Neutral Citation Number: [2014] EWCA Crim 49

Case Nos: 2013/03604/A7 & 2013/03860/A7

IN THE COURT OF APPEAL CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2014

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE MITTING
and
MRS JUSTICE THIRLWALL

- -

Between:

R	**Respondent**
- and -	
Sellafield Limited	**Appellant**

R	**Respondent**
- and-	
Network Rail Infrastructure Limited	**Appellant**

- -

Richard Matthews QC and **Eleanor Sanderson** for the appellant **Sellafield Limited**
Barry Berlin (instructed by the Principal Solicitor at **the Environment Agency** and Senior Solicitor of **the Health and Safety Executive**) for **The Crown**
Prashant Popat QC and **Oliver Campbell** for the appellant **Network Rail Infrastructure**
Sarah Le Fevre (instructed by the **Prosecutor** at **the Office for Rail Regulation)** for **The Crown**

Hearing date: 19 November 2013

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Approved Judgment

The Lord Chief Justice of England and Wales :

Introduction

1. These two appeals are being heard together as they raise issues of principle in relation to the level of fines to be imposed for breaches of safety and environmental protection legislation on very large companies –Sellafield Limited (Sellafield Ltd) with a turnover of £1.6bn and Network Rail Infrastructure Ltd (Network Rail) with a turnover of £6.2bn.

   i) Sellafield Ltd was fined £700,000 at the Crown Court at Carlisle on 7 February 2013 for offences arising out of the disposal of radioactive waste.

   ii) Network Rail was fined £500,000 in the Crown Court at Ipswich on 27 June 2013 for an offence arising out of a collision at an unmanned level crossing, causing very serious injuries to a child.

2. Both companies seek leave to appeal on the basis that the fines were manifestly excessive. We grant leave.

The general principles

3. It is important at the outset to recall the provisions which Parliament has enacted in the Criminal Justice Act 2003 (CJA 2003) in relation to the duty of the courts in sentencing, as these principles are applicable to all offenders, including companies:

   i) The courts must have regard in dealing with offenders to the purposes of sentencing which Parliament specified as (a) the punishment of offenders (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences (s.142 of the CJA 2003).

   ii) In considering the seriousness of the offence the court must have regard to the culpability of the offender and the harm caused or which might foreseeably be caused (s.143 of the CJA 2003).

   iii) If a court decides on a fine it must approach the fixing of fines having regard not only to the purposes of sentencing and the seriousness of the offence, but must also take into account the criteria set out in s.164 of the CJA 2003:

> (1) Before fixing the amount of any fine to be imposed on an offender who is an individual, a court must inquire into his financial circumstances.
>
> (2) The amount of any fine fixed by a court must be such as, in the opinion of the court, reflects the seriousness of the offence.
>
> (3) In fixing the amount of any fine to be imposed on an offender (whether an individual or other person), a court must take into account the circumstances of the case including, among other things, the financial circumstances of the offender so far as they are known, or appear, to the court.
>
> (4) Subsection (3) applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.

4. There can be no doubt as to the objective in applying these principles when sentencing a company for offences against health and safety and environmental legislation. As Scott Baker J stated in giving the judgment of this court *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 at 255, [1999] 2 Cr App R (S) 37 at 44

> "The objective of prosecutions for health and safety offences in the work place is to achieve a safe environment for those who work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders."

5. Where a fine is to be imposed a court will therefore first consider the seriousness of the offence and then the financial circumstances of the offender. The fact that the defendant to a criminal charge is a company with a turnover in excess of £1 billion makes no difference to that basic approach.

6. The fine must be fixed to meet the statutory purposes with the objective of ensuring that the message is brought home to the directors and members of the company (usually the shareholders). The importance of the application of s.164 in relation to corporate defendants was reinforced in the Definitive Guideline of the Sentencing Guidelines Council *Corporate Manslaughter & Health and Safety Offences Causing Death,* published in 2010. It has been reflected in more recent decisions of this court: see for example: *R v Tufnells Park Express Ltd* [2012] EWCA Crim 222 at para 43 (the fine after trial on a company with a turnover of £100m and profitability of £7.7m was £225,000; this represented, as the court noted, 2.9% of its operating profit).

7. It will therefore always be necessary in the case of companies with a turnover in excess of £1 billion to examine with great care and in some detail the structure of the

company, its turnover and profitability as well as the remuneration of the directors. Although the appellant companies are similar in that they are companies with such a turnover, they differ considerably. Sellafield Ltd is an ordinary commercial company which makes profits for its shareholders who are large multinational companies. In contrast, the parent company of Network Rail, Network Rail Limited, has no shareholders who receive profits; its members derive no profit from the company. It invests its profit in the rail infrastructure. Both discharge important services of a public nature that have from time to time been directly undertaken by the State. This appeal illustrates the close analysis required. We turn to that analysis at paragraphs 52 and following after we have set out the facts and considered the seriousness of the offence; as this court has repeatedly stated, the size of the penalty will depend on the facts of each case.

1. THE SERIOUSNESS OF THE OFFENDING OF SELLAFIELD LTD

(1) The stringent standards of safety imposed by the legislative regime

8. The processing and storage of nuclear waste is a by-product of an activity of national economic importance: the generation of electricity by nuclear power.

9. It carries with it potentially grave risks. To mitigate those risks the most stringent standards have been adopted at national and international levels. In the United Kingdom they have been laid down in licences granted under the Radioactive Substances Acts 1948, 1960 and 1993 and, more recently, by the Environmental Permitting Regulations 2010. The UK is also a signatory to the European Agreement for the International Carriage of Dangerous Goods by Road – an agreement made under UN auspices – to which effect is given by the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. These instruments set out detailed and specific provision for the sorting, carriage and disposal of nuclear waste.

10. The public rightly expects strict compliance with those standards.

(2) The offences committed

11. Between 15 November 2008 and 19 April 2010 Sellafield Ltd breached those standards in a variety of ways in relation to the system for segregating non-radioactive waste from radioactive waste and for disposing of it.

12. On 7 February 2013, Sellafield Ltd had pleaded guilty at the Magistrates' Court at Workington to seven offences. The Magistrates committed Sellafield Ltd to the

Crown Court as they considered their sentencing powers were insufficient; the maximum penalty they could have imposed was £230,000.

13. A fine of £700,000 was imposed on 14 June 2013 by HH Judge Peter Hughes QC at Carlisle Crown Court, being made up of a fine of £100,000 for each of the seven offences. Five contraventions of different statutory requirements were set out in seven charges. Two pairs of charges covered the same factual allegations, but were separately laid because of change in the statutory regime which took effect on 5 April 2010. Sellafield Ltd

i) Operated a regulated facility other than in accordance with an environmental permit on or about 12 April 2010 by disposing of radioactive waste at a landfill site contrary to Regulation 38(1) of the Environmental Permitting (England and Wales) Regulations 2010.

ii) Failed to comply with or contravened a condition of an authorisation or permit by failing to check the effectiveness of systems equipment and procedures for the disposal of radioactive waste contrary to Section 13 of the Radioactive Substances Act 1993 between 1 November 2009 and 5 April 2010 and Regulation 38(2) of the 2010 Regulations between 6 April and 19 April 2010.

iii) Failed to comply with or contravened a condition of an authorisation or permit by failing to have a management system, organisational structure and resources in place sufficient to achieve compliance with their conditions contrary to Section 13 of the 1993 Act between 15 November 2008 and 5 April 2010 and Regulation 38(2) of the 2010 Regulations between 6 April and 19 April 2010.

iv) Did not comply with a condition of an authorisation or permit by failing, prior to 5 April 2010, to comply with appropriate criteria for accepting monitoring equipment inter-service contrary to Section 13 of the 1993 Act.

v) On and before 12 April 2010 caused or permitted non-exempt radioactive waste to be carried in a manner which did not comply with the European Agreement for the International Carriage of Dangerous Goods by Road contrary to Regulation 5 of the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009.

(3) The processing of exempt waste and the failures by Sellafield Ltd

(i) Exempt waste

14. Sellafield Ltd generates substantial quantities of waste from its activities at its extensive site at Sellafield in Cumbria. Much of it is not radioactive. Such waste may be disposed of as non-toxic waste by ordinary means of waste disposal, principally in landfill sites. This is known as "exempt waste".

(ii) The new system for identifying exempt waste

15. In 2009 Sellafield Ltd set about establishing a means of identifying exempt waste gathered from all over the site for disposal as such. The template was a system already established in one of the buildings on site for waste generated within it – B222.5. Waste was to be sorted by a so-called "waste route" into radioactive and exempt waste. The first step was to identify categories of waste likely to be classifiable as exempt waste – for example mop-heads and office equipment. The next was to measure surface radioactivity by handheld monitors. The results were logged on a form known as "F116/Form 2". The waste was then taken in bags to a purpose-designated building F116.

16. In that building the waste was to be passed through two monitoring devices similar to those operating in B222.5: an Initial Segregation Monitor and an Exempt Waste Monitor. Each device contained two detector heads, set to measure the risk, if any, posed to humans by radiation in microsieverts per hour – the dosage of radiation: a G35 monitor head which measured radiation up to 20 microsieverts per hour, and a G64 head which measured radiation up to 100 microsieverts per hour. The G35 head was so configured that it could not measure a dosage greater than 20 microsieverts per hour. Waste with a dosage above that level was passed to the G64 head for measurement.

17. Any waste passed through the Initial Segregation Monitor with a dosage level greater than zero (or, perhaps, greater than a fraction above zero) should have been set aside as low level radioactive waste – non-exempt waste. Apparently exempt waste was then passed into the Exempt Waste Monitor for a second and final check. It produced an assay report, retrievable at the press of a button, for each bag of waste. If a bag was not radioactive, the measured dose should have been shown in microsieverts per hour as zero or near-zero. If the detector heads in both devices were properly calibrated, no waste other than exempt waste should have been passed for disposal as such.

18. Unfortunately they were not. The G35 monitors were correctly calibrated in both devices and performed their function satisfactorily; but the G64 monitors were not. For them to function effectively, their software had to be adjusted to apply an Activity Conversion Factor – i.e. a multiplier – to the dosage which they were measuring. As installed and delivered by the manufacturers, the multiplier was set at zero. It had to be re-calibrated to function effectively. It was not. Accordingly, whatever dosage was given off by waste bags passing the G64 heads, the dosage registered was zero. It was, accordingly, possible for waste with a dosage over 20 microsieverts per hour to

be passed through the devices as if the dosage was zero and so set aside for disposal as exempt waste.

(iii) The extent of the failure in the system

19. The system was installed in May 2009 and brought into full operation in November 2009. The first batch of exempt waste was dispatched from the site on 12 April 2010 to a nearby landfill site. Four thousand further bags of supposedly exempt waste passed through the monitors with an apparent dosage of zero microsieverts per hour. In fact a small number of bags – five out of five thousand – had dosage levels in excess of 20 microsieverts per hour. The error in the setup of the devices was discovered by chance on 19 April 2010 when, during a training exercise, a bag of waste with a dosage of 41 microsieverts per hour was passed through them and wrongly classified as exempt waste.

20. The error was discovered when the operator checked the assay produced by the Exempt Waste Monitor and saw the dosage level there recorded. This led to the taking of immediate steps to identify the problem and its extent and to alert the relevant authorities and the operators of the landfill site to which the first batch of one thousand bags had been dispatched.

21. Once alerted to the problem, Sellafield Ltd did all they could to ensure that no harm came to anyone. It is as near certain as can be that none has. Five bags were identified from the assay report with dosages of between 23 and 32 microsieverts per hour. Four had been dispatched to the landfill site and one retained on site. Measurements taken at the landfill site vastly exceeded the low level permitted to be deposited at the site – 0.4 bequerels per gram (a measure of the radiation emitted by an object). Three of the bags were within the lowest category of toxic waste – low level radioactive waste – and one was within the next category – intermediate level radioactive waste.

22. There was expert evidence that exposure to the four bags by anyone who might have handled them would have been no greater than a passenger would experience on a flight to Paris. There was agreed expert evidence that had the problem not been discovered for a long time – years – and non-exempt waste of this category had been regularly handled, there would have been a very small but perceptible increase in the risk of death from cancer to those handling it.

(iv) The errors should have been avoided

23. The prosecution case, which was not disputed, was that the errors which led to this state of affairs were readily avoidable and that Sellafield Ltd had numerous opportunities to avoid them, as follows:

i) There was an error in specification. Sellafield Ltd ordered two Exempt Waste Monitors instead of one Initial Segregation Monitor and one Exempt Waste Monitor. In consequence, the manufacturers did not calibrate the G64 detector head on the Initial Segregation Monitor to enable it to perform its function.

ii) The re-calibration necessary of the G64 head in the Initial Segregation Monitor (and as was carried out after 19 April 2010) of the G64 head in the Exempt Waste Monitor was not performed by the staff of Sellafield Ltd. There was no system in place to ensure that it would be.

iii) The G64 head in both monitors was not tested during trials. If a test similar to that performed on 19 April 2010 or a simulated exercise replicating the conditions of that test had been performed, the miscalibration would have been revealed.

iv) No comparison was ever made between the results produced by the handheld devices used to measure surface radiation on the bags recorded in F116/Form 2 and the results produced by the Exempt Waste Monitor.

v) No check of the assay reports produced by the Exempt Waste Monitor was made. If it had been, it would have alerted the operator to the dosage of the five bags of waste wrongly classified as exempt waste.

vi) No routine checking of the calibration of the detector heads was performed.

(v) Culpability and harm

24. The judge summarised the significance of the failures:

> "The mistake that was made in this case was a fundamental one in the setting up, the testing and the subsequent monitoring of the equipment. That such a basic mistake could possibly occur in what needs to be an industry managed and operated with scrupulous care for public safety and the environment is bound to be a matter of grave concern to everyone and particularly local residents in Cumbria. What adds significantly to the concern and the seriousness of the mistake is that it had been in existence and allowed to go undetected for the period of 4 months or so that the system had been in use."

25. The prosecution alleged, Sellafield Ltd accepted, and the judge found, that these failings

> "indicate basic management failures and a deeply concerning lack of procedures formally established and rigorously enforced

> to ensure that equipment was properly set up at the outset and regularly and routinely checked."

26. This led the judge to conclude that

> "The management failures are not confined to specific individuals or failures at certain levels to follow established procedures. They demonstrate…**a custom within the company which was too lax and…to a degree complacent,** and senior management must bear its share of responsibility." (Our emphasis).

27. He identified three aggravating features:

i) The failure was not isolated but systemic.

ii) It potentially exposed those who handled waste off-site and the public to unnecessary risk.

iii) It was not a first offence. A prohibition notice had been served on 28 June 2008, one year before installation of the new monitors, by the Department of Transport for breach of Regulation 5 of the 2009 Regulations. Sellafield Ltd had been fined twice for incidents involving the emission of radioactive material in 2005 and 2007 - £500,000 and £75,000 respectively.

28. He also took into account the mitigating factors already mentioned. The breaches were not deliberate or reckless; no harm had been done and the actual risk of harm was relatively low; Sellafield Ltd had readily co-operated with the authorities and had pleaded guilty at the first opportunity.

(4) The grounds of the appeal

29. It was submitted that the fine was manifestly excessive. There was no actual harm and a very low risk of harm. No credit was given for the guilty pleas and the degree of co-operation with the Environment Agency and the Health and Safety Executive. The level of fine imposed equated with a major public disaster or loss of life, a significant nuclear event or an unmitigated environmental pollution incident. There was no appeal against the order for costs.

(5) Our conclusion on harm and culpability

30. There was in effect no actual harm, as we have explained at paragraph 22. There was a foreseeable risk of some perceptible harm if the failure had not been detected for a number of years; this risk can properly be characterised as very low. We therefore take into account, as s.143(1) requires us to do, the fact that there was in effect no actual harm but there was a very small risk of some harm.

31. The judge found that there had been a custom in the company Sellafield Ltd which was too lax and complacent; that senior management must bear a share of the responsibility. We can see no basis for criticising that finding. The failure was easily avoidable and could and should have been detected very quickly; there was the clearest negligence. We therefore conclude that for an incident of this kind the culpability was medium.

2. THE SERIOUSNESS OF THE OFFENDING OF NETWORK RAIL

(1) The accident

(i) The level crossing at Wright's Crossing

32. Network Rail took over the rail infrastructure in 2002 and has since then been responsible for the level crossings on that infrastructure. One of these crossings is Wright's Crossing on the East Suffolk line. It is what is known as a user worked crossing. It is on private land and provides access to a farm split into two distinct parts by the construction of the line. At Wright's Crossing the East Suffolk line is a single line with a speed limit for trains of 55mph. About 19 trains a day pass over the crossing.

33. The crossing is protected by gates across the road. To cross the line in a car the gates have to be opened before the vehicle crosses and closed when it has crossed. Safe use of the crossing depends on the user seeing an oncoming train. However the sight lines are not good, as the track is curved with high vegetation on each side. There was no telephone, but in bad weather or when large machinery was crossing the line, Mr Wright, the farmer whose farm was accessed by the crossing would telephone the signal box at Saxmundham.

(ii) 3 July 2010

34. On 3 July 2010 at about 8.30 in the evening, Mr Wright drove his 4x4 car to the crossing. He was accompanied by his 10 year old grandson and his dog. Mr Wright stopped at the crossing, opened the first gate looked both ways, crossed on foot and opened the second gate. He looked both ways again and then re-crossed the track

back to his car. He told his grandson to get out of the driver's seat and back into the rear seats. His grandson did so after about 15-30 seconds. Mr Wright got into the car and drove towards the crossing.

35. As he was about to cross the line, he saw a train coming and braked, but the car slipped on the loose gravel and was hit by the train. The grandson was thrown out of the car and his head struck the track. Mr Wright was badly bruised but his grandson had suffered a brain stem bleed; despite extensive hospital treatment the accident has changed his life.

36. The victim impact statement in respect of the grandson sets out the devastating effect that the accident had had. The hospital had given him a 5% chance of survival. He had not had a normal childhood. He would need teaching support, a scribe and a reader throughout his education; his brain's processing speed was 50% of normal. He had right side blindness, his peripheral vision was damaged and he had to avoid all contact sports. He had a titanium plate in his head. His future prognosis would not be known until he was 21 or 22.

(2) The proceedings

(i) Network Rail's plea of guilty

37. Network Rail accepted that it was guilty of significant failings in relation to the risk assessment of Wright's Crossing; that, if a proper risk assessment of the crossing had been made prior to the accident, then a telephone connected to the signal box would have been installed. One had been installed at the crossing after the accident.

38. Network Rail therefore pleaded guilty, on a basis of plea, at the Lowestoft Magistrates Court on 13 March 2013 to an offence of failing to discharge a duty under s.3(1) of the Health and Safety at Work Act 1974. The basis of plea reflected the facts and aggravating and mitigating features to which we will refer. It apologised to the grandson and his family. The magistrates committed the case for sentence to the Crown Court at Ipswich, as the maximum fine it could impose was £20,000. On 27 June 2013 the sentencing hearing took place before Judge Holt sitting at the Crown Court at Ipswich.

(ii) The significant failures of Network Rail

39. In 1996 guidance was issued in the form of Railway Safety Principles and Guidance in respect of user worked crossings. The guidance set out a number of factors that had to be taken into account in any risk assessment of such a level crossing.

40. Prior to the accident there were risk assessments on 15 January 2000, 24 September 2003, 4 March 2007 and 12 April 2009. Those in 2007 and 2009 were carried out by Mobile Operations Managers for Network Rail. There was a maintenance inspection on 28 January 2010.

41. Elementary mistakes were made in the assessment. It should have been obvious to those conducting the risk inspections and to those more senior persons within Network Rail responsible for level crossings that, because of the nature of the use of the crossing and the sight lines, a telephone should have been installed so that anyone crossing the line could ring up and find out if a train was on its way. The sight lines were such that, given the time it would take to cross and the speed of the trains on the line, there was an obvious and serious risk of a collision. It is also of particular importance that in the risk assessment carried out in 2003 the assessor concluded that the crossing was not safe, but no steps were taken to remedy it over the following 6 years, particularly by installing a telephone. As we have noted, after the accident, a telephone was installed at Wright's Crossing.

42. The judge found that there was that obvious risk and it was readily reducible. He also found that the risk assessments were poorly done; there were repeated failures to follow the correct guidance. In 2007, Network Rail had installed a computer system; the risk assessments in 2007 and 2009 were inputted into it, but the programme used did not spot the inconsistencies. Network Rail were unable to explain this failure. We consider that these findings were amply justified on the evidence.

(iii) The aggravating and mitigating factors

43. In accordance with the decision of this Court in *R v Friskies Petcare UK Limited* [2000] 2 Cr App R (S) 401, aggravating and mitigating features were identified in what is commonly called a "*Friskies schedule"*. The aggravating features were:-

i) The injuries to Mr Wright and his grandson resulted from exposure to risk at Wright's crossing.

ii) Serious injury was eminently foreseeable.

iii) The risk had been obvious for many years.

iv) Network Rail's assessment of the risk and its implementation of control measures fell substantially below the standard expected.

v) All users of the crossing had been exposed to risk.

44. There were the following mitigating features:-

i) Network Rail pleaded guilty at the first available opportunity.

ii) Network Rail has cooperated with the investigation.

iii) Network Rail acted after the accident to improve safety by implementing a speed restriction and the installation of telephones. It made changes to its level crossing teams and their approach to the assessment of risk and implementation of control measures after the accident.

iv) Network Rail had in recent years taken steps to improve safety at level crossings.

v) Network Rail took its health and safety responsibilities very seriously. Safety performance had improved significantly in recent years. In the context of its size and the complexity of its organisation, Network Rail had a good safety record.

vi) Network Rail's failings did not arise from an attempt to save money or place profit before safety.

vii) Network Rail's income came from public funds and profit was reinvested in the network to improve safety and performance.

45. In his very clear sentencing remarks, the judge carefully examined this schedule; the fact that it was agreed does not mean that the judge in performance of his duties should accept it uncritically. In our judgment, he was quite entitled to make the following observations in relation to the mitigating features relied on by Network Rail:

(a) As to (iii) that the accident was a poor indictment of the training of Network Rail's staff who had a very important role in assessing the safety of unmanned level crossings which was a recognised source of danger nationally.

(b) As to (iv), the judge found it difficult to accept that the installing of the computer system in respect of level crossings was a panacea on the basis of what had been explained to him. This conclusion was criticised by Network Rail as the computer system had been approved by the Office of the Rail Regulation. We do not consider this criticism of the judge's view was justified. It was no panacea. Network Rail had not, as we have set out at paragraph 42, explained how the use of the system had failed to expose the serious inconsistencies between the

assessments, which would have demonstrated the lack of safety at Wright's Crossing. Moreover as the Crown rightly pointed out, the utility of the programme depended on the data inputted into it.

(c) As to (v), its safety record, the judge considered that that record had to be seen in the context of its previous convictions. He concluded that Network Rail's record was not unblemished; the size and complexity of an organisation was not much mitigation.

(d) As to (vi), he did not regard that as significant mitigation as tax payers and the public expected first call on public funds to be the safety of the public and those who used level crossings.

We see no basis for any possible criticism of these clear findings.

(iv) Network Rail's previous convictions

46. The list of previous convictions provided to the Crown Court and to us show a number of convictions for breach of the Health and Safety at Work Act over the years from 1997. Some were relatively minor such as inadequate maintenance of line side fencing and some very serious such as the fine of £3.5m imposed upon Network Rail in 2005 in respect of the deaths of 4 persons when a GNER passenger train derailed at Hatfield on 17 October 2000. Four convictions for breach of s.3 of the Health and Safety at Work Act were of particular relevance as the events had occurred prior to the accident at Wright's Crossing.

i) A conviction on 16 July 2009 in respect of an incident when a passenger train was derailed at Croxton AHB level crossing in September 2006; Network Rail was fined £70,000.

ii) A conviction on 26 November 2010 when Network Rail was fined £75,000 in respect of a fatal accident at West Lodge footpath crossing on 22 January 2008.

iii) A conviction on 15 March 2012 when Network Rail was fined £1m in respect of the killing of two teenage girls when crossing a station footpath in December 2005; Network Rail had failed to carry out proper assessment of the risk to safety of members of the public in the years 2001 and 2005.

iv) A conviction on 12 June 2012 when Network Rail was fined £356,250 in respect of its failure to act on evidence that pedestrians using a crossing in Wiltshire had insufficient sight of approaching trains. A death had resulted in May 2009.

(v) The sentence at the Crown Court

47. Network Rail was fined £500,000, ordered that they should pay £23,421.74 by way of costs and £15 victim's surcharge. The application for leave to appeal was only against the fine imposed.

(3) The grounds of the appeal

48. It was submitted that, as there had been a guilty plea at the first available opportunity, the starting point was far too high. The judge had failed to take into account previous cases; in *R v Network Rail* [2010] EWCA Crim 1225 where this court had observed that a fine of £666,667 imposed where two had been killed was severe. Reference was made to other cases where lower fines had been imposed such as *R v TDG (UL) Ltd* [2009] ICR 127, *R v John Pointon and Sons Ltd* [2008] 2 Cr App R (S) 82, *R v Merlin Attractions Operations Ltd* [2012] EWCA Crim 270. It was submitted that fines with a starting point of £750,000 would only be appropriate where there was more than one fatality (or there was some significant aggravating factor), or in cases involving a public disaster and where the defendant had been convicted of the offence of corporate manslaughter.

49. It was also submitted that the judge had also failed to give sufficient credit for Network Rail's record, its commitment to safety and that it had taken steps in recent years to improve safety.

(4) Our conclusion on harm and culpability

50. The actual harm caused in the present case was, as is evident from the facts we have set out, serious; much greater harm was foreseeable.

51. As to the level of culpability of Network Rail, there was no evidence of specific senior management failures. The failures, serious and persistent though they were, were at lower operational levels.

3. THE LEVEL OF FINE TO BE IMPOSED IN RESPECT OF THE SERIOUSNESS OF THE OFFENCES

52. We turn to consider how, in the light of our conclusions on the seriousness of the offences committed by the two offenders and their financial circumstances, each of the statutory purposes of sentencing can best be achieved.

(1) The provision of financial and corporate information to the sentencing court

53. To enable us to consider the financial circumstances of the offenders, we called for the accounts of both companies prior to the hearing of the appeal.

54. It is important that well in advance of the sentencing hearing there is provided to the sentencing court the accounts of the offending companies and any other information (including information about the corporate structure) necessary to enable the court to assess the financial circumstances of the company and the most efficacious way of giving effect to the purposes of sentencing. The provision of that information to the court and to counsel for the Crown will enable counsel for the Crown to present the information to the sentencing court so that it can carry out the analysis required.

(2) The corporate structure of Sellafield Ltd and its finances

55. The site at Sellafield, Cumbria is owned by the Nuclear Decommissioning Authority on behalf of the State. The Nuclear Decommissioning Authority has awarded Sellafield Ltd a contract to operate the relevant part of the site. Sellafield Ltd is a company owned by Nuclear Management Partners, a consortium of three major shareholders – the multinationals, URS Corporation, Amec plc and Areva Group. Sellafield Ltd holds the site licence.

56. Sellafield Ltd is therefore an ordinary company owned by corporate shareholders with a Board of Directors. It seeks like other commercial companies to make a profit for the benefit of its shareholders on the contract it has with the Nuclear Decommissioning Authority. In 2012, it had a revenue of £1.6bn and made a profit of £29m. Its profits go to its shareholders by way of dividend. A financial penalty will therefore directly affect the shareholders. As it is such a narrowly held company, there is no difficulty in the three shareholders holding the directors to account and requiring them to remedy the failures which resulted in the criminal convictions.

(3) The corporate structure of Network Rail and its finances

57. Network Rail is entirely owned by Network Rail Limited. Network Rail Limited is a "not for dividend company". It has members who appoint the directors and to whom the directors are accountable. As it has no shareholders who receive profits by way of dividend, it is in reality quite different from Sellafield Ltd.

58. Its revenue of £6.2bn in the year ended 31 March 2013 is derived almost entirely from fees paid by the train operating companies which utilise its track and from grants provided by the Department for Transport. The profit of £780m made is re-invested in the rail network.

59. The primary governance of Network Rail Limited is the responsibility of its Board which comprises substantially the same persons as the Board of its subsidiary Network Rail. The Board is appointed by the members. These are over 50 in number. The Department for Transport is a member with special rights; the other members are appointed members of the public. The members are responsible for holding the Board to account.

60. The executive directors were paid in the year beginning 1 July 2013 basic pay of between £577,000 and £348,000 with the addition of contributions to a pension scheme and performance related bonuses. According to the annual report, the purpose of a bonuses is to allow the business "to target, reward and recognise exceptional performance for stakeholders" through an annual incentive plan and a long term incentive plan. The amount of the additional remuneration (which can be up to 60% of annual salary under the annual incentive plan) is determined by the Remuneration Committee by reference to a number of factors such as passenger and freight performance, cost efficiency and passenger and customer satisfaction. As to safety, the position of the Board of Network Rail Limited, as set out in its annual report for the year ended 31 March 2013, is:

> "Safety of the workforce, passengers and general public remains the paramount consideration. We believe that it is not appropriate to include safety as a specific performance measure. The executive directors already treat safety measures as a priority as they strive to continuously improve performance in this area. Nevertheless the remuneration committee retains a wide discretion to adjust any award downwards for poor safety performance, particularly in the case of a catastrophic accident for which Network Rail was found culpable".

(4) Our conclusion

(a) Sellafield Ltd

61. We approach the fine imposed as an overall total fine for the course of conduct reflected in the offences charged.

62. We have set out at paragraphs 30-31 our conclusions on the seriousness of the offending by Sellafield Ltd – medium culpability extending to management but with no actual harm and a very low risk of harm. We take into account the guilty pleas made at the first available opportunity and the very considerable cooperation that Sellafield Ltd displayed after the discovery of the failures. Both these factors deserve very considerable credit. We also take into account the previous offences.

63. It is not appropriate, as was submitted on behalf of Sellafield Ltd, to consider a fine of £1 million as apposite only to a major disaster. To accept that submission would be to ignore the court's obligation under s.164 of the CJA 2003 to have regard to the financial circumstances of the offender and the approach made clear in the Sentencing Guidelines Council Guideline to which we have referred at paragraph 6 above. There is no ceiling on the amount of a fine that can be imposed.

64. In considering those financial circumstances, we have regard to its turnover of £1.6 billion (or £30.7 million per week) and its annual profit of £29m (or £560,000 per week). It is clear that viewed in the light of the financial circumstances of this company, a fine of £700,000 after a guilty plea is a fine which reflects a case where the culpability was moderate, the actual harm in effect nil and the risk of harm very low. It must be viewed against the requirement that those engaged either as directors or shareholders of companies engaged in the nuclear industry must give the highest priority to safety as Parliament has directed.

65. A fine of the size imposed, even though only a little more than a week's profit and about 2% of its weekly income, would, in our view, in the circumstances achieve the statutory purposes of sentencing by bringing home to the directors of Sellafield Ltd and its professional shareholders the seriousness of the offences committed and provide a real incentive to the directors and shareholders to remedy the failures which the judge found existed at the site at Sellafield as we have set out at paragraphs 24-27, particularly the custom within the company which was too lax and to a degree complacent. If it does not have that effect, then, as in the case of any other offender, the sentence of a court for any further culpable failure would have to reflect that a fine of the size imposed for the current offences had not achieved some of the statutory purposes of sentencing.

66. We therefore see no grounds for in any way criticising the level of fine imposed by the judge. We dismiss the appeal.

(b) Network Rail

67. We have set out at paragraphs 50-51 our conclusion on the seriousness of the offending by Network Rail. The actual harm was serious and even greater harm was foreseeable. The culpability of local management was serious and persistent, but there was no specifically identified failure by senior management. However those failures must be judged in part in the context of Network Rail's poor previous offending in respect of level crossings (which reflect on the senior management) but also in the light of Network Rail's expenditure of £130m on level crossing safety – a fact that was agreed before us. We take into account the guilty plea, the remedying of the safety failures at Wright's Crossing and the other mitigating and aggravating factors we have set out.

68. We reject the submission made on behalf of Network Rail that a fine of £750,000 was appropriate only where there had been a fatality. As we have explained in respect of Sellafield Ltd that would be to ignore the statutory obligation to consider the means of the offender – in the case of Network Rail a turnover of £6.2 billion (or £119m per week) and annual profitability of £750m (or £14.4m per week).

69. However, a significant fine imposed on Network Rail would, unlike the case of Sellafield, in effect inflict no direct punishment on anyone; indeed it might be said to harm the public. That is because the company's profits are invested in the rail infrastructure for the public benefit; the profits make an addition to the state funds that are otherwise provided to meet the requirements of the provision of that infrastructure. It is likely that any shortfall in the requirements as a result of a fine will have to be met from public funds or in a reduction in the investment. That is a factor which a court must take into account: see *R v Milford Haven Port Authority* [2002] 2 Cr App R 423*; R v Network Rail* [2011] Cr App R (S) 44, [2010] EWCA Crim 1225 at para 24.

70. A fine will, nonetheless, serve three other purpose of sentencing if it reduces criminal offences of the kind committed by Network Rail, reforms and rehabilitates Network Rail as an offender and protects the public. To ensure that a fine will achieve these statutory purposes of sentencing, the fine must be such that it will bring home to the directors and members of Network Rail these three purposes of sentencing.

i) We were told that the Members of Network Rail would not be involved with issues of safety at level crossings. However although the extent of the responsibility of the Members was unclear, it is clear that their responsibilities must include appointing to the Board executive and non-executive directors who put at the forefront of their duties compliance with Network Rail's responsibilities for the safety of people's lives from the risks of their operations and the reduction of offending by Network Rail.

ii) As we have set out at paragraph 67, Network Rail has invested substantial funds in level crossing safety. Nonetheless the record of Network Rail reflects the fact that accidents at level crossings were prevalent. That makes clear the necessity for all the directors to pay much greater attention to their duties in this respect.

iii) We have set out in paragraph 60 the statement by the non-executive directors as to how they will reduce bonuses if safety performance is poor; it appears to concentrate on a catastrophic accident and not accidents of the kind with which this appeal is concerned which has had such a devastating effect on a child. There was evidence before us (but not the judge) that the bonuses of the directors had been adjusted downwards to a minor (though inadequate) extent in part because of the poor level crossing safety record to which we have referred. Plainly the bonuses should have been very significantly reduced. For the future, it will be important for Network Rail to ensure that full

information is provided to the sentencing court, as it is highly material to the assessment of the response of the board of the company to the statutory purposes of sentencing in a case where a fine inflicts no direct punishment on anyone. If, as is accepted by the board of Network Rail, a bonus incentivises an executive director to perform better, the prospect of a significant reduction of a bonus will incentivise the executive directors on the board of companies such as Network Rail to pay the highest attention to protecting the lives of those who are at real risk from its activities. In short, it will demonstrate to the court the company's efforts, at the level of those ultimately responsible, to address its offending behaviour, to reform and rehabilitate itself and to protect the public.

71. We can infer from the fact that Network Rail has invested £130m in level crossing safety and there was some minor adjustment downwards of the directors' bonuses that it is attempting to reduce its offending behaviour, is being reformed and rehabilitated in this aspect of its offending behaviour and is taking steps to protect the public whose lives have been at risk at level crossings.

72. Nonetheless, the fine of £500,000 imposed on a company of the size of Network Rail can only be viewed as representing a very generous discount for the mitigation advanced; we would observe that if the judge had imposed a materially greater fine, there would have been no basis for criticism of that fine. Indeed, were it not for the matters to which we have referred, a fine of the size imposed would have been very significantly below that which should be imposed for an offence committed by a company of this size where the harm was relatively serious and the culpability at local operational management was serious and persistent.

73. We therefore dismiss the appeal.