IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM CLEANTOWN CROWN COURT

BETWEEN:

R (on the prosecution of the Environment Agency)

and

LUCKLESS LIMITED

SKELETON ARGUMENT ON BEHALF OF LUCKLESS LIMITED

---

1. This is an appeal by Luckless Limited ("the appellant") against the fine of £140,000 imposed upon it by HHJ Stern QC, following the 2 early guilty pleas entered by the appellant in respect of a single count under s.85 Water Resources Act 1991 ("WRA"); and a single count under s.33(1)(c) Environmental Protection Act 1990 ("EPA").

Grounds of Appeal

2. There are 2 grounds of appeal:

    i) The fine is manifestly excessive because, notwithstanding the absence of a tariff for regulatory offences, the penalty is out of scale; and

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

3. It is submitted that even if the court does not accept the appellant's submission on ground ii) and considers that the learned judge's application of the procedure relating to the calculation of Variable Monetary Penalties ("VMPs") was acceptable, the fine remains manifestly excessive and should be reduced on the basis that a lower or no multiplier would have been appropriate given the appellant's conduct since the breach.

Ground 1: The fine is manifestly excessive

4. The appellant submits that the fine set is manifestly excessive and out of scale as it is inconsistent and out of scale with the fines imposed by the courts both in respect of the same or similar offences, and with penalties imposed by the courts in respect of other regulatory crimes, having regard to its relative seriousness within the range of regulatory offences.

Inconsistency with fines imposed for the same or similar offences

5. It is accepted by the appellant that in determining the level of fine each case must be considered on its own facts. The court has expressly declined invitation to lay down a sentencing tariff in cases such as the present for this reason; R v Anglian Water Services [2003] EWCA Crim 2243, [27].

6. The absence of a tariff for such regulatory offences and a requirement to consider each case on its own facts does not however mean that the field is absent a benchmark against which the level of fines imposed should be assessed.

7. It has been noted that the Sentencing Advisory Panel ("SAP") has advocated a "framework of consistency in sentencing" for offences relating to pollution of controlled water, and the court emphasised that "care should be taken to fit any penalty within the framework of previously imposed fines"; R v Yorkshire Water Services Ltd [2001] EWCA 2635, [18].

8. It is therefore appropriate when considering whether the fine is manifestly excessive and/or out of scale for regard to be had to decisions of the court in respect of the same or similar offences, and the court is invited to consider the facts of and fine imposed in Anglian Water.

9. Anglian Water, as here, concerned an offence under s.85 WRA. In that case, the "grossly irresponsible" failure of the defendant to have in place an adequate backup system led to partially treated sewage entering a river. This had a "catastrophic" effect on the 2km of river affected, with evidence that fish and mammals living in that stretch died, and a serious risk of harm was posed to remaining wildlife. The effects were therefore considerably more serious than in the present case, in which no harm to wildlife materialised.

10. As in the present case the defendant had made good their breach in a prompt manner, had entered a timely plea and, in the context of that site, had a good previous environmental record. The fine originally imposed, of £200,000, was considered "manifestly excessive" for a single offence, and reduced by the Court of Appeal to £60,000. In the appellant's submission, the fine imposed on it should be not exceed the £60,000 imposed in the Anglian Water case to reflect the fact that no actual harm was caused.

11. It is further submitted that the fact that the appellant was prosecuted under 2 separate offences should not serve to increase the level of fine, see [26] (ii) below.

12. In Anglian Water the need to impose fines that afford due weight to the serious nature of environmental offences was acknowledged and the penalty of £60,000 was imposed on that basis. It is therefore submitted having regard to the facts of the present case, a fine of not more than £60,000 would more than meet this requirement.

13. Further, in normal circumstances, the magistrates would have accepted jurisdiction in the present case. It was only the appellant's decision to elect trial on indictment, taken without legal advice, which resulted in this case going to the Crown court. The magistrates must therefore have been satisfied that the case was one in which a fine not exceeding the combined summary maxima of £70,000 was sufficient.

14. Absent any special facts which are capable of justifying a fine in excess of that imposed in the previous decision, which the appellant denies, the court should reduce the level of fine to bring it into line with its earlier decisions.

Inconsistency with penalties imposed in respect of other regulatory offences

15. The fine imposed is also out of scale with the penalties imposed for other regulatory offences, evidenced here by comparison with health and safety offences.

16. Figures from the most recent HSE Enforcement Report (2004/5) were provided to the learned judge prior to his passing sentence. The fine imposed is significantly in excess of the average penalties imposed in health and safety cases during the report period. Fines of £100,000 or more were imposed in just 20 out of 1,267 convictions in 2004/5. Having regard to the fact that the learned judge was in possession of this information, the implication is that he considered the offence to be of sufficient seriousness to justify such a penalty. The appellant submits that this is inappropriate.

17. The most serious breaches of health and safety law are those involving fatalities, i.e. where serious harm has flowed from the breach; where the degree and extent of the risk posed is significant; and where the defendant has intentionally profited from the breach; R v F.Howe and Son [1999] 2 Cr. App. R (S.) 37. It is reasonable to assume that the 20 cases in which a fine of £100,000 or more was imposed will have displayed some if not all of these features.

18. Subsequent case law, including Anglian Water at [23] and Yorkshire Water at [16], above, has accepted that the principles set out in Howe are relevant in the context of environmental offences. It is therefore again reasonable to assume that the most serious environmental cases, that is those justifying an exceptional penalty in excess of £100,000, will also share some of these features.

19. In the appellant's case *none* of the defining characteristics of a serious breach justifying a fine in excess of £100,000 were present; accordingly the appellant submits that the fine imposed is inconsistent and out of scale with sentencing practice for regulatory offences.

Ground 2: The method of calculation was inapplicable to the criminal jurisdiction

20. The appellant submits that the method of calculation applied by the judge was inapplicable to the criminal jurisdiction, inappropriately usurped the role of the Sentencing Advisory Panel and the Sentencing Guidelines Council; and results in a number of adverse consequences.

Method applied was relevant only to the civil jurisdiction

21. The judge wrongly applied the methodology of calculating civil sanctions in determining a criminal penalty. This is improper as administrative sanctions are a distinct system which should not affect the criminal jurisdiction. The judge followed the method for calculating VMPs, available under s.42(3)(a) Regulatory Enforcement and Sanctions Act ("RESA") 2008. He did so, however, without complying with the procedure for issuing VMPs set out s.43 RESA 2008 which puts in place the following important statutory safeguards:

    i) the regulator must serve a notice of intent

    ii) the person so served has a period to respond with written representations and objections

iii) the regulator may decide to modify the VMP or impose an alternative discretionary requirement

iv) the regulator issues a final notice, and

v) the regulated person can appeal to the First Tier Tribunal (s.54(1)(a)) on a number of specified grounds (s.43(7)).

22. By applying the criteria for VMPs to a criminal fine, the important statutory safeguards in RESA 2008 were effectively disapplied, which is against the scheme of the Act and wrong in principle. Furthermore, the appropriate venue for hearing appeals against VMPs is the specialist tribunal established under the Act after the requisite procedures have been followed, not the criminal courts.

23. s.44 RESA 2008 in fact excludes the possibility criminal proceedings where a variable monetary penalty is imposed.

<u>Method usurped the role of the Sentencing Advisory Panel and the Sentencing Guidelines Council:</u>

24. By applying civil sanctions reasoning the judge usurped the role of the Sentencing Advisory Panel ("SAP"). Offences under s.33 EPA 1990 and s.85 WRA 1991 were specifically considered in the SAP's 2000 report *Environmental Offences: The Panel's Advice to the Court of Appeal*. Para.15 of that report states that

> "The level of the fine should be fixed in accordance with the normal principles in the Criminal Justice Act 1991, s.18 [supplanted by ss.163 and 164 Criminal Justice Act ("CJA") 2003] and attendant case law, taking account of the seriousness of the offence and financial circumstances of the individual defendant"

25. This is the proper approach, as discussed in detail in ground 1 above. The civil sanctions system did nothing to amend or otherwise influence this. Defra's statutory guidance states that "improved criminal sentencing in environmental cases would help to increase the impact ... investigations and prosecutions have on countering wildlife crime and organised environmental crime" (para.4.4) but accepts that this depends on "further public consultation" and "the Sentencing Guidelines Council's plans to consider possible sentencing guidelines for regulatory offences, including environmental offences" (para.4.51). It is not appropriate for the court to usurp the

function of the Sentencing Guidelines Council by formulating its own approach to sentencing based on that applied in a distinct system in advance of any such guidelines or consultation coming forward.

Adverse consequences of the approach

26. There are further adverse consequences of the judge's approach:

    i) By starting with a maximum fine and multiplying it upwards it was unable to take account of the Defendant's guilty plea as the court is obliged (s.144 CJA 2003) or other mitigating circumstances including the financial circumstances of the Defendant (s.164(3) CJA 2003)

    ii) By calculating fines for the two offences separately, the judge overlooked the requirement to proportion the level of fine where the two concurrent offences apply, as they do in this case, to the same factual scenario. As held by Rougier J in *Yorkshire Water* (at [18]):

> "[I]t must be correct to determine what the penalty for any one incident should be rather than tot up the various manifestations of that incident as reflected in the counts in the indictment"

27. For these reasons it is submitted that the judge's methodology was flawed and without basis. This court is respectfully invited to reassess the level of fine to be imposed on the appellant as set out under ground i) above.

REBECCA CLUTTEN

NED WESTAWAY

A CHAMBERS

Contact: Rebecca Clutten, c/o Francis Taylor Building, Inner Temple, EC4Y 7BY

07977 442049

pupil1@ftb.eu.com