

WEIGHING UP THE

LAW

Sailesh Mehta speaks to **David Claxton** about his work on a recent fire safety prosecution

Sailesh Mehta: I'd like to discuss an important fire law case involving a company and its director that you have been working on.

David Claxton: Yes, it was the prosecution by Suffolk Fire and Rescue authority of a company called Home from Home Property Management Limited, and its director and primary shareholder. They are a property management company with a large portfolio of companies and properties that they operate in the East Anglian region. This case was principally, although not exclusively, concerned with the sufficiency of the fire risk assessment as it related to ACM cladding.


SM: Is it unusual in your experience for the prosecution to pursue a management company as opposed to other duty holders?

DC: It is unusual, but I think it may end up being more commonplace. It's simply a function of the way in which that Fire Safety Order (FSO) is structured and the way in which the obligations can be delegated. In this instance there was a company that engaged Home from Home to deal with all matters relating to fire safety, which meant that under Article 5.3 of the FSO, Home from Home was the duty holder and so had the primary responsibility for fire safety for the building.


SM: Why was the prosecution interested in pursuing the director of that company as well as the company?

DC: If a company commits an offence, and if that offence is caused by connivance or neglect by a director or officer, then that director or officer also commits an offence. It is a way of ensuring that those who are truly responsible, in the

" My experience is that historically, companies or individuals who have created a risk assessment rarely get prosecuted, partly because the standard is not well defined."



Silessh Mehta



David Claxton

sense that it is their acts or omissions that bring about the circumstances complained of, don't escape criminal liability, simply because they're operating through a company.

The other part of the rationale is that fire safety prosecutions are rare, but are an important part of how fire services signal to the community the way in which it takes fire safety seriously. The analysis in this case was that it was just and proportionate to prosecute both the company and the director, and that it was consistent with their wider public duties.

SM: This was a prosecution involving a fire risk assessment. Is that a sort of fairly new trend? My experience is that historically, companies or individuals who have created a risk assessment rarely get prosecuted, partly because the standard is not well defined.

DC: Yes, although this case wasn't as much as of a departure as it would appear because it wasn't Home from Home who had produced the fire risk assessment in question. They had gone to an external fire expert, and there was no question of the quality and experience of the fire risk assessor, rather the issue was the information that had been provided by Home from Home. It came down to whether or not there had been a fire engineer analysis and report on the cladding and what they assessed the risk as. They had in fact provided a scoping report, but it was no more than a one paragraph email that said that the risk was high, and that they could produce a full technical report, but when the information was given to the fire risk assessor, he was told that there had been a full technical report, and that the information provided was that the risk was low.

Therefore the shortcoming in the fire risk assessment wasn't the fault of the fire risk

assessor, but of the client who deliberately provided false information.

SM: And so there was cladding outside the building that was dangerous and had been tested to and was proved after the testing to be dangerous?

DC: A sample of the cladding was sent off to the High Rise Coordination Group and the BRE, who assessed it, tested it, and reported back that it was a Category 3 failure. Therefore the information being thus plainly had to be reflected in the fire risk assessment.

SM: And so what should the management company have done in those circumstances that it didn't do?

DC: I think it's important to delineate what was within their powers and what wasn't. Certainly they didn't have the resources or the power of their own volition to remove the cladding, or to initiate the steps that would ultimately lead to its removal. They should have, however, told the fire risk assessor of the fact of the failure, because he then could have assessed what the associated risks were, for example, on the placing and the extent of fire alarms, the evacuation strategy, the programming of the automatic opening vents on the fire alarm system, and the information and training of residents.

So the prosecution concerned not only the fire risk assessment, albeit that was the lead allegation. There were secondary counts on the indictment concerning the suitability of the fire alarm for the type of evacuation procedure in place, the programming of the opening vents, and the lack of any suitable drills or other preparations for the style of evacuation in place.

SM: So there are a number of technical aspects that you had to get across to the jury. How does one get across these technical aspects to a jury who would likely know nothing about this area?

DC: It is our job as barristers to take these complicated subjects and to express them in a simple way, to find the right witnesses to explain them, and to take those witnesses through their evidence in a way, which is understandable and digestible. For all they are technical subjects, I think they're interesting to a jury because everyone's affected by the risk of fire and all aspects of fire safety are inherently logical. For example, it is logical that if you're going to have a fire risk assessment, and its purpose is to identify fire risks in order that they can be managed, mitigated, and understood, that has to include the fact you've got combustible material on the exterior.

My sense in the course of this trial was that, while we were traversing some fairly technical territory, there was no point at which the jury didn't understand what it was about and what the relevance of it was. Do you usually have an expert witness to assist a jury or do you manage without one?

SM: My first option is to have an expert, to say that in these circumstances there is a risk of death or serious injury, and also to explain some technical aspects, but, I think in your case, you didn't have an expert?

DC: No, we didn't. There is always going to be a question whether there is some advantage in having an expert in that there is someone who can explain, by reference to their own opinion, how the fire safety arrangements should work, how they did work, and what the consequential risks were. It is worth explaining that an ordinary witness is confined to giving evidence as to what they saw or observed, or what is otherwise within their knowledge. They are not allowed to express an opinion.

The difference with an expert witness is that they are permitted to assist a jury in understanding the issues by giving their opinion, and so it is always easier if you're not constrained in that way.

SM: Usually, even an expert is not allowed to comment on what's known as the 'ultimate issue' of the case, which is for the jury, but often in fire cases the expert is entitled to say, in his or her

opinion, that the combination of these factors do result in a risk of death or serious injury which can be an added bonus, if one is able to have an expert.

DC: I think there are also some downsides to experts in the sense that they elongate the proceedings, they add cost, and it is sometimes the case can become a battle between experts. So I am a little wary sometimes about engaging experts unless they're strictly necessary. But you certainly go into a trial with an advantage if you have a good one who can explain the complex in simple terms.

SM: And in this case, the defence didn't have an expert either.

DC: It was an expert free case, although there was lots of technical evidence, and we were able to, to some degree, to get around the absence of an expert by, for example, reference to the Article 50 guidance, which has a statutory status and so is admissible.

We also had expert fire officers within Suffolk Fire and Rescue Service who, whilst not called as experts and not expressing their opinion on anything encroaching on the ultimate issue, were able to explain how fire safety arrangements work, what arrangements should be in place, and the sorts of things that in their experience can result when the fire safety arrangements aren't as they ought to be.

SM: Can I ask why was this case in the Crown Court? Was it the prosecution who elected a Crown Court trial or the defence?

DC: The defendant elected a Crown Court trial, as was his right. I do think, though, that with increased fines available, that's another factor. When this case began, the law hadn't changed in relation to maximum fines, albeit it wouldn't have necessarily affected this particular set of offences, but now that the fines are largely unlimited across fire safety offences, there is likely to be much more willingness on the part of magistrates' courts to hear cases.

SM: I agree, and more and more cases are likely to be kept in the magistrate's court unless there's good reason to go to the Crown Court. Can I quite come back to a point in your case related to fire risk assessments? What's your opinion generally on risk assessors and their

liability? Although, I appreciate in your case, you weren't prosecuting the company that actually carried out the risk assessment.

DC: My personal opinion is that there is a great deal of variance of quality across fire risk assessments. As things stand, it is an unregulated profession where anyone can hold themselves out as a fire risk assessor and perform fire risk assessments. Of course in doing so, they take on duties under the Fire Safety Order, so they are not wholly unregulated in that sense and one can easily imagine a deficient fire risk assessment resulting in prosecution in the right circumstances. However, that that would require a fairly rare combination of circumstances where a fire service has occasion to look at a fire risk assessment and is in possession of sufficient information to contradict or to show that it's deficient, and then to take the decision to prosecute.

So I think that threat exists, but it is likely to be exercisable so infrequently that it has a very limited deterrent effect for those who ought not to be performing fire risk assessments. There are of course, non-mandatory qualifications that can be obtained, but those don't always guarantee quality, but I think it is ripe for something. If it were legislative the danger is that the regulator creates a standard that's relatively easy to satisfy, and that it creates a false reassurance. I tend to think that a voluntary code is probably a better measure, because it's likely that only those who are truly skilled in the relevant area would volunteer, as opposed to just having to meet a somewhat artificial set of criteria, as is always the case with any regulated professional body.

SM: I appreciate that you haven't got to the sentencing stage of your case yet, but what are the broad areas that one should consider, whether prosecuting or defending, when it comes to sentencing in a case like the one you've just completed?

DC: When you're dealing with a company, the first and the most consequential determinate for sentencing is the means of the company, and that's principally a function of turnover, but it's also the net asset position, profitability, and various other financial factors. So one always has to look at the finances of the company,

and ordinarily a company would be ordered to disclose its annual accounts for the previous three years.

You will also look at whether or not the work that ought to have been done as at the date of the offences has since been completed, the level of cooperation with fire services with other investigations, whether or not any actual harm resulted, and how long the state of affairs that gave rise to the offence persisted for. A first offence by a company which had good intentions, but on a given occasion, found that those good intentions fell short, and on having that pointed out to them quickly and without complaint put things right will go into a sentencing hearing in a very different position from one that has put cost before safety, allowed a dangerous situation to persist over a long period, and has sought to evade liability over a prolonged period.

So far as individuals in fire safety cases are concerned, one looks at the sorts of things that are common to all individuals, such as their personal circumstances, their individual culpability, the reasons behind their offending, their attitude to it, and their own efforts at putting things right.

SM: To close, what would you say are the key takeaways from this case?

DC: The key takeaways are the importance of a focused indictment which fits within a story that can be readily told to a jury. Here we had the fire risk assessment, which as I've described was the lead offence, but it had a connection to the other offences as well, because the fire risk assessment is how you would determine what was the appropriate evacuation procedure, and by reference to that evacuation procedure, the sufficiency of the fire alarm, whether or not the operation of vents is working correctly, and whether or not there's been sufficient training and drills.

It is important not just to pick a random selection of fire safety breaches, because there are many of them in the order and where there is one in a building, there are often lots more. Instead, choose those that are part of a coherent narrative, which makes the prosecution case understandable and appealing to a jury. ◀