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HEALTH AND SAFETY COMMISSION

THE IMPLICATIONS OF THE COURT OF APPEAL DECISION IN HTM LTD

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Issue

1. On 22 May 2006 the Court of Appeal ruled on two preliminary points of law in respect of a prosecution brought by HSE in respect of a duty owed under section 2 HSWA. Those rulings did not reflect the law as it had been understood by HSE.

Timing

2. In the ordinary course of business.

Recommendation

3. The Commission note the ruling and its implications (set out in the Annex to this paper).

Background

4. Some of the background is set out in the note in the Annex. A fuller account of the issues can be found in the report of the HTM ruling (**[2006] EWCA Crim 1156**).

Argument

5. Regulation 21 was intended to reverse the judgement in R v Nelson [1999] 1 W.L.R. 1526 and also to implement Article 5(3) of the Framework Directive. Both those policies remain important.

Action

6. HSE is considering whether to put forward proposals to amend regulation 21 to address the Court of Appeal's finding as to its application. Further advice will be put to the Commission in due course.

Annex 1

Health and Safety Commission

HTM LTD

The Court of Appeal decision

1 This case relates to the deaths of two employees who were killed when the telescopic tower they were driving came into contact with overhead electric wires. The case now returns for trial on the facts; the hearing is due to start on 08/01/07. In those circumstances neither HSE nor HSC should comment on its facts until those proceedings have been concluded.

- 2 HSE appealed from two preliminary rulings of the trial judge. These were that:
- (i) foreseeability was not irrelevant when considering what was reasonably practicable for the purposes of discharging the duty under s.2 (1) of the Health and Safety at Work etc. Act 1974 and evidence of foreseeability was therefore admissible; and
 - (ii) regulation 21 of the Management of Health and Safety at Work Regulations 1999 did not preclude a defendant from advancing evidence of any act or default of one of its employees in its defence.

3 The Court of Appeal agreed with both findings and certified that the ruling raised two questions of particular public importance. However the House of Lords subsequently refused leave to appeal, on the grounds that the the petition did not raise an arguable point of law of general public importance which ought to be considered by the House at that stage of the proceedings.

What does the judgment mean?

Foreseeability

4 The Court of Appeal held that a defendant charged with breaching a health and safety duty is not prevented from calling evidence as to the likelihood of the relevant *risk* materialising when trying to show that he had taken all reasonably practicable steps to control that risk.

5 The Court of Appeal noted that, whilst the defendant cannot be prevented from adducing that evidence, its relevance should be 'closely confined'. The Court of Appeal described the concept of foreseeability as 'merely a tool' with which to assess the likelihood of the risk arising. The Court of Appeal stressed that concepts of fault should not be imported from the civil law and that the concept of reasonable foreseeability did not provide a defence in itself.

6 It will be important for those prosecuting cases under section 2 or 3 of the Health and Safety at Work Act to ensure that the limited nature of this ruling is recognised. Foreseeability issues which might be relevant to a civil case, such as its role in establishing the existence of the duty or of the damage for which the duty-holder may be liable, are not relevant to a criminal trial. There was no intention on the part of the Court of Appeal to reduce the protection offered by HSWA to the equivalent of liability under the common law.

Regulation 21 – actions of employees

7 Regulation 21 of the Management Regulations 1999 reads: *Nothing in the relevant statutory provisions shall operate so as to afford an employer a defence in any criminal proceedings for a contravention of those provisions by reason of any act or default of... an employee of his...* . Regulation 21 was intended to make it clear that a duty-holder could not escape his duty by pointing to the act of an employee, reversing a Court of Appeal decision, R v Nelson. It was also part of the implementation of Article 5(3) of the Framework Directive: *The workers' obligation... shall not affect the principle of the responsibility of the employer.*

8 The Court of Appeal in HTM ruled that the legal burden on a defendant to show that he had reduced the risk so far as was reasonably practicable should be analysed as a *qualification* to the offence rather than a *defence* in law. They held that regulation 21 does not prevent an employer from pointing to the act of an employee as part of his argument that he has done all that is reasonably practicable. Pre-Regulation 21 case-law, including the Nelson case, said that the courts could entertain evidence of an isolated negligent act of an employee, to establish that the employer has done all that was reasonably practicable. The "isolated act" arises typically where a properly trained and instructed employee does something carelessly or contrary to orders, and the court ruled such an act should not give rise to liability in the employer, with the implication that systematic negligence or systematic disobeying of orders would be evidence that the employer has not done enough.

9 Following HTM, the employer must still demonstrate that everything reasonably practicable had been done to ensure that the employee had the appropriate skill and instruction, that there were safe systems of work, adequate supervision and the employee has been provided with safe plant and equipment for the proper performance of the work.

What is the impact of this case?

10 The impact of this case is limited. The Court of Appeal judgment does not alter the responsibility of duty holders to ensure the health and safety of employees and the public nor does it permit them to wash their hands of this duty by delegating it to its employees. Duty holders will still need to carry out a suitable and sufficient risk assessment. Where the relevant risk or danger, including those linked to human factors, is well known or the subject of guidance, the duty holder must show that he took all necessary steps to address those risks.

What is HSE doing?

11 HSE inspectors have received guidance as to the impact of the judgment on the way they investigate, enforce and give advice. The guidance emphasises the limited nature of the finding on foreseeability.

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