

**IN THE DISTRICT COURT
AT WESTPORT**

**CRI-2009-086-000105
CRI-2009-086-000106**

MARITIME NEW ZEALAND
Informant

v

**REEL PASSION CHARTERS LIMITED
MARK ANDREW HOARE**
Defendants

Hearing: (At Nelson) 20 July 2009

Appearances: I R Murray for Informant
M J Logan for Defendants

Judgment: 7 August 2009

NOTES OF JUDGE DJR HOLDERNESS ON SENTENCING

[1] On 20 July 2009 Reel Passion Charters Limited (“the company”) and Mark Andrew Hoare, the sole shareholder in and director of the company, pleaded guilty to charges laid under s 68(1) of the Maritime Transport Act 1994 (“the Act”).

[2] By its guilty plea the company acknowledged that on 20 August and 27 August 2008 it operated a ship, Reel Passion (“the vessel”), outside coastal limits without holding the appropriate current maritime document namely, a Safe Ship Management Certificate (“the certificate”).

[3] The vessel was photographed on the dates of the offences from an RNZAF aircraft. On each occasion the vessel was approximately 37.1 nautical miles off the shore of the west coast of the South Island. The certificate held in respect of the vessel allowed it to operate within New Zealand coastal limits which extend 20 nautical miles from the shoreline at Greymouth. On each occasion the vessel was 17.1 miles outside the coastal limit.

[4] Pursuant to s 69(3)(b) of the Act the company is liable to a maximum fine of \$100,000. Mr Hoare is liable under s 68(3)(a) to imprisonment for a term not exceeding 12 months or a maximum fine of \$10,000.

[5] 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. Operating limits are imposed upon vessels by the Safe Ship Management system.

[6] The company operates a commercial charter fishing business. Mr Logan, for the defendants, mentioned in his written submissions that modern, sophisticated vessels are used to take clients, often overseas tourists, on fishing trips targeting game fish. The operation moves south from the Bay of Islands and the Bay of Plenty to the west coast of the South Island for several months of the year. From bases in Greymouth and Westport charter trips targeting blue fin tuna are run by the company and other operators. It was in the course of such fishing trips that the vessel was photographed on 20 and 27 August 2008.

[7] Mr Hoare was the Master of the vessel on both occasions. In a letter he wrote to Maritime Investigations on 10 December 2008, Mr Hoare acknowledged that the vessel had been outside coastal limits on each occasion. He said that the offences had been accidental. However, he accepted that more care should have been taken to keep track of the vessel's position.

[8] The informant submits that aggravating features of the offences are that they were committed in the course of trips being carried out for financial gain and that on

each occasion the vessel was almost twice the distance from the coast than the 20 nautical mile limit permitted pursuant to the certificate.

[9] One of the objects of the Act is to ensure that participants in the Maritime Transport system are responsible for their actions. The informant points to the safety risks involved in relation to this type of offence. These are risks in respect of both the operators and the persons who charter such vessels. Mr Murray submits that any penalties should be sufficient to deter the company and Mr Hoare and other charter fishing operators from offences of this nature which involve a failure to comply with the requirements of the Act.

[10] The informant acknowledges, as mitigating factors, the pleas of guilty entered by the company and by Mr Hoare and the fact that neither have previously been prosecuted for any maritime offence.

[11] The informant places reliance upon several cases in which fines have been imposed for offences against the Act namely, *Maritime in New Zealand Limited 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 New Zealand King Salmon Company Limited*.

[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] 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.

[22] 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.

[23] 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.

[24] 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.

[25] 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.

[26] Mr Logan submits that difficulties for operators arise because of the “somewhat arbitrary” way in which coastal limits are defined namely, by a straight line between fixed points. Mr Logan contends that, because the coastline does not follow a straight line, the distance between the shore and the coastal limit can vary significantly along the coastline. However, Mr Logan acknowledges that the straight line coastal limit has the benefit of clarity and that it was marked on navigation aids used by the company and Mr Hoare. Nevertheless, Mr Logan submits that the straight method of defining coastal limits can lead to confusion in practice arising because of the change in the legal status of a vessel in different positions along the coastline, despite the fact that it may be operating at the same distance from the shore. Mr Logan submits that this diminishes the informant’s submission that safety issues arise when vessels operate more than a certain distance from the coast.

[27] However, the central submission advanced on behalf of each defendant is that the breaches were inadvertent and were caused not only by the nature of the limits, as discussed above, but also the nature of the charter fishing operation. It is submitted that Mr Hoare’s attention was diverted by the fact that blue fin tuna, which are fast moving, have to be located and followed and because, when hooked, a tuna generally puts up a lengthy and powerful fight. It is suggested that, in these circumstances, a skipper may not notice that his vessel has strayed beyond the coastal limit.

[28] In considering these submissions the Court cannot overlook in this case the distance which the vessel strayed beyond the coastal limit and that this occurred twice within a period of seven days.

[29] The Court considers that these offences call for a greater fine than that imposed in *Bay Fishing Charters Limited* (District Court, Nelson, CRI-2009-086-

000113, 31 July 2009). In that case the defendant's vessel was on one occasion 5.5 nautical miles beyond its permitted distance from the shore. A fine of \$2000 was imposed under s 68(3)(b) from a starting point of \$7500. That was also a blue fin tuna charter fishing case. In *Bay Fishing Charters* the informant relied upon the commercial gain aspect as the only significant aggravating feature and the Court in that case assessed the defendant's culpability as being in the mid range.

[30] In this case, the Court is satisfied that the company's culpability is greater. The Court assesses that a proper starting point for the first offence is a fine of \$10,000. For the second offence an appropriate starting point is \$12,500.

[31] The company and Mr Hoare are entitled to full credit for their guilty pleas and also for the fact that neither has any previous convictions for an offence against the Act.

[32] The Court also takes into account that there was no accident or physical harm arising from the offences.

[33] The Court must also take into account the means of the company and of Mr Hoare. The affidavit sworn by Mr Hoare on 24 June 2009 has been taken into account by the Court. The company's annual accounts for the year ended 31 March 2008 disclose a trading loss.

[34] Mr Hoare lives near Auckland. The company's operations are conducted mainly in the North Island. However, it would appear that charter fishing off the South Island west coast was thought sufficiently lucrative to warrant the vessel moving there for charters during the blue fin tuna season. It is appropriate that there be some reduction in the fines by reason of the financial position of the company and Mr Hoare.

[35] Taking into account all the Sentencing Act factors which appear relevant Mr Hoare will be fined the sum of \$2250 for the 20 August offence and the sum of \$2500 for the second offence. The Court has applied the totality principle in fixing

the total of the fines at \$4750. Mr Hoare will be ordered to pay court costs of \$130 and a solicitor's fee of \$250.

[36] For two reasons it is appropriate that the fines be imposed upon Mr Hoare rather than the company. First, Mr Hoare was personally in control of the vessel on each occasion. Secondly, the Court must have regard to the different penalty provisions set out in s 68(3) and, in particular, the seriousness of the maximum sentence for an individual which the Act provides for. This suggests that the penalty should be imposed under s 68(3)(a). The company and Mr Hoare are in reality one and the same entity. The company will therefore be convicted and discharged.

DJR Holderness
District Court Judge