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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 14 February 2019

B e f o r e:

LORD JUSTICE IRWIN

MR JUSTICE HOLGATE

MR JUSTICE MARTIN SPENCER

R E G I N A

v

EDWARD MCINTOSH

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Ms S Riggs appeared on behalf of the **Appellant**

Mr B Mills appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

MR JUSTICE MARTIN SPENCER:

1. Pursuant to leave granted by the single judge, the appellant appeals against sentence imposed by His Honour Judge Berlin at the Wolverhampton Crown Court on 4 May 2018 for offences committed under the Environmental Permitting Regulations 2010 and other offences relating to environmental waste, whereby he was sentenced to a community order with an unpaid work requirement of 200 hours, was disqualified from being a director for a period of 5 years and he was ordered to pay £36,577.08 towards the costs of the prosecution.
2. These offences arose out of the appellant's directorship of a company called Caledonian Waste Limited ("CWL") which operated from two sites: Unit 1, West Bromwich Road, Walsall ("the Walsall site") and Unit 1, Friar Park Road, Wednesbury ("the Wednesbury site"). In relation to the Walsall site, CWL held an environmental permit for operating a household commercial and industrial waste transfer station. That permit was issued on 7 August 2013. At Wednesbury, CWL was involved in the operation of a wood waste facility in relation to one area of which it held an exemption, Area A. This permitted the company to deposit wood waste in Area A within the limits of that exemption.
3. The appellant, who was sole director of CWL, was involved directly and indirectly with the operation of both sites and was continually in receipt of advice and enforcement measures taken in relation to them by the Environment Agency and environmental health officers. It was the prosecution case that the failings of the company were therefore attributable to the appellant's negligence.

The Walsall site

4. The Walsall site was used for storage of RDF bales apparently intended for export to Holland. RDF stands for "Refuse-Derived Fuel", which is a fuel produced from various types of waste such as municipal solid waste, industrial waste and commercial waste. It includes biodegradable material as well as plastics and is used to generate energy at recovery facilities, many of which are in Europe, where they produce electricity and hot water for communal heating systems.
5. The permit issued by the Environment Agency on 7 August 2013 for the site contained two central conditions. First, the activity should be managed and operated in accordance with a written management system that identified and minimised risks of pollution, including those arising from operation, maintenance, accidents, incidents, nonconformities, closure and those drawn to the attention of the operator as the result of complaints, using sufficient and competent persons and resources. Secondly, the operator should comply with the requirements of an approved competent scheme.
6. The operation was deemed to be a medium risk facility according to the Waste Management Industry Training and Advisory Board and as such the technically competent manager ("TCM") had to be able to demonstrate an initial level of competence within 4 weeks of initial permitted activity starting and would then have 12 months in which to achieve full competence for operating the site.

7. On 6 September 2013, an email was sent to the Environment Agency stating that Marie McIntosh, the appellant's daughter, had been appointed as TCM for the site; that is, she was the individual denoted as providing the suitable technical skills and knowledge to a regulated waste operation for compliance with the approved competent scheme.
8. Between 29 January 2014 and 17 February 2014, RDF bales were brought onto the site eventually numbering almost 3,000 in quantity.
9. On 13 February 2014, an officer of the Environment Agency received information that the site was already receiving waste and a site visit was carried out on 5 March 2014. During the course of their inspection, the Environment Agency officers found that there was no adequate written management system in place as required by the permit condition nor did the management system adequately address the standards for the storage of combustible materials as required. Furthermore, there were no contracts in place regarding the export of waste from the site and no evidence that the waste was suitable for export.
10. A Compliance Assessment Report pursuant to the Environmental Protection Regulations was issued which detailed the failings that had been observed. The report required the company to provide an expanded and detailed management report by 31 March 2014 and to adapt the operations on site according to the risks which had been highlighted. It also stipulated that evidence should be provided that Marie McIntosh held the relevant initial competence award within 4 weeks of permitted activities commencing on site and that she was enrolled to achieve the full level of competence within 12 months.
11. The risks that arose from the breaches included risk of combustion, the potential impact of smoke and water run-off and the location of the site in close proximity to the M6 motorway and surrounding sensitive receptors such as residential areas, the River Thames, railway stations, schools, sewage treatment works and nearby health and social care facilities.
12. These breaches for failure to comply with the conditions of the environmental permit eventually formed the basis of counts 1 and 2 of the indictment.
13. On 21 March 2014, the Environment Agency sent a letter of concern highlighting how the site was being operated. The company replied on 1 April 2014 with a voluntary improvement plan which included spacing for the RDF stacks and stating that 800 bales of RDF would be moved to a suitable registered transfer station.
14. On 23 April 2014, this appellant signed the voluntary improvement plan and a technical competence scheme promising the improvements set out together with a revised management system.
15. The deadline for implementation of the voluntary improvement plan was 28 May 2014 but this was not met. The voluntary improvement plan provided and included deadlines for providing a suitably revised and updated management system, providing waste transfer notes demonstrating that the excess waste had been removed and the carrying out of reorganisation of the remaining waste.

16. By the time the deadline had passed, little or nothing had changed, the breaches persisted and the revised plan was never put into practice to any adequate extent.
17. A further site inspection on 28 May 2014 revealed that the company was unable to provide evidence that there was a suitably qualified TCM on site. The TCM named in the original application had been one Dawn Power and in fact the substitution of Marie McIntosh for her had not been permitted and she was never a suitably qualified TCM.
18. Therefore, on 11 June 2014, the Environment Agency issued and served a Regulation 36 enforcement notice citing breaches of conditions 1.1.1 and 1.1.4 of the permit and requiring compliance by 10 July 2014. The date for compliance was not met and this formed the basis of count 3 in the indictment.
19. A site inspection on 11 July showed that only 61 bales of RDF had been removed, not the 800 required, and odorous and decomposing waste was found.
20. A further site inspection on 8 September 2014 revealed that there was still no compliance and on 9 September the appellant was interviewed by officers of the Environment Agency. He apologised for his ignorance, asked for leniency and further time to comply and so on 29 September 2014 a further Regulation 36 enforcement notice was served citing breach of the conditions of the permit and now requiring compliance by 6 November 2014. However, again, that date for compliance was not met and this failure formed the basis of count 4 of the indictment.
21. On 15 December 2014, the Environment Agency sent to the appellant a letter stating they were minded to revoke the environmental permit and the revocation notice was served on 13 March 2015 requiring the removal of all waste by 16 July 2015. This deadline was again not met and with the revocation of the permit the appellant was operating a non exempt waste operation without a permit. That offence comprised count 5 of the indictment.
22. A further inspection by the Environment Agency on 8 September 2015 revealed that about 80 per cent of the Walsall unit's floor space was covered with RDF bales without a permit and the cost of clean-up operations to clear the site was estimated at approximately £250,000.
23. So, in summary, it was the prosecution's case that in relation to the Walsall site there were the following failings:
 1. Between January 2014 and April 2014, the company received the bulk of the waste on site and then did not remove it.
 2. They breached the conditions of the permit (counts 1 and 2).
 3. They did not react to repeated advice and warnings as to compliance with the permit.
 4. Excessive amounts of waste were brought onto site.
 5. They began receiving and storing waste on site before any export contracts were in place and before there was an adequate written management system in place.

6. They improperly stored such waste without proper consideration of stack sizes and separation distances and did not store adequately with regard to the risks of combustible waste.
7. They failed to comply with the two Regulation 36 notices and with the revocation notice.
8. They operated the site illegally from the date that the permit was revoked.

The Wednesbury site

24. The Wednesbury site was divided into Areas A and B. Area A had a T6 exemption allowing for the treatment of wood waste limited to a maximum of 500 tonnes treated or stored in 7 days. Storage after treatment was permitted for no longer than 3 months. There was no exemption for Area B.
25. In November 2014, the Environment Agency received complaints from members of the public about unsafe loads and lorries which were causing a nuisance. An inspection then revealed that large amounts of shredded wood had been moved onto Area B, which was not covered by the T6 exemption.
26. On 6 January 2015, officers of the Environment Agency attended the site and found deposits of both shredded and untreated wood on Area A and shredded wood on Area B, which included processed and unprocessed wood containing contaminants such as paints and plastics. The storage of treated wood was not covered by the exemption and the presence of 900 tonnes of wood waste on the site exceeded the 500 tonnes permitted by the exemption. The deposit on Area B was entirely outside the boundary of the registered exemption. The officers asked to see paperwork and were provided with waste transfer notes which showed that the loads being delivered included mixed wood. Such loads would not have been covered by the exemption.
27. A further inspection took place on 29 January 2015 when officers of the Environment Agency noted that the quantity of waste had not changed since the previous visit on 6 January and they estimated that approximately one third of the land surface of Area B was covered with chipped wood and that the average height of the heap was approximately 1.5 metres above the immediate surrounding ground level. The deposited material was mixed chipped processed wood, medium density fibre wood and plywood with contaminants such as paint and plastic. Thus Area B was still being used unlawfully to operate a waste storage facility without authorisation.
28. An advice letter was sent on 30 January 2015 but breaches remained evident in March 2015. In June 2015, the Environment Agency sent a letter to the company putting them on notice of an intention to deregister the exemption and that occurred on 22 July 2015. However, on 13 August 2015 the waste was still on site and the processed wood remained in place until February 2016.
29. The breaches in relation to the Wednesbury site formed the basis of counts 6 and 8 of the indictment, count 6 alleging operating a non exempt waste operation without a permit and count 8 alleging depositing controlled waste on land without there being an environmental

permit in force which authorised such deposit.

30. So, to summarise the failings in relation to the Wednesbury site, they were that the company:

1. Operated a waste activity outside the exemption limitations for the site, count 6.
2. They ran the site in breach of the exemption for Area A, also count 6.
3. They deposited waste on land that did not benefit from any permit, that is Area B, forming the basis of count 8.

31. Prior to entering his guilty pleas to each of these counts the appellant had engaged in extensive talks with the prosecution about his culpability and his role. This led to a basis of plea whereby the appellant pleaded guilty to all counts on the indictment except count 7 on the basis that:

1. Caledonian Waste Limited was a joint venture between him and one John Dyke, with the appellant the sole director and Mr Dyke the sole beneficial shareholder. Mr Dyke and an associate of his, Shaun Nash. Together with Mr Dyke's son, were involved in the day to day running of the business. The appellant visited the Walsall site two to three times a week and also visited the Wednesbury site on occasions.

2. The direction of the business was directed by Mr Dyke, who chose the profit to make and the monies he was prepared to spend. The appellant had been involved in negotiating the price of a number of deliveries to the Wednesbury side and was involved in requesting payments to be made or expenditure incurred. Any payments made on behalf of the company were carried out by Mr Nash as sanctioned by and on the instruction of Mr Dyke, save for a couple of payments for the removal of waste.

3. The appellant was pleading guilty on the basis he was negligent in his role as a director.

4. The appellant thought that others, and in particular Andrew Harris, a consultant working for the company, were dealing with the shortcomings of the company when in fact they were not. The appellant recognised that he should have focused less attention on generating and developing the business by sourcing waste and more attention on the management of operations he had delegated to officers to ensure, for example, that a written management plan was created and implemented.

5. It was accepted the appellant should have resigned and was negligent in not doing so when he realised that the company was not complying with the various requirements and notices.

32. There were further bases of plea relating to the individual counts and to the Wednesday site which it is not necessary to recount in detail.

33. In sentencing the appellant, the learned judge took account of his age, 63, and the fact that he was being treated as a man of good character. The learned judge referred to the repeated breaches and failures by the company despite repeated warning from the Environment

Agency both oral and written and the fact that the appellant was being prosecuted in his capacity as sole director of the company. He said the offences showed a catalogue of deliberate and ongoing failures by the company to comply with their legal obligations. The learned judge considered that the appellant's admissions illustrated a high degree of negligence and that he knew what was going on in the company but did little or nothing to prevent the breaches.

34. In sentencing the appellant, the learned judge had regard to the environmental offences definitive guidelines. He decided to fix onto count 1 a global sentence for the totality of the offending, making the sentence for the other counts concurrent. He said:

"I am of the opinion that the defendant's persistent and high levels of neglect which contributed to the company's offending is serious enough to warrant a community order."

35. Having considered the seriousness, the aggravating and the mitigating features, which included the appellant's remorse, he reached a figure of 250 hours of unpaid work to which he applied a credit of one fifth to reflect the guilty pleas which had been tendered after trial had been fixed and he had thereby reduced the number of hours of unpaid work to 200.
36. In addition, he disqualified the appellant from being a director of a company for a period of 5 years, pursuant to section 2 of the Company Directors Disqualification Act 1986. He took the view in so doing that there was an element of financial motivation for the appellant's inactivity rather than simple incompetence or naivety as he must have known about the statutory regime, having been involved in construction and soil waste for many years.
37. Finally, he considered that the appellant should pay the prosecution costs.
38. On behalf of the appellant, it was originally argued that the total number of hours of unpaid work was manifestly excessive because it failed to take into account sufficiently the mitigation advanced on behalf of the appellant and the principle of totality. However, Ms Riggs, who has represented the appellant today, has informed the court that the sentence has been completed in the sense that the appellant has now complied with the number of hours of unpaid work and therefore any appeal in relation to that aspect of the sentence is, in a sense, academic. She therefore does not pursue the first ground of appeal.
39. In relation to the disqualification order, Ms Riggs argues that the learned judge's comments were not substantiated on the evidence which was before the court, for example that the offences had been committed for financial gain. She submits there was no evidence that the appellant received any financial reward from the offences nor had this been suggested by the prosecution.
40. In relation to the costs order, Ms Riggs argues that the appellant will need to find some £33,000, having paid the first £3,000 within 7 days, and even if he used all his disposable weekly income, which is put at £220, that would take him 150 weeks to pay off and she argues this is a disproportionate amount to pay when in reality he could not use all of his disposable weekly income to pay off the order in any event. Even using half, she points out, would take 6 years and his income is likely to be affected in any event by reason of the disqualification order, should this court uphold that order. She argues that the court took

insufficient account of the appellant's means to pay when making the order that it did.

41. For the respondent, Mr Mills has argued that by reference to culpability and harm the judge was entitled to make the findings that he did and make the community order that he did.
42. So far as the director disqualification is concerned, Mr Mills observes that this falls to be considered as part of the relevant guideline, coming under step 9. He argues that the judge has a wide discretion and against the background of repeated and serious negligence causing very high clean-up costs to be borne by others, it was entirely reasonable to conclude that a period of disqualification was required. He argues that this was persistent negligence across two sites and the offences were committed against a backdrop of ignored advice, notices and warnings.
43. So far as the element of financial motivation is concerned, Mr Mills points to the learned judge's sentencing remarks where he said "his potential reward then was that he believed that he would get a business off the ground by storing material of this kind ... He plainly had a financial incentive for doing it". This, said Mr Mills, was what formed the final motivation.
44. Finally, in relation to the costs order, Mr Mills argues that the judge properly considered the offender's means, including his equity of approximately £255,000 in a domestic property, together with his weekly income, his annual dividend from Liberty Construction Limited and his savings and interest in a vehicle. He submits that the appellant's equitable interest in the property is a relevant consideration when assessing means and the fact that the order may require the defendant to sell property or re-mortgage it is no bar to the making of an appropriate order, although that may affect the length of time to pay, and he relies on the authority of *R v Martindale* [2014] EWCA Crim 1232. He submits therefore that the appellant does have means to pay the reasonable costs and it is reasonable to take into account the fact that the appellant has contributed nothing to the clean-up costs and that the business has avoided substantial professional costs.
45. In our judgment, for the reasons relied upon by Mr Mills and argued before us, there is no merit to this appeal.
46. So far as the number of unpaid work hours is concerned, this is now abandoned but we would observe that the imposition of 200 hours of unpaid work after credit for plea reflected not only just and appropriate punishment for the appellant but also reflected the repayment of the debt owed to society by the appellant for his role in the activities of a company which was in flagrant breach of environmental laws which are designed to protect the public. By ignoring the regulations and the efforts of the Environment Agency to get the company to comply, significant risks were run which could have had disastrous consequences and the appellant has now paid that debt by completing the unpaid work requirement and we regard that as wholly appropriate.
47. As stated by Mr Mills, the decision to disqualify the appellant as a director formed part of the learned judge's wide discretion. Whatever the appellant's individual role in the commission of these offences may have been, the time must have come, and indeed did come, when he realised that the company was not complying with its obligations and that his position as a

director was compromised. Nevertheless, he did not resign but he continued in that role and this, in our view, demonstrates a lack of understanding of his responsibilities as a director of a company, which in our judgment more than justified the order for disqualification.

48. Finally, so far as the costs are concerned, the short answer to the appellant's argument in relation to his means to pay lies in his equitable interest in his property. In our judgment, by reason of that equitable interest the appellant does have the means to pay, albeit he will need further time either to sell the property or re-mortgage it, whatever is appropriate. His decision to contest these charges until a relatively late stage caused significant costs to be generated by the prosecution and it is right that he should pay those costs.

49. In the circumstances, the appeal is dismissed but we would allow a further 6 months for the payment of the costs.

MR MILLS: My Lord, in relation to today's hearing, there is an application for £2,000 costs for the preparation and the attendance at court today.

LORD JUSTICE IRWIN: Do you have a bill for summary assessment or any basis for the application?

MR MILLS: Those are simply based on my costs to the Environment Agency. I have told the appellants that that is the figure.

LORD JUSTICE IRWIN: It is normal to produce a bill for assessment, if there is one.

MR MILLS: There is not but all it would say is counsel's fee for preparation and attendance, £2,000.

LORD JUSTICE IRWIN: That is all it would say?

MR MILLS: That is all it would say. My solicitors are not claiming anything for their work on it at all.

LORD JUSTICE IRWIN: Ms Riggs, do you want to say anything on the costs application for today?

MS RIGGS: I do not think there is much I can say, my Lord.

LORD JUSTICE IRWIN: No, all right.

We will grant the respondent the costs of the appeal assessed at £2,000 added to the bill. Therefore, 6 months to clear the costs overall.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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