



AOSH / IOSH Legal Update

18 January 2024

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Agenda

- Enforcement
 - Health and Safety Executive
 - Building Safety Regulator
 - Office for Product Safety and Standards
- Sentencing Update
 - Very Large Organisations
 - Current issues in H&S sentencing
 - Trends in CDM prosecutions
- Artificial Intelligence in H&S



Enforcement

HSE - Prosecutions

Early Investigative Advice:

- Fatal and serious cases
- HSE lawyers actively involved from inception

Decision to Prosecute (DTP):

- Principal Inspector approves referral to HSE lawyer for DTP
- Full Code Test applied by HSE lawyer: a) Evidential, b) Public Interest

HSE – Prosecutions

Outcome:

- Like Police and CPS?
- More lawyers!

Potential Impact:

- Better, more independent decision making
- More targeted evidence gathering / lengthier investigations

HSE – Costs Recovery

HSE consultation – changes to cost recovery

Sectors:

- Oil, gas and pipeline systems
- Onshore oil, gas and geothermal exploration and production
- Wind and marine energy

Activities:

- Inspector training
- Intervention planning
- Guidance
- Advice
- Standards
- Working with trade associations and bodies
- Working with other regulators
- Public Engagement
- Research.

BSR - Enforcement Approach

BSR Enforcement Policy Statement - published December 2023

Purpose of enforcement:

(1) Building work: Ensure those who carry out building work on higher risk buildings comply with the requirements of the building regulations

(2) *Occupied buildings*: Ensure accountable persons are managing building safety risk in higher risk buildings appropriately.

BSR – Enforcement Approach

Verbal or written warnings about breaches of the law

Recommending a prosecution for serious breaches

Formal enforcement notices including:

- **Building control authority**– compliance notices, stop notices or notices requiring alteration or removal of non-compliant building work
- **Occupied higher-risk buildings**– compliance notices
- Failure to comply = **criminal offence**

Appointment of a special measures manager

BSR – Enforcement Approach

Enforcement Policy Statement indicates that where appropriate prosecutions should go ahead.

Two main factors in the decision:

- Sufficient evidence
- Public interest

Individuals as well as organisations can be prosecuted.

OPSS – Construction Product Safety

- OPSS role
 - ‘National Regulator of Construction Products’ for DLUHC
- Background
 - Poor industry practice
 - Ineffectiveness of trading standards
 - New regulator established under The Construction Products (Amendment) Regulations 2022

OPSS – Construction Product Safety

- Early enforcement action
 - Kingspan Insulation Ltd
 - Major construction product manufacturer
 - Prohibition Notices
 - Kooltherm K15 insulation board
 - Tests showed did not meet fire safety classification claimed on declaration of performance.
 - Product recall and remedial action for incorporate board

- Practical points / tips
 - Early engagement
 - Right to appeal?



Sentencing

Very Large Organisations (VLOs)

R (HSE) v Northern Gas Networks Ltd

R (HSE) v Tarmac Aggregates Ltd

- Step 2 – Starting Point, H&S Sentencing Guidelines

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

Very Large Organisations (VLOs)

R (HSE) v Northern Gas Networks Ltd

- Facts
 - Gas explosion in February 2019
 - Escape of gas from 6-inch fracture in gas main.
 - Main not identified on drawings and not maintained.
 - NGN pleaded guilty to s3(2) HSWA 1974 offence
 - Fined £5m in February 2022
- Sentencing Remarks (HHJ Stubbs, Leeds Crown Court)
 - *“This is one of those organisations which the Court of Appeal identifies the courts will recognise when they see; this is a very large organisation.”*
 - Incorporated *“all relevant factors”* in arriving at £7.5m fine.

Very Large Organisations (VLOs)

R (HSE) v Northern Gas Networks Ltd

- Appeal
 - Grounds: mitigation not considered and unclear how sentencing judge arrived at £7.5m.
 - Appeal rejected.
 - *“There was no need for [the Judge] to set out the arithmetic”;*
 - *“There is no obligation ... for the Judge to say by how much he is reducing the fine”*

Very Large Organisations (VLOs)

R (HSE) v Tarmac Aggregates Ltd

- Facts
 - Incident in June 2017 at quarry in Leicestershire
 - Contractor fatally crushed during maintenance work on feed hopper
 - Company failings - isolate the feed hopper, provide a working test button or pre-start alarm, or ensure critical defects recorded / rectified
 - Company pleaded guilty – Sections 2&3 HSWA 1974
 - Fine - £1.275m

- Analysis
 - Turnover figures
 - £343m – 2019
 - £283m – 2020
 - £340m – 2021
 - **NOT** a VLO

Very Large Organisations (VLOs)

R (HSE) v Tarmac Aggregates Ltd

- Analysis (cont'd)
 - R (HSE) v Whirlpool UK Appliances Ltd [2017] EWCA Crim 2186
 - Lord Chief Justice Burnett
 - “... not desirable to create an artificial boundary ...”
 - “... the courts should not be required to take an arithmetic approach ...”
- Conclusion
 - Matter for sentencing judge
 - Obvious? What about organisations with turnover between £100m - £500m?

Horizon Scanning - H&S Sentencing

- Increased H&S fines in line with EA prosecutions?



- Use of Variable Monetary Penalties in H&S cases?



Trends - CDM Prosecutions

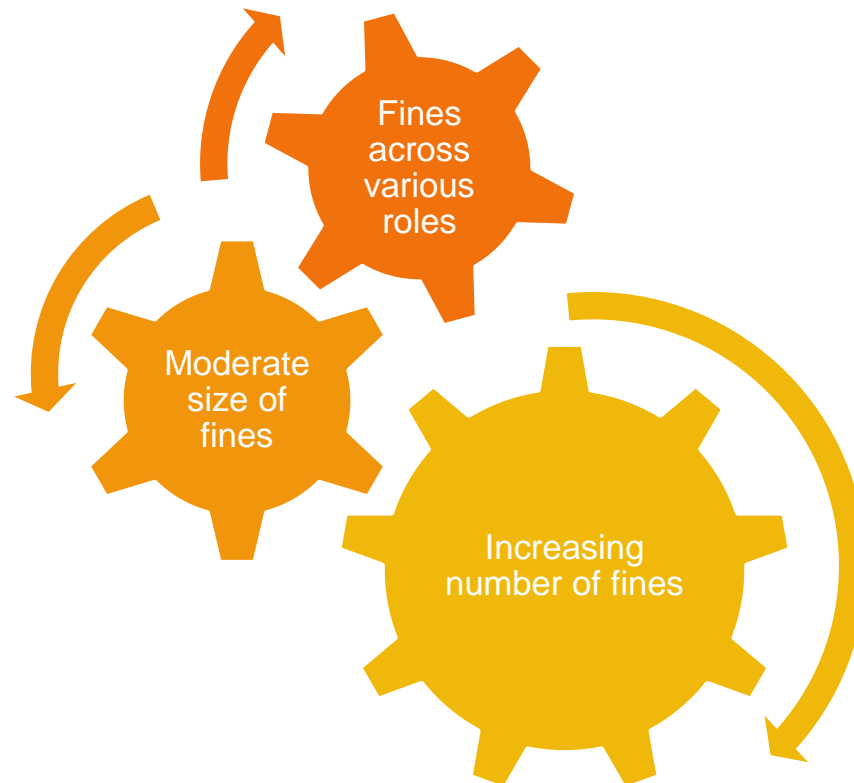
Sherwood Homes Ltd *CLIENT*

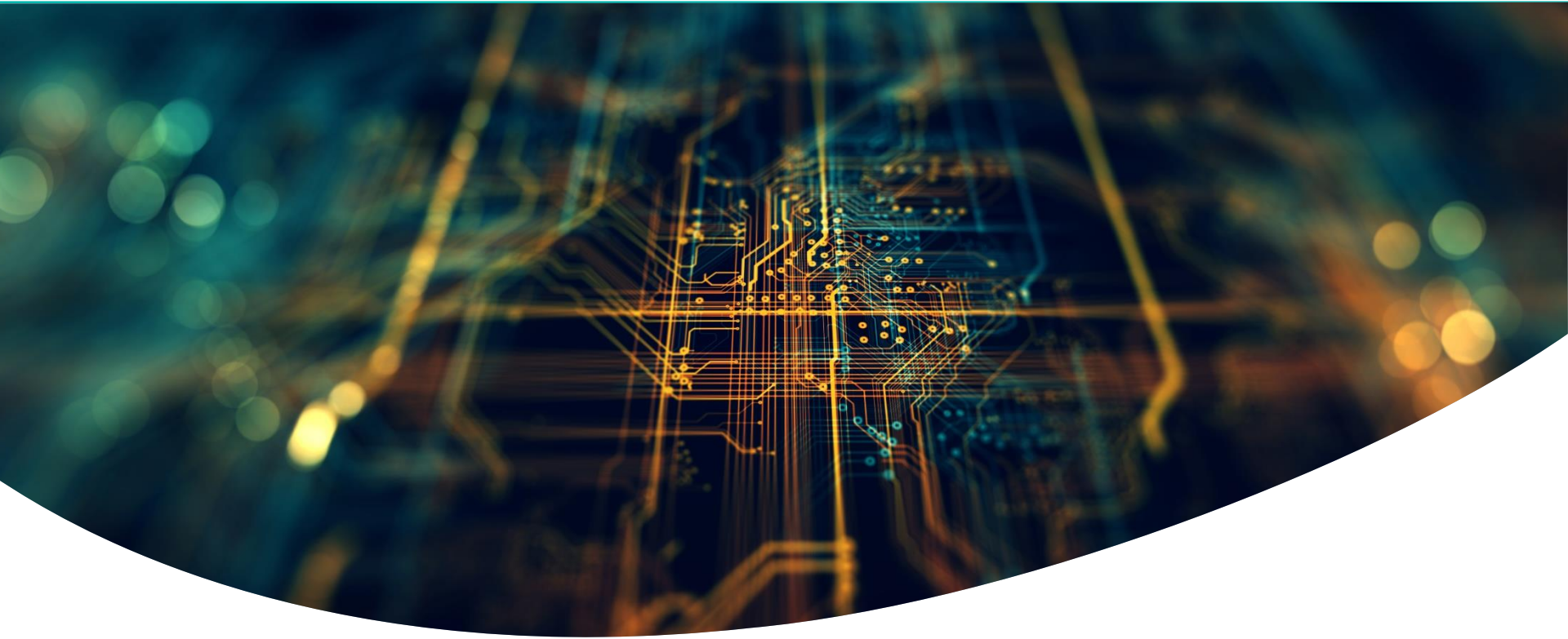
- Failed to ensure suitable contractors; no notice or details to HSE
- **Reg. 4(1) CDM**
- Fine: £170,000

BAM Nuttall Ltd *CONTRACTOR*

- Failed to make a suitable risk assessment and provide a safe system of work
- **Reg. 15(2) CDM**
- Fine: £700,000

Trends - CDM Prosecutions





Artificial Intelligence in H&S

Artificial Intelligence in H&S



Artificial Intelligence in H&S

- Current Regulatory Framework
 - No overarching regulator
 - White Paper. “*Pro-innovation approach to AI Regulation*”
 - 5 principles:
 - Safety, security and robustness;
 - Transparency;
 - Fairness;
 - Accountability and governance; and
 - Contestability and redress.
 - Regulation of AI in the workplace?
 - HSE and general duties / principles under HSWA 1974

Artificial Intelligence in H&S

- ‘Reasonable practicability’.
 - What are RP steps?
 - AI specific risk assessment
 - Best practice and training
 - Monitoring / review of implementation
- Other potential legal implications?
 - Data generation and disclosure of ‘computer held material’ to Police / regulators
 - Supervision
 - Competency

Q&A



