

HOT TOPICS

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Case 1:

**Newcastle Port Corporation v MS
Magdalene Schiffahrtsgesellschaft MBH;
Newcastle Port Corporation v
Vazhnenko [2013] NSWLEC 210**

The Case

- Two charges under section 8(1) of *Marine Pollution Act* 1987 (NSW).
- Owners pleaded guilty to charges.
- Maximum fines: \$10 million for a body corporate (such as the owner) and \$500,000 for a natural person.
- Second largest oil spill in the history of New South Wales.



The Facts

- MV "Magdalene" commenced deballasting the number 6 starboard double bottom ballast tank.
- 72,000 litres of heavy fuel oil.
- Extensive boom containment following discovery of spill.
- Clean up operations 1.5 months at a cost of \$1,913,197.23.

Newcastle Port



Newcastle Port



Cause

- Sounding pipes lacked perforations.
- No watch kept during deballasting.
- No inspection of the ballast tank.



Sentencing

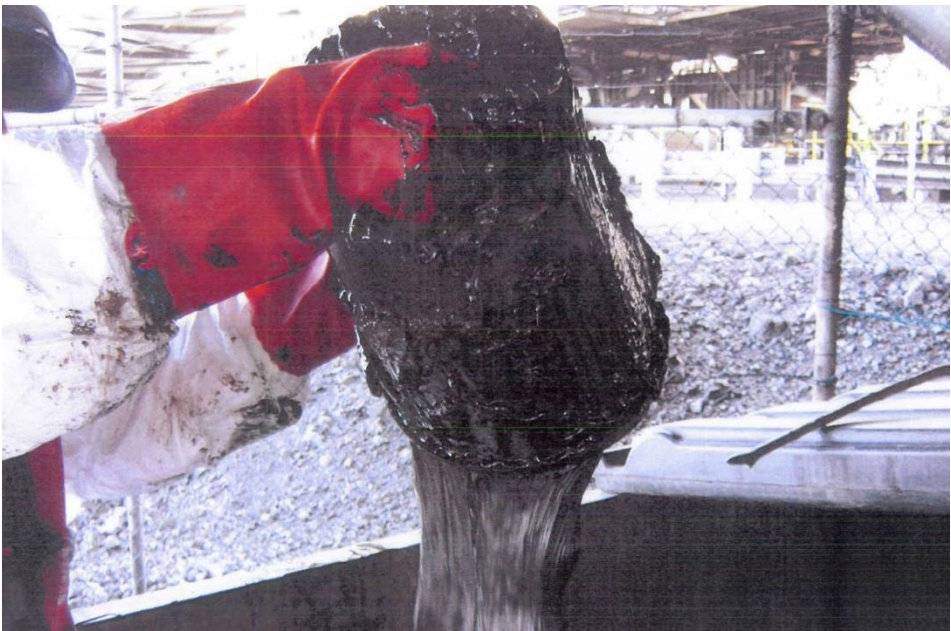
- 3A, 10, 21A, 22, and 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- Seek guidance from comparable cases to determine the objective seriousness of offences.

Sentencing & Seriousness

- *Environment Protection Authority v Orange City Council* ("Orange Council") [1995] NSWLEC 103
 - > 0-10% of maximum penalty being the "lowest" seriousness;
 - > 10-30% of maximum penalty being "low to mid" seriousness;
 - > 30-60% of maximum penalty being "mid-range" seriousness;
 - > 60-80% of maximum penalty being "mid to high" seriousness;
 - > 80-100% of maximum penalty being the "highest" seriousness.

Sentencing & Seriousness

- Principle of evenhandedness is crucial.
- *Laura D'Amata* – was the only comparable offence to the offences in question.
- Magdalene, found to be 50% of the worst case; mid-range seriousness.
- Increases in the size of the fine since *D'Amata* did not mean that the fine would be increased by the same amount.



Mitigating/Aggravating Factors

- *Plath v Rawson* [2009] NSWLEC 178.
- Facts adverse to the defendant must be proved beyond reasonable doubt, and those favourable to the defendant need be proved only on the balance of probabilities.
- Environmental harm is the only aggravating factor.

Mitigating/Aggravating Factors in Magdalene Prosecution

- Owner's payment of the clean-up costs, and its preparedness to pay the legal costs.
- Early guilty pleas.
- *R v Thomson; R v Houlton* [2000] NSWCCA 309
Maximum guilty discount of 25% with a range for a discount being from 10-25%

Mitigating/Aggravating Factors in Magdalene Prosecution

- The co-operation and assistance of the defendants.
- formal admission of liability within three months of incident.
- Modest discount should be given for the crew's co-operation due to strict obligations on ship owners and crew in respect of frankness and cooperation in the Marine Pollution Act.

Mitigating/Aggravating Factors in Magdalene Prosecution

- Contrition and remorse of the defendants through taking actions.
- No just smooth apologies through their legal representative.

Mitigating/Aggravating Factors in Magdalene Prosecution

- Fine reduced by one third due to the early pleas of guilt, co-operation, remorse, pre-trial payment of clean-up and the commitment to pay costs.
- Total fine was \$1.2 million down from the maximum fine of \$1.8 million.

Take Home Message

- Sentencing is a methodical process.
- Plead guilty as soon as possible, and then implement as many post offence mitigation factors as possible such as assisting authorities, taking steps to rectify any harm caused and taking steps to prevent occurrence of a similar incident again.

Take Home Messages

- Evan handedness is the best starting point.
- Increases in the maximum penalties under the relevant statute does not necessarily mean that the applicable fine will be increased by the same percentage increase in the maximum penalty.
- Clear established procedures for watch-keeping, and inspections and maintenance.

Case 2:

Shagang Shipping Co Ltd v Ship ‘BULK PEACE’ as surrogate for the Ship ‘DONG-A ASTREA’ [2014] FCAFC 48

- Arrest of the “Bulk Peace”.
- A Full Federal Court was convened quickly over the weekend to hear the case 4 days after the arrest.

The Facts

- *Dong-A Astrea* was chartered under a long-term time charter pursuant to the New York Produce Exchange 1946 Form for USD\$52,000 per day.
- Between Shagang Shipping Co Ltd as owners of the “Dong-A Astrea”, and Grand China Shipping (Hong Kong) Co Limited as charterer.
- Guaranteed by HNA Group Co Ltd.

The Facts

- The performance guarantee by HNA was in terms that that company undertook its obligations as a primary obligor, and not as a surety merely.
- September 2010 Grand China Shipping failed to pay hire.
- Shagang's solicitors issued HNA with a notice anticipated by the performance guarantee requesting they take over the Charterparty.

The Facts

- ❖ No steps were taken by HNA to direct the ship and no funds were paid.
- ❖ Repudiation of contract accepted and arbitration proceedings commenced in London.
- ❖ An award was made in favor of Shadang in the amount of USD\$66,356,281.00.



Issues Before the Court

- Satisfaction of the requirements for a surrogate ship arrest in paragraphs 19(a) and 19(b) of the *Admiralty Act*.



Section 19(a)

- Relevant person, the owner of, the charterer of, or in possession or control of the first-mentioned ship at the time when the cause of action arose.
- HNA had control of the *Dong-A Astrea* because?:
 - > HNA had the ability to exercise the right to take control of the ship initially chartered to Grand China Shipping
 - > Shagang exercised rights under the performance guarantee to call upon HNA to take over the position of charterer.

Section 19(b)

- That at the time the proceedings were commenced, the relevant person, was the owner of the second-mentioned arrested surrogate ship
- The test in Australia for ownership involves the right to make physical use of the vessel, and to sell and keep the proceeds of the sale.

Problems with Section 19(b)

- Commercial reality of one-ship companies.
- Difficulties for surrogate ship arrest in Australia.

The Evidence – Did the arresting party meet the requirements of the Admiralty Act?

- Under 19(b) command and direction is not ownership.
- No evidence of a sham business.

Take Home Messages

- Narrow construction of “owner” in section 19(b) of the *Admiralty Act*.
- Prior to effecting an arrest, make all necessary inquiries as to the ownership of the vessel to be arrested both at the time of the cause of action arises and the time the arrest takes place. Care must be taken to make a proprietary and property analysis of ownership.
- Australian Courts can move quickly to arrest vessels, and hear cases dealing with issues arising out of the arrest.

Case 3:

Cross border Insolvency: An impediment to a ship arrest in Australia?



Background

- *Yu v STX Pan Ocean Co Ltd (South Korea) in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea)* [2013] FCA 680 has the effect of allowing the arrest of a ship in Australia, despite the operation of the *Cross Border Insolvency Act 2008* (Cth) which incorporates the United Nations Model Law on cross border insolvency into Australian law.

The Order Sought

- Receiver of STX Pan Ocean Co Ltd sought an order pursuant to Article 21 of the Model Law, that the administration and realisation of all of the STX Pan Ocean's assets located in Australia be entrusted to the South Korean receiver.
- If made the maritime law security regime, would not be effective.

The Decision

- Court refused to make the order.
- Arrest would be allowed where the proceedings and the arrest warrant are issued to enforce an existing security right of a *maritime lien* (claims for damage done by a ship, for seamen's wages, and for salvage).

Unresolved issue

- What maritime lien?
- Forum?
- Lex Loci?
- Contractual?

New Zealand Approach

- *Kim and Yu v STX Pan Ocean Co. Limited* [2014] NZHC 845.
- No maritime lien but leave given to continue with claims against the arrested vessel.
- Decision turned upon the timing of the arrest being prior to Korean rehabilitation.

Take Home Messages

- Potential new exposures to wrongful arrest actions for general maritime law claimants.
- Not all admiralty claims will now have the benefit of an earlier security.





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