



Neutral Citation Number [2019] EWCA Crim 1344

Case No: 201900316 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT OXFORD
HHJ ROSS
S20180012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2019

Before :

LORD JUSTICE GROSS
MR JUSTICE WILLIAM DAVIS
and
MR JUSTICE GARNHAM

Between :

THAMES WATER UTILITES LTD
- and -
REGINA

Appellant

Respondent

MR S MEHTA for the Crown
MR K FUAD QC and MS A PRYOR for the Appellant

Hearing dates : 23rd July 2019

Approved Judgment

Mr Justice William Davis:

Introduction

1. On 16 January 2018 Thames Water Utilities Limited (“Thames Water”) pleaded guilty at the first opportunity to an offence contrary to Regulation 38(1)(a) of the Environmental Permitting (England and Wales) Regulations 2016 by causing a discharge in contravention of Regulation 12(1)(b) of the 2016 Regulations. That discharge was of untreated sewage from a pumping station at Milton-under-Wychwood in the Cotswolds into a nearby brook. The case was committed to the Crown Court for sentence.
2. On 21 December 2018 in the Crown Court at Oxford Thames Water was fined £2,000,000. A victim surcharge order was made in the sum of £120.00. Thames Water was ordered to pay prosecution costs in the sum of £79,991.57.
3. On 8 February 2019 the case was re-listed pursuant to Section 155 of the Powers of Criminal Courts (Sentencing) Act 2000. When imposing sentence on 21 December 2018 the judge had said that, if Thames Water were to make contributions to local wildlife and environmental charities totalling £200,000 within the period permitted for variation of sentence, the fine would be reduced by the same sum. Such contributions were made. Thus, on 8 February 2019 the judge reduced the fine to £1,800,000. We note that Thames Water was not represented at this slip rule hearing. Because this was a variation which did not lead to the company being dealt with more severely than the sentence originally imposed and because the company had proper notice, we are satisfied that there was compliance with the provisions of CPR 28.4(4) and that the power to vary the sentence was properly exercised.
4. Thames Water now appeals with the leave of the single judge against the fine imposed. Given the history as set out above, the sum with which we are concerned is £2,000,000.

The facts

5. Thames Water is the UK’s largest water and wastewater company. It operates 4,780 sewage pumping stations and 351 sewage treatment works. This case concerns the Bruern Road sewage pumping station. It serves the villages of Idbury and Fifield in North Oxfordshire. The pumping station pumps the raw sewage from those villages with a combined population of around 550 people to the sewage treatment works at Milton-Under-Wychwood.
6. The pumping station operates using two submersible pumps. They are intended to operate on a duty/standby basis. At any given point one pump is sufficient to cope with normal flow conditions. If that pump fails or is inhibited in its operation, the other pump on standby will be activated so that the sewage continues to be pumped to the treatment works. The operation of the pumps rotate so as to spread the load on each pump. Activation of the standby pump is controlled by a “smart” controller device i.e. technological equipment monitoring the operation of the pumps. A significant component within the device is an ultrasonic sensor which detects the level of sewage within the well of the pumping station. Failure of the sensor will mean that the smart controller device does not operate. In those circumstances the pumping station can only operate on one pump unless and until someone goes to the pumping

station and deals with the fault. When only one pump is operational, there is no standby system. If that pump fails to operate, there is flooding of sewage into freshwater streams. Such flooding will occur within 2 hours 45 minutes of the failure of all pumps.

7. On the morning of 8 August 2015 at 9.33 two alarms from Bruern Road pumping station were received at Thames Water's operation control centre in Reading. They were high priority alarms and they indicated (a) insufficient pump capacity to deal with incoming sewage and (b) a high level of sewage in the well of the pumping station. The cause of these alarms was the failure of the only operative pump at the pumping station. The alarms were acknowledged by a member of staff at the control centre but no immediate steps were taken to respond to the alarms. Someone should have attended the pumping station within 3 hours. That did not happen. The following afternoon shortly before 13.30 the alarms were cleared because the pump restarted. By that time around 82,000 litres of untreated sewage had gone into Idbury Brook causing serious pollution for a distance of around 50 metres. 146 bullhead fish were killed as a result of the sewage spillage. Other aquatic wildlife was able to escape the polluted area. The Environment Agency became aware of the position when a member of the public reported dead fish in the brook, this report being made on the evening of 9 August 2015. That agency notified Thames Water which had been unaware of the polluting event.
8. After the event it became apparent that one of the pumps at the pumping station had been out of action for much of the 12 months prior to the incident in August 2015. In August 2014 a failure of the sensor was identified. It was not rectified until January 2015 during which time the pumping station was operating with only one pump. The same situation arose from May 2015, the second pump being switched off during a maintenance visit. Further, over that 12 month period, there were many instances of pumping station failure alarms being received from Bruern Road at the control centre, those alarms not being dealt with sufficiently or at all. This could have been because of understaffing at the control centre or because of a belief that the alarms were false alarms or a combination of those factors. In either event over a number of months the state of affairs at the pumping station and the response of Thames Water staff to the position were such that there was a heightened risk of pollution from Bruern Road pumping station.

The proceedings in the Crown Court

9. On 5 September 2018 Thames Water tendered a basis of plea. In relation to culpability it argued that this was a case properly described as a negligent breach. The company said that the smart controller device was properly maintained but accepted that it failed to pay sufficient heed to the very frequent alarms in the period from June 2015 up to the date of the incident, those alarms indicating that pumps at Bruern Road were inoperative. In particular, there was a failure to investigate particular alarms on the day before the incident which led to pollution. The company also accepted that there was insufficient training of control centre staff as to how to make best use of the features at the centre. As to harm it was argued that it was in Category 3 because of the minor and localised nature of the impact with a short recovery time.
10. The prosecution responded to the basis of plea. They argued that culpability fell within the definition of reckless. They pointed to the evidence that the smart

controller device was inadequately maintained for around 7 months prior to the incident. They said that there had been inadequate response to alarms over the same period.

11. The judge conducted a Newton hearing on four different days between 8 November and 21 December 2018. He gave his findings in an oral ruling delivered on 21 December 2018. At the outset he gave his headline findings: reckless in terms of culpability by reason a failure to put in place and to enforce systems which could be expected to avoid commission of the offence; Category 3 harm but at the upper end of the category.
12. In relation to the issue of culpability the judge said that Thames Water had placed too much emphasis on technological solutions to the exclusion of the need to integrate those solutions with the people employed to apply them. He found that the second pump at Bruern Road had been either switched off or running ineffectively for the best part of a year prior to the incident. This had happened because the warnings given by the technology had not been heeded. That was due to inadequate training of control room staff coupled with insufficient staffing of the control room. The judge concluded that, because of the number of alarms, the staff assumed that there was a fault in the alarm system rather than a fault at the pumping station. The judge also considered that there was a failure to adopt proper maintenance systems. When faults were identified, whether with the sensor or with a pump, nothing was done for considerable periods so as to create a serious risk of environmental hazard.
13. As to harm, the judge found that the sewage spill had been relatively minor and localised. He accepted that in the event there had been modest damage to the environment and to wildlife albeit that the spill had gone on for many hours, possibly up to a day. He also noted the sensitivity of the surrounding water courses.
14. There is and can be no challenge to the judge's findings of fact. Further, the inferences he drew from his findings of fact are not the subject of challenge.

The sentencing remarks

15. Thames Water is a very large company. At the time of the sentence hearing its annual turnover was approximately £2 billion. The operating profits in the most recent financial statements were around £2 million per day. The judge in his sentencing remarks referred to turnover of £20 billion per year. This was clearly a slip of the tongue. Elsewhere in the course of the hearing he acknowledged the true figure.
16. The judge did not repeat his findings as to culpability and harm when he came to sentence, that exercise occurring on the same day as his judgment in relation to the Newton hearing. He referred to the fact that Thames Water had a number of previous convictions for environmental offences. He mentioned two previous convictions in particular. First, in March 2017 at Aylesbury Crown Court Thames Water was fined a total of £20 million for a series of offences committed between 2012 and 2014. Second, in 2014 Thames Water was fined £250,000 for offences committed in the summer of 2012. That fine was imposed at Reading Crown Court. The sentence was subsequently considered by the Court of Appeal. We shall return to the judgment of this court in that case. The judge commented that the offence with which he was dealing was "of a hugely lower magnitude" than the offences in relation to which sentence was imposed at Aylesbury. But he noted that, whilst the consequences of the

breaches dealt with at Aylesbury were on a different scale, the causes of the breaches were similar to the factors which led to the offence with which he was dealing.

17. The judge accepted that Thames Water had pleaded guilty at the first opportunity. He said that the Newton hearing was essential to allow him to reach a proper conclusion as to where the case fell within the sentencing guidelines. He described it as “a voyage of exploration”. Later in his sentencing remarks he said “full credit is there”. Both parties to the appeal agree that the judge decided that Thames Water was entitled to full credit for the plea of guilty. We consider that this was a generous conclusion. The substantial area of dispute between the parties was the level of culpability. The judge found against Thames Water on that issue. No complaint could have been made had the judge reduced the credit for plea to around 20%. He did not do so. However, we shall abide by his conclusion in considering the sentence he imposed.
18. The judge said that “there has to be a sense of proportionality”. He asked rhetorically where this case fell within the range of other cases involving Thames Water. He said that it came “nowhere near the Aylesbury incident” and was “closer in likeness to the episode dealt with at Reading Crown Court”. He found that the previous convictions were a severely aggravating feature, not least because the failings apparent in those instances had been permitted to persist within the organisation. The judge also noted the environmental sensitivity of the site affected by the pumping station.
19. In terms of mitigation the judge found that there had been some steps taken to remedy the problems albeit that he was unconvinced about the issue of training. He accepted that Thames Water had shown remorse, noting the offer to pay sums to local environmental charities.
20. Towards the end of his sentencing remarks the judge referred to the sentencing guidelines i.e. the Sentencing Council Definitive Guideline for Environmental Offences. He said that the guidelines “end, in terms of the highest category, with organisations which have far far lower levels of turnover and profitability and it is important to retain a sense of proportionality about all of this”. Having dealt in a little detail with the charities to which donations were to be made the judge simply said “the fine I’m going to impose is one of £2,000,000”.

The grounds of appeal

21. Three grounds of appeal are argued. They are inter-related. First, it is said that the judge did not comply with his duty to state his reasons for deciding on the sentence imposed. The argument is that he did not explain how he reached the figure of £2 million. Linked to that is the proposition that the judge did not engage in a step by step exercise as required by the Sentencing Guidelines. Second, the level of fine before credit for plea was manifestly excessive. Had full credit not have been given the fine would have been in the region of £3 million. Third, the judge drew a parallel with the case dealt with in Reading where the fine was £250,000. Taking that as a benchmark there was no proper basis to increase the fine in this case by a factor of 8.
22. We agree that the judge did not engage fully in a step by step approach as required by the Sentencing Guidelines. We accept that his sentencing remarks failed to set out clearly how he reached a figure of £2 million as representing the appropriate fine. Of itself that does not take Thames Water very far. The task of this court is to determine whether a sentence in any given case was manifestly excessive or wrong in principle. That task is not made easier if a judge fails to follow a structured approach to

sentencing. Equally, such a failure does not invalidate the sentence. It follows that we must move to consider the second ground, namely that the sentence was manifestly excessive. We shall do so by applying the Sentencing Council Definitive Guideline.

23. The judge in his findings at the conclusion of the Newton hearing reached a clear view on the issues of culpability and harm. We have set them out above. It follows that the judge dealt appropriately with Step Three as required by the guideline. We adopt his findings. The next stage was for the judge to consider the starting point and category range by reference to the tables at Step Four of the guideline. The judge made passing reference to this at the end of his sentencing remarks when he referred to the highest category. Large companies – companies with a turnover of £50 million and over – are the subject of a grid of financial starting points and ranges. For a reckless breach with Category 3 harm the starting point is £100,000 with a range of £60,000 to £250,000. The guideline deals with very large organisations by saying that where turnover “very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence”. The judge used the term “proportionate” when sentencing but he did not explain how a much larger fine could be proportionate given the nature of the organisation to be sentenced.
24. As part of Step Four the sentencer is required to consider a non-exhaustive list of aggravating and mitigating factors. The judge carried out such an exercise. The guideline emphasises the aggravating effect of relevant recent convictions, namely they are likely to result in a substantial upward adjustment and, in some cases, to lead to a move beyond the identified category range.
25. In this case the judge referred specifically to two previous convictions of Thames Water. He was provided with a note and accompanying schedule which set out 181 previous convictions resulting from breaches of environmental regulations dating back to 1991. A significant number related to sewage pumping stations and/or pump failures. The convictions were admitted by Thames Water.
26. Steps Five and Six in the guideline require the sentencer to step back and to review whether “the sentence as a whole meets, in a fair way, the objectives of punishment, deterrence and removal of gain derived through the commission of the offence”. There was no explicit stepping back by the judge in this case. He did not set out the relevance of the size of the organisation to the level of fine required to effect adequate punishment or deterrence. Had he done so, the judge inevitably would have increased the level of the fine very substantially beyond that appropriate for a large company.
27. The final Step of relevance to this case was the extent to which the sentence should be reduced to give proper credit for the plea of guilty. The judge may not have stated the discount in clear terms at the point of imposing sentence but he did state that full credit would be given.
28. Before we consider what the result would have been had the judge followed the Steps as set out in the guideline, we shall consider what was referred to by the judge as the Reading case since it forms the basis of the third ground of appeal. Our consideration of that case is in the context of the resulting appeal: *R v Thames Water Utilities Limited [2015] EWCA Crim 960*. The principles set out by the court in that case are wholly apposite to the facts in this case. They are as follows:

- It is of particular importance in the case of such very large commercial organisations to take into account the financial circumstances of the offender as required by s.164 of the Criminal Justice Act 2003. This should ensure that the penalty imposed is not only proportionate and just, but will bring home to the management and shareholders the need to protect the environment.
 - The Court is not bound by, or even bound to start with, the ranges of fines suggested by the Sentencing Council in the cases of organisations which are merely "large".
 - Previous convictions will always be relevant aggravating features and in the case of some, seriously aggravating features. Offences which result from negligence or worse should count as significantly more serious. Repeated operational failures – suggestive of a lack of appropriate management attention to environmental obligations – fall into this category. For example, to bring the message home to the directors and shareholders of organisations which have offended negligently once or more than once before, a substantial increase in the level of fines, sufficient to have a material impact on the finances of the company as a whole, will ordinarily be appropriate. This may therefore result in fines measured in millions of pounds.
 - Where the harm caused falls below Category 1 suitably proportionate penalties which have regard to the financial circumstances of the organisation should be imposed. In an appropriate case, a court may well consider, having regard to the financial circumstances of the organisation, that to achieve the objectives in s.143 of the Criminal Justice Act 2003, the fine imposed must be measured in millions of pounds.
 - In the case of such an organisation, there must not be a mechanistic extrapolation from the levels of fine suggested at step 4 of the guideline for large companies. This is made clear by (1) the fact that by definition a very large commercial organisation's turnover very greatly exceeds the threshold for a large company, and (2) the requirement at step 6 of the guideline to examine the financial circumstances of the organisation in the round.
 - Even in the case of a large organisation with a hitherto impeccable record, the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them. In the case of repeat offenders, the fine should be far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures properly to reform themselves and ensure that they fulfil their environmental obligations.
29. The third ground of appeal as elaborated in the skeleton argument submitted for the purpose of the hearing is that the fine in this case was £1.75 million greater than the fine imposed in the Reading case. Leaving aside the fact that this proposition fails to take account of the principles set out in the judgment of this court in respect of that case, it ignores the view expressed by the court in the penultimate paragraph of the judgment:

“In his written submissions Mr. Berlin suggested that the fine actually imposed by the Recorder was lenient. While we have every sympathy for the difficulty facing the Recorder, we agree that it was, even taking into account the significant mitigation

afforded by Mr. Aylard's evidence. We would have had no hesitation in upholding a very substantially higher fine. This appeal is dismissed."

This court was not in a position to increase the fine imposed by the judge sitting in Reading. Had it been, it would have done so. In those circumstances the fact that the judge who imposed the sentence with which we are concerned saw similarities with the facts of the Reading case is of no account. The sentence imposed by the judge sitting in Reading can be of no persuasive effect.

Conclusion

30. Applying the principles set out by this court in 2015, we are quite satisfied that, had the judge engaged in the step by step approach as required by the guideline, he would have reached the same conclusion as he did when apply a less structured approach. This was a breach of environmental regulations committed by a very large organisation as a result of corporate recklessness. The size of the organisation meant that the figures provided within the table applicable to a large company were of little relevance. The previous history of the organisation was little short of lamentable. To bring home to the directors and shareholders the need to protect the environment required a very substantial fine. In those circumstances a fine measured in millions of pounds was entirely proportionate. A fine after a trial of £3 million was appropriate. As we have indicated we consider that the credit given by the judge may have been generous. Certainly the resulting fine of £2 million was not manifestly excessive or wrong in principle.
31. We were invited by counsel for Thames Water in their written submissions to provide sentencing guidance for cases where the water company is a very large organisation. We took this to amount to an invitation to add a table to the guideline providing starting points and ranges. We would have rejected any such invitation. Had the Sentencing Council thought that such a table would have been appropriate, one would have been included in the guideline. It was not. It is not for this court to engage in ad hoc drafting of sentencing guidelines.
32. In oral submissions the invitation was refined. We were asked to note the difficulties facing very large organisations in assessing the likely level of a fine in any given case. In the light of those difficulties it was suggested that we could offer a view to the Sentencing Council, namely that an additional table should be added to the guideline to provide ranges of fines for the different categories of offence. We decline that more modest suggestion. The guidance sought by counsel is to be found in the decision of this court in 2015 as referred to above. In our view it provides more than satisfactory guidance on the approach to be taken by judges. We observe that it is a judgment to which the then Lord Chief Justice contributed. We cannot offer any improvement. The judgment does not set out sentencing ranges by reference to figures because very large organisations vary greatly in size and in the nature of their operation. For the same reason the Sentencing Council took an informed decision to provide only general guidance for sentences in relation to very large organisations. We are satisfied that there is no basis to amend that approach.
33. This appeal is dismissed. The respondent prosecutor is entitled to its costs which are agreed in the sum of £6,000.

