Case No: 200906982 A7

Neutral Citation Number: [2010] EWCA Crim 1268

COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT

HHJ RIVLIN QC

T20090568

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 16/06/2010

Before :

LORD JUSTICE PITCHFORD

MRS JUSTICE RAFFERTY

and

HHJ GOLDSTONE QC

- -

Between :

NEW LOOK RETAILERS LIMITED **Appellan**

- and -

THE LONDON FIRE AND EMERGENCY PLANNING AUTHORITY **Responde**

- -

- -

Mr Jonathan Caplan QC and Mr John Cooper (instructed by Bond Pearce LLP - Solicitors) for the **Appellant**

Mr Stephen Walsh QC and Saba Naqshbandi (instructed by **London Fire and Emergency Planning Authority**) for the **Respondent**

Hearing date: 11th May 2010

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Judgment

Lord Justice Pitchford :

1.

This is an appeal with the leave of the single judge against the sentence of a fine in the total sum of £400,000 imposed by HHJ Rivlin QC, the Recorder of Westminster, for two offences charged under the Regulatory Reform (Fire Safety) Order 2005. One of the questions which has arisen in the appeal is whether and to what extent the approach to sentencing for offences under the Order should follow those which apply to offences committed under the Health and Safety at Work Act 1974.

2.

The appellant's principal ground of appeal is that, in assessing the fine appropriate to the offences admitted by the appellant, the sentencing judge failed to give sufficient weight to the fact that neither individually nor cumulatively were the breaches of duty causative of fire, nor did they cause injury or death. It is submitted that if and to the extent the judge applied a higher presumed standard of seriousness to breaches of fire safety responsibilities than he would for breaches of duty towards employees and visitors under the 1974 Act, he fell into error.

Appellant's Business Premises and Circumstances of Fire

3.

The appellant is a private company in the business of retailing clothing for women and children. It conducts business from approximately 612 retail premises in the United Kingdom. It employs over 20,000 staff. In the year 2009 its pre-tax profits were £200m and turnover is approximately £1bn per annum. Accordingly, it was common ground that the judge was not concerned with the appellant's ability to meet any appropriate fine. One of the appellant's retail premises was situated in Oxford Street in the West End of London. New Look held the premises under a lease from the National Farmers Union Mutual Insurance Society Limited with an annual rental of £825,000. It was the responsibility of the tenant, under clause 4.6.1 of the lease, to comply with all recommendations and requirements of the insurers and fire authorities relating to fire precautions and safety within the premises. New Look occupied the basement, ground, first and second floors. The third and fourth floors were occupied by Fresh and Wild. The main entrance was situated to the front of the building in Oxford Street. There were exits and a goods inwards facility at the rear of the premises in Ramillies Place.

4.

On 26 April 2009 a fire broke out, probably in a store room on the second floor. The cause of the fire remains unknown. It was a serious fire which required the attendance of 30 pump fire appliances and engaged the fire services overnight. Approximately 400 people required evacuation, about 150 of whom exited through New Look's store. Oxford Street was closed for 2 days and the passage of traffic was severely limited.

5.

Working opposite the New Look store was a Mr Robert Arrow. From his office on the 5th floor of a building at the corner of Oxford Street and Middle Street, Mr Arrow observed, at about 6.30pm, a bright light behind a second floor window at the front of New Look's store. Smoke was billowing from the second floor windows. Windows were blown out and shoppers were running in front of the main entrance, some of whom were ducking as glass fell to the pavement from the windows above. Mr Arrow happened to be an experienced retail manager and was a nominated fire marshall. He could see no obvious signs of a planned evacuation and in particular observed no fire marshalls organising customers out of the building. Mr Arrow's 999 call was made at 6.53pm, followed 3 minutes later by a call to the London Fire Brigade from Mr William Dontoh, a security guard working for New Look. Eventually the premises were demolished and a new building erected in its place. Following the fire, and before demolition, inspections were carried out by Mr Michael Redmond, Station Manager in the Borough of Westminster and Operational Senior Officer in the Fire Service for the purposes of the current investigation.

6.

New Look was issued with a fire certificate under the Fire Precautions Act 1971 on 29 February 2000. The document certified the existence of means of escape in case of fire, means of securing the safe and effective use of means of escape, means of fire fighting and means of giving warning as shown on plans annexed to the document. It was a specification of the original certificate that there were available, at the rear of the premises, two sets of exit doors giving egress from passages giving protected means of escape.

Legislative Scheme

7.
The Regulatory Reform (Fire Safety) Order 2005, which came into force on 1 October 2006 and replaced regulations made under the Fire Precautions Act 1971, were made under the Regulatory Reform Act 2001 in compliance with the United Kingdom's obligation under the EU directive on fire safety in the workplace and business premises. The scheme of the Order appears in part to be a mirror image, for cases specifically of fire precaution regulation, of the provisions of the Health and Safety at Work Act 1974.

8.
By Article 8(1)(a) the responsible person must take such fire safety precautions as will ensure, so far as reasonably practicable, the safety of his employees. Article 8(1)(b) requires the responsible person to take such general fire precautions as may reasonably be required to ensure that the premises are safe. These are the equivalent for fire safety precautions of sections 2 and 3 of the Health and Safety at Work Act 1974. Articles 8 to 22 set out specific obligations with which, by Article 5 it is the duty of the responsible person to ensure compliance.

9.
Of particular relevance to the current appeal are the following articles:

i)
Article 9 requires the responsible person to "make a suitable and sufficient assessment of the risks to which relevant persons are exposed for the purpose of identifying the general fire precautions he needs to take to comply with the requirements and prohibitions imposed on him by or under this Order". The responsible person is required by Article 9(3) to review the assessment at regular intervals, in particular if there is reason to suspect that the assessment is no longer valid or there has been a significant change in the matters to which it relates. In the event that the reviewed assessment requires changes to fire precautions the responsible person must make them.

ii)
Article 14(1) provides "where necessary in order to safeguard the safety of relevant persons, the responsible person must ensure that routes to emergency exits from premises and the exits themselves are kept clear at all times". It is the obligation of the responsible person under Article 15 to establish and give effect to appropriate safety drills and to nominate a sufficient number of appropriate persons to implement them.

iii)
Article 17 requires the responsible person to ensure that the premises and any facilities, equipment and devices provided should be kept in an efficient state, working order and repair where necessary in order to safeguard the safety of relevant persons. By Article 21 the responsible person must ensure that his employees are provided with adequate safety training, both when they are first employed and when they are exposed to new or increased risks. The training must include suitable precautions and

actions to be taken by the employee in order to safeguard himself and others. The training must take place periodically where appropriate and must be adapted to take account of any new or changed risks.

10.
Offences under the order are created by Article 32. In its relevant parts, Article 32 reads as follows:

> “32(1) It is an offence for any responsible person… to –
>
> (a) fail to comply with any requirement or prohibition imposed by Articles 8 to 22…. where that failure places one or more relevant persons at risk of death or serious injury in case of fire….”

Appellant’s Pleas of Guilty

11.
Under the indictment originally laid the Authority set out some 35 alleged breaches of duty. With encouragement from Judge Rivlin at a case management hearing and the agreement of the parties, the indictment was replaced with a two count indictment charging the appellant with:

i)
A failure contrary to Article 32(1)(a) and Article 9 to carry out a suitable and sufficient assessment of the risks to which relevant persons were exposed for the purpose of identifying the fire precautions needed to comply with the requirements and prohibitions imposed by the order; and

ii)
A failure contrary to Article 32(1)(a) and Article 21(1) to ensure that its employees were provided with adequate safety training.

The appellant accepted and counsel for the Authority opened to the judge a number of individual breaches alleged in the original indictment as demonstrating the failure of the appellant to carry out a suitable and sufficient risk assessment. This was undoubtedly a sensible way to proceed since it ensured that the parties were agreed as to the scope of the appellant’s breaches of duty while keeping the indictment within manageable proportions. The judge imposed a fine of £250,000 in respect of count 1 and a fine of £150,000 in respect of count 2. He ordered the appellant to pay the prosecution’s costs.

Breaches of the Order

12.
A fire risk assessment was prepared, in purported compliance with Article 9 on 16 January 2007 by an employee called Emma Holly. Ms Holly was not a person who was responsible for fire safety. That person was the Health and Safety Manager, Katherine Stewart. The fire assessment was defective in two respects. It failed to identify some of the deficiencies in the store’s fire safety precautions which would expose customers in the event of fire to a risk of injury or death. Secondly, it failed to identify the steps it was necessary to take in order to rectify both those deficiencies and changes to the fire safety precautions which had been certified under the original fire certificate. The Authority relied upon the following matters, in particular:

i)

There was no proper record of persons nominated to assist with fire evacuation. There was no adequate statement of emergency procedures in the event of fire. No one sufficiently or suitably trained was identified as qualified to perform the risk assessment itself.

ii)
There was no sufficient analysis of the existence and efficiency of the fire detection and alarm system.

iii)
There was no clear statement of designated emergency routes and exits.

iv)
There was no identification of working emergency escape lighting.

v)
There was no statement of arrangements for testing the fire alarm system and emergency lighting.

vi)
There was no statement of refresher training for staff and the performance of fire drills.

vii)
There was no statement of arrangements with the neighbouring occupiers, Fresh and Wild, to co-ordinate emergency procedures.

13.
One consequence of the failure of the risk assessment was confusion on the evening of the fire. Instead of being ushered by trained staff to safe escape routes and thereby to designated fire exits, customers made for the main exit by routes which took them under the seat of the fire on the second floor.

14.
Inspection of the building after the fire by Mr Redmond revealed a number of failings in the physical condition of the escape routes which should have been identified in the fire safety risk assessment and rectified. The basement was used as a shop floor. There were two escape routes via exit doors into Ramillies Place at the rear. One of them had, in effect, been eliminated. Building works obscured the sign indicating the escape route both to staff and customers. If there had been a fire in the basement near the front of the premises, the effect of lack of signage would have been to risk the escape of customers in the direction of the fire rather than away and into protected escape routes. During an interview with Katherine Stewart, it emerged that one of the rear exit routes required by the fire certificate in 2000, had been discounted by the appellant without the consequences of that decision being considered.

15.
Along one of the protected routes out of the basement, the corridor was obstructed by plastic crates, some containing stock, stacked to a height of 1.7 metres, creating both a fire hazard and a ‘funnel’ danger to those seeking egress.

16.
The fire exit doors from the basement were controlled by a locking mechanism which required a swipe card to overcome it. The locking mechanism did not appear to be electrically linked to the fire alarm system so as to unlock the doors in an emergency. One, at least, of the doors had the break glass and

emergency release button on the wrong side of the door so that it was inaccessible to those seeking egress from the basement shop floor into the fire escape corridor.

17.

Inspection of the ground floor revealed that there was no natural lighting in the staircase marked A as a means of egress; neither was there any emergency lighting provided, only bare electrical wiring into an open stairwell.

18.

On the ground floor landing serving staircase B were found clothing racks and cardboard boxes. The obstructed landing was regularly used as a storage area. An adjacent fire door was left propped open.

19.

The fire exit door on the first floor landing for staircase B was also propped open. An open fire door overcame the self closing mechanism, thus exposing the escape route, in the event of fire, to increased danger from smoke inhalation.

20.

A number of combustible items were found stored in the landing area serving staircase A along a designated emergency exit route.

21.

It was the prosecution case that these were serious breaches of the order. The decommissioning of the rear fire exit door was of long standing. The risk assessment had identified failures in the designed escape routes via swipe card controlled doors but the action plan was blank. Obstruction of the escape routes with stock appeared to have become a work practice. Experts for the Authority and the appellant pointed to the additional hazards caused to visitors by obstructed and disorganised fire escape routes in the event of fire. The failure of implementation of an emergency escape plan caused customers to proceed by way of the normal exit routes. One customer in the basement of the shop, Ms Weever made a statement in which she said that she received no advice or assistance from members of staff and made her way up the unprotected escalator to the ground floor and exited through the main entrance of the building. She recalled falling glass and the heat of the fire from above. There were ten or twenty people in the basement at the time the fire alarm was sounding; for some reason the fire alarm was, for a time, switched off.

22.

The action plan on the health and safety notice board was suitable for premises comprising a small single storey office and not a premises of this complexity and magnitude. In the case of some employees no training had been received; in the case of others training had not been refreshed. When interviewed as the company representative, Katherine Stewart said that as Health and Safety Manager for the New Look Group, she had direct responsibility for providing policy and procedures relating to fire safety matters. She had designed the fire risk assessment which it was the Branch Manager's responsibility to complete. Emma Holly was not even the branch manager. Ms Stewart was asked why fire exit 4 had been discounted or identified as non-operational to which she replied that she could not tell if it was leading to a point of safety or not. She was unaware of the alteration to the building which had permitted the signage from the shop floor to the exit route door to be obscured. She said that training should be organised by the Manager on an annual basis. This had not occurred. It was not company policy for stock to be stored in fire escape routes. She could not explain why, when the fire alarm sounded on 26 April, the store was not immediately evacuated under the control of the staff. She was unaware of confusion as to which contractor was responsible for making an

electrical link which overcame the swipe card system in the event of fire. She did not know of the fire escape door whose break glass was on the wrong side of the door. No audit of fire safety precautions had been taken by April 2007.

23.
It was the prosecution case that in each respect the appellant had fallen far short of the standards appropriate to their duties under the Order of 2005. The premises had traded for some ten years and the appellants were well aware of their responsibilities. The appellants had failed to respond to its own risk assessment on 16 January 2007 and could not therefore claim to have been unaware of failures within its fire safety system. In particular the Authority attended at the premises on 31 January 2007 when Ms Holly herself indicated the non-availability of the exit doors in the basement. The appellant had no previous conviction for Health and Safety offences but it had received relevant enforcement notices:

i)
On 12 December 2000 an enforcement notice was served in respect of the Oxford Street premises concerning the storage of stock within escape routes. The goods inward area at rear basement level should have been a designated escape route to exit door 4.

ii)
On 19 December 2006 an enforcement notice was served in respect of a store at Bogna Regis. The risk assessment was not current and not site specific.

iii)
On 19 August 1997 an enforcement notice was served in respect of a store at Bishop Auckland. A corridor the rear exit and the exit door itself were obstructed.

24.
On 9 August 2007, some weeks after the present fire, in Peterlee, the appellant was served with a notice that its risk assessment was neither suitable nor sufficient and routes to an emergency exit were obstructed.

Judge's Assessment of Seriousness

25.
Judge Rivlin noted that the appellant's pleas of guilty each acknowledged breaches of duty which, under Article 32(1)(a), "places one or more relevant persons at risk of death or personal injury in case of fire". At page 8 of the transcript of his sentencing remarks Judge Rivlin said:

> "There are in my judgment certain obvious features of aggravation and mitigation in this case. I propose to refer to the main ones. First, aggravating features:
>
> (1) The court is not dealing in this case with the odd breach or merely technical breaches. I am satisfied that we are here dealing with a multitude of very real and deeply disturbing breaches resulting in a system falling a long way below the standard required and to be expected of a company of this size. Some of the complaints are plainly more serious than others but taken all in all the unhappy picture presented by the evidence is of a company almost dismissive of its obligations to ensure safety against fire. As a result of these failures, the potential for real human tragedy was always there. By great good fortune this was avoided, but in my view most importantly the defendant's conduct

inevitably placed at risk the lives of many people on an ongoing basis, which plainly would have been a disaster too awful to contemplate.

(2) This store was situated in the heart of one of the main shopping centres in the country. Quite apart from the risk of injury or even death to which I have referred, the potential for public consternation, inconvenience and loss to other businesses in the area was considerable.

(3) All of the failures that have been drawn to my attention and have been admitted were really simple matters which should easily have been identified and obviated as part of routine risk assessments and appropriate training, and they could have been put right without considerable expenditure. It is, in my view, a significant aggravating feature of the case that even those failures which were identified and reported upon were by and large ignored or disregarded. The action plan following a lamentable assessment in January 2007 is blank."

26.

The judge went on to accept mitigating features advanced by Mr Cooper on the appellant's behalf at page 10 of the transcript as follows:

"(1) As Mr Cooper has said, thankfully no one was killed or injured. Actual consequences or lack of consequences in particular in terms of consequence to say individuals whether staff or customers are always an important consideration when attempting to assess the appropriate sentence. Of course there can be little doubt that luck is bound to form an element in this equation, but there it is.

(2) The defendants have pleaded guilty and accepted responsibility at the first reasonable opportunity.

(3) The defendants have demonstrated and they have now taken significant and hopefully effective steps to remedy the situation in the sense that although they no longer occupy this site they have nevertheless taken steps to ensure that there will be no repetition of an incident such as this. In earnest of this I have been referred to pages 116 to 144 of a bundle of documents provided by the defendant. It is agreed that in all of the defendant's many stores there have been no "notifications" within the last 12 to 18 months."

Discussion of the Appellant's Grounds

27.

Mr Jonathan Caplan QC, on behalf of the appellant, posed the question whether the sentencing judge must have had in mind a principle that a generally higher level of fine was appropriate for breaches of duty in the context of fire safety precaution than was appropriate for breaches of duty under the Health and Safety at Work Act 1974. His reasoning was that the fine imposed exceeded levels previously imposed for Health and Safety Act breaches of duty where death had resulted.

28.

Several previous decisions of the Court of Appeal Criminal Division, and at first instance, were provided to the judge for his consideration before sentence. In his sentencing remarks the judge

acknowledged the views of counsel for the prosecution and the defence that there were no guideline or other cases which directly assisted him in relation to the assessment of fines in respect of offences of this particular kind. He acknowledged the assistance of cases in the health and safety field and the sentencing guidelines for sentencing in cases of Corporate Manslaughter and Health and Safety Offences involving death. It was the judge's view that "for obvious reasons" while those sources were of some assistance, they were only of limited assistance in the circumstances of the present case. He acknowledged the assistance of counsel through their skeleton arguments as to the principles of sentencing to be applied and had taken them into account. The judge noted Mr Cooper's reference to F. Howe & Sons Engineers Ltd [1992] 2 Cr App R(S) 37 which set out the correct approach to sentencing. Mr Cooper had attempted to draw a parallel between the current facts and those of ESB Hotels Limited [2005] EWCA Crim 132 to which we shall later refer. He had also drawn attention to the advice of the court in TDG UK Plc [2008] EWCA Crim 1963 to the effect that assistance can be obtained from the decided cases for the purpose of obtaining a "feel for the appropriate sentence". The judge continued:

> "I have considered all the cases drawn to my attention but when all is said and done each case must be considered on its own facts and on its own merits. The defendants are a major and highly successful private company with an annual turnover in each of the last two years of well over £1bn and pre-tax profits of over £200m. The absence of death and injury is plainly an important matter in this case but I consider there are circumstances in which a court may not need to wait for the onset of human tragedy to send out a clear message that safety of customers and staff, or indeed anyone who may be affected, must be regarded as of paramount importance. In my view, for the reasons I have given, this was plainly a bad case of its kind. It is difficult to assess the appropriate penalty in a case where, on one view of the matter, only a disproportionate fine could have any real impact on defendants as successful as these. Doing the best I can to weigh all of these factors in the balance, I consider that the circumstances of this case must be marked by a substantial fine."

29.

We do not accept that HHJ Rivlin QC either intended or was purporting to set a new standard for sentencing corporations for breaches of fire safety legislation. He clearly accepted that the correct approach was the conventional approach described by the court in FH Howe & Son (Engineers) Ltd. Those principles were helpfully identified and listed by Mackay J when assessing fines for offences committed by Balfour Beatty and Railtrack following the Hatfield rail disaster. His summary was approved and adopted by the court on appeal against sentence by Balfour Beatty in a judgment given by Lord Phillips CJ, as he then was, which we need not repeat here (see R v Balfour Beaty Rail Infrastructure Services Limited [2006] EWCA Crim 186 at paragraph 22).

30.

Mr Caplan submitted that the judge's words in passing sentence imply that he somehow recognised that the fine he was about to impose was disproportionate to the breaches of duty admitted. We do not accept this submission. The judge was making the obvious point that, among others, there were three considerations to be borne in mind when passing sentence upon a corporation between which there could be said, in some circumstances, to be a tension requiring a judgement as to the appropriate balance. The first was the seriousness of the breach; the second was the capacity of the organisation to meet the fine; and the third was the need for the fine to make an impact upon shareholders and senior managers. As Lord Phillips said at paragraph 42 of Balfour Beatty, the fine should:

> “…reflect both the degree of fault and the consequences so as to raise appropriate concern on the part of shareholders at what has occurred. Such an approach will satisfy the requirement that the sentence should act as a deterrent. It will also satisfy the requirement, which will rightly be reflected by public opinion, that a company should be punished for culpable failure to pay due regard for safety, and for the consequences of that failure.”

31.
It does not seem to us that the judge was proposing to set a disproportionate fine. He was simply observing that the appellant could bear any fine he could reasonably impose and that a fine sufficient to make a real impact upon the appellant’s shareholders would be disproportionate to the seriousness of the breach. Mr Caplan attempted to persuade us that a starting point of £600,000 demonstrated that the judge’s approach was to impose a disproportionate fine. We do not agree.

32.
In further support of his submission Mr Caplan drew our attention to the Sentencing Guidelines Council guideline on Corporate Manslaughter and Health and Safety Offences Causing Death. At paragraph 24 the guidance states:

> “24. The offence of corporate manslaughter, because it requires gross breach at a senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine will seldom be less than **£500,000** and may be measured in **millions of pounds**.
>
> 25. The range of seriousness involved in health and safety offences is greater than for corporate manslaughter. However, where the offence is shown to have caused death, the appropriate fine will seldom be **less than £100,000** and may be measured in **hundreds of thousands of pounds or more**.” [original emphasis]

Mr Caplan sought to extract from this guidance an indication of tariff for Health and Safety cases involving death. It follows, he submitted, that what the judge had done was to impose a fine which may have been appropriate to a case in which death had been caused but was not appropriate to a case in which no death or injury had resulted.

33.
This submission assumes that paragraphs 24 and 25 of the guideline created a tariff for all ranges of organisations, however small, however large, and however profitable. On the contrary, at paragraphs 12 to 16 the guideline recognises that assessment of the size of the financial penalty is likely to be affected by the nature of the organisation concerned, its assets and profitability. The Council expressly considered the possibility of making a direct correlation between the size of the fine and the turnover or profit of the organisation. For reasons it explained, that was not an appropriate approach. Nevertheless, at paragraph 22 it is acknowledged that “there will inevitably be a broad range of fines because of the range of seriousness involved and the differences in the circumstances of the defendants.” It follows that the general indications given at paragraphs 24 and 25 must not be assumed to apply as a “tariff” in the case of any organisation, of whatever nature and size, whose breach of duty causes death. It is intended to be and is expressed to be a general indication of current levels of fines but not, as we think Mr Caplan acknowledges, a ceiling against which fines for offences which do not cause death must be measured.

34.
Nevertheless, Mr Caplan set out to demonstrate that a fine of about £500,000 for a breach involving a major public disaster might be appropriate. In R v. Friskies Petcare UK Ltd (No 99/5226/W5 10 March 2000) the Recorder of Leeds, giving the judgment of the court, said at paragraph 26:

"Those reported cases show that fines in excess of £500,000 (as this one was) tend to be reserved for those cases where a major public disaster occurs, for example, the collapse of the railway tunnel constructed under Heathrow Airport, or derailment of railway trains – that is to say, cases where the breaches of regulations put large numbers of the public at risk of serious injury or more. This is not one of those cases."

35.
In Friskies, the deceased suffered electrocution when, as a maintenance engineer, he was exposed to a live electrical circuit in the course of his work. The underlying cause of death was that welding, with potentially lethal voltages, was taking place in a confined, conductive and damp environment. The activity was potentially dangerous. The fine imposed by the judge at first instance of £600,000 was reduced on appeal to £250,000.

36.
The observation of the Recorder of Leeds at paragraph 26 can no longer be taken to reflect judicial attitudes towards responsibility for major disasters. The fine imposed on Balfour Beatty was £7.5m.

37.
Next, Mr Caplan drew our attention to the decision of the court in John Pointon & Sons [2008] EWCA Crim 513. The deceased was exposed in the course of his work to potentially dangerous gases. He died from the inhalation of carbon monoxide resulting in fatal hypoxic brain damage. The industrial system had inherent and obvious dangers and the employer had no established health and safety procedures. The company's attitude to health and safety was careless and irresponsible. The court reduced the resultant fine of £620,000 to £460,000. Mr Caplan uses the decision in Pointon to demonstrate a further occasion upon which the court had imposed a fine of less than £500,000 where death resulted.

38.
The decision to which the sentencing judge made specific reference was ESB Hotels Limited. In that case the owners of the Bolton Moathouse Hotel pleaded guilty to two counts of contravening the requirements of a fire certificate, contrary to section 4 Fire Precautions Act 1971. The breaches comprised permitting bedroom mattresses to be stored in two corridors, one on the third floor and another on the first floor of the hotel. The mattresses were stored on their ends and created a combustible environment. Investigations showed that staff had an incomplete or mixed understanding of the potential fire hazard. The seat of the fire was within the mattresses stored on the third floor corridor. However, the fire was not occasioned by the accidental combustion of the mattresses but by the deliberate act of an employee of the hotel with a grudge against his employer. The employee had been sent to remove the mattresses. Nevertheless, the court upheld a finding by the judge at first instance that the breach of duty by the hotel had made a contribution to the deaths of two guests overcome by smoke. The court concluded as follows:

> "In the light of the fact that the appellant had taken steps to address the breach in relation to the third floor, which steps were disastrously frustrated by the criminal act of its employee, and the failure of the judge to take into account the information as to pre-

> tax profits of the appellant for the relevant year, we have concluded that the amount of fines was too large.”

A fine of £400,000 was reduced to £250,000.

39.
We agree with the judge’s view that ESB did not provide him with any benchmark for the assessment of the fines in the present case. In the appeal of ESB the appropriate level of fine was assessed by a painstaking examination of culpability, causation, means and mitigation. Contrary to the submission made to us, ESB, in our view, provides support for the judge’s observation that assessing fines in these cases is, first and foremost, a fact sensitive exercise.

40.
The judge’s attention was drawn to decisions at first instance, as was ours. A recent decision at the Inner London Crown Court concerned the imposition of a fine of £300,000 on Shell International Limited for breach of the Order of 2005 by failure to carry out a review of a risk assessment. The building was a large London office block (the Shell-Mex building) in which about 2,000 people were employed. The judge made a visit to the premises in order to assess in what regard the original requirements were outdated. Mr Cooper represented Shell International Limited and submitted to Judge Rivlin that it was a decision of not much assistance to the court since the size of the fine implied that corporate offending in the field of fire safety precautions was more serious than in the field of health and safety under the 1974 Act. Notwithstanding this submission to Judge Rivlin we were told that there was no appeal against the fine. The learned judge responded “when it comes to fire, one does not have to think very deeply in order to appreciate the potential for disaster.”

41.
We observe, as did the judge, that Article 32, which creates the offence, specifically requires proof of breaches of a magnitude which would put relevant persons at risk of death or serious injury in the case of fire, however caused. This is a relevant difference between the terms of the Order and the provisions of section 33 of the 1974 Act. However, the magnitude of the risk taken by the defendant will, as in Health and Safety breaches, vary from case to case. The terms of Article 32 do not of themselves imply that fines for breaches of Article 32 should be in a different scale from those imposed under the 1974 Act. As in all cases of risk of death or serious injury in the health and safety field, assessment of culpability and harm will depend upon the particular factual context. We do not consider that Judge Rivlin QC was intending to or did depart from these well known principles.

42.
What the sentencing judge was entitled to recognise was the fact that the nature of the risk against which employees and others were to be protected was the risk from death or serious injury in a fire. Fire can be indiscriminate in its effect and, in the case of an organisation which in the centre of a large city undertakes responsibility for large numbers of visitors to its premises, breach will usually be a very serious matter. It is no different a standard from that owed by any organisation towards large numbers of people whom it is required to protect from injury or death from a known hazard. The judge rightly observed, in our view, that the court does not have to wait until death or serious injury has occurred to express its displeasure at wholesale breaches of the defendant’s responsibilities under the Order. It does not follow, as the judge expressly recognised, that fines will be imposed at the same level for breaches which do and breaches which do not have a causative influence in the fire or in death or serious injury. In other words, we accept that the judge was intending to impose a fine which reflected the seriousness of the offence in its creation of the risk to its visitors. The magnitude

of that risk was demonstrated, not by a death or serious injury, but by a fire in which death and serious injury was fortuitously avoided. What the fire served to illustrate was the magnitude of the risk which the appellant ran with public safety. Exactly the same considerations would have been relevant if, in the case of a near miss, investigation had revealed wholesale disregard by Balfour Beatty and Railtrack for their responsibilities towards rail passengers. Fines would in that eventuality have been imposed for the magnitude of the risk knowingly taken and not for the causation of any tragic consequences.

43.
The judge expressly disclaimed any intention to treat the occurrence of the fire as an element of culpability and expressly treated the absence of serious consequences to life or limb as a significant factor.

Conclusion

44.
Having rejected the appellant's submissions as to the judge's approach to the task of assessing the seriousness of the offences we turn to the level of the fines. The judge reached a starting point of £600,000 on the basis of the aggravating and mitigating factors which he had identified before applying the standard discount for timely pleas of guilty. At page 9G-10B of the transcript of his sentencing remarks (paragraph 25 above), the judge identified as an aggravating factor the fact that the store was situated at the heart of one of the main shopping centres in the country. There was thus "the potential for public consternation, inconvenience, and loss to other businesses in the area". We have considered whether in expressing himself as he did the judge was indicating that the fire itself was an aggravating feature of the offences. If so it would have been inconsistent with the judge's express acceptance that there was no evidence that the appellant was responsible, by means of these breaches of duty or otherwise, for the fire which occurred. Having re-read his remarks in their full context, it is in our view much more probable that Judge Rivlin intended only to highlight the potential for serious wider consequences of the appellant's breaches of duty having regard to the situation of the shop in an area densely occupied by shoppers. He was not intending, having expressly abjured such an approach, to punish the appellant for the actual consequences of the fire for which it was common ground the breaches were not responsible.

45.
We have, further, examined the mitigating factors accepted by the judge. They included a responsible approach to the fire authority's investigation and an immediate and cooperative approach to remedial action. However, we share the judge's scepticism, expressed during argument, that the appointment of a single fire safety advisor for a group of 600 and more shops was a sufficient response to the magnitude of the obligation.

46.
Having reached the conclusion that the sentencing judge made no error in principle or of approach to the issues of seriousness and culpability, we consider, finally, whether the fines imposed were manifestly excessive. It is not submitted that the fines were disproportionate to the appellant's means. The breaches of duty acknowledged by the appellant fell into two distinct categories, first, deficiencies in the appellant's provision and maintenance of fire safety precautions and, secondly, failure to provide any adequate training and re-training schemes not just for essential health and safety staff but for employees generally. We share the judge's view that the appellant's performance of its fire safety duties in a large department store in the centre of London was lamentable. The fines were, we

recognise, severe, but they were not in our judgment manifestly excessive and the appeal is dismissed.