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Albion Chambers REGULATORY NEWSLETTER

Dig deep

Damaging the environment is no longer a victimless crime

In 2013 the Sentencing Guidelines Council (SGC) issued draft sentencing guidance for environmental offending, with the aim of ensuring consistency in the courts and tougher penalties for the most serious offenders.

A three-month consultation period closed on 6 June 2013 and it was announced at the end of February that the new guidelines will apply to those sentenced on or after 1 July 2014. The guidelines differ to the consultation document in several key respects, namely: increased turnover brackets, a requirement for "major" (as opposed to substantial) consequences to fall within the most serious category of harm, a new "micro" category for smaller businesses and separate guidance for individuals.

Background

The previous lack of sentencing guidance for environmental offending led to concerns that different courts had been inconsistent in the approach to sentencing, with some of the most serious offenders escaping proportionate punishment for their crimes. The proposals aim to eradicate these concerns by laying down a sentencing framework for the courts whilst encouraging Magistrates to make use of the highest levels of fines available in the most serious cases. The new system will have retrospective effect, meaning individuals and companies will still fall into the clutches of the new system regardless of the date the offences were committed.

Scope

The guidelines impose a now familiar sequence of steps to be followed which will assess the culpability of the offender, the harm caused and the financial circumstances of the individual or company. The new guidelines cover a wide variety of offences governed by the Environmental Protection Act and the Environmental Permitting Regulations. These include fly-tipping of waste, by both companies and individuals, and situations where waste has not been handled or disposed of correctly. They will also apply to companies in breach of the waste permitting regime, and 'nuisance' offenders who cause noise, smells, dust or health or pollution risks.

The new sentencing guidelines are an indication that the courts are going to be encouraged to take a much tougher approach with companies that engage in environmentally damaging behaviour and a consensus appears to have emerged that the current penalties have simply not been strong enough.

Penalties

The guidelines do not create a formal tariff for offences. However, they are clearly intended to operate on that basis as they set out clear ranges of penalty that depend upon the size of the operation, the degree of culpability and the level of harm caused. The SGC has clearly indicated that environmental offences are not to be taken lightly. For example, under the proposed sentencing regime a medium-sized company (with a turnover of £10m – £50m) found guilty of committing a deliberate act that causes the most serious level of environmental harm should expect a fine in the range of £170,000 - £1m, with a starting point of £400,000. For large companies with a turnover exceeding £50 million, the maximum fine reaches £3 million. SGC member and Magistrate Katharine Rainsford claims: "These offences are normally motivated by making or saving money at the expense of the taxpayer. Our proposals aim to ensure that sentences hit offenders in their pocket". This point is further emphasised by specific guidance that the amount of economic benefit derived from the offence should normally be added to the fine.

The Environment Agency website also highlights a series of cases where individual directors have been prosecuted for environmental offences alongside the offending business. Indeed, over the past 18 months many of us practising in the regulatory sphere have noticed a distinct shift in policy, both EA and HSE, to indict the directors alongside the company. Whilst these cases have tended to be restricted to smaller enterprises, where the director may have sole control of the activities of the operation, the proposed penalties for individual offenders should not be overlooked. The new guidelines suggest that in the event of a deliberate act by individuals, even if that act causes only minor harm, a custodial sentence could follow. Even negligent acts include imprisonment in the sentencing range if the harm caused to the environment is sufficiently serious (albeit the starting point has now been reduced to a fine as opposed to 12 weeks custody as envisaged by the consultation document).

Guidelines or tramlines?

Although sentencing guidelines are, by their very nature, intended to be only used as guidance, there is a real expectation amongst practitioners that they will be followed far more rigidly than the guidelines produced for 'mainstream' crime. In general, Magistrates have very little experience in sentencing environmental offences and, as such, these guidelines will provide Magistrates with an invaluable sentencing tool in an area where their knowledge and experience is limited. Indeed, the SGC recognises that "Magistrates' experience of sentencing environmental cases is likely to be so infrequent that there is no realistic possibility that substantial experience will be gained by any one individual". It seems, therefore, that whether it is an individual or business before the court for an environmental offence, there may be very little 'wriggle room' in terms of

the level of sentence and those sentences will be much more severe after 1 July.

The way forward

In order to avoid ending up on the wrong side of one of these prosecutions it is important for businesses to pay attention to the licences, authorisations and permits that have been issued, particularly any conditions that have been attached to those, such as where, how or if waste can be disposed of in a certain location.

It is rarely worth risking being in breach of any of the conditions that have been imposed, as the fines that already exist – let alone the new sentencing guidelines – could cripple a small business, particularly one already suffering from cash flow problems as a result of current economic conditions.

Having said that, whilst we can expect fines to dramatically increase for corporate offenders where harm is caused, the guidelines do not appear to raise fines from current levels for less serious offenders. Of course, the Environment Agency is likely to say that those trying to squeeze into this narrow opening are very few indeed. As always then, maintaining a courteous, open and constructive dialogue with the Inspectors and enforcement teams can do no harm, and will pay dividends when it comes to the parties seeking to agree into which category the offending falls. Moreover, a new mitigating factor introduced is compensation paid voluntarily to remedy the harm caused so, again, proactive remedial steps and co-operation will only help come sentence.

Notwithstanding careful attention to the permit regime and polite diplomacy with enforcement agencies, if one finds oneself at the wrong end of a prosecution and facing sentence under the new guidelines, it will be important to draw the court's attention to the danger of defining the level of penalty a guilty organisation should receive by reference to turnover. Indeed, during the consultation period the Justice Committee argued that such an approach could unfairly penalise those firms with high turnovers and small profit margins and recommended that the council clarified that other financial information should be taken into account when appropriate (and also urged the Magistrates' Association to ensure that magistrates are adequately trained to understand financial documents). The guidelines still refer to "turnover or equivalent" so these suggestions appear to have been unheeded, but the point is a valid one and may be worth pursuing during your plea in mitigation.

Either way, the general up shot is this: not only are environmental prosecutions on the up, so are the fines.

*The Guidelines can be found at: http://sentencingcouncil.judiciary.gov.uk/guidelines/forthcoming-guidelines.htm#Environmental_offences_definitive_guideline

Jason Taylor

"Won't get fooled again" – hopefully!

As the legendary Roger Daltrey passes his three score years and ten, I imagine that he will not be considering an investment in a timeshare holiday product, but many passing that landmark age have done so only to repent (rather than enjoy) at their leisure. To add insult to injury they have also marked themselves as targets for future high-pressure sales pitches and scams.

Timeshare products, have for thousands of people turned into millstones representing an ever-increasing liability. Ironically, the costs levied against existing timeshare owners have increased since tighter regulation has made it increasingly difficult for sales teams to 'convince' new customers to part with their money. So, as the timeshare companies charge their existing 'investors' more and more, how are commission-driven timeshare salesmen to make a living?

A recent case before Exeter Crown Court, *R v Mendoza and Girvin*, concerned one attempt to answer this conundrum. Both Defendants had previously been active within a company that had mis-sold timeshares. This led to a successful civil action and compensation for some of the victims. The Defendants' new money making scheme sought to exploit this. They cold called disgruntled timeshare owners with talk of a 'class legal action' and an opportunity for compensation. When proposed litigants attended an appointment the Defendants moved to their real sales intention – attempting to persuade these people that whilst they were waiting for compensation the Defendants would help them to get rid of their timeshare once and for all. This of course came at a cost – often many £1000s – and in this way the Defendants grossed over £150,000 in just seven months. After trial, both Defendants were convicted of offences under the Consumer Protection from Unfair Trading (CPUT) Regulations 2008.

Their actions demonstrated the breadth of the CPUT Regulations. For whilst most of those who attended the Defendants' presentations were not prepared to be "fooled again", the Defendants' practices were outlawed by the Regulations nonetheless.

Anyone who has had cause to look at these Regulations may, understandably, have concluded that their turgid style is apt to frustrate any meaningful exercise in law enforcement. The root cause of this style is to be found in the European origins of the Regulations. They were introduced to implement in UK law, the obligations created by the European Unfair Commercial Practices (UCP) Directive 2005. The UCP Directive is a 'maximum harmonisation' directive designed to achieve harmonisation of consumer law throughout the European Union. Thus, to understand the provisions one must consider the lengthy regulations, apply the appropriate interpretation section and be guided by the 'European approach to construction' – that requires the wording to be construed as far as possible so as to implement the purposes of the UCP Directive.

Where did this leave Messrs. Mendoza and Girvin? One phrase that was common to all the offences that they faced was that the commercial practices in question must "cause or be likely to cause the average consumer to take a transactional decision he would not have taken otherwise". The definition of what was a "transactional decision" illustrates the breadth of these provisions.

Regulation 2 states that "transactional decision" means *any decision taken by a consumer whether it is to act or to refrain from acting, concerning –*

(a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or

(b) whether, how and on what terms to exercise a contractual right in relation to a product. Quite broad? But did it cover those targeted by the Defendants' marketing/cold calls, who did not attend a presentation, or those that did attend but did not engage the Defendants' services?

Article 3 of the UCP Directive stipulates that it applies to *"practices… before, during and after a commercial transaction"*. The European Commission guidance on the UCP Directive makes it clear that the decision to attend a presentation is as

much a transactional decision as the decision to pay for the service ultimately offered. This is easily understood when compared to a consumer's decision to enter a shop as a result of misleading poster in the window, but perhaps less obvious when consumers are more distant. Consideration of these provisions have, in other EU states (e.g. Airport Baltic 2009E03-REUD-54), lead to the conclusion that *"transactional decision"* includes a decision to visit a traders website even if the consumer does not go on to buy. A view repeated in guidance provided by the OFT.

Although these offences can be made out even if the average consumer is purely hypothetical, many people who had been fooled into purchasing timeshares in the past were drawn to the presentation by the offer of compensation when the Defendants' true intention was to sell on overpriced service. Fortunately, most of them had the Who's lyrics firmly in mind and were not "fooled again". This mendacious business model is, however, not the brainchild of these two Defendants and so the CPUT Regulations may well be needed to protect others, if not Mr Daltrey himself.

Alan Fuller

New developments in the disclosure regime in criminal proceedings

The proper disclosure of unused material is an essential element of any fair criminal procedure. The failure to implement proper disclosure is also one of the most frequent sources of complaint to the appellate courts. The Criminal Cases Review Commission noted in 2013 that the biggest cause of miscarriages of justice has been the failure to provide disclosable material to the defence.

Recognising that this fundamental process does not always function correctly, the Attorney-General and the Lord Chief Justice have issued two new documents to explain clearly the respective roles of prosecuting authorities, defence representatives and the courts in the disclosure process.

Both issued on the same day, 3 December 2013, the Attorney General's Guidelines on Disclosure 2013 ('The AG's Guidelines') and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases ('the Judicial Protocol') contain guidance which must be followed in all criminal proceedings. This article is intended to highlight a number of particular issues identified by those documents and give some guidance on the practicalities of conducting proceedings within the new regime.

The starting point for disclosure of unused material remains unchanged. According to section 3 of the Criminal Procedure and Investigations Act 1996 ('CPIA'), material will be disclosable if it "might reasonably be considered capable of undermining the case for the prosecution … or of assisting the case for the accused."

Initial disclosure

Investigating officers must bear in mind at all times the importance of the contents of the schedules of unused material. The use of acronyms and jargon should be avoided where possible. Clear and detailed descriptions of the material held should be provided, so that both prosecuting advocates and defence representatives are able properly to assess its relevance to their cases (paras 22-24 of the AG's Guidance).

The defence statement

The role of the defence statement (often incorrectly referred to as a defence case statement) is crucial. The content of the defence statement will then inform the ambit of secondary disclosure and the omission of any relevant detail will prevent the making of a successful application for relevant further disclosure under section 8 of the CPIA (para 26 of the Judicial Protocol). Any subsequent application under section 8 should refer back to the content of the defence statement to justify the relevance of the material.

If the defence statement does not comply with the requirements of section 6A CPIA then it is deficient. This has always been capable of leading to the drawing of an adverse inference during the trial process. However the Judicial Protocol on disclosure now places an obligation on prosecuting bodies to highlight any perceived deficiencies in the defence statement at an early stage, rather than simply waiting for trial. In most cases, especially complex matters or those involving voluminous papers, this should be done in writing, copied to both the court and the defence.

At the PCMH, where there is no defence statement, or no adequate defence statement, the court should explicitly warn the defence of the consequences of non-compliance. This is true even when there is no defence statement either by agreement or because the 28 days from initial disclosure has not expired. Where the court does not do so of its own volition, the prosecuting advocate should invite that this is done.

Responding to the defence statement

Once the defence statement has been received, the secondary disclosure process is triggered. The Judicial Protocol envisages that in cases of complexity there will be a number of stages to secondary disclosure, described as follows (para 22):

"i. Service by the prosecution of any further material due to the defence following receipt of the defence statement.

ii. Any defence request to the prosecution for service of additional specific items. As discussed below, these requests must be justified by reference to the defence statement and they should be submitted on the section 8 form.

iii. Prosecution response to the defence request.

iv. If the defence considers that disclosable items are still outstanding, a section 8 application should be made using the appropriate form."

Third party material

The new guidance does not change the obligations of the prosecuting authority in respect of any material held by a third party, but does restate the best practices to follow. Where access to material held by a third party is granted, the usual disclosure test should be applied. However, if the third party refuses to permit access to potentially relevant information, the prosecutor must consider whether it is "appropriate" (para 46 of the Judicial Protocol) to seek a witness summons.

Note that this test is not one of necessity or desirability. Relevant factors will include the complexity of the case, the likely evidential value of the material and the potential consequences of conviction, but prosecuting authorities should exercise common sense, proportionality and pragmatism. In any event, the court and defence should be notified of the approach which the prosecutor elects to take, so an aggrieved defendant can seek a summons of his own if required.

Electronic and digital material

In cases involving a substantial amount of electronic material, it may not be practical for disclosure officers to examine every piece of material. In such cases prosecuting advocates, lawyers and disclosure officers should liaise to agree upon the scale and focus of the review of such material, commensurate with the gravity and nature of the case (para 48 of the AG's Guidance).

The Judicial Protocol makes specific reference (at para 15) to the need for the defence to identify relevant search terms when there is a substantial body of electronic material to be reviewed. Prosecuting authorities should therefore consider making reference to this practice, perhaps in the

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covering letter accompanying any schedule of unused material.

In any defence statement in a case which involves a large volume of electronic material, the defence should suggest a list of potential search terms which might help to identify relevant material. This will avoid any criticism of the defence role in the disclosure process. It should be made explicit in the defence statement that any such list is non-exhaustive and the prosecutor is obliged to provide all disclosable material held, whether or not caught by the identified search terms.

Edward Hetherington

Fines in non-fatality prosecutions – a case update

Case Citation; [2014] EWCA Crim 49

In January 2014 the Court of Appeal gave judgment in the conjoined appeals of *R v Sellafield* and *R v Network Rail.* Both companies, both funded, at least in part, by public money, appealed against their respective sentences for non-fatal accident breaches. Both appeals were refused. As part of the judgment the CoA erected some useful signposts to assist us in our advising our clients in the future.

Breaches and punishment

Due to the shortness of column inches available to me, I am unable to go into the details of each case to any great extent. Suffice to say, in Sellafield's case, a fine of £700,000 was imposed for environmental breaches concerning the disposal of radioactive waste, whilst in Network Rail's case the Crown Court handed down a fine of £500,000 for H&S breaches resulting in a ten year old boy sustaining life changing injuries at a level crossing. Both companies had previous convictions.

Appeal submissions

I do a disservice to the submissions made on behalf of the respective appellants by butchering them in the following fashion, however, the submissions can be boiled down to the following propositions:

- Fines should be tempered where it is to be paid from public money;
- Fines shouldn't be this large where somebody doesn't die;
- Fines shouldn't be this large where no injury arose.

A clear steer

Sometimes, the CoA can make us wait until the end of a judgment before we know which way they are going to decide, however, in this case paragraph 1 of the judgment reads as follows;

"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".

When respective Counsel for the appellants heard those opening words, they would have been left in no doubt as to the course of the judgment.

However, even if there were a glimmer of hope remaining, by paragraph 4, that must have been extinguished. In that paragraph the CoA explicitly references the well known case of *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 at 255, [1999] 2 Cr App R (S) 37 at 44 and specifically, the following paragraph (my emphasis added):

"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

Pre-sentence preparation

However, lest it be said that the Court of Appeal was simply taking a broad-brush approach in this regard, one of the clear features of the judgment was its focus on the importance of (i) the provision of material, by the Appellants, regarding accountancy, finances and corporate structure and (ii) the necessary process to be undertaken by the Court in assessing this material. The CoA made it clear that only by doing so the objectives of sentencing as per the CJA 2003 could be satisfied.

Richard Shepherd