Land and Environment Court of New South Wales

Environment Protection Authority v Hogan [2008] NSWLEC 125 (31 March 2008)

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NEW SOUTH WALES LAND AND ENVIRONMENT COURTCITATION: Environment Protection Authority v Hogan [2008] NSWLEC 125PARTIES: PROSECUTOREnvironment Protection AuthorityDEFENDANTDavid HoganFILE NUMBER(S): 50038 of 2007CATCHWORDS: Prosecution :- sentence - person concerned in management of corporation that used premises as a waste facility when licence suspended - person taken to have contravened the same provision - mitigating factors on sentence - late entry of a guilty plea - utilitarian value of pleaLEGISLATION CITED: Crimes (Sentencing Procedure) Act 1999Protection of the Environment Operations Act 1997 CASES CITED: Environmental Protection Authority v HTT Huntley Heritage Pty Ltd (2003) 125 LGERA 333R v O'Neill (1979) 2 NSWLR 582R v Olbrich [1999] HCA 54; (1999) 199 CLR 270CORAM: Jagot JDATES OF HEARING: 26 - 27 March 2008JUDGMENT DATE: 31 March 2008LEGAL REPRESENTATIVESPROSECUTORMr S T FloodSOLICITORSEnvironment Protection AuthorityDEFENDANTMr D Hogan (in person)SOLICITORSN/AJUDGMENT:

THE LAND AND ENVIRONMENT COURTOF NEW SOUTH WALESJagot J31 March 200850038 of 2007ENVIRONMENT

PROTECTION AUTHORITYApplicantDAVID HOGANRespondentJUDGMENTJagot J: 1 The defendant, David Hogan, has pleaded guilty to the following charge:...*from about 12 May 2006 until about 21 June 2006, in Schofields in the said State, as a person concerned in the management of a corporation, namely Riverstone Earthmoving Pty Ltd, he committed an offence against section 144(1) of the Protection of the Environment Operations Act 1997...by reason of section 169(1) of the Act, in that the corporation, being the occupier of land, used it as a waste facility without lawful authority*.2 Under s 144 of the *Protection of the Environment Operations Act* 1997 (the POEO Act) a person who is the owner or occupier of any land and who uses the land, or causes or permits the land to be used, as a waste facility without lawful authority is guilty of an offence. A "waste facility" is defined in the Dictionary to the POEO Act as meaning "any premises used for the storage, treatment, processing, sorting or disposal of waste (except as provided by the regulations)".3 The maximum penalty for contravention of s 144 of the POEO Act in the case of an individual is $250,000 and, for a continuing offence, a further penalty of $60,000 for each day the offence continues.4 Section 169 of the POEO Act provides that:*(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that: (a) (Repealed)(b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or(c) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.(2) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision*....5 The prosecutor (the Environment Protection Authority or EPA) and defendant agreed the following facts:*1. On 27 September 2005 the Environment Protection Authority (EPA) transferred Environment Protection Licence (licence number 4594) from Collex Pty Ltd to Riverstone Earthmoving Pty Ltd (Riverstone) to operate a solid waste class 2 landfill at 127 Burfitt Road Schofields. The licence authorised the licensee to undertake the activities of landfilling of solid and inert waste.2. Mr David Hogan was employed as the general manager of Riverstone.3. Mr Hogan was a person concerned in the management of Riverstone.4. On*

14 March 2006 the EPA issued to Riverstone, a notice of intention to suspend the Environment Protection Licence.5. On 20 April 2006 the EPA issued to Riverstone a Notice of Suspension of licence 4594.6. The suspension of the licence came into effect on 12 May 2006.7. Between the dates of 12 May 2006 and 21 June 2006 waste was delivered to Riverstone.8. No actual environmental harm resulted from the waste being received at the Burfitt Street premises during the period 12 May 2006 and 21 June 2006.6 The defendant changed his plea from not guilty to guilty on the second day of the hearing on the basis that although he believed virgin excavated natural material (known as VENM) was not waste he accepted that he had not made sufficient inquiries of the supervisor of the waste facility (Justin Edrupt) to satisfy himself that certain loads of waste were VENM. In the event, those loads turned out to be solid waste. 7 Sentence must be determined on the basis of facts. The plea of guilty involves an admission of the elements of the offence and no more (*R v O'Neill* (1979) 2 NSWLR 582 at 588). Other facts must either be agreed (as above) or proved. Facts adverse to the defendant must be proved beyond reasonable doubt whereas facts in the defendant's favour need only be proved on the balance of probabilities (*R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270 at [27]). The evidence established the following additional matters beyond reasonable doubt relevant to sentence:(1) Although the defendant was the general manager of Riverstone Earthmoving Pty Ltd and a person concerned in its management, he had no financial interest in that corporation. The sole director and shareholder of that corporation was David Gibbs.(2) The defendant, however, did have an actual or prospective financial interest in another company, trading as Riverstone Remediation (a company unrelated to Riverstone Earthmoving). Riverstone Remediation was interested in buying the waste facility and had offered the defendant employment and some financial share in the project that it wished to carry out on the waste facility.(3) Riverstone Earthmoving had insufficient experience and resources to manage the waste facility in compliance with legal requirements. This situation deteriorated after the former waste facility manager (Malcolm Buttsworth) resigned. Mr Edrupt was then assigned this role but had insufficient experience and inadequate training to ensure legal compliance.(4) The defendant and Mr Gibbs both had far too many responsibilities for them to manage adequately due to Riverstone Earthmoving rapidly expanding. This further contributed to an obvious

lack of systems and procedures capable of ensuring environmental compliance at the waste facility.(5) The operation of the waste facility after the transfer of the licence to Riverstone Earthmoving breached some of the more fundamental requirements of the licence (such as nature and application of cover material, as well as the quantity of tyres able to be stored on site).(6) After suspension of the licence, Riverstone Earthmoving, being the occupier of the waste facility, permitted the premises to be used as a waste facility without lawful authorisation by permitting trucks to enter and deposit waste thereon on numerous occasions between 12 May and 21 June 2006. Some of this waste was VENM, but some was not. (7) Although the defendant: - (i) was aware that he was the nominated contact person for the EPA to deal with about the waste facility, (ii) had in fact regularly dealt with the EPA about the waste facility, and (iii) was in a position, as the general manager of Riverstone Earthmoving, to influence the conduct of that corporation to ensure it did not use the premises as a waste facility after the suspension of the licence, the defendant did not use all due diligence to prevent the contravention. This last finding is explained in more detail below.8 First, I accept that the defendant believed (and continues to believe) that VENM is not "waste" as defined. However, that belief is in error. The Dictionary to the POEO Act defines "waste" as follows:***waste*** *includes: (a) any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or(b) any discarded, rejected, unwanted, surplus or abandoned substance, or(c) any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, processing, recovery or purification by a separate operation from that which produced the substance, or(d) any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in the circumstances prescribed by the regulations, or(e) any substance prescribed by the regulations to be waste.A substance is not precluded from being waste for the purposes of this Act merely because it is or may be processed, recycled, re-used or recovered.*9 The defendant (and Mr Gibbs) believed that because VENM was to be used as capping material on site or sorted and re-used as filling material on other sites, it was not "waste". They were supported in this belief by, amongst other things, Sch 1 to the POEO Act (Schedule of EPA-licensed activities). Sch 1 defines "waste facilities" in a manner that

excludes VENM from the calculation of tonnages for various classes of facility. As I have said, I accept the genuineness of the defendant's belief in this regard. However, this approach overlooks the following: - (i) the exclusion of VENM in Sch 1 operates for the purpose of identifying waste facilities that require a licence only, (ii) if a facility requires a licence (as in the present case) then the relevant definition of "waste" is that contained in the Dictionary to the POEO Act, (iii) that definition is inclusive and expressly contemplates that "waste" might be "processed, recycled, re-used or recovered", (iv) the VENM imported to the waste facility was unwanted and surplus to those who had excavated it, explaining why those people were willing to pay to truck it to the waste facility and deposit it, and (v) the fact that Riverstone Earthmoving wished to re-use some or all of that material did not alter its character as "waste" within the meaning of the definition. Consistent with the approach in *Environmental Protection Authority v HTT Huntley Heritage Pty Ltd* (2003) 125 LGERA 333 at [8] to [21], VENM is waste. The defendant's attempt to distinguish *Huntley* was unpersuasive. In any event, and as noted above, many deliveries of waste were made between 12 May and 21 June 2006 which, on any view, were not VENM. 10 Secondly, there were inconsistencies between the defendant's evidence and that of Mr Edrupt and Carly Drum (who worked with Mr Edrupt at the waste facility weighbridge). Mr Edrupt said that he received his day-to-day instructions from the defendant. Further, he was never made aware of the suspension of the licence. Instead, on 16 May (four days after the suspension came into effect) the defendant told him not to let trucks through as the driveway was getting fixed. Moreover, the defendant called Mr Edrupt after 16 May to instruct him to let certain trucks in carrying black soil. Ms Drum also said that she did not know the licence had been suspended. Mr Edrupt told her that the trucks had to stop coming in as the driveway needed to be fixed. According to Ms Drum the defendant also rang her up after that date (16 May 2006) to instruct her to let certain trucks in, including from companies known as Yammine and Riverstone Remediation. The defendant denied doing so other than in respect of trucks carrying what he believed to be VENM and said he was surprised that Mr Edrupt and Ms Drum were unaware of the suspension as he had told the office to let them know. The defendant also explained that, although he had received the notice of intention to suspend the licence (on 15 March 2006) and had responded thereto (on 28 March 2006), he had tried to distance himself from the waste facility because, by this time, he

had an offer from Riverstone Remediation and Mr Gibbs was concerned about a potential conflict of interest. Further, the defendant was exceedingly busy at this time working out of the office for long hours on multiple projects.11 It is sufficient to observe that I am satisfied beyond reasonable doubt that Mr Edrupt and Ms Drum did not know about the suspension of the licence at any relevant time. However, the defendant knew about the suspension of the licence but did not take adequate steps to inform himself about its requirements. He also did not ensure that Mr Edrupt and Ms Drum were fully apprised of the situation. While the defendant was very busy on other projects, I do not accept that he took any recognisable step to distance himself from the management of the waste facility and transfer his management responsibilities to any other person. The defendant remained the general manager of Riverstone Earthmoving throughout the relevant period. Many of the trucks entering the premises to deposit waste after the licence suspension involved entities that had made arrangements about price directly with the defendant. 12 Thirdly, it was apparent from the defendant's submissions that the defendant believed his liability should be limited to trucks that he knew were entering the waste facility on and from 12 May 2006 and should have known were not carrying VENM. This involves a serious misunderstanding of the environmental compliance requirements of the POEO Act. Those who are directors of or accept management positions in corporations carrying out a scheduled activity under an environmental protection licence thereby accept important and onerous responsibilities. The statutory scheme is obviously directed at ensuring that such people personally ensure that the corporation in which they carry out their directorial or management activities has in place the required systems to avoid breaches of environmental laws. Under s 169, if the corporation breaches the POEO Act, then each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision unless the person can establish that they were not in a position to influence the conduct of the corporation in relation to its contravention of the provision or were in such a position but used all due diligence to prevent the contravention by the corporation. The defence of a contravention by a person without "the knowledge actual, imputed or constructive of the person" was repealed from 1 May 2006 (by the *Protection of the Environment Operations Amendment Act* 2005) and required a defendant to prove the lack of all three classes of knowledge.

Mere lack of actual knowledge was never a defence for directors or persons concerned in management. Further, the offence created by s 144 of the POEO Act is a strict liability offence and thus knowledge is not an element of that offence. 13 Fourthly, and accordingly, the source of liability is the capacity to influence the corporation not to contravene the law and the failure to use all due diligence to prevent the contravention. I am satisfied beyond reasonable doubt that any systems Riverstone Earthmoving had in place were woefully inadequate to ensure that the corporation did not continue to use the premises as a waste facility after the licence had been suspended. The defendant was in a position to influence the corporation in its contravention of s 144 but took no steps to prevent the corporation doing so up to 16 May 2006 and very inadequate steps thereafter. The fact that Mr Gibbs was in the same position is obvious, but does not alter the defendant's own liability. Similarly, the fact that Riverstone Earthmoving itself could have been prosecuted is not to the point. Section 169(2) permitted the EPA to proceed against the defendant without having proceeded against the corporation. The choice of defendant was a matter for the EPA alone to determine. 14 The defendant's apparent belief in his own limited responsibility for the situation in which he now finds himself (that is, as a defendant to a criminal charge) discloses a lack of understanding of the system of environmental regulation in New South Wales and his personal responsibilities under the POEO Act as the general manager of a corporation carrying out scheduled activities under the authority of an environment protection licence. His submissions disclosed that this lack of understanding continues to date. This makes it difficult to accept the guilty plea as a full and proper expression of the defendant's remorse and contrition for his conduct. This difficulty was reinforced by the defendant's wholly unfounded speculation in submissions of some improper conduct by the EPA towards him and/or Riverstone Earthmoving. 15 The defendant's culpability is not trivial. Waste management is an industry with significant potential for environmental harm. It is an industry where adequate environmental management systems are critical. I am satisfied beyond reasonable doubt that Riverstone Earthmoving's systems, such as they were, were extraordinarily poor. So poor, indeed, that even though the company was on notice of the proposed suspension of the licence, no steps were taken to ensure that anyone bothered to read and understand the notice of suspension when it arrived. No inquiry was made of the EPA to resolve

any uncertainty about the date the suspension took effect or whether the suspension allowed VENM to be brought in. The company traded on as normal until 16 May 2006 unaware of the date the suspension took effect (11 May 2006), even though the date is clear on the face of the notice. It traded on thereafter, believing VENM was not waste, on the basis of an incomplete and inaccurate understanding of the legislation that it never sought to clarify. Attempts, such as they were, to ensure that only VENM was deposited on site were sporadic, inadequate and ineffective. The defendant, a full time employee, was the general manager of this company. No amount of excessive work is an adequate or reasonable excuse for what occurred in this case. 16 With respect to s 241 of the POEO Act, I accept that there was no actual harm caused by the offence and that likely harm appears to have been limited to the circumstances that prompted the EPA to suspend the licence rather than the contravention, with the consequence that s 241(a) to (c) are largely immaterial. I also take into account that the site was a licensed waste facility subject to a suspension of licence and that the period of the unlawful activity was of a relatively short duration (12 May to 21 June 2006). In terms of s 241(d), the defendant was a person who had control over the causes of the offence, for the reasons given above. 17 With respect to s 21A of the *Crimes (Sentencing Procedure) Act 1999*, the defendant has no prior convictions, is a person of good character, is unlikely to re-offend, and entered a guilty plea on the second day of the hearing. Despite the lateness of the plea, the EPA accepted that it had some utilitarian value. 18 On the facts of this case both general and specific deterrence are relevant. General deterrence is important given the nature of the industry, its potential for environmental harm, and the significant obligations the POEO Act places upon directors and those concerned in the management of corporations. General deterrence considerations, however, cannot lead to a penalty disproportionate to the objective seriousness of the offence. As to specific deterrence, although I accept that the defendant is no longer involved in the waste industry, the defendant's experience is in project management, a field that covers a potentially vast range of industries including scheduled activities under the POEO Act. Further, the defendant indicated that he wished to be involved in the remediation of waste left on the waste facility to "clean his slate". Specific deterrence, therefore, remains a legitimate object of sentence. 19 The defendant is an undischarged bankrupt. His wages are not presently subject to any garnishee order. He said he had numerous debts that he was

repaying and thus had little left over from his present income of $120,000 per annum. He is married with two dependent children, one at school and one at university. I give the defendant's financial position some but not significant weight, having regard to the defendant's ongoing income earning capacity. 20 The EPA sought a costs order in its favour and indicated that its costs would be in the order of $30,000. No doubt these fairly significant costs reflect the fact that the defendant entered his guilty plea on the second day of the hearing only. On 31 March 2008 the defendant made a submission to the effect that there should be no costs order on the basis that: - (i) the EPA had not disclosed its real case against him but pursued an "undercover" method of inquiry with the consequence that the defendant did not understand why he had been charged until the end of the first day of the hearing, (ii) if the EPA had been up front then no hearing would have been necessary, (iii) much of the EPA's evidence was not used at the hearing, (iv) awarding costs would limit the defendant's ability to recycle the waste at the waste facility, (v) the defendant's capacity to pay is constrained, and (vi) the real background to the case is the EPA's intention to close the waste facility despite the result of proceedings in 2002 allowing the waste facility to remain open. I do not accept these submissions other than (v). The summons clearly disclosed the case against the defendant. There is no evidence to support the defendant's unfounded allegations of misconduct by the EPA. Much of the EPA's evidence was not required at the hearing because of the late change of plea. As to (v), I do not consider it a reason not to make a costs order against the defendant.21 The EPA drew my attention to other cases involving breach of s 144 of the POEO Act. Each case turns on its own facts but sentences should be even handed. The facts in those cases, however, are not analogous. None involved the suspension of a licence. All were decided at a time when the maximum penalty for individuals for breach of s 144 of the POEO Act was $120,000. 22 Having regard to all of the factors set out above, I accept the EPA's submission that this offence, while not trivial, falls at the lower end of the scale of seriousness. I also accept that a conviction and penalty are required in all of the circumstances. I consider that a single penalty of $20,000 is warranted with a small deduction (10%) in recognition of the utilitarian value of the plea of guilty, being significantly less than might have been the case if entered at an earlier time. Accordingly, a total penalty of $18,000 is to be imposed.23 For these reasons:(1) The defendant is convicted of the

offence charged.(2) The defendant is fined the sum of $18,000.(3) The defendant is to pay the prosecutor's costs as agreed or assessed.(4) The exhibits are returned.**********