



# Risk insight

**Property management:  
time for a change of approach?**

**It is common for commercial landlords to believe that the contractual relationship they have with their managing agents will protect them from liability when things go wrong. However, there are circumstances when the contractual relationship will not provide protection and none more so than the area of health and safety regulatory compliance.**

Much will depend on the relationship between the parties. However, landlords must appreciate that appointing managing agents or contractors will not necessarily absolve them from liability so far as regulatory enforcement

proceedings are concerned and that selection, performance and management of the contract or work are all key factors should a near miss or incident occur.

The changes to criminal sentencing in this area were introduced in 2016 and have significantly increased the risks facing landlords as the fine they may receive is not dependent upon the extent of their perceived failing in any given event, but primarily based on the size of their corporate turnover. This means that in the event of a health and safety prosecution a landlord's fine may be significantly larger than that of its managing agents.

## Case Study



There have been a number of instances where landlords and managing agents have been prosecuted and fined for breaching their legal duties. In one case, a property owner and the management company engaged to run the day to day activities of a hotel and spa were fined when a number of guests and staff members inhaled fumes from incorrectly mixed cleaning products<sup>1</sup>, although a more recent case best illustrates the risks facing property owners and landlords. This case concerned a five year old girl who was tragically trapped in a defective disability lift sustaining fatal injuries<sup>2</sup>. The landlord, its managing agents and the lift maintenance contractors they engaged were prosecuted as a result. The HSE investigation revealed a catalogue of failures by all three companies including:

- Having no risk assessment in place
- Not undertaking the six monthly lift service inspections in accordance with guidance
- Failing to act on safety issues raised when service inspections were undertaken

Another factor in this case was that maintenance contractors had twice quoted to replace the lift but the landlord had not approved the works, as it was considering undertaking other modifications to the property.

In court, the Landlord accepted that it could not delegate its legal duty and that the failings of the managing agents were part of its breach. The company was handed a fine of £1m and ordered to pay £40k prosecution costs. The issue of unquantifiable reputational damage is also likely to be a factor in this case, as health and safety prosecutions often attract unwanted media attention.

<sup>1</sup> <https://www.maidenhead-advertiser.co.uk/news/maidenhead/122847/fredrick-s-hotel-fined-after-employees-are-hospitalised-by-accidents.html>

<sup>2</sup> <https://www.bbc.co.uk/news/uk-england-dorset-46874763>

# ‘Sentencing Guidelines’ – What are they and why were they introduced?



The Sentencing Council’s guidelines for fines for health and safety offences<sup>3</sup> are used by both the Magistrates and Crown Courts to determine the level of fines handed down for breaches of health and safety regulations. A fine will be based on corporate turnover. In practice, this means that a landlord’s fine may be significantly larger than that of its managing agents.

The primary elements of the guidelines are that any fine must:

- Reflect the seriousness of the offence
- Take into account the turnover (as opposed to profit) of the offender
- Reflect the extent to which the offender fell below the required standard
- Meet in a fair and proportionate way the aims of punishment and deterrence.

The fines which the courts are required to follow under the guidelines are shown below for large businesses<sup>4</sup>:

## Turnover or equivalent: £50 million and over

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
<b>High culpability</b>		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
<b>Medium culpability</b>		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
<b>Low culpability</b>		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

The Sentencing Council’s stated intention was to increase fines for serious offences and create an element of consistency in sentencing across the board, with a view to ‘incentivising’ businesses to ensure the health, safety and wellbeing of their employees and visitors etc. by proactively managing health and safety. The view the courts take in such cases is illustrated by the following quote:

*“The Court is required to have regard to the guidelines set out for it by the Sentencing Guideline Council. It has been made clear that in these cases, the punishment imposed must be such as to bring home to directors and shareholders of companies their duty to protect the safety of their employees and others, therefore the punishment is such as must hurt”.*

**Stephen Linehan Q.C - St. Philips Chambers (Birmingham) – Willis Towers Watson Mock Trials 2019**

Source: Stephen Linehan Q.C - St. Philips Chambers (Birmingham) – Willis Towers Watson Mock Trials 2019

<sup>3</sup> <https://www.sentencingcouncil.org.uk/>

<sup>4</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/Health-and-Safety-Corporate-Manslaughter-Food-Safety-and-Hygiene-definitive-guideline-Web.pdf>

## Changing Regulatory Landscape



Given the changing regulatory landscape as demonstrated by the case examples, there is more pressure on landlords to evidence robust management 'from the top' regarding their practices and policies for keeping people, employees and third parties safe. This includes being able to demonstrate and evidence that they have a pro-active relationship with their managing agent and that managing agents are simply not left to 'get on with it'.

HM Government has also recently refocused its attention on health and safety regulatory compliance. In addition to the introduction of the health and safety sentencing guidelines, there have been two significant developments.

The All-Party Parliamentary Group on Occupational Safety and Health criticised local authorities for failing to take adequate steps to monitor the health and safety activities of those organisations which fall under their remit and, where necessary, take regulatory enforcement action to ensure compliance. Chaired by Jo Stevens MP, the group challenged the general assumption that businesses in the sector regulated by local authorities should be considered "low risk" for health and safety purposes.

It also stated that there had been a substantial reduction of 97% in pro-active regulatory inspections, culminating in an overall reduction in all types of inspections and interventions of 65% during the period 2010 – 2016<sup>5</sup>.

Indeed, it was noted that the fall in inspections may be even greater than the statistics suggest as analysis of the data shows that local authorities sometimes incorrectly record the nature of an attendance as being health and safety focused, when they are primarily conducted for other purposes such as public health and licencing visits. The All-Party Parliamentary Group commented as follows:

After publication of this report, HM Government conducted a tailored review of Health and Safety Executive (HSE) activities and issued a number of recommendations, three of which were directed at enforcement activities<sup>7</sup>:

- **Recommendation 17:** The HSE should review its risk appetite in prosecutions and consider taking on more challenging prosecutions in line with existing prosecution and enforcement guidance.
- **Recommendation 19:** The HSE should continue to work with the cabinet office in line with the recommendation of the regulatory futures review to consider local authorities to recover the cost of some of their enforcement activities.
- **Recommendation 23:** The HSE should explore opportunities for expansion of the use of cost recovery in certain sectors building on the lessons learned for FFI to ensure clear objectives.

It is clear from the above that a more aggressive attitude to enforcement is anticipated going forward and it remains to be seen how, and when, HSE will react. However, we are likely to see a worsening position for landlords with the HSE now showing its appetite for pursuing cases such as those highlighted.

*"The fall in inspection activity has correlated with a very large decline in enforcement activity... This means far fewer employers are being brought to justice. This does not appear to be because fewer employers are putting their workforce at risk as there has been no fall in injury or ill-health statistics"*<sup>6</sup>.



### How Can Willis Towers Watson Help?

Our Claims Defensibility & Regulatory Practice has developed a number of services to help prevent and defend regulatory action.

- Director/Senior Manager H&S Governance Briefing
- Regulatory Defensibility Review
- Regulatory Mock Trial Training
- Bespoke Accident/Incident Investigation Training
- Contractor Management Training

<sup>5</sup> <https://www.sentencingcouncil.org.uk/wp-content/uploads/Health-and-Safety-Corporate-Manslaughter-Food-Safety-and-Hygiene-definitive-guideline-Web.pdf>

<sup>6</sup> [https://www.tuc.org.uk/sites/default/files/APPG\\_Local\\_Authorities\\_Report\\_2018\\_AW.pdf](https://www.tuc.org.uk/sites/default/files/APPG_Local_Authorities_Report_2018_AW.pdf)

<sup>7</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/765480/hse-tailored-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765480/hse-tailored-review.pdf)

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