

**IN THE DISTRICT COURT
AT WESTPORT**

CRI-2009-086-000104

MARITIME NEW ZEALAND
Informant

v

CASCADE CHARTERS LIMITED
Defendant

Hearing: (At Nelson) 20 July 2009

Appearances: (Inaudible) for Informant
M J Logan for Defendant

Judgment: 7 August 2009

NOTES OF JUDGE DJR HOLDERNESS ON SENTENCING

[1] On 20 July 2009 Cascade Charters Limited (“the company”) pleaded guilty to a charge laid under s 68 (1)(a) of the Marine Transport Act 1999 (“the Act”).

[2] By its guilty plea the company acknowledged that on 20 August 2008 it operated a ship, the Cascade III (“the vessel”), outside coastal limits without holding the 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 37 nautical miles off the west coast of the South Island. The certificate held in respect of the vessel

permitted it to operate only within 30 nautical miles from the shoreline. On the date of the offence it was therefore approximately seven nautical miles too far out to sea.

[3] Pursuant to s 58 (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 vessel 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 limited upon vessels.

[5] The company operates a commercial charter fishing business, mainly in North Island areas such as the Three Kings Islands and White Island. The company is also involved in charter fishing for blue fin tuna off the South Island west coast. The vessel was engaged in a charter fishing trip on the day of the offence.

[6] The informant submits that an aggravating feature is that the offence occurred while the company was pursuing financial gain. The informant points to the safety risks involved, 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. Such offences involve a failure to comply with the requirements of the Act. An object of the Act is to ensure that participants in the maritime transport system are responsible for their actions.

[7] 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.

[8] 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*.

[9] 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.

[10] 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 vehicle 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.

[11] 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.

[12] 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.

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

[14] 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.

[15] 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*.

[16] 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.

[17] 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.

[18] 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.

[19] 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)).

[20] 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.

[21] 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.

[22] 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.

[23] 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.

[24] 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.

[25] Mr Logan, for the defendant, suggested that the coastal waters have a “somewhat arbitrary” limit because they are defined by a straight line between fixed points. As the coastline is not straight the coastal limit can vary significantly as a vessel moves along the coast. Mr Logan submits that this causes difficulties and confusion for operators such as the defendant as the legal status of a vessel may change depending upon its latitude. However, Mr Logan accepts that the straight

line coastal limit has the benefit of clarity and that it was marked on navigational aids used by the company. Nevertheless, he submits that the straight line definition method diminishes the strength of the informant's contention that safety issues arise when the coastal limit is exceeded.

[26] It is submitted that the nature of blue fin tuna charter fishing operations and of this particular fish species means that inadvertent breaches occur as a consequence of a skipper's attention being distracted with the result that a vessel straying beyond the coastal limit is not always noticed. The Court finds it difficult to attach a great deal of weight to this submission. The Court must proceed on the basis that these factors were, or ought to have been, known to professional charter boat skippers.

[27] The Court considers that an appropriate starting point in this case is a fine of \$7500, i.e. 7.5% of the maximum fine provided for under s 68(3)(b). The Court is satisfied that the offence in this case 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.

[28] The commercial gain factor is the only aggravating feature upon which the informant has placed specific reliance.

[29] Taking into account all the Sentencing Act 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 physical harm arising from the offence the company will be fined the sum of \$2000 and ordered to pay court costs of \$130 and a solicitor's fee of \$250.00

DJR Holderness
District Court Judge