Neutral Citation Number: [2017] EWCA Crim 2186

Case No: 201701764 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BRISTOL CROWN COURT
His Honour Judge Patrick
S20170069

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2017

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON THE LORD BURNETT OF MALDON
THE HON MR JUSTICE TEARE
and
THE HON MR JUSTICE KERR

- -

Between :

WHIRLPOOL UK APPLIANCES LIMITED	**Appellants**
- and -	
REGINA	
(Upon the prosecution of Her Majesty's Inspectors of Health and Safety)	**Respondent**

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- -

Mr Dominic Adamson (instructed by **Plexus Law**) for the **Appellants**
Mr Alan Fuller (instructed by **Lester Aldridge LLP**) for the **Respondent**

Hearing date: 21 November 2017

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Approved Judgment

Lord Burnett of Maldon CJ:

1. On 21 March 2017 at the Crown Court at Bristol the appellant company was sentenced by His Honour Judge Patrick to pay a fine of £700,000 having earlier pleaded guilty to an offence contrary to section 3(1) of the Health and Safety at Work Act 1974 ["the 1974 Act"]. That imposes a duty on an employer to conduct its undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in its employment are not thereby exposed to risks to their health and safety. This prosecution was brought following the death of Mr. Clive Dalley, a self-employed alarm and telecommunications contractor, who died as a result of an accident at the appellant's premises on 21 March 2015.

2. This appeal against sentence is brought with leave of the single judge. Mr Adamson, who appears for the appellant before us, as he did below, submits that the judge erred in his application of the Definitive Guideline on Corporate Manslaughter, Health and Safety and Food and Safety Hygiene Offences, effective from February 2016, with the result that the sentence imposed was manifestly excessive. Three issues fall for particular consideration in this appeal. First, the impact of a death on the approach to the ranges set out in the Guideline. Secondly, how one identifies and then treats a "very large organisation" for the purposes of the Guideline. Thirdly, the impact of relatively poor profitability in the context of an organisation with a substantial turnover.

The Facts in outline

3. Mr Dalley was a self-employed fire alarm and telecoms contractor of 30 years' experience who was frequently employed as a sub-contractor at the appellant's Indesit factory in Yate near Bristol. On 21 March 2015 he was working on the fire and heat detector systems from a mobile elevated working platform which he had manoeuvred into position between hanging baskets on the overhead conveyor system. The overhead conveyor system was set in motion by an employee of the appellant who was part of a maintenance team working elsewhere on the conveyor. One of the baskets knocked the working platform causing it to topple and Mr Dalley to fall. He suffered multiple fractures and died ten days later from complications arising from his injuries.

4. Both the appellant and Mr Dalley (who had comparable duties as a self-employed contractor as those imposed on the appellants under the 1974 Act) were aware of the risks involved of working at height and also that the maintenance work was to be carried out that morning. Two days before the accident, Mr Dalley had discussed the work with the maintenance co-ordinator at the factory and they walked through it. It was agreed that he would return on the Saturday when few people would be in the premises. It was explained that the maintenance team would be working on the conveyor system at the same time and that their work would take priority over his. A permit to work system was operated. Mr Dalley was issued with a permit. There was a risk assessment relating to working at height. It was agreed that Mr Dalley would tell the other workers when he wanted to do his work to enable them to turn off the conveyor system.

5. On the morning in question, Mr Dalley told the maintenance workers that he was going to have a cup of coffee before he started his work from the working platform.

They continued with their tasks which required the overhead conveyor to be turned on and off intermittently. Unfortunately, they were unaware that Mr Dalley had returned and raised his working platform to a position vulnerable to being struck. It was in those circumstances that this tragedy occurred. It illustrates the importance of systems being devised which recognise human frailty and the possibility of a small oversight giving rise to serious potential consequences.

6. The failures which gave rise to the breach of section 3 of the 1974 Act were:

   a) The appellants did not require Mr Dalley to prepare a job-specific risk assessment and method statement for the work he was to carry out on 21 March 2015;

   b) The appellant could have prepared a more detailed Permit to Work which specifically identified the potential risk posed by a working platform being used in the vicinity of the overhead conveyor and the control measures required.

The Guideline

7. The Guideline provides a structure within which to sentence for breaches of health and safety legislation. At Step One, the court is enjoined to determine the offence category. As part of that exercise it must first decide "culpability". There are four levels of culpability: very high, high, medium and low. The conduct described in the Guideline to inform the assessment of culpability ranges from "deliberate breach of or flagrant disregard for the law", at one end, to "offender did not fall far short of the appropriate standard" at the other.

8. Consideration of "harm" follows in the context that the offences under sections 2 and 3 of the 1974 Act are ones of creating a risk of harm. The Guideline requires the court to determine both the seriousness of the harm risked and the likelihood of that harm arising. Each of those factors may be ascribed to one of three categories. The hierarchy of harm is then divided into four categories by the Guideline, as set out in the following table:

	Seriousness of harm risked		
	Level A • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy	**Level B** • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition	**Level C** • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

9. Having identified the appropriate level of harm, the Guideline then requires the court to consider whether the offence exposed a number of workers or members of the

public to risk and whether the offence was a significant cause of actual harm. It continues:

> "If one or both of these factors apply the court must consider moving up a harm category or substantially moving up within the category range at step two … The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified in the scale of seriousness…"

10. At Step Two a starting point and category range are determined by focussing on turnover, with aggravating and mitigating features influencing where in the range the starting point lies. The Guideline describes organisations as large (turnover £50 million and over), medium (turnover £10 to £50 million) small (turnover £2 to £10 million) and micro (turnover up to £2 million). In respect of each, there is a table bringing together the four possible levels of culpability and four possible harm categories. By way of illustration, and also because it is at the heart of the submissions we have heard, we reproduce the table applicable to large organisations:

Large **Turnover or equivalent: £50 million and over**		
	Starting point	**Category range**
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

The Guideline provides for larger organisations in this way:

> "Very large organisations
>
> Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence."

11. The Guideline includes a non-exhaustive list of factors both increasing seriousness and those reducing it, or reflecting mitigation. It explains that recent relevant previous convictions should result in a substantial upward adjustment. The impact of

both aggravating and mitigation features may result in a move outside the category range identified in the Guideline.

12. We pause to observe that the features of the Guideline we have so far referred to reflect its inherent flexibility necessary to meet the broad range of circumstances that fall to be considered in breaches of sections 2 and 3 of the 1974 Act. In considering a guideline replete with so many figures there is a temptation to approach its application in an arithmetic way. In our opinion that should be resisted. In this area, as much as any, the court should not lose sight of the fact that it is engaged in an exercise of judgement appropriately structured by the Guideline but, as has often been observed, not straitjacketed by it.

13. Thus far the court will have taken account of culpability, harm (with its two components as set out in the Guideline), the extent of those exposed to the material risk, the incidence of actual harm, the turnover of the organisation and aggravating and mitigating factors to determine a starting point. Mr Adamson submits that in addition to turnover, the broader financial health of the organisation could fall into account at Step Two for the purpose of the Guideline. We do not agree. It is clear from its terms that such factors come into play at Step Three.

14. Step Three requires the court to "check whether the proposed fine based on turnover is proportionate to the overall means of the offender". It identifies three general principles affecting sentencing at this stage. It notes that section 164 of the Criminal Justice Act 2003 requires a fine to take account of the financial circumstances of the offender; that it must meet in a proportionate way the objectives of punishment, deterrence and removal of gain derived from the offending; and that it must be "sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation." It then enjoins the court to consider the financial circumstances of the offender – the economic realities – with the result that in finalising the sentence the following factors are relevant:

- Profitability. Adjust downwards for a small profit margin and upwards for a larger profit margin.
- Any quantifiable benefit derived from the offence.
- Whether the fine will put the offender out of business.

15. Step Four, which has no relevance to this appeal, requires the court to consider matters such as whether the fine will impair the offender's ability to make necessary improvements to its systems, make restitution to victims or adversely affect the economic interests of others. Step Five, also not in play in this appeal, concerns formal assistance to the prosecuting authorities in connection with other prosecutions. Step Six concerns reduction for guilty pleas.

Authority

16. This court considered the approach to fines for very large organisations in environmental cases, with a Definitive Guideline structured in a similar but not identical way, in *R v Thames Water Utilities Limited* [2015] EWCA Crim 960. In the

judgment of the court delivered by Mitting J the general principles governing the sentencing of very large organisations run for profit which had been identified in *R v Sellafield Limited* [2014] EWCA Crim 49 at paragraph 3 were adopted:

> "It is important at the outset to recall the provisions which Parliament has enacted in the Criminal Justice Act 2003 (CJA 2003) in relation to the duty of the courts in sentencing, as these principles are applicable to all offenders, including companies:
>
> i) The courts must have regard in dealing with offenders to the purposes of sentencing which Parliament specified as (a) the punishment of offenders (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences (s.142 of the CJA 2003).
>
> ii) In considering the seriousness of the offence the court must have regard to the culpability of the offender and the harm caused or which might foreseeably be caused (s.143 of the CJA 2003).
>
> iii) If a court decides on a fine it must approach the fixing of fines having regard not only to the purposes of sentencing and the seriousness of the offence, but must also take into account the criteria set out in s.164 of the CJA 2003:
>
> > (1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.
> >
> > (2) The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence.
> >
> > (3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.
> >
> > (4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine."

17. The Guideline applicable in the appeal before us reflects this settled approach.

18. There was no doubt that Thames Water Utilities Limited was a "very large organisation". At paragraph 37 of the judgment, Mitting J records a submission to the

effect that all organisations should be treated as very large if turnover exceeds £150 million per year on a three yearly average and observed:

> "We do not think there is any advantage to be gained by such a definition. In the case of most organisations, it will be obvious that it either is or is not very large. Doubtful cases must be resolved as and when they arise."

19. An obvious case concerning a very large organisation was *R v Tata Steel UK Limited* [2017] EWCA Crim 704. The appellant had a turnover of about £4 billion a year, and although a going concern was not at the time profitable. The appeal concerned two offences under section 2 of the 1974 Act when on separate occasions employees had been seriously injured. At paragraph 45 of the judgment of the court Gross LJ approved the approach of the sentencing judge to reflect the size of the appellant. By reference to the table we have set out in paragraph 10 above, this was a "high culpability harm category 2" case which gave starting point of a fine of £1.1 million. But he moved up a category and proceeded from a starting point of £2.4 million. The judge then enhanced it further at Step Three to bring the fine home to the management and shareholders because the senior management were inadequately focussed on day to day safety.

The Sentencing Remarks

20. The judge noted that the appellants had in place procedures to minimise risk although they had failed. He considered that there should have been a second person with Mr Dalley whilst he worked and that the Permit to Work should have been much more specific about the work to be done and the risks that it entailed. The risk that the maintenance workers posed to Mr Dalley had not been properly assessed, in particular as there was no line of sight between them and him.

21. The judge set out the review of policies and procedures undertaken by the appellant after the tragedy which had done everything possible to eliminate further problems. The appellant fully cooperated in the investigation.

22. There was a culture of commitment to safe systems and improvements in which all the employees were engaged. The judge summarised the range of safety systems and procedures in place, all of which tended to demonstrate that commitment. The company had an exemplary health and safety record, with no previous convictions. It profoundly regretted what had occurred. None of the aggravating features sometimes found in health and safety cases, for example deliberate cost-cutting or calculated risk-taking to enhance profit was present. On the contrary,

> "so far as the guideline is concerned … not only are there no aggravating features, every single mitigating feature arises … It has an excellent health and safety record … The company had also taken steps to ensure that [Mr Dalley] was aware of his duty to act under a code of practice which highlighted the risk of working at height, and the company was aware that he was qualified to undertake the work he was doing. It is accepted that there was no formal process to inform workers of contractors working on site. Mr Dalley had been asked to

> notify the workforce when he would be working at the site of the accident but did not do so."

23. The judge went on to consider the Guideline. He concluded that for the purpose of the Guideline the breach of duty was one of low culpability, because the appellant did not fall far short of the appropriate standard. He said:

> "I have regard to the fact that there were systems in place; that there were systems for working at height; there was a lockout policy; there were policies for working with contractors, of which Mr Dalley was aware and in which he was conversant, he himself had been trained for working on platforms and had undergone retraining in 2015. The platforms themselves have an excellent safety record… While the permit to work could have been fuller and could have contained more detail, in fact it contained a significant amount of details to minimise a risk … it was only on the day of the incident itself that there was any risk…Whilst there was no document confirming the presence of Mr Dalley at the factory on Saturday and no one directly responsible at the time, it is clear that people were aware of his presence, and there had been a walk through to discuss risk only two days before the incident."

24. Turning to the question of harm, the judge said it was "plainly a level A case" because the risk of harm included death or serious injury. He recognised that he had to assess the risk of that harm materialising. That is because the gravamen of the offence under section 3 of the 1974 Act is to avoid the risk of harm. He concluded that there was no risk of harm to any other person that day because the factory was not in production and there were fewer than a dozen people on site. There was a low likelihood of harm materialising. In the result that was a "harm category 3" case for the purposes of the Guideline.

25. The judge then considered the appropriate starting point. He said that the appellant's turnover was £500 million (whereas the tables in the Guidelines are based upon a turnover of £50 million). He noted that the company had £500 million of assets and that in the two years covered by the appellant's annual report for December 2015, in one year there was a profit and in the other year there was a loss. He then said this:

> "I am told that manufacturing costs often amount to some 80% of the turnover and I am asked to contrast this company with those with lower operational costs. I have regard to that point but decline to draw a distinction between companies with high costs and those with low. In my judgment that appropriate starting point is £1.2 million. I give credit for plea and also make allowance for good character and remorse. Other factors have been arrived at when arriving at low culpability and therefore I impose a fine of £700,000 …"

If we unpack that a little, the result is this. The starting figure of £1.2 million was reduced by £150,000 for good character and remorse and then reduced by a third to reflect the guilty plea.

The financial position of the appellant

26. Before considering the submissions made on this appeal, it is necessary to note in a little more detail the information revealed in the appellants' annual report for December 2015. Turnover in 2014 was £672,842,000 and in 2015 £710,798,000, rather than the £500 million identified by the judge. In 2014 there was a profit before tax of £24,738,000. But in 2015 there was a loss of £165,041,000. The reason for the loss was two exceptional items. One resulted from corrective action remedying certain safety and quality issues which required the recall of products. The other was an impairment to an investment in a related company. The former resulted in a provision for £178,577.000. In 2014 the company had assets of £546,518,000 and in 2015 assets of £567,548,000. Directors' remuneration was £579,000 in 2014 and £584,000 in 2015. The highest paid director received £480,000 in 2104 and £488,000 in 2015.

Discussion

27. On this appeal there are two principal criticisms of the judge's approach. First, Mr Adamson submits that the judge's starting point of £1.2 million is far too high, by comparison with the starting points and category ranges in the Guideline for large organisations. The second main criticism is that the judge failed to examine the financial circumstances of the company at stage 3 which requires the court to consider whether the proposed fine based upon turnover is proportionate to the overall means of the offender. In particular the Guideline states that the profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover downward adjustment may be needed. In declining to draw a distinction between companies with high costs and those with low costs it is said that the judge erred.

28. We agree with the judge's conclusion that for the purposes of the Guideline at Step One the offence should be treated as one of "harm category 3". It is more than justified when one considers the circumstances that surrounded this tragedy and is not in issue before us.

29. In discussing the scheme of the Guideline in the context of this appeal we will begin by considering the approach to sentence for a large company with a turnover of £50 million or so. The starting point for such an offence would be £35,000. Culpability has a marked impact on starting points, as the table we have reproduced shows. Had the culpability been very high the starting point would be £1 million, £540,000 if the culpability were high and £300,000 if medium. The table also demonstrates that the harm category can have as profound an impact on starting points.

30. There was no question of exposing other workers or members of the public to harm, but the systemic failings were a significant cause of harm, indeed the most serious harm imaginable, namely death. That would justify an upward movement within the appropriate category range or a move into the next harm category. Were the appellant a £50 million organisation the Guideline recognises that the fact of death would justify a substantial move away from the £35,000 starting point to the top of the category range (£140,000) or beyond.

31. A consistent feature of sentencing policy in recent years, reflected both in statute and judgments of this court, has been to treat the fact of death as something that

substantially increases a sentence, as required by the second stage of the assessment of harm at Step One. Without more, we consider that the fact of death would justify a move not only into the next category but to the top of the next category range, suggesting a starting point of perhaps £250,000.

32. What impact on that starting point does the higher turnover of the appellant have? We note that there is a five-fold difference in turnover between the smallest and largest organisations falling within both the "small" and "medium" categories for the purposes of the Guideline. The Guideline does not apply the same arithmetic approach to define the boundary between a large and very large organisation. No upper limit is mentioned for a large organisation. Instead, the Guideline suggests that "very large organisations" will have a turnover that "very greatly exceeds" the threshold for large organisations. In such cases "it may be necessary to move outside the range to achieve a proportionate sentence." We remind ourselves that in paragraph 40(iv) of the Thames Water Utilities case this Court made clear that there should be no mechanistic extrapolation for levels for large companies.

33. Each of the category ranges in which the turnover limits are identified is designed to accommodate organisations with turnovers at both ends of the range. The language of the Guideline suggests that the category ranges identified for large organisations are designed to cater for turnovers which "exceed" £50 million, indeed "greatly exceed" £50 million. These first two examples do not fall within the definition of a very large organisation at all. Most organisations with a turnover which "very greatly exceeds £50 million" will be treated as very large organisations. But even then the Guideline retains flexibility to meet the individual circumstances by suggesting that it "may", not will, be necessary to move outside the range. The language of the Guideline suggests that a very large organisation is likely to have a turnover of multiples of £50 million but we would not wish to create an artificial boundary. The turnover of the appellant was of the order of £700m. Although the judge did not say in terms that the appellant was therefore a very large organisation within the language of the Guideline it is clear to us that it must be; and indeed that must have been the view of the judge. It was therefore permissible to move outside the appropriate range in order to achieve a proportionate sentence.

34. Having determined that an organisation is very large, the calculation of a fine through the structure of the Guideline does not at this stage dictate an arithmetic approach to turnover. There is no linear approach. That much is clear from the conclusion endorsed by this court in the Tata Steel case where a turnover of £4 billion, as opposed to £50 million, led to a step change of one harm category rather than extravagant multiples.

35. As we have said, the range of recommended fines for a large company where there is low culpability and harm category 3 goes up to £140,000. But we have concluded that the fact of death, without taking account of turnover, should take the starting point to the top of the next category or about £250,000. That figure must be increased to reflect the large turnover the appellant and its status as a very large organisation. The next range up in the Guideline extends from £180,000 to £700,000.

36. We have reached the stage in the Guideline of having to take into account the following factors. First culpability; secondly risk of harm; thirdly actual harm – in this case death; and fourthly turnover. The judge's conclusion that there was low

culpability and a low likelihood of harm underpins this part of the exercise. Were the culpability or harm category greater, then a substantially higher starting point would be appropriate. In our view the last of these four points, namely turnover, should result in the starting point moving to £500,000 before aggravating and mitigating factors are taken into account.

37. The judge significantly reduced his starting point to reflect the strong mitigation he identified. In following his approach we arrive at a figure of £450,000.

38. The judge did not expressly consider Step Three of the Guideline. That step requires the court to consider the financial circumstances of the offender and the judge decided not to do so. There is a significant difference between an organisation trading on wafer-thin margins and another, perhaps a professional services company where the profits shared between partners or shareholders is a substantial percentage of turnover. An organisation with a consistent recent history of losses is likely to be treated differently from one with consistent profitability. So too, an organisation where the directors and senior management are very handsomely paid when compared to turnover is likely to attract a higher penalty than one where the converse is the case.

39. However, when one has regard to the overall means of this appellant we do not consider that the figure at which we have arrived requires adjustment. The appellant has an underlying profitability. The recent loss was the result of two exceptional items. Furthermore, the assets of the company both in 2014 and 2015 were about £550m. The fluctuations in the profitability did not affect the directors' remuneration. As required by the Guideline we have stepped back and reviewed the proposed level of fine. Having regard to the underlying culpability, risk of harm, actual harm and turnover, in our view a starting point of £450,000 at Step Three is sufficient to have a real economic impact which will bring home to the management and shareholders the need to comply with health and safety legislation but it is also proportionate to the appellant's overall means. As the judge noted, this is an organisation with an impeccable safety record which has done everything possible to make good the deficiencies exposed by these events.

40. Step Three in the Guideline does not provide an invitation to the court to disregard what has gone before, but to adjust any conclusion to reflect the economic realities.

41. The final step is to reduce the fine to reflect the guilty plea. The Guideline dictates a reduction of a third with the result that, in our judgment, the appropriate fine in this case should be one of £300,000. It follows that we consider that the sentence imposed by the judge was manifestly excessive. We quash the fine of £700,000 and substitute one of £300,000. The remaining orders are unaffected.

42. Nothing in this judgment is intended to alter the policy in this Court in recent times (consolidated by the Sentencing Guidelines Council) of ensuring that organisations are made to pay fines that are properly proportionate to their means. That of course does not relieve the Court of a duty to enquire carefully into the facts of each case so as fairly to reflect different levels of harm and culpability. The circumstances of this case are unusual in flowing from an offence of low culpability and low likelihood of harm. Had they involved any increased culpability or likelihood of harm the appropriate fine would have been very much larger. No two health and safety cases are the same. The Guideline provides for very substantial financial penalties in

appropriate cases, particularly when the offender is a large or very large organisation. Yet it is subtle enough to recognise that culpability, likelihood of harm and harm itself should be properly reflected in any fine, as well as turnover. The same degree of actual harm following a breach of section 2 or 3 of the 1974 Act can deliver very different fines depending on the circumstances. That is obvious when one considers the table we have reproduced in paragraph 10, with its wide range of potential fines for the same offence.

43. Large commercial entities in many areas of business are vulnerable to very substantial financial penalties for regulatory failings. The same is true for breaches of health and safety or environmental law in appropriate cases. A fine of the order imposed by the judge in this case would only have been appropriate if the factors weighing in the balance for the purposes of the Guideline had been different.