Risk Management Briefing

Construction Industry Council

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Corporate Manslaughter

Introduction

In the case of R v Cotswold Geotechnical Holdings Ltd (17 February 2011), the new offence of corporate manslaughter has been tested in the courts for the first time with a successful prosecution against the defendant company under the Manslaughter and Corporate Homicide Act 2007.

This briefing seeks to set out the background to the change in legislation. It provides a guide to the new offence, a discussion of the Cotswold Geotechnical Holdings Limited case and an analysis of the implications.

Background

Historically, in order to prosecute companies for the criminal offence of manslaughter, it was necessary to identify an individual who could be described as 'the embodiment of the company itself'. It was only possible to convict the company if such an individual was also found guilty of the offence of manslaughter. Therefore, if it was not possible to prosecute and convict the individual, the prosecution against the company was bound to fail.

This led to great difficulties in prosecuting companies for manslaughter as it was not always possible to identify a 'controlling mind' who also had sufficient *mens rea* or 'mental state' to be convicted of the offence. This was especially the case with larger companies where no single individual was responsible for health and safety matters. Consequently, there have not been many successful prosecutions of companies for manslaughter, and only then against small corporate entities.

A series of disasters during the 1980s and 1990s led to calls for the companies involved to be prosecuted for manslaughter. However, because of the difficulty of identifying suitable individuals there was no merit in pursuing such prosecutions. This was seen to be an untenable situation highlighted by the fact that inquiries following

disasters such as the Herald of Free Enterprise, the Kings Cross fire and the Clapham and Southall Rail crashes found the companies involved to be responsible and subjected them to serious criticism. Additionally, the inquiries were followed by successful prosecutions under the Health and Safety at Work etc. Act 1974.

Following these disasters and comprehensive reports on this issue prepared by the Law Commission in 1997 and 2000, a draft Corporate Manslaughter Bill was published in March 2005. This became the new Corporate Manslaughter and Corporate Homicide Act 2007 (the "Act") which came into force on 6 April 2008.

The new offence of corporate manslaughter

Companies and other organisations will be guilty of corporate manslaughter under Section 1 of the Act, if the way in which they manage or organise their activities at a senior management level:

a) amounts to a gross breach of a relevant duty of care (i.e. conduct that falls far below what can reasonably be expected of the organisation in the circumstances); and
b) is the substantial cause of a person's death.

Senior management for the purposes of the Act is defined as those persons who play significant roles in:

a) the making of decisions about the whole or a substantial part of an organisation's activities; or
b) actually managing or organising those activities.

The first prosecution: Cotswold Geotechnical Holdings Limited

Cotswold Geotechnical Holdings Limited ("Cotswold") recently became the first company to be convicted of the offence of corporate manslaughter under the Act at Winchester Crown Court in February 2011.

The case was brought against Cotswold following the death in 2008 of a junior geologist, Alex Wright, who was killed when the 3.5m deep unsupported trial pit which he was working in, collapsed. The company's sole director, Mr Eaton had been on-site that day and was aware when he left in the evening that Mr. Wright was working alone in the trench.

A number of serious safety issues were raised by the prosecution:

a) Mr. Wright was a junior employee who had little training or experience;
b) Mr Wright was working alone;
c) the pit was 3.5m deep and had no protective shuttering holding up the sides (in contravention of industry specific guidance and previous HSE advice that prohibit entry into unsupported trenches deeper than 1.2m);
d) no risk assessments/method statements for trial pit work had been produced;
e) Mr Eaton admitted that his working practices had not changed since the 1970s; and
f) the company health and safety policy was last updated in 1992 and did not include information specifically related to trial pit work.

Mr Eaton had originally been charged individually with gross negligence, manslaughter and health and safety offences but following several adjournments these charges were dropped on the grounds of Mr Eaton's ill-health.

Decision

On 15 February 2011 Cotswold became the first company to be convicted of the new offence of corporate manslaughter. The jury found that the company's working practices were 'wholly and unnecessarily dangerous' and it ignored well-recognised industry guidance.

A fine of £385,000 was imposed, to be repaid over the next 10 years. This was less than the £500,000 minimum fine recommended by the Sentencing Guidelines Council but represents a figure greater than Cotswold's turnover for the previous year.

When handing down the sentence, the Judge recognised that the fine carried the risk of putting the company into liquidation but stated that, if that was the case, it would be 'unfortunate but unavoidable. But it's a consequence of the serious breach'. In fact the company went into liquidation in June 2011 following the dismissal of their appeal by the Court of Appeal.

Implications

If convicted of corporate manslaughter under the Act a company will be liable for an unlimited fine and, if deemed appropriate, an order publicising the conviction and the level of fine imposed. Therefore, companies will need to consider the financial and reputational risks associated with conducting themselves in such a way that may lead to a conviction under the Act.

This case highlights the importance of:

a) ensuring that all relevant industry standards and guidance are met;
b) undertaking risk assessments wherever necessary;
c) reviewing the management and lines of responsibility for health and safety;
d) reviewing all relevant health and safety policies;
e) reviewing any reporting procedures; and
f) undertaking to amend and/or implement such policies and procedures where necessary.

Although Cotswold was prosecuted under the new Act, it is important to note that a prosecution against a company of this size with one director would have been possible under the old legislation as there would have been no difficulty in establishing the 'controlling mind' as described above.

However, another prosecution of a much larger company may soon be making its way through the courts. Future prosecutions against larger organisations should provide companies with greater insight into the operation of the Act and the fines and other orders that may be imposed under it.

This briefing was compiled by Jacqueline Burns of Arup.

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