IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2009-442-10

BETWEEN	NELSON CITY COUNCIL (R D JOHNSON) Appellant
AND	DIAMOND OFFSHORE NETHERLANDS B.V. Respondent

Hearing: 19 May 2009

Counsel: J C Ironside for Appellant
R J B Fowler for Respondent

Judgment: 20 May 2009

JUDGMENT OF RONALD YOUNG J

Introduction

[1] This appeal, by way of case stated, concerns the interpretation of the time limits for laying informations under the Resource Management Act 1991 ("RMA").

[2] The respondent faced an allegation that they had committed an offence against s 338(1A) of the RMA by dumping mussels and other organisms into the coastal marine area when "defouling" its drilling rig without resource management consent in contravention of its duty in s 15A(1)(a) of the RMA.

[3] The District Court Judge hearing the prosecution determined (as the case stated identified) "that offences under s 338(1A) and (1B) of the RMA did not come within the limitation period prescribed by s 338(4) but fell within the limitation

period prescribed by s 14 of the Summary Proceedings Act 1957 ("SPA"). The question of law certified was therefore:

> … whether my decision was erroneous in point of law and in particular whether the limitation period prescribed under s 338(4) applies to offences under s 338(1A) and (1B) of the Act.

[4] The relevant factual background identified in the case stated was:

> 1. The information alleged that between 4 December and 24 December 2007 the defendant, Diamond Offshore Netherlands BV did commit an offence against section 338(1A) of the Resource Management Act 1991 (**the Act**) by dumping in the coastal marine area waste or other matter from an offshore installation (a drilling rig known as Ocean Patriot) without a resource consent in contravention of section 15A(1)(a) of the Act. The alleged offending arose out of a defouling operation to remove mussels and other marine organisms from the subsurface structures of the drilling rig.
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> 2. The defendant pleaded not guilty, and after hearing the parties and the evidence adduced by them, on 25 March 2009 I issued a written decision dismissing the information on the basis that it was statute barred.
>
> 3. The informant within 14 days after the determination, filed in the office of the District Court at Nelson a notice of intention to appeal by way of case stated for the opinion of this Honourable Court on a question of law only, and I therefore state the following case:
>
> (i) At paragraph [50] of the decision I found that there was no dispute as to the following relevant dates:
>
> - The defouling operation took place in the coastal marine area between 7-23 December 2007 (the date of offending)
>
> - The District Council would or should have become aware that the defouling took place within the coastal marine area on about 27 February 2008 (the date of knowledge)
>
> - The information was laid on 6 August 2008, ie within six months of the date upon which the District Council (and the City Council) became aware of or should have become aware of the alleged contravention, but more than six months after the date the alleged contravention actually occurred.

Statutory Scheme

[5] Part 3 of the RMA is headed "Duties and restrictions under this Act". It identifies restrictions on the use of land; the coastal marine area; rivers and lakebeds and water (s 9–14). Sections 15, 15A, 15B and 15C deal with prohibitions on various discharges. The other provisions of Part 3 are of no particular relevance to these proceedings. Section 15(1) and 15(2) have been in the RMA since its inception. Subsection (3) was added in 1988 when s 15A, 15B and 15C were also added to the RMA.

[6] Sections 15, 15A, 15B and 15C prohibit identified actions, typically discharges, dumping or incineration in particular areas. Section 15 is the more general provision dealing with discharges into the environment whereas s 15A, B and C all deal with particular types of discharges into particular areas.

[7] Part 12 of the Act deals with "Declarations, enforcement and ancillary powers". Sections 338–343 are the offence sections. Section 338 identifies in what circumstance a person commits an offence; for example, contravention of statutory duties. Section 339 sets out a hierarchy of penalties for various offences. The remaining penal sections are concerned with specific offences, liability and defences.

[8] Finally, as to time limits, s 14 of the SPA provides a general time limit for the laying of such informations, from the date of the commission of the offence. Section 338(4) creates an exception to s 14.

Background facts and submissions

[9] To return then to the facts of this case. The appellant was charged with an offence under s 15A and s 338(1A) of RMA. Section 15A(1) provides as follows:

> **15A Restrictions on dumping and incineration of waste or other matter in coastal marine area**
>
> (1) No person may, in the coastal marine area,—

> (a) Dump any waste or other matter from any ship, aircraft, or offshore installation; or
>
> (b) Incinerate any waste or other matter in any marine incineration facility—
>
> unless the dumping or incineration is expressly allowed by a resource consent.

[10] Section 338(1A) provides it is an offence against the Act for anyone to contravene s 15A. Section 339(1) makes a person is liable on conviction for this offending to imprisonment up to two years, a fine of $200,000 and if a continuing offence a fine of up to $10,000 per day as the offence continues.

[11] The appellant's case in the District Court was that the facts known and provable by the informant supported a prosecution for dumping waste in the coastal marine area when it defouled its drilling rig without resource management consent.

[12] As the case on appeal identifies, the events, which are said to constitute the crime, occurred between 7–23 December 2007. The local authority should have known of the events by 27 February 2008. The information was laid on 6 August 2008, more than six months after the events occurred but less than six months after the local authority should have known of the events.

[13] Section 14 of the SPA provides as follows:

> **14 Time for laying information**
>
> Except where some other period of limitation is provided by the Act creating the offence or by any other Act, every information for an offence (other than an offence which may be dealt with summarily under section 6 of this Act) shall be laid within 6 months from the time when the matter of the information arose.

[14] The only "other period of limitation" provided for in the RMA is s 338(4) which provides as follows:

> **338 Offences against this Act**
>
> …
>
> (4) Notwithstanding anything in the Summary Proceedings Act 1957, any information in respect of any offence against subsection (1) of this

> section may be laid by any person at any time within 6 months after the time when the contravention giving rise to the information first became known, or should have become known, to the local authority or consent authority.

[15] The respondent's position at trial, therefore, was that the laying of the information in August 2008 was time prohibited, in that it was more than six months after 23 December 2007, the last date on which it was alleged the matter of the information arose.

[16] The respondent was charged with an offence under s 15A and s 338(1A). On the face of it, s 338(1A) was not subject to the s 338(4) approach to time limits. Only offending under ss (1) was covered by this exception.

[17] And so, on the face of the statutory regime in the RMA and the SPA an information under s 338(1A) had to be laid within six months from the time when the matter of the information arose. The information laid 6 August 2008 was, therefore, beyond the six months from the time when the matter of the information arose, which was at the latest 23 December 2007.

[18] The appellant's case in the District Court and in this Court was, however, that s 338(4) should be read as including within its ambit not just ss (1), but also ss (1A) and (1B) of s 338. If that is correct, then s 14 of the SPA would not apply to s 338(1A) offending, and accordingly the date from which the six months ran would, therefore, be 27 February 2008. Laying the information on 6 August 2008 meant it had been laid within the six month period prescribed in s 338(4).

[19] This submission is based on the proposition that Parliament made an error when it neglected to amend s 338(4) when it introduced s 15A, B and C and s 338(1A) and (1B) to the RMA, by including these offences within s 338(4).

[20] The appellant, therefore, does not claim that this is a case of a lacuna in a statute or of ambiguity. It says this is a case of clear parliamentary error. The appellant says Parliament could not have meant to leave s 338(4) unamended when it added s 15A, B and C and s 338(1A) and (1B) to the RMA. The appellant submits that the only logical approach to the new sections would have been for Parliament to include them within s 338(4) and thus provide that the time for laying informations

under s 338(1A) and (1B) runs from knowledge of the "contravention" or when the informant should have known of the "contravention".

[21] The appellant says that at the third reading of the Resource Management Amendment Bill (in November 1994) the relevant Minister in support of the Bill observed that the amendments were designed to bring all of the controls over the dumping and incineration of waste in the territorial sea within the RMA (8 November 1994) 544 NZPD 4597–4598).

[22] Further, the appellant points out that s 339(1) (the penalty section) was amended to include s 338(1A) and (1B) supporting the proposition that Parliament intended but mistakenly failed to amend s 338(4). The appellant submits these factors in combination show the parliamentary error and that this is a proper case for judicial intervention to remedy this error.

Discussion

[23] I accept the thrust of the appellant's argument that including s 15A, B and C and s 338(1A), (1B) within s 338(4) on balance is more logical than not. For example, a breach of s 15A will self evidently be difficult to detect. It involves the dumping of waste in the coastal marine area by the ship, aircraft or other off-shore installation. The offending, therefore, will occur at sea, far from the informant's gaze. In this, s 15(1A) is in a similar category to some of the s 15(1) duties, which also have an element of difficulty in detection.

[24] The second point is that the offending in s 338(1A) and (1B) are in the most serious category of the hierarchy of penalties. In this, they are at the same level as offences under s 338(1).

[25] The appellant submits that I should approach this case as suggested in cases such as *Frucor Beverages Ltd* v *Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) and especially *Inco Europe Ltd* v *First Choice Distribution* [2000] 2 All ER 109 (HL).

[26] I do not consider these authorities help the appellant. Whether the failure to include s 338(1A) and (1B) in ss (4) is a parliamentary error or mistake cannot, I consider, be stated with certainty. Simply because it would have been logical, as I accept, to include the (1A) and (1B) offences within ss (4) does not make the decision not to do so a parliamentary drafting error.

[27] There is nothing in any parliamentary debate that makes it clear that Parliament's intention was to amend s 338(4) when it added s 338(1A) and (1B). There is nothing in the debates which indicate the issue was even considered by Parliament.

[28] The statutory circumstances were quite different in *Inco Europe*. There a literal reading of the amended statute would have ended a pre-existing, broad right of appeal from the High Court to the Court of Appeal. There was nothing to suggest in the parliamentary debates that this had been Parliament's intention.

[29] Lord Nichols said (at 115) when considering the power to correct drafting errors by adding, omitting or substituting words to a statute:

> This power is confined to plain cases of drafting mistakes.

And went on to say:

> Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

[30] Firstly, I am not satisfied that this is a plain case of drafting error. There is nothing in the parliamentary discussion of the amendment from which to conclude this is a plain case of drafting error. Whether to include s 338(1A) and (1B) within s 338(4) was and is a question of policy. Courts are notoriously poorly equipped to deal with such matters.

[31] Secondly, turning to the three matters identified by Lord Nicholls, the express intention of Parliament, in the amending Act, was to bring the controls over dumping

of waste in the sea within the RMA. This, the amendment achieved without any s 338(4) amendment. As I have observed there is nothing to suggest what Parliament's intention was with respect to amending s 338(4).

[32] Other factors confuse the appellant's claim of clarity of error. There are differences between s 338(1) and especially s 338(1A) offences. Subsection (1) offences are strict liability. Subsection 338(1A) offences require proof of mens rea.

[33] Parliament was able to amend s 339(1) to include s 338(1A) and (1B) offences in the higher penal regime. It did, therefore, consider what amendments were required subsequent to the introduction of ss (1A) and (1B). This supports intentionally leaving s 338(4) unamended.

[34] These factors convince me that the District Court Judge was correct to refuse to interpret s 338(4) in the way advocated by the appellant. There was no clear parliamentary error. Without such a finding this Court would be undertaking Parliament's function if it added to s 338(4) those offences under s 338(1A) and (1B).

[35] I, therefore, agree with the District Court Judge's conclusion. The answer to the question of law is that the Judge's decision on a point of law relating to the limitation period under s 338 was correct. The appeal will be dismissed.

Costs

[36] Should the respondent seek cost memorandum should be filed within fourteen days and in response by the appellant within a further fourteen days.

Ronald Young J

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