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 FOR THE CROWN

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1. In respect of the appeal by Luckless Limited ('the appellant') against the fine of £140,000 imposed upon it by HHJ Stern QC, following the 2 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'), the Crown has been asked to make submissions on the following matters:

    i) how penalties in environmental cases are to fit in with other spheres of regulation (addressing in particular discrepancies in summary maxima); and

    ii) the relationship between VMPs and fines.

How penalties in environmental cases are to fit in with other spheres of regulation:

2. The Crown's submissions on how penalties in environmental cases interact with other spheres of regulation is structured as follows:

    i) The approach to determining penalties in environmental cases compared with that applicable to determining penalties for other regulatory offences;

ii) The level of fines imposed for environmental offences compared with those imposed in other spheres of regulation; and

iii) The relevance of the summary maxima applicable to the different fields.

The approach to determining penalties

3. The relevant factors applicable to the determination of financial penalties in environmental cases are the same as those applicable to cases concerning health and safety offences, namely those set out in R v F Howe and Son [1999] 2 Cr App R (S) 37. Very generally these are the level of harm and/or risk of harm caused and the culpability of the defendant. A failure to heed warnings and deliberate profiteering through non-compliance are particular aggravating features (p.43 Howe); in addition "the defendant's resources and the effect of the fine on its business" is important (ibid.). This approach has been adopted in environmental cases (eg R v Yorkshire Water Services Ltd [2002] Cr App R (S) 13, [16]) and is supported by guidance issued by the Magistrate's Association on environmental offences, see *Costing the Earth* (September 2009).

The level of fines

4. Notwithstanding that the factors relevant to their determination are the same; there is no authority for the proposition that fines penalties imposed for environmental regulatory offences should fit in with those imposed in respect of other regulatory offences, or that they should be more or less severe.

5. Contrary to what one might anticipate seeing in circumstances where there is a requirement or expectation that fines imposed in a particular field should fit in to a scheme of penalties, no tariff has ever been laid down by the court in respect of either environmental or health and safety offences. In Howe, p43 the court has described such an exercise as "impossible", and instead emphasised the need for each case to be dealt with "according to its own particular circumstances". To date, no authorities that have suggested otherwise.

6. There is therefore no legal basis for requiring the substantive penalties imposed in respect of environmental offences to correlate with those imposed in respect of other regulatory offences.

7. The court has however suggested that within the sphere of environmental offences themselves, penalties should be imposed "within the [necessarily wide] framework of previously imposed fines"; Yorkshire Water, [18]. Fines for environmental offences should therefore fit into a framework of established principles and decided cases as appropriate, but there is a considerable degree of flexibility.

The relevance of summary maxima

8. The Crown acknowledges that serious offences will have more serious summary maxima and that this may be reflected by larger monetary sanctions on indictment.

9. In many cases summary maxima will not be decisive because:

   (i) Where cases are committed to the Crown Court, the maximum fine is generally unlimited. The court should not in those circumstances be fettered by sentencing limits at magistrates' level;

   (ii) Fines for environmental offences do not need to correspond to those for regulatory offences, as discussed above;

10. Therefore differences in summary maxima should have little impact on fines set by the Crown Court and are not relevant to the decision in the present case.

11. Furthermore, there are not substantial differences between summary maxima in environmental and other regulatory cases. If anything summary maxima are higher for environmental offences. This may suggest that environmental offences should also have higher fines in the Crown Court, but a dogmatic approach should be avoided.

The relationship between VMPs and fines:

12. The Crown's submissions on the relationship between VMPs and fines is structured as follows:

   i) Criminal and civil sanctions are part of the same system and are based on the same principles

   ii) The effectiveness of civil sanctions would be undermined if criminal sanctions did not follow the same principles and correspond with them

   iii) The compatibility of a civil sanction approach to criminal sanctions with

      a. a reduction in sentence for a guilty plea

b. the principle of totality

The connection between the civil and criminal sanctions systems

13. The Regulatory Enforcement and Sanctions Act ('RESA') 2008, which has been operational since April 2010, revolutionised the system of regulation for certain offences. Under s.64(2)(a) RESA 2008 enforcement guidance includes guidance as to criminal sanctions. Defra's statutory guidance defines the new regime as

> "a broader, more proportionate toolkit to deal with the full range of non-compliance, from minor non-compliance through to the most serious cases where prosecution will remain appropriate" (para.4.1)

It is essential, therefore that criminal sanctions are part of the new regime, not distinct from it. The Government's proposed option (para.4.46ff Defra guidance) was to introduce civil sanctions *at the same time as* "strengthening the role of criminal courts" (para.4.59).

14. Further support for this key aspect of the new sanctioning regime is found in Professor Macrory's final report (2006), *Regulatory Justice: Making Sanctions Effective*, on which RESA 2008 is based. The review considered and proposed an "extended enforcement toolkit available to regulators and Government departments. *This would be in addition to the existing sanctions of criminal prosecution*" (para.1.1) (emphasis added). The report advocated that the recommendations should bring about "a paradigm shift" in the approach to sanctions (para.1.44).

15. Civil sanctions are guided by the same principles and purpose as criminal sanctions. This is reflected in Macrory's report. At para.2.2 the author explains that his 6 "penalties principles" mirror the guidance in the Criminal Justice Act ('CJA') 2003 (viz. s.142). The Macrory principles are in fact an effective statement of the purposes of *regulatory sanctioning*. All of the principles have their counterpart in the CJA 2003 with the exception of principle 2 (the elimination of financial gain from non-compliance), although it is well-established in criminal sentencing that

> "A deliberate breach of the health and safety legislation with a view to profit seriously aggravates the offence" (p.43 Howe)

The effectiveness of civil sanctions

16. If criminal sanctions did not have regard to civil sanctions, it would undermine the ability of the system as a whole to maximise compliance. They are both part of a 'sliding scale' of regulatory responses. The Defra guidance states that:

> "there is no limit to fines in those criminal cases that magistrates commit to the Crown court – a VMP [Variable Monetary Penalty] needs to be a realistic alternative to criminal prosecution" (para.5.28)

This applies equally, if not with more force, the other way round. If criminal fines were disproportionately less than VMPs, it would take away the supportive effect of the criminal sanction as an alternative to a VMP in the most serious case. Macrory's report rightly states (at para.1.20) that

> "If regulators are pursuing, as they should, a risk based compliance orientated enforcement strategy, prosecution will be a sanction applied for the most serious cases of regulatory noncompliance. When prosecutions do take place, it is reasonable to assume that they are for the most serious offences and offenders. *Sentencing should also reflect this level of seriousness and be a strong deterrent signal for others in the regulated community*" (emphasis added)

17. It is proper that fines in the Crown Court should reflect the approach to setting VMPs. This is so notwithstanding that there is a separate system of independent appeals for VMPs and VMPs can never be imposed directly by a criminal court. A criminal court applying the analogy of civil sanctions should be entitled to have regard to RESA 2008 and any guidance issued in relation to relevant offences when fixing monetary sanctions. The correlation between the principles and purposes of the two regimes noted above supports this conclusion.

18. It should be noted that for offences that are triable only summarily RESA 2008 provides that the VMP may not exceed the maximum specified for the offence (s.42). This supports the Crown's view that it is appropriate for there to be a correlation between criminal and civil penalties.

<u>The effect of a guilty plea</u>

19. The Crown acknowledges that concern has been expressed about the difficulties of incorporating the statutory reduction in sentence for an early guilty plea under the administrative sanctions method. The following points address this concern:

(i) The guilty plea is not as relevant in a regulatory context where liability tends to be strict.

(ii) Cooperation with the regulator is an important factor when deciding the level of multiplier for VMPs (cf para.5.12ff Defra guidance), relevant factors include "[t]he extent to which prompt action has not been taken to eliminate or reduce the risk of damage from regulatory compliance" and "[v]oluntary reporting of regulatory non-compliance" (paras.5.15 and 5.17 Defra guidance).

(iii) Where an early guilty plea is relevant to the level of a regulatory criminal sentence, it can and should be taken into account under s.144 CJA 2003.

<u>The effect of the 'totality' principle</u>

20. Similar concerns have been expressed about the application of the 'totality' principle, whereby sanctions for concurrent offences (or counts) are not simply 'totted up' if they are based on a single incident. As with the reduction for a guilty plea, there is no reason why this can and should not also apply in circumstances where civil sanction methodology is used in a criminal setting. It should however also be noted that the Defra guidance on civil sanctions allows the "starting sum" to be based on "[t]he maximum criminal fine a magistrates court could impose for the specific offence" (para.5.13), this enables a reduction for concurrent offences for the VMP itself.

21. It should be noted that some regulatory offences although they overlap factually, are in fact based on quite different rationales. The example in this case may be a good example of that. Failure to control waste under s.33 EPA 1990 and pollution of a river under s.85 WRA 1991 do not in the Crown's view properly overlap.

22. These are the submissions on behalf of the Crown.

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