

UPDATE ON "KNOWINGLY PERMITTING" AND ENVIRONMENTAL SENTENCING – April 2014

A recent Court of Appeal case has provided helpful guidance on the concept of “knowingly permitting” in environmental law. This legal test is used as the basis for criminal, covering offences and regulatory liability in waste legislation, water pollution, environmental permitting and the contaminated land regime. The meaning the Court of Appeal applied in this case, combined with new sentencing guidelines for environmental offences, reinforces the importance of contractor due diligence and awareness of contractors’ activities on site and their compliance with environmental law.

The judgement serves as a reminder of the implications companies may face as a result of contractors’ activities on their sites. Even limited knowledge of operations could result in criminal liability, the consequences of which are considered further below.

WALKER AND SONS (HAULIERS) LTD V ENVIRONMENT AGENCY (COURT OF APPEAL (CIVIL DIVISION) [2014] EWCA CRIM 100)

The case in question was a prosecution by the Environment Agency of Walker and Sons (Hauliers) Ltd, a haulage company undertaking a site redevelopment project. Walker and Sons subcontracted the demolition work at the site to Bloom (Plant) Limited who, in the course of carrying out the contracted work, were transferring third party waste to the site and burning it without a suitable permit. Bloom was found guilty of operating illegal waste activities and Walker and Sons was subsequently charged under the Environmental Permitting Regulations 2007 with “knowingly permitting” the illegal waste operations.

The managing director of Walker and Sons was aware of fires at the site but did not know that not all activities related to the contracted work and further that they were not authorised by an environmental permit. The Court of Appeal had to determine whether “knowingly permitting” illegal waste activities required the defendant (a) to have knowledge that the waste operation was not authorised by an environmental permit or (b) whether all that was required was knowledge of the offending activities occurring at the site, this

clearly being a substantially lower standard to prove.

The Court of Appeal found in favour of the prosecution and agreed that in order to commit the offence all that had to be proved was that the defendant company had knowledge of the waste operation in question. It was considered unnecessary to show that a defendant knew that the activities were not permitted. Ignorance of a permit or permit conditions does not offer a company any defence. The offence, pursuant to which the charge was laid, was knowingly permitting the contravention of Regulation 12 of the Environmental Permitting (England and Wales) Regulations 2007. Regulation 12 provides that no person may operate a regulated facility except under and to the extent authorised without an environmental permit.

The judgement confirmed that companies can no longer rely on the notion of taking all reasonable precautions and exercising all due diligence to avoid commission of a criminal offence. This defence was available in the preceding permitting legislation and also still applies to other aspects of environmental law. However, this recent Court of Appeal decision retains the strict liability approach in this

legislation, thereby increasing the likelihood of a successful prosecution in this field.

SENTENCING

Notwithstanding this ruling there are still mechanisms by which a Judge can, and should, take into account care and due diligence by a company where a waste offence has been committed. However, in light of this decision, this is now relevant only to mitigation of sentence.

It should be noted that English courts must now consider the Sentencing Council's new sentencing guideline for environmental crimes. This is expected to result in higher fines for corporate defendants and serious offenders. The guideline aims to encourage courts to make more use of higher fines and particularly where these offences are motivated by making a profit or saving money. In the case of individuals, where imprisonment is also an option, custody remains the starting point for the most serious types of offenders who deliberately commit a crime that causes, or presents a serious risk of, significant harm.

This guideline, the first environmental sentencing guideline published, covers a

number of offences under the Environmental Protection Act 1990 and Environmental Permitting (England and Wales) Regulations 2010. It officially comes into force from 1 July 2014 although we are already seeing courts applying its principles.

IMPLICATIONS

Although mitigation of sentence may be available if involvement in illegal activities is limited, courts are being encouraged to impose higher fines on companies where appropriate. We are likely to see fines for environmental offences increasing, particularly where there is active culpability. Breaches of environmental law can result in a criminal conviction which, as well as a potentially significant fine, may impact on a company's ability to raise finance and in tendering processes. Any trial would be public so media reporting and adverse reputational impact could follow. Finally, any criminal conviction may attract an application for recovery of benefit gained from illegal operations through a Proceeds of Crime Act 2002 confiscation order, a tool the Environment Agency is increasingly using.

If you would like to discuss how these updates could affect you, please contact one of the following members of our dedicated Environment and Health and Safety team.

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