

**IN THE DISTRICT COURT
AT NELSON**

CRI-2009-086-000113

MARITIME NEW ZEALAND
Informant

v

BAY FISHING CHARTERS LIMITED
Defendant

Hearing: 20 July 2009

Appearances: I R Murray for Informant
T Spear for Defendant

Judgment: 31 July 2009

NOTES OF JUDGE DJR HOLDERNESS ON SENTENCING

[1] On 20 July 2009 Bay Fishing Charters Limited (“the company”) pleaded guilty to a charge laid under s 68(1)(a) of the Maritime Transport Act 1994 (“the Act”).

[2] By its guilty plea the company acknowledged that on 27 August 2008 it operated a ship, the Nimble II (“the vessel”), outside coastal limits without holding an appropriate current maritime document, namely a Safe Ship Management Certificate (“the certificate”). The vessel was photographed on the date of the offence from an RNZAF aircraft. At the time it was approximately 35.5 nautical miles off the West Coast of the South Island. The certificate held by the company

allowed the vessel to operate within 30 nautical miles of the shoreline. On the day of the offence it was therefore 5.5 nautical miles too far out at sea.

[3] Pursuant to s 68(3)(b) the company is liable to a maximum fine of \$100,000.

[4] In 2007 Maritime New Zealand launched a safety campaign to discourage the operators of vessels from exceeding their prescribed limits. The Safe Ship Management system is intended to protect vessels and the lives of those on board them. The system imposes operating limits upon their vessels.

[5] The company operates a commercial charter fishing business. It was incorporated in February 2006 for the purposes of carrying out charter fishing trips off the Bay of Plenty and, for blue fin tuna, off the South Island west coast.

[6] The vessel was purchased by the company in Australia about three years ago. It was certified in Australia as a commercial fishing vessel to a distance of 200 nautical miles off the Australian coast. The company accepts that in New Zealand waters the certificate it held allowed the vessel to operate no further than 30 nautical miles from the West Coast shoreline.

[7] The informant contends that an aggravating feature is that the offence occurred while the company was pursuing financial gain. It is not disputed that, when photographed, the vessel was engaged in a chartered fishing trip. The informant points to the safety risks involved. These are risks in respect of both the operators and the persons who charter such vessels. Mr Murray submits that any penalty should be sufficient to deter the company and other charter-fishing operators from offences of this nature, which involve a failure to comply with the requirements of the Act.

[8] One of the objects of the Act is to ensure that participants in the maritime transport system are responsible for their actions.

[9] The informant acknowledges, as mitigating factors, the company's plea of guilty and the fact that it has not previously been prosecuted for any maritime related offence.

[10] Mr Murray referred the Court to several cases in which fines have been imposed for offences against the Act, namely, *Maritime New Zealand v Peninsula Moorings Limited*; *R v Rackley*; *Maritime New Zealand v Douglas*; *Maritime New Zealand v Coppell*; *Police v Tierney* and *Department of Labour v The New Zealand King Salmon Company Limited*.

[11] Mr Murray advised the Court that *Peninsula Moorings* and *New Zealand King Salmon Company* are the only cases he is aware of where a body corporate has been prosecuted.

[12] The sentence in the *Peninsula Moorings* case was imposed by Judge Noble in the District Court at Christchurch in May 2008. The defendant company pleaded guilty to five charges laid under s 68 and five further charges of operating a ship after it had been detained but before it had been released by a competent authority. The vessel "Merlin" was used by the defendant for inspecting moorings in Akaroa Harbour. The facts were summarised by Judge Noble as follows:

Late in 2006 Maritime New Zealand ascertained that the Merlin had for some time been operating absent the necessary certificate and served a notice on the company's director, that was a detention notice, which was issued in December of 2006 which demanded that the vessel be not sailed pending survey and the obtaining of the necessary certificate. Contrary to that notice in circumstances which Mr Davis has frankly acknowledged was the proffering of what turned out to be incorrect legal advice as to the issue of whether the term "at sea" also included a harbour, which it did. The Merlin sailed on five other occasions, if "sailed" is the appropriate expression but I suppose it is in these circumstances, between March and July 2007 engaging in mooring maintenance, checking and repair operations.

It was eventually surveyed, passed the survey and was released from detention in September 2007.

[13] In the course of his sentencing remarks, having noted the defendant company's very limited means to pay fines, Judge Noble said this:

... if all things were equal, that is if this had been a financial viable undertaking, it had been conducted away from the placid waters of the inner

harbour, and then matters may well have demanded a starting point in the order of \$20,000 but those circumstances do not prevail here.

[14] In the event Judge Noble took what he acknowledged was a pragmatic approach and fined the defendant \$1000 on each of the charges laid under s 68. On the other charges the defendant was convicted and discharged.

[15] The facts of the *Peninsula Moorings* case are significantly different from the facts of this case.

[16] In the *New Zealand King Salmon* case the defendant pleaded guilty to a charge under the Health and Safety in Employment Act and three charges laid under the Maritime Transport Act including two charges under s 68 of the Act. In relation to the Maritime Transport Act offences the defendant acknowledged having operated the vessel “Shikari” in a manner which caused unnecessary danger or risk.

[17] In my view the sentence imposed in *New Zealand King Salmon* is of limited assistance. This is because Judge Toohey decided that it was appropriate to impose “

... the substantive sentence on the charge under the Health and Safety in Employment Act, which carries the heavier penalty and in relation to which there is a clear path for sentencing provided to this Court by decisions of the Higher Courts and in particular a recent decision of *Department of Labour v Hannan & Philip Contractors Limited*.

[18] In the course of his sentencing remarks Judge Toohey also observed that the:

... difference between the first two charges on the one hand and the second two on the other is that the first two are based directly on the collision that killed two persons and injured another four.

[19] The judge noted that the latter two charges (the s 68 charges) did not depend upon the collision and that they were not directly relevant to it.

[20] Having weighed a number of factors, many of which were primarily relevant to the charge under the Health and Safety in Employment Act, and having imposed substantial reparation sentences Judge Toohey imposed a fine of \$60,000 for the charges under the Health and Safety in Employment Act and the charge under s 65

of the Maritime Safety Act. For each of the two s 68 offences the judge imposed a fine of \$3000.

[21] The other cases which counsel referred to involved charges against individuals. The maximum penalty in such cases is a term of imprisonment not exceeding 12 months or a fine not exceeding \$10,000 (s 68(3)(a)).

[22] In *Douglas* there were four charges laid under s 68(2) of the Act. The other charges were laid under s 65 and involved the same maximum penalty. One or more of the charges arose from an accident that involved a minor injury, a bruised cheek sustained by one passenger. There had been unlawful operation of the vessel over a period of months. It was said that the operation resulted in a very small commercial gain of only about \$400. Judge Barry, in imposing sentence in *Douglas* in the Blenheim District Court on 12 May 2006 said this:

It is clear, certainly in respect of the charges under s 65(1)(a) that he (the defendant) was neither qualified at the time, nor competent. He ran the vessel aground at something like 18 knots as a result of following an old GPS line in the dark. There were five passengers and approximately 500 kilograms of equipment on board. At the time it was planing, and ran several metres up the beach, grounding approximately 50 metres from a jetty, causing about \$1200 of damage to the vessel and fortunately no serious injury.

[23] In *Douglas* Judge Barry considered a fine of \$2000 was justified as a starting point for the s 65 offences. After a discount of approximately one third the defendant was fined \$650 on each of those charges involved. For the s 68 offences, from a starting point in the range of \$2500, a fine of \$350 was imposed for each offence.

[24] In *Rackley* a fine of \$500 was imposed for a single s 68 offence. The sentencing judge said this:

Of course it is important to remember that these offences have to be treated seriously, or others who are similarly placed or might be similarly placed to you, would treat the law with scant regard.

[25] In *Police v Tierney* a fine of \$750 was imposed in January 2002 on two charges laid under s 65. For a s 68 offence the fine was \$1000.

[26] In *Coppell* the Court dealt with a s 68 offence involving a vessel which collided with a breakwater at Greymouth. A fine of \$2000 was imposed.

[27] Mr Spear, for the defendant, submitted that there was no intent by the company to allow its agent, the skipper of the vessel, to sail beyond its authorised limits. He suggested that enthusiasm in chasing tuna triumphed over correct safety procedures. It has to be said that this is one type of activity which the legislators had in mind and which the Act seeks to discourage. Furthermore, I do not accept that the Court is able to take into account that the vessel was authorised in Australia to be out to 200 nautical miles offshore. In my view this does not amount to a mitigating factor in respect of an offence in New Zealand against the Act. The company was aware that the legislation in New Zealand is different from the Australian equivalent legislation. The company did not take proper or adequate steps to comply with the requirements of the Act.

[28] Mr Spear submits that the *Douglas* case is more analogous to this prosecution than the other cases referred to. However, he contends that because of financial difficulties faced by the defendant a similar approach to that adopted in *Peninsular Moorings* would be appropriate.

[29] Mr Spear emphasises that in this case the company has been charged with a s 68(1) offence, which he submits, ought properly to be viewed as less serious than the mens rea offences created by s 68(2). He submits it is clear that “the higher range of penalties” is aimed at the more serious offences under s 68(2).

[30] However, s 68(3) does not differentiate between these two categories of offence. The penalties set out in s 68(3) apply to both s 68(1) and s 68(2) offences.

[31] The Court has read and considered the affidavits sworn by Mr Robert Lynds, the sole director of the company, and Mr Wayne Bird, the skipper of the vessel. The Court accepts their evidence that the vessel is well built, well equipped and entirely seaworthy. There is no suggestion that it wasn't a suitable vessel for this type of charter work.

[32] Mr Bird has acknowledged in his affidavit that he was not watching his GPS to monitor the vessel's actual position at the time of the offence. However, he says that he had ventured out "a bit further" to assist a small boat with a battery problem. He has also mentioned that when the vessel was chasing tuna he was solely responsible for going beyond the coastal limit.

[33] Mr Lynds has mentioned financial problems faced by the company and says that it has been operating at a loss. However, the company must have regarded charter fishing off the West Coast as sufficiently lucrative to warrant bringing the vessel from the Bay of Plenty for that purpose.

[34] In my view the appropriate starting point is a fine of \$7500, i.e. 7.5% of the maximum provided for. This starting point reflects the Court's acceptance that the offending was not at the higher end of the scale in terms of culpability. The Court assesses the company's culpability as being in the mid range.

[35] The commercial gain factor is the only aggravating feature upon which the informant has placed any real reliance. The commercial gain from this particular charter may have been relatively modest.

[36] Taking into account all the factors which appear relevant including the company's plea of guilty; the absence of any previous conviction and the fact that there was no accident or actual physical harm arising from the offence the company will be fined the sum of \$2000 and ordered to pay court costs of \$130 and solicitors' costs of \$250.

DJR Holderness
District Court Judge