in a more orthodox case.

It is also vitally important that investigators document all of the offences that are being investigated initially, in order to bring a case within the CRA 2015 if at all possible. Equally, those defending a case, brought by a local authority, that crosses county boundaries, may want to make early enquiry as to the claimed authority for prosecution.

Both pieces of legislation are currently under consideration in a case before Bristol Crown Court and their application will perhaps be the subject of subsequent bulletins. It remains to be seen if this door is open or closed.

Alan Fuller

Brexit hash

Food safety after Brexit

A recent tip from food inspectors in a case I prosecuted where a major hotel chain had severely poisoned dozens of guests, hospitalising many of them: avoid chicken liver pâté at any event with large-scale catering. Around 50,000 people are poisoned each year in the UK by the Campylobacter bacteria, and our food-safety regime is plainly struggling to

reduce the number of outbreaks. Swinging budget cuts at Defra and in Local Authorities that enforce food regulations, have reduced the number of officers by around a quarter. Brexit could not have come at a worse time for the food-safety industry.

Food safety is an area of law where the vast majority of legislation and policy is based in European laws. If an equivalent regulatory regime is not in place by 29 March 2019, addressing surveillance, risk assessment, risk management and controls, the food industry faces great uncertainty. It is not only consumers who may suffer if proper food laws are not in place. Countries importing UK food will demand assurance that we have a complete regulatory regime in place to protect their consumers. Heather Hancock, the chair of the Food Standards Agency, recently warned 'get it wrong and we put at risk public health, public trust and confidence. It potentially also compromise valuable trade opportunities and employment.'

A recent report from City University's Centre for Food Policy, suggested that the government might seek to suspend key food-safety rules to help keep supplies moving across borders in a 'no deal' scenario. The report says civil servants have been told to draw up plans to "suspend food controls" if there are delays at the UK border so food does not spoil while sitting in lorries in border queues. The authors of the report note that "If the UK were to suspend food safety controls, others might block exports from a country taking such a cavalier approach to public health. It would go completely against all the protestations of commitment to high consumer and health standards. Yet this appears to be what Defra envisages." The claim has been denied by Defra, but there remains a deal of uncertainty and speculation about what will happen to food safety in the event of a no deal.

Food safety laws are just one of the problems in this area. A linked difficulty relates to accessing vital information. As an EU member the UK is part of a framework that ensures traceability of products which pose a high level of risk, including types of food and animal products. The European Food Safety Authority investigates emerging risks to health in the food chain, and develops scientific knowledge. The system provides rapid access to Europe-wide intelligence about contamination. Regular alerts are sent to local authorities about issues including salmonella and E. coli levels, which assists councils to target enforcement activity. There are, as yet, no replacement structures in place.

Self-regulation may become even more important if UK agencies struggle to assume additional monitoring and investigatory responsibilities. Best to stay away from that pâté for a few years yet.

Kate Brunner QC

Sentencing

When does being 'very large' become a problem?

The Sentencing Council's Definitive Guideline on Health and Safety Offences has been with us since February 2016. It observes the now well-known pattern of assessing 'harm' and 'culpability', together with other factors, to provide a sentencing outcome. In matters of Health & Safety this can be fraught with difficulty. 'Culpability' can be vague in offences that are often 'sins of omission' and can further be influenced simply by the size (by turnover) of the organisation involved. The Guideline states, for a 'Very Large Organisation', that "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 (emphasis added)".

The most recent authorities dealing with very large organisations, however, offer no clear guidance on precisely where it 'may be necessary'.

Most recently, a £900,000 fine handed to utility firm Electricity North West (ENW) was reduced to £135,000 – by 85% – by the Court of Appeal, upon a reassessment of culpability and the relevance of the company being a 'very large organisation'.

The Health and Safety Executive had brought the prosecution after an accident which occurred in November 2013. Linesman John Flowers was cutting away ivy from around power lines, when he severed his work positioning belt. He was not wearing a fall-arrest lanyard and sustained fatal injuries in a fall of approximately six metres.

The Company had risk assessed the task but had failed to ensure it was properly planned and supervised by ensuring (in essence) a MEWP was available, thereby breaching Regulation 4 of the Work at Height Regulations.

At the original sentencing hearing, the Court had determined that the company's culpability was high; that the seriousness of the harm risked was within level A and that the likelihood of harm arising was low (harm category 3). Finally, it was determined that Electricity North West's turnover warranted an upward adjustment from the starting point. The Company's turnover was £450m, and because the company fell within the large category this meant that starting point for the fine was £540,000. The category range was £250,000-£1,4m and the Judge set the starting point at the higher end of the range at £900,000.

The Appeal ([2018] EWCA (Crim) 1994) was against both conviction and sentence. The Appeal against Conviction was unsuccessful, for reasons of some interest to practitioners (e.g. the fact that a risk is not reasonably foreseeable is not an answer to a charge of breaching regulation 4 of the Work at Height Regulations by a failure of proper planning). The Court of Appeal then turned to whether the original fine was manifestly excessive.

The grounds of appeal against sentence were that the fine was manifestly excessive in the circumstances, in that:

- The Appellant argued the Judge had (exceptionally) to sentence for a Health and Safety offence on the basis that the company had carried out a sufficient risk assessment which did not expose anyone to a risk of harm. It followed that he ought not to have attempted to apply the sentencing guidelines.
- His assessment of culpability was inconsistent with the evidence and with acquittals on other counts and he misdirected himself when considering the risk of harm created by the offence. The result was that the starting point was too high.
- The Judge was also in error in approaching the issue of sentence on the basis that, because the company was a 'very large' organisation, he was required to make an upward adjustment to the sentence. In fact, it was not necessary to increase the fine in order to achieve a proportionate sentence. In short, the

sentence was out of proportion to the shortcomings the Judge had identified.

The first point was briskly rejected by the Court. This was a conviction under s.33(1)(c) of the Health and Safety at Work Act 1974 and a breach of health and safety regulations, to which the guidelines apply.

The Court of Appeal dealt with the second point by agreeing that the offence fell within Harm Category 3, but were of the view said the company's culpability was "on the cusp" of low and medium.

The Court then concluded that the right sentence in the case was a fine of £135,000, before dealing with the third point thus - "We do not consider that any further upward adjustment to reflect turnover should be made on the facts of this case".

That, as they say, was that. No further comment on the size of the company and what this may have meant for the fine. Zero, zilch, zip, nada. This was something of a surprise in the light of *Whirlpool UK Appliances Ltd* [2017] EWCA Crim 2186, where the £700,000 fine handed to the domestic appliance manufacturer, after a contractor died when he fell from a work platform, was reduced upon appeal, but where Whirlpool being a 'very large organisation' remained fundamental to sentence.

Upon *Whirlpool* and the comprehensive review of the guideline and relevant authorities contained within, there can be no doubting Electricity North West's 'very large' status based upon turnover [see Whirlpool at 33 and 34].

In *Whirlpool*, the Court of Appeal interpreted a near identical sentencing matrix (to ENW) of Harm Category 3 (with the seriousness of harm risked being at its highest) and Low Culpability (as opposed to 'the cusp' of low and medium in ENW). Whirlpool, the turnover of which was £672.8m and £710.8m in 2014 and 2015 respectively was, however, further dealt with as a 'very large' company.

The Court of Appeal noted that the starting point fine for a 'large' organisation is £35,000, which it adjusted to £250,000 (the top end of the next category range) to reflect the fact that a worker was fatally injured. The Court then increased this further to take account of Whirlpool's very large status (as had the original sentencing Judge) and set a starting point of £500,000, This starting point was reduced by £50,000 for mitigating factors, and then by one third for an early guilty plea, resulting in a £300,000 penalty. In relation to the question of very large organisations, the judgment stated thus [at 42]:

Nothing in this judgment is intended to alter the policy in this Court in recent times … 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 enquire carefully into the facts of each case so as fairly to reflect different levels of harm and culpability… 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.

Despite such caveats, the very different approach in two such highly analogous cases remains surprising. It seems the Court of Appeal will allow itself a considerable margin of discretion in relation to where "it may be necessary to move outside the suggested range to achieve a proportionate sentence".

Alun Williams

Environmental prosecutions

Waste management still a focus for regulators

In the Environment Agency's recent Annual Report, the only 'performance measure' it was said to have been failing in, was its ability to reduce the number of high risk illegal waste sites. Despite enhanced regulatory powers and higher fines for offenders in recent years, it appears the EA's significant investment in this area has not yet had the desired result. Practitioners will note that waste management, and particularly waste transfer or treatment sites, are likely to be a focal point for the regulator in 2018/19.

The margins, as it happens, are slight. There were 253 active high risk illegal waste sites in the financial year 2016/17, which rose to 259 in 2017/18. A modest rise, but one which led to the Environment Agency failing to meet its year end target.

Further statistics have now been released by the EA, dealing with the 2017 calendar year or, where available, the financial year 2017/18. The scale of the problem with illegal waste sites quickly becomes clear; the EA stopped 812 illegal waste sites during 2017/18, and investigations found a further 856 new sites where there was illegal waste activity; figures which broadly mirror 2016 levels. While higher fines have been in place since mid-2014, it seems they are not having the deterrent effect regulators had anticipated.

That said, serious pollution incidents have reduced, down 18% on 2016 figures. Farming activities continue to cause the most incidents with just over 16% of all serious pollution incidents – a statistic all practitioners with clients in farming may wish to take note of – while waste management activities account for 15% and water companies 12%. Of the incidents relating to farming, 71% were caused by containment and control failures, rising to 82% when activities not requiring an EPR permit are taken into account.

The waste sector is clearly a focus for the Environment Agency, with 94% of the 'persistently poorly managed' sites falling within the waste management industry, and the EA having received an extra £30 million of government investment over four years to tackle the issue. The number of poorly managed sites as a whole is lower than 2016, and the number of serious incidents caused by waste management activities has also fallen, however the number of incidents caused by the waste treatment sector has flatlined at 42 incidents per year.

Earlier this year regulators were given increased powers to take action against rogue operators, including locking illegal waste sites, blocking access and seizing vehicles. As of July this year, 22 vehicle have been seized, some of which had

been crushed. In June Michael Gove launched a review of how the waste management industry was being used by criminals, including organised crime groups. The government's forthcoming Resources and Waste Strategy is expected to include further measures.

The Environment Agency latest statistics make it clear that waste management is still an issue of significance for the government and for the regulators. While the overall number of pollution incidents may have fallen in recent years, the number of illegal waste sites has remained constant, and with increased regulatory interest in those sites and recent changes to the regulator's powers it is possible that individuals and organisations will need legal advice more this year than ever before.

Alexander West

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