Neutral Citation Number: [2019] EWCA Crim 228

Case No: 201703949 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HHJ BEDDOE
S20160024

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before:

LORD JUSTICE LEGGATT
MRS JUSTICE CUTTS DBE
and
HIS HONOUR JUDGE WALL QC
(SITTING AS A JUDGE OF THE CACD)

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Between:

The Queen	**Respondent**
- and -	
NPS London Ltd	**Appellant**

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- -

Sailesh Mehta (instructed by the **Health and Safety Executive**) for the **Respondent**
Matthew Gowen (**Birketts LLP**) for the **Appellant**

Hearing date: 15 February 2019

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Approved Judgment

Lord Justice Leggatt:

1. On 25 July 2017, at Southwark Crown Court, the appellant ("NPS London") was fined a sum of £370,000 after pleading guilty to an offence of failing to comply with its duty under s.3(1) of the Health and Safety at Work Act 1974. It appeals, with leave, against that sentence.

2. Under s.3(1) of the 1974 Act it is "the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected are not thereby exposed to risks to their health or safety".

The background

3. We have described the background to the offence in our judgment given in the related case of *R v Squibb Group Limited* [2019] EWCA Crim 227. The role of NPS London was that of managing on behalf of the London Borough of Waltham Forest a project to refurbish a school. In that capacity, it was responsible for commissioning an asbestos survey carried out by Redhill Analysts. NPS London admitted that it failed to recognise the deficiency of the survey and consequently failed to take further reasonably practicable steps which it should have taken to ensure that all the asbestos which was present in the building was identified and safely removed before the refurbishment works took place. The failure to do this resulted in those who carried out works and others being exposed to dust containing asbestos with a consequent long-term risk to their health.

4. NPS London is a joint venture company, owned as to 80% by NPS Property Consultants Ltd (which we will refer to as "the NPS parent") and as to 20% by the London Borough of Waltham Forest ("the Borough"). The NPS parent is ultimately controlled by Norfolk County Council. NPS London was set up in order to outsource professional services previously performed by employees of the Borough. At least 80% of its turnover is derived from services provided to the Borough under a long-term contract. Any profits from its operations are shared equally between the Borough and Norfolk County Council.

The sentencing guideline

5. In sentencing NPS London, the judge was required to follow the definitive guideline for this type of offence issued by the Sentencing Council. The guideline sets out a series of steps. Step one is to determine the category into which the offence falls by assessing the offender's culpability and the risk of harm created (along with any actual harm caused) by the offence. 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 guideline contains tables for different sized organisations. These include tables for "large" organisations – defined as organisations with annual turnover or equivalent of £50m and over; for "medium" organisations, with turnover of between £10m and £50m; and for "small" organisations, which have a turnover of between £2m and £10m.

6. Step three requires the court to "check whether the proposed fine based on turnover is proportionate to the overall means of the offender." The court is enjoined at this stage to "step back", review and, if necessary, adjust the initial fine reached at step two on the basis of turnover to ensure that it fulfils general principles, which include the principle that "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." For this purpose, the guideline says that:

> "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."

Factors to which the court is required, in particular, to have regard include the profitability of the organisation. It is said that, if an organisation has a small profit margin relative to its turnover, downward adjustment may be needed.

7. Under the heading "obtaining financial information", which is relevant for both steps two and three, the guideline states that 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. The guideline further states, in a passage which is central to the argument on this appeal:

> "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."

The guideline states that, for companies, when considering their annual accounts particular attention should be paid to turnover, profit before tax, directors' remuneration, loan accounts and pension provision, and also assets as disclosed by the balance sheet.

8. Step four requires the court to consider any wider impacts of the fine within the organisation or on innocent third parties that may warrant adjustment of the proposed fine. The remaining steps include, at step six, the requirement to make any appropriate reduction for a guilty plea.

The judge's reasoning

9. Applying the sentencing guideline to the facts of this case, the judge at step one assessed the culpability of NPS London as high and the risk of harm created by the offence as falling within harm category 2. No issue is taken on this appeal with those assessments.

10. The accounts of NPS London for its three most recent financial periods, which were provided to the court, showed that its annual turnover had been of the order of £5-6m. On this basis, for the purpose of identifying which table to use, NPS London was a "small" organisation. For such an organisation, for an offence in the relevant

category, the starting point is £100,000 and the category range is from £50,000 to £450,000.

11. The judge, however, did not treat the table for small organisations as the relevant table. He considered that the relevant table was that applicable to large organisations. He reached that conclusion on the basis of the passage in the guideline which states that, exceptionally, it may be demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account. We were not shown the accounts of the NPS parent, but it is apparent from the transcript of the sentencing hearing that they were provided to the judge and we were told that the annual turnover of the NPS parent was around £125m. It is not in dispute that the NPS parent qualified as a "large" organisation.

12. For a large organisation, the starting point for an offence falling in the relevant offence category is £1.1m and the category range is from £550,000 to £2.9m.

13. The judge observed that NPS London had no previous convictions, that it had cooperated with the investigation, that its failings were not deliberate but were "the product of poor management and process" and that the "profitability of this enterprise is low and primarily operates for the benefit of local authorities". Taking these factors into account, the judge adjusted the fine downwards to the bottom of the bracket – that is, £550,000 – and then reduced it further by giving full credit to NPS London for pleading guilty at the earliest reasonable opportunity. In that way he arrived at the final figure of £370,000.

The issues on this appeal

14. The principal ground of appeal is that the judge was wrong to treat NPS London as a large organisation for the purposes of the sentencing guideline. This raises two questions. The first is whether the judge was entitled to regard the NPS parent as a "linked organisation" whose resources could properly be taken into account for the purposes of sentencing its subsidiary company, NPS London. The second question is whether, if so, it was legitimate to take this consideration into account in the way that the judge did – that is to say, by treating the relevant table to use in sentencing as the table applicable to large organisations.

Was the judge entitled to treat NPS London as a large organisation?

15. It is convenient to take the second question first. We think it clear that the judge was wrong to read the guideline as entitling him to treat NPS London as, or as if it were, a large organisation for the purpose of sentencing. It is the offending organisation's turnover, and not that of any linked organisation, which, at step two of the guideline, is to be used to identify the relevant table. This reflects the basic principle of company law that a corporation is to be treated as a separate legal person with separate assets from its shareholder(s). There are circumstances, restated by the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415, in which it is permissible to 'lift the corporate veil', and in such circumstances it would be legitimate to treat a corporate defendant as part of a larger organisation for the purpose of sentencing in this context, in the same way as, for example, it can be appropriate to lift the corporate veil in criminal confiscation proceedings: see *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19; [2016] 2 Cr App R

(S) 11. An example of a case where it would be appropriate to treat the relevant figure for turnover as that of a parent company might be one where a subsidiary had been used to carry out work with the deliberate intention of avoiding or reducing liability for non-compliance with health and safety obligations. The mere fact, however, that the offender is a wholly owned subsidiary of a larger corporation or that a parent company or other "linked" organisation is in practice likely to make funds available to enable the offender to pay a fine is not a reason to depart from established principles of company law or to treat the turnover of the linked organisation as if it were the offending organisation's turnover at step two of the sentencing guideline.

16. By contrast, whether the resources of a linked organisation are available to the offender is a factor which may more readily be taken into account at step three when examining the financial circumstances of the offender in the round and assessing "the economic realities of the organisation". It may certainly be relevant at that stage, when checking whether the proposed fine is proportionate to the overall means of the offender, to take into account the economic reality – if it is demonstrated to the court's satisfaction that it is indeed the reality – that the offender will not be dependent on its own financial resources to pay the fine but can rely on a linked organisation to provide the requisite funds.

The *Tata Steel* case

17. That this is how the guideline should be read and applied is consistent with the decision of this court in *R v Tata Steel UK Ltd* [2017] EWCA Crim 704. In that case the defendant company was convicted of an offence under s.2(1) of the 1974 Act. The defendant was part of the Tata Steel group, of which the ultimate parent company was Tata Steel Ltd ("TSL"). The defendant was itself a very large organisation in terms of its turnover, but its operations were loss-making. It was not suggested that the turnover of TSL was relevant at step two in identifying which table to use. But the defendant argued that, at step three, a downwards adjustment should be made to reflect its lack of profitability. The Court of Appeal upheld the judge's decision in that context to treat TSL as a linked organisation and to take TSL's resources into account in considering whether a downwards adjustment was appropriate.

18. The Court of Appeal did not regard the fact that the defendant was a subsidiary of TSL as by itself sufficient to treat TSL as a linked organisation and kept "well in mind" their separate corporate personalities (para 56). However, the court noted that the defendant's accounts contained a statement by its directors that they could continue to prepare its accounts on a "going concern" basis because they had a reasonable expectation that TSL would provide any financial support needed to enable the company to continue in operational existence for the foreseeable future. On that footing, the court was satisfied that the case was one of those exceptional cases where the resources of TSL, as well as those of the defendant, could properly be taken into account (para 57).[1]

[1] Some confusion could be caused by the court's statement that "this is one of those exceptional cases within Step Two, where the resources of TSL, as well as those of [the defendant], can properly be taken into account" (emphasis added). We think it plain, however, that the reference here to "step two" is intended only to reflect the fact that the passage which provides for such exceptional cases appears within

Was the judge entitled to treat the NPS parent as a linked organisation?

19. It is in our view clear that the judge in the present case was entitled to draw a similar conclusion from the information about the financial circumstances of NPS London. At the time of sentence, its most recent accounts, being those for the year ended 31 March 2017, showed that NPS London was loss-making and insolvent on a balance sheet basis, with negative equity of some £4.5m. Under the heading "going concern", the directors' report stated that any finance required was provided by the NPS parent and that Norse Group Limited (the ultimate parent company, controlled by Norfolk County Council) had confirmed that it would continue to provide any financial support required for a period of at least 12 months. On that basis the directors believed that it remained appropriate to prepare the financial statements on a going concern basis.

Conclusions

20. The upshot is that the judge, in our view, went wrong in treating the relevant table for sentencing purposes as that applicable to large organisations. He should have used the table that applies to small organisations. That would have given him a starting point of £100,000. Conducting the rest of the exercise afresh on that basis, some reduction should be made for mitigating factors which the judge identified. However, the fact that NPS London was an enterprise with low profitability and no resources of its own from which to pay a fine was not a reason to reduce the amount, because it was proper to regard the NPS parent as a linked organisation which could be counted on to provide the required funds.

21. In the circumstances we consider that, when the correct principles are applied, an appropriate fine after taking account of relevant mitigating factors and before giving credit for the company's guilty plea was one of £75,000. The full credit to which NPS London was entitled for its plea reduces this to £50,000. Accordingly, we vary the sentence by substituting for the fine imposed by the judge a fine in the sum of £50,000.

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the section of the guideline headed "step two". The court's reasoning makes it clear that the stage at which the court considered that the resources of TSL could properly be taken into account was at step three.