Case No: 200900861A8

Neutral Citation Number: [2010] EWCA Crim 202
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROYDON CROWN COURT
MISS RECORDER WICKHAM
S20080509

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2010

Before :

LORD JUSTICE MOORE-BICK
MR JUSTICE DAVID CLARKE
and
MR JUSTICE SWEENEY

- -

Between :

	REGINA	**Respondent**
	- and -	
	THAMES WATER UTILITIES LTD	**Appellant**

- -
- -

Jonathan Barnard (instructed by **Ashfords Solicitors**) for the **Appellant**
Mark Harris and Howard McCann (instructed by **The Environment Agency**) for the **Respondent**

Hearing dates : 9th November 2009

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JUDGMENT **Mr Justice Sweeney:**

Introduction

1. On 4 December 2008 in the Sutton Magistrates' Court the Appellant company admitted an offence, committed in September 2007, of causing polluting matter, namely sodium hypochlorite (bleach), to enter controlled waters, namely a tributary of the River Wandle and the River Wandle itself, contrary to section 85(1) of the Water Resources Act 1991 ("The 1991 Act").

2. On 26 January 2009 in the Crown Court at Croydon, the Appellant was sentenced by

Miss Recorder Wickham to pay a fine of £125,000, and was also ordered to pay £21,335.19 towards prosecution costs.

3. The Appellant now appeals against that sentence by leave of the Single Judge. The appeal raises important issues as to the sentencing of major water companies for criminal breaches of the environmental protection legislation.

The Facts.

4. The Appellant was incorporated in April 1989. It is the largest supplier of water and sewage services in the United Kingdom. Among the agencies responsible for regulating it is the prosecutor in this case, the Environment Agency. The Appellant's net profit for the year ending March 2008 was £278million.

5. One of the sewage treatment works operated by the Appellant is the Beddington Sewage Treatment Works ("the Works") in South Croydon. Treated effluent exits the Works via the main effluent carrier, which is a concrete channel some 2.3 kms long forming a tributary of the River Wandle. At the point of confluence, the effluent from the Works amounts to about 80% of the water in the river, which eventually flows into the Thames.

6. Over the years prior to the 1970s, the Wandle had become heavily polluted. However, from the 1970s onwards, it was gradually brought back to life, and angling clubs, the Wandle Trust and the National Trust (through whose property at Morden Hall Park the river flows) all took a keen interest. The river thus became an important fishery and recreational resource in South London. The Works normally discharged good quality effluent into the river, and from 2003 onwards the Environment Agency stocked the river with, in all, approximately 7,700 fish.

7. In the two years leading up to the offence, the Appellant invested over £15 million in the equipment at the Works, in order to further its continuing effort to improve the quality of the effluent.

8. As part of this improvement, four large filter tanks were purchased from the manufacturer Norsk Hydro, and were installed at the Works in about 2005/6. The tanks supplemented the already existing primary and secondary sewage treatment plants at the Works by together providing a tertiary treatment plant for the removal of any remaining small pieces of solid, before the effluent flowed into the main effluent carrier, and thus finally into the river. The tertiary treatment plant came on line in early 2007.

9. In simple terms, effluent from the secondary treatment plant flowed to the tertiary treatment plant where it was diverted into the tanks, exiting each tank over a weir, and thence into the

main effluent carrier.

10. Whilst there was a penstock valve at the entrance to each tank which could be closed electronically, preventing the flow of effluent into the tank, there was no barrier (other than the weir) capable of preventing flow out of each tank.

11. The maintenance plan for the tertiary treatment plant included the periodic cleaning of the inside of the tanks, involving two processes being carried out, about a fortnight apart, by the manufacturer Norsk Hydro. In the first process, hydrochloric acid was to be used to remove lime scale build up. The second process involved about 1,600 litres of sodium hypochlorite (bleach) being poured into each tank to remove any biological matter.

12. Each process required the penstock valve of the tank being cleaned to be closed – thus preventing the flow of effluent into the tank, and thereby preventing the cleaning chemical from being flushed out from the exit of the tank and over its weir. In each process it was intended that the cleaning chemical would be neutralised or removed prior to the recommencement of normal operations.

13. Norsk Hydro carried out the first ever hydrochloric acid cleaning of the inside of the tanks at some point in the weeks leading up to 17 September 2007. However, they were not available to carry out the first ever sodium hypochlorite cleaning process until about the end of October 2007. It was in those circumstances that the Appellant, wishing to ensure the optimum performance of the tanks sooner rather than later, decided to carry out the second cleaning process itself.

14. However, before doing so, the Appellant failed to carry out any sort of risk assessment. The grave risk of the escape of the sodium hypochlorite should have been obvious, along with the potential for catastrophic consequences. As indicated above, there was no ability to close the exit from any of the tanks during the cleaning process. The penstock valve at the entrance to each tank closed electronically. If it indicated that it was closed when it was not, then effluent would continue to flow into the relevant tank, with the risk that the sodium hypochlorite would thereby be flushed out of the tank and over its weir. The only precautions that could be taken, absent any ability to close the exit, were the use of a dipstick to check the level in the tank, and the posting of a lookout on the weir of the tank, before the cleaning chemical was poured in, so as to ensure that the outflow over the weir had already stopped. Absent a lookout, or in the event of failure by the lookout, or of the failure of the penstock valve at the entrance of the tank during the process, there was no secondary system to ensure safety at all. Hence there was no possibility, in risk terms, of a failure to safety.

15. The sodium hypochlorite cleaning process was begun at about 10 a.m. on 17 September 2007. It was carried out by two of the Appellant's employees. They had not been given

any training in the risks involved, nor were they supervised. The first three tanks were, however, cleaned without incident. When the penstock valve to the fourth tank was closed it registered as being fully shut. However it was not, and effluent continued to flow into the tank. No dipstick test was carried out as to the level inside the tank, nor was a lookout posted on the weir, and therefore the two employees failed to notice the continuing ingress of effluent. Mr Barnard for the Appellant conceded that a moment's reflection would have revealed the need for safeguards, and that the mistake in failing to post a lookout on the weir was a 'juvenile' one. Thus when the 1,600 litres of sodium hypochlorite was poured into the tank, the great majority of it was flushed out over the weir and into the main effluent carrier. Although the employees realised that some of the chemical had been flushed out, it appears that they thought that it was only a small proportion, and thus the matter was not reported.

16. Downstream however, the catastrophic consequences soon became obvious. Within half an hour, local residents noticed a very strong and nauseating smell of bleach coming from the main effluent carrier, that the water in it had turned cloudy and was bubbling, and that fish were dying in numbers. Police officers were called to the scene and, as one of the officers put it, saw that the chemical was killing the fish and stripping the river of life. The public had to be kept back from the river bank for their own protection from the effects of the bleach. Suspecting that the problem had come from the Works, an officer went there and was informed about the cleaning process. The officer contacted the Environment Agency and they attended the affected area (which, by then, extended along the whole of the main effluent carrier, and also about 2.7 kilometres downstream from its confluence with the river). The officials from the Environment Agency were eventually joined by a senior employee of the Appellant company.

17. A sample of the polluted water was taken by a member of the public. Analysis of the sample showed that it contained 150 milligrams of bleach per litre. The Environment Agency's recommended limit for discharge from the Works was .005 milligrams per litre.

18. There then followed a significant operation to clean up the damage to the main effluent carrier and the river. It involved the Environment Agency, the Appellant's contractors, members of angling clubs and members of the public. The clean up operation lasted several days.

19. A report prepared by a Fisheries officer indicated that, on a conservative estimate, over 2 tonnes of fish had been killed by what was, in environmental terms, a short sharp shock to the controlled waters. Substantial quantities of the fish were of very high quality, with many of the larger specimens likely to be over 10 years old, and thus effectively irreplaceable. Also killed were the vast majority of the water hog lice, fresh water shrimp and other invertebrates in the affected area, along with all the flora touched by the pollution. Further destruction at Morden Hall Park had been averted by closing sluice gates after information from an alert member of the public about events upstream.

20. The Chairman of the Trustees of the Wandle Trust (otherwise relied upon by the Appellant – see paragraph 24 below) described the offence as follows:-

> "The pollution event from [the Works] was completely inexcusable; a tragedy for the Wandle that with one wrong turn of a stopcock destroyed many years of hard work by local people to restore the river".

21. In terms of the 5 kilometre area affected this was plainly therefore a catastrophic event. It is clear that it will take many years to restore the fishery of the river to its pre-pollution condition. Nevertheless, happily, re stocking of the river was able to begin some three months after the offence.

22. In the aftermath of the incident, the Appellant opened the Works to the Environment Agency, and co-operated fully with the Agency's investigation. At a public meeting on 3 October 2007 the Appellant's Chief Executive Officer accepted responsibility, and pledged £500,000 in compensation to restore the river.

23. In the result, the following sums have been paid or pledged:-

- £7,000 project funding for a local education project;
- £10,000 in compensation for the two local angling clubs;
- £30,000 to meet the costs of restocking and an ongoing survey to assess damage to the river's ecology;
- £200,000 core funding for the Wandle Trust to include support for the cost of an employee who will raise additional project funding to deliver access and habitat improvements along the length of the river;
- £250,000 to be paid over 5 years for a restoration fund to support local projects to improve the river environment.

24. These sums have been warmly welcomed by the Anglers Conservation Association, and by the Chairman of the Trustees of the Wandle Trust.

25. The Appellant's Head of Catchment Waste Services was interviewed on 28 November 2007. He set out the background of recent investment at the Works, including the installation of the tertiary treatment plant. He explained the maintenance process for the

tanks, and accepted the circumstances which had lead to the catastrophe. He indicated that steps had been taken with a view to reviewing the need to add a penstock valve at the exit from each tank to provide a fail safe, along with the need for dipsticks to be used, and a lookout being posted at the relevant weir.

26. The Appellant had 82 convictions in the period between March 1991 and May 2008 for offences in connection with the discharge of sewage from its premises – though none of the convictions related to the Works. The vast majority of the convictions and resultant sentences were dealt with in the Magistrates' Courts. However, sentence had been imposed in the Crown Court on a number of occasions in the period between 2000 and 2006. In the most serious of those cases the Appellant was fined £200,000 for an offence likely to cause harm to human health, contrary to section 33(1)(c) of the Environment Protection Act 1990, and (on the same occasion) £50,000 for an offence contrary to section 85(3)(b) of the 1991 Act. In three other cases, all concerned with section 85(3)(b) of the 1991 Act, fines of between £50-60,000 were imposed.

The hearing in the Crown Court.

27. In passing sentence, the learned Recorder noted that there had been a delay in the Appellant alerting the Environment Agency even though the River Wandle had been polluted within 35 minutes of the incident. The consequences had been devastating as to the loss of fish and the vast damage to other aquatic life. She also noted that the police had been required to keep the public away for their own safety because of the strong bleach fumes. In summary, she said, it had been a 5 kilometre tragedy along the river.

28. The learned Recorder nevertheless observed that the Appellant had tried to deal with the situation over the following days, and further that it had paid (or pledged to pay) a total of £500,000 in compensation (and for future improvement).

29. The aggravating features which the learned Recorder took into account included the scale of the consequences; the fact that there had been quite insufficient risk analysis; the fact that the cleaning activity had been carried out unsupervised and with insufficient manpower; and (albeit that the Appellant is the biggest water company in the country) the number of its previous convictions.

30. The mitigating features identified by the learned Recorder were the timely plea of guilty; the fact that the Appellant had never shirked its responsibility; the fact that the Appellant had abandoned the system used at the time and had since devised a fail safe system; and the payment (and pledge to pay) unusual and speedy compensation – although that had to be weighed against the size of the company and its very substantial profits. The compensation paid could thus have an impact on the fine, but not a substantial one.

31. In the result, the learned Recorder concluded that having considered the authorities, and the impact of the pollution, the starting point after a trial would have been a fine of £250,000. However, given the various mitigating features, the fine was reduced to one of £125,000.

The Grounds of Appeal.

32. The Appellant argues that the fine imposed was manifestly excessive as the learned Recorder:-

i) Took insufficient account of the £500,000 in reparation paid or pledged by the Appellant;

ii) Took too high a starting point of £250,000;

iii) Gave too much weight to the Appellant's previous convictions.

The Relevant Sentencing Principles.

33. Before setting out the arguments in relation to the Grounds advanced, it is important to identify the relevant sentencing principles in cases of this type.

34. The penalty for an offence by a company contrary to section 85(1) of the 1991 Act is a fine of up to £20,000 in the Magistrates' Court, and an unlimited fine in the Crown Court.

35. The purposes of sentencing are, of course, spelt out in section 142(1) of the Criminal Justice Act 2003, as follows:-

> "Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing –
>
> (a) the punishment of offenders
>
> (b) the reduction of crime (including its reduction by deterrence)
>
> (c) the reform and rehabilitation of offenders
>
> (d) the protection of the public

(e) the making of reparation by offenders to persons affected by their offences."

36. Section 143(1) and (2) of the same Act provide that:-

> "(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence, and any harm which the offence caused, was intended to cause or might foreseeably have caused.
>
> (2) In considering the seriousness of an offence ('the current offence') committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating feature if (in case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to –
>
> (a) The nature of the offence to which the conviction relates and its relevance to the current offence,
>
> (b) The time that has elapsed since the conviction.".

37. Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for the making of compensation orders after conviction, and also requires a court to give reasons if it does not make a compensation order in a case where the section empowers it to make one. The section also makes clear that if the total sum of a prospective fine and compensation order would exceed an offender's realistic means, then the level of the fine must be reduced accordingly. There is no financial limit on the amount of a compensation order in the Crown Court, whereas in the Magistrates' Court there is a limit of £5,000 per offence.

38. Between them, Mr Barnard and Mr Harris (who appears for the Respondent) have drawn our attention to the Sentencing Advisory Panel Advice to the Court of Appeal in March 2000 in connection with environmental offences (which, as the authorities make clear, is still relevant today), and to the Sentencing Guidelines Council Definitive Guideline on Overarching Principles: Seriousness published in December 2004, as well as to a number of authorities including *Milford Haven Port Authority [2000] 2 Cr App R (S) 423, Anglian Water Services Limited [2003] EWCA Crim 2243, Balfour Beatty Rail Infrastructure Services Limited [2006] EWCA Crim 1586,* and *Kelleher [2008] EWCA Crim 3055*.

39. From the combination of all the above-mentioned materials, it seems to us that there is clearly an overlap with the sentencing principles applicable to health and safety cases, and

that the following principles emerge which are of relevance in this particular case:-

i) The environment in which we live is a precious heritage, and it is incumbent on the present generation (including the courts) to play a part in preserving it for the future. Rivers and water courses are an important part of the environment, and there is an increasing awareness of the necessity to preserve them from pollution.

ii) Parliament has imposed on the Appellant, and other companies like it, a heavy burden to do everything possible to ensure that they do not cause pollution by the escape of materials from sewage treatment plants into controlled waters.

iii) Section 85(1) of the 1991 Act is an offence of strict liability precisely because Parliament regards the causing of polluting matter to enter controlled waters to be so undesirable as to merit the imposition of criminal punishment irrespective of a company's knowledge, state of mind, belief or intention.

iv) Although environmental safety involves a question of where to strike the balance of priority, there is a clear onus on a prudent water company to conduct ongoing risk assessments looking at not only the likelihood of events occurring that might lead to pollution, but also looking at the extent of the damage, or possible damage, if such events do occur. When the level of risk requires it, fail safe systems must be put in place.

v) The size of the overall penalty will be dependent on the peculiar facts of each case. The authorities provide no tariff as such, although decisions of this Court are likely to continue to emerge over time, and will provide some kind of focal points.

vi) Punishment, deterrence (thereby protecting the environment and the public in the future), and reparation are all particularly important purposes of sentence in this type of case.

vii) Punishment speaks for itself.

viii) The purpose of deterrence, in this context, includes :-

(a) Making clear that the overall penalty for a breach of the law is always likely to be more costly than any expense that should have been incurred in avoiding the breach in the first place.

(b) The need for the overall penalty to be such as to bring the necessary message

home to the particular defendant (whether individual or corporate) before the Court, in order to deter future breaches - whether by that defendant, or by other potential offenders.

(c) The need for equal deterrence of all potential offenders, whether wealthy or of limited means - not least because the wealthiest potential offenders are likely, via the scale of their operations, to have the greatest potential to cause the most serious damage.

ix) Thus, in the case (as here) of a large wealthy company defendant, the overall penalty should, if required, be substantial enough to have a real economic impact so as (along with the attendant bad publicity) to bring the necessary deterrent message home to those who manage the company, and also to its shareholders. That said, if (in contrast to the present case) the Defendant is an under-funded organisation, care may need to be taken to avoid the counterproductive effect of imposing too great an overall penalty.

x) Consistency of fine level will therefore be difficult to achieve between cases, as will consistency of proportionality between the fine and the gravity of the offence. However, such consistency is <u>not</u> a primary aim of sentencing in cases of this type.

xi) Whilst reparation is one of the principal purposes of sentence in this type of case, the only formal order available to the sentencing court to achieve it is a compensation order. There is, however, an obvious potential difficulty in making compensation orders in this type of case. This Court has made clear, on a number of occasions, that complex compensation issues should not be dealt with in the criminal courts, and it is likely that compensation issues in this type of case will often be complex. Therefore, although compensation orders must always be considered, there may well be practical difficulties in imposing them.

xii) The following factors, relating to the actual or potential extent of the damage caused, may aggravate the seriousness of the offence:-

a) The pollutant was noxious, widespread or pervasive or liable to spread widely or to have long-lasting effects.

b) Human health, animal health or flora were adversely affected – especially where a protected species was affected, or where a site designated for nature was affected.

c) An extensive clean up operation, site restoration or animal rehabilitation

operation was required.

d) Other lawful activities were prevented or significantly interfered with.

xiii) More general aggravating features include:-

a) The extent to which the company fell short of its duty, and thus its degree of culpability.

b) The deliberate breaching of a duty in order to maximise profit.

c) The skimping of proper precautions to make or save money, or to gain a competitive advantage.

d) Evidence of repetition, or failure to heed advice, caution, concerns or warnings whether from the Regulatory Authorities, employees, or others.

e) A poor attitude and/or response after the event.

f) Any previous convictions.

xiv) Mitigating features include:-

a) A good record of compliance with the law.

b) A good attitude and/or response after the event – including prompt reporting of the offence, co-operation with the enforcement authorities, the taking of prompt and effective measures to rectify any failures, and the payment of compensation. Albeit that appropriate corrective action (both putting right the failures that led to the offence, and ensuring lack of repetition) should been seen as the necessary minimum response, as indicated above, a poor response will be regarded as an aggravating feature.

c) A timely admission of guilt, and a plea of guilty at an early opportunity.

The Arguments.

Ground 1 – Insufficient account taken of the £500,000 in reparation.

40. Mr Barnard argued that:-

i) The payment and pledged payment totalling £500,000 directly engaged section 142 (1)(e) of the Criminal Justice Act 2003 (above), and therefore required the accordance of great weight in the sentencing exercise, rather than the modest weight given to it by the learned Recorder, when she indicated that its impact on the fine should be 'not too substantial'.

ii) That was particularly so in this case, because the total sum goes far beyond any compensation for loss or damage resulting from the offence which the court could have awarded under the provisions of section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 (above).

iii) In addition, the voluntary payment of any such sum in reparation was unprecedented, quite apart from its amount and the far reaching extent of its future effect, and was far better directed than any order which the court could have imposed.

iv) Thus the payment of such sums in the future should be encouraged by a very substantial reduction in the otherwise appropriate level of fine, perhaps to only a nominal figure.

Ground 2 – Starting point too high.

41. Mr Barnard argued that:-

i) The Appellant had only recently invested £15 million in the Works, including the installation of the tertiary treatment plant itself.

ii) Thus there was clearly no aggravating feature of the offence being driven by profit making, or the saving of otherwise necessary expense – which, in any event, would have been negligible.

iii) In particular, the absence of a risk assessment was not financially motivated. Indeed the risks created by the escape of bleach were 'blindingly obvious' and the risks created by the absence of any fail safe were so obvious that it did not require a risk assessment to point them out.

iv) The Appellant's motivation in carrying out the cleaning process on 17 September had been to ensure the best water quality sooner rather than later, not to save the few hundred pounds that it would have cost for Norsk Hydro to carry out the necessary work.

v) The failure to post a lookout on the weir had been (as accepted above) a 'juvenile' mistake, rather than the product of inappropriate fiscal motivation. It was a classic case of carelessness, not a deliberate or reckless breach of the law.

vi) Nor was there any failure to heed or respond to advice, caution, warnings or concerns from others. On the contrary, the Appellant's attitude towards the authorities had been responsible and fully co-operative throughout.

vii) The facts in the *Anglian Water Services Limited* case (above) were broadly analogous to the instant case, and the fact that the fine in that case (which also involved an early plea) was reduced on appeal from £200,000 to £60,000 showed that the learned Recorder's starting point of a fine of £250,000 after a trial, and before giving effect to any mitigating features (in particular the £500,000 reparation), was far too high.

viii) The sentences imposed by Magistrates in a number of similar cases further supported this submission.

Ground 3 – Too much weight given to previous convictions.

42. Mr Barnard argued that:-

i) It is, in reality, inevitable that (as the largest water and sewage service company in the country) the Appellant has in the past, and will in the future, commit strict liability breaches of the 1991 Act.

ii) In those circumstances, the learned Recorder should have given effect to this court's approach in the *Anglian Water Services Limited* case (above) to the effect that 'the number of previous convictions is not of great significance when seen in the light of the ambit of the Appellant's operation' – see paragraph 30 of the judgment.

iii) It was also a significant feature, to which the learned Recorder gave too little weight, that none of the Appellant's previous convictions related to the Works, and that only two related to the escape of bleach, the last of which was 5 years before

the instant offence.

43. In all therefore, Mr Barnard submitted that the fine of £125,000 was manifestly excessive, and that a nominal or small fine should be substituted for it.

44. On behalf of the Respondent Mr Harris, in addition to addressing us on the sentencing principles to be applied, submitted that:-

i) The *Anglian Water Services Limited* case (above) was significantly less serious than the instant case. In the former case only 2 kilometres of the river was affected rather than 5 kilometres as in the instant case; the river recovered within 24 hours rather than the three months in this case; the gravity of the fish stock loss was far worse in the instant case; as was the loss of public amenity. In addition (given the terms of the judgement in the *Anglian Water Services Limited* case) the Appellant's failures to carry out a risk assessment and/or to provide a fail safe system were particularly grave.

ii) The Appellant's reliance on sentences imposed in other cases, particularly cases in the Magistrates' Court, was inappropriate.

iii) The learned Recorder's identification of a fine in the order of £250,000 after a trial and before making any allowance for mitigation was in the correct bracket – albeit that the authorities do not provide a tariff against which to judge the correct bracket for a case of this type.

iv) It was, however, right to acknowledge that the court's power to have awarded compensation would have been limited to about £30-40,000 and thus the sum of £500,000 in reparation represented a very significant payment in excess of that figure, albeit that a substantial proportion of it was to be paid over 5 years, and would thus lack the full impact on the Appellant of it all having to be paid in one payment – as would normally be the case with a fine and compensation imposed by a court in this type of case.

Discussion.

45. In 2003, in the *Anglian Water Services Limited* case (above), this Court made crystal clear the heavy burden on water companies like the Appellant to ensure that they do not cause the escape of polluting materials from sewage treatment plants into controlled waters, and the consequent need for water companies to conduct ongoing risk assessments as to both the likelihood of events occurring that might lead to pollution, and also the extent of the damage, or possible damage, if such events did occur. The need, when necessary, for fail

safe systems was made equally clear.

46. Viewed against the clarity of those requirements, it is plain that the failures in this case make the offence an extremely serious one of its type.

47. As to the damage caused:-

i) The pollution was noxious, widespread and pervasive. It also had long-lasting effects.

ii) Human health was affected to the extent that, in the very early stages, those near the pollution suffered nausea, and steps had to be taken to keep people away. Animal health and flora were devastated, with (for example) the loss of substantial quantities of high quality fish, with many of the larger specimens being effectively irreplaceable.

iii) An extensive clean up operation, site restoration and animal rehabilitation operation were all required.

iv) The lawful enjoyment of the controlled waters as an important fishery and recreational resource in South London was prevented and/or significantly interfered with.

48. As to the more general aggravating features of the offence:-

i) The Appellant fell far short of its duties. There was no risk assessment. There was no fail safe system. There was no appropriate training of staff as to the risks involved. There was no supervision. The discipline of the carrying out of a risk assessment would have revealed the 'blindingly obvious' risk of catastrophe. This should, in turn, have led to the recognition of the need for a fail safe system, including a penstock valve at the exit from the tank, and the proper training of staff as to the need to use a dipstick and to have a lookout on the weir, and for proper supervision. Instead, nothing was done, and a 'juvenile' error duly led to a catastrophe.

ii) This was not, however, a breach involving the maximising of profit, or the skimping of proper procedures to make or to save money. That said, the acceptance that the risks were 'blindingly obvious' and that the eventual error was 'juvenile', which were put forward by the Appellant to underline its lack of financial motivation, are nevertheless (as we have just set out, and as Mr Barnard accepted

in argument), highly aggravating features in themselves.

iii) In any event, as already touched on above, the breaches of duty described above involved a reprehensible failure to heed the advice, caution and warnings of this court in the *Anglian Water Services Limited* case.

iv) The Appellant has a large number of previous convictions for similar strict liability offences, albeit that none relate to the Works, and only two relate to the escape of bleach. Whilst, for the reasons given by this court in the *Anglian Water Services Limited* case, a sentencing court should not be overborne by the number of convictions per se in a case involving a major water company, nevertheless section 143(2) of the Criminal Justice Act 2003 must be respected. Thus, in our view, the learned Recorder was clearly entitled to regard the Appellant's previous convictions as aggravating the offence.

v) There was also an initial, albeit short, poor response by the Appellant after the event. As indicated above, this was because the likely scale of the consequences was not appreciated when it should have been.

49. As to the mitigating features:-

i) After the initial poor response, the Appellant did everything that could be expected of it and more, by way of:-

a) Co-operation with the enforcement authorities;

b) The taking of prompt and effective measures to rectify the failures, both in the restitution of the controlled waters, and in the provision of a fail safe system for the future;

c) The unprecedented payment and pledge of the total sum of £500,000 – a sum vastly in excess of any which the court could have ordered by way of compensation.

ii) There was a timely admission of guilt, followed by a plea of guilty at the earliest opportunity.

50. The learned Recorder was thus faced with a very difficult sentencing exercise. On the one hand, this was an extremely serious case of its type. On the other hand, there was the wholly unprecedented payment and pledge of a total sum of £500,000 in reparation, and

there were other mitigating features. Equally, the authorities provided no tariff by way of guidance as to the appropriate level of fine, only the indication that the fine should be substantial enough to have a real economic impact so as (along with the attendant bad publicity) to bring the necessary message home to those who manage the Appellant, and also to its shareholders and others.

51. The learned Recorder's task was made the more difficult by the fact that the authorities provided little practical guidance as to a structured approach by which to reach an appropriate overall penalty in a case of this type and, in particular, how to balance the requisite elements of punishment, deterrence and reparation against the voluntary payment or pledge of £500,000 in reparation.

52. It seems to us that we are in no better position than the Court in the *Anglian Water Services Limited* case was to give general guidance as to the appropriate levels of sentence in cases of this type. The authorities, such as they are, still provide insufficient data to enable us to do so. We do not regard decisions of Magistrates' Courts, necessarily based on the facts of the particular offences involved, as providing any help at all. In any event, given the likely infinite factual variety of offences of this type, and (outside the major water companies) the likely significant variety of the means of offenders, it may be very difficult to give general guidance anyway. This is therefore a case in which the appropriate level of punishment must be decided on its own facts, albeit guided in significant part by the principles enunciated in *Anglian Water Services Limited*, and by the adoption of a principled approach which we set out below.

53. In our view there is a clear policy need, in cases of this type, to encourage the making of voluntary reparation by offenders (whether by consenting to appropriate compensation orders, or the making or pledge of voluntary payments, or both) whilst at the same time ensuring appropriate punishment and deterrence. As part of this, it must be recognised that in making voluntary reparation an offender is (as here) likely to make a public relations gain, and may also (as here) be able to spread payments out to a much greater extent than would be the case if a fine and compensation order was imposed, thus reducing the otherwise requisite sting. Equally, there can be no question of routinely buying off the punishment aspect of sentence.

54. Using the example of a plea of guilty by a company to a single offence which requires the imposition of a fine, we therefore suggest that the following principled approach to sentence may assist the Court in a case of this type:-

    i) The Court should first assess the seriousness of the offence by reference to its facts. This assessment should include consideration of all aggravating and mitigating features relating to the offence itself.

ii) Given the resultant assessment of seriousness, and consideration thereafter of the offender's means, the Court should then identify the amount of a notional fine after a trial. The notional fine should combine both the punishment and deterrent elements of the sentence. The deterrent element should be the amount, over and above the amount of the punishment element, that is required to reach a total figure that brings the necessary message home to the offender's managers and shareholders (and thereby to others).

iii) The Court should then consider the making of any appropriate compensation order (s), and (if made) the extent to which the amount of any such order(s) should be imposed in addition to, or deducted from, the amount of the notional fine identified thus far. In addition to the requisite consideration of the means of the offender, the fact of a prompt offer by the offender to submit to such an order or orders may be a significant feature in such a decision.

iv) The Court should then go on to consider the question of the extent to which (in addition, if it be the case, to the acceptance of any compensation order or orders) the offender has brought the message home to itself, and then the extent (if any) to which that should be reflected in a deduction from the amount of the notional fine thus far identified as appropriate. The cost of putting right the failures that led to the offence, and of ensuring lack of repetition, should not be taken into account in this regard. Such corrective action should be regarded, save in the most exceptional case, as the minimum response to an offence, with failure to carry it out being regarded as a significant aggravating feature. In contrast, the making of substantial voluntary reparation should, depending on its nature and amount, generally be regarded as a significant mitigating feature in this respect, typically requiring at least some reduction in the level of the deterrent element of the notional fine thus far identified. It may, in an appropriate case, result in a very significant reduction. In an exceptional case it may even reduce the deterrent element of the notional fine to a nil amount. However, a deduction for voluntary reparation should not generally reduce the level of the notional fine below the amount already identified as representing the punishment element of the sentence. There may, nevertheless, be very exceptional cases in which justice requires that the extent and amount of voluntary reparation should, at this stage of the process, be reflected in a reduction of the notional fine to an amount below that hitherto identified as representing the punishment element of the sentence. This will all depend upon the particular facts of each case.

v) Having made any reduction for the extent to which the offender has brought the necessary deterrent message home to itself, the Court (which will have considered the mitigating features of the offence itself when assessing seriousness) should then consider whether there are any other mitigating features requiring any further reduction in the amount, thus far reached, of the notional fine.

vi) Finally, the Court should deduct the appropriate percentage of discount for the plea, thereby arriving at the final amount of the actual fine to be imposed (together with any compensation order/orders).

55. Applying that approach to this case:-

i) As we have already indicated, it seems to us that on its facts, including consideration of the aggravating and mitigating features of the offence itself, this was an extremely serious offence of its type. Thus the learned Recorder was plainly entitled to regard it as such.

ii) Given that assessment, and after consideration of the Appellant's very considerable means, it seems to us that on the facts of this case the appropriate notional fine after a trial, combining both the punishment and deterrent elements of sentence, was a notional fine in the order of £250,000 to £300,000 (with the punishment element of that sum being in the order of £75,000 to £80,000). Thus the learned Recorder's starting point of £250,000 was within the appropriate bracket.

iii) It was not possible to make a compensation order, as the total sum of £30,000 to £40,000 in compensation that might have been the subject of such an order, or orders, had already been paid as part of the voluntary reparation, and thus fell to be considered as part of it.

iv) The nature and amount of the voluntary reparation made and pledged in this case was clearly exceptional. It was, in all, substantially more than the amount of the notional fine after a trial that we have identified above. Although there was an obvious element of public relations gain, and also payment (in substantial part) over a longer period than would have been the case under a court order, the Appellant had thereby clearly brought the necessary deterrent message home to its managers, to its shareholders, and (as a result of the attendant publicity) to others. In the result, the nature and amount of the reparation in this case was such, in our view, as to mean that the proper course should have been for the learned Recorder, in consequence, to have reduced the deterrent element of the notional fine to nil. She therefore fell into error by making a much smaller reduction. We have further considered, with particular care, whether this is one of those rare cases in which the learned Recorder should have gone even further and reduced the punishment element of the notional fine at this stage of the process too. Given, in particular, the extreme seriousness of the offence, it would not have been right for her to have done so, in our view, in this particular case.

iv) We have not identified any further mitigating feature which ought to have reduced the punishment element of the notional fine.

vi) Taking the figure at the bottom of the bracket that we have identified above for the punishment element, namely £75,000, and applying (as she otherwise rightly did) full discount for the early plea, the learned Recorder should thus have arrived at an actual fine of £50,000.

56. As a result of following this approach in the future there may well be occasions when, on the face of the court record, a relatively modest sentence may have been imposed for what was, in fact, an offence which would normally attract a higher (or possibly much higher) sentence. It would obviously be undesirable, in the event of the commission of a subsequent offence by the same offender, for the court dealing with the subsequent offence to be misled as to the seriousness of the previous offence simply because of the relatively modest size of the penalty recorded in the court records or in criminal records. It will therefore be incumbent on investigators and prosecutors to ensure that the courts are not so misled.

Conclusion

57. In the result, the fine of £125,000 that the learned Recorder imposed was, in our view, manifestly excessive. Accordingly we quash it, and substitute for it a fine of £50,000.

58. To that extent, this appeal is allowed.

59. Finally, we make a Defendant's Costs Order in favour of the Appellant, in an amount to be determined in accordance with the Regulations.