MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Department of Transport and Main Roads v NM & AA Foley Contracting Pty Ltd* [2023] QMC 5
PARTIES:	Department of Transport and Main Roads **v** NM & AA Foley Contracting Pty Ltd
FILE NO/S:	1875/22
DIVISION:	Magistrates Courts
PROCEEDING:	Sentence
ORIGINATING COURT:	Holland Park
DELIVERED ON:	11 July, 2023
DELIVERED AT:	Holland Park
HEARING DATE:	16 May, 2023
MAGISTRATE:	Young, S
ORDER:	**(One fine) $1,200,000. Conviction recorded.**
CATCHWORDS:	s.26C *Heavy Vehicle National Law*; s26H *Heavy Vehicle National Law* - 37 charges for employed drivers contravening fatigue regulations - obligation to ensure safe operation of transport activities - amount of fine having regard to specific and general deterrence - s. 48 *Penalties and Sentences Act*
SOLICITORS:	Mr Louden for the Department Mr Walters of counsel instructed by Connolly Suthers for the defendant

[1] The defendant NM & AA Foley Contracting Pty Ltd entered a guilty plea on the 16 of May 2023 to 37 charges of contravening s 26H of the *Heavy Vehicle National Law* ("HVNL") by failing to meet the safety duty imposed upon its transport activities under s 26C of the HVNL.

[2] In essence, a total of eight of the company's truck drivers committed a large number of fatigue regulated breaches during a five week period from 1 July, 2020 to 6 August, 2020. S 26C gave the defendant a positive duty to prevent these breaches.

[3] While the breaches of the drivers are not the basis upon which the defendant is sentenced, it is appropriate by way of context and in identifying the relative seriousness of the defendant's conduct to note the following:

That is, for each week ending:

5 July 2020: 26 critical risk breaches, two severe risk breaches, seven substantial risk breaches, and 29 minor risk breaches;

12 July 2020: 21 critical risk breaches, one severe risk breach, three substantial risk breaches, and 26 minor risk breaches;

19 July 2020: 18 critical risk breaches, five severe risk breaches, three substantial risk breaches, and 26 minor risk breaches;

26 July 2020: (work reduced by rain) six critical risk breaches, one severe risk breach, four substantial risk breaches, and seven minor risk breaches;

2 August 2020: 12 critical risk breaches, 8 severe risk breaches, 4 substantial risk breaches, and 26 minor risk breaches.

TOTAL: 83 critical risk breaches, 15 severe risk breaches, 14 substantial risk breaches, and 81 minor risk breaches.

[4] The terms critical, severe, substantial, and minor risk breaches are defined under s 222 of the *Heavy Vehicle National Law* (thereafter referring to the national regulations) and are made offences under s 250 HVNL (or s 254 as the case may be).

[5] It is important to note that neither the drivers nor executive officers of the defendant company (s 636 HVNL) are being sentenced today. The defendant's duty was to ensure the safety of its transport operations by not encouraging the drivers to work excessive hours in breach of the fatigue regulated hours (applicable to each driver) and failing to eliminate or minimise a public risk by taking reasonably practicable steps to ensure a driver did not exceed the maximum hours to be worked as a solo driver.

[6] All drivers were engaged by the company to transport very large rocks (between five and eight tonnes each) from the Ravenswood goldmine to a stockpile near the construction of the Port of Townsville Expansion Project. On the 6 August 2020 one of the drivers misjudged the hydraulics on the side tipper mechanism of the trailer and caused the entire combination to fall over on its side. Fatigue is explicitly excluded as part of the reason for the incident, however as a result of the subsequent investigation the defendant was charged with the 37 offences before the court.

[7] It is perhaps fortunate given the large number of breaches which involve the drivers driving on public roads that the offences were discovered in this way rather than through something more tragic or fatal.

[8] The defendant paid its drivers by way of a generous hourly rate and unsurprisingly the relevant drivers sought to maximise their income but in doing so paid little regard to the fatigue regulated driver obligations of the HVNL. The drivers submitted weekly workbooks as the basis of their hourly claims. Even a cursory

review of the hours worked by the drivers on a weekly basis shows significant concerns but instead of stepping in to end the drivers offending conduct, the defendant paid them substantially - although not entirely - in accordance with their claims, and in doing so have been held to have encouraged the drivers to continue to disregard their fatigue obligations.

[9] It is relevant to the culpability of the defendant that in paying the drivers in such a way the defendant needed to be proactive in avoiding circumstances of the drivers not complying with the fatigue regulations to increase their take home pay. As the opportunity and temptation to the drivers was obvious, the company needed to be diligent in overseeing the obvious risk.

[10] Of the 40 weekly worksheets submitted by the drivers over the relevant period some 31 were modified by the defendant's officers after reference back to the drivers about their claims. The modified worksheets that form the basis of the relevant charges therefore confirm the defendant was fully aware of the drivers offending conduct.

[11] As an aside, the Department was refused leave to introduce further information about the drivers' conduct subsequently obtained in their investigation, primarily on the basis that this information was not part of the particularised charges. This refusal was further reinforced when in defence counsel's verbal submissions it was stated that the defendant did not own any of the 90 odd vehicles involved in the transportation of the rocks from the Ravenswood gold mine - as such paragraphs 95 to 99, and 155 and 156 of the of the Facts were disregarded by the court.

[12] Before turning to the law, it is noted in mitigation of penalty the defendant has no prior or subsequent history of offending and entered an early plea of guilty to the charges for the purposes of s 13 of the *Penalties and Sentences Act*. This plea of guilty has particular utility, perhaps best understood in the context that the Agreed Facts, Schedules and respective sentencing submissions consisted of more than 1,300 pages. I have had regard to all of those documents even if they are not explicitly referenced in these reasons. I have reduced the penalty from what might otherwise have been applied to reflect the early plea of guilty.

[13] The director of the company Mr. Foley who was present in court for the plea and submissions also cooperated with the Department's investigations by undertaking two recorded interviews and providing documents on behalf of the company as required. However, it was disturbing for the Court to hear in those interviews that even an experienced transport operator such as Mr Foley had little understanding and regard to the obligations of the company to ensure its drivers were complying with the HVNL and felt that he had so little ability to do so. The Court can only hope this is not a widespread attitude within the industry, but regardless, this speaks to the need for specific and general deterrence.

[14] It seems the company had made some progress to retrain its drivers after the period of the offences but with limited success: as at November 2020 similar issues of logbook corrections and fatigue breaches were still being observed by investigators although no charges for such are before the court today. In submissions defence counsel informed the court that earlier this year, 2023, the defendant has engaged a separate employee to deal with logbook and driver fatigue related matters and that limitations on driver hours are now in force. In the absence of further information, I

am not satisfied that this fully deals with the company's rehabilitation, and only modestly reduces aspects of specific deterrence relevant to the sentence.

Penalty Ranges and Submissions

[15] In accordance with the relevant annual uplift to the penalties under the *Heavy Vehicle National Law* the maximum penalty for the defendant company for each charge is $569,790 therefore for 37 charges the maximum penalty is $21,082,230.

[16] Under s 46(1) of the *Penalties and Sentences Act* the maximum penalty that can be imposed in this court for a single offence is 835 penalty units for a company. At the relevant time the penalty unit was $133.45 so the largest fine that can be imposed by this court for 37 charges is a modest $4,122,937.75. No issue was raised by either party regarding the jurisdiction of this Court to apply an appropriate fine.

[17] The Department submits that this is a most serious example of the offending conduct by the defendant, whereas defence counsel submitted that it was a moderate to serious example of the offending conduct, utilising as an expression of convenience: 50% to 75%.

[18] The Department seeks a fine of $2.1 million to $2.5 million (and there is some logic to that which I shall come to momentarily). The Department accepts that this is an early plea with utility in the administration of justice, there was cooperation with the investigation and the company has no prior or subsequent offences. The Department seeks a penalty with significant deterrence aspects, both specific and general.

[19] The court was not prepared to accept the Department's submission that the defendant company be viewed as part of a wider conglomerate of companies allowing the court to impose a much larger fine having regard to the overall financial resources of that grouping. Leave was also refused for the Department to tender a further arch-lever folder of information about other companies involved in the Townsville Expansion Project. Despite the apparent views of the Department, the defendant company is a stand-alone entity and must be assessed for penalty on its own position, resources, and culpability. The significance of s 48 of the *Penalties and Sentences Act* regarding the defendant's capacity to pay a fine probably represents the largest disparity between the positions of the parties.

[20] Ultimately the defendant did not make any submissions about appropriate penalty through counsel but instead chose to rely upon a letter from the company's accountant enclosing two years of financial statements. Those statements are brief and limited in their assistance to the court.

[21] It is not particularly appropriate that the defendant's accountant's covering letter includes a statement that he has been informed by a director of the company (the same Mr. Foley who was in court) that if a fine of $200,000 or less was imposed that financial assistance would be provided to ensure the company would be able to pay the amount.

[22] Defence counsel in his submissions also referred to the intention to pay a fine of up to this amount as being reflective of the genuine intention of a good corporate citizen to see that some material benefit is returned to the community through a fine

that was able to be paid rather than an amount that would see the company wound up.

[23] I choose to consider the intention expressed in this communication as an expression of remorse and genuine intent. It could just as easily be regarded as a form of ultimatum to the court.

[24] Even choosing to view this expression as I do, it carries limited weight for a number of reasons:

1. Being contained in a letter rather than in an affidavit of either the accountant or Mr. Foley. For the accountant it is hearsay;
2. There is no binding commitment upon anyone to support the company financially.
3. The defendant is a 'two dollar company' as it is colloquially known, it has no assets or apparent resources and no capacity to pay any fine on the basis of the limited financial information provided. The directors could resolve to wind up the company for any amount of fine;
4. Nothing prevents the directors/shareholders from providing that level of resources to the company in partial payment of a larger fine and winding up the company for the balance;
5. I noted to defence counsel in submissions that the $200,000 amount represents under two thirds of the dividend paid to shareholders in the 2020-2021 financial year;
6. Despite the court inviting a submission on sentence from the defendant - and with counsel adjourning to confirm instructions from Mr. Foley - no other position was put forward. Most relevantly, no commitment or binding undertaking (of whatsoever nature) was advanced;
7. Such resourcing has not already been provided to the company. Not that there is any requirement to do so, but the submission might have carried more weight with a proactive effort;
8. Even considering the best position of the defendant – that of being a moderately serious example of the charges (which ultimately I do not accept) – a fine in the sum of $200,000 or less does not represent an appropriate sentence.

[25] I accept the defendant company has no apparent resources from which to pay a fine. It has no disclosed assets, no debtors, and would only appear to operate in more recent years with a modest level of profitability, although I have no detailed information of income and expenses. The defendant's net assets, according to the accountant, is some $4,500.

[26] This is directly relevant to the court's considerations of s 48 of the *Penalties and Sentences Act*: that is, in determining the amount of the fine and the way in which it is to be paid the court must, as far as practicable, take into account the financial circumstances of the offender and the nature of the burden that payment of the fine would be on the offender (s 48(1)).

[27] S. 48(5) also has some relevance although limited in the present circumstances: in fixing the amount of the fine the court may have regard to, amongst other matters, the value of the benefit received by the person because of the offence.

[28] However, without more detailed accounts it is impossible for the court to determine the value of the benefit received by the company for the five weeks of the offending conduct. The Department has submitted invoices (received from the defendant) for the value of the work claimed for the months of July 2020 and August 2020 (Exhibit 9). At face value these invoices are from a different entity although payment was directed to the defendant's bank account. I mentioned during submissions that this may represent an error holding over from a previous business structure although it may not necessarily be the case. A significant part of the invoice dated 1 August 2020 relates to the provision of 'Plant' in the sum of some $648,000 – perhaps the trucks delivering the rocks – but there is nothing to suggest that the defendant owned any Plant nor any way of knowing whether this receipt is to be offset against the hiring of the Plant by the defendant from some other person or entity.

[29] This difficulty might explain why the Department did not seek to apply the provisions of s 597 of the *Heavy Vehicle National Law* for a commercial benefits penalty order, which can be up to three times the amount estimated to be the gross commercial benefit received by an offender. Although this might otherwise have been an appropriate case for such an application, it has not been sought, and as such, has no relevance to the court's considerations of penalty.

[30] The written submissions on behalf of the defendant seek to advance a principle of parsimony in support of the amount of the fine that the directors might be prepared to pay or to resource to the company; it is submitted that the court should apply the minimum penalty that reflects the objective and subjective purposes of sentencing – in this case an amount that might be able to be paid rather than a symbolic amount that would see the company wound up.

[31] The principle of parsimony has no role in the exercise of the court's sentencing discretion in Queensland in this instance – and see for example paras 21 and 22 of the Court of Appeal decision in *R v Williams* [2017] QCA 307 in a different context. Apart from this principle, which I expressly reject, the submissions on behalf of the defendant represent an orthodox sentencing approach, relevantly s. 9 of the *Penalties and Sentences Act*, s. 48 as already discussed, and s. 49 of the *Penalties and Sentences Act* regarding the imposition of one fine for multiple offences of a similar nature or founded on the same facts. This is clearly appropriate here and this then gives rise to what is known as a totality consideration.

[32] The 'totality' of the sentence is that applicable to a five-week course of conduct giving rise to 37 charges. In some ways the number of charges give rise to an unrealistic understanding of the offending conduct itself. I prefer to approach the sentence as a course of conduct over five weeks rather than 37 discreet sentences to be considered noting that each relevant week the defendant had the information and indeed the obligation to step in and address the conduct of its drivers – but did not. I further note that the Department could easily have tendered one charge or five charges as 37; however in entering a plea of guilty to the 37 charges the maximum penalty of some $21 million is the relevant reference point for the court, not a lower amount that may have been available for fewer charges.

[33] Nothing in s 593 of the *Heavy Vehicle National Law* prevents the court from taking an approach of totality and it is appropriate to do so pursuant to the circumstances and to s 49 of the *Penalties and Sentences Act.*

[34] The department's submission of a fine of $2.1-2.5 million is based upon a relatively standard approach; that is under s 4(3)(a) of the *State Penalties Enforcement Regulation 2014* the fine payable for an infringement offence under *Heavy Vehicle National Law* is the lesser of 10% of the maximum penalty or 20 penalty units. This would represent approximately $2.1 million for the 10% or $1.85 million in penalty unit value for a company for 37 infringements. The uplift to $2.5 million appears to represent the 'most serious' categorisation of the offences by the Department.

[35] Tickets cannot be issued for these offences and penalty must be assessed only by a court. Whilst the court can have regard to the integrity of a ticketing system in determining a penalty in the exercise of the courts sentencing discretion, this is not particularly compelling in these circumstances. Nor is it appropriate for a purely mathematical approach to be adopted having regard to the court's discretion and considerations, as expressed in s 9(2) and s 9(3) of the *Penalties and Sentences Act.*

[36] There are no comparative decisions to assist the court in this matter from any jurisdiction but as a plea of guilty it is an exercise in applying fundamental sentencing principles rather than examining any of the many ambiguities in the definitions of the *Heavy Vehicle National Law*; such issues have been avoided by the plea of guilty and are in no small way part of the utility of the plea.

[37] There is however recent assistance to the court in matters of principle from the Court of Appeal in *R v Cordwell; R v Cordwell Resources Pty Ltd* [2023] QCA 26. It deals with uncertainties under the *Workplace Health and Safety Act 2011* (Qld) which, like the *Heavy Vehicle National Law,* is part of a unified national framework and has some broad application to the HVNL although it may be immediately noted that there are (or may be) distinct differences in certain defined terms under each Act.

[38] I would paraphrase Their Honour's reasoning expressed at paras [63] to [70] relevant to this sentence as follows:

1. Features of the *Heavy Vehicle National Law* are relevant to sentences as part of a national scheme. Duties are imposed upon the operators of transport activities in this context and the penalty also to be considered in the same way.
2. S 3 of the *Heavy Vehicle National Law* seeks to promote public safety and safe business practices, as such general and specific deterrence are particularly relevant in this sentence.
3. The *Heavy Vehicle National Law*, like the *Workplace Health and Safety Act*, imposes different categories of offences. The maximum penalties indicate the seriousness of the breaches; s 26H of the HVNL is a category 3 offence, the least serious category. However, it should be noted that in 2016 that the maximum penalty lifted from $30,000 to $500,000 - a considerable increase being an indication of the seriousness with which the legislature viewed such breaches.
4. The focus of the duty is not upon a particular outcome occurring but upon addressing the risk (however "risk" may be properly defined under the *Heavy Vehicle National Law*). It is the objective seriousness of the risk to which the company's conduct has exposed the public in its operation of transport activities that is to be assessed by the court in determining penalty.

5. Culpability for the offending must be regarded in the circumstances of the company's conduct including the potential consequences, what steps could have been taken to remove or minimise the risk and how difficult and complex such steps may have been.

[39] In those particular cases the individual defendant was sentenced to six months of imprisonment, immediately suspended for 12 months and the corporate defendant fined $500,000. The maximum fine for the company in that case was $3 million. The matter involved serious injuries to an employee at a sand plant on the Sunshine Coast. Leave to appeal the sentences was refused. Nothing mathematical can be taken from the Cordwell cases and the statements of principles outlined above do not dictate any particular outcome here, but must be applied by this court in the usual way.

[40] This is a matter where general and specific deterrence are particularly important; I regard the offending as a serious example of the conduct the legislation was seeking to curtail. I do not consider the offending to be the "most serious" as the risk of catastrophic harm, which existed, was not realised (and which by itself is not determinative but relevant), that the offending occurred over a relevantly short space of time and there has been some effort, even belatedly, by the company to address its systemic shortcomings. Other mitigating factors have already been noted.

[41] I have had regard to s 9, s 12, s 13, s 48 and s 49 of the *Penalties of Sentences Act* and I have turned my mind specifically to the factors of s 9(2) and (3) although not to the exclusion of other relevant consideration.

[42] I conclude that the mandatory considerations of s 48 are not reasonably practicable to be applied in this case in minimising the fine to the level sought by the defendant. The company has been set up, and conducted, in such a way as to minimise the risk to an individual's assets or position. It has virtually no capital, no assets, operates relatively modestly, in an acknowledged high-risk industry. As part of a wider conglomerate of entities (consistent with para 12 of the Schedule of Facts) the defendant company was designed for exactly this present situation – to be wound up in the event of an adverse event without exposing the wider business, other entities, individuals, or their assets, and is capable of being readily substituted - all else being equal. This is nothing more than a commentary on a properly executed business and asset protection strategy according to law.

[43] Therefore, the lack of capacity of the defendant to pay any fine is diminished in the weight to be given to s 48 of the *Penalties and Sentences Act.* It will not always be the case that a company is so completely replaceable in its own business. The legislature has already acknowledged the special position of corporate defendants by increasing by five times any fine applicable to an individual. Where, as is this case, a company's capacity to pay a fine is deliberately kept to an absolute minimum in accordance with an asset protection strategy, lower weight can be given to s 48 considerations.

[44] Further, as in these circumstances, where the disparity between a sentence reflecting appropriate denunciation and deterrence is significantly different from what the company might be prepared to pay, the balance falls in favour of denunciation and deterrence. Again, this will not always be the case, but is appropriate here. Specific

deterrence still has relevance (more so with respect to the officers of the company rather than the company itself which is likely to be wound up although that might be true of all corporate penalties) and more so than rehabilitation in the circumstances, although as I have mentioned all factors under s 9 were considered.

[45] The defendant has a high degree of culpability: firstly, it created the environment for the breaches to occur and had a moral and legal obligation to ensure its transport activities were properly managed. It is telling that not one or two, but 8 drivers took advantage of the opportunity to line their pockets at the expense of complying with fatigue management rules. Further, the company had the capacity as well as the obligation to step in to stop the egregious actions of its drivers when that became obvious. Such action was not overly difficult or complex - at worst, it was perhaps uncomfortable; the risk to innocent road users and the public generally was unacceptably high – even if not realised – and having regard to the maximum penalty of $21 million (there is no minimum) it justifies the court imposing a financial penalty that appears beyond the present means of the company.

[46] The need for general denunciation of this conduct in particular is more important than the company's preference to keep trading in its present state; although I agree with counsel for the defendant that a fine that does not see the company wound up might otherwise be preferable the difference between what is appropriate and what is affordable is too great to favour the company's submissions in this regard.

[47] Having regard to the significant mitigating factors of the defendant previously mentioned the company is fined the sum of $1,200,000. I direct the proper officer of the Court to refer the fine to SPER for registration.

[48] That this penalty has regard to each offending week as a course of conduct is as a matter of convenience; not every week was the same and the fine represents the appropriate denunciation of the conduct as a whole and is not based on some mathematical extrapolation of penalties or mechanical approach.

[49] Even for a first offence the seriousness of the matters makes it appropriate to record a conviction against the Defendant. No contrary submissions were made.