Neutral Citation Number: [2019] EWCA (Crim) 520

Case No: 2018/02453/A1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM NEWCASTLE CROWN COURT**
**RECORDER WOOD QC**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2019

**Before :**

**LORD JUSTICE GROSS**
**MR JUSTICE SWEENEY**
and
**SIR KENNETH PARKER**

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**Between :**

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| **FALTEC EUROPE LIMITED** | **Appellant** |
| **- and -** | |
| **HEALTH AND SAFETY EXECUTIVE** | **Respondent** |

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**Stephen Hockman QC** and **David Hercock** (instructed by **Rachel Lyne** at **Browne Jacobson LLP** ) for the **Appellant**
**Ben Mills** (instructed by **Health and Safety Executive**) for the **Respondent**

Hearing date : 15 March 2019

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# Approved Judgment

**LORD JUSTICE GROSS :**

INTRODUCTION

1. This is an appeal against the amount of 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.

2. On 3 April 2017, having pleaded guilty before Magistrates, the Appellant company ("Faltec") was committed for sentence pursuant to s.3, *Powers of Criminal Courts (Sentencing) Act 2000*, in respect of the following matters:

   i) Count 1, failure to ensure the health and safety of non-employees, contrary to ss. 3 and 33(1)(a) of the *Health and Safety at Work Act 1974* ("the Act"). This Count concerned an outbreak of legionella.

   ii) Count 2, failure to ensure the health and safety at work of employees, contrary to ss. 2 and 33(1)(a) of the Act. This Count too concerned an outbreak of legionella.

   iii) Count 3, failure to ensure the health and safety at work of employees, contrary to ss. 2 and 33(1)(a) of the Act. This Count related to the explosion in a flocking machine.

3. On 17 May 2018, in the Crown Court at Newcastle upon Tyne, before Mr Recorder Wood QC, Faltec was sentenced as follows:

   i) Count 3, £800,000 fine.

   ii) Count 1, £800,000 fine, consecutive to Count 3 but concurrent with Count 2.

   iii) Count 2, no separate penalty.

   Accordingly, the total fine imposed was £1.6 million. Faltec was additionally ordered to pay prosecution costs in the amount of £75,159.73.

4. It may at once be noted that the Judge heard some 4 days of evidence and submissions, and read some 6,000 pages of documents.

5. Faltec now appeals against sentence – the amount of the fine – by leave of the Single Judge. Its grounds of appeal essentially comprise a root and branch attack on the Judge's conclusions.

THE FACTS

6. Faltec is a wholly owned subsidiary of a Japanese holding company ("the Holding Company").

7. Originally incorporated in 1989, Faltec has traded throughout as a manufacturer of car parts for Nissan's European plants. It has also supplied other car manufacturers, including Renault, BMW and Honda. In recent years, it has had a turnover of between £33 and 39 million, *per annum.* Although it reported a profit in 2015, it has been

running at a loss in 2016 and 2017, subsisting largely on loans and share capital supplied by the Holding Company – which itself has a worldwide turnover of between £550 million and £600 million *per annum* and an accounting annual profit of between £10 and £20 million *per annum* in each of the last three years.

8. Faltec is located in the Boldon Business Park, South Tyneside, close to Newcastle upon Tyne. Its operations are spread over five separate factory units. It has about 550 employees. As the Judge observed (sentencing observations, at [2]), in the vicinity of the Faltec site, there is a housing estate, a shopping centre, a cinema, a hotel, public houses and a car dealership; Faltec operates within a well populated urban area.

9. The three counts concerned two distinct courses of criminal conduct. Counts 1 and 2 concerned exposure to legionella bacteria and outbreaks of Legionnaires' disease in and amongst the employees and local population around Faltec's place of business, between 1 October 2014 and 6 June 2015. Count 3 concerned an explosion in a flocking machine (machine B14), on 16 October 2015, which caused injury to an employee.

10. Legionella (with which Counts 1 and 2 are concerned) is a bacterium which can develop within water systems and spread through the air in vapour to infect human beings – who can test positive for the legionella virus. Only some of those infected by the virus will go on to develop Legionnaires' disease – itself a serious and potentially fatal form of pneumonia. It is normally contracted by inhaling small drops of water (aerosols), suspended in the air containing the bacteria. The initial symptoms following exposure are flu like and include headaches, muscle pain, fever, chills, tiredness and confusion. Once the bacteria begin to infect the lungs, symptoms of a form of pneumonia develop – such as persistent cough, shortness of breath and chest pains. If untreated it will lead to life threatening problems, including organ failure or septic shock, leading to coma and, possibly, death.

11. As to statistics, on the basis of expert evidence called by Faltec, it was not in dispute that in a human population with a normal spectrum of characteristics, including age and disease, the recorded proportion of those exposed to outbreaks of legionella pneumophilia from cooling towers who would be expected to sustain fatal injuries would be between 0 and 0.04% (i.e., up to 4 in 10,000).

12. The water system at the Faltec site is large, comprising four cooling towers and 22,000 metres (22 kilometres) of pipework. The legionella bacteria contaminated one of the cooling towers. It was common ground that there were "dead legs" (lengths of pipe which have been capped off, and therefore lead to a dead end) which allowed the bacteria to develop. In its basis of plea, Faltec admitted a failure of oversight of its specialist water contractor, Guardian Water Treatment ("GWT"), which had failed to maintain an effective biocide dosing treatment regime ("dosing"). An effective dosing regime would have neutralised the bacteria in question.

13. Over the period spanned by Counts 1 and 2, October 2014 – June 2015, five people were infected and diagnosed with Legionnaires' disease. One of those spent time in intensive care under an induced coma, lasting for ten days. Four of the victims had worked for Faltec, two on an agency basis; the fifth lived near to the site. One of the five had been infected in or around October 2014; the others in April or May 2015. It would therefore seem that there were two separate outbreaks, spanning the period

October 2014 – June 2015. In addition to those infected, it was said that many people in the locality had been put in fear in consequence of the outbreak.

14. The function of a flocker machine (of the type with which Count 3 is concerned) is to attach flock to a chrome strip used as a component in the manufacture of motor cars. It is normally used in car door parts for sealing the areas around the door window and is also used in other areas of a vehicle and for a variety of reasons including aesthetics and improving insulation. Flock is a polymide, with a flashpoint of 400◦ Celsius and an ignition temperature of approximately 450◦ Celsius. Particles of flock are applied to metal parts by the application of a high voltage electric field. The flock is given a negative charge and flies vertically onto the metal part attaching to pre-applied adhesive. Flock itself constitutes a dangerous substance for the purposes of the *Dangerous Substance and Explosive Atmospheres Regulations 2002* ("the DSEAR regulations").

15. At the Faltec site there were four combined co-extrusion flocking lines. The accident happened on machine B14. The risk of explosion is ever present when the flocking machine is in operation as the flock cloud is not only electrically charged but is also highly flammable – and liable to explosion should an ignition source be applied, such as a spark from an electrically charged metallic grill. After having the flock applied to it, the car part enters an air blast cabinet designed to remove excess flock. During this operation, the blast cabinet may be accessed by sliding up a polycarbonate guard.

16. On machine B14, the access points were not fixed in position or interlocked, with the result that the machine could be opened and accessed whilst in operation. At the time of the incident (October 2015), there was a plastic mesh grid, approximately 3 millimetres thick, installed just before the electrostatic grid in an attempt to prevent parts coming into contact with the electrostatic grid.

17. As to the incident itself on 16 October 2015, Mr Haswell had worked at Faltec for eight months as an apprentice. On the 15 October, he had started work on the night shift at 23.00, on line B13/14. The accident happened almost at the end of the night shift, at around 05.30 on 16 October. As Mr Haswell walked past the air blast unit, he saw that a part had fallen off the rollers. He decided to remedy it, lifted up the polycarbonate guard and placed it on top of the air blast unit, so that he could use both hands to remove the part. This action did not stop the machine from operating, nor did it cut the power to the electrically charged elements. At that moment he was exposed to a high level of risk of harm because the atmosphere present within the immediately adjacent flocking unit was flammable and parts were not prevented from coming into contact with the live electrostatic grid. Due to the length of the part he was seeking to retrieve he had to bend it towards him to get it out and, as he did so, it may have touched the live electrostatic grid.

18. At this point, Mr Haswell was leaning into the grid and the explosion came from the left out of the parts exit of the flocking unit. He described it as a big flash and he turned his face away to the right. He was only wearing a short-sleeved polo shirt, safety glasses, hearing protection, steel toe capped boots and trousers. He shouted out in pain and one side of his face and arms were red and covered in flock; all his hair and beard were singed. He was taken by ambulance to hospital in Newcastle and put into an induced coma until the afternoon of 17 October; he was discharged on 18 October. He suffered first degree burns to his face, right arm and left elbow. He also had back pain

as the blast sent him into the workbench. He was initially off work for four months and, thereafter, for a further two months suffering from anxiety and depression (extending to an attempt to cut his wrists and seeking counselling). Various other personal consequences followed, though subsequently matters appear to have improved.

19. By its basis of plea, Faltec admitted that flocker machine B14 did not meet the required safety standards, that risk assessments had failed to identify the control measures necessary and that Mr Haswell had not been sufficiently trained.

APPLYING THE GUIDELINE

20. It is common ground that in this area there is a relevant Guideline, namely the *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline*, effective from 1 February 2016 ("the Guideline").

21. 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."

The Guideline assists in an exercise of structured judgment; it is not a straitjacket: Lord Burnett of Maldon CJ, in *Whirlpool UK Appliances Ltd v R* [2017] EWCA Crim 2186; [2018] 1 Cr App R (S) 44, at [12].

22. Further, there was no dispute that the correct general approach to the Guideline is, as set out by Gross LJ, in *R v Tata Steel Ltd* [2017] EWCA Crim 704; [2017] 2 Cr App R (S) 29, at [25]:

> "*Overview*: Standing back from the detail, the following broad picture emerges of the Guideline as a whole, insofar as relevant for present purposes.
>
> (i) first, the Guideline begins by considering the level of culpability. It then looks at the seriousness of the harm risked, followed by the likelihood of that harm materialising. In combination, the seriousness of the harm risked together with the likelihood of it materialising, yield various harm categories.
>
> (ii) secondly, the level of culpability, considered together with the relevant harm category are then applied to tables, depending on and reflecting the size of the organisation's turnover. This exercise produces a starting point for the fine. It can then be adjusted upwards or downwards for aggravating and mitigating factors.

> (iii) thirdly and likewise, the starting point may warrant adjustment to reflect the true size of the organisation. In particular, an upwards adjustment may be called for in the case of a very large organisation so as to produce a proportionate fine, bringing home the message to management and shareholders of the need to comply with health and safety legislation. In this manner, the Guideline reflects the objective, clearly set out by Mitting J, giving the judgment of the Court in *Thames Water (supra),* at [38]:
>
> 'The object of the sentence is to bring home the appropriate message to the directors and shareholders of the company…Sentences imposed hitherto in a large number of cases have not been adequate to achieve that object.'
>
> (iv) fourthly and in accordance with s.164 of the *Criminal Justice Act 2003,* the financial circumstances of the offender must be taken into account. A downwards adjustment may be called for where an organisation has a small profit margin relative to its turnover; by implication, a downwards adjustment may equally be appropriate where the business is loss-making. So too, any wider impact of the fine on those who are not shareholders or directors, should be considered and may warrant adjustment.
>
> (v) fifthly, as with any other sentencing exercise, there is a discount for an early guilty plea and totality must be taken into account."

THE SENTENCING OBSERVATIONS

23. The Judge's sentencing observations were extensive and thorough.

24. Almost at the outset, the Judge recorded Faltec's pleas of guilty to all three Counts; it was common ground that the pleas had been entered at the very earliest opportunity and that Faltec was entitled to a full 1/3 credit in the fines which the Judge would impose.

25. The Judge drew attention to Faltec's two previous Health and Safety convictions, which had attracted fines arising from breaches of s.2(1) of the Act; the first, related to an incident in 2006, in which an employee died; the second, related to an incident in 2012 in which an employee was gravely injured. In the Judge's view (at [13]), both convictions "…represented significant prior failures" by Faltec in its Health and Safety regime. Admittedly, a new managing director had been appointed in 2012 and had given a fresh commitment to Health and Safety; however (*ibid*):

> "Whilst I do not doubt this assertion, the speed, determination and thoroughness with which that 'fresh commitment' was implemented has to be judged in the context of the events which are disclosed by the two grave Health and Safety breaches which overcame the company in 2015 and [with] which I now have to deal."

The Judge was critical of what he described (*ibid*) as "…weak line management, with insufficient priority being given to even the most fundamental issues of Health and Safety", culminating in the offences forming the Counts before us.

26. Turning to the legionella outbreaks, the parties were agreed (at [14]) that the Judge should pass a single sentence for both offences by the imposition of a single fine.

27. The Judge referred to the statistical risk of fatal injuries (the 0 – 0.04% range, set out above) and observed (at [20]) that the Health and Safety Executive ("HSE") inspector gave the fatality figure in another way; he had stated that:

> "Legionnaires' disease is a type of a typical pneumonia that is fatal in around 10-15% of cases."

The Judge did not regard these statements as in any way inconsistent with each other. As the Judge put it (at [21]):

> "Dr Lee is simply saying that if a population of ten thousand people are exposed to contamination by a cooling tower leaking legionella bacteria, that on a statistical analysis between none and 4 of them could die. Mr Smith is simply saying if 10 from that exposure contract Legionnaires' disease at least one (10 – 15%) of them is likely to die. In the instant case something of the order of an urban population of 5000 people may well have been exposed to the risk, by this leakage, we do not know how many were infected by the legionella virus, but we do know that 5 succumbed to Legionnaires' disease, and happily none died."

28. Because the dangers of Legionnaires' disease are so well known, since 1991 the HSE or its predecessors had published detailed regulations for its control. The fourth edition of the Approved Code of Practice ("ACOP") was published in 2013 and was applicable at the material time. The "fundamental requirement" involved the control of legionella bacteria in water systems and pointed out the specific danger from dead legs. The Judge there observed (at [23]) that Faltec should have been "well familiar" with ACOP and should have had reasonable systems in place to ensure compliance. The Judge regarded a "written scheme" as essential. Having described Faltec's water system (as set out above), he noted (at [25]):

> "In its basis of plea the defendant admits a deficit in oversight of its specialist water contractor….[i.e., GWT]…and that there were deadlegs in the system which should not have been there."

29. The Judge highlighted the warnings given to Faltec by HSE inspectors in 2012 and 2013, the primary areas of concern comprising (at [29]), "(a) the state of the pipework system itself and (b) the effectiveness of the biocide dosing". The Judge had not omitted mention of the appointment of GWT to conduct a survey in 2013 (prior to the further 2013 intervention by the HSE) but underlined that it was not GWT's responsibility to carry out this work.

30. With regard to the pipework, the Judge concluded (at [31]) that the remedial work upon which Faltec relied had not been carried out "either with the necessary care or attention

to detail required by the regulations, or with the necessary supervision, or with any adequate understanding as to why the deadlegs should be removed, or the very real dangers they presented". Further, no system had been put in place to ensure new dead legs were not added to the system. The Judge's further and, as he described it, "inevitable" conclusion (at [32]) was that the efforts "put in over a few weekends after the receipt of the GWT survey and the September [2013] enforcement notices were a wholly inadequate response". There had been no systematic inspection; dead legs had been missed; no proper system had been put in place to record new dead legs or to monitor the system to ensure continuous removal. The Judge commented adversely on the "lack of experience and training" of the operatives engaged in the 2013 removal, with the two employees primarily responsible not attending a 5 day City and Guild course until 2014.

31. As to dosing, Faltec "outsourced" the requisite work to GWT. In its basis of plea, Faltec admitted that "there was a deficit in its oversight of the actions of its specialist water treatment contractor…*GWT*..". The Judge had some sympathy (at [35]) for the Faltec submission that GWT was a reputable and experienced sub-contractor and it (Faltec) had not been warned that action was needed to prevent the problems which gave rise to the legionella outbreaks. There were, however, problems with the Faltec stance, as explained by the Judge in a telling passage which merits citation at some length:

> "35. ….Rather than employing skilled and experienced staff itself, the company is actually seeking to outsource its regulatory responsibilities concerning safety, whilst it does not have an adequate system in place for reviewing the actions of its subcontractor. This is illustrated by the lack of any written documentation of standards and systems of review, and by the limited experience and training of the two people charged with the obligation of receiving the reports of the subcontractor.
>
> 36. I venture to suggest that a five day City and Guilds training course on a subject is unlikely to give anyone the status or expertise to countermand the suggestions of an apparently experienced subcontractor….. The answer lies with the joint experts' report at para. 10. When asked 'What would amount to proper oversight of GWT by Faltec' they have responded that it is 'agree[d] that Faltec had appointed a Responsible Person, as required by the ACOP/G. The proper expectation is that safe operating parameters should be contained within a Written Scheme, which would then set out the actions to be taken by the Responsible Person if those parameters were not met for a significant period of time. The Responsible Person should have monitored the activities of GWT. It is agreed that the situation revealed by the GWT reports to Faltec should have triggered action by Faltec to ensure immediate and effective increases in dosing. This did not occur.'
>
> 37. I simply add that those charged with the responsibility did not appear to have had the necessary training or experience to do this without such guidance. Such guidance was not in place because the company was over a prolonged period failing to

> comply with the requirements of having a written regime for monitoring in place."

32. Coming next to Count 3 and after reference to the DSEAR regulations, the Judge underlined (at [47]) that, at the time of the incident, "there was nothing to prevent the door being opened while the grid was operating, electronically charged or when a flock dust cloud was present within." The risk of explosion was "ever present" within the flocking machine when in operation "as the flock cloud was not only electrically charged but also highly flammable, and liable to explosion should an ignition source be applied, such as a spark from the electrically charged metallic grill". The Judge reiterated (at [48]):

> "….The access points were not fixed in position or interlocked meaning it could be opened and accessed whilst the machine was in operation. This was the unit at which the accident occurred."

33. The Judge went on to describe the accident in detail and recorded Faltec's basis of plea (set out above).

34. The Respondent had contended that there were wider failures in training. Against this background, the Judge explored the events leading up to the incident, focusing on the acquisition of the machine in question in 2014. Machine B14 was, in the event, acquired from the Holding Company for some £90,000 less than the price on offer from a third party supplier of flocking machines. B14 arrived in about March 2014. The evidence of Mr McDonald, the senior Manager Design, Engineering and Project, was carefully considered by the Judge. He said this:

> "63. As to what if any testing was done in the UK upon the machine before it was put into production Mr McDonald's statement frankly discloses a quite appalling situation having regard to the fact that Flocking Machines were known by ….[Faltec]…to require DSEAR compliance, and, when operational to contain potentially explosive ingredients….."

Mr McDonald had said, *inter alia*, that Faltec had not carried out an assessment of the fire and explosive risks. They had allowed the "Japanese guys" from the Holding Company to take the lead in installing the machine. He did not think the machine had any CE marking. He did not think that any DSEAR assessment had been carried out. There had been no agreement on the specification before the machine was shipped. There had been "an informal process" of checking the safety but nothing formalised against the standard.

35. The Judge's conclusion was as follows:

> "66. The prosecution contend that given the differences in the quote and the obvious deficiencies in the machine which was built, this is a clear indication that there was cost-cutting at the expense of safety. The defence disagree. In my judgment as a result of agreeing to the lesser price from the HC in Japan, …[Faltec]…was well aware that it was taking on a heavy burden in ensuring the machine was safe for its employees, knowing that

> it had no one in place to certify it, or ensure it was made compliant, and then knowingly failed to take adequate steps to ensure that it was safe for operation by its employees before commencing with its use upon the line. The machine started in operation in October 2014."

36. Between December 2014 and April 2015, there were various incidents involving fires affecting machines B11 and B14. There was a further incident involving B11 (the design was different to that of B14) in July 2015. Some remedial works were undertaken in respect of both machines. Nonetheless, the Judge was satisfied (at [78]) that there had been "significant and substantial non-compliance" in respect of risk assessments, certification of the machinery and training of Faltec employees.

37. The joint experts were in agreement on the control measures in place (cited at [79]):

> "…the hazard or danger which was risked was that a person could intervene by gaining access to the flocking chamber whilst the flocking machine was in operation, with the risk that a source of ignition could be created, primarily through contact with the electrically charged grid. Operators working at the glue unit, the air-blast unit or loading the hopper were at significant risk of injury should an explosion event occur. It was agreed, given the nature of the explosion risked, that persons in the vicinity of the flocking machine, but not intervening…would not be at significant risk….."

They further agreed (*ibid*) that "interlocked guarding" was required to prevent access via the front doors of the flocking machine and the top cover of the air blast unit. Further still (*ibid*), the joint experts agreed that Mr Haswell had received no proper training and that his injuries were of the nature to be expected in the light of his intervention into the flocking machine. For his part, the Judge concluded that:

> "….there was a very real risk of injury greater than that sustained by Mr Haswell being sustained by persons unfortunate enough to be involved in such an accident."

38. *The legionella incidents:* Turning to the legionella incidents, the Judge sought to proceed in accordance with the Guideline, having regard to the observations of this Court in *Tata Steel*.

39. *Step 1:* As to *culpability*, the Judge rejected the Faltec submission that it should be categorised as low. To the contrary, there were many features which could justify culpability being regarded as high. There had been serious and systemic failures within the organisation to address grave Health and Safety risks. Ultimately, however, the Judge acceded to the Respondent's submission that medium categorisation was justified but (at [83]) "…it is a categorisation right at the top end of medium". The Judge was persuaded in this regard by the engagement of an apparently reputable sub-contractor, GWT. However:

> "…the lessons of this case are that simply subcontracting out HSE obligations cannot provide an answer to failures to properly

> monitor and overview that contractor's work. The failings in that regard were significant and substantial…."

40. Turning to *harm*, the parties were agreed that the level of risk created by the offences fell into Level A – namely, death physical or mental impairment resulting in lifelong dependency on third party care for basic needs or a significantly reduced life expectancy. The issue under this heading went to the likelihood of harm arising; the Respondent contended for a high likelihood; Faltec for a low likelihood. The Judge pondered the question (at [84]) of whether the criminal standard of proof was applicable or whether he should simply assess the likelihood of the harm occurring. At all events, the Judge rejected the Faltec case and, in the light of the statistical evidence, said this:

> "….I do not consider that …a risk of between zero and 0.04% of death resulting could possibly be described as low, when considering an urban area."

Accordingly, the Judge held (at [85]) that risk of level A harm arising was high. It was "more as a result of good fortune" that when 5 people had succumbed to Legionnaires' disease, there were no fatalities given "…a statistical likelihood that….between 10% and 15% of those infected" would die. The Judge therefore concluded "to the criminal standard" that the risk of harm was high; though he did not say so in terms, it is plain that the Judge here had in mind a high risk of harm *arising*.

41. In the light of this conclusion, the Judge did not need to resolve the issue of whether he was prohibited from moving up a harm category by the concluding wording on p.5 of the Guideline (see further below). The Judge made it clear (at [86]) that he did not think he was so prohibited; thus, had he been wrong in his assessment of the likelihood of harm being high – and should it only be medium – he would have raised the category of harm from category 2 to category 1 "because of the large numbers of people potentially affected by this outbreak".

42. Pausing there, the Judge had now concluded that there was medium culpability and, applying the Guideline matrix, this was a case of Harm Category 1.

43. *Step 2:* Next, it was agreed that Faltec was a Medium level company, having a turnover of under £50 million *per annum*. It followed from the Guideline grid that the range for the offence was £300,000 - £1.3 million. There was aggravation in the form of Faltec's two previous convictions; although the notices from the HSE were not Court orders, the Judge took the view (at [89]) that they were "akin to" Court orders. He also treated Faltec's overall poor safety record as aggravating the matter. As to mitigation, the Judge had regard to the steps taken "although these were regularly prompted by intervention by the authorities, appeared lethargic, reluctant and were inadequately implemented". In the event, balancing these factors, the Judge took a starting point ("SP") "towards the top end of the range of £1,200,000".

44. *Step 3:* At the next stage, the Guideline contemplates the decision-maker stepping back and considering proportionality. Here the Judge acknowledged that Faltec was trading at a loss. That was not, however, the position of the Holding Company. Having regard to the statements in Faltec's 2015, 2016 and 2017 accounts, going to it enjoying the full support of the Holding Company and its position as a going concern, the Judge concluded (at [93]) that "some limited regard" was to be had to the Holding Company.

The Judge then referred (at [94]) to the provision in the accounts, ultimately for some £1.6 million in the 2016 accounts, in respect of these very incidents. While this constituted proper financial provision for these Health and Safety issues, the Judge said in terms that he "obviously….paid no regard to this when considering the level of fine" – but treated it as relevant to the financial health of Faltec and the consequences for others of the fine he had in mind.

45. *Steps 4, 5 and 6:* The only factor to be taken into account here was Faltec's guilty plea. Accordingly, the Judge reduced his provisional figure of £1.2 million by the full 1/3 credit, so resulting in a fine of £800,000 for the legionella outbreaks. That fine could be expressed as concurrent on each of counts 1 and 2, or it could be attached to one of those counts, with no separate penalty on the other.

46. *The flocking incident:* Here too, the Judge sought to proceed in accordance with the Guideline.

47. *Step 1:* As to *culpability*, there was a case (at [98]), relating to the acquisition of machine B14, for categorising it as "very high" on the ground that failure in regulatory compliance was deliberate and constituted a flagrant disregard of law. In the event, the Judge rejected this option and also rejected the Faltec submission of medium culpability. He held instead (*ibid*) that this was a case of high culpability:

> "All of the features for High culpability are present. …[Faltec] fell far short of the appropriate standard. It failed to put in place well recognised standards. It allowed itself to be sold a machine by its holding company which it knew was not certified to the standards in the industry. It failed to deal with the warnings by the HSE concerning its systems. After B14 was introduced onto the line it was subject to fire, and the incidents described had a marked similarity to that which befell Mr Haswell….. I believe this situation was allowed to develop through incompetence, lack of training, lack of resources in Health and Safety, much of which may now have been hopefully rectified…"

48. With regard to *harm*, the Judge was sure that there was a high likelihood of harm but was "uncertain as to whether the harm fits into level B or level C". He was, however, satisfied (at [101]) that if he had assessed the case as being one of Level C harm, then because the offence was a significant cause of actual harm (the injuries sustained by Mr Haswell), he could and would have increased the harm category. The upshot was that whether this incident was to be regarded as one of Level B or Level C harm, the relevant category was Harm Category 2.

49. *Step 2:* The upshot was a sentencing range of £220,000 - £1,200,000. As the case verged on very high culpability, it fell at the highest end of this sentencing bracket. It was again aggravated by previous convictions. Further, the Judge had regard to what he termed (at [103]) as "…cost cutting (in terms of the purchase of the machine for £90,000 more cheaply than a regulatory compliant one), which was at the expense of safety". The Judge made no finding as to the motive for the cheap purchase from the Holding Company but observed that it had the effect of leaving Faltec "with a significant health and safety exercise, which it failed to undertake appropriately." The Judge regarded the breaches of the enforcement notices as an aggravating factor, though

they were not Court orders; further aggravation arose from the length of time the breaches were ongoing and remarked that it took the accident for Faltec to do what it should have done before operating B14. Still further, the Judge treated Faltec's poor Health and Safety record as aggravating. There was no real mitigation (*ibid*):

> "I reject the defence suggestion ….[of] an injury free period. The machine had been in operation for a year and the injuring explosion was its third in that period. This was an accident waiting to happen, and no sufficient steps were taken to prevent it."

Accordingly, the Judge chose a SP at the very top end of the category range, namely, £1.2 million.

50. *Step 3:* There was one difference from the position with regard to the legionella outbreaks. Having regard to the role of the Holding Company in the supply of the defective machine, the Judge held (at [104]) that he was entitled "to exceptionally have regard to their resources" in determining whether the penalty to be imposed was proportionate. It must, the Judge said, "be exceptional that a HC be so intimately involved in the events which gave rise to these breaches". Even without regard to the Holding Company, the Judge could have regard to the size of the provision for a possible fine made in the Faltec accounts and the state of its finance generally. The Judge was satisfied that the penalty was proportionate and would bring home to Faltec "the need for all machinery to be compliant to both European and UK standards when imported".

51. *Steps 4, 5 and 6:* Here too, the only relevant adjustment related to the discount for Faltec's guilty plea; allowing a full 1/3, the Judge fixed the fine for Count 3 at £800,000.

52. *Step 7:* Reviewing the totality of the sentence, the Judge was satisfied that the total fine of £1.6 million would bring home to the directors and shareholders of Faltec the appropriate message. No downwards adjustment was called for.

DISCUSSION: COUNTS 1 AND 2 – LEGIONELLA

53. *Principal Issues:* Especially having regard to the wide-ranging attack launched by Faltec against the sentencing observations, it is necessary to underline the appellate role of this Court. Our task is not to re-run the hearing before the Judge – a hearing during which he heard days of evidence. Instead, we are concerned with whether it has been shown that the Judge was wrong and, if so, whether any such error/s demonstrated that the sentence passed was wrong in principle or manifestly excessive.

54. The following principal Issues can be distilled in respect of the legionella outbreaks, Counts 1 and 2:

    i) Did the Judge err in concluding that Faltec's culpability was at the top-end of medium? ("Issue I: Culpability")

    ii) Did the Judge err in concluding that there was a high likelihood of Level A harm (death) arising? ("Issue II: Harm")

iii) If the Judge erred in concluding that there was a high likelihood of Level A harm (death) arising, was he precluded from moving up a Harm category? ("Issue III: Moving up a Harm category")

iv) Did the Judge err as to any applicable aggravating and mitigating factors? ("Issue IV: Aggravating and mitigating factors")

v) Did the Judge err in his approach to Faltec's financial position? ("Issue V: Financial position")

vi) Overall conclusion on Counts 1 and 2. ("Issue VI: Counts 1 and 2 – overall conclusion")

55. *Issue I: Culpability:* Mr Hockman QC, for Faltec, mounted a sustained argument that the Judge erred in categorising culpability as "Medium" and "right at the top end" of Medium. Mr Mills, for the Respondent, submitted that the Judge's categorisation was amply justified. We agree with Mr Mills.

56. As set out in the sentencing observations, the dangers of Legionnaires' disease were sufficiently well-known, so resulting in the publication of a code of practice - ACOP. ACOP refers to the specific dangers flowing from dead legs. It is common ground that dead legs were present which, as accepted in Faltec's basis of plea, "ideally…should not have been present". On any view, there had been communications between the Respondent and Faltec as to dead legs in 2013, yet no effective action had been taken to remove them. Indeed, Faltec did not have an essential "written scheme", including a "schematic diagram" of pipework at its site. In passing, whether these communications between the Respondent and Faltec should be characterised as "warnings" seems to us to be neither here nor there; those communications focused, *inter alia*, on the concern as to dead legs, a matter of which Faltec should in any event have been cognisant in the first place. It would be quite wrong to underplay the significance of dead legs; the Joint Experts were agreed that:

> "…the existence of deadlegs contributed to the overall risk, and…the outbreak strain of bacteria was found to be present in a deadleg on line B21. The nature of that contribution was that if the biocide treatment regime was not effective, such deadlegs were a potential source of migration of…bacteria…from which the route to infection….could progress…..The extent of the contribution to overall risk by the deadlegs present cannot be determined."

57. The upshot was that the entire weight of risk management fell on (biocide) dosing. Of itself that does not strike us as prudent. Dosing had been outsourced to GWT, an admittedly reputable sub-contractor. But, as is again common ground, there was a failure in Faltec's oversight of GWT. As highlighted by the Joint Experts and recorded at [36] of the sentencing observations, Faltec lacked a written scheme containing safe operating parameters. Had a proper oversight system been in place, the GWT reports to Faltec should have triggered immediate and effective increases in dosing. Plainly such training as the relevant Faltec operatives had received was inadequate for them to take action, absent such a written scheme – thus serving to emphasise the importance of written guidance and the seriousness of its absence. We do not overlook the Faltec

argument that dosing is capable of remedying problems created by dead legs; however, if the entire risk management system depended upon the success of dosing, then it was imperative to have an adequate system in place to ensure such success. That Faltec did not have.

58. In all these circumstances, the Judge was amply entitled to reach the conclusion he did as to Faltec's culpability. Moreover, given the serious, systemic failure of oversight, through the lack of written guidance, the Judge's finding of "top end" Medium culpability, may be regarded as generous to Faltec.

59. *Issue II: Harm:* As will be recollected, this Issue went to the likelihood of Level A harm - specifically death – arising, from the legionella outbreaks.

60. One matter can be disposed of at the outset. Although the Judge mused (at [84]) on whether he needed to be sure of the likelihood of the harm arising to the criminal standard of proof, it is plain from his conclusion (at [85]) that he was satisfied, to the criminal standard, that the risk of the Level A harm arising was high. For that matter, we think he was right to consider the question by reference to the criminal standard of proof.

61. Some guidance on the correct approach to this Issue is, with respect, furnished by *R v Squibb Group Ltd* [2019] EWCA Crim 227. Giving the judgment of the Court, Leggatt LJ said this (at [44]):

> "On the issue of harm, however, while it was common ground that the seriousness of the harm risked was at Level A, there does not appear to us to have been any proper basis for the judge's conclusion that there was a medium likelihood of such harm arising. The likelihood or otherwise that exposure to asbestos at a particular level for a particular period of time will ultimately cause a fatal disease is not something which is rationally capable of being assessed simply on the basis of supposition, impression or imagination. It is a scientific question which should be answered, if possible, with the assistance of scientific evidence."

62. We read this passage as of general application. Thus, in the present case, the likelihood of Level A harm arising can only be assessed having regard to the scientific evidence before the Court. The Court could not, for instance, substitute an impressionistic view for the evidence that those exposed to outbreaks of legionella from cooling towers who would be expected to sustain fatal injuries, would be between 0 and 0.04%.

63. The more difficult question is the characterisation of that figure, i.e., 4 in 10,000, as a high, medium or low likelihood of harm arising. As it seems to us, this question of characterisation is one for the Court on all the evidence, rather than the expert witness. The Court is here engaged in an evaluative exercise and must, in our judgment, be permitted a margin of appreciation.

64. That said, the Court's evaluation cannot ignore the scientific evidence of likelihood. So, in *Squibb*, Leggatt LJ went on to say this (at [45]):

> "….The expert's best estimate was that, if 100,000 people were exposed to asbestos to a similar extent to Squibb's employees, about 90 deaths would result. To put this estimated risk in context, the risk of dying from smoking cigarettes is around 1 in 5 (i.e., 20,000 cases per 100,000) and the risk of dying from working in the construction industry for 40 years or from an accident on the roads is around 500-600 chances per 100,000. On this basis, the likelihood that one of Squibb's employees will die as a result of their employer's breach of duty in this case is on any view extremely small."

While we do not read this paragraph as laying down a rule for the characterisation of the likelihood of harm arising, let alone a rule of general application, it does serve as a reminder that the Court's characterisation ought not to be divorced from the reality of the scientific evidence before it.

65. On the evidence, the relevant figure for deaths in the present case from an exposure to legionella would be 4 in 10,000. In an urban area (where the Faltec site was located), over a short period of time (unlike the asbestosis, smoking or construction industry examples set out in *Squibb*¸ relating to periods of years), we are unable to accept that this figure involves a *low* risk of harm arising.

66. Moreover, although there is no *precise* evidence as to Level A harm risked other than death, it is logically inescapable that if the risk of death is 4 in 10,000, there must be a risk of other Level A harm in an additional percentage. As the Respondent's Opening before the Judge indicated, there was evidence that, if untreated, Legionnaires' disease "will lead to life threatening problems including organ failure or septic shock leading to coma *and possibly* death" (italics added). Thus, as logic alone must dictate, Legionnaires' disease may well result in catastrophic illness coming within Level A harm other than death.

67. Against this background, we are satisfied that the correct categorisation for the likelihood of Level A harm arising from these outbreaks of legionella in a densely populated urban area is "Medium". We reject the Faltec submission of "Low" likelihood and, equally, we are unable to agree with the Judge's categorisation of "High" likelihood. We do not think that the Judge's categorisation can be sustained in the light of the statistical evidence before the Court.

68. For completeness, we add that we view the relevant statistical figure as that comprised in the 0 – 0.04% risk of fatal injuries. We too (as did the Judge) accept that the Respondent's evidence (that 10-15% of those who contracted Legionnaires' disease might die) was not inconsistent with Faltec's (0 – 0.04%) risk figure - but we do not think that this risk assessment of the cohort actually infected informs the characterisation of the likelihood of harm arising in this case. Both sets of figures underline the sheer good fortune that there were no fatalities in the instant case, where five people contracted Legionnaires' disease – and reinforce the grave view we take of Faltec's failings in this regard.

69. *Issue III: Moving up a Harm category:* Using the "grid" in the Guideline, a High likelihood of harm results in "Harm category 1", whereas a Medium likelihood of harm results in "Harm category 2". The financial impact when applied to a case of Medium

culpability is considerable. Thus, Medium culpability and Harm category 1 produce a SP of £540,000 and a Category range of £300,000 - £1,300,000. By contrast, Medium culpability and Harm category 2, mean a SP of £240,000 and a Category range of £100,000 - £600,000. The Judge made clear (at [86]) that if wrong in categorising the risk of Level A harm arising as "High", he would have moved up a Harm category, so that the same result was achieved.

70. The foundation for the Judge's "alternative" approach was as follows. Having used the table in the Guideline (at p.5) to identify an "initial harm category" based on both the seriousness of the harm risked (Level A) and the likelihood of that harm arising (High, Medium or Low), the Court is next enjoined to consider whether either of two further factors applies.

71. Pausing there, we underline that the Guideline enjoins a Judge to *consider* moving up a harm category or within the category range; the Judge is not *obliged* to make an upwards adjustment. The Guideline is permissive rather than obligatory.

72. The first of those further factors ("factor i)") is in these terms:

> "**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."

The second factor ("factor ii)") reads as follows:

> "**Whether the offence was a significant cause of actual harm**…."

The Guideline then continues with the following paragraph ("the paragraph"):

> "If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range….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 on the scale of seriousness above."

73. The Judge took the view that he would have been entitled to move up a Harm category and was not precluded from doing so by this concluding "caveat"; he said this (at [86]):

> "…I would have raised the category of harm from category 2 to category 1, because of the large numbers of people potentially affected by this outbreak, and would have ruled that the caveat on limb 2 of the guidance only applied to the second limb of limb 2, namely elevation of category by reason of injuries sustained."

74. The parties disagree starkly on whether this course was open to the Judge. Mr Hockman submitted that it was not. The paragraph applies to both factor i) and factor ii). Actual harm was caused but not amounting to Level A harm, even though Level A harm was risked; accordingly, the Court was not entitled to move up a harm category. Mr Mills submitted that it was. The "caveat" in the paragraph applied only to factor ii) and did

not "fetter" the Court from moving up a harm category in factor i) cases, where many people were exposed to risk.

75. Attractive though we find the course contemplated by the Judge and the submission of Mr Mills, we are not persuaded that it was open to the Judge (or to us). First, though the Guideline is not to be construed as a statute, on a natural reading, the paragraph applies to both factor i) and factor ii), as its opening words make clear. Secondly, the primary focus of the Guideline – and the gravamen of many Health and Safety offences – is exposure to *risk*, not actual harm. There is, accordingly, ample scope for an upwards adjustment in Harm category in cases where numbers of people have been exposed to the risk of harm - but no actual harm has been caused. Thirdly, it is only where actual harm has been caused, but *to a lesser degree than the harm risked*, that the language of the Guideline does prevent the Court from moving up a Harm category. Fourthly, that is the position here – given that Level A harm was risked but not caused. It follows that the concluding caveat in the paragraph is applicable - all the more so, it would appear, given that the offence was a *significant cause of actual harm* (with regard to the five victims) and thus within factor ii) as well as factor i).

76. We therefore conclude that the relevant provisional categorisation for the legionella outbreaks, for the purposes of the Table at p.7 of the Guideline, is Medium culpability, Harm category 2. Accordingly, and subject to any adjustment/s, aggravation or mitigation, there is a SP of £240,000 and a Category range of £100,000 - £600,000.

77. *Issue IV: Aggravating and mitigating factors:* We have already summarised the Judge's treatment of this topic (at [89] of the sentencing observations). Looked at in the round, we are unable to accept the Faltec submissions that he fell into error, let alone that he was "completely wrong" or that the figure at which he arrived was manifestly excessive - aside from the need to scale down the figure in the light of our conclusion as to the relevant Harm category. In any event, it cannot realistically be said that the Judge placed undue weight on the aggravating features; he treated the legionella outbreaks at the "very top end" of Medium culpability but, as will be recollected, the fine was provisionally fixed at £1.2 million for these matters, thus *less* than the top of the Category range. Double counting would, however, be wrong and, with that in mind, we express the matter in our own words to make it clear that there has been no double counting.

78. A repeated refrain in the Faltec submissions is that the decision of this Court in *R (Health and Safety Executive) v ATE Truck and Trailer Sales Ltd* [2018] EWCA Crim 752; [2018] 2 Cr App R (S) 29, esp. at [58], means that the Court could not have regard to Health and Safety failings outside the period of the indictment. In *ATE*, as explained at [57], that was a consideration of particular importance, in the light of the basis of plea and the different methods of work adopted. Moreover, it is settled law that a sentence cannot reflect offences of which a defendant has not been convicted: *R v Kidd* [1998] 1 WLR 604. However, nothing in either *ATE* or *Kidd*, or any relevant principle, prevents a Court taking into account previous convictions by way of antecedents as an aggravating factor – provided that they are relevant and that double counting is avoided. Consistent with principle, there is express provision in the Guideline (at p.10), permitting a Judge to treat previous convictions as a statutory aggravating factor.

79. In our judgment, therefore, the Judge was amply entitled to take into account, as an aggravating factor, Faltec's two previous Health and Safety convictions, with their

attendant grave consequences (as summarised at [13] of the sentencing observations). They were both Health and Safety convictions and we are entirely satisfied as to their relevance. As the Judge put it (at [89]), those were "significant and substantial convictions and they very significantly aggravate these convictions…". We agree. Furthermore, our treatment of culpability has not reflected them at all, so there is no double counting.

80. By contrast, the "warnings" given to Faltec in 2013 (dealt with above), fell naturally into a consideration of culpability, so we make no further mention of them here.

81. As to mitigating factors, with respect to Mr Hockman's challenge, we do not think that the Judge was wrong to treat them as he did (at [89]) of the sentencing observations.

82. Overall, subject to any adjustments in respect of the matters which remain to be considered and the discount to be allowed for Faltec's guilty plea, we share the Judge's view that Counts 1 and 2 call for a fine towards the top end of the relevant Category range. In the light of the "new" Category range, we fix that figure as £570,000.

83. *Issue V: Financial position: (A) Introduction:* It is important to be clear as to the nature of this Issue in the context of Counts 1 and 2. The Judge's decision (sentencing observations at [95]) was that the penalty he had in mind was proportionate, would not impact inappropriately adversely on Faltec or others and would bring home "the seriousness of their transgression". The Judge declined to make a downwards adjustment to the provisional amount of the fine, on the ground that Faltec had been trading at a loss in 2016 and 2017. The dispute is whether the Judge erred in not making such a downwards adjustment. Faltec submits that he was wrong not do so; the Respondent seeks to uphold his decision.

84. *(B) The Guideline provisions:* Having addressed aggravating and mitigating factors (in the light of the Guideline grid), the sentencing Judge may be required to refer to other financial factors at Step 3, to ensure that the fine is proportionate. This is part of the process of stepping back, reviewing and, if necessary, adjusting the initial fine based on turnover "to ensure that it fulfils the objectives of sentencing for these offences": Guideline, at p.10. The Court may adjust the fine upwards or downwards.

85. Step 3 (Guideline, at p.10) provides that the Court should finalise the appropriate level of fine "in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender". It should not, as the Guideline goes on to say, "be cheaper to offend than to take the appropriate precautions". The Guideline specifically provides (*ibid*) that the fine 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".

86. As to whose resources are relevant, the Guideline provides at p.6:

> "Normally, only 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."

The Guideline continues (at p.10):

> "The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing."

87. In finalising the sentence, the Court should have regard to the profitability of the organisation. As the Guideline provides (at p.10), if an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. It is at once to be noted that a downward adjustment *may* be needed; a downward adjustment is not mandatory. By implication (*Tata Steel,* at [25 (iv)]), a downward adjustment may equally be appropriate where the business is loss-making.

88. *(C) The challenge to the Judge's decision:* Distilling the essence of the Faltec argument, it comes to this:

i) The Judge was wrong to take into account the position of the Holding Company. Criminal liability and punishment are personal to the offender; a fine should not be imposed on the basis that it will, or might, be paid by a third party. Accordingly:

> "….the defendant company must be shown to have a legal right or interest in the resources of the linked organisation in order to satisfy the requirement that those resources are available."

Furthermore, the 2017 Faltec accounts contained no statement that Faltec was dependent upon the support of the Holding Company to enable it to continue as a going concern.

ii) The fact that Faltec had, prudently, included a reserve in its 2017 accounts in the amount of £1.6 million, in respect of the fine, was an irrelevance and the Judge erred insofar as he had regard to it.

iii) As Faltec was loss-making, the Judge erred in failing to make, or consider, a downward adjustment.

89. *(D) The position of the Holding Company:* There is, of course, no dispute as to hornbook principles of separate corporate personality; that criminal liability is personal; and that a fine should not be imposed on the basis that it will, or might, be paid by a third party. None of that is in issue here. The question instead is whether, as the Guideline expressly provides, this is an exceptional case where "the resources of a linked organisation are available and can properly be taken into account". In that regard, the Court should consider the "financial circumstances of the offender in the round" so as to assess "the economic realities of the organisation". The "economic realities" test is a broader test than that postulated by Mr Hockman of a legal right of the offender to the resources of the linked organisation. The decision on this point in *Tata Steel* (at [57]) was based on the economic realities test; that was an "exceptional" case in that it was clear that the support of the parent was of the first importance to ensuring that the offender could continue to prepare its accounts on a "going concern" basis. Whether the economic realities test is satisfied will depend on a fact specific

inquiry in the individual case; there is no "catch-all" answer. In any event, the question should be approached with a degree of caution; ordinarily, it is only the resources of the offender which are to be taken into account; the fact that companies are members of the same group or have a subsidiary – parent relationship, will not *of itself* satisfy the test; it is only in exceptional cases that the resources of a linked organisation fall to be considered.

90. Was the present case exceptional? The 2015 and 2016 accounts support the Judge's conclusion that they were. Over and above the extract cited by the Judge (at [93]) of the sentencing observations, those accounts included the following passage:

> "The company meets its day to day working capital requirements by having access to loans from its parent undertaking. The company is dependent on continuing financial support being available from the bank and the continued financial support, should it be required from its parent undertaking.
>
> The parent undertaking has agreed to provide sufficient funds to the company should they be required, to enable it to meet its liabilities as they fall due and has confirmed the availability of such support for a minimum of 12 months from the date of approval of these financial statements."

In those circumstances, as in *Tata Steel*, to ignore the Holding Company's resources would be wrong and would produce a misleading and unrealistic picture of Faltec's resources.

91. The 2017 Faltec accounts did not contain a statement in the same terms. But had the essence of the matter changed? The 2017 accounts continued to be prepared on a "going concern" basis. There had been, as is plain, a "debt for equity" swap, involving the extinguishment of a £36 million loan from the Holding Company in return for a share issue in an equivalent amount. The reason for the debt for equity swap was explained in the witness statement of Mr Keith Wakley, Deputy Managing Director of Faltec, dated 18 April 2018, which was before the Court. As Mr Wakley expressed it, the swap was carried out:

> "…as head office [i.e., the Holding Company] accepted that the outstanding loans were at a level that they could not realistically be repaid. Head Office continue to own 100% of the share capital of …[Faltec]…"

92. In our judgment, the economic realities here make this too, an exceptional case. Faltec's dependence on the Holding Company is such that, for Faltec's accounts to be produced on a going concern basis, it would be unrealistic and misleading to ignore the Holding Company's resources. The Judge was therefore entitled to have "some limited regard" (at [93]) to the Holding Company's resources in his proportionality assessment, relating to Counts 1 and 2. The Holding Company was not loss-making. We therefore reject the Faltec challenge to the Judge's approach, based on his having regard to the Holding Company's resources.

93. *(E) The £1.6 million reserve:* As appears from the 2017 Faltec accounts, a prudent reserve of £1.6 million has been made against the contingency of a fine in respect of Counts 1-3. The Judge made it plain (at [94]) that the size of the reserve was (of course) irrelevant to the size of the fine. However, he appears to have taken it into account in concluding that Faltec remained solvent *after* making such provision. With respect to the Judge, we are unable to agree that the size of the reserve ought to have formed part of the proportionality assessment. The danger is one of unintended consequences – namely, discouraging prudent reserving. That said, we are not persuaded that Faltec was prejudiced as a result. If the fine did not bear unduly hard *after* making allowance for the reserve, it could hardly have been disproportionate if no account was taken of the reserve. The better course, however, is to leave such provisions out of account.

94. *(F) Ought the Judge to have made a downward adjustment, having regard to the resources of Faltec alone?* On the material before us, despite a substantial turnover, Faltec appears to have been trading at a loss in 2016 and 2017. It follows that the Judge had a discretion to make a downward adjustment. It is plain that he considered doing so but decided against it. In our judgment, that was a decision he was entitled to make. Faltec's 2017 accounts were presented on a going concern basis. Although there were losses, Faltec's "Statement of Financial Position" does not suggest that the company was in such ill-health that the impact of the fine (in the amount contemplated by the Judge) would have been disproportionate. Insofar as there is criticism of the manner in which the Judge approached this discretionary exercise, we need say no more than that we would have reached the same conclusion – having regard to all the factors to which reference has already been made. Moreover, given the reduced amount of the fine which follows from our conclusion on the likelihood of harm arising, there is even less reason for making a downward adjustment.

95. *Issue VI: Counts 1 and 2 – overall conclusion:* To recap, having regard to the various matters discussed, the provisional amount of the fine in respect of Counts 1 and 2 is £570,000 – concurrent on each of those Counts (an approach we prefer to the Judge's imposition of no separate penalty on Count 2, though there is no practical difference between them). The reduction from the Judge's equivalent figure of £1.2 million essentially flows from the different view we have taken of the likelihood of Level A Harm arising.

96. All that remains is the discount for Faltec's guilty plea. No other adjustments are called for. Although there was a Newton hearing, the Judge allowed the full 1/3 discount (hence his final figure of £800,000 in respect of these Counts). In the circumstances, we propose to follow the same course. The upshot is a fine of £380,000, concurrent on each of Counts 1 and 2 – and, to such extent, we allow the appeal on Counts 1 and 2.

DISCUSSION: COUNT 3 – THE FLOCKER INCIDENT

97. *Principal Issues:* Here too, we begin by distilling the principal Issues which arise for decision on this appeal:

    i) Did the Judge err in concluding that Faltec's culpability in respect of the flocker incident was high? ("Issue VII: Culpability")

ii) Did the Judge err in concluding that this charge should be categorised as Harm category 2? ("Issue VIII: Harm")

iii) Did the Judge err as to any applicable aggravating and mitigating factors? ("Issue IX: Aggravating and mitigating factors")

iv) Did the Judge err in his approach to Faltec's financial position? ("Issue X: Financial position")

v) Overall conclusion as to the flocker incident. ("Issue XI: Count 3 – overall conclusion")

98. *Issue VII: Culpability:* Notwithstanding the extensive submissions addressed by Faltec on this Issue, its essence is straightforward, and the point is short. The inescapable factual assessment casts Faltec in an extremely unfavourable light. The Judge's summary (at [47] – [48]), already foreshadowed, was impeccable:

> "At the time of the incident there was nothing to prevent the door being opened while the grid was operating….It is within the flocking machine that the risk of explosion is ever present when it is in operation…..
>
> …The access points were not fixed in position or interlocked meaning it could be opened and accessed whilst the machine was in operation…. "

In the event, that is precisely what happened. It was an accident waiting to happen. Moreover, the failing was not sudden; this was a longstanding failure on the part of Faltec to meet the requisite safety standards. To reiterate, by their basis of plea, Faltec admitted (as recorded by the Judge, at [57]) that machine B14 did not meet the required safety standards, that risk assessments had failed to identify the control measures necessary and that Mr Haswell had not been sufficiently trained. This was (at the least) a serious failure within the organisation to address a Health and Safety risk. The Judge categorised the flocker incident as one of High culpability and there is no realistic basis for criticism of this culpability categorisation.

99. *Issue VIII: Harm:* This Issue too can be taken shortly. Given the nature of the harm risked – namely explosion – a credible case could have been made out for Level B risk, i.e.: "Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work". That said, the Judge (at [101]) was not sure whether the harm came within Level B or the lower Level C ("All other cases not falling within Level A or Level B"). On that footing, we agree with Mr Hockman that the correct course was and is to categorise the seriousness of the Harm risked as Level C.

100. As to the likelihood of that harm arising, the Judge had an ample basis for concluding that it was high. As the Judge expressed it (at [100]):

> "Undoubtedly the frequency of explosion disclosed by the schedule and the lack of regulatory compliance, alterations to the

> machine to create safe systems or proper training of the staff about these risks gives rise to a high likelihood of harm…."

101. In Guideline terms, the upshot is, provisionally, Harm category 3. However, on this approach, the Judge made clear (at [101] – [102]) that he was minded to move up a Harm category. The basis for doing so was factor ii) - the offence was "a significant cause of actual harm", comprised of Mr Haswell's injuries. The Judge was fully entitled to take this course and we agree with him. In consequence, Count 3 is brought within Harm category 2, with a SP of £450,000 and a Category range of £220,000 - £1,200,000.

102. *Issue IX: Aggravating and mitigating factors:* As already recorded, the Judge viewed this offence as significantly aggravated by reason of a variety of matters (at [103]), with no real mitigation. He therefore decided on a SP at the top of the Category range, of £1.2 million. We agree with the Judge, if not for entirely the same reasons.

103. First, as with Counts 1 and 2, this matter is aggravated by Faltec's previous Health and Safety convictions. As the Judge observed, it is additionally aggravated by the convictions in respect of Counts 1 and 2, albeit he did not think it necessary to rely on that further aggravation.

104. Secondly, for the reasons already discussed, nothing said in *ATE* or *Kidd*, prevents the offence from being aggravated by matters relating to the period October 2014 – October 2015, prior to the date upon which the charge focuses.

105. Thirdly, the statutory aggravating features listed at p.9 of the Guideline comprise a "non-exhaustive" list. The Judge – and we – are entitled to consider the facts in the round, when assessing aggravation (and mitigation). Specifically, for present purposes, a matter might fall outside the list (on a proper construction of the statutory list) but nonetheless comprise an aggravating factor.

106. Fourthly, given that the Judge made no finding "as to the motive for the cheap purchase" of B14 from the Holding Company, there are real difficulties in bringing the matter within the statutory aggravating factor "cost-cutting at the expense of safety". Plainly, such "cost-cutting" cannot be established merely because a cheaper rather than a more expensive machine has been purchased and it transpires that the more expensive machine had safety advantages. Further, though we decline to accept that the Guideline is *confined* by the decision in *R v F. Howe and Son (Engineers) Ltd* [1992] 2 Cr App R(S) 37, it would be unlikely that it had not been *informed* by the tenor of that decision. In *Howe* (at p.43), Scott Baker J (as he then was) said that particular aggravating features would include situations where the offender:

> "…had deliberately profited financially from a failure to take the necessary health and safety steps or specifically run a risk to save money."

On the basis of any such formulation, the motive for the purchase of B14 necessarily required consideration. It may be that Faltec was fortunate that the Judge made no finding in this regard - but so be it. We therefore do not think that the Judge could properly conclude that Count 3 was aggravated by this statutory aggravating factor.

107. Fifthly, that conclusion, however, makes no practical difference; the history of the acquisition and operation of flocker machine B14 was such that the offence was significantly aggravated – and plainly so – albeit not by reason of the statutory aggravating factors. In the light of the evidence before him, set out above, the Judge was amply entitled to describe (at [63]) the situation as "quite appalling". It is unnecessary to repeat the evidence as to a failure to carry out an assessment of fire and explosion risks, the absence of CE marking and the lack of any DSEAR assessment. So too, having acquired the machine as it did and given the absence of certification, the Judge was entitled – and in our judgment correct – to observe (at [66]) that Faltec was "well aware that it was taking on a heavy burden in ensuring the machine was safe for its employees". The accident itself demonstrated that Faltec had failed to ensure that B14 was safe for operation by its employees. The matter was further compounded by the two previous (fires or) explosions connected with this machine. It is correct that Faltec had not done nothing and that a consultant had missed the problem which directly led to this accident; further, in the context of his training, it is right to remind ourselves that Mr Haswell was not a designated operator of this machine; but these considerations are dwarfed by the Health and Safety failings which took place, against the background of acquiring an uncertificated cheaper machine from the Holding Company. The Judge's description (at [103]) that "…the situation which led to this accident should never have prevailed" and that "no sufficient steps were taken to prevent it" was more than justified.

108. Sixthly, it is unnecessary to belabour the point further. This offence was gravely aggravated. Though Faltec did make improvements after the accident, we find it difficult to see what other course it could have adopted. In any event, such mitigation as there was, was overwhelmingly outweighed by the aggravating factors described above. The Judge did not err in deciding on a SP at the very top of the Category range; in any event, we agree with his decision.

109. *Issue X: Financial position:* We adopt but do not repeat the observations and conclusions under Issue V above, where we dealt with this same topic in the context of Counts 1 and 2. There is, however, one additional point where, with respect, we part company with the Judge – though our difference of view has no practical consequences.

110. It will be recollected that, in respect of Count 3, the Judge took the view (at [104]) that, exceptionally, he could have regard to the Holding Company's resources because it would have profited from the supply of the defective machine to Faltec. We cannot agree. Even if the Holding Company was culpable in respect of the supply of machine B14, it simply does not follow that, on this ground, its resources are available to Faltec or can properly be taken into account.

111. However, this additional matter does not cause us to reconsider the answer we have already given under Issue V – and, for the reasons there set out, we agree with the Judge's conclusion that he was not obliged to make any downward adjustment arising from Faltec's financial position.

112. *Issue XI: Count 3 – overall conclusion:* As already set out, the Judge took as his SP a fine of £1.2 million. Notwithstanding the Newton hearing, he allowed Faltec a full 1/3 discount for its plea and fixed the fine for Count 3 as £800,000, consecutive to the fine in respect of Counts 1 and 2. For the reasons set out above, we are satisfied that the

Judge was entitled to reach the conclusion he did and, for that matter, we agree with him. Accordingly, we uphold the fine of £800,000 in respect of Count 3.

TOTALITY

113. As the Guideline provides (Step Eight, at p.12), we must finally consider totality. On totality grounds, we would not have intervened with regard to the £1.6 million total fine imposed by the Judge, had we otherwise been able to uphold it in respect of Counts 1 and 2. In the light of the limited success of the appeal under Counts 1 and 2, the total fine is reduced to £1,180,000. *A fortiori*, we do not think that this reduced total amount offends against the principle of totality.

POSTSCRIPT

114. Faltec's "Written Argument" ran to more than 60 pages. It was augmented by Mr Hockman's "Speaking Note" (which he kindly provided) running to 13 pages. Well-written though both were and welcome though the Speaking Note was, the length of the "Written Argument" was unacceptable. Indeed, the Speaking Note would itself have sufficed as Faltec's skeleton argument. Had we been aware of the length of the Written Argument in enough time before the hearing, we would, with respect, have declined to accept it and would have required re-service of a dramatically shortened version.

115. We note that the current *Criminal Practice Direction ("CPD")*, at *CPD X11 D.17 (Archbold*, Appendix B-693ce), while providing, subject to any overriding judicial directions, that skeleton arguments must not normally exceed 15 pages, together with ancillary directions as to font sizes and line spacing (amongst other matters), does not contain an express enforcement mechanism. For our own part, we would favour a provision that any skeleton argument exceeding the maximum length would automatically be rejected by the Court office on receipt. We draw these observations to the attention of the Criminal Procedure Rules Committee for its consideration.