IN THE DISTRICT COURT
AT TAURANGA

CRI-2012-070-001872

MARITIME NEW ZEALAND
Informant

v

DAINA SHIPPING COMPANY
Defendant

Hearing: 26 October 2012

Appearances: R Ronayne and C Harold for the Crown
P Mabey QC for the Defendant

Judgment: 26 October 2012

NOTES OF JUDGE R P WOLFF ON SENTENCING[i]

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[1] Daina Shipping is for sentence today on one charge under s 338(1B) of the Resource Management Act 1991, arising out of a spillage of oil as a result of a collision by the ship *Rena* with the Astrolabe Reef.

[2] The consequences have resulted in what has been New Zealand's worst maritime environmental disaster. It has been a disaster that has highlighted the risks associated with shipping and commerce, the exposure of the environment and the need for a community, when such events occur, to work together to reach a solution.

[3] The actual cause of the collision with the reef was the result of poor navigational skills of the captain and second mate and a rush on their part to reach Tauranga, which proved to be an unnecessary rush. At no point during the course of

the hearing in relation to them, or this, has there been any suggestion that the present defendant had put any pressure of time, or of operational requirements, on those persons actually responsible for the ship running aground, and that needs to be borne in mind.[ii]

[4] It also needs to be borne in mind that this is a single charge and that it is one of strict liability. That means that the owner cannot escape liability in such circumstances.

[5] It is against that background that the Court cannot be a panacea, but needs to apply a principled and careful approach to a sentence in this case, as with any other and must follow the same procedure. That procedure starts by identifying the start point for the seriousness of the offence. That takes into account any aggravating or mitigating circumstances related to the offence itself. In the case of a strict liability offence that is a relatively restricted compass and, at that point, the Court has got to decide, bearing in mind the maximum sentence of $600,000, as to what the appropriate start point for this particular offence is.[iii]

[6] The Court is guided by earlier authoritative Court decisions that it must follow and, if it does not follow, would need to explain with considerable care why not. Those decisions have been referred to by counsel[iv] and reveal that for environment sentencing, the Court must consider in the case of public welfare offences, the nature of the environment affected, the extent of the damage afflicted, the deliberateness of the offence and the attitude of the defendant.

[7] As to the first of those, the entire coast of the Bay of Plenty has been affected, as have a vast number of individuals, businesses, iwi groups and the like. The damage has also been caused to wildlife, the protection of which of course is one of the purposes of the Resource Management Act.

[8] This is not an offence that was caused deliberately. That is in distinction to those offences that are committed by those who know that they are not permitted to do something and, for instance, discharge deliberately knowing that they are not permitted to do so.[v]

[9] Given that I have got to allow for those sorts of deliberate cases within the range of available penalties. I accept counsels' submission that the start point in this case is one of $450,000, because I have to leave room for those cases where there has been deliberateness, recklessness, and/or a high level of carelessness by the person being sentenced.

[10] I have had very responsible and careful submissions of counsel. The submissions have been precise and directed to the important issues that this Court must decide.

[11] The next consideration is the size and nature of the defendant and whether they can afford a fine. In this case, from what I heard, they can.

[12] The other factors that are often referred to, which include the extent of attempts to comply, remorse, profits realised and the criminal record, all stand favourably for the offender. There is remorse. There has been no profit realised. This was not in any way deliberate and the defendant has not ever previously appeared.[vi]

[13] The Court then needs to consider what is required in this case to send an appropriate deterrent message. The sending of a deterrent message applies not only to the offender, but also so that other potential offenders can understand the consequences of lack of care with regard to our environment. I therefore need to fix a penalty that reflects that, while at the same time taking into account the mitigating features and steps taken by the defendant.

[14] As the Crown has accepted in this case, there have been significant steps taken by the defendant and I am satisfied that, starting from the agreed start point of $450,000, there would be 10 percent deduction for those matters. That leaves a tentative figure, before taking into account co-operation and the early plea of guilty, of $405,000.

[15] The next issue that the Court needs to consider is, and it is well recognised by the Supreme Court,[vii] that where people plead guilty, avoiding the costs of a trial and saving considerable public expense, a discount of up to 25 percent is appropriate.

[16] Allowing that percentage and without quibbling too much, and rounding the end result because we are talking in relatively significant numbers here, I am satisfied that the appropriate penalty to impose in the present case is a fine of $300,000.

[17] I note that there would be the opportunity for the Court to impose other penalties for a continuing offence, but these are not sought by the prosecution and for good reason. It is plain that the steps taken by the defendant in the present case meet all of the objectives that any such continuing fine would meet, and it is more important for co-operation and goodwill, that the difficulties associated with this are to be resolved in a satisfactory way. I note that there are no other matters sought by the Crown, in terms of any other orders that are available to the Environment Court and, thus, the end result is the fine that I have imposed of $300,000.

R P Wolff
District Court Judge

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[i] Footnotes are added post-sentencing with the consent of counsel because without footnotes the decision would be of no use for comparative purposes in other cases, or for academic criticism. While adequate for those present in Court at the time of delivery, it is inadequate for these additional purposes.

[ii] I was the Judge who sentenced the captain and mate of the Rena. It was therefore unnecessary to have the summary of facts read out. The basic facts had been presented to the Court over a full day hearing on that earlier occasion and had included a video presentation of the course of the Rena and the navigational errors that resulted in the Rena grounding on Astrolabe Reef. For present purposes an executive summary of the facts is best achieved by setting out paragraphs from the prosecutor's memorandum as follows:

> 7. This is a pollution case, the essential features of which are:
> (i) the discharge of hundreds of tonnes of oil from the wreck into the ocean, the major component of which was heavy fuel oil;
> (ii) the discharge of hundreds of containers and their contents, including dangerous goods, into the ocean;
> (iii) the major pollution of island and mainland shorelines with oil, containers and all manner of other debris;

(iv) significant consequences for wildlife;
(v) significant consequences for, and impact on, the community;
(vi) enormous expense to central and local government.

8. The total cost to the Crown to date is approximately $47m.

9. The civil liability of ship owners and others for damage caused by a bunker oil spill is governed by the Maritime Transport Act 1994 but that liability in the circumstances arising here is limited to a sum of approximately $11.3m.

10. As a result of extended and cooperative negotiations between the Crown and the defendant and its insurers, the owner and its insurers have agreed to pay compensation to the Crown in the total sum of $27.6m.

In addition it was accepted by the Crown that the following matters set out in defence submissions were uncontested.

5. The Crown submissions refer to the agreement reached between the Defendant and the Crown concerning compensation ("the Agreement"). The submissions record that the compensation payment to be made ($27.6m or $38m if a resource consent is granted) significantly exceeds the Defendant's civil liability under the Maritime Transport Act and International Conventions.

6. Had the Defendant resorted to its rights to cap its liability the Crown would be left to claim against the capped fund and would have received a payment pro rata with all other persons able to establish loss as a result of the grounding. Any payment to the Crown would have been less than the capped fund of $11.3m.

7. As a result of the Defendant's willingness to negotiate with the Crown for a payment in excess of its civil liability the Crown has avoided a much greater loss than the deficit which will remain after the compensation payment.

8. As noted in the Crown submissions, in addition to any compensation paid pursuant to the Agreement, the Defendant through its insurers has made payments for salvage and cleanup which are on-going. Salvors were immediately engaged after the grounding. Braemar Howells (an International Pollution Response Company) was also immediately engaged and continues to have personnel based in Tauranga.

9. To date, in addition to the compensation payment to be made to the Crown pursuant to the Agreement, the Defendant's insurers have paid in excess of $NZ235m towards salvage and cleanup.

10. The defendant and its insurers are committed to further payments. The American salvors, Resolve are currently engaged in dismantling the wreck. As noted, Braemar Howells remain in Tauranga and continue to work on cleanup as and where necessary.

[iii] This statement is true for this case but had reparation been an issue it would have had to have been fixed prior to the final calculation of the fine.

[iv] *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC); *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) (as to the effect of insurance on such a calculation).

[v] An example of this is *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-25, 27 August 2010

[vi] This was a figure put forward by both counsel and, in my view, reflected accurately the need to allow for deliberate or more negligent discharges.

[vii] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607