Date: **14.06.2017**
Venue: **Arundel House, 13-15 Arundel Street, London WC2R 3DX**
CPD: **2.5 hrs**

TGC Health & Safety Seminar 2017

Wednesday 14th June 2:30pm

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temple garden chambers

TGC Health & Safety Seminar 2017

Wednesday 14th June 2017

Arundel House, 13-15 Arundel Street, WC2R 3DX

CPD: 2.5hrs, Ref: 949

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#TGChs2017

2.30 Coffee & Registration

2.45 Conference Opens

4.00-4.15 Short Coffee Break

5.15 Questions and Closing Remarks

5.30 Drinks Reception

Temple Garden Chambers
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Charles Curtis – Temple Garden Chambers

Charles has considerable experience both prosecuting and defending health and safety cases. He has a particular expertise in fatal cases. He is regularly instructed to attend inquests, acting on behalf of families, employers and other interested parties. His practice covers a broad range of industries. For example, he has recently prosecuted a London Nursery over the death of a child in their care and acted for the family of the deceased in the only death to have occurred during the Cross Rail Project.

Additionally, Charles has a substantial personal injury practice, including considerable experience in insurance fraud. He has acted in a large number of high value Fatal Accident claims. His practice includes Stress at Work claims, Industrial Disease claims and Clinical Negligence.

Keith Morton QC – Temple Garden Chambers

Keith has a long-established practice in the field of health and safety. He acts exclusively for defendants. He is one of small number Silks ranked in Band 1 by Chambers and Partners. In 2015 he was short-listed as Health and Safety Silk of the Year. He has been instructed in some of the most prominent health and safety trials in recent years including the Stockwell Shooting case and the first prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007. He has considerable experience of related civil proceedings, inquests and public inquiries (e.g. Ladbroke Grove Rail Inquiry, the Inquest into the 7/7 London Bombings and the (first) Mid-Staffordshire NHS Foundation Trust Inquiry). Before taking Silk Keith was appointed by the Attorney General to the A Panel of Treasury Counsel (2003 – 2008, 2009 - 2011).

Mike Appleby – Fisher Scoggins Walters

Mike is a partner at Fisher Scoggins Waters LLP. He is ranked as a star individual in Chambers and Partners (2017) for Health and Safety. The directory says he *"is recognised as one of the leading practitioners within the health and safety space"*. In Legal 500 (2016) Mike is described as an *"an outstanding practitioner and fantastic tactician"*.

He has over 20 years experience of defending individuals and companies facing investigation or prosecution for health and safety offences or manslaughter arising from work related incidents. Mike and Keith Morton QC of Temple Garden Chambers represented OCS Group UK Ltd in its successful judicial review of the dispute process of HSE's Fee for Intervention scheme (FFI).

Kevin McLoughlin – Temple Garden Chambers

Kevin practices in the fields of health & safety, personal injury and coroner's inquests. He was formerly a solicitor advocate and partner in two national solicitors firms. In addition to his legal practice, he sits as a coroner in four coronial areas conducting inquests into workplace fatalities, prison deaths, RTCs and deaths following medical treatment. He is also a chartered safety practitioner (CMIOSH) and advises companies on regulatory compliance issues.

Fiona Canby – Temple Garden Chambers

Fiona has been recommended in the legal directories since 2007 as a leading junior in health and safety. She developed an interest in this area early on in her career, as Keith Morton's pupil. She was one of the juniors for Balfour Beatty Rail in the prosecution arising out of the Hatfield train crash. She has particular expertise in long and complex inquests, having acted in the inquests into the 7 July bombings and the inquests into the Lakanal House fire. The range of her practice is reflected in current instructions on the Didcot power station collapse, the Germanwings Inquest and the IICSA inquiry into Lord Janner. She has been appointed to the Attorney General's B Panel of Civil Counsel since 2013 and as a result is one of the few Counsel to have experience of Crown censure proceedings. For a number of years she was a Committee member of the HSLA.

Catherine Rawlin – RGL Forensics

Catherine is a partner in the London office of RGL Forensics, a global firm of forensic accountants and consultants, specialising in investigation, quantification and valuation. Catherine has been involved in forensic accounting for almost thirty years, having escaped from auditing as soon as was humanly possible! As well as being a Fellow of the Institute of Chartered Accountants in England & Wales, she is also a Practising Member of the Academy of Experts and a Member of the Chartered Institute of Arbitrators. She is often appointed as an expert and has given evidence in Court, at Arbitration and Adjudication. In the Health & Safety sphere, RGL are called upon to present factual financial and accounting information to assist the Court in arriving at the amount of a fine.

Dominic Adamson – Temple Garden Chambers

Dominic Adamson has a broad health & safety practice and regularly appears in the Court of Appeal, Crown and Magistrates Court representing duty-holders in relation to prosecutions under the HSWA 1974 involving fatalities and in related coroner's inquests. Has acted in some of the most high profile cases representing companies of all sizes and individuals in a wide range of industries/sectors. Recent significant cases include: R v Tata Steel UK Limited [2017] EWCA Crim 704 (sentencing very large corporate entity), R v B [2016] EWCA Crim 2270 (abuse of process in health and safety case), the Inquests into the death of the 96 at the Hillsborough Stadium Disaster. Ranked by Chambers and Partners and Legal 500 as a Leading Junior for Health & Safety in every year since 2006. The current edition of Chambers and Partners states Dominic is "*Hard working, very pleasant and personable*" and "*technically very astute across a broad range of areas*". Legal 500 states that he is "*a first-class strategist, who always goes that extra mile.*"

temple garden chambers

JUDICAL REVIEW OF THE DISPUTE PROCESS OF HSE's FEE FOR INTERVENTION SCHEME (FFI)

KEITH MORTON QC

AND

MIKE APPLBY, FISHER SCOGGINS WATERS LLP

BACKGROUND TO FFI

- ***Good Health and Safety, Good for Everyone*** (2011) – shifting the cost of regulation from taxpayer to businesses that *"are found to be in serious **breach** of health and safety law".*
- Report to HSE Board on FFI Consultation (2011) – in relation to the dispute process – *"Consultees commonly used the phrase 'judge and jury' to describe HSE on this point".*
- Introduced in 2012 - The Health and Safety (Fees) Regulations 2012, now the Health and Safety and Nuclear (Fees) Regulations 2016

Fisher Scoggins Waters

BACKGROUND TO FFI

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- Introduced in 2012 - The Health and Safety (Fees) Regulations 2012, now the Health and Safety and Nuclear (Fees) Regulations 2016

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FFI SCHEME

- Notice of Contravention (NoC) – *material breach* of health and safety law in the opinion of the Inspector
- Invoice(s) - £129 per hour
- Query – Principal Inspector – usually inspector's line manager
- Dispute – Panel of two HSE managers and an 'independent' person drawn from a pool of industry and Trade Union representatives.

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BACKGROUND TO JR

- OCS is a facilities management company
- Contract to provide horticultural services at Heathrow Airport
- Inspection following a RIDDOR report of HAVS diagnosis
- NoC 4 August 2014 -Inspector was of opinion that OCS in material breach of regulations 6(2) – management of vibration risk – and 7(2) – suitable health surveillance – of the Control of Vibration at Work Regulations 2005
- Query (1 Dec 2014) and Dispute (28 Feb 2015) rejected

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HEATHROW – INSPECTOR'S OPINION

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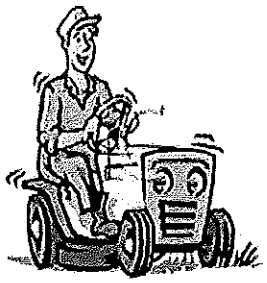
ALWAYS



NEVER

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ONLY STRIMMERS WITH LOWEST VIBRATION

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ONE HAVS DIAGNOSIS = BREACH OF REG 7(2)

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REASONS FOR JR

- OCS believe current dispute process unfair
- Good case to JR – ideal facts and no enforcement proceedings
- Impact on future prosecution – Interview by Peter McNaught to Ben Rich of 2 Hare Court in 2013
- Commercial implications – (i) cost of managing risk as set out in NoC; and (ii) tendering for work (pre-qualification questionnaires requiring disclosure of FFIs)

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JR GROUNDS

1. ***The dispute process under FFI*** - whether the decision making process is unlawful - OCS argued that it fails to comply with common law principles of natural justice and/or Article 6 ECHR and/or Article 1 of the First Protocol (A1P1); and

2. ***The rejection of a query and dispute by the HSE of the August 2014 NoC*** – OCS argued the specific dispute was not determined in accordance with the common law principles of natural justice and/or the decision was irrational.

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MINIMUM REQUIRED BY COMMON LAW

1. HSE to put its allegations to the dutyholder;
2. to provide disclosure;
3. to permit a response and submissions by dutyholder;
4. a dispute to be determined independently and impartially.

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COMMENCING PROCEEDINGS

- Pre-action protocol letter dated 23 March 2015
- 20 April 2015 Peter McNaught for HSE replies in detail stating the claim is contested in full
- 28 May 2015 JR issued
- 18 June 2015 by consent proceedings stayed for HSE to consider claim further – a number of stays follow
- On application of OCS stay lifted on 15 July 2016
- HSE file acknowledgement of service and draft grounds of resistance disputing claim in full

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PERMISSION STAGE

On 20 September 2016 permission granted by Mr Justice Kerr.

The Judge makes the following observation:

> *"It is arguable that the HSE is, unlawfully, judge in its own cause when operating the FFI scheme; and that the scheme is either unlawful or is being operated in an unlawful manner*

Full hearing listed for 8 and 9 March 2017

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COMPROMISE

Consent order approved by Court on 23 February 2017

OCS agrees to withdraw claim on following basis

1. HSE agrees to introduce revised dispute process by **1 September 2017** that meets the minimum requirements of the common law, the main term of which are set out in the schedule to the order which HSE are to consult upon
2. HSE withdraws NoC dated 4 August 2014 and invoices (approx £2,300)
3. HSE pays OCS's costs

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CONSULTATION

9 February 2017 HSE press release

> *HSE has always kept the dispute process under review and following a recent application for a judicial review we believe the time is right to move to a dispute process which is completely independent of HSE*

21 April 2017 HSE publishes consultation (CD284) to close on 2 June 2017

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Judicial Review of the Dispute Process of HSE's Fee for Intervention (FFI)

By Keith Morton QC and Mike Appleby, Partner at Fisher Scoggins Waters LLP

On 9 February 2017 HSE announced that it would be making the dispute process of its costs recovery scheme Fee for Intervention (FFI) "fully independent". In its press release a spokesman for the regulator said:

> *"HSE has always kept the dispute process under review and following a recent application for a judicial review we believe the time is right to move to a dispute process which is completely independent of HSE."*

The judicial review referred to by HSE was brought by the facilities management company OCS Group UK Limited. This article explains the background to FFI, what the judicial review was about and the changes that HSE has agreed to make to the FFI disputes process following the case.

A Consultation on the new process (CD284) was published at the End of April 2017 and closed on 2 June 2017. The new process is to be introduced on or before 1 September 2017

What is FFI?

In 2011 the government published its proposals for the reform of health and safety entitled *Good Health and Safety, Good for Everyone*. This stated:

> *"..it is reasonable that businesses that are found to be in serious breach of health and safety law – rather than the taxpayer – should bear the related costs incurred by the regulator in helping them put things right."*

In October 2012 FFI was introduced under the Health and Safety (Fees) Regulations 2012. It is now currently set out in the Health and Safety and Nuclear (Fees) Regulations 2016

Under the Scheme if an inspector is of the opinion a duty holder is in 'material breach' of health and safety legislation, the inspector will serve a 'Notification of Contravention' (NoC) setting out the material breach with reasons for his/her opinion and often what steps are required to remedy the breach. This then triggers recovery of the cost of the inspector's time currently charged at £129 per hour.

If the duty holder disagrees that there has been a material breach or wishes to challenge the amount charged, then the duty holder can raise a 'query' in writing. This is done by writing to the 'FFI Team' within 21 days of receipt of each invoice received under the Scheme. The query is determined by a Principal Inspector in the same office as the Inspector (usually the inspector's line manager). The query stage is free of charge.

If the duty holder wishes to appeal further then a 'dispute' can be raised in writing, once again to the FFI Team within 21 days of receipt of the query decision. This will be determined by a panel of two

senior managers from HSE and an 'independent' person. If the dispute fails there is a further charge of the panel's time calculated at £129 per hour.

Queries and disputes are decided on the papers. The duty holder is not entitled to see any of the evidence on which the inspector's opinion is based although those determining the query and dispute will.

While the average FFI invoice (of which there is often more than one) is in the region of £700 there have been some significantly larger ones. HSE's Small Business Trade Association Forum's Hot Topics Fact Sheet Number 11, dated 15 March 2016 details invoices of £201,150.14, £93,558.00, £86, 200.16 and £76,929.60.

Concerns about FFI

In July 2011 HSE published a consultation on FFI. It made clear that the consultation was not about whether FFI should be introduced but upon how it should be implemented. One of the matters consulted upon was the queries and disputes process. It set out the two-stage process, as described above, but originally there was no 'independent' person on the disputes panel which was to comprise three HSE senior managers.

In the response to the consultation presented to the HSE Board on 7 December 2011 it was reported that there was a strongly-held view that a disputes process without input independent of HSE was not credible. It was said that respondents commonly used the phrase *"judge and jury"* to describe HSE on this point. The proposed solution was to replace one the HSE members on the disputes panel with an independent person. However the problem with this solution was that the two HSE managers on the panel could always out vote the independent person.

The Department of Work and Pensions appointed Martin Temple, at the time Chair of Engineering Employers Federation (EEF), the Manufacturers' Organisation, and since May 2016 the Chair of HSE, to undertake a review of HSE. His report was published on 9 January 2014. A section of the Report addressed FFI.

He stated that while the principle behind FFI is valid, its introduction has primarily been driven by HSE's need to raise income. Mr Temple noted concerns expressed by stakeholders that FFI was understood to be a penalty and that:

> *"At its worst stakeholders told me that it is against the principle of justice for HSE to act as police, prosecutor, judge and jury".*

He concluded:

> *"....I am very concerned at the strength of feeling from stakeholders that FFI damages HSE's reputation for acting impartially and independently. I comment on it here because of the impact it appears to be having on HSE's reputation for independence and integrity as a regulator."*

And that:

> *"..it is a dangerous model which links, directly or indirectly, the funding of the regulator to its income from 'fines'"*

However Mr. Temple, in his first interview after taking up his new position with HSE published in the October 2016 edition of Health + Safety at Work Magazine, had tempered his view of FFI saying:

> *"I think some of my initial concerns have been addressed...We talk about it in a different way, we talk about why it is really there. The really important thing is to draw people's attention to the fact that the duty holders have got to make it a safe place to work. And if they don't, then they have to pay the penalty – and will hopefully be more diligent in the future. In a way we're making a bigger thing of it than we need."*

What Prompted OCS to bring the Judicial Review?

In August 2014 HSE served a Notice of Contravention (NoC) under the FFI scheme alleging that OCS was in breach of Regulations 6(2) and 7(2) of the Control of Vibration at Work Regulations 2005 in relation to the way it cut grass as part of its horticultural services contract at Heathrow airport. HSE sent FFI invoices totalling just over £2,300.

The service of the NoC followed a site visit by a principal specialist inspector of occupational health at HSE in response to OCS submitting a report under RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013) in relation to the diagnosis of HAVS (hand arm vibration syndrome) for one of its employees.

OCS used pedestrian mowers (for the smaller areas at the Airport) and ride on mowers. The inspector had initially wanted only ride on mowers to be used. Given the nature of some of the areas in OCS's view this was not practical and in some cases presented other significant risks.

The inspector then raised concerns about the use of strimmers. She wanted strimmers with only the lowest vibration rate to be used – irrespective of the length of time they were used for (which is relevant to calculating exposure to vibration) and the circumstances (i.e. not taking into account other risks such as manual handling). This in OCS's view was also the wrong approach.

Mr Temple also commented in his 2014 report that:

> *"....health and safety legislation is goal-setting and risk-based. This means that the discussion that takes place between the regulator and the regulated about what is reasonably practicable is vital".*

It was OCS's view that in this case there had not been an adequate discussion about what was reasonably practicable.

The inspector also alleged that OCS was not monitoring HAVS appropriately on the basis it had submitted a RIDDOR report in relation to HAVS. However other inspectors had reviewed sites where OCS was undertaking similar tasks and had been complimentary of OCS's approach, with one inspector writing in an email: *"OCS is comprehensively considering HAVS".*

OCS wrote a detailed letter raising a query enclosing witness statements from the contract manager and the regional health and safety advisor explaining the management of HAVS at the site along with the detailed safe system of work for managing vibration and the relevant vibration risk assessment. This query was rejected on 1st December 2014. A detailed dispute was then submitted which this time also included evidence from other inspectors that had visited OCS sites and had been satisfied with OCS's approach to managing HAVS. The dispute was rejected on 28 February 2015. This meant the only way in which OCS could further challenge the NoC was to bring a claim for judicial review.

The Judicial Review

There were two elements to the Judicial Review:

a. ***The disputes process under FFI*** - whether the decision making process is unlawful, OCS argued that it fails to comply with common law principles of natural justice and/or Article 6 ECHR and/or Article 1 of the First Protocol (A1P1); and

b. ***The rejection of a query and dispute by the HSE of the August 2014 NoC*** – OCS argued the specific dispute was not determined in accordance with the common law principles of natural justice and/or the decision was irrational.

Appendix 1 is the Claimant's Statement of Facts and Grounds.

OCS argued that in the context of FFIs, as an absolute minimum, the common law requires resolution of the dispute to be and to be seen to be fair and impartial. As a minimum, that requires:

1. HSE to put their allegations to the duty holder;
2. to provide disclosure;
3. to permit a response and submissions;
4. an appeal to be determined independently and impartially.

In response to the pre-action protocol Mr Peter McNaught, Director of Legal and Governance at HSE responded by saying that the claim would be contested in full. Proceedings were issued on 28 May 2015. Once proceedings had been served, the Government Legal Department, representing HSE, asked for the proceedings to be stayed to enable discussions to take place with a view to avoiding litigation. The stay was eventually lifted in June 2016 and the proceedings continued.

Permission was granted on 20 September 2016 by Mr. Justice Kerr who observed:

> *"It is arguable that the HSE is, unlawfully, judge in its own cause when operating the FFI scheme: and that the scheme is either unlawful or being operated in an unlawful manner."*

The judicial review hearing was set to take place on 8 and 9 March 2017. However, the parties were able to reach a settlement in which a consent order was approved by the Court on 23 February 2017. Appendix 2 is the consent order.

APPENDIX 1

STATEMENT OF FACTS & GROUNDS

OCS GROUP UK LTD –V- HSE

Claim No

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

R (on the application of OCS GROUP UK LIMITED)

v

THE HEALTH AND SAFETY EXECUTIVE

STATEMENT OF FACTS
AND GROUNDS

References in square brackets refer to the accompanying bundle in the format [Section/Tab/page or exhibit number]

THE ISSUES

1. This Claim gives rise to issues of general public importance with implications for all dutyholders regulated by the Health and Safety Executive ("HSE").

2. This Claim is concerned with challenges by way of judicial review to:

   a. The procedure and decision making process established by the HSE pursuant to Regulation 25(5) of the Health and Safety (Fees) Regulations 2012 to challenge the liability of a dutyholder to pay fees determined and charged by the HSE pursuant to those Regulations.

      The issue is whether the decision making process is unlawful on the grounds that it fails to comply with common law principles of natural justice and/or Article 6 and/or Article 1 of the First Protocol of the ECHR; and

   b. The rejection of a query and dispute by the HSE of a Notification of Contravention and fees issued to OSC Group Limited ("OCS").

The issue is whether the specific dispute was determined in accordance with the common law principles of natural justice and/or whether the decision is irrational.

THE STATUTORY REGIME AND FINANCING THE HEALTH AND SAFETY EXECUTIVE

The Policy Objective

3. On 21 March 2011 Chris Grayling MP (then the Minister for Employment) launched the government's approach to reforming the health and safety system in Britain with *Good Health and Safety, Good for Everyone*. This included identifying the policy objective of shifting the cost of health and safety regulation from the public purse to businesses and organisations that contravene health and safety laws.

The Regulations

4. The Health and Safety (Fees) Regulations 2012 ("the Regulations") [D/2] came into force on 1 October 2012. They introduced a new regime for charging dutyholders known as fees for intervention ("FFI"). So far as is material [D/2/19]:

> "Fees for Intervention
>
> 23(1) Subject to regulation 24, if –
>
> (a) a person is contravening or has contravened one or more of the relevant statutory provisions for which the Executive is the enforcing authority; and
> (b) an inspector is of the opinion that that person is doing or has done so, and notified that person in writing of that opinion,
>
> a fee is payable by that person to the Executive for the performance of its functions described in paragraph (2) and (3) …
>
> 23(5) An inspector of the opinion that a person is contravening or has contravened one or more of the relevant statutory provisions must have regard, when deciding whether to notify that person in wiring of that opinion, to the guidance entitled HSE 47 – Guidance on the Application of Fee for Intervention …"

5. Regulation 25 is entitled "Repayments and disputes" [D/2/22]. It provides for repayment by the HSE of any fee paid in respect of an offence with which the dutyholder is charged but not convicted or any enforcement notice which is subsequently cancelled. In respect of a fee paid or demanded in other circumstances the Regulations provide:

"25(5) The Executive must provide a procedure by which disputes relating to fee for intervention will be considered".

The Guidance

6. The HSE has issued HSE 47 Guidance on the application of Fee for Intervention ("the Guidance") [D/3]. At paragraph 3 the Guidance notes:

"These measures include shifting the cost of health and safety regulation from the public purse to businesses and organisations that break health and safety laws. [The Regulations] put a duty on the HSE to recover its costs for carrying out its regulatory functions from those found to be in **material breach** ... of health and safety laws" (original emphasis).

7. The Guidance further provides as follows [D/3/52]:

"What is a material breach?

...

15. A material breach is when, in the opinion of the HSE inspector, there is or has been a contravention of health and safety law that requires them to issue a notice in writing of that opinion to the dutyholder.

16. Written notification from an HSE inspector may be by way of a notification of contravention, an improvement or prohibition notice, or a prosecution ...

17. The written notification should also make clear which contraventions are material breaches.

18. When deciding whether a dutyholder is in material breach of the law, HSE inspectors must apply this guidance and the principles of HSE's existing enforcement decision making frameworks, the Enforcement Management Model and the Enforcement Policy Statement

...

Administrative and financial arrangements

35. HSE is responsible for the administration of the FFI scheme, including issuing invoices and, if needed, debt recovery."

8. Paragraphs 42 to 49 deal with the procedure for handling queried and disputed invoices. It is asserted that "HSE aims to resolve all queries or disputes promptly, *fairly and in a transparent way*" (emphasis added). The guidance identifies the sort of issues that might be queried. The most obvious, namely whether or not there was a material breach of the law, is relegated to the last bullet point as an example of "other issues". The Guidance sets at a two stage process:

a. Stage 1: a dutyholder may query the notification of contravention. There is no charge;
b. Stage 2: if dissatisfied with the outcome of the query the dutyholder may formally dispute the invoice by writing to the HSE setting out the specific reasons why they do not believe the charge is valid.

9. The Guidance says nothing about who will determine the Stage 1 query. Elsewhere it has been suggested that this will "usually be handled by the inspector's manager"[1]. Paragraph 46 provides that Stage 2 disputes are considered by a "panel of HSE staff and an independent representative".

Further Guidance

10. The HSE has issued further guidance entitled Procedure for Queries and Disputes for Fee for Intervention [D/4]. This provides:

> "10. Disputes are considered by a panel of HSE staff (managers who are independent of the management chain responsible for the work that generated the invoice) and an independent representative.
> ...
> 16. The Disputes Panel will comprise of HSE staff (managers who are independent of the management chain responsible for the work that generated the invoice) and an independent representative drawn from a pool of industry and Trade Union representatives. The panel will review the response the dutyholder received in relation to their query, the invoice and the work associated with the disputed elements of the invoice to establish whether the disputed invoice should be upheld, varied or cancelled. This could include considering whether ... there has been a material breach of health and safety law ..."

11. This description of the disputes process and membership of the panel does not accord with the understanding of the Independent FFI Review Panel (see further below). At paragraph 93 of its June 2014 report [D/9/416] it stated:

> "If [the query] is not resolved, [the dutyholder] can raise a (level 1) dispute, which is dealt with by a senior manager in the HSE. If still not satisfied, the dispute can be considered by a Disputes Panel (level 2). The level 2 Disputes Panel consists of senior HSE staff, sitting alongside an external, independent business representative"

[1] Report of the Independent FFI Review Panel, June 2014 paragraph 92 [D/9/416]

It is to be noted that there is no reference to membership of the panel including a Trades Union representative.

12. The guidance goes on to provide that following resolution of a dispute in favour of the HSE the outstanding invoice must be paid. If it is not, this "will result in HSE initiating its debt recovery processes". It anticipates, therefore, that the HSE may issue proceedings in the County Court to recover the debt.

Commercialisation of the HSE

13. Underlying the introduction of FFI is the commercialisation of the HSE. The HSE is seeking to increase its non-taxpayer revenue. At a Strategic Planning Event in April 2014 the HSE Board considered "how best to take forward the then Minister's direction that HSE should seek to develop as a priority its potential for generating commercial income"[2]. An aspect of this is for the HSE to "recover the full costs of what we do as a regulator where we can". Specifically, FFI is regarded by the HSE as "effective in achieving the policy aim of shifting the cost of health and safety regulation from the public purse to businesses that break health and safety laws"[3].

14. The Department of Work and Pensions' appointed Mr Martin Temple, Chair of EEF, the Manufacturers' Organisation, to undertake the Triennial Review ("TR") of the HSE. The TR report is dated 9 January 2014 [D/8]. It considered the importance of FFI for the funding of the HSE. Mr Temple noted concern that [D/8/341]:

> "3.19 ... while the principle behind FFI is valid, its introduction has primarily been driven by HSE's need to raise more income. In the first six months of its operation ... FFI raised £2,673,773 for HSE ... I understand that without FFI, HSE's financial model going forward would incur a significant shortfall in the order of £20m a year. Therefore I recognise that FFI is a critical part of HSE's business and finance model and loss of this income, without replacement, would seriously impact HSE".

15. The Treasury permits the HSE to retain an increasing sum generated from FFIs: up to £10m in 2012/13, £17m in 2013/14 and £23m in 2014/15.

2 Board Paper HSE/14/68, 13 August 2014 [D/10]
3 Board Paper HSE/14/57, 2 July 2014 [D/11]

16. A report of the Independent FFI Review Panel dated June 2014 [D/9] noted that in the 16 months from the introduction of FFI to January 2014 21,261 invoices were issued under the FFI regime, raising just over £10.6m for the HSE. Of those:

    a. 43 were for an amount greater than £10,000;
    b. 697 (3.3%) were queried;
    c. 3 went to the dispute stage (<0.01%);
    d. none were challenged on the basis that there had not been a material breach.

17. In response to the Pre-Action Protocol letter the HSE has provided further information from which it appears it does not record specifically whether the ground for challenge is on the basis that there has been no material breach[4].

18. To state the obvious:

    a. The HSE has a vested financial interest in issuing and upholding FFIs;
    b. A fair, transparent and independent process by which FFIs may be challenged is required.

19. Mr Temple noted in the TR concerns expressed by stakeholders that the FFI was understood to be a penalty or a fine and that:

    "At its worst stakeholders told me that it is against the principles of justice for HSE to act as police, prosecutor, judge and jury".

    He concluded:

    a. "... I am very concerned at the strength of feeling from stakeholders that FFI damages HSE's reputation for acting impartially and independently. I comment on it here because of the impact it appears to be having on HSE's reputation for independence and its integrity as a regulator" [D/8/338 at para 3.12];

4 The figures provided refer to challenges on the ground of proportionality which it is said "covers is there a material breach" [D/7/262]

b. "While this may be a bleak response, I believe that this reaction is genuine, and I am inclined to agree" [D/8/339, para 3.15]; and

c. "That it is a dangerous model which links, directly or indirectly, the funding of the regulator to its income from 'fines'" [D/8/341 at para 3.20].

FFIs IN CONTEXT AND THEIR SIGNIFICANCE FOR DUTYHOLDERS

20. FFI introduced a new power of enforcement: the hierarchy of enforcement powers now available to the HSE are:

    a. Advice (informal or formal);
    b. Notification of Contravention and a FFI;
    c. Improvement and/or Prohibition Notices;
    d. Prosecution.

21. Health and safety legislation sets outcomes which must be achieved by dutyholders, either absolutely (in the case of strict liability offences) or qualified. Commonly a duty is qualified to the extent that is reasonably practicable (for a review of the nature of the statutory scheme see for example *R v Chargot* [2009] ICR 263). Where this is so, the burden of proof is reversed and it falls to the dutyholder to establish that it was not reasonably practicable for it to have done more than was in fact done: see Section 40 of the Health and Safety at Work etc Act 1974. A duty may be qualified in other ways. Thus, in this case (see further below) OCS was under a duty to take "appropriate" measures. In every case where there is a qualified duty careful consideration is required as to:

    a. Whether the required outcome has been achieved; and, if not
    b. What measures the dutyholder has taken to comply with that duty; and
    c. Whether it was reasonably practicable for the dutyholder to have done more or, as the case maybe, whether it has done what is appropriate.

22. In the case of a Notification of Contravention that analysis must be undertaken by the inspector issuing the Notification or the HSE when considering a challenge of the

Notice. Thus Mr Temple concluded that the threshold for FFI to apply to any given inspection is determined by the inspector's opinion that there has been a material breach of the law:

"As I have already discussed, health and safety legislation is goal setting and risk based. This means that the discussion that takes place between regulator and the regulated about what is reasonably practicable is vital." [D/8/340 at para 3.16]

23. Other than the offering of advice, all these enforcement measures require an inspector to be of the opinion that the dutyholder has contravened a statutory provision or, in the case of a prohibition notice, is carrying on an activity which involves the risk of serious personal injury (and by necessary implication has contravened a relevant statutory provision). Section 24 of the Health and Safety at Work etc Act 1974 provides for appeals against improvement and prohibition notices to the Employment Tribunal. A prosecution may be challenged at trial. In each case the challenge is resolved by a process independent of the HSE. In both cases there is an independent and impartial adjudication of the challenge, with procedural safeguards to ensure fairness[5].

24. There is no impartial adjudication of a challenge to a Notification of Contravention and no procedural safeguards.

25. A Notification of Contravention is a serious matter for a recipient with substantial adverse consequences for its business interests and reputation. By way of example:

    a. The recipient is required to pay money to the HSE. In the present case the FFI is modest (see below). But that will not necessarily be so (it is understood some FFIs run to tens of thousands of pounds) and dutyholders such as OCS may be exposed to numerous FFIs;

    b. The fees are by definition a charge to business. The fact that they are calculated by reference to time spent, over which the payee has no control, is

[5] In relation to appeals to the Employment Tribunal see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Schedule 4. Offences are triable either way.

irrelevant. The payment is in the nature of a penalty. The TR categorised them as fines. They are certainly in the nature of a penalty;

c. The condition precedent to issuing and upholding the FFI is an opinion that the dutyholder is in material breach of a statutory provision and has committed a criminal offence. That is recorded by the HSE. If accepted, there is an implied admission of guilt. If challenged unsuccessfully there is a finding that the opinion that an offence had been committed was correct;

d. The HSE publishes the fact of a Notification of Contravention to employees (see Health and Safety at Work etc Act 1974 section 28(8)). As Mr Cutter explains in his statement, this has the potential to impact adversely on employer/employee relations [D/5/97 para 38];

e. The HSE may seek to adduce evidence of a Notification of Contravention in criminal proceedings as evidence of guilt[6] or a previous warning or bad character and/or to determine whether more serious enforcement action is required in a subsequent case;

f. OCS, and almost all dutyholders, operate in highly competitive markets. A good health and safety record is crucial. The fact of a Notification of Contravention will almost certainly have to be disclosed to clients in the course of a contract or when tendering for new or renewed business. The circumstances in which this is so are set out in detail in the witness statements of Mr Gary Cutter [D/5/97 paras 39-43] and of Mr Andrew Mortimer [D/6/230 paras 14-31]. Mr Mortimer concludes:

> "26. It is essential that OCS retains its excellent track record in the area of health and safety performance to ensure we first and foremost retain our existing contracts and also create the foundation upon which we are able to win new work. Our ability to do so is impeded by a notice of contravention. Thus the opinion of an inspector that there has been a material breach is a significant matter that has adverse consequences for OCS's business and its continuing success and allocation of resources".

[6] The point is obvious, and has been expressly foreshadowed by Peter McNaught, Chief Legal Advisor to HSE, in a recent interview with 2 Hare Court [D/5/GC14/221]

g. A notification of contravention may impact upon the manner in which an organisation operates its business. This may be to its detriment. By way of example on the facts of the present case (see below) Mr Cutter explains [D/5/96 para 35] the logic of the notification in this case is that OCS should stop using a strimmer which is widely available (and in respect of which the HSE has taken no action against the manufacturer or others who operate them) and replace them at cost in the order of £1,000,000. The logic of this approach is that this must be repeated each and every time a machine with lower vibration becomes available. Further, as Mr Cutter explains the approach may result in exposure to a different risk such as manual handling.

THE SPECIFIC NOTIFICATION OF CONTRAVENTION

26. In summary: OCS is a facilities outsourcing company. It was contracted by BAA Limited to provide horticultural services at Heathrow Airport. On 4 August 2014 Dawn Smith, a principal specialist inspector of the HSE, served a notification of contravention on OCS [D/5/GC1]. She alleged OCS was in breach of the Control of Vibration at Work Regulations 2005 ("COVAWR") [D/14]. She expressed the opinion that OCS was in breach of Regulations 6(2) and 7(2) and that these breaches were material breaches for which a fee was payable to the HSE under the FFI scheme. On 23 September 2014 the HSE served on OCS a demand for payment in the sum of £1,810.40 [D/12/437]. On 1 December 2014 HSE served a further demand for payment in the sum of £496.00 [D/12/441]. OCS denies that it was in material breach of the COVAWR and queried the opinion that it was [D/5/GC2]. In order to resolve that query the HSE asserted it needed to consult with the original decision maker and her line manager [D/5/GC4]. On 1 December 2014 the Kerry Trow of the HSE rejected that query [D/5/GC5]. Only as a result of the pre-action protocol procedure has it become apparent that that Mr Trow was formerly Dawn Smith's line manager. OCS did not accept that decision and raised a dispute [D/5/GC6]. That dispute was rejected on 23 February 2015 [D/5/GC10]. The decision makers were unknown at the time. In the course of the pre-action procedure the HSE has now revealed the members of the Dispute Panel: two senior managers employed by HSE (including the Chair of the Panel) and one independent member whose details have been redacted

[D/7/275]. HSE now demands payment of £2,336.40. A further demand for money is anticipated in relation to the dispute.

27. The detail is set out in the witness statement of Mr Cutter and in the chronology at Annex I to this Statement of Facts and Grounds.

GROUNDS

Ground 1: The Procedure for Considering Disputes

28. By Regulation 25(5) of the Health and Safety (Fees) Regulations 2012 the HSE was required to provide a procedure by which disputes relating to fees for intervention will be considered. The procedure provided by the HSE, pursuant to which OCS's dispute has been rejected, is unlawful. It is contrary to common law principles of natural justice and Article 6 and Article 1 of the First Protocol of the ECHR.

29. The FFI scheme may reasonably be characterised as follows:

- The Regulations impose a duty on the HSE to recover fees in respect of contraventions of health and safety legislation;
- The HSE exercises that power in respect of matters that in the opinion of its inspectors are material breaches;
- A FFI adversely affects the rights and reputation of the recipient and imposes a fine or penalty or otherwise deprives him of money;
- The Regulations require the HSE to establish a means of considering disputes, that includes a procedure to determine whether there was a material breach;
- In its discretion HSE has established a system which at the query stage has input from the original decision maker and his or her manager and no input independent of the HSE at all (despite a recommendation that it should and an assertion by the Minister that, from April 2014, it does[7]);
- At the dispute stage there is an almost total absence of transparency;
- The dispute is determined by senior HSE managers with some input which purports to be independent;
- There is no right to be told what contraventions are alleged;

[7] Page 7, Government response to TR, June 2014 (this document has not been included in the bundle)

- There is no right to disclosure and the HSE specifically resists giving disclosure;
- There is no right to examine witnesses;
- There is no right to know what evidence HSE relied on;
- There is no right to make submissions or otherwise respond;
- The system is one in which the HSE is essentially the prosecutor, judge and jury;
- All this in circumstances in which the scheme provides the central pillar of HSE's commercial income and where HSE has a financial interest in imposing, maximising and upholding fees for intervention.

30. This regime is plainly unfair. It places dutyholders at a disadvantage. This could easily and simply be remedied by the establishment of a fair procedure and an independent means of resolving disputes. This would not be unduly burdensome and would be a lawful means of resolving the small number of disputes that are likely to arise. This is to be contrasted with the disproportionate and burdensome alternative remedy for which it is understood the HSE contend (see further below).

31. In its response to the pre-action protocol letter the HSE positively asserts that it is not under a duty to act in accordance with the principles of natural justice: "It is clear that the intention of Parliament was not to establish a quasi-judicial process to which the rules of natural justice would apply" [D/7/256]. That is wrong.

32. Lord Brown-Wilkinson explained in *R v Home Secretary ex p Pierson* [1998] AC 539 at 574:

> "Where wide powers of decision making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice ... However widely the power is expressed in the statute, it does not authorise that power to be exercised otherwise than in accordance with fair procedures".

33. A failure to exercise a statutory power in accordance with these principles is unlawful.

34. The two core principles of natural justice are that a man may not be a judge in his own cause and a man's defence must always be fairly heard. In *O'Reilly v Mackam* [1983] 2 AC 237 at 279F Lord Diplock observed:

" ... rights accorded [to an affected individual] by the rules of natural justice of fairness [include] to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it"

35. The specific requirements of natural justice are context specific. Thus, in *Lloyd v McMahon* [1987] AC 702 Lord Bridge said:

"My Lords the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

36. In the context of FFIs, as an absolute minimum, the common law requires resolution of the dispute to be and to be seen to be fair and impartial. As a minimum, that requires:

a. HSE to put their allegations to the dutyholder;
b. to provide disclosure;
c. to permit a response and submissions;
d. an appeal to be determined independently and impartially.

37. A Panel constituted of two senior managers employed by the HSE (including the Chair) and one person not employed by the HSE, who may or may not be drawn from a panel including trade union officials, is plainly not independent of the HSE or impartial.

38. In the present context the common law may well go further and require an oral hearing and examination of witnesses: the HSE itself appears to consider that appropriate albeit in the context of the alternative remedy for which it contends.

39. The HSE is a public authority. Section 6 of the HRA requires the HSE to act in a manner compatible with the ECHR. The scheme for the consideration of disputes does not comply with Article 6 or Article 1 of the First Protocol ("A1P1").

40. Article 6 provides, so far as is material:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

41. Article 6 guarantees *at least* that there be an independent and impartial tribunal to determine the dispute (see Laws LJ in *International Transport GmbH v Home Secretary* [2003] QB 728 at paragraph 100).

42. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ..."

"Possessions" has been widely interpreted. Plainly it includes assets such as cash. But it can also include the good will and economic interest connected with running a business.

43. The State may only deprive a person of his possession in accordance with the law. The law established by the State so as to entitle it to take possessions must be proportionate. That is to say there must be a reasonable relationship of proportionality between the means employed (FFI) and the aim sought to be realised (shifting burden of cost of regulation from tax payers to dutyholders). The existence of procedural safeguards is a relevant factor when assessing proportionality of the interference with possessions. In *Jokela v Finland* (2003) 37 EHRR 26 at paragraph 45 the ECtHR held:

> "Although [A1P1] contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining

whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures …"

44. Here, contrary to A1P1 the HSE has failed to put in place any meaningful procedural safeguards. On the contrary, HSE has established a procedure designed to be unfair. The balance between the policy objective and the adverse impact on the interests of the dutyholder arising from that unfairness does not accord with the principle of proportionality.

45. It follows that the procedure established by the HSE is contrary to common law and/or Article 6 of the ECHR and/or Article 1 of the First Protocol of the ECHR:

    a. Contrary to the presumed intention of Parliament the HSE has failed to establish a procedure that complies with the principles of natural justice. Rather, it has established a system which is not and does not appear to be either impartial or fair;

    b. At the query stage, despite a recommendation of the Triennial Review and an assertion of the Minister to the contrary, the issue is determined solely by the original decision maker and/or others who are and appear to be partial;

    c. At the dispute stage the extent to which there is any independent input is obscure. The process is not transparent. But, in so far as there is any independent input it is not sufficient to meet the public law and ECHR duty of independence and impartiality;

    d. The HSE has failed to establish procedural safeguards to ensure fairness and comply with its public law and ECHR duties. In particular the procedure operated by the HSE does not permit the charges to be put to the dutyholder, for disclosure of evidence (including expert evidence), challenging evidence, submitting evidence, or making meaningful representations. The HSE does not even identify who the decision makers are.

e. The procedure operated by the HSE is not a proportionate means of achieving a legitimate aim and does not therefore constitute a lawful interference with a dutyholder's possessions.

f. The HSE has failed to provide for an effective means of challenging a FFI.

Ground 2: The rejection of OCS's specific dispute was unlawful

46. The rejection of OCS's dispute was unlawful because the decision was made by the application of the procedure established by the HSE under Regulation 25(5) of the Health and Safety (Fees) Regulations 2012 which is itself unlawful for the reasons set out. Those matters are repeated in the context of the specific dispute. The decision itself was unlawful.

47. The application of this procedure in this specific dispute exemplifies the procedural impropriate inherent in it and, therefore, its unlawfulness:

a. The specific charges which purport to underlie the opinion of the HSE that OCS was in material breach of Regulations 6(2) and 7(2) of COVAWR were not put to OCS before the decision to issue the notification of contravention and the FFI. The opinion purports to be based on the use of one model of strimmer over another. Dawn Smith's initial concern related to an entirely different matter, namely the use of pedestrian mowers rather than ride-on mowers.

b. The evidence relied upon in support of that opinion has not been disclosed at any stage, including the expert evidence of Tao Wu. The HSE has expressly refused to disclose the material in the course of the query and dispute and pursuant to an FOI request. The HSE has asserted that the procedure does not provide for disclosure [D/5/GC9].

c. Regulation 6(2) imposes a duty to reduce exposure to vibration to as low a level as is reasonably practicable by establishing and implementing a programme of organisational and technical measures which is appropriate to

the activity. Regulation 7(2) requires a dutyholder to place employees under suitable and appropriate health surveillance which is intended to prevent or diagnose any health effect related to vibration. These are precisely the sort of goal based duties Mr Temple had in mind when identifying the "vital" need for discussion between the regulator and the dutyholder. HSE failed to fulfil this obligation;

d. The notes supporting the invoice reveal that Dawn Smith failed to approach her investigation with an open mind but rather had had prejudged the issue of material breach against OCS. For example:

   i. The entry on 25 July 2014 [D/12/438] states "review of evidence *in relation to material breach regarding failure* to reduce employee exposure to vibration to as low a level as is reasonably practicable following investigation ..." (emphasis added). This entry was made at a time when the investigation was on-going and OCS had no notice of the concern the inspector then purported to have;

   ii. The entry on 30 July 2014 [D/12/438]indicates that the expert consulted had also prejudged the central issue: "Review of evidence with Tao Wu, vibration specialist, in relation to material breach regarding failure ..." [D/12/438]

   iii. The same point is apparent from the entry on 31 July 2014: "Discussion with Inspector Dawn Smith in relation to material breach regarding failure to reduce employee exposure to vibration to as low a level as is reasonably practicable ..."

e. OCS has not been provided with an effective opportunity to put its case or challenge the case against it;

f. The determination of the dispute [D/5/GC10] is perfunctory and not appropriately reasoned so as to enable the recipient to understand why the dispute has been rejected. The wholly inadequate consideration of the dispute

by the Panel is now revealed by the notes of its meeting which have been disclosed as part of the pre-action protocol [D/7/275]. The decision itself is irrational for the reasons set out below.

48. The opinion that OCS was in material breach of Reg 6(2) of COVAWR and the decisions to reject its query and dispute in respect of that opinion disclose errors of law and/or are irrational.

a. OCS was not in material (or any) breach of Regulation 6(2);

b. There was no rational or reasonable basis for the opinion that it was in breach of Regulation 6(2);

c. The opinion that it was in material breach was formed without any reasonable and/or rational regard for the evidence, including that submitted by OCS;

d. Specifically, the decision of the Dispute Panel is based on:

i. An erroneous and irrational conclusion that the use of one type of strimmer over another with lower vibrations constitutes a breach of Reg 6(2). That is obviously wrong. In any event the Panel has taken no account of the environment in which the strimmer is used or the time for which it is used. Further, this was not the basis upon which Dawn Smith originally purported to be of the opinion OCS was in material breach;

ii. An irrelevant consideration, namely the assertion that OCS did not make representations to its client (presumably a reference BAA) about reduction of exposure to vibrations (a matter which in any event it did not ask OCS to address);

iii. An irrelevant consideration, namely the opinions of inspectors who have no knowledge of horticulture and the day to day operation of the

machinery which they criticise either generally or specifically by OCS at Heathrow;

iv. A failure to take account of relevant consideration namely the evidence submitted by OCS (see letter dated 29 September [D/5/GC2/107], statement of Mr Gray [D/5/GC2/113] and statement of Mr Milligan [D/5/GC2/119]). This set out in detail the nature of the work undertaken at Heathrow, the system for managing HAVS, the rationale for the selection of equipment, its use, testing and assessment including the determination of the maximum daily HAV exposure level and control measures. This has either been ignored by the Dispute Panel or rejected without reasons;

v. A failure to take account of relevant considerations, namely the expertise of OCS and its witnesses.

49. The opinion that OCS was in material breach of Reg 7(2) of COVAWR and the decisions to reject its query and dispute in respect of that opinion disclose errors of law and/or are irrational.

a. OCS was not in material (or any) breach of Regulation 7(2);

b. There was no rational or reasonable basis for the opinion that it was in breach of Regulation 7(2);

c. The opinion that it was in material breach was formed without any reasonable and/or rational regard for the evidence, including that submitted by OCS;

d. Specifically, the decision of the Dispute Panel is based on:

i. An erroneous application of Regulation 7(2). Regulation 7(2) is concerned with establishing suitable and appropriate health surveillance systems intended to prevent or diagnose vibration related injury. OCS had a health surveillance system. It was suitable and

appropriate. It worked: it diagnosed Mr Krainski's vibration related injury;

ii. An erroneous and irrational conclusion that the facts of Mr Krainski's case establish a breach of Regulation 7(2). On the contrary, the facts of his case demonstrate that the health surveillance system operated correctly, and would have been even more effective had Mr Krainski completed his post-offer health questionnaire fully and accurately. Even if, which is denied, the system did not operate correctly in the case of a single employee that does not equate to a breach of Regulation 7(2), still less a material breach;

iii. An erroneous and irrational conclusion that OCS should have known of Mr Krainski's exposure to vibration from earlier employment;

iv. A failure to take account of relevant consideration namely the evidence submitted by OCS (the letter and witness statements referred to above). This has either been ignored by the Dispute Panel or rejected without reasons.

e. The opinion that OCS was in material breach of Regulation 7(2) is inconsistent with the opinions of other HSE inspectors who have concluded that OCS is not in breach of Regulation 7(2) [D/5/GC6/139, 140 and D/5/GC7]. These matters were specifically drawn to the Panel's attention but have been ignored or disregarded without reasons.

MATTERS ARISING FROM THE PRE-ACTION PROTOCOL CORRESPONDENCE

Time limits

50. In its response to the pre-action protocol letter [D/7/253] the HSE asserts in relation to Ground 1 that the claim is out of time on the basis that the scheme was introduced in October 2012. This proposition is wrong as a matter of law: see for example *R (Ramey) v University of Oxford* [2015] (neutral citation number not available at the time of writing). Further, it overlooks the obvious points that:

a. OCS had no standing to bring a claim until it was itself affected by the application of that scheme. Thereafter it has acted promptly. The suggestion that OCS should have launched an entirely academic claim in a factual vacuum is unreasonable and unrealistic (see statement of Mr Cutter [D/5/99 para 45];

b. The continuing nature of the unlawful act alleged.

51. If, however, the Court concludes that there is merit in the HSE's assertion an application is made to extend time pursuant to CPR Part 3.1(2)(a) on the grounds that:

a. There is a good reason for the delay: OCS had no standing to bring the claim before it did;

b. It would not have been reasonable or appropriate for OCS to have brought a claim for judicial review any earlier than it in fact did. Any challenge launched before OCS had been affected by the scheme would have been purely academic, and plainly not in accordance with the overriding objective (and no doubt resisted by the HSE on those grounds);

c. If the HSE is right it would amount to an immunity from judicial scrutiny: it is almost certain that no one would have been in a position to challenge the scheme within 3 months of its instigation (note that in this case it took the HSE 6 months from issue of the notification of contravention to rejection of the dispute);

d. The unlawful scheme is continuing and, unless time is extended, will do so indefinitely;

e. This claim gives rise to an issue of general public importance;

f. If there is delay, it has not caused the HSE any prejudice. Extending time will not cause hardship or be detrimental to good administration.

Alternative Remedy

52. The HSE relies upon the ex temporary judgment of HHJ Behrens in *Grosvenor Chemical Limited v HSE* [2013] EWHC 999 (Admin) in support of the proposition that there is an equally effective alternative remedy available to OCS and that this defeats this claim for judicial review. The equally effective remedy contented for is that OCS should wait for HSE to exercise its discretion to enforce the debt arising from the unpaid FFI by a debt recovery action in the County Court. That is not an equally effective remedy for reasons including:

    a. *Grosvenor Chemical* is distinguishable. That case was concerned with the Control of Major Accident Hazards Regulations 1999 ("COMAH") [D/15]. That is a different statutory scheme which places no duty on the HSE to establish a scheme for the consideration of disputes (although it has elected to do so). Under that statutory provision there was an undoubted liability to pay triggered by the explosion. The only issue was how much was reasonable. Under the FFI scheme there is the critical distinguishing feature that the trigger for a Notification of Contravention is the opinion that the dutyholder is in material breach with all the consequences that follow (see paragraph 25 above);

    b. The issue in Ground 1 of this Claim is the lawfulness of the scheme established by the HSE to consider disputes under Regulation 25(5), not the amount of the FFI. The County Court has no jurisdiction to determine that issue;

    c. The issue in Ground 2 relates to the specific notice of contravention: the issue is whether the FFI is payable at all, not its reasonableness. The challenge is on public law grounds. In *Grosvenor Chemical* the issue was the reasonableness of the fee, in respect of which COMAH specifically provided for recovery an action for a civil debt;

d. It is doubtful whether *Grosvenor Chemicals* was correctly decided. But, even if it was a County Court action for recovery of the debt is not an equally effective remedy for OCS here because:

i. It would be an action to enforce a statutory debt in which it would be open to the HSE to rely upon its own unlawful determination of the dispute to justify the amount claimed;

ii. It would be dependent upon the HSE exercising its discretion to launch proceedings. It may or may not do so;

iii. It would not be prompt: HSE would have up to 6 years to launch proceedings;

iv. There would be no effective cost recovery: this claim would be allocated to the Small Claims Track;

v. In the Small Claims Track there is a limited, and in the context of this dispute, inadequate obligation to provide disclosure;

vi. OCS could not challenge the lawfulness of the scheme under which the debt arises.

53. It is to be noted that the decision in *Grosvenor Chemical* supports the proposition that a dispute panel of similar composition to that in the present case is not independent of the HSE since the views of the panel are "predominantly the views of the HSE" (see paragraph 14).

54. More generally, if successful this Claim would result in the HSE establishing a fair and independent means for resolving disputes which would avoid the need for the alternative remedy for which HSE contends. It is a curious aspect of HSE's response to the pre-action protocol letter that it contends for litigation, contrary to the Overriding Objective and the principles of proportionality, whereas a lawful exercise

of its discretion under Regulation 25(5) of the Regulations would make that unnecessary.

REMEDY

55. OCS invites the Court to:

a. Declare that the scheme established by the HSE pursuant to Regulation 25(5) of the Health and Safety (Fees) Regulations 2012 for consideration of disputes under the FFI scheme is unlawful;

b. Quash the procedure established pursuant to Regulation 25(5) of the Health and Safety (Fees) Regulations 2012 by which disputes relating to fee for intervention will be;

c. Quash the decision rejecting OCS's dispute of the Notification of Contravention dated 4 August 2014, uphold the dispute and set aside the Notification of Contravention.

KEITH MORTON QC

18 May 2015

Temple Garden Chambers

Temple, EC4

APPENDIX 2

SEALED ORDER

OCS GROUP UK LTD –V- HSE

IN THE HIGH COURT OF JUSTICE CO/2420/2015

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

The QUEEN on the application of

OCS GROUP UK LTD. Claimant

and

THE HEALTH AND SAFETY EXECUTIVE Defendant

CONSENT ORDER

UPON the Defendant agreeing to introduce a revised process for determining disputes under the Fee for Intervention scheme ('FFI'), now pursuant to Regulation 24(5) of the Health and Safety and Nuclear (Fees) Regulations 2016 and originally pursuant to Regulation 25(5) of the Health and Safety (Fees) Regulations 2012 on or before 1 September 2017 that will include:

1. HSE putting its allegations of material breach of health and safety legislation to the dutyholder;
2. HSE providing disclosure to the dutyholder;
3. Permitting the dutyholder to respond and make submissions; and
4. Independent and impartial determination of the dispute,

and to consult stakeholders upon the proposed revised process for determining disputes under FFI, the main terms of which are set out in the attached Schedule.

AND UPON the Defendant agreeing to forthwith withdraw and cancel the Notification of Contravention dated 4 August 2014 served on the Claimant and cancelling the related invoices, namely invoice numbers 134366 and 142211.

BY CONSENT IT IS ORDERED THAT:

1. The Claimant withdraws its claim for Judicial Review; and

2. The Defendant to pay the Claimant's costs until 3 February 2017 on the standard basis to be assessed if not agreed.

Dated this 7 day of February 2017

Signed: Fisher Scoggins Waters LLP For the Treasury Solicitor

Fisher Scoggins Waters LLP
On behalf of the Claimant

Government Legal Department (Z1513141)
On behalf of the Defendant

ADMINISTRATIVE COURT OFFICE
BY CONSENT ORDER AS ASKED

15 FEB 2017

PHILIP R SHEARER
ACO LAWYER

By the Court

SCHEDULE

The relevant parts of the process are as follows:

I *Query Process:* This process will remain largely unchanged. However, while most queries will be resolved in writing, in particular cases it may be appropriate for there to be direct contact between the Principal Inspector and the dutyholder;

II *Provision of Information:* The HSE will collate a Summary which will summarise, to the extent that it is relevant:

a) What relevant provisions have been contravened;
b) Particulars of why HSE is of that opinion;
c) Details/evidence upon which that opinion is based;
d) Why those contraventions are said to be 'material breaches';
e) What functions have been performed as a consequence of the contravention;
f) How the performance of those functions is reasonably attributed to the person;
g) How and why the costs claimed under the FFI have been reasonably incurred by the Executive; and
h) HSE's response to any issue raised by the dutyholder during the query or in requesting the dispute;

III *Representations from Dutyholders:* The dutyholder can make written representations on receipt of the Summary. Such representations can include any information, documents or evidence which the dutyholder wishes to be taken into account. The representations should make clear why the FFI is disputed and set out why it is considered that the FFI is not payable. In the event that it is accepted that FFI is payable, but not the amount claimed, the representations should make this clear and set out why it is considered that the costs have not been reasonably incurred by HSE;

IV *Disclosure:* Subject to any need to protect sensitive material, HSE will disclose any recorded information/evidence upon which HSE seeks to rely to show that FFI is payable;

V *Determination of Dispute:* The dispute will be considered by an independent panel consisting of a lawyer as chair together with two other members with practical experience of health and safety management. In the usual course disputes will be decided on paper. However, the panel will have the discretion to convene a meeting with the dutyholder and

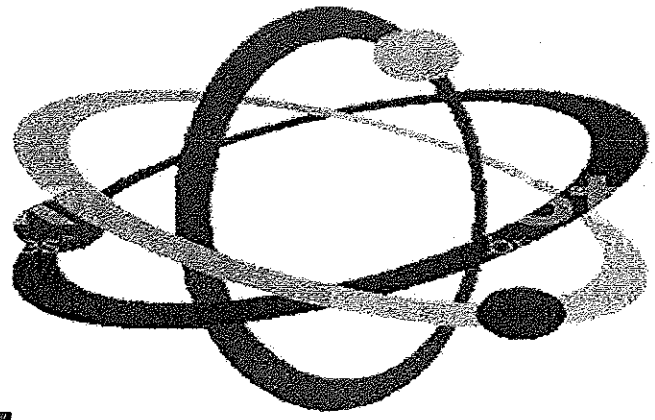
HSE to address the issues where it is considered necessary and desirable to do so. The panel will make recommendations in relation to the determination of the dispute which ordinarily HSE will accept. Ultimately any fees which remain disputed will be recovered by HSE taking civil action to recover the debt; and

VI *Suspension of Dispute Process:* Where an investigation or appeal against an enforcement notice is pending, the dispute process will be suspended until the outcome of any enforcement action or appeal is known.

The Interrelationship between Inquests & HSE prosecutions

Kevin McLoughlin
Barrister
Assistant Coroner
Chartered Safety Practitioner

Each legal process in its own orbit



Issues

- Which should come first?

- The expert evidence to be called at an Inquest

The order of precedence:
---- suspension of an Inquest

Schedule 1, Coroners & Justice Act 2009

Obligatory in certain circumstances if:

- **A 'prosecuting authority' requests**
  Defined in section 48: DPP/CPS or person covered by an order made by the Lord Chancellor
- **Homicide or "related offence"**
  Schedule 1Paragraph 1(6)(d)(a) "involves the death of the deceased"

--covers corporate manslaughter and may in future be a route to cover
-- not at present available to HSE for offences under the HSWA 1974

HSE's scrutiny process

- Fear of repetition of R v Beedie situation [1997] 3 WLR 758
- Consultation with CPS/Police/Coroner/bereaved family
- Primacy formally passed to HSE
- Unlikely Inquest will reveal other evidence
- Work Related Death Protocol adherence

The order of precedence

- The Coroner has a duty to complete an Inquest within 6 months or as soon as reasonably practicable after that date
  - -Rule 8 The Coroners (Inquests) Rules 2013
  - Chief Coroner Guidance No. 9: Opening Inquests, paragraphs 28 &31
- HSE have no statutory time limits

Which should come first?

HSE prosecution first:

- Maybe no need for an Inquest -- if all the pertinent issues have been covered
- Could save the family cost and anguish
- Issues will be more thoroughly tested in Crown Court proceedings
- Speeds up the judicial process?

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www.hse.gov.uk/enforce/enforcementguide/wrdeaths/chronology.htm

Contrary view

- Family are centre stage at an Inquest
  But have no voice in HSE prosecution
  (save victim impact statement)
- Inquest may cover issues wider than 'risk'
- Coroner may refer back to CPS to consider manslaughter
- Delay if HSE cases goes to trial & appeal
- Interested Persons may prefer to test the evidence at the Inquest before deciding on tactics / plea
- Statutory scheme requires Inquest asap

Suspension is discretionary where...

- A person has been charged with a homicide offence, but
  - DPP/CPS have no objection to the Investigation continuing
  - The Coroner thinks there is an exceptional reason for not suspending the investigation

Coroner's overall discretion

A Coroner may suspend an investigation ...in any case if it appears to the Coroner that it would be appropriate to do so

Schedule 1, paragraph 5 Coroners & Justice Act 2009

Resumption of suspended investigations

- If the Coroner thinks there is sufficient reason to resume -- then he must do so

  Schedule 1, paragraph 8(1) Coroners &^ Justice Act 2009

- The determination in the Inquest must not be inconsistent with the outcome of the criminal proceedings

  Schedule 1, paragraph 8(5) C &JA 2009

The evidence to be called

(a) having your expert called

- putting evidence on the record
- deterring a subsequent prosecution
- influencing the finding as to the cause of death

(b) demanding the Coroner obtains a report from an independent expert

- Exploring issues at public expense

Basic principles

- It is for the Coroner to decide how to adduce the necessary evidence

McKerr v Armagh Coroner [1990] 1 WLR 649
Chief Coroner's Law Sheet No.5: The Discretion of the Coroner

- Not obliged to call every witness who might have relevant evidence, so long as sufficient are called to undertake a proper inquiry

Ahmed v HM Coroner South & East Cumbria [2009] EWHC 1653

- The Coroner has a wide discretion
  - Mack v HM Coroner for Birmingham [2011] EWCA 712

Challenging the Coroner's decision

- High Court will only intervene if satisfied the decision was not properly open to him, on Wednesbury principles
- The discretion must be exercised reasonably & fairly

R v Inner South London Coroner ex parte Douglas-Williams [1999] 1 All ER 344

- No general principle that independent expert evidence is always required to comply with Article 2 obligations

Goodson v HM Coroner for Bedfordshire [2004] EWHC 2931, per Richards J at paragraph 71

Le Page case – Expoert Evidence

Coroner has a power, (not a duty) to call an expert put forward by an Interested Person

Test:

will the expert provide positive assistance to the Inquiry?

But note Chief Coroner's judgment comments :

- It may have been wiser to call the expert... as a matter of practical justice
- Family's expert may have brought a completeness to the process & helped allay suspicion
- This is a field in which appearances are generally thought to matter. [paragraphs 61-63]

R (Le Page) v HM Ass Dep Coroner for Inner South London [2012] EWHC 1485

Examples -- where the challenge

(a) Succeeded

R (Wright) v Secretary of State for the Home Department [2002] HRLR 1

R (Warren) v HM Ass Coroner for Northamptonshire [2008] EWHC 966 (Admin)

(b) Failed

Chambers v HM Coroner for Preston [2015] EWHC 31

Inquest trends: 2016 statistics

- Accident/misadventure : 19% of conclusions
- Road traffic collision
- Deaths in state detention:
  - prison deaths (298) – 14% increase
  - Mental Health Act detentions (252) –up 34%
- Narrative (unclassified conclusions) – 12%
- Open conclusions reducing (4%, 2016 -2006,9%)
- Declining trend in post mortem examinations
- Jury Inquests (576) 1% of all inquests

THE ROLE OF FORENSIC ACCOUNTANCY IN SENTENCING CORPORATIONS UNDER THE GUIDELINES

FIONA CANBY
Temple Garden Chambers
CATHERINE RAWLIN
RGL Forensics

tgc

RGL Forensics

When to instruct a forensic accountant?

- If you don't understand the accounts!
- Inability to pay a fine or costs
- Large or unexplained financial movements
- Unusual expenditure
- Current financial status of D
- Turnover not a fair indicator of size of organisation

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Procedural Issues (1)

- Crim PR 19 applies to expert opinion evidence, including evidence for the purpose of sentencing.
- An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his area of expertise and by complying with court directions: CrimPR 19.2
- D must serve its expert evidence on P as soon as practicable and in any event if D is making an application which is supported by the expert evidence: CrimPR r 19.3(3)
- If service is not carried out in accordance with the CrimPR, the expert evidence cannot be introduced, unless all parties agree or the Court gives permission: CrimPR r 19.5

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Procedural Issues (2)

- Parties should alert the court and the other side at the earliest practicable moment if they are intending to adduce expert evidence.
- The nearer the start of the hearing, the greater the urgency in informing the court and the other side of the possibility of adducing expert evidence so that appropriate steps can be taken by the court and the other side to manage the expert evidence in an efficient way.
- Permission can be refused where service is so late as to constitute a grave breach of the rules: see *Ensor* [2010] 1 Cr App R 255

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What information does the forensic accountant need?

- Meeting
  - Gain an understanding of the business
    - Products
    - Customers
    - Suppliers
    - Competitors
  - Financial issues for the business
    - Profitability
    - Cash
    - Other assets
    - Liabilities

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What information does the forensic accountant need?

- Documents - Examples
  - Annual accounts
  - Management accounts
  - Cashflow analysis
  - Bank statements
  - Bank loan/overdraft agreements
  - Correspondence with bank
  - Lease agreements
  - Pension-related documents
  - Directors remuneration

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Required Content of Expert's Report

- Requirements set out at CrimPR 19.4.
- Includes:
  - a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based.
  - Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given.
  - A statement to the effect that the expert has complied with his duty to the court to provide independent assistance by way of objective, unbiased, opinion in relation to matters within his expertise, and an acknowledgement that the expert will inform all parties in the event that his opinion changes on any material issues.

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Case Study – Examples of Issues

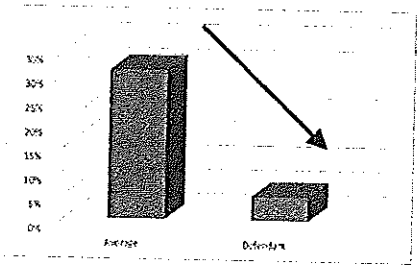
1. Profitability

Turnover bracket:

£10m to £50m

Average gross profit:

31%



Gross profit of Defendant:

5%

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Profitability by category of company

Company Type	Turnover	Average Gross Profit
Micro	Not more than £2m	56%
Small	Between £2m & £10m	42%
Medium	Between £10m & £50m	35%
Large (& Very Large)	£50m & over	32%

Source : MarketIQ database which holds data on companies involved in M&A transactions - http://www.experian.co.uk/marketiq/ (subscription needed).

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Case Study – Examples of Issues
2. Directors' Remuneration

- Directors salaries
  - c £33k per Director
- Directors pension contributions
  - c £3k per Director
- *Compare with standard remuneration (c £120k)*
- Directors loans
  - 5.5% annual rate of interest
- Dividends
  - Not paid

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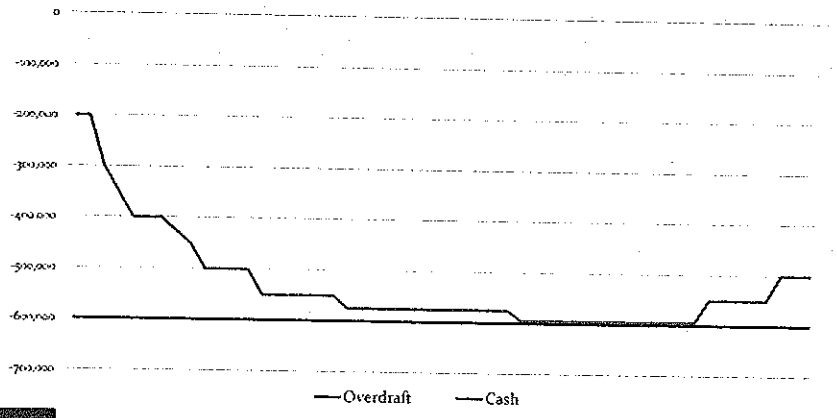
Case Study – Examples of Issues
3. Cashflow



What is a very large company?

- When does turnover "very greatly exceed £50 million"?
- It's "obvious"!
- Suggestion that a company is very large if turnover exceeds £150m on a 3-yearly average was rejected: para 37 *Thames Water* [2015] EWCA Crim 960
- Pre-guidelines the LCJ in *Sellafield and Network Rail* had described both companies as "very large". Sellafield's turnover was £1.6bn and Network Rail's was £6.2bn.
- *R v Ineos Chlorvinyls Ltd* [2016] EWCA Crim 607 – turnover of £904m but loss of £37m, Court still entitled to go above the bracket for large companies bearing in mind turnover and the available resources of the parent company
- *R v Merlin Attractions Ops Ltd* Sept 2016 – arguable that turnover of around £400m would justify moving outside the suggested offence range but a proportionate sentence could be achieved without doing so.
- Could tax legislation be used as a guide? "Very large" defined as annual taxable profits over £20m in an accounting period: draft Corporation Tax (Instalment Payments)(Amendments) Regulations 2015

What is a very large company?

Company Type	Turnover	Number of UK companies (2016)
Micro	Not more than £2m	2,427,690 (95.0%)
Small	Between £2m & £10m	96,545 (3.8%)
Medium	Between £10m & £50m	22,825 (0.9%)
Large (& Very Large)	£50m & over	7,450 (0.3%)
	£1bn to £5bn	*345 (0.01%)*
	£5bn & over	*100 (0.004%)*

Sources:
https://www.ons.gov.uk/file?uri=/businessindustryandtrade/business/activitysizeandlocation/datasets/ukbusinessactivitysizeandlocation/ukbsal/enterprisebyturnoversizebandlegalstatusandregion/ukbsal.xls
https://www.ons.gov.uk/file?uri=/businessindustryandtrade/business/activitysizeandlocation/adhocs/006568analysisofenterprisesintheukbyspecificsalesizesectionletterandspecifiedturnoversizeband2016ahoxv.xls

Company part of a wider group

- Only information relating to the organisation before the court UNLESS
  - Exceptionally
  - Resources of a linked organisation are available AND
  - Can properly be taken into account
- Not enough for P to show that D is part of a wider group
- Should only be looking to the wider group if company accounts do not reflect true position
- *R v Tata Steel UK Ltd* [2017] EWCA Crim 704 paras 52 – 59 – where there was a reasonable expectation that Tata had adequate resources including the support of the parent company, there was no downward adjustment to reflect Tata's losses

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Accountancy input – is this a linked business?

- History
  - Why is the business structured this way?
- Activity
  - Different/Same?
- Reporting
  - Upward reporting requirements from subsidiary
- Management
  - Decision making
- Operational
  - Staff/insurance/assets/policies & procedures
- Financial
  - Flow of funds/profits

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APPENDIX 1

The criminal Procedure Rules Part 19

PART 19

EXPERT EVIDENCE

Contents of this Part

When this Part applies

19.1.—(1) This Part applies where a party wants to introduce expert opinion evidence.

(2) A reference to an 'expert' in this Part is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.

[Note. Expert medical evidence may be required to determine fitness to plead under section 4 of the Criminal Procedure (Insanity) Act 1964(a)*. It may be required also under section 11 of the Powers of Criminal Courts (Sentencing) Act 2000*(b)*, under Part III of the Mental Health Act 1983*(c)* or under Part 12 of the Criminal Justice Act 2003*(d)*. Those Acts contain requirements about the qualification of medical experts.]*

Expert's duty to the court

19.2.—(1) An expert must help the court to achieve the overriding objective—

(a) by giving opinion which is—

(i) objective and unbiased, and

(ii) within the expert's area or areas of expertise; and

(b) by actively assisting the court in fulfilling its duty of case management under rule 3.2, in particular by—

(i) complying with directions made by the court, and

(ii) at once informing the court of any significant failure (by the expert or another) to take any step required by such a direction.

(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.

(3) This duty includes obligations—

(a) to define the expert's area or areas of expertise—

(a) 1964 c. 84; section 4 was substituted, together with section 4A, for section 4 as originally enacted, by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c. 25), and amended by section 22 of the Domestic Violence, Crime and Victims Act 2004 (c. 28).
(b) 2000 c. 6.
(c) 1983 c. 20.
(d) 2003 c. 44.

(i) in the expert's report, and

(ii) when giving evidence in person;

(b) when giving evidence in person, to draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise; and

(c) to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement.

Introduction of expert evidence

19.3.—(1) A party who wants another party to admit as fact a summary of an expert's conclusions must serve that summary—

(a) on the court officer and on each party from whom that admission is sought;

(b) as soon as practicable after the defendant whom it affects pleads not guilty.

(2) A party on whom such a summary is served must—

(a) serve a response stating—

(i) which, if any, of the expert's conclusions are admitted as fact, and

(ii) where a conclusion is not admitted, what are the disputed issues concerning that conclusion; and

(b) serve the response—

(i) on the court officer and on the party who served the summary,

(ii) as soon as practicable, and in any event not more than 14 days after service of the summary.

(3) A party who wants to introduce expert evidence otherwise than as admitted fact must—

(a) serve a report by the expert which complies with rule 19.4 (Content of expert's report) on—

(i) the court officer, and

(ii) each other party;

(b) serve the report as soon as practicable, and in any event with any application in support of which that party relies on that evidence;

(c) serve with the report notice of anything of which the party serving it is aware which might reasonably be thought capable of detracting substantially from the credibility of that expert;

(d) if another party so requires, give that party a copy of, or a reasonable opportunity to inspect—

(i) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and

(ii) anything on which any such examination, measurement, test or experiment was carried out.

(4) Unless the parties otherwise agree or the court directs, a party may not—

(a) introduce expert evidence if that party has not complied with paragraph (3);

(b) introduce in evidence an expert report if the expert does not give evidence in person.

[Note. A party who accepts another party's expert's conclusions may admit them as fact under section 10 of the Criminal Justice Act 1967(a)*.*

(a) 1967 c. 80.

Expert to be informed of service of report

19.5. A party who serves on another party or on the court a report by an expert must, at once, inform that expert of that fact.

Pre-hearing discussion of expert evidence

19.6.—(1) This rule applies where more than one party wants to introduce expert evidence.

(2) The court may direct the experts to—

(a) discuss the expert issues in the proceedings; and

(b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(3) Except for that statement, the content of that discussion must not be referred to without the court's permission.

(4) A party may not introduce expert evidence without the court's permission if the expert has not complied with a direction under this rule.

[Note. At a pre-trial hearing, a court may make binding rulings about the admissibility of evidence and about questions of law under section 9 of the Criminal Justice Act 1987(**a**)*; sections 31 and 40 of the Criminal Procedure and Investigations Act 1996*(**b**)*; and section 8A of the Magistrates' Courts Act 1980*(**c**)*.]*

Court's power to direct that evidence is to be given by a single joint expert

19.7.—(1) Where more than one defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.

(2) Where the co-defendants cannot agree who should be the expert, the court may—

(a) select the expert from a list prepared or identified by them; or

(b) direct that the expert be selected in another way.

Instructions to a single joint expert

19.8.—(1) Where the court gives a direction under rule 19.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.

(2) A co-defendant who gives instructions to the expert must, at the same time, send a copy of the instructions to each other co-defendant.

(3) The court may give directions about—

(a) the payment of the expert's fees and expenses; and

(b) any examination, measurement, test or experiment which the expert wishes to carry out.

(4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.

(a) 1987 c. 38; section 9 was amended by section 170 of, and Schedule 16 to, the Criminal Justice Act 1988 (c. 33), section 6 of the Criminal Justice Act 1993 (c. 36), sections 72, 74 and 80 of, and paragraph 3 of Schedule 3 and Schedule 5 to, Criminal Procedure and Investigations Act 1996 (c. 25), sections 45 and 310 of, and paragraphs 18, 52 and 54 of Schedule 36 and Part 3 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44), article 3 of, and paragraphs 21 and 23 of S.I. 2004/2035, section 59 of, and paragraph 1 of Schedule 11 to, the Constitutional Reform Act 2005 (c. 4) and Part 10 of Schedule 10 to the Protection of Freedoms Act 2012 (c. 9). The amendment made by section 45 of the Criminal Justice Act 2003 (c. 44) is in force for certain purposes; for remaining purposes it has effect from a date to be appointed.

(b) 1996 c. 25; section 31 was amended by sections 310, 331 and 332 of, and paragraphs 20, 36, 65 and 67 of Schedule 36 and Schedule 37 to, the Criminal Justice Act 2003 (c. 44).

(c) 1980 c. 43; section 8A was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by SI 2006/2493 and paragraphs 12 and 14 of Schedule 5 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10).

(5) Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.

Court's power to vary requirements under this Part

19.9.—(1) The court may extend (even after it has expired) a time limit under this Part.

(2) A party who wants an extension of time must—

(a) apply when serving the report, summary or notice for which it is required; and

(b) explain the delay.

APPENDIX 2

CrimPR Part 19 Expert Evidence

CrimPR Part 19 Expert evidence

CPD V Evidence 19A: EXPERT EVIDENCE

19A.1 Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.

19A.2 Legislation relevant to the introduction and admissibility of such evidence includes section 30 of the Criminal Justice Act 1988, which provides that an expert report shall be admissible as evidence in criminal proceedings whether or not the person making it gives oral evidence, but that if he or she does not give oral evidence then the report is admissible only with the leave of the court; and CrimPR Part 19 , which in exercise of the powers conferred by section 81 of the Police and Criminal Evidence Act 1984 and section 20 of the Criminal Procedure and Investigations Act 1996 requires the service of expert evidence in advance of trial in the terms required by those rules.

19A.3 In the Law Commission report entitled 'Expert Evidence in Criminal Proceedings in England and Wales', report number 325, published in March, 2011, the Commission recommended a statutory test for the admissibility of expert evidence. However, in its response the government declined to legislate. The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and CrimPR 19.4 lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment.

19A.4 In its judgment in *R v Dlugosz and Others* [2013] EWCA Crim 2, the Court of Appeal observed (at paragraph 11): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

19A.5 Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

19A.6 In addition, in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

CPD V Evidence 19B: STATEMENTS OF UNDERSTANDING AND DECLARATIONS OF TRUTH IN EXPERT REPORTS

19B.1 The statement and declaration required by CrimPR 19.4(j), (k) should be in the following terms, or in terms substantially the same as these:

'I (name) DECLARE THAT:

1. I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.

2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.

5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.

6. I have shown the sources of all information I have used.

7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.

9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.

10. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.

11. I understand that:

(a) my report will form the evidence to be given under oath or affirmation;

(b) the court may at any stage direct a discussion to take place between experts;

(c) the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;

(d) I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert.

(e) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.

12. I have read Part 19 of the Criminal Procedure Rules and I have complied with its requirements.

13. I confirm that I have acted in accordance with the code of practice or conduct for experts of my discipline, namely *[identify the code]*

14. [For Experts instructed by the Prosecution only] I confirm that I have read guidance contained in a booklet known as *Disclosure: Experts' Evidence and Unused Material* which details my role and documents my responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of disclosure. In accordance with my duties of disclosure, as documented in the guidance booklet, I confirm that:

(a) I have complied with my duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996, as amended;

(b) I have compiled an Index of all material. I will ensure that the Index is updated in the event I am provided with or generate additional material;

(c) in the event my opinion changes on any material issue, I will inform the investigating officer, as soon as reasonably practicable and give reasons.

I confirm that the contents of this report are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true.'

CPD V Evidence 19C: PRE-HEARING DISCUSSION OF EXPERT EVIDENCE

19C.1 To assist the court in the preparation of the case for trial, parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts' discussion

and, if so, when. Under CrimPR 19.6 such pre-trial discussions are not compulsory unless directed by the court. However, such a direction is listed in the magistrates' courts Preparation for Effective Trial form and in the Crown Court Plea and Trial Preparation Hearing form as one to be given by default, and therefore the court can be expected to give such a direction in every case unless persuaded otherwise. Those standard directions include a timetable to which the parties must adhere unless it is varied.

19C.2 The purpose of discussions between experts is to agree and narrow issues and in particular to identify:

(a) the extent of the agreement between them;

(b) the points of and short reasons for any disagreement;

(c) action, if any, which may be taken to resolve any outstanding points of disagreement; and

(d) any further material issues not raised and the extent to which these issues are agreed.

19C.3 Where the experts are to meet, that meeting conveniently may be conducted by telephone conference or live link; and experts' meetings always should be conducted by those means where that will avoid unnecessary delay and expense.

19C.4 Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone. The experts may not be required to avoid reaching agreement, or to defer reaching agreement, on any matter within the experts' competence.

19C.5 If the legal representatives do attend:

(a) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and

(b) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.

19C.6 A statement must be prepared by the experts dealing with paragraphs 19C.2(a) - (d) above. Individual copies of the statements must be signed or otherwise authenticated by the experts, in manuscript or by electronic means, at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 5 business days. Copies of the statements must be provided to the parties no later than 10 business days after signing.

19C.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement. The joint statement should include a brief re-statement that the experts recognise their duties, which should be in the following terms, or in terms substantially the same as these:

'We each DECLARE THAT:

1. We individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so.

2. We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.'

19C.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion.

CrimPR Part 21 Evidence of bad character
CPD V Evidence 21A: SPENT CONVICTIONS

21A.1 The effect of section 4(1) of the Rehabilitation of Offenders Act 1974 is that a person who has become a rehabilitated person for the purpose of the Act in respect of a conviction (known as a 'spent' conviction) shall be treated for all purposes in law as a person who has not committed, or been charged with or prosecuted for, or convicted of or sentenced for, the offence or offences which were the subject of that conviction.

21A.2 Section 4(1) of the 1974 Act does not apply, however, to evidence given in criminal proceedings: section 7(2)(a). During the trial of a criminal charge, reference to previous convictions (and therefore to spent convictions) can arise in a number of ways. The most common is when a bad character application is made under the Criminal Justice Act 2003. When considering bad character applications under the 2003 Act, regard should always be had to the general principles of the Rehabilitation of Offenders Act 1974.

21A.3 On conviction, the court must be provided with a statement of the defendant's record for the purposes of sentence. The record supplied should contain all previous convictions, but those which are spent should, so far as practicable, be marked as such. No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require. When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed.

DEFINITIVE GUIDELINES RELEVANT TO HEALTH & SAFETY CASES

DOMINIC ADAMSON

Relevant Guidelines

- Sentencing Health & Safety Offences, Corporate Manslaughter and Food Hygiene and Safety Guidelines (in force from 1 February 2016)
- Reduction in Sentence for a Guilty Plea (in force from 1 June 2017)
- Offences Taken into Consideration and Totality (in force since 6 March 2012)

Sentencing Guideline – initial thoughts

- The verdict of the Health and Safety Bulletin was as follows: *"The Sentencing Council's definitive guideline has resulted in a significant increase in the general severity of sentences for health and safety offences, including a notable number of fines of £500,000 and more. It also appears to be resulting in an increased number of custodial sentences, although the smaller numbers involved, and previous fluctuations, necessitate greater caution before pronouncing a definite custodial effect."*
- 2014 - no fines over £1m were imposed
- 2015 - 3 fines over £1m were imposed
- 2016 - 19 fines over £1m
- Still wide discrepancies

Citation of Authority

- Citation of Authorities: R v Thelwall [2016] per Thomas LCJ

"The citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance. There may be cases where the court is asked to say something about a guideline where, in wholly exceptional circumstances – and we wish to emphasise that these are rare –the guideline may be unclear. In such circumstances the court will make observations which may be cited to the court in the future. However, in those circumstances it is highly likely that the Council will revise the guideline and the authority will cease to be of any application.

- Guideline states "The court should determine the offence category using <u>only</u> the culpability and harm factors in the tables below" (emphasis added)

Friskies are dead! Err, long live Friskies!

- R v Thelwall per LJ Thomas

  "There is extensive reference in the documents before us to Friskies Schedules. R v Friskies Pet Care UK Ltd[2000] 2 Cr App R(S) 401 is no longer of any materiality. The matter has been superseded by the Criminal Practice Direction VII Q3."

- What does the Criminal Practice Direction state?
  - VII Q3-3 states "In such a case, 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) [2000] 2 Cr App. R. 401*"

- Many prosecutors still producing old-style Friskies Schedules

Delay as an argument for non-application

- Delay not fertile territory to seek to disapply
- Section 125(1) Coroners and Justice Act 2009 – must follow a sentencing guideline "unless contrary to the interests of justice to do so" for offences committed after 6 April 2010
- R v Watling Tyre Service Ltd [2016] EWCA Crim 1753

R v Tata Steel UK Limited [2017]

- 2 offences relating to inadequate guarding
- Offences occurred within 6 months of each other
- Intervening improvement notice relating to guarding and preventative measures in response to first incident
- Both incidents resulted in partial finger amputation

HHJ Mayo: Second Offence at First Instance

- Critical of failure to identify the inadequate guarding on the lathe notwithstanding the improvement notice
- Previous incident in relation to the lathe in 2000 and a risk assessment in 2012 which recommended fitting an interlocked guard)
- Estimated use of equipment: 150,000 man hours
- Incident happened during a training exercise
- Judge found high culpability, high likelihood of level B harm but level B harm not occasioned (i.e. harm cat 2)
- Starting Point £1.1m (NB range was £550k to £2.9m)
- Size of Organisation – t/o £4bn – moved up a harm category to £2.4m (harm cat 1)
- Moved up then to £2.75m to reflect inadequate focus on day to day safety.
- No reduction to reflect the fact that Tata Steel was loss making (2016 – accounts recorded losses of £851m) or mitigation
- Acknowledged fine his was 'out of proportion' with pre-guideline cases - the Guideline was a 'new dawn'
- Full discount for guilty plea - £1.8m. No discount for totality on offence 2

The First Offence at First Instance

- Piece of guarding removed by operative at unknown time – jam occurred
- Equipment not isolated – machine started up whilst employee attempted to manually clear jam - partial amputation of two fingers
- Judge said risk was obvious and it was a dangerous practice
- Assessed culpability as medium, level B, one infers that he assessed likelihood as high
- Starting Point £300k (range £130k to £750k) – which assumes HC2
- Same approach re: size of organisation – i.e. moved up category to HC1 – SP £600k
- Increased to £700k because risk was obvious and dangerous practice had developed
- No discount for financial circumstances
- Discounted for plea (down to £465k)
- Reduced by a further 60% for totality – down to £185k

The Appeal: the four main issues

- Was the assessment of likelihood correct on offence 2?
- Ought the Judge to move outside the range to reflect the size of organisation?
- Did the Judge fail to take account of mitigation?
- Ought there to have been downward adjustment to reflect losses?

Issue 1: Likelihood

- Gross LJ concluded that there was a medium likelihood
- Three points:
  - One previous incident
  - 150,000 man hours
  - It occurred during training rather than normal operations
- Per Gross LJ

"None of this detracts from the admitted high culpability for the incident – which could have been prevented by simple precautions – but it does tell against the high likelihood characterisation...We conclude accordingly that offence 2 was to be characterised as one of *medium likelihood.* "

Thoughts on Issue 1

- First appellate court decision interfering with judicial assessment of likelihood under the new guideline
- R v Thelwall [2016] – fall from height case – appeal successful – not on issue of likelihood
- Need for credible statistical/numerical evidence

Issue 2: Size of Organisation

- The Guideline states "Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations **it may be necessary to move outside the range** to achieve a proportionate sentence"
- Gross LJ concluded (para 48) "the Judge was, **at the least, amply entitled to move up a harm category** to reflect that Tata, judged by turnover, was a very large rather than a large organisation and so to impose a proportionate fine. Indeed, at Step Two, **the box of text at the top of p.7 of the Guideline (set out above) expressly so provides.**"
- As to the move upwards to £2.4m there could be "no proper" criticism

Thoughts on Issue 2

- Moving up a harm category is endorsed – will this approach be adopted more widely?
- Does not help on the question of what is a large organisation
- R v Merlin Attractions Limited [2016]
- R v Travis Perkins [2016]
- R v Havering B.C. [2017]
- R v Whirlpool Appliances UK Limited [2017]

Issue 3: Factors Affecting Seriousness/Mitigation

- NB HHJ Mayo first instance increase from £2.4m to £2.75m – Gross rejected the contention that there was double counting on culpability matters (para 49)
- Gross LJ (para 50) stated "the Judge plainly had regard to mitigating factors in this part of his sentencing observations, in particular the "concerted effort" to respond to the Improvement Notice and the many steps taken to improve safety provisions. That said and as he observed, the steps taken had been "patently insufficient" to prevent the incident giving rise to offence 2. In the circumstances, **though some Judges might** have adjusted the £2.75 million starting point downwards to allow for these mitigating factors, we are not minded to interfere"

Thoughts on Issue 3

- 15% increase at this phase for what were ostensibly culpability issues – this was not double counting according to the CoA
- No discount for mitigation – harsh?
- R v MJ Allen Holdings [2016] per Haddon-Cave J – critical of the Court at first instance for making 'no discount whatsoever for any mitigating factors'

Issue 4: Parental Support

Gross emphasised the following points:

- Financial circumstances are to be taken into account
- Small profit margin relative to turnover, or a loss making business might warrant downward adjustment
- Normally only information relating to the organisation will be relevant unless 'exceptionally' it is demonstrated that 'the resources of a linked organisation are available and can properly be taken into account'

Issue 4: Parental Support Cont.

- Court noted that the accounts indicated that the company had adequate resources (including the support of its ultimate parent) to continue to adopt the 'going concern' basis in preparing the financial statements
- Gross LJ

"**On that footing**, it seems to us that **this is one of those exceptional cases within Step Two, where the resources of TSL, as well as those of Tata, can properly be taken into account.** Indeed, as the support of TSL is plainly of the first importance in ensuring that Tata could continue to prepare its accounts on a "going concern" basis, **it would seem to me wrong <u>not</u> to take the position of TSL into account – the removal of TSL's resources would produce a misleading and unrealistic picture of Tata's financial circumstances.**"

Issue 4: Parental Support cont.

- Gross LJ

The Judge was "quite simply, **recognising the economic reality of the situation**....[He] was **amply entitled** to take TSL's resources into account when considering whether or not to make a downwards adjustment in the light of Tata's financial circumstances."

Thoughts on Issue 4

- Gross LJ not saying that the accounts of the parent need to be produced (but they may be sought)
- Gross LJ not saying losses are irrelevant
- But relevance is limited where there is parental support
- Similar result in R v Ineos Chlorvinyls Limited [2016] EWCA Crim 607 (environmental case; appeal against a fine of £167k; organisation t/o £850m, losses of £51m)
- What if there had been modest profit and no account taken of parental resource?

The Result

Gross summarised as follows:

- "the raised starting point of £2.75 million cannot stand.....The correct figure should instead be £2 million. That amount is arrived at **by starting in** harm category 3; then moving up a category to harm category 2 and **thereafter moving up the range for the same reasons** as the Judge expressed and which we upheld"

But why £2million?

- Guideline would suggest start at High Culp HC 3 = £540k; up to HC 2 for size £1.1m. Thereafter, moving up a further £900k to £2m? HHJ Mayo only moved £350k.

tgc

Guilty Plea Definitive Guideline

- The purpose of the guideline is to encourage those who are going to plead guilty to do so
- Nothing in the guideline should be used to put pressure on a defendant to plead guilty
- Purpose of guilty plea discount is to yield benefits: reduce impact on victim, save victims and witnesses giving evidence, and saves time and money
- Reduction should be applied after mitigating factors – this is consistent with the approach at steps 2 and 6 of the Health and Safety Guideline

tgc

Plea at first stage in proceedings

- Discount of one third should be made at the first hearing at which a plea or indication of plea is sought and recorded by the court
- Plea in indicated after first stage should be a maximum of one quarter
- Sliding scale reduction thereafter to a maximum of one tenth on the first day

Exceptions to the loss of credit if plea not entered at the first stage of proceedings (1)

Where further information, assistance or advice necessary before indicating a plea

- If the sentencing court is satisfied there were *'particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done'* it should still make a reduction of one third.
- Late disclosure of prosecution papers?
- Need to give board advice?

Exceptions to the loss of credit if plea not entered at the first stage of proceedings (2)

Newton hearings

- Where a Defendant's version of events is rejected at a Newton hearing the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction.
- More prescriptive than the 2007 guideline which stated "If after pleading guilty there is a Newton hearing and the offender's version of the circumstances of the offence is rejected, this should be taken into account in determining the level of reduction."

Exceptions to the loss of credit if plea not entered at the first stage of proceedings (3)

Offender convicted of a lesser or different offence

- If a Defendant is convicted of a lesser or different offence to that originally charged and they had made an unequivocal indication of a guilty plea to that charge they should be given the level of reduction that is appropriate to the stage of proceedings at which the indication was given.

Totality Guideline

- Determine the fine for each individual offence based on the seriousness of the offence and taking into account both the circumstances of the case and the financial circumstances of the offender.
- Add up the fines for each offence and consider if they are just and proportionate.
- **If the total is not just and proportionate** the Guideline gives two examples of how the fine might be reduced

(1) Where the fine is for multiple **offences arising out of the same incident or 'offences of a repetitive kind'** it will **often** be appropriate to impose a fine for the most serious offence reflecting the totality of the offending and no separate penalty in respect of the other offences

(2) **Where the fine is for multiple different offences** it is appropriate to impose a fine for each of the offences and then assess whether they are just and proportionate. If it is not, the Court should **consider** whether **all of the fines can be proportionality reduced.** Separate fines should then be passed.

Postscript: R v Tata and Totality

Appeal on offence one rejected

- Gross LJ stated "In arriving at his conclusion, the Judge, **very generously, reduced the figure of £465,000 by 65%, to allow for totality**. The upshot is a fine of £185,000 which cannot realistically be characterised as manifestly excessive - even had there been (which we do not accept) errors in the Judge's reasoning in arriving at a starting figure of £700,000, reduced to £465,000 for the early guilty plea. "

Delegate List.

Name	Firm
Jonathan Lloyd	Transport for London Legal
Anthony Baker	Plexus Law
Carl Wright	All Day Safety Ltd
Tony Day	All Day Safety Ltd
Richard Voke	Ashfords
Jack Baumgardt	Ashfords
Robert Belton	Ashfords
Allen Cartwright	Aspen Insurance
Graham Freeman	Aviva
Phil Rowley	BAM
Philippa Dyer	Birketts
Trevor Francis	Blackfords
Gary Bloxsome	Blackfords
Sarbjit Bisla	BLM
Leanne Conisbee	BLM
Malcolm Keen	BLM
Jennifer Batham	BLM
James Jevon	BLM
Jessica Joscelyne	BLM
Jon Cooper	Bond Dickinson LLP
Stephen Panton	Bond Dickinson LLP
Natasha Hyde	Bond Dickinson LLP
Ashley Borthwick	Bond Dickinson LLP
Dean Murphy	Bouygues
Belinda Liversedge	British Safety Council
Rory Ferguson	Civil Aviation Authority
Matthew Bennett	Civil Aviation Authority
Paul Johnson	Carey Group
Jenna Choi	Carlsberg UK
David Leckie	Clyde & Co LLP
Tom Roberts	Clyde & Co LLP
Sally Roff	DAC Beachcroft LLP
Fiona Gill	DAC Beachcroft LLP
Colin Moore	DAC Beachcroft LLP
Claire Moore	DAC Beachcroft LLP
Kiera Petchey	DAC Beachcroft LLP
Simone Protheroe	Devonshires

Zoe Harris	Eversheds Sutherland
David Young	Eversheds Sutherland
Kevin Elliott	Eversheds Sutherland
Amy Sadro	Eversheds Sutherland
Elliot Kenton	Fieldfisher LLP
Andrew Sanderson	Fieldfisher LLP
Susan Dearden	Finch Consulting
Kamal Chauhan	Finch Consulting
Adrian Jones	First Group
Mke Appleby	Fisher Scoggins Waters LLP
Charlotte Waters	Fisher Scoggins Waters LLP
Nathan Peacey	Foot Anstey
Bill Bates	Fox Glove Electrical Safety Management
Nicola Wall	Furley Page Solicitors
Anthony Taylor	GVA
Chris Warburton	H&S at Work Magazine
Howard Watson	Herbert Smith Freehills LLP
David Bennett	Herbet Smith Freehills LLP
Hilary Meredith	Hilary Merdith Solicitors
Clare Stevens	Hilary Merdith Solicitors
Sinead Cartwright	Hilary Merdith Solicitors
Sarah Barnes	Hill Dickinson
Simon Curtis	Horwich Farrelly
Mark Dickson	Horwich Farrelly
Dr Surinder Johal	Imperial College
Dr Anton de Paiva	Imperial College
Nick Warburton	IOSH Magazine
Louis Wustermann	IOSH Magazine
Janinie Holbrook	Kennedys
Hazel Milner	Kennedys
Anna Naylor	Kennedys
Kadie Cooper	Kennedys
Aimie Farmer	Kennedys
Richard Crockford	Kennedys
Daniel McShee	Kennedys
David Wright	Kennedys
Susan cha	Kennedys
Laura-Rose Budden	Kennedys
Maria Harris	Kennedys
Kathryn Lumby	Kennedys
Jesal Parekh	Kennedys
Tracey Perry	Kennedys
Anne-Marie Hodges	Kennedys
Stephanie Powet	Kennedys
Rebecca Souch	Kennedys
Emily Jones	Kennedys
Christopher Newton	Keoghs LLP
Tom Stevenson	Keoghs LLP

Melinka Berridge	Kingsley Napley
Adam Glass	Lewis Silkin
Maggie Gonzalez	Newham College
Rebecca Bailey	Norton Rose LLP
Tim Jones	Norton Rose LLP
Cathryn Teverson	Norton Rose LLP
Holly Stebbing	Norton Rose LLP
Madaleine Abas	Osborn Abas Hunt
Mary Lawrence	Osborne Clarke
Anna Lundy	Osborne Clarke
Julie Bond	Pennington Manches
John Doherty	Pennington Manches
James Harrison	Pennington Manches
Emma Evans	Pinsent Masons
Laura Page	Pinsent Masons
Sean Elson	Pinsent Masons
Natacha Kikkine	Plexus Law
Matthew Stanely	Plexus Law
Chris Foulkes	Plexus Law
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Nick McMahon	Reynolds Porter Chamberlain LLP
Caroline Bedford	RGL Forensics
Sarah Hayes	RGL Forensics
Catherine Rawlin	RGL Forensics
Mamata Dutta	Reynolds Porter Chamberlain LLP
Stuart Page	Segro PLC
Julia Messervy-Whiting	Shakespear Martineau
Alan Carruthers	Shepherds Bush Housing Aso.
Philip Ryan	Shoosmiths
Lyn Dario	Shulmans
David Askwith	Swissport UK
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Mark McConochie	Transport for London Legal
Simon Joyston-Bechal	Turnstone Law
Natalie Wargent	Veale Wasbrough Vizards
Tabitha Cave	Veale Wasbrough Vizards
Rachel Turnbull	Walker Morris
Crispin Kenyon	Weightmans LLP
Kirsty Finlayson	Weightmans LLP
Mauro Del Noce	Whirlpool Corporation
Matthew Bridge	Whirlpool Corporation
Jurate Laimikiene	Whirlpool Corporation
David Sherrington	Whirlpool Corporation

Keith Morton QC	Temple Garden Chambers
Andrew Prynne QC	Temple Garden Chambers
Jonathan Watt-Pringle QC	Temple Garden Chambers
Andrew O'Connor QC	Temple Garden Chambers
Charles Curtis	Temple Garden Chambers
Kevin McLoughlin	Temple Garden Chambers
Dominic Adamson	Temple Garden Chambers
Fiona Canby	Temple Garden Chambers
Tim Sharpe	Temple Garden Chambers
Lionel Stride	Temple Garden Chambers
James Henry	Temple Garden Chambers
Matthew Waszak	Temple Garden Chambers
Robert Riddell	Temple Garden Chambers
Elizabeth Gallagher	Temple Garden Chambers
Ellen Robertson	Temple Garden Chambers
Richard Boyle	Temple Garden Chambers
Piers Taylor	Temple Garden Chambers
James Yapp	Temple Garden Chambers
Dean Norton	Temple Garden Chambers
Keith Sharman	Temple Garden Chambers
Nancy Rice	Temple Garden Chambers