SUPREME COURT OF QUEENSLAND

CITATION:	*Gold Coast Boats Pty Ltd v Nixon* [2018] QCA 221
PARTIES:	**GOLD COAST BOATS PTY LTD** **ACN 160 410 613** **(applicant)** **v** **MANDY-LOU NIXON** **(respondent)**
FILE NO/S:	CA No 262 of 2017 DC No 83 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Southport – [2017] QDC 246
DELIVERED ON:	18 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2018
JUDGES:	Sofronoff P and Philippides JA and Daubney J
ORDERS:	**1. The applicant has leave to appeal.** **2. The appeal is dismissed.** **3. The appellant shall pay the respondent's costs of and incidental to the appeal, including the application for leave to appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – OTHER CASES – where the applicant was charged under the *Marine Safety (Domestic Commercial Vessel) National Law* with operating a vessel without a certificate of operation and causing or permitting another to perform duties or functions without a certificate of competency – where the charges were brought one day outside the limitation period – where the Acting Magistrate imposed a stay on that basis – where the imposition of that stay was appealed to the District Court – where the learned District Court Judge set aside the stay – whether the learned District Court Judge correctly interpreted s 4B of the *Crimes Act* in setting aside the stay – whether s 4B(3) of the *Crimes Act* only has effect where a punishment of imprisonment is provided – whether s 4B(3) only applies to a body corporate when a pecuniary penalty may be imposed on a natural

person convicted of the same offence

Crimes Act 1914 (Cth), s 3(2), s 4AA, s 4AB, s 4B, s 15B, s 16
Crimes Act 1914 (as passed), s 21, s 24, s 57, s 90 (repealed)
Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth) sch 1, s 53, s 65

Inco Ships Pty Ltd v Barber [2009] TASSC 55, cited
Spencer v Cooma-Monaro Shire Council [2008] ACTCA 18, cited

COUNSEL: K C Kelso for the applicant
B J Power for the respondent

SOLICITORS: Parley Legal for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Daubney J and with the orders his Honour proposes.

[2] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Daubney J. I agree with his Honour's reasons and the orders proposed.

[3] **DAUBNEY J:** By a complaint and summons sworn on 2 February 2017, the applicant was charged with three offences under the *Marine Safety (Domestic Commercial Vessel) National Law* 2012 (Cth). Each offence carries a maximum penalty of 60 penalty units.

[4] On 6 March 2017, a Magistrate ordered a stay of the charges on the basis that they had been brought one day outside the one year limitation period prescribed by s 15B(1A)(b) of the *Crimes Act* 1914 (Cth) ("the *Crimes Act*").

[5] The respondent complainant appealed to the District Court against the stay pursuant to s 222 of the *Justices Act* 1886 (Qld). On 21 September 2017, that appeal was allowed and the stay was set aside.

[6] The applicant now seeks leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967. Given the argument raised by the applicant, the respondent did not oppose the grant of leave and, as is conventional, the applicant's substantive arguments were canvassed in the hearing before this Court.

[7] There was no factual contest between the parties for present purposes. In particular, it was not in issue that the complaint and summons was issued more than one year after the alleged offences were committed.

[8] The only argument before this Court was one of statutory interpretation. Whilst this particular argument had not been raised in the courts below, the respondent did not oppose it being ventilated in the present hearing.

Legislation

[9] The applicant was charged under ss 53(1) and 65(1) of the *Marine Safety (Domestic Commercial Vessel) National Law* 2012[1]:

> "53 Offence – operating etc. a vessel without a certificate of operation (owner)
>
> (1) The owner of a domestic commercial vessel commits an offence if:
>
> (a) the owner operates the vessel, or causes or permits the vessel to be operated by another person; and
>
> (b) the operation of the vessel is not authorised by a certificate of operation in force for the vessel; and
>
> (c) the vessel is not exempt from the requirement to have a certificate of operation (see section 143).
>
> Penalty: 60 penalty units.
>
> …
>
> 65 Offence – owner causing etc. performance of duties or functions without a certificate of competency
>
> (1) The owner of a domestic commercial vessel commits an offence if:
>
> (a) the owner causes or permits another person to perform duties or functions in relation to the vessel; and
>
> (b) the regulations require the other person to hold a certificate of competency of a particular kind in order to perform those duties or functions; and
>
> (c) the other person does not hold a certificate of competency of that kind; and
>
> (d) the other person is not exempt from the requirement to hold a certificate of competency of that kind (see section 143).
>
> Penalty: 60 penalty units.
>
> (2) An offence against subsection (1) is an offence of strict liability."

[10] A "penalty unit" is relevantly defined in s 4AA of the *Crimes Act* to mean the amount of $210 (subject to indexation).

[11] The argument in this Court turned particularly on the terms of s 4B of the *Crimes Act*, which provides:

> "**4B Pecuniary penalties – natural persons and bodies corporate**
>
> (1) A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless

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1 Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act* 2012 (Cth).

the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons.

(2) Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:

Term of Imprisonment x 5

where:

Term of Imprisonment is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

(2A) Where a natural person is convicted of an offence against a law of the Commonwealth in respect of which a court may impose a penalty of imprisonment for life, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding 2,000 penalty units.

(3) Where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.

(3A) Where an Act (whether enacted before or after the commencement of this subsection) confers power to make an instrument (including rules, regulations or by-laws but not including a law of a Territory) and specifies the maximum pecuniary penalty that can be imposed for offences created by such an instrument, then:

(a) unless the contrary intention appears, the specified penalty is taken to be the maximum penalty that the instrument can prescribe for such offences by natural persons; and

(b) where a body corporate is convicted of such an offence – the specifying of that penalty is not to be treated as an indication of a contrary intention for the purposes of applying subsection (3).

(4) Where under a law of the Commonwealth any forfeiture, penalty or reparation is paid to a person aggrieved, it is

payable to a body corporate where the body corporate is the person aggrieved."

[12] The time limits for commencement of prosecutions are set out in s 15B of the *Crimes Act*:

> "**15B Time for commencement of prosecutions**
>
> (1) Subject to subsection (1B), a prosecution of an individual for an offence against any law of the Commonwealth may be commenced as follows:
>
> (a) if the maximum penalty which may be imposed for the offence in respect of an individual is, or includes, a term of imprisonment of more than 6 months in the case of a first conviction – at any time;
>
> (b) in any other case – at any time within one year after the commission of the offence.
>
> (1A) A prosecution of a body corporate for an offence against any law of the Commonwealth may be commenced as follows:
>
> (a) if the maximum penalty which may be imposed for the offence in respect of a body corporate is, or includes, a fine of more than 150 penalty units in the case of a first conviction – at any time;
>
> (b) in any other case – at any time within one year after the commission of the offence.
>
> (1B) A prosecution of an individual for an offence that is taken to have been committed because of section 11.2 or 11.2A of the *Criminal Code*, or against another law of the Commonwealth dealing with aiding and abetting, in relation to an offence committed by a body corporate may be commenced as follows:
>
> (a) if the maximum penalty which may be imposed for the principal offence in respect of a body corporate is, or includes, a fine or more than 150 penalty units in the case of a first conviction – at any time;
>
> (b) in any other case – at any time within one year after the commission of the offence by the individual.
>
> (2) Notwithstanding any provision in any law of the Commonwealth passed before the commencement of this Act and providing any shorter time for the commencement of the prosecution, any prosecution for an offence against the law may be commenced at any time within one year after the commission of the offence.

> (3) Where by any law of the Commonwealth any longer time than the time provided by this section is provided for the commencement of a prosecution in respect of an offence against that law, a prosecution in respect of the offence may be commenced at any time within that longer time."

The District Court appeal

[13] The point taken by the present respondent before the learned District Court Judge was that the learned Magistrate who had granted the stay had proceeded on an erroneous interpretation of the relevant statutory provisions. Argument focused on the Magistrate's construction of s 4B(3) of the *Crimes Act* as a "discretionary provision", from which the Magistrate had concluded that the applicable maximum penalty in respect of each of the offences for the purposes of s 15B(1A) was 60 penalty units and that, on that basis, the proceedings had been commenced out of time. The present respondent argued, and the learned District Court Judge accepted, that s 4B(3) does not involve the discretion contemplated by the Magistrate, and that the operation of s 4B(3) dictated a maximum penalty in the case of the present corporate respondent of 300 penalty units. By applying s 15B(1A)(a), this meant that the prosecution could be commenced at any time. His Honour held that the prefatory words in s 4B(3) "where a body corporate is convicted of an offence" convey the "obvious proposition that no penalty is imposed on a body corporate unless it is actually convicted (rather than delaying resolution of the question until after conclusion of a trial)", and that the operation of s 4B(3) is "confined to those cases where the individual pieces of legislation may not have set out a penalty regime for a corporate defendant".

The present argument

[14] The applicant's present argument is founded on the following propositions:

(a) That s 4B(3) of the *Crimes Act* only has effect in respect of offence provisions for which a punishment of imprisonment is provided, and

(b) That s 4B(3) only applies to a body corporate when it is possible for a pecuniary penalty to be imposed on a natural person convicted of the same offence.

[15] In advancing these propositions, the applicant focused on the specification in s 4B(3) that the Court may "impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence". It was argued that, for the purposes of applying s 4B(3), a pecuniary penalty could only be imposed on an individual in two ways, namely where a period of imprisonment attached to the offence provision or where the offence provision specifically stated a pecuniary penalty of some specified amount. Under the first of these scenarios, subsections 4B(2) and (2A) permit the Court to impose a pecuniary penalty instead of, or in addition to, a penalty of imprisonment.

[16] In this regard, the applicant also argued that the specification of 60 penalty units in each of the sections under which the applicant was charged was not a "pecuniary penalty", but was a fine. A "pecuniary penalty" was said to be the term applied to

a penalty imposed when a term of imprisonment had effectively been converted into a monetary penalty or a penalty specifically stated to be a pecuniary penalty.

[17] In my view, none of these arguments can be accepted.

[18] The term "pecuniary penalty" means precisely what it says. According to the Macquarie Dictionary, a "penalty" is "a punishment imposed or incurred for a violation of law or rule." A "pecuniary penalty" is punishment which involves the payment of money. It is to be contrasted with a custodial penalty, which involves imprisonment. In former times, it would have been contrasted with corporal punishment and capital punishment.

[19] The applicant sought to rely on the original wording of s 16 of the *Crimes Act* (as passed), which provided:

> "16(1) Subject to this Act, the penalty set out at the foot of any section or sub-section of this Act is the maximum penalty which may be imposed in respect of an offence against the section or sub-section, but the Court before which any offender is convicted may impose any lesser penalty and, if it thinks a pecuniary penalty sufficient to meet the case, may impose a fine in lieu of imprisonment.
>
> (2) The maximum fine for an offence against this Act shall, unless the contrary intention appears, be as follows –
>
> (a) on conviction on indictment, Two hundred pounds; and
>
> (b) on conviction before a Court of Summary Jurisdiction, One hundred pounds."

[20] That section, however, did not define the term "pecuniary penalty" in such a way as to confine its meaning to situations where the penalty was imposed as an alternative to incarceration. Rather, the term described the nature of the penalty which the Court had a discretion to impose in lieu of imprisonment, but it was not limited to that context. When one reads further in the *Crimes Act* (as passed), this understanding is confirmed. The offence provisions in the *Crimes Act* (as passed) specified penalties which were either custodial penalties of stated maximum terms of imprisonment or pecuniary penalties of stated maximum amounts of currency.[2]

[21] So, for example, s 57 of the *Crimes Act* (as passed) provided:

> "57. Any person who utters any counterfeit coin, knowing it to be counterfeit, shall be guilty of an indictable offence.
>
> Penalty: Imprisonment for three years."

Section 90 of the *Crimes Act* (as passed) provided:

> "90. Any person who, without lawful excuse (proof whereof shall lie upon him), suffers or permits any cattle or other live stock in his possession, custody, or control, to trespass or stray upon any land belonging to, or in the occupation of, the Commonwealth, shall be guilty of an offence.

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2 Other than the offence of treason, which was a capital offence under s 24 of the *Crimes Act* (as passed).

Penalty: Five pounds."

[22] The relevant time limitation provision in the *Crimes Act* (as passed) was s 21(1), which provided:

> "21.(1) A prosecution in respect of an offence against this or any other Act or any regulation under any Act may be commenced as follows:
>
> (a) where the maximum term of imprisonment in respect of the offence in the case of a first conviction exceeds six months – at any time after the commission of the offence;
>
> (b) where the maximum term of imprisonment in respect of the offence in the case of a first conviction does not exceed six months – at any time within one year after the commission of the offence; and
>
> (c) where the punishment provided in respect of the offence is a pecuniary penalty and no term of imprisonment is mentioned – at any time within one year after the commission of the offence."

[23] It is quite clear that s 21(1)(c) was directed to the offence provisions such as s 90 which, in accordance with the legislative drafting conventions of the time, specified actual amounts as the maximum fines which constituted the pecuniary penalty. The reference there to "pecuniary penalty" had nothing to do with a conversion of a custodial penalty to a pecuniary penalty, as was permitted by s 16(1).

[24] The applicant's current argument proceeds on an assumption that, in the current iteration of the *Crimes Act*, the specification of a penalty in terms of "penalty units" is not the imposition of a "pecuniary penalty". That assumption is incorrect. As explained above, the term "pecuniary penalty" is descriptive of the nature of the penalty imposed. Reference to "penalty units" is a legislative tool for quantifying the pecuniary penalty imposed instead of the legislation specifying stated, exact amounts, as was formerly the drafting convention. Indeed, s 4AB of the *Crimes Act* provides a mechanism for the conversion of pecuniary penalties expressed in legislation in stated dollar amounts to penalty units:

> "**4AB Conversion of pecuniary penalties expressed in dollar amounts to penalty units**
>
> (1) A reference in a law of the Commonwealth or in a Territory Ordinance to a pecuniary penalty of D dollars where D is a number, is taken to be a reference to a pecuniary penalty of P penalty units, where P is:
>
> (a) if D ÷ 100 is a whole number – that whole number; or
>
> (b) if D ÷ 100 is not a whole number – the next highest whole number.
>
> (2) Subsection (1) does not apply to a reference to the maximum amount of a penalty that is not imposed by

a court, or by a service tribunal under the *Defence Force Discipline Act 1982*.

(3) Subsection (1) does not apply to:

(a) section 76 of the *Competition and Consumer Act 2010*; or

(c) a provision of a law of the Commonwealth prescribed for the purposes of this subsection.

(4) In this section:

penalty includes a fine.

Territory Ordinance has the same meaning as in section 4AA."

[25] The applicant's argument that the specification of 60 penalty units in each of the relevant offence sections was not a "pecuniary penalty" but a fine also cannot be sustained in the face of s 3(2) of the *Crimes Act* which provides that a reference to a fine includes a reference to a pecuniary penalty (other than certain specified pecuniary penalties under specific pieces of legislation).

[26] Accordingly, I do not accept that the term "pecuniary penalty" in s 4B is limited in meaning in the way contended for by the applicant.

[27] This rejection of the applicant's interpretation of "pecuniary penalty" also means that the applicant's argument about the construction of s 4B(3) cannot be accepted.

[28] The applicant's argument to the effect that the operation of s 4B(3) is related to subsections 4B(2) and (2A) fails to appreciate the distinction between those sections. Subsections 4B(2) and (2A), on the one hand, and s 4B(3), on the other, respectively deal with discrete topics.

[29] The former confer a discretion on a sentencing court to effectively convert all or part of a custodial penalty to a pecuniary penalty.

[30] The discretion on a sentencing court under s 4B(3) is quite different. As was said by Blow J (as he then was) in *Inco Ships Pty Ltd v Barber*[3], all that s 4B(3) does "is to make the maximum fine for a corporation five times the maximum fine for a natural person". Like his Honour[4], I am fortified in that view of the plain meaning of s 4B(3) by reference to the relevant Explanatory Memorandum[5] which relevantly said:

> "Subsection (3) provides for a similar scheme in respect of offences committed by bodies corporate. It provides that bodies corporate are subject to pecuniary penalties equal to five times the amount applicable to natural persons convicted of the same offence, irrespective of whether the pecuniary penalty for the natural person is found in the law creating the indictable offence or whether the

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3 [2009] TASSC 55 at [6].

4 At [7].

5 Explanatory Memorandum to the *Crimes Legislation Amendment Bill* 1987.

> pecuniary penalty is derived pursuant to proposed sub-section 4B(2)."

[31] The applicant also sought to rely on the following observations by the Australian Capital Territory Court of Appeal in *Spencer v Cooma-Monaro Shire Council*[6]:

> "Section 4B is a technical provision applying to offences for which the only penalty is a term of imprisonment. The section permits a court to impose a pecuniary penalty on a natural person convicted of the offence and enables it to impose such a penalty on a body corporate convicted of an offence. The conversion factor applies in relation to convictions – it provides no basis for a civil action of any kind."

[32] That case, in fact, was not concerned with the interpretation of s 4B, but rather was an appeal against a Master's decision that summary judgment should be granted in the action on the grounds that the appellant's statement of claim did not disclose a cause of action. The quoted observations by the Court of Appeal were clearly *obiter dicta* in an appeal which was primarily concerned with a point of procedure. Moreover, they were preliminary remarks delivered by the Court in an *ex tempore* judgment. The quoted remarks were clearly intended to be a general description only, and did not purport to provide a definitive interpretation of s 4B.

[33] For all of these reasons, I do not accept either of the propositions on which the applicant's present argument is based.

Disposition

[34] Given the nature of the argument raised by the applicant, and in light of no relevant opposition by the respondent, it is appropriate that the applicant have leave to appeal. For the reasons I have given, however, I would dismiss the appeal.

[35] I would therefore make the following orders:

1. The applicant has leave to appeal;
2. The appeal is dismissed;
3. The appellant shall pay the respondent's costs of and incidental to the appeal, including the application for leave to appeal.

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6 [2008] ACTCA 18 at [2].