

## Regulatory / Health & safety

# Too hot to handle?

The heat is on for organisations & individuals who do not pay heed to fire safety precautions, notes **Gerard Forlin QC**

The Regulatory Reform (Fire Safety) Order 2005 (SI 2005/1541) (2005 Order) came into force on 1 October 2006, replacing regulations made under the Fire Precautions Act 1971 (FPA 1971). This order was made pursuant to the Regulatory Reform Act 2001 (RRA 2001) to be in compliance with the EU directive on fire safety in the workplace and business premises. There have been a series of recent cases where the fines have been gradually ramping up.

### First relevant case?

Arguably, the first relevant case fell under the previous legislation. In *R v ESB Hotels Ltd* [2005] EWCA Crim 132, [2005] All ER (D) 159 (Jan) owners of a hotel pleaded guilty to two counts of contravening the requirements of a Fire Certificate, contrary to s 4 of FPA 1971. Bed mattresses had been stored in various corridors. Investigators found that the hotel staff did not appear to have a complete understanding of the potential fire hazard. The seat of the fire was the ignition of mattresses which had been caused by a deliberate act of an employee. The fine was reduced from £400,000 to one of £250,000.

In *R v Shell International Ltd*, Shell was fined £300,000 in 2009 for breaches of the 2005 Order. The Shell building employed about 2,000 people. There had been two small fires in three weeks in the Waterloo Shell Centre. There was no appeal against sentence.

### IN BRIEF

- Recent judgments demonstrate that the courts are taking a more stringent approach to issues relating to fire risk. Organisations & individuals who fail to comply with fire safety regulations could face large fines & imprisonment.

### New Look Retailers

In *R v New Look Retailers Ltd* [2010] EWCA Crim 1268, [2010] All ER (D) 117 (Jun), the Court of Appeal (Criminal Division) looked again at the relevant law and previous decisions. It concerned an appeal against a £400,000 sentence imposed by HHJ Rivlin QC for two offences under the 2005 Order. The national clothing retailer had a serious fire in its Oxford Street premises. The fire probably started in a store room on the second floor. Thirty fire appliances attended and Oxford Street was closed for two days. Four hundred people had required emergency evacuation. Article 8(1)(a) of the 2005 Order requires that the responsible person must take such fire safety precautions as will ensure, so far as is reasonably practicable, the safety of his employees. Article 8(1)(b) also requires the responsible person to take such general fire precautions as may be reasonably required to ensure that the premises are safe.

The original indictment had 35 alleged breaches of duty but the actual indictment set out two counts, namely:

- a failure to carry out an adequate risk assessment; and

- a failure to ensure that the employees were provided with adequate training.

The Court of Appeal in determining the appropriate sentence looked at a number of factors and made some interesting observations.

### Nature of the risk

One such observation was: "Contrary to the submissions made to us, *ESB* [the case last cited], in our view, provides support for the judge's observation that assessing fines in these cases is, first and foremost, a fact sensitive exercise." They also quoted and agreed with what HHJ Rivlin QC had said: "When it comes to fire, one does not have to think very deeply in order to appreciate the potential for disaster." They went on: "What the sentencing judge was entitled to recognise was the fact that the nature of the risk against which employees and others were to be protected was the risk from death or serious injury in a fire. Fire can be indiscriminate in its effect and, in the case of an organisation which is in the centre of a large city undertakes responsibility for a large number of visitors to its premises, breach will usually be

a very serious matter.” They continued: “What the fire served to illustrate was the magnitude of the risk which the appellant ran with public safety. Exactly the same considerations would have been relevant if, in the case of a near miss, investigation had revealed wholesale disregard by Balfour Beatty and Railtrack [see *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586, [2006] All ER (D) 47 (Jul)] for their responsibilities towards rail passengers. Fines would in that eventuality have been imposed for the magnitude of the risk knowingly taken and not for the causation of any tragic consequences.” It is interesting that the court used a health and safety case as an analogy.

In conclusion, the court said: “However, we share the judge’s scepticism, expressed during argument, that the appointment of a single fire safety advisor for a group of 600 and more shops was a sufficient response to the magnitude of the obligation.” They felt that “the breaches of duty acknowledged by the appellant fell into two distinct categories, first, deficiencies in the appellant’s provision and maintenance of fire safety precautions and, secondly failure to provide any adequate training and retraining schemes not just for essential health and safety staff but employees generally. We share the judge’s view that the appellants’ performance of its fire safety duty in a large departmental store in the centre of London was lamentable. The fines were, we recognise severe, but they were not in our judgment manifestly excessive and the appeal is dismissed”.

### More stringent approach

This judgment has heralded a more stringent approach by the courts and penalties are increasing in severity.

In April 2010, Tesco was fined £95,000 at Wood Green Crown Court and ordered

to pay £24,000 in costs after pleading guilty to five breaches of the 2005 Order arising from various breaches at their store in Barnet after a small fire in the staff kitchen. London Fire Commissioner, Ron Dobson,

## “ This judgment has heralded a more stringent approach by the courts & penalties are increasing in severity ”

said: “Fire safety is a key part of good business management and the general public should feel safe from fire when they are out shopping. London Fire Brigade will continue to take action when businesses, large or small, do not take their fire responsibilities seriously. Failure to comply with the law can, as this case has shown, result in a prosecution.”

### Potential death trap

Also in April 2010, the Co-operative Group was fined £210,000 and ordered to pay £28,000 costs. The company pleaded guilty to six breaches of the 2005 Order relating to their store in Southampton. These related, inter alia, to failure to keep the rear emergency exit doors unlocked for easy egress in an emergency and the fact that they had fitted a lock between the retail and storage area which required a security code to unlock it.

The judge said that the case demonstrated a lamentable approach to fire safety and that the Group had been responsible for a potential death trap, given the severity of the fire safety failings.

In July 2011 a hotel manager of two hotels together with an external fire risk assessor, Mr O’Rourke, were both jailed for eight months for fire safety offences. Nottingham Fire and Rescue Services found in a routine inspection that fire precautions

in the sleeping areas were inadequate, including at one hotel where officers found both staircases terminated in the same ground floor area with no alternative escapes or separation. There were also blocked exit

routes and a locked fire door. Mr O’Rourke also pleaded guilty to two counts for failing to provide a suitable fire risk assessment.

Further, at Blackfriars Crown Court, a hotel owner and the hotel have recently been fined £210,000 and £50,000 costs following a trial. It is believed to be the first time a jury rather than a judge or a magistrate, has convicted an organisation for breaches under the 2005 Order.

### Summary

In conclusion, these cases and in particular the last two, herald a severe approach to issues relating to fire risk. The Health and Safety Executive has also given guidance as to what is required under the Construction (Design and Management) Regulations 2007 (SI 2007/320). This is particularly important in relation to new-build timber frame constructions. Organisations and individuals (including professional advisers) who do not have adequate systems and assessments in place, run the risk of large fines and terms of imprisonment. Prevention is now, more than ever, the touchstone of prudence.

NLJ

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