EVERSHEDS SUTHERLAND

# Reassurance for "linked organisations" in Health and Safety cases

A recent Court of Appeal case offers helpful guidance and clarification as to how a Court of First Instance should approach "linked organisations" in health and safety cases when the Sentencing Guideline is applied.

NPS London Ltd pleaded guilty to an offence under section 3 of the Health and Safety at Work etc. Act 1974. They were fined £370,000 for failing to take reasonably practicable steps to prevent asbestos exposure. The Company appealed against sentence on the basis that the Sentencing Guideline had been wrongly applied.

In the original judgement, the usual four-step test, as set out in the Guideline, was applied. Step two of the test requires the Court to focus on a company's annual turnover to decide on a starting point for a fine. NPS London Ltd, despite falling within the "small company" category (based on their own turnover), was deemed to be a "large company" as the judge had taken into account the resources of a linked parent company with a much higher turnover.

The Court of Appeal re-examined the four-step test and concluded that the approach at step 2 had been wrongly applied stating:

> *"It is the offending organisation's turnover, and not that of any linked organisation, which, at step two of the guideline, is to be used."*

It was also identified that the mere fact that an offender may be a wholly owned subsidiary of a larger corporate (and therefore in practice likely to make funds available to enable the offending company to pay a fine) would not be sufficient reason to depart from the established principles of Company law in piercing the corporate veil.

It was clarified that, in contrast, whether the resources of a "linked organisation" are available to an offender is a factor that may be taken into account during Step three of the test. The third step requires the judge to consider the financial circumstances of the offender in the round, suggesting that the Courts are more likely to take into account the "economic realities" to test if an anticipated fine is proportionate.

In its conclusions the Court of Appeal found that the judge had used the Guideline incorrectly and should have used the table that applied to small organisations. On this basis the fine was reduced from £370,000 to £50,000.

## Takeaway point

This judgment gives some reassurance to companies who are part of large group structures going forward. It indicates that in circumstances where the offending company is a subsidiary of a larger parent company, that circumstance within itself does not permit judges to treat the turnover of the "linked organisation" as if it were the offending company's turnover when determining the starting point for any fine.

For more information please contact health and safety lawyers Paul Verrico, Kara O'Neill or visit our website.

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