The UKELA Mooting Competitions 2010

Deadline for submission of skeletons: January 28th 2010

1. The United Kingdom Environmental Law Association is pleased to announce the opening of entries for the 2010 Mooting Competitions.

2. Further information about UKELA may be found at www.ukela.org.uk.

3. There are two mooting competitions:

   a. *The Lord Slynn of Hadley Mooting Trophy Competition* (the senior competition) is open to all those who as of 31st October 2009 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are on taking the CPE. In essence this competition is for those on vocational courses

   b. *The UKELA Student Prize Moot* (the junior competition) is open to those who as of 31st October 2009 do not qualify for the Lord Slynn Trophy Competition but who are studying for a degree (including graduate degrees, e.g. LLM's or non law degrees). In essence this competition is for those who are students not yet on vocational courses.

4. Teams consist of two members. An institution may enter more than one team. Teams may comprise of competitors from different institutions.

5. Each team should submit two skeleton arguments, one on behalf of Luckless Ltd (the Appellant) and one on behalf of the Crown (Respondent). No more than two authorities may be cited in each skeleton in addition to those referred to in the Moot problem. Each skeleton argument should be no more than six pages of A4 paper. The font should be Times New Roman, size 12, with 1.5 line spacing. Paragraphs and pages should be numbered. The skeleton arguments should include a contact name, address and day and evening telephone number. A copy of the skeleton argument should be forwarded electronically, by email to rk@no5.com **no later than 4pm on Monday 28th January 2010**.

6. The semi-finalists will be selected on the basis of the skeleton arguments. All competitors will be notified of the outcome. The semi-finals and finals will be held in London on a single date be announced during March 2010.

7. The Master of the Moot reserves the right to change the rules of the competition without notice as he thinks fit and his decision is final.

8. The winners of both competitions will receive a cash prize of £100 (per team member) from No5 Chambers plus a year's subscription to Environmental Law and Management, kindly donated by Lawtext. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy and the Junior competition winners will receive the Junior Trophy. All finalists receive free UKELA student membership.

The Moot Grounds

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IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM CLEANTOWN CROWN COURT

His Honour Judge Stern QC

BETWEEN

REGINA

(On the prosecution of the Environment Agency)

V

LUCKLESS LIMITED

ADVICE ON APPEAL AGAINST SENTENCE

&

GROUNDS OF APPEAL

Introduction

1. The Company pleaded guilty on 10 September 2011 before HHJ Stern QC at Cleantown Crown Court to: one count under Section 85 Water Resources Act 1991, namely causing poisonous noxious or polluting matter to enter controlled waters, and; one count under Section 33 (1) c Environmental Protection Act 1990, namely keeping controlled waste in a manner likely to cause pollution to the environment or harm to human health.

2. The plea was entered upon the particular basis and upon aggravating and mitigating features which were not disputed between the parties.

3. The learned judge sentenced the company to pay a fine of £140,000 and to pay prosecution costs of £10,000.

4. The Company now seeks permission to appeal against the fine.

Facts

5. Luckless Limited have premises adjacent to the Clean River. Their operation includes the use of water based paints. The means by which the paints are contained is less than adequate. On two occasions paint escaped from the works into a surface water drain which discharged directly to the Clean River. The date of the first uncontrolled release was 1st April 2009. The date of the second uncontrolled release was 1st April 2010.

6. The Environment Agency investigated both releases. It did not prosecute for the first incident, but and issued a Summons in respect of the second incident.

7. The company took advice rather late. It appeared without representation before the Magistrates on the return date on the summons. In determining mode of trial, the Magistrates would have accepted jurisdiction. However, the company elected trial on indictment and was committed to the Crown Court. The company then took advice and accepted that an offence contrary to Section 85(1) and (6) Water Resources Act 1991 was a strict liability offence to which none of the statutory offences applied. Likewise, it was advised that there was no reasonable prospect of defending the s33 EPA matter. The elements of the offence were made out. It promptly informed the prosecution of its intended change of plea.

8. The company entered a guilty plea at the Cleantown Crown Court on 10 September 2011. The agreed aggravating and mitigating features of the offence were: that the escape was easily avoidable; that an Environment Agency pollution prevention visit had highlighted the possibility of such an escape; that there was a risk of harm to aquatic life; there had not, as a matter of fact, been any harm to any aquatic life; the company was otherwise of good character; the company had cleaned up the release in a speedy manner; there was full cooperation with the Environment Agency; there was a guilty plea as soon as advice had been received.

9. The maximum penalty available in the Magistrates' Court was £20,000 in respect of the WRA offence and £50,000 in respect of the EPA offence. The company was in a substantial way of business and could pay any reasonable fine and hence its means were irrelevant.

Ground One

10. The fine is manifestly excessive because, notwithstanding the absence of a tariff for regulatory offences[1,.2,3], the penalty is out of scale.

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[1] R v F Howe (Engineering) Ltd [1999] 2 Cr App R (S) 37 "*"… it is impossible to lay down any tariff or to say that the fine should bear any specific relationship to the turnover or net profit of the defendant. Each case must be dealt with according to its own particular circumstances."*

11. Environmental offences fall within the general bracket of regulatory offences, of which health and safety and environmental offences are teh most numerous. The penalty is within the highest bracket, save those penalties imposed in cases of national disaster. So much is demonstrated by the table of penalties set out in the HSE Enforcement Report 2004/5 (no later report exists to date):

	Offences prosecuted	Convictions	Fine
2002/03	1,659	1,273	£6,251 (n)
2003/04	1,720	1,317	£9,633 (o)
2004/05p	1,267	999	£12,642 (p)

12. Having regard to the plea, and the mitigation which was accepted by the prosecution, it appears that the starting point in setting the penalty was in excess of £200,000. It is evident that only a very small proportion of penalties exceed £100,000, hence the HSE go to the trouble of finding averages which exclude such high penalties in order to avoid the skewing effect. It seems to me that there is nothing to put this case within the top 3% of penalties for health and safety offences, still less for environmental offences. It is likely that the penalty imposed was one which would bring the case within the top 20 health and safety fines imposed during 2007.

13. The above data were provided to the learned judge in advance of the hearing in the form of a Note and these points were fully canvassed with him.

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[2] R v ESB Hotels Ltd [2005] EWCA Crim 132, per Beaston J at para31: '*Whilst guidance can certainly be taken from a comparison of the circumstances of cases care must be taken.*'

[3] R v Yorkshire Water [2000] 2 Cr App R (S) 423 at 454 *"So care should be taken to fit any penalty within the framework of previously imposed fines. So in the light of the main variables which will exist we think that any rigid approach is not realistic since that framework will necessarily be wide."*

14. It is to be acknowledged that sentencing in this area is unusual because of the absence of a tariff and because the range of penalties extends over several orders of magnitude, i.e. penalties range from hundreds of pounds to millions of pounds. However, in my opinion this case is unremarkable and absent the particularly aggravating features of (1) serious, or any, harm; (2) cutting corners to save money or make money, or (3) a defendant who shows a reckless disregard for health, safety or the environment. So far as the learned judge repeatedly emphasised the deterrent effect of penalties such cases, that must apply to all cases which come before the court and I was unable to discern any particular reason for a deterrent sentence; certainly, no reason was given.

15. It is also acknowledged that the principles which are to be applied in such sentencing exercises tend to be set out in the context of the most serious cases. This is because the small number of cases which reach the Court of Appeal must (a) have been committed to the Crown Court, and (b) have been dealt with in such a way as to justify the costs of the appeal.

16. Put shortly, the penalty might be appropriate to a fatality in a health and safety case. While protection of the environment is a significant public interest, proportion and scale are required as between sentencing outcomes in the general field of regulatory crime.

Ground 2

17. The learned judge misdirected himself by applying a method of calculation to the setting of sentence which was not applicable to the criminal jurisdiction

18. It was explained by the prosecution that since early 2010 there was a new system of 'administrative' penalties in place pursuant to Part III of the Regulatory Enforcement and Sanctions Act 2008. It provided for the Environment Agency to impose Variable Monetary Penalties, the amounts of which were subject of appeal to the General Regulatory Chamber (First Tier Tribunal). It is, therefore, a distinct and separate scheme of regulatory sanctions.

19. In approaching the question of quantum of the VMP, the Environment Agency applies ministerial guidance[4]. In applying that guidance to the instant case, the Environment Agency had concluded that there was neither significant financial

[4] See DEFRA's Consultation Draft of the Statutory Guidance to the RESA 2008 re VMPs

benefit to the defendant by way of money saved, nor significant restoration costs associated with the offence. Hence, according to the guidance, the starting point for determining the deterent element was the maximum fine available to the magistrates' court, namely £50,000 in respect of the EPA offence, and/or £20,000 in respect of the WRA offence.

20. The Environment Agency concluded that the starting point was a sum of £70,000. The Environment Agency considered that the guidance did not require or anticipate that the principle of 'totality' would apply, i.e. to avoid double counting where offences overlap.

21. The next step in the guidance is to apply a multiplier, which must be less than four. On the basis that the company: (a) was clearly on notice as to the risks because of the previous identical incident, and; (b) caused harm to the environment, it was appropriate to apply a factor of 2.

22. In the result, a VMP of £140,000 would have been imposed. The learned judge accepted the Environment Agency's approach and imposed a penalty of £140,000, plus costs.

23. The judge fell into serious error because:

    i. there is no principle in the criminal law that the court starts at the maximum available and multiplies it upwards;
    ii. the approach adopted provided no credit for a guilty plea
    iii. the principle of totality was ignored
    iv. the administrative penalties regime is intended for offences at the lower end of the scale of seriousness and was not intended to be applied in the criminal jurisdiction

<u>Advice</u>

24. In my opinion, the penalty was manifestly excessive and wrong in law. This is not a marginal case, but one in which the penalty is very much out of scale and to the extent that it will be necessary to invite the court to reduce the penalty very substantially.

A BARRISTER

UKELA Chambers

12 September 2011

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM NORTHAMPTON CROWN COURT

His Honour Judge Stern QC

BETWEEN

REGINA

(On the prosecution of the Environment Agency)

V

LUCKLESS LIMITED

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ORDER OF THE SINGLE JUDGE

I grant leave to appeal on both grounds. The case raises important questions of sentencing practice both in the criminal jurisdiction and as to how the new administrative penalties are to relate to penalties imposed in the Magistrates' and Crown Courts.

The prosecution does not generally play a significant role in an appeal against sentence. However, in this case it would be of assistance to the court to receive submissions as to (a) how penalties in environmental cases are to fit in with other spheres of regulation – in particular I note that the summary maxima are quite different, and (b) the relationship between VMPs and fines.

A High Court Judge [date]