Neutral Citation Number: [2019] EWCA Crim 1691

Case No: 201802922/A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM IPSWICH CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2019

Before :

LORD JUSTICE DAVIS
MR JUSTICE WILLIAM DAVIS
and
MR JUSTICE JULIAN KNOWLES

- -

Between :

BUPA CARE HOMES (BNH) LIMITED	**Appellant**
- and -	
	Respondent
REGINA **(Upon the prosecution of Her Majesty's Inspectors of Health and Safety**	

- -
- -

Richard Matthews QC and Eleanor Sanderson (instructed by **n/a**) for the **Appellant**
Jonathan Ashley-Norman QC (instructed by **HSE**) for the **Respondent**

Hearing dates: 4 July 2019

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Approved Judgment

Mr Justice Julian Knowles:

1. This is an appeal against sentence with the leave of the Full Court.

2. On 14 June 2018 at the Crown Court at Ipswich the Appellant company, which we shall refer to as BUPA (BNH), was sentenced by Her Honour Judge Peters to pay a fine of £3 million having earlier pleaded guilty to an offence contrary to s 3(1) of the Health and Safety at Work, etc Act 1974 (the 1974 Act). That imposes a duty on an employer to conduct its undertaking in such a way as to ensure, so as 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 Kenneth Ibbetson, aged 84, from Legionnaire's disease on 23 June 2015. At the time of his death Mr Ibbetson was a resident of the Hutton Village Nursing Home (the Home), which was owned and operated by the Appellant. He had been a resident at the Home for a little under three months when he sadly died. Nothing in this judgment is intended to minimise the loss which his family has suffered.

The facts

3. Legionnaires' disease, also known as legionellosis, is a form of pneumonia caused by any type of *Legionella* bacteria, most commonly *Legionella pneumophilia*. The disease is named after the outbreak where it was first identified, at a 1976 American Legion convention in Philadelphia. It is usually spread by breathing in mist that contains the bacteria. The threat posed by Legionnaires' disease, especially to the elderly and those with compromised immune systems, is well-known. It is potentially deadly. The bacteria can proliferate in water systems, and consequently it is necessary for such systems to be maintained in a way which minimises any chance of the bacteria developing.

4. The prosecution's case was that this was not done at the Home as the result of multiple systemic maintenance failures over a number of years. It is right to make clear at the outset, however, that the judge found that these maintenance failures were not the cause of Mr Ibbetson contracting the disease. Tests showed that he had been infected by the same strain of *Legionella* bacteria which was present in a tap in his bathroom. However, the judge concluded (having heard evidence at a *Newton* hearing) that the most likely cause of his infection was the failure to flush and disinfect pipes and fittings that had been installed during refurbishment works at the Home which concluded shortly before Mr Ibbetson became a resident. We address the evidence before the judge later.

5. The prosecution said that the risk posed by *Legionella* was well-known within the Appellant company, and it had its own systems intended to control that risk. It obtained the support of specialist contractors, Advance Environmental Ltd, to help control the risks. The prosecution said that the breach of duty by the Appellant was the failure to take sufficient steps to guard against the risks posed by the proliferation of the bacteria within the water system at the Home. It said that there were multiple warning signs going back to at least 2012, but these had either been ignored or not dealt with properly. A culture developed which meant that *Legionella* warnings were inadequately understood or acted upon.

6. It is necessary at this point to say something about the corporate structure of which the Appellant is a part, as explained in the Appellant's Expanded Basis of Plea dated 16 March 2018. It is also necessary to say something of the procedural history. Both of these matters are relevant to issues on this appeal.

7. BUPA stands for British United Provident Association. British United Provident Association Limited is the ultimate owner of what are worldwide and distinct medical, care and hospital service providers. 'Care Services' is the BUPA business unit whose undertaking extends to the provision of BUPA care homes within the UK. BUPA Care Homes CFG Plc (BUPA CFG) is the immediate parent company of the Appellant, BUPA (BNH).

8. Informations were laid against both the Appellant and against British United Provident Association Ltd in the Chelmsford Magistrates Court for the s 3 offence. The Appellant pleaded guilty at the first opportunity on 27 September 2017 on a basis of plea dated 17 September 2017 and was committed to the Crown Court for sentence. British United Provident Association Ltd pleaded not guilty and in due course was committed to the Crown Court for trial.

9. The Appellant's basis of plea was not acceptable to the prosecution for the reasons that it set out in a response dated 31 October 2017. Paragraph 2 of that document stated the prosecution's position:

> "The public interest requires the prosecution of the First Defendant [British United Provident Association Limited]. The Second Defendant [BUPA BNH] is a wholly owned subsidiary of the First. The Second Defendant operated under the instruction of the First, subject to the supervision and monitoring of the First, and it was the responsibility of the First to guard against, identify and correct deficiencies in the control of *Legionella* by the Second Defendant. The immediate operational failures were those of the subsidiary Second Defendant, but the failures of management and control which permitted the creation of a deficient culture at Hutton Village, were the failures of the parent First Defendant."

10. The prosecution's response went on to ascribe particular failures to British United Provident Association Ltd including, for example, the failure to use the refurbishment works (for which it was the client) as an opportunity to rectify the identified deficiencies in the maintenance of the water system at the Home ([7)]. Paragraph 12 of the response therefore invited both corporate defendants to plead guilty on a 'full facts' basis.

11. There was a hearing at the Crown Court on 5 March 2018 at which submissions concerning the liability of a parent company were made.

12. In a Note dated 8 March 2018 the following was accepted on behalf of both corporate defendants:

> "b. Any health and safety failings in respect of the systems in respect of the control of risks from legionella and/or its implementation at Hutton Village can properly be reflected in the

> sentencing of BUPA Care Home (BNH) Ltd; the extent of such failings and the extent to which they can properly be held to have been causative breaches of the death of Mr Ibbetson can be determined by the Judge at a *Newton* hearing.
>
> c. The Court can and should be informed of the position of BUPA Care Homes (BNH) Ltd as a wholly owned subsidiary and that sentence can and should reflect the 'economic realities' of the BUPA group (in accordance with the guidance given by Lord Burnett CJ in the recent case of *Whirlpool* [2017] EWCA Crim 2186)."

13. The prosecution submitted a Note dated 12 March 2018 rejecting the submissions that had been made on 5 March 2018. However, the prosecution invited the Appellant to submit a revised basis of plea addressing five issues: (a) the seriousness of the offence; (b) the parent/subsidiary financial position; (c) causation; (d) costs; (e) any other matters. Paragraph 6 went on to say:

> "A revised Basis of Plea, if it is to prompt a reassessment of the public interest in the case against the parent [British United Provident Association Limited], would have to reflect the seriousness of the offence. This lies, in the Crown case (sic), in the systematic failures within the Group. The Group had the relevant information and repeatedly failed to act upon it itself, or to ensure that it was acted upon by the subsidiary."

14. In this paragraph, after the first reference to 'Group', there was a footnote which said: 'A deliberately neutral phrase, but for the avoidance of doubt, for which the parent was responsible.'

15. Paragraphs 9 and 10 set out the financial position of the Appellant, and also British United Provident Association Limited. The BUPA Annual Report showed total revenues for 2015 as nearly £10 billion. The following year its revenues were over £11 billion. Paragraph 11 then said:

> "In circumstances where any revised Basis of Plea from the subsidiary expressly invites the Court to reflect in the sentence the wider Group failures, that Basis must expressly concede that this is one of those exceptional cases within Step Two of the Guideline where the resources of the parent as well as the subsidiary can properly be taken into account (*R v Tata Steel UK Ltd* [2017] 2 Cr App R (S) 29)."

16. In response to this, the Appellant submitted an Expanded Basis of Plea dated 16 March 2018. In that document the following was said:

> "7(c). The sentencing court is entitled to take account and reflect how this failure by BUPA BNH was part of a failure to fully implement a system for centralised oversight of legionella control measures within care services.

The parent/Subsidiary Financial Position

> 8. As set out above, it is accepted that the sentencing court can properly reflect the economic realities of BUPA BNH, ie reflect how it is a wholly owned subsidiary with its ultimate parent owner being British United Provident Association Ltd, however it will be submitted that any reflection of this matter would properly be considered at Step Three [of the relevant Sentencing Guideline, which we consider later] (in accordance with the more recent guidance given by Burnett LCJ expressly on this point in the case of *Whirlpool UK Appliances Ltd* [2017] EWCA Crim 2186), although whether at Step Two or Step Three and how so is a matter entirely for the sentencing judge."

17. Following this, the case against British United Provident Association Limited was discontinued. The Respondent's Notice in response the Appellant's Combined Advice and Grounds of Appeal dated 9 July 2018 at [11] made clear that this decision followed the concession that the parent's financial position could be taken into account in the Appellant's sentencing.

The Sentencing Guideline

18. Before turning to the judge's sentencing remarks and the Appellant's grounds of appeal, it is convenient to consider the Sentencing Council's Definitive Guideline, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences* (the Guideline). As with all Sentencing Council Guidelines, the duty of the court in respect of the Guideline is contained in s 125 of the Coroners and Justice Act 2009:

> "(1) Every court - (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case … unless the court is satisfied that it would be contrary to the interests of justice to do so."

19. The Guideline assists in an exercise of structured judgment; it is not a straitjacket: Lord Burnett of Maldon CJ, in *R v Whirlpool UK Appliances Ltd* [2018] 1 WLR 1811, [12].

20. This Guideline has been considered recently by this Court in three cases in particular: *R v Tata Steel UK Ltd* [2017] 2 Cr App R (S) 29; *Whirlpool Appliances Ltd*, supra, and *R v NPS London Ltd* [2019] EWCA Crim 228. The following summary is gratefully adapted from those decisions.

21. 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.

22. Consideration of 'harm' follows in the context that the offences under ss 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 seriousness of the harm ranges from Level A (death/physical or mental impairment resulting in lifelong dependency on third party care for basic needs/significantly reduced to life expectancy) to Level C (all other cases not falling within Level A or Level B). The likelihood of harm is to be categorised as either High, Medium or Low. The hierarchy of harm is then divided into four categories by the Guideline, as set out in the table in the Guideline to which the reader is referred. For example, for seriousness of harm at Level A, with a medium likelihood of harm, then the harm category is Category 2.

23. 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…"

24. 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). The defendant is expected to provide the court with relevant financial information to enable this exercise to be carried out. In respect of each, there is a table bringing together the four possible levels of culpability and four possible harm categories.

25. It is important to emphasise that the Guideline provides that normally, only financial information relating to the organisation before the court will be relevant, unless 'exceptionally' it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.

26. 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.

27. In *Whirlpool Appliances Ltd,* supra, Lord Burnett of Maldon CJ observed at [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."

28. He added at [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."

29. 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 s 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: (a) profitability. Adjust downwards for a small profit margin and upwards for a larger profit margin; (b) any quantifiable benefit derived from the offence; (c) whether the fine will put the offender out of business. Such an outcome might be appropriate in some cases.

30. There are further steps under the Guideline which are not relevant for the purposes of this appeal, save that Step Six provides for the usual reduction to the overall fine arrived for a guilty plea.

The judge's findings on sentencing

31. As we have said, the judge heard evidence at a *Newton* hearing on the extent of the Appellant's failings and the extent to which they could properly be held to have been causative breaches of the death of Mr Ibbetson. The judge's findings of fact in her sentencing remarks were as follows.

32. She said there was no dispute that Mr Ibbetson contracted the disease at the Home, and that the source of the bacteria was likely to have been an aerosol from his *en suite* hot tap. That tap was sampled the day after his death and was found to be positive for the *Legionella* bacterium.

33. The risk posed by *Legionella* was well known and the Health and Safety Executive had published guidance on the management of water systems to reduce, so far as possible, the risks it poses. The Appellant, as providers of care for a population which is particularly susceptible, was well aware of the risk and it accepted that it knew that it had to take steps to reduce that risk as far as possible.

34. The judge correctly said that the first question for her was the extent of the Appellant's failures and where they should be put within the Guideline. As we have explained, Step One required the judge to determine the level of culpability. The prosecution said that it was high, whereas the defence said it was only medium. The prosecution said that the Appellant had fallen far short of the appropriate standard by allowing serious breaches to subsist over a period of time, whilst the defence said that systems were in place but these were not sufficiently adhered to.

35. The judge found the risks posed by *Legionella* at the Home had been recognised as long ago as 2012 by Femi Akinola, the Appellant's estate surveyor, who had carried out a risk assessment which noted that the steps taken to tackle it were insufficient and that further steps were required. Tests on the hot water tap in Mr Ibbetson's room undertaken after his death showed readings far in excess of safe limits.

36. Next, the judge considered the evidence in relation to the Appellant's management structure in relation to *Legionella* risks. Her conclusion was that the management system had devolved all responsibility down to an untrained person (namely, the Home's manager), supported either by no permanent or trained maintenance man at a time when plumbing was recognised to be a problem and the checks were known to have been falsified. This was a reference to records that had been falsified by a maintenance man who was dismissed in 2014. She said this was a serious and significant failing.

37. The next issue which the judge considered were the risk assessments, and maintenance systems in place. She said that the Appellant conducted its own internal biannual risk assessments on each home. Whilst she found that some work was done in respect of matters identified by risk assessments, there was no record of what was done on each occasion.

38. In relation to training, the judge found that the Home's manager, to whom responsibility for *Legionella* had ultimately been devolved, had not had appropriate training. The maintenance man appointed at the beginning of 2015 was in the same position. The previous occupant of the post was dismissed in 2014 *inter alia* because of concerns whether he was conducting water checks correctly and because he had falsified records. The judge noted that there had been inadequate training at a number of the other BUPA care homes.

39. The judge then considered what the risk assessments carried out from 2012 found and how identified problems had been tackled. Her review of the evidence revealed a number of failures including, for example, a failure to flush the system regularly and a failure to carry out water temperature checks. The latter are particularly important in *Legionella* prevention because the bacteria can only grow within a certain temperature range. Overall, the judge found that there had been numerous identified problems, many of which were risk factors for the proliferation of the bacterium, few or none of which were adequately tackled.

40. Next, the judge turned to the refurbishment of the Home. The business case for this was signed off in October 2014. This noted that the Home had a plumbing problem, the hot water temperatures were unsatisfactory, and the water flow was also unsatisfactory. However, the judge found that the refurbishment, which began in December 2014, did not address any of the plumbing issues. In fact, the judge found that the refurbishment made matters worse because, for example, thermostatic mixing valves (TMVs) (used to prevent scalding) were boxed in during the work, making inspection of them difficult. It is important that these are regularly flushed through, inspected, serviced and cleaned to ensure no build-up of organic or other matter which might encourage bacterial growth. Earlier, in 2014, a number of these had been found to be blocked with slime. Overall, the judge found that no-one ever intended the refurbishment to solve the plumbing problem, and that in fact it made it worse, and that it may have contained the error which caused the outbreak which led to Mr Ibbetson's death.

41. A standard issued in 2012 required flushing and disinfection after construction works, because of the risk that dirt or organic matter might be introduced into pipes which could aid bacterial growth. The judge found that no such flushing and disinfection took place after the refurbishment work and the Appellant never sought certification to show that it had been done.

42. The judge said that in February 2015 (a month or so before Mr Ibbetson moved in) Jonathan Wilks of Advance Environmental came to do his annual check. He had a copy of the 2014 assessment. He noted the vulnerable population, and said that low water flow and return temperatures, both identified in 2014, had not been dealt with. He also noted a range of other issues.

43. Overall, the judge's conclusion on culpability was as follows:

> "In my view BUPA Care Homes fell far short of the appropriate standards by allowing problems of which they were aware and which had a direct bearing on the management of *Legionella* risk to persist over a lengthy period. The earliest failings I saw evidence of were in 2012 …
>
> In my view these failings over this period of time, taken together, amount to serious failings in a system that, at that time, took too much pride in delegation and devolution and too little time in sorting and scrutinising when problems arose …
>
> … the culpability in this case is properly described as more than merely a lack of sufficient adherence or implementation.
>
> Having reminded myself of the manner in which the Sentencing Council characterises high culpability and medium culpability, I've concluded on the basis of the entirety of the evidence I have heard and read that I am sure it's right to approach this decision on the basis that the culpability level is high."

44. The judge then turned to her assessment of harm. She said the seriousness of the harm risked was death, and that that had not been disputed. She then turned to the

question of the likelihood of that harm. Having considered the statistical evidence about mortality from Legionnaires' disease, she concluded that the risk was low, which meant that the harm category in the relevant table was Category 3.

45. The judge then considered the two questions: (a) whether the offence exposed a number of workers or members of the public to the risk of harm. The greater the number of people, the greater the risk of harm; (b) whether the offence was a significant cause of actual harm, and to adjust the harm category (or not) depending upon the answers to the questions.

46. As to the first question, the judge said that she was in no doubt, and there was no dispute, that the offence exposed a number of employees and residents to the risk of harm. She said a number of different outlets had tested positive.

47. The judge then considered the second question, namely, the issue of causation in relation to Mr Ibbetson's death, which she said was a more complicated question. She found that the failures she had identified did not themselves contribute to the circumstances which led to the exposure of Mr Ibbetson to *Legionella*. Based upon scientific tests carried out after his death which found, for example, that the *Legionella* that was found was downstream of the TMVs rather than upstream, that the most likely cause of the proliferation of the bacteria which led Mr Ibbetson's death was a failure to flush and disinfect the pipes after the refurbishment work, which may have led to organic matter being introduced into the pipes which aided bacterial growth. She said the Appellant was at fault for not obtaining a certificate to show that the work had been done, but that was not, of itself, a significant cause of the actual harm which occurred, namely Mr Ibbetson's death.

48. Overall, the judge said that it was right to go up a category in terms of harm to Category 2 so that, overall, the case was one of high culpability, with the harm in Category 2.

49. The main grounds of appeal argued by Mr Matthews QC on behalf of the Appellant relate to Steps Two and Three of the sentencing framework established by the Guideline. We turn to how the judge addressed those steps.

50. In relation to Step Two, the judge first identified the range of fine in the relevant table in the Guideline. The Appellant's turnover in 2015 was £77 million. In 2016 its turnover was £89 million (although, as the judge noted, it made a loss due to re-evaluation of various assets). Thus, under the Guideline, it ranked as a 'Large Organisation' which meant the starting point was a fine of £1.1 million with a range of £550,000 to £2,900,000. That starting point is based on an organisation with a turnover of £50 million.

51. The judge then said:

> "In my view, given my assessment of where this sits in terms of harm and culpability within the range, together with consideration of the turnover of BUPA Care Homes (BNH) Ltd, there is very good reason to go up from that start point within the range.

> This is not purely mathematical or arithmetical exercise and I wish to be clear that I have not approached it in that way. But in the same way as one moves around guidelines based upon different factors in other types of offences, so it is right to do in cases such as these."

52. The judge then turned to aggravating and mitigating factors. She noted the Appellant had one previous conviction, but not related to *Legionella*, in 2011. She also noted that there had been an improvement notice in relation to *Legionella* risk management in 2009 in relation to another company within the BUPA group.

53. In relation to mitigation she said there had been significant steps to address the cause of the offence and that better measures were now in place. She said there had been remorse within the company albeit it had not been well expressed.

54. The judge concluded:

> "Taking account of all the relevant factors at this stage and my conclusions on culpability and harm, at the conclusion of Step Two I reach a fine of £2,250,000."

55. In relation to Step Three, the judge said that she had considered the decisions of the Court of Appeal in *Tata Steel UK Ltd*, supra, and *Whirlpool Appliances Ltd*, supra. We will return to these later. She said that it was accepted that she was entitled to properly reflect the Appellant's economic realities as being ultimately owned by British United Provident Association Ltd. In saying this, the judge was plainly referring to the concessions made by the Appellant in return for which the case had been discontinued against its parent. We addressed these earlier.

56. The judge then summarised submissions about the nature of the parent company, and the fact that the profits of subsidiary entities are remitted to the parent company which then reinvests them into the business to meet its objectives. But the judge also noted that the entire group's revenue in 2016 was circa £11 billion and in 2017 it was around £12 billion, with a quarter of that figure coming from care and health and other revenues. The profits were around £485 million in 2017, £386 million in 2016, and £278 million in 2015. In the UK the revenue in 2017 was £287 million with and underlying profit of £231 million.

57. The judge concluded:

> "I have noted the directors' remuneration. I have noted the global benefit derived from the BUPA Foundation. I accept the public good in providing the service that they do, but there's no question that this is a profitable organisation, both BUPA as a whole and this particular subsidiary generally.
>
> All of that being so, and also taking a step back as the guidelines require, to ensure that my initial fine fulfils the purposes of sentencing, it is my view that the conclusions I reach based upon the turnover of the subsidiary, the usual profitability of the subsidiary, the economic realities of the group as a whole, the

> mitigating aspects of the group, including the BUPA Foundation and the lack of shareholders, the need to consider the extent to which I consider the defendant company fell below the required standard, the need to have a real economic impact to bring home to management the need to comply with the legislation and the mitigation of the steps taken to remedy the failings, based upon all of that, and accepting this is a case which is high culpability and harm category 2, it is my view that the correct approach is to increase the start point.
>
> I particularly consider that necessary, despite their reaction since the event, for the very good reason of bringing home to management the need for these matters to be taken seriously and dealt with properly.
>
> I've already outlined a summary of the finances of this company. BUPA as a whole is an enormous organisation and has huge revenues. In order to meet the aims of sentencing and to reflect all of these considerations, I consider it proper at step three to elevate the start point from £2,250,000 to one of £4,500,000 which, in my view, meets the justice of all of these points."

58. The judge then gave the full one-third credit for the Appellant's guilty plea, to produce the fine she imposed of £3 million.

Grounds of appeal

59. On behalf of the Appellant, Mr Matthews made two main submissions.

60. First, he said that in elevating the starting point at Step Two from £1.1 million to £2.25 million, the judge engaged in double counting because in the course of so doing she said this was done to reflect, 'where this sits in terms of harm and culpability within the range together with a consideration of the turnover of BUPA Care Homes (BNH) Ltd'. He says that harm and culpability had already been taken account of at Step One, and thus that the judge engaged in 'double counting' (Ground 1).

61. Second, he said that at Step Three the judge wrongly adjusted the fine on the basis of the turnover of British United Provident Association Limited, and that this was contrary to the approach in *Tata Steel Ltd*, supra, and *Whirlpool Appliances Ltd*, supra (Ground 2).

62. On behalf of the Respondent, in relation to Ground 1, Mr Ashley-Norman QC said that the judge was entitled to take into account harm and culpability in fixing a starting point within the indicated range. He pointed to the fact that in relation to Step Two, the Guideline say at p6 that 'the court is required to focus on the organisation's annual turnover or equivalent to reach a starting point for a fine' and that '[t]he court should then consider further adjustment within the category range for aggravating and mitigating features.' He further points out that at p9 of the Guideline aggravating and mitigating features are listed, but that these are expressed as being non-exhaustive, and that the judge is required to consider whether 'any combination of these, or other

relevant factors, should result in an upward or downward adjustment from the starting point.'

63. In relation to Ground 2, he submitted that the judge was entitled to adjust her starting point to reflect the Appellant's 'economic realities' as the wholly owned subsidiary of a company whose turnover at the relevant time was around or in excess of £11 billion. He said this had been accepted by the Appellant earlier in proceedings during discussions on the basis of plea, as a result of which the case had been discontinued against the parent. He said the judge took into account all relevant factors and that her decision cannot be faulted. Importantly, however, Mr Ashley-Norman conceded that the basis of plea did not of itself shut out Mr Matthews from arguing that the judge went wrong in increasing the fine as she did by reference to the large financial resources of the parent, especially as the judge did not expressly or clearly rely on it herself for that purpose.

Discussion

Ground 1

64. We do not agree with the Appellant's submission that at Step Two under the Guideline a sentencing judge is only concerned with turnover and the aggravating and mitigating features set out in the table on p9, and not with factors relating to harm and culpability. In fairness to Mr Matthews, he largely conceded this during the course of argument, although he did nonetheless suggest that the judge's starting point did not properly reflect the fact that there is no upper limit of turnover for large organisations, and therefore the range of fines specified could apply to orgacupnisations with turnovers a number of multiples of the Appellant's turnover, and hence that the judge's starting figure, being far above the starting point, was too large.

65. We do not consider that the judge went wrong at this stage of her application of the Guideline. As the Lord Chief Justice observed in *Whirlpool Appliances Ltd*, supra, at [12] the Guideline is intended be flexible, and flexibility is necessary in order to meet the broad range of circumstances which may fall to be considered in relation to offences under ss 2 and 3 of the 1974 Act.

66. Although Step One requires an assessment of culpability in the range very high to low according to the factors listed at p4 (and, as the preamble makes clear, only those factors), we do not consider that that means that, in selecting a starting point within the appropriate range at Step Two, the judge must leave out of account, or not make, a quantitative assessment of the extent of the harm and culpability involved in the offending. For example, it seems to us that an offender whose culpability is high because of the presence of a number of listed factors ought in principle to be punished more severely than an offender whose culpability is high because of the presence of just one factor. Put another way, it seems to us that the presence of multiple culpability factors can properly be regarded as matter capable of increasing the starting point within the indicated range of fine as set out in the relevant table for the size of the organisation involved.

67. As we have said, the judge considered the two questions (a) whether the offence exposed a number of workers or members of the public to the risk of harm. The greater the number of people, the greater the risk of harm; (b) whether the offence was

a significant cause of actual harm, and to adjust the harm category (or not) depending upon the answers to the questions, and answered the first affirmatively and the second negatively. She increased the harm category to Category 2.

68. In his oral submissions, Mr Matthews referred us to the relatively recent case of *Health and Safety Executive v Faltec Europe Ltd (Practice Note)* [2019] 4 WLR 77. This was an appeal against the fine imposed in respect of three health and safety offences, two concerning exposure to *legionella* bacteria and outbreaks of Legionnaires' disease, the third relating to an explosion in a flocking machine. The appellant company had been fined a total of £1.6 million for these offences. He referred us to [75] of Gross LJ's judgment where he discussed this aspect of the Guideline. We did not, with respect, find this passage to be of assistance on the issues before us and we do not consider the judge erred in increasing the harm category.

69. In this case, the judge impressively analysed the evidence that she had heard and concluded that there had been multiple failures by the Appellant over a number of years which had exposed the Home's residents to the risk of *Legionella* infection. In our judgment, this was a very bad case with all of the factors in the 'High' culpability bracket being present, namely: (a) failing to put in place measures that are recognised standards in the industry; (b) ignoring concerns raised by employees or others; (c) failing to make appropriate changes following prior incidents exposing risks to health and safety; (d) allowing breaches to subsist over a long period of time. These matters justified a substantial increase above the starting point of £1.1 million in the relevant bracket. Given that this figure relates to an organisation with a turnover of £50 million, and that the Appellant's turnover was very significantly in excess of that, we do not consider that the judge's starting point at Step Two of £2,250,000 can be faulted in light of her conclusion that a significant number of people were put at risk.

70. The first ground of appeal therefore fails.

Ground 2

71. In essence, Ground 2 raises the question if, and to what extent, the judge was properly able to reflect the fact that the Appellant was the wholly owned subsidiary of a company (British United Provident Association Limited) with a turnover of circa £11 billion and to uplift the fine accordingly.

72. Before turning to the substance of Ground 2, we firstly need to discuss some of the relevant case law on sentencing in health and safety cases, namely, *Tata Steel UK Ltd*, supra, *Whirlpool Appliances Ltd*, supra; and *NPS London Ltd*, supra.

73. In *Tata Steel UK Ltd*, supra, this Court considered an appeal against sentence by the appellant company (Tata) against a total fine of £1.985 million for two health and safety offences in which workers had been injured. Tata's ultimate parent was Tata Steel Limited (TSL) and Tata's activities were managed as an integral part of its parent's activities. Tata was a 'very large organisation' under the Guideline with a turnover of around £4 billion, as opposed to £50 million for a 'large organisation'. The Court noted at [33] that although during the relevant period Tata's turnover had been around the £4 billion already noted, in the year ended March 2015 it had recorded a loss after tax of £851 million. The evidence was that ultimately Tata had the financial support of its parent, TSL in order that it continue in operational

existence. Having determined the level of fine by reference to Tata's turnover, the judge did not make a downward adjustment at Step Three in order to reflect the fact that despite its very large turnover, the appellant was actually a loss-making business. The Court said at [57] that the judge had been right to take TSL's resources into account as an exceptional case within Step Two, given that the resources of TSL were of the first importance so that Tata could continue to prepare its accounts on a 'going concern' basis, and thus he was correct to have had regard to them when considering whether or not to make a downward adjustment at Step Three. At [58] the Court said that he had been right not to make such an adjustment because Tata's losses were borne by TSL.

74. The next case is *Whirlpool Appliances Ltd*, supra. The appellant company was sentenced to a fine of £700,000 arising out of the death of a self-employed contractor in an accident at one of the appellant's factories. One of the issues was what the impact should be on the fine of relatively poor profitability in the context of an organisation with a substantial turnover. The appellant had a turnover of £672 million in 2014 and a pre-tax profit of £24.7 million. In 2015 its turnover was in excess of £710 million but it made a loss of £165 million due to two exceptional items. The judge did not apply Step Three, in other words, he did not consider the financial circumstances of the company. The Court commented at [40] that Step Three 'does not provide an invitation to the court to disregard what has gone before, but to adjust any conclusion to reflect the economic realities.' The Court said that as the appellant was a fundamentally profitable company, no adjustment for its 2015 losses was required.

75. In *NPS London Ltd*, supra, the appellant company was fined £370 000 for a health and safety offence. It was a small organisation within the Guideline, its turnover at the relevant time being £5 – 6 million. It was 80% owned by a larger company (the NPS parent) and 20% by the London Borough of Waltham Forest. The NPS parent's turnover was £125 million. For the purposes of the Guideline the judge treated the appellant as a large organisation. He reached that conclusion because of the passage in the Guideline at Step Two which states that, exceptionally, the resources of a linked organisation can be taken into account, and he regarded the NPS parent as such a linked organisation.

76. The principal ground of appeal was that the judge was wrong to treat NPS London as a large organisation for the purposes of the sentencing guideline. The Court said at [14] this raised two questions. The first was whether the judge was entitled to regard the NPS parent as a 'linked organisation' whose resources could properly be taken into account for the purposes of sentencing its subsidiary company, NPS London. The second question was whether, if so, it had been legitimate to take this consideration into account as the judge did by treating the relevant table to use in sentencing as the table applicable to large organisations

77. This Court took the second question first. Leggatt LJ said at [15] – [16] (original emphasis):

> "15. … We think it clear that the judge was wrong to read the guideline as entitling him to treat NPS London as, or as if it were, a large organisation for the purpose of sentencing. 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 to identify the relevant table. This reflects the basic principle of company law that a corporation is to be treated as a separate legal person with separate assets from its shareholder(s). There are circumstances, restated by the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, in which it is permissible to 'lift the corporate veil', and in such circumstances it would be legitimate to treat a corporate defendant as part of a larger organisation for the purpose of sentencing in this context, in the same way as, for example, it can be appropriate to lift the corporate veil in criminal confiscation proceedings: see *R v Boyle Transport (Northern Ireland) Ltd* [2016] 2 Cr App R (S) 11. An example of a case where it would be appropriate to treat the relevant figure for turnover as that of a parent company might be one where a subsidiary had been used to carry out work with the deliberate intention of avoiding or reducing liability for non-compliance with health and safety obligations. The mere fact, however, that the offender is a wholly owned subsidiary of a larger corporation or that a parent company or other "linked" organisation is in practice likely to make funds available to enable the offender to pay a fine is not a reason to depart from established principles of company law or to treat the turnover of the linked organisation as if it were the offending organisation's turnover at step two of the sentencing guideline.
>
> 16. By contrast, whether the resources of a linked organisation are available to the offender is a factor which may more readily be taken into account at step three when examining the financial circumstances of the offender in the round and assessing "the economic realities of the organisation". It may certainly be relevant at that stage, when checking whether the proposed fine is proportionate to the overall means of the offender, to take into account the economic reality – if it is demonstrated to the court's satisfaction that it is indeed the reality – that the offender will not be dependent on its own financial resources to pay the fine but can rely on a linked organisation to provide the requisite funds."

78. At [17]-[18] the Court went on to consider the *Tata Steel* case, supra, and noted the Court's conclusion that the support of TSL could properly be taken into account at Step Three in order not to adjust downwards the fine despite Tata's losses because it was only that support which enabled Tata to continue as a going concern. At [19]-[20] the Court concluded:

> "19. It is in our view clear that the judge in the present case was entitled to draw a similar conclusion from the information about the financial circumstances of NPS London. At the time of sentence, its most recent accounts, being those for the year ended 31 March 2017, showed that NPS London was loss-making and insolvent on a balance sheet basis, with negative equity of some

> £4.5m. Under the heading "going concern", the directors' report stated that any finance required was provided by the NPS parent and that Norse Group Limited (the ultimate parent company, controlled by Norfolk County Council) had confirmed that it would continue to provide any financial support required for a period of at least 12 months. On the basis the directors believed that it remained appropriate to prepare the financial statements on a going concern basis.
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> 20. The upshot is that the judge, in our view, went wrong in treating the relevant table for sentencing purposes as that applicable to large organisations. He should have used the table that applies to small organisations. That would have given him a starting point of £100,000. Conducting the rest of the exercise afresh on that basis, some reduction should be made for mitigating factors which the judge identified. However, the fact that NPS London was an enterprise with low profitability and no resources of its own from which to pay a fine was not a reason to reduce the amount, because it was proper to regard the NPS parent as a linked organisation which could be counted on to provide the required funds."

79. Hence, both *Tata Steel*, supra, and *NPS London*, supra, were cases where the parent's turnover was taken into account not because it could somehow be treated as belonging to the subsidiary company, but because the economic reality was that the subsidiary would not have been a going concern without it, and so it could not properly be ignored as part of that reality. Also, the parent's turnover was used in both cases not to reduce the impecunious subsidiary's fine; they were *not* cases where it was used to *increase* a wealthy subsidiary's fine.

80. We turn to our conclusions.

81. Firstly, we pay tribute to the judge's sentencing remarks. On any view this was a difficult sentencing exercise involving a lot of technical evidence and a complicated sentencing Guideline which had to be applied in the context of a defendant company that was a part of a corporate structure with a huge turnover.

82. With respect to the judge, however, we have concluded that she went wrong at Step Three when she increased the fine from £2,250,000 to £4,500,000 on the basis of British United Provident Association Ltd's turnover. The course which the judge took did not, in our judgment, properly reflect the economic realities of the situation.

83. The starting point, as the Court observed in *NPS London*, supra, is that the Guideline has to be applied in a way which does not infringe ordinary and well-understood principles of company law. Thus, the mere fact that one company may be the wholly owned subsidiary of a larger parent (with larger financial resources) does not mean that the resources of the parent can be treated as available to, or as part of the turnover of, the subsidiary company, because they are not. The Guideline phrase 'economic realities' cannot be extended to mean that the parent's resources belong to the subsidiary simply in order to justify a large increase in fine at Step Three, any more than they can be taken into account to increase the size of the subsidiary's turnover

for the purposes of the tables in Step Two. To take the latter course would be inconsistent with what was said in *Tata Steel Ltd*, supra, and *NPS London*, supra, and this means that the former step would also be wrong, as the Lord Chief Justice made clear in *Whirlpool Appliances Ltd*, supra, at [40], when he said that Step Three 'does not provide an invitation to the court to disregard what has gone before …'.

84. In other words, if it is generally wrong to take into account the parent's turnover so as to increase the subsidiary's turnover at Step Two (which it is) then it is wrong to take it into account to increase the fine at Step Three absent some special factor of the type identified in *Tata Steel Ltd*, supra, or *NPS London*, supra (although, as we have observed, these were cases where fines were not reduced because of the parental turnover; they were not cases where fines were increased because of it). We decline to speculate on what such special factors might be; the question will have to be determined as and when it arises.

85. But we are clear there was no such factor here. The defendant in this case was BUPA (BNH) and the offence in question arose out of its breaches of duty. It did not delegate these to its parent. It alone bore criminal liability. The defendant was a large profitable organisation in its own right. There was no suggestion that it would be unable to pay the fine and require instead the parent to pay it, or that it would not be a going concern absent the financial support of the parent company. Those were the economic realities. The fact that, as we were told, BUPA (BNH) remits its profits to its parent is nothing to the point. Fining BUPA (BNH) would no doubt serve to decrease the amount remitted by it to its parent, but that does not alter the economic realities.

86. Although, as we have set out, during pre-trial negotiations it appears that the prosecution and defence were seeking to secure a plea agreement by which the parent's large turnover was to be factored in at sentencing in return for which the case against it would be discontinued, in the event, Mr Ashley-Norman conceded that it was open to Mr Matthews to contend that the judge had gone wrong in increasing the fine in the way that she did at Step Three simply because the parent's turnover ran into the billions of pounds and that Mr Matthews was not estopped from doing so by what had happened earlier.

87. We therefore conclude that what the judge did in this case at Step Three was wrong in principle. The fine before discount for plea (Step Six) should have been £2,250,000. Applying a one third discount for the guilty plea produces a figure of £1,500,000. We therefore quash the fine of £3,000,000 and substitute a fine of £1,500,000. To that extent, the appeal succeeds.