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Environmental Offences: Finally Making the Polluter Pay?

Opi Outhwaite

This update focuses on developments in sentencing for environmental crimes. The imposition of appropriate penalties is crucial, not only to the use of judicial mechanisms for securing access to environmental justice, but also to respect for the polluter pays principle, a keystone of environmental law. There has been long-standing criticism in the UK of the failure of the courts to treat environmental crimes sufficiently seriously when imposing sentences. Fisher et al observed that insufficiently severe sentences, including low levels of fines, undermine the effectiveness of criminal prosecutions, reinforce an attitude of moral ambiguity towards environmental crime and do not produce a deterrent effect.¹ The issues relate to sentencing for both individuals and businesses, though the latter has arguably been the most problematic. Two important facets of this problem have both been addressed this year, through developments in sentencing guidance and in decisions of the Court of Appeal.

The Court of Appeal and Sentences for Corporate Offenders

The Court of Appeal has established something of a track record for reducing the fines imposed upon companies by the lower courts. One of the best known examples of this is the *Sea Empress* case.² A record fine of £4 million was imposed on the Milford Haven Port Authority as a result of the *Sea Empress* oil disaster. On appeal the fine was reduced to £750,000. This has been seen to reflect a general reluctance of the courts to impose serious penalties on corporate environmental offenders and for environmental crimes in general. The Court of Appeal, in considering the penalty, held that the judge had failed to give sufficient credit for the Port's plea of guilty, failed to consider the impact of such a large fine on the ability of the Port Authority to perform its public functions, and that it had taken too rosy a view of the Port's financial situation. These considerations are pertinent to the recent decisions, discussed below.

¹ Fisher, E. et al, *Environmental Law: text, cases and materials*, Oxford: OUP (2013).

² *R v Milford Haven Port Authority (The Sea Empress)* [2000] Env L.R. 632.

As noted by Stookes, this approach of the Court of Appeal has been observed in more recent cases. In *R v Anglian Water Services Ltd*³ the defendant company pleaded guilty to discharging effluent into a watercourse and was fined £200,000 by the Crown Court. The Court of Appeal reduced the fine to £60,000. In *R v Cemex Ltd* a company failed to comply with an environmental permit and was fined £400,000.⁴ The fine was reduced on appeal to £50,000.⁵ Stookes notes that this position has resulted in some offenders being prepared to risk paying a fine rather than comply with environmental legislation.

In January 2014 three important Court of Appeal decisions dealt with the imposition of fines for corporate environmental offences and suggest a marked change in attitude as well as establishing important general principles for fines applied to corporate offenders.⁶

R v Sellafield Ltd and *R v Network Rail Infrastructure Ltd* were heard together; in both cases the issue was whether fines imposed were 'manifestly excessive'.⁷ Reviewing the general principles relating to the duty of the courts in sentencing, as set out in *the Criminal Justice Act 2003*, it was noted that the purpose of sentencing included punishment of offenders, reduction of crime (including through deterrence), reform and rehabilitation of offenders, protection of the public and the making of reparation for harm caused.⁸ The culpability of the offender and the harm caused or which might foreseeably be caused were to be regarded when considering the seriousness of the offence⁹ and when imposing a fine, the criteria set out in s.164 should be considered, including the financial circumstances of the offender and the seriousness of the offence (which may have the effect of increasing or reducing the fine). Citing *R v F Howe & Son (Engineers) Ltd*¹⁰ the court emphasised that the fine must be fixed to meet the statutory purposes with the objective of ensuring that 'the message is brought home to the directors and members of the company (usually the shareholders)'.¹¹

³ [2003] EWCA Crim 2243.

⁴ [2007] EWCA Crim 1759.

⁵ Stookes, P. Will the polluter finally pay the price? *Solicitors Journal*, 28 October 2014.

⁶ Likely influenced by the then forthcoming developments in sentencing guidelines which were introduced in July 2014 and are discussed below.

⁷ *R v Sellafield Ltd* and *R v Network Rail Infrastructure Ltd* [2014] EWCA Crim 49.

⁸ s.142 CJA 2003. *Ibid* at [3].

⁹ s.143 CJA 2003. *Ibid* at [3].

¹⁰ [1999] 2 All ER 249.

¹¹ [2014] EWCA Crim 49 [6].

In *Sellafield*, the company had adopted a system for separating exempt and non-exempt (radioactive) waste according to the statutory framework. Exempt waste could be disposed of as landfill whereas radioactive waste was subject to separate processes. The equipment introduced for the purpose of categorising the waste was not correctly calibrated so that the dosage always registered as zero and the waste in question was consequently set aside for disposal as exempt waste. The error was discovered by chance, during a training exercise. In the intervening period several thousand bags of waste had passed through, though it was accepted that only a small number of bags were radioactive above the level that should have been detected. The Court of Appeal accepted that Sellafield then did everything they could to ensure that no harm came to anyone.¹²

With respect to harm and culpability the court considered that there was no actual harm and the risk of harm was low. Culpability was considered to be 'medium'; the court agreed that Sellafield that the failures could easily have been avoided and should have been detected quickly, though the application of specified monitoring and checking procedures.¹³

Network Rail involved health and safety failures rather than specifically an environmental issue but the sentencing principles were applied in the same way as for Sellafield. A child was seriously injured when the car he was in was hit by a train at a level crossing. National Rail accepted that it was guilty of significant failings in the assessment of risk; if a proper assessment had been made then a telephone connected to the signal box would have been installed at the crossing (and was installed after the accident). Guidance on risk assessment had been issued in 1996 and risk assessments were undertaken in 2000, 2003, 2007 and 2009. There was a maintenance inspection in 2010. The Crown Court considered, and Court of Appeal accepted, that 'elementary mistakes' were made in the assessment.

In appealing against the fine Network Rail submitted that since a guilty plea was entered (a mitigating factor) the starting point was far too high and further, the judge had not given sufficient credit for Network Rail's commitment to safety. The Court of Appeal found that serious harm was foreseeable, in addition to the actual harm caused. As to culpability there was no evidence of specific management failures; the failures were at lower operational levels.

¹² [2014] EWCA Crim 49 [21].

¹³ [2014] EWCA Crim 49 [31].

Having considered culpability and harm, and aggravating and mitigating factors in both cases, the Court of Appeal turned to the issue of whether the fines were excessive. Concerning Sellafield, the Court of Appeal made it very clear that significant fines could be appropriate to large companies of this type. A fine of £700,000 (reduced from a starting point of £1 million, after mitigation) reflected the case where culpability was moderate and harm low; it should achieve the purpose of sentencing by bringing home to Sellafield Ltd and its shareholders the seriousness of the offences committed and should act as an incentive to directors and shareholders to remedy the failures found, including the too lax and complacent approach of management. If it did not have that effect then in a future case the fine would have to reflect that the level imposed in this case had not achieved the statutory purpose of sentencing. The Court noted also that there was no upper ceiling on the maximum fine that could be imposed on a company.

Concerning Network Rail the Court of Appeal rejected the submission that a fine of £750000 (before mitigation) was appropriate only where there had been a fatality. But, differently to Sellafield, it was noted that a significant fine would inflict no direct punishment on anyone, and may harm the public, since the company's profits are reinvested in the rail infrastructure rather than benefiting shareholders. Nevertheless to ensure that it fulfils the other purposes of sentencing (reducing offences, reforming the offender and protecting the public) the fine must be such that it brings home to the directors and members of Network Rail those three purposes. The fine would stand and indeed 'represented a very generous discount for the mitigation'¹⁴ – even if there had been a materially greater fine it would not have been criticised.

Finally, *R v Southern Water Services Ltd*¹⁵ concerned failings at a sewage pumping station which led to the discharge of untreated sewage into the sea. Concerning culpability there had been a failure to notify and remedy the problems quickly, as found by the trial judge. Although there was no actual harm, there was the potential for serious harm. Again the Court noted that the company had significant resources available to them and also a record of persistent offending. In dismissing the appeal and upholding the original fine of £200,000 the Court of Appeal commented that it would not interfere with the fine and would not have done so even if the fine had been substantially higher.

¹⁴ [2014] EWCA Crim 49 [72].

¹⁵ [2014] EWCA Crim 120.

In all three cases the Court of Appeal gave significant weight to the considerable resources available to each company, even where the company did not owe a duty to shareholders. In particular, the impact of the fine - rather than only the ability to pay - was considered in relation to the purpose of sentencing. The Court also commented carefully on the record of persistent offending in each case.

Sentencing for Environmental Offences: The New Guideline

Also in 2014, the Sentencing Council issued its Definitive Guideline for environmental offences.¹⁶ The position of the Court of Appeal, discussed above, became relevant when the lower courts had imposed relatively substantial fines or penalties where environmental offences had been committed. These instances were often the exception however, with low levels of fines and inconsistent sentencing considered to be a persistent problem in the lower courts.

In a detailed discussion of the data and issues pertaining to the consultation preceding the Guideline, Parpworth notes that empirical research undertaken by the Sentencing Council indicated a limited awareness among magistrates of the sentencing guidelines in relation to environmental offences.¹⁷ Further, the limited number of environmental cases heard by individual magistrates meant that they were unlikely to have substantial experience of the application of the guidance, leading to inconsistencies including in the level of fine imposed. The view of the Environment Agency was that fines would need to increase substantially for businesses to understand the environment's true value, rather than viewing pollution as an acceptable risk. Similarly, the House of Commons Environmental Audit Committee noted that the levels of fines imposed neither reflected the gravity of the environmental crimes nor deterred or adequately punished those who commit them.¹⁸

¹⁶ Sentencing Council, *Environmental Offences: Definitive Guideline*, [2014] available at http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Definitive_Guideline_%28web%29.pdf.

¹⁷ Parpworth, N. 'Sentencing for environmental offences: a new dawn?' *Journal of Planning & Environmental Law* [2013] 9, 1093.

¹⁸ *Ibid* and see further House of Commons, *Environmental Crime and the Courts*, (HC, 126, 6th report of the session 2003-04).

Although the data on sentencing was inadequate, Parpworth notes that the data analysis published alongside the consultation demonstrated that in most cases companies were sentenced by magistrates (82% of cases) and fines were the usual sentence (93% of sentences). In 2011 only 12% of corporate fines were above £10,000 and the median figure for 2001-2011 shows an overall downward trend from £2500 in 2001 to £1500 in 2011.

Similarly, in 2011 the vast majority of individuals were sentenced by magistrates (90% of cases). Fines remain the most common sanction but have decreased from 78% to 65% of cases. In the period 2001- 2011 the mean fine imposed upon individual offenders decreased from £350 to £200. In the same period there has been an increase in the number of individuals receiving a discharge and slight increase in the imposition of community orders.¹⁹ The new Guideline came into effect in July 2014 and applies to individual offenders and to organisations, with each addressed separately. To determine the appropriate sentence the guideline specifies the range of sentences appropriate for each type of offence and divides each offence into categories according to the degree of seriousness. 'Category ranges' are then specified; the sentences appropriate for each level of seriousness. A starting point for sentences in each category is set out and then adjusted according to various factors.²⁰

Two main groups of offence are addressed: those committed under s.33 of *the Environmental Protection Act 1990* and certain offences under *the Environmental Permitting (England and Wales) Regulations 2010* (summarised in the Guideline as those dealing with unauthorised deposit, treatment or disposal of waste and illegal discharges to air, land and water). The guidance makes clear however that the Guideline should be referred to in sentencing "other relevant and analogous offences".

The guideline sets out a series of steps to be applied in determining the appropriate sentence - though there are some differences in the detail applicable to individuals as compared with organisations, the guidance is comparable. An important starting point is that steps one and two respectively require the court to consider making a compensation order

¹⁹ See Parpworth [n 17] and Sentencing Council, Environmental Offences Sentencing Data, Research and Analysis Bulletin available at http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_bulletin__Final.pdf.

²⁰ It has been noted that the specification of starting points for sentences is unique to sentencing for England and Wales as compared with jurisdictions such as the USA and New Zealand, see Parpworth [n 17].

and to consider confiscation. This requirement is separate from the determination of any fine to be imposed.

Steps three and four provide for categorisation of the offence and determination of the starting point and range for fines. In categorisation of the offence, a sliding scale of culpability and harm is used, with each including four categories. Culpability ranges are (i) deliberate (intentional breach or flagrant disregard or, for organisations, deliberate failure to put in place and enforce systems which could reasonably be expected), (ii) reckless (actual foresight, wilful blindness, reckless failure to put in place and enforce systems), (iii) negligent (failure to take reasonable steps) and (iv) low or no culpability. In determining culpability of organisations it should be noted that the 'deliberate' and 'reckless' categories apply to acts or omissions that can be properly attributed to the organisation. The categories of harm range from actual harm, such as a major adverse effect on air or water quality (category 1), through to risk of minor localised damage to air or water quality (Category 4). Risk of harm is presumed to be less serious than actual harm though it is recognised that this might not be the case where the extent of potential harm is particularly high.

The combination of culpability and harm indicates the starting point for the determining the level of fine. For organisations the starting point and range is further divided according to the size of the organisation, ranging from 'large' (turnover or equivalent of at least £50million p/a) to 'micro' (turnover or equivalent of not more than £2million p/a). This provides a clear basis for imposing fines appropriate to the particular organisation in question, particularly when read with steps 5 - 7. To support this factor, detailed information about required accounting information is also set out. The guidance also provides that for 'very large organisations' the fine may be outside of the suggested range. This category is not defined except as one whose 'turnover or equivalent vastly exceeds the threshold for large companies'. The lack of a starting point for fines in this category might be problematic but read as a whole the clear assumption in the guidance is that the starting point will be proportionately higher than for large organisations.

In steps 5 - 7 the Court is required to 'step back' and, with reference to the specific factors set out, review whether the sentence as a whole meets the objectives of punishment, deterrence, and removal of gain derived through the commission of an offence. Certain new criteria are set out in these steps which should support the more effective use of fines, particularly for offending organisations. Step five sets out new guidance to ensure 'that the combination of financial orders...removes any economic benefit derived from the offending'.

Economic benefits expressly include avoided costs, operating savings and any gains made as a direct result of the offence. For organisations (but also for individuals) this step is important in preventing economic gains derived from 'cutting corners' or failing to comply in the context of calculated financial risk.

The requirement that the fine meets the objectives of sentencing of organisations is enforced further in step six. Here the court is required to ensure that the fine based on turnover is proportionate to the means of the offender. The language of proportionality in this section errs towards environmental protection rather than the interests of the organisation. The guideline does, however, allow for a 'bespoke' approach; in assessing the financial situation of the organisation, the profit margins of the organisation should be examined and not only the overall turnover, with an upward or downward adjustment of the fine accordingly.²¹ This allows for appropriate adjustment based on the circumstances of the case. The combination of financial orders must though be 'sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance'. In some cases, putting the offender out of business will be an acceptable consequence of the fine.

The non-exhaustive list of aggravating factors also includes addition of the offence having been committed for financial gain. Evidence of a wider impact or impact on the community is a further addition to the list of aggravating factors.²² Aggravating and mitigating factors will be used to adjust the starting point in step 4. The requirement to remove any economic gain similarly applies to individual offenders.

Comment

The developments in sentencing for environmental offences appear to indicate a welcome change in the consistency and seriousness with which they will be dealt by courts at all levels. A low level of fines and the reduction in high fines on appeal have been a persistent issue in UK environmental law and, as noted, are considered to have contributed to a view that environmental offences are not 'serious' crimes or are morally ambiguous. The

²¹ Brosnan notes that this has implications for the Environment Agency who will now need to investigate the financial circumstances of offenders in more detail in order to present supporting information to the court. Brosnan, A. *ELR*, 16, 3 (203) [2014]

²² Brosnan [2014], *Ibid.*

approach of the Court of Appeal in the cases discussed appears designed to turn the tide on organisations who might otherwise treat non-compliance as an acceptable business risk. The change in emphasis in the Court of Appeal to the purpose of sentencing and the need to 'bring the message home' to corporate offenders - particularly those with access to considerable resources and a history of non-compliance - is also seen in the Sentencing Council's Definitive Guidelines for environmental offences. Since the vast majority of cases are heard in the lower courts and the usual sentence is the imposition of a fine, the Guideline also has far reaching implications. The detailed and structured approach to determining the category of offences and the overall level of fine to be imposed should provide greater consistency and it is widely thought that it will lead to an increase in the level of fine imposed on organisations.²³ In particular, the more detailed guidance on the need to negate economic gains and to consider the in detail financial situation of the organisation in question goes to the heart of the purpose of sentencing and to the criticism levelled at lower levels of fine in not acting as an adequate punishment or deterrent.

As might be expected, there are some limitations. The more vague reference to 'very large organisations' might cause difficulties. The requirement in step six for the court to examine the profit margins of a company provides an opportunity for an assessment which avoids injustice (both to the organisation and in relation to the harm or risk of harm) but might potentially be leaned on by large companies seeking to argue that they are operating with losses. Finally, the Guideline addresses some of the most common and potentially serious types of environmental offence but it is nevertheless restricted. Many other offences (for instance, those involving wildlife crime) are subject to similar problems with sentencing and are not addressed, though it remains to be seen how widely the courts will apply the principles set out in the Guideline.

²³ Brosnan considers that the level of fines imposed on individuals will remain about the same (ibid).