

Sentencing Principles for Water Pollution Offences

Date : September 6, 2018

BACKGROUND

On 7 and 8 March 2018, judgment was delivered in *Environment Protection Authority v Ardent Leisure Ltd (ACN 104 529 106)* [2018] NSWLEC 36 (**Ardent**) to impose a fine totalling \$157,950 on Ardent Leisure Ltd (**AL**) for polluting Sydney Harbour after approximately 6000L of diesel fuel escaped into the waters from a fuel storage system at Rushcutters Bay marina.

AL was convicted with the following offences and penalty imposed:

1. Section 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for the pollution of waters in Rushcutters Bay (**Water Pollution Offence**) – Penalty \$135,000.00;
2. Clause 19(2) of the *Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2014* (NSW) (**UPSS Regulation**) in relation to Ardent's failure to include current 'as-built' drawing for the fuel storage system (**UPSS Regulation Offence**) – Penalty \$22,950.00

A publication order for a notice of the offences was also made for the purposes of improving the effectiveness of general deterrence.

PRINCIPLES RELATING TO SENTENCING

When sentencing, the Court is to consider the following:

1. the factors set out under s 241 of the POEO Act;
2. the principles in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**);
3. the relevant aggravating and mitigating factors in ss 21A(2) and (3) of the CSP Act.

It is crucial that the sentence determined is proportionate to the gravity or objective seriousness of the offences and to the subjective and personal circumstances of the offender.

Objective circumstances

When determining the objective seriousness of the offences, the Court takes into consideration a range of objective circumstances of which include the following:

- The nature of the offences
- The maximum penalty for the offences
- The environmental harm caused
- The practical measures which may have been taken to prevent or mitigate the environmental harm



- The foreseeability of the harm
- The extent to which the defendant had control over the causes
- The heightened state of mind

In *Ardent*, the Court found that AL's conduct in causing a significant amount of diesel fuel to escape into the environment undermined both the statutory schemes and legislative objectives established under the POEO Act and the UPSS Regulation. The Court held that the Water Pollution Offence fell within the moderate range of objective seriousness whilst the UPSS Regulation Offence fell within the higher range of objective seriousness.

The Court found that there were clearly practical measures AL could have taken to prepare and supply accurate "as-built" drawings. This having said, the Court also found that it was appropriate to consider the conduct of others (such as the contractors employed by AL) who if had complied with the practical measures set out by industry practice might have prevented the occurrence of the Water Pollution Offence.

Subjective circumstances

When sentencing, the Court also considers various subjective circumstances of which include the following:

- Prior convictions
- Assistance to authorities
- Early pleas of guilty
- Remorse for the offences and good character
- Measures taken to avoid a recurrence of an incident of this type
- Specific deterrence
- General deterrence

In *Ardent*, the Court considered the utilitarian value of AL's early plea of guilty and applied a 25% discount in respect of both offences.

Totality

In *Ardent*, the Court considered and applied the totality principle to reduce the sentence such that AL would not be punished twice for the common characteristics shared by both of the offences.

IMPLICATIONS FOR COUNCIL

This case provides a good summary of the objective and subjective factors the Court is to consider and how the Court balances the relevant factors in order to deliver an appropriate sentence.

For a copy of the full judgment, please click [Environment Protection Authority v Ardent Leisure Ltd \(ACN 104 529 106\) \[2018\] NSWLEC 36](#)