Errors led to distorted sentencing exercise (R (on the application of Health and Safety Executive) v ATE Truck & Trailer Sales Ltd)

25/04/2018

Corporate Crime analysis: Did a judge stray into the facts of the count on which no evidence had been offered and venture outside the indictment period? Simon Belfield, director of regulatory, compliance and investigations at DWF LLP, looks at a case which serves as a reminder of the need for care when tendering and accepting a basis of plea.

R (on the application of Health and Safety Executive) v ATE Truck & Trailer Sales Ltd [2018] EWCA Crim 752, [2018] All ER (D) 47 (Apr)

What are the practical implications of this case?

In reducing the level of fine from £475,000 to £200,000, the Court of Appeal undertook an analysis exercise of the Sentencing Guidelines constrained by a very narrow basis of plea. In so doing, it noted that the Crown Court judge sentenced ATE on facts that were outside the basis of plea, and also where there was agreement from both experienced prosecution and defence counsel.

The case highlights the need for practitioners to be very careful when tendering and agreeing a basis of plea. It also highlights the need for judges to be very clear upon the basis they are sentencing the defendant when looking at the Sentencing Guidelines, albeit they should not be 'straightjacketed' by the guidelines. Practitioners should be wary that agreed basis of pleas are not binding on the court, although sensible agreement is to be encouraged between parties in this area and can be 'expected to be weighed carefully by any court before departing from it'.

The case gives further prominence to the features highlighted in *R (upon the prosecution of HM Inspectors of Health and Safety) v Whirlpool UK Appliances Ltd* [2017] EWCA Crim 2186, [2017] All ER (D) 124 (Dec) and *R v Thames Water Utilities* [2015] EWCA Crim 960, [2015] All ER (D) 31 (Jun), namely the need to move up a harm category and towards the top of the range of that category when considering a case where the breach has 'caused' the death (Step 1—harm 2(ii)) and reflecting the need for a real economic impact to bring home the appropriate message to the defendant (steps 3 and 4).

What was the background?

ATE pleaded guilty to failing to provide a suitable and sufficient risk assessment as required by regulation 3(1) of the Management of Health and Safety at Work Regulations 1999, SI 1999/3242. No evidence was offered to a further and wider charge under section 3(1) of the Health and Safety at Work Act 1974 (HSWA 1974).

The investigation followed the tragic death of Mr Price, an experienced contractor and scrap metal dealer who conducted his own business of removing the roof and stanchions from curtain-sided trailers and selling the metalwork on as scrap. He conducted this on ATE's premises and paid £50 per superstructure in lieu of rent. He was removing the metalwork when the tragedy occurred on 21 February 2013. It should be noted that, on occasions, ATE also conducted this work using its own employees.

This is relevant because ATE's plea of guilty was based on the fact that it did not have a risk assessment in place for the work conducted by its employees, but tenuously acknowledging that it was possible for the lack of risk assessment to have a connection with Mr Price's accident. The

position of the defendant was that Mr Price was conducting his own undertaking and had the primary expertise for the activity he was doing.

The judge, it would appear, had scant regard for the basis of plea and the agreed position adopted by the prosecution and defence, finding that:

- the failure to have a suitable and sufficient risk assessment significantly contributed to the death of Mr Price
- culpability was high on the basis that ATE failed to put into place measures that are recognised standards in the industry and that the breach had subsisted over a long period of time given that events began in 2002/03. It should be noted that there were no recognised standards in the industry for this work and that the indictment period was limited to approximately three years
- there was a high likelihood of harm given that the risk was prevalent every time Mr Price conducted this work

It was clear that the judge was looking at the work carried out by Mr Price along with other features that were not part of the prosecution case by the time it came to sentencing.

What did the court decide?

The Court of Appeal accepted that the basis of plea had led to difficulties in being able to sentence ATE for its failings towards its own employees distinct from the method of work adopted by Mr Price and regularity with which he performed his task.

In relation to culpability, the Court of Appeal agreed with the prosecution and defence that it was 'low', and that there was no justification for the judge categorising the case as 'high'. It was clear that the judge had strayed into the facts of the count on which no evidence had been offered, and that he went outside the indictment period when suggesting that the failure had subsisted over a long period of time, again erroneously focusing on the work done by Mr Price rather than the employees of ATE.

The Court of Appeal also disagreed with the judge in the Crown Court over the likelihood of harm, saying that it was 'medium' and not 'high', noting that the only criticism of the method adopted by the ATE employees was the absence of a risk assessment. That being said, the Court of Appeal stated that it was not a 'low' likelihood (as the defence maintained) because the small number of occasions on which ATE employees conducted this work, alongside the indictment period and the 'accident-free' period of time, was not persuasive when considered against the circumstances of the case.

The judge also erred in stating that factor 2(i) of the guideline applied because his focus was, again, on the work undertaken by Mr Price and not the employees of ATE.

However, the Court of Appeal found that factor 2(ii) was applicable in that the fact of death was a significant aggravating factor (following *Whirlpool*).

£300,000. Taking into account the guilty plea, this was reduced to £200,000 and the appeal, therefore, allowed.

What general principles can be derived from this judgment in terms of drafting bases of pleas which could have wider application?

The case serves as a reminder to all practitioners of the need for care when tendering and accepting a basis of plea. Clearly the Crown Court judge and the Court of Appeal were concerned as to the artificiality surrounding the plea. The plea suggests that the prosecution was keen to avoid a trial and, so long as there was some 'causative' link to the death of Mr Price, agreed to a much-diluted

charge that enabled the defence to maintain its arguments over the duty owed to Mr Price given his distinct relationship with ATE.

There appears to have been a 'shoehorning' of causation into an agreed basis where it is difficult to reconcile given the limited admitted failings. Perhaps if the prosecution had taken this into account from the outset (presumably, the point was made at the interview/submissions stage), then the case could have been put on a more reasonable basis at the start, thus avoiding the need for the basis of plea discussions, the climbdown by the prosecution and the complexities caused for the judge in light of the narrow basis of plea.

Notwithstanding those complexities, the judge failed to follow the basis of plea when considering the level of culpability and harm. Both parties agreed that culpability was 'low' but the judge, obviously looking at the full facts of the case under HSWA 1974, s 3(1), which was not pursued by the prosecution, erroneously concluded it was 'high'.

In relation to the likelihood of harm, the judge, again, ignored the views of both prosecution and defence and deemed it to be 'high'. The Court of Appeal agreed with the Health and Safety Executive and deemed it to be 'medium' given the fact that the admitted breach by ATE was the absence of a risk assessment for the method of work adopted by its own employees.

Interestingly, the Court of Appeal agreed with the decision in *R v Diamond Box Ltd* [2017] EWCA Crim 1904, that an 'accident-free' period was not of itself a factor to show that the likelihood was not high. Accidents can always be waiting to happen and never materialise—that being said, the judge should have stayed true to the indictment period and should not have considered the work carried out by Mr Price as this did not constitute the basis upon which ATE pleaded guilty. These errors led to a distorted sentencing exercise in the Crown Court.

The Court of Appeal's judgment also highlights two important factors that now seem to be gaining traction in sentencing exercises:

- where death is caused by the breach, the courts should move up a harm category and, indeed, towards the top of that category range. This follows the observations of Lord Burnett CJ in *Whirlpool* at para [31]
- the need to reflect a real economic impact, so bringing home the appropriate message to the defendant, as per the observations of the Court of Appeal in *Thames Water* at para [38]. This can also mean moving up a harm category and towards the top of the range

In this case, the starting point went from £40,000 to £300,000 on those two factors alone—a steep increase indeed and one which the defendant would be unlikely to have envisaged when the very narrow basis of plea was agreed.

Interviewed by Evelyn Reid.

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