Newcastle Port Corporation v MS Magdalene Schiffahrtsgesellschaft MBH; Newcastle Port Corporation v Vazhnenko [2013] NSWLEC 210

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Damage to the environment as a result of pollution from ships has increasingly become a serious concern for the legislature and the public. This is particularly so considering the long term threat that such pollution can have on the environment which can, in turn, result in serious commercial and public use consequences. Marine and estuarine water quality is important to preserve and it is in this context that these two decisions of Justice Sheehan, which were heard together in the Land and Environment Court of New South Wales, arise.

The decisions concern two charges under s 8(1) of *Marine Pollution Act* 1987 (NSW) ('MPA') against the owner of the MV "Magdalene" and its Master. This section provides that a strict liability offence is committed by both the Owner and Master of a ship that discharges 'oil', or an 'oily mixture', into state waters. In this case, the Owner and the Master pleaded guilty to charges under s 8(1) arising from a serious oil spill incident in Newcastle Harbour, NSW on 25 August 2010. Accordingly, the hearings were sentencing hearings.

The maximum fines for these charges, following major increases in 2002, are $10 million for a body corporate (such as the owner), and $500,000 for a natural person (such as, here, the defendant Master, Captain Volodymyr Vazhnenko).

The decisions are important as they arise out of the second largest oil spill in the history of New South Wales, and the largest oil spill in 10 years following the *Laura D'Amato* incident in 1999. They provide useful guidance on the sentencing procedure to be followed by a court and show that a prosecution of this kind can be simplified using an Agreed Statement of Facts in order to reduce the costs of both the prosecutor and defendants.

Facts

The MV "*Magdalene*", was registered in Monrovia, Liberia, and was a bulk carrier with a deadweight tonnage of 149,530 commissioned in 1989. On 25 August 2010, at approximately 1030 hours, while berthed at Kooragang Berth 4 in the Port of Newcastle, the MV "Magdalene" commenced deballasting the number 6 starboard double bottom ballast tank. During the deballasting, between 1030 and 1400 hours on the 25th of August, oil was discharged from this tank into the Hunter River at the Port of Newcastle. The MV "Magdalene" discharged into the Hunter River, on her port side, 'a mixture of oily water', containing 72,000 litres of 'heavy fuel oil'.

Tank No 6 was relatively low in the ship and was between the cargo hold and the outside shell of the hull adjacent to, and having a common steel wall with, a fuel tank. This is a common arrangement for older ships. It was common ground that oil came into the ballast tank as a result of a 15mm diameter hole in the internal transverse bulkhead between the ballast and HFO tanks. This oil would have leaked into the ballast tank over an extended period of time prior to the MV "Magdalene"'s arrival in Australia.

Following observation of the spill at approximately 1400 hours, an extensive boom containment action commenced at about 1545 hours. Clean-up operations commenced the next morning, and continued until 8 October 2010 when the clean-up was finalised with a total costs to the Port of Newcastle of $1,913,197.23. Difficulties were encountered with the clean-up due to the thickness of the oil. Accordingly, a longer than anticipated manual clean-up operation was required.

The oil was originally observed up to approximately 100 metres from the K4 and K5 berths, and around the ships docked at them (MV "Magdalene" and MV "Citrus"), and the slick spread into other parts of the harbour. The oil had reached up into the North Arm of the Hunter River, at the entrance of the Stockton Channel about one nautical mile south of the Stockton Bridge, by 1430-1500 hours on 26 August 2010, affecting mangroves and sand beaches, and the Hunter Wetlands National Park. The Hunter Wetlands National Park is a Wetlands park of international significance under the *Ramsar Convention on Wetlands of International Importance*.[1] This

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[1] 1971, 996 UNTS 245.

area comprises the Stockton Sand Spit, an important roosting area for 37 species of international migratory birds. The movement of the oil spill into and within the Park was caused by strong westerly winds and tidal action.

Causation

In finding that this was a significant spill which was neither intentional nor reckless, but that the spill would have caused less damage had steps reasonably available to prevent it sooner were implemented, the Court made the following findings with respect to causation:[2]

> (a) Because the sounding pipes lacked perforations, the manual soundings did not detect oil in the ballast tank. Additional checking of the tank was needed, before de-ballasting commenced, especially with the increased risk of corrosion as a result of the tank's having been empty for a time (together with a risk of significant environmental damage).
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> (b) A 'proper watch' should have been in place, especially in the absence of perforated pipes, but 'there was no watch [kept], nor any system [in place] to ensure a watch was kept on 25 August 2010', and the discharge, which occurred between 1030 and 1400 hours on that day was not observed by the crew, until the ship was advised of the spill, by the coal terminal operator, at 1500 hours. The experts agree that, quite apart from tank inspection prior to the commencement of de-ballasting, a proper watch system during de-ballasting ought to have detected contamination at an early stage, without the risk of significant environmental damage.
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> (c) A 'highly prudent' owner and a 'highly prudent' Master, in the above circumstances, 'would have ordered an inspection of the ballast tank be conducted before use. This, whilst not a class requirement or invariable international practice, was a simple and cost-effective measure available to the defendants to prevent a foreseeable risk of environmental harm'.

Sentencing

The court held that in determining the penalties in a case of this kind regard must be had to ss 3A, 10, 21A, 22, and 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). These are lengthy provisions which detail the purposes of sentencing, when a section 10 order should be granted (which refers to an order that no conviction be recorded although the offender is found guilty of an offence), the aggravating and mitigating factors in sentencing, how a guilty plea should be taken into account, and the power of a court to reduce penalties for assistance provided to law enforcement authorities.

Seriousness

The court made it clear that in arriving at its sentence, it must pay close attention to the legislature's decision on the current maximum penalty for a particular offence. In addition, it must seek guidance from comparable cases, or from the range of penalties imposed in all relevant cases, as each involves consideration of the scale of objective seriousness of the offences in question. It is this scale of seriousness, by reference to the maximum penalty under the MPA which ultimately determines the size of the fine imposed. The court noted that this is a difficult task. In applying these provisions, the court obtained guidance from the general range or scale of objective seriousness as set out in *Environment Protection Authority v Orange City Council*:[3]

> 0-10% of the maximum penalty being the "lowest" seriousness;
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> 10-30% of the maximum penalty being "low to mid" seriousness;
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> 30-60%of the maximum penalty being "mid-range" seriousness;
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> 60-80% "of the maximum penalty being " mid to high" seriousness; and
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> 80-100%of the maximum penalty being the "highest" seriousness.

[2] *Newcastle Port Corporation v MS Magdalene Schiffahrtsgesellschaft MBH; Newcastle Port Corporation v Vazhnenko* [2013] NSWLEC 210 (11 December 2013) [162].
[3] [1995] NSWLEC 103 (23 June 1995) (*'Orange Council'*).

In determining where the seriousness of the offences in question fell, the principle of evenhandedness as detailed in *Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd*[4] was of fundamental importance to the court. This sentencing principle requires the court to have regard to the general pattern of sentencing for offences of the kind being considered and to carefully identify the factual differences among the cases, checked against any legislative movement in penalties. Legislative alterations to penalties was an important consideration in the MV "Magdalene" decision because in 2002, following the *Laura D'Amato* (which the court found was the only comparable offence to the offences in question), the MPA underwent major revision which resulted in substantial increases in penalties in cases where commercial vessels were involved. The maximum for a corporation increased from $1.1M to $10M, and from $220,000 to $500,000 for individuals, increases which seriously altered the historic relativity between the penalties (the ratio of 5:1 became 20:1).

The Court found that *D'Amato* caused many more concerns than the MV "Magdalene" and based on objective seriousness considerations, was 50% of the worst case. Accordingly, it was of mid-range seriousness. The spread of oil following the MV "Magdalene" incident was not as severe: it did not create any serious odour problem; it did not kill as much vegetation; and it created no public health or explosion risks, such as occurred in *D'Amato*. The environmental consequences lasted less than two months but in *D'Amato* they persisted for longer than five months.[5] In addition, in *D'Amato* there was demonstrable human negligence.[6]

With respect to the increases in the size of the fine since *D'Amata*, the court held that deterrence of Owners was a clear legislative objective of the multiplication of the maximum corporate penalty by a factor of nine, while the individuals' maximum went up by a factor of only 2.25.[7] However, following *Cabonne Shire Council v Environment Protection Authority*,[8] it remains necessary to address the facts of the particular case with due regard to the current maximum penalty and the seriousness of the offence, and regard to the need for deterrence thereby indicated, together with all other relevant matters. Accordingly, the increase in penalty under the MPA did not mean that the fine would be increased by the same percentage the maximum penalty was increased. Offences of low criminality remain offences of low criminality even if the maximum penalty is increased.

Balancing these facts, the court then held that before consideration of any statutory aggravating or mitigating factors, this incident should be assessed at somewhere near, but certainly not more than, 20% of the theoretical 'worst case', at the midpoint of the *Orange Council* decision low to mid-range scale of seriousness, which would suggest a fine in the order of $1.8M.[9]

Mitigating/Aggravating factors

With respect to the aggravating and mitigating sentencing factors in section 21A(2) and (3) of the *Crimes Sentencing Procedure Act* 1999 (NSW), the Court followed the decision *in Plath v Rawson.*[10]. Although a prosecution under the *National Parks and Wildlife Act 1974,* the Court made clear this judgment set out a useful 'checklist' of relevant considerations to be factored into the setting of a penalty for any environmental offence.

The decision is quoted at length and should be the first port of call for any guilty party looking to consider the factors which may aggravate or mitigate the sentence imposed by the court.

It was held that facts adverse to the defendant must be proved beyond reasonable doubt, and those favorable to the defendant need be proved only on the balance of probabilities. The absence of any mitigating factors proven in favour of the defendant is not an aggravating factor against the defendant.[11]

Harm in the context of this prosecution was considered by the court to be the only aggravating factor under section 21A(2).[12] In this matter the harm was found to have been substantial and significant but not long lasting and permanent. The harm was considered to be environmental harm only and comprised the following:[13]

[4] [2013] NSWLEC 185 (1 November 2013).
[5] [2013] NSWLEC 210 (11 December 2013) [238].
[6] Ibid [239].
[7] Ibid [245].
[8] [2001] NSWCCA 280 (4 July 2001).
[9] [2013] NSWLEC 210 (11 December 2013) [249].
[10] [2009] NSWLEC 178 (28 July 2009).
[11] [2013] NSWLEC 210 (11 December 2013) [251].
[12] Ibid [252].
[13] Ibid [43].

(a) oil contamination of pelicans;

(b) oil spotting of protected saltmarsh and mangrove vegetation;

(c) contamination of invertebrate animals on mudflats; and

(d) the production and disposal of oil contaminated waste.

In terms of mitigating factors, the Court considered that the following facts were mitigation factors:[14]

(1) this offence is not part of any planned or organised criminal activity;

(2) neither defendant is known to have any criminal record;

(3) neither defendant has seen its/his character questioned; and

(4) both have good prospects of rehabilitation.

It was also held that the Owner's payment of the clean-up costs, and its preparedness to pay the legal costs of both itself and the Master were matters operating to the credit of the owner.[15]

The Court then considered the impact of the guilty plea of the defendants.[16] The Court applied, in full, the principles stated in *R v Thomson; R v Houlton.*[17] Those principles set a maximum guilty discount of 25% with the discount ranging from 10-25 per cent at the judge's discretion. Early pleas in matters where there are complex issues about which evidence will have to be gathered and adduced will attract the maximum discount.

The co-operation and assistance of the defendants was also considered and credit was given to the Owner for its formal admission of liability within three months, well before the commencement of proceedings, to the Master for his, and to both defendants for the preparedness of the Master (and his crew) to participate, subject to the limitations of entirely appropriate legal advice, in the prosecution's investigation.[18] However, in the context of a MPA prosecution it was held that only a modest discount should be given for the crew's co-operation. This is because sections 10, 50 and 53 of the MPA impose very strict obligations on ship owners and crew in respect of frankness and cooperation, and prescribe serious penalties for their breach.

The contrition and remorse of the defendants were considered mitigating factors pursuant to the decision in *Environment Protection Authority v Waste Recycling and Processing Corporation*.[19] The court followed this decision which held contrition and remorse will be more readily shown by the offender taking actions, rather than offering smooth apologies through their legal representative.[20] In the MV "Magdalene" proceedings, there was not just smooth apologies from counsel (genuine contrition was shown in affidavits); steps were taken to rectify harm, prevent further pollution and to address the cause of the offence.

In relation to these mitigating factors listed above which do not have defined discounts (only a plea of guilty does) the Court held that undefined percentages will be added to the guilty discounts. It was made clear that in the context of environmental prosecutions, discounts of 30-50% were not uncommon and often reached as high as 40%. However, when considering such discounts, the court was adamant to make clear that the penalty must still bear a reasonable relationship to the objective seriousness of the offence which is necessary to preserve the public's confidence in courts.[21] Accordingly, adopting these concerns and following the comments in *SZ v The Queen*[22] that generally discounts for assistance to authorities range from 20 to 50% and are only more than 40% in exceptional circumstances, the Court reduced the fine by one third due to the early guilty pleas, co-operation,

[14] Ibid [254].
[15] Ibid [256].
[16] Ibid [259]-[262].
[17] [2000] NSWCCA 309 (17 August 2000).
[18] [2013] NSWLEC 210 (11 December 2013) [263]-[265].
[19] [2006] NSWLEC 419 (10 July 2006).
[20] [2013] NSWLEC 210 (11 December 2013) [266]-[268].
[21] [2013] NSWLEC 210 (11 December 2013) [276].
[22] [2007] NSWCCA 19 (14 February 2007).

remorse, pre-trial payment of clean-up and the commitment to pay costs. Accordingly, the owner's fine was reduced to $1.2 million down from $1.8 million.[23]

The Master

With respect to the Master, the Court held that the offence was more of a system or command failure rather than one where there was neglect on the part of the master. The Court also held it was not part of the Master's duties to take personal charge of the port operations of the ship and that he was entitled to rely upon other personnel, namely the second and third officers who were on deck, to do a better job. The Court considered the Owner, not the Master, were vicariously liable for their failings. Likewise the need for perforated sounding pipes or procedures to compensate for their absence were matters for the Owner not the Master. Acknowledging that the granting of a s 10 order under the *Crimes (Sentencing Procedure) Act 1999* (NSW) order is not free from difficulty, or doubt, the Court ordered that no conviction be recorded against the Master, despite his guilt.[24]

Conclusion

This decision clearly indicates that sentencing of environmental offences is a methodical process. Accordingly, certain actions can increase the fine imposed and certain early actions can decrease the fine imposed. Guilty parties seeking to minimise the penalty imposed though plead guilty as soon as possible, and then implement as many post offence mitigating factors as possible such as assisting authorities, taking steps to rectify any harm caused and taking steps to prevent occurrence of a similar incident again. Appropriately advised clients could obtain a 30-40% reduction in the penalty imposed for an offence.

If you are advising a client on their exposure to a penalty, remember that the principle of evanhandedness is the best starting point, so find cases with comparable factual circumstances and conduct your own assessment of objective seriousness of the offence your client is charged.

Furthermore, this decision indicates that in the context of a statutory offence where the legislature has recently increased the maximum penalties under the relevant statute, this does not necessarily mean that the applicable fine will be increased by the same percentage increase in the maximum penalty available under statute.

Finally, the decision is a reminder of the importance of clear, established procedures for watch-keeping, and inspections and maintenance so that Owners as well as Masters are alert to when additional precautions may be required to prevent a marine pollution incident.

As an aside, the *Marine Pollution Act* 2012 (NSW) commenced earlier this year replacing the *Marine Pollution Act* 1987 (NSW). While the regime for the offences that are the subject of this decision remains largely unchanged, the new Act introduces several significant new offences and obligations. In particular, both Masters and Owners must prepare and carry emergency plans for pollution incidents involving oil and noxious liquid substances; there are new offences relating to pollution by harmful substances in packaged form, garbage and sewage; additional reporting obligations, and a new regime of marine pollution notices.

[23] [2013] NSWLEC 210 (11 December 2013) [279].
[24] Ibid [308].