Neutral Citation Number: [2022] EWCA Crim 1465

Case No: 202102946 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM The Crown Court at Caernarfon
Her Honour Judge Nicola Jones
T20190131

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2022

Before:

SIR ADRIAN FULFORD
MRS JUSTICE CUTTS
and
MRS JUSTICE FARBEY

- -

Between:

GORDON ANDERSON	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Samantha Riggs (instructed by **Weightmans LLP**) for the **Appellant**
Christopher Stables (instructed by **Natural Resources Wales**) for the **Respondent**

Hearing dates: 16th August 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on [9th November 2022] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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SIR ADRIAN FULFORD:

History

1. On 8 March 2021, in the Crown Court at Mold before Judge Nicola Jones, the appellant (who is 67) pleaded guilty to two identically worded counts of failing to comply with or contravening an environmental permit condition, contrary to Regulations 38(2) and 41 of the Environmental Permitting (England and Wales) Regulations 2016 (counts 8 and 9). The particulars of the offence in each case were that between 1 January 2017 and 26 June 2018, in relation to land at Unit 1-1a & 2 Parkway, Deeside Industrial Park, Deeside, Clwyd, Paperback Collection and Recycling Limited ("PCR") had committed the offences in counts 1 and 2, and the offences reflected in counts 8 and 9 (respectively relating to counts 1 and 2) were committed with the consent or connivance of, or was attributable to, the neglect of the appellant, who was a director of the company (for the terms of counts 1 and 2, see [7] *et seq* below).

2. He pleaded guilty, additionally, to one count of operating a regulated facility otherwise than in accordance with an environmental permit, contrary to Regulations 38(1)(1), 12(1)(a) and 41 of the Environmental Permitting (England and Wales) Regulations 2016 (count 12). The particulars of the offence were that between 1 January 2017 and 26 June 2018, in relation to land at the former Anglesey Aluminium Works, Penrhos, Hollyhead, Anglesey, PCR had committed the offence in count 5, and this offence (*viz.* count 12) was committed with the consent or connivance of, or was attributable to the neglect of, the appellant, who was a director of the said company.

3. Counts 10, 11, 13 and 14 on the indictment were ordered to lie on the file in the usual terms.

4. On 18 August 2021, in the Crown Court at Caernarfon, Judge Jones sentenced the appellant on the three counts to concurrent terms of 15 months' imprisonment suspended for 18 months together with 250 hours unpaid work, and he was disqualified from being a director for 15 years under section 2 of the Company Directors Disqualification Act 1986. We note, *en passant*, that the maximum disqualification period that can be imposed is 15 years. The appellant now appeals against that overall sentence by leave of the single judge.

5. PCR was jointly charged with the appellant. The company, now in liquidation, entered guilty pleas on counts 1 – 7.

6. It is necessary to consider in greater detail the various counts faced by the appellant and PCR.

7. Counts 1 – 4 were charges against PCR of failing to comply with or contravening an environmental permit condition, contrary to Regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016.

8. On count 1 it was charged that PCR, between 1 January 2017 and 26 June 2018, in relation to land at Units 1-1a and 2 Parkway, Deeside Industrial Park, Deeside, Clwyd, failed to comply with Condition 2.3.1(a) of its environmental permit by storing in excess of 12,000 tonnes of external waste (that being the limit set by the permit). Count 8 was a mirror of count 1 and related to the appellant as the director of PCR. As set out above, given the company had committed the offence in count 1, the appellant was guilty of count 8, since the offence was committed with his consent or connivance or was attributable to his neglect as the director of PCR. Natural Resources Wales ("NRW"), the prosecuting authority, did not accept that Count 8 occurred merely as a result of neglect, it being the prosecution's case that the defendant consented to the decisions reached in the name of the company (indeed, he had made them), and connived in the determination and carrying out of those decisions (as he had day-to-day operational control of the company and its activities).

9. On count 2, PCR was charged that between the same dates and at the same premises (Deeside), it failed to comply with the same condition by failing to ensure that the dimensions of waste stacks were in accordance with the guidance document TGN7.01, and by failing to ensure that the required minimum separation distances between waste stacks existed and/or were maintained. Count 9, relating to the appellant, was a mirror of Count 2. The Crown did not accept that the failings in relation to the waste stacks as to maximum height and separation distances occurred – as averred by the appellant – only "some of the time"

10. On count 3, again between the same dates and at the same premises (Deeside), PCR was charged with failing to comply with condition 2.1.1 of its environmental permit by storing plastic waste, of EWC Code 19 12 04, in or on external areas at the land.

11. On count 4, PCR was charged that between 17 November 2017 and 26 June 2018 at the same premises at Deeside it failed to comply with Condition 2.4.1 of its environmental permit by failing to submit a written fire prevention and mitigation plan to NRW for approval within the time specified in the environmental permit.

12. On count 5, PCR was charged with operating a regulated facility otherwise than in accordance with an environmental permit, contrary to Regulations 38(1)(a) and 12(1)(a) of the Environmental Permitting (England and Wales) Regulations 2016, in that between 01 January 2017 and 26 June 2018, in relation to land at the former Anglesey Aluminium Works, Penrhos, Hollyhead, Anglesey ("Penrhos"), PCR operated, or knowingly caused or permitted the operation of, a regulated facility, namely a waste operation, without the authority of an environmental permit. Count 12 to which the appellant pleaded guilty was a mirror of Count 5.

13. We note that the owner or the proprietor of Penrhos was a company called Orthios Eco Parks (Anglesey) Ltd ("Orthios"), based in Christleton, just outside Chester. The company had been the proprietor of the site since May 2016. In February 2018, following receipt of an anonymous letter at the NRW Bangor office, officers found a large quantity of film-wrapped baled waste inside an extremely large A frame building at Penrhos, comprised of plastics mixed with other waste, which had been attributed with waste code 19 12 04 (*viz.* plastics

and rubber). This latter information was revealed in documents which were obtained during the investigation. The operation of Penrhos to store the baled waste was the basis of Counts 5 and 12 to which, as just set out, the company and the appellant pleaded guilty.

14. Copies of waste transfer notes showed the importation (*viz.* the deposit) of 8,686.3 tonnes, or 17,372 bales of waste, from Deeside to Penrhos. The A Frame building at Penrhos had been leased to PCR. There were no permits for either the importation of the waste or its storage. A waste exemption had been registered in respect of the waste stored at Penrhos, but the terms of the exemption were contravened, as it only allowed storage of up to 500 tonnes over a period of 12 months. A breach of the exemption rendered it void. PCR provided a copy of the exemption certificate to Orthios. As the operation at Penrhos grew, the landlord was advised incorrectly by the appellant that the appropriate permits were in place.

15. The *modus operandi* adopted during this criminality was that Penrhos was used to store waste when Deeside became full. The appellant knew that there was insufficient storage capacity at Deeside to accept the waste, which the company had been paid to accept, and Penrhos was specifically procured as additional storage space. The appellant was given clear advice by his environmental consultant about the 500-tonne limit. In September 2017 an application was made for a full permit for a plastic-to-waste recovery operation, which included storage, in respect of Penrhos site, but this was rejected. Therefore, despite having received clear advice from his environmental consultant, the appellant continued to transport baled waste to Penrhos beyond the amount permitted. The operation of that facility was entirely illegal: as just rehearsed, the breached exemption was voided and an environmental permit was never granted.

16. On count 6, PCR was charged with depositing controlled waste otherwise than in accordance with an environmental permit, contrary to section 33(1)(a) and (6) of the Environmental Protection Act 1990, in that between 1 January 2017 and 26 June 2018 PCR deposited at Penrhos, or knowingly caused or permitted to be deposited, controlled waste, namely baled waste plastics mixed with other waste, otherwise than in accordance with an environmental permit.

17. We note in passing that although PCR pleaded guilty to counts 5 and 6 on a suggested basis, it was the prosecution's case that the 12,000 tonne waste limit was exceeded throughout most, if not all, of the indictment period and not, as suggested in the basis of plea, merely "on occasion".

18. Finally, on count 7, PCR was charged with failing to comply with relevant duty of care requirements, contrary to section 34(1)(a) and (6) of the Environmental Protection Act 1990, in that between 1 January 2017 and 26 June 2018, being a company which produced, carried, kept, treated or disposed of controlled waste, it failed to take all reasonable measures to prevent any contravention by any other person of section 33 of the Environmental Protection Act 1990. The company was sentenced to a nominal fine of £1 on each count.

19. The procedure, therefore, was that waste was treated and baled at Deeside prior to being transported to Penrhos. A company called UPM-Kymnene had transferred a total of 13,894

tonnes of waste to PCR between February 2017 and February 2018. During this period PCR received a total of £2,132,234 from various companies for waste operations. UPM-Kymnene alone paid £1,200,000 to PCR, which included extracting and baling the relevant waste.

20. Given Deeside was regulated and subject to a permit granted by NRW in September 2015, the site was the subject of regular visits by NRW officers. On 18 September 2017 officers found baled waste that was not stored in compliance with the fire prevention or the fire risk assessment plans. Stack heights were up to seven bales high, which was excessive. Distances between the stacks were inadequate at between one to two metres, and the boundary stacks were too close to neighbouring premises. Furthermore, PCR was in contravention of various permit conditions (including the limit for the storage of waste) and waste was stored contrary to the fire safety provisions in the fire safety plan which had been incorporated into the permit. After a variation of the permit in November 2017, PCR also failed to submit to NRW a new fire prevention mitigation plan as required by the permit conditions. The risk at Deeside was one of a major fire. This would have had the potential to be extremely dangerous, causing serious and extensive harm to the environment and to human health. The cost to clear Deeside, excluding legal costs, was £1,850,000 (*per* the statement of Andrew Bird).

The Restraint Orders

21. On 10 February 2020, Judge Petts discharged restraint orders against the appellant and his wife which had been granted, on the papers, by Judge Rowlands on 16 May 2018 (following an application by NRW). Judge Petts was unpersuaded by the prosecution's submission that since the Andersons were the sole directors and shareholders, and Mr Anderson was the sole decision maker, the corporate veil could be pierced thereby enabling the court to conclude that there were reasonable grounds to suspect that Mr and Mrs Anderson had benefited from criminal conduct. The judge concluded there would need to be a stronger basis for reaching that conclusion.

The Sentencing Exercise

22. On 17 May 2021, the case was listed to determine if the sentencing hearing, then set for 21 May 2021, should be vacated. The prosecution informed the judge that a basis of plea had been submitted on behalf of the appellant, revealing a "substantial gap" between the parties relating to factual matters, which could not be resolved other than by a Newton hearing. NRW had that morning received a defence bundle running to 1,100 pages. The appellant submitted the hearing date should be maintained and that the sentencing hearing should proceed on the basis that PCR was a business that had been trading for 25 years with a significant business record and representations could be advanced simply on the basis of the contemporaneous paperwork. It is to be stressed, therefore, that the appellant encouraged the judge to resolve the relevant factual issues bearing in mind the parties' submissions, which were to be based on documents rather than on any oral evidence.

23. Although at the commencement of the hearing on 17 May 2021, Judge Jones expressed the view that a Newton/Fact Finding Hearing would be needed, having heard submissions she determined that it had not been established that this step was necessary, as she did not consider that the gap between the parties would make a material difference to the sentence. Whilst the judge recognised that there were significant differences between the prosecution and the defence, it was not, she suggested, the place of the court to iron out every detail that had not been agreed. The judge expressed the view that although the parties disagreed significantly, those disagreements would not affect the eventual outcome.

24. The sentencing hearing eventually took place on 18 August 2021. The court was not advised of any change of position as regards the approach to be taken to establishing the relevant facts. Indeed, in the document served on the court by Ms Riggs on 16 August 2021 entitled "Reference the Defence Bundle", there was no suggestion that witnesses should be called and instead it was simply indicated that relevant passages in the defence bundle, which included an expert report, would be drawn to the court's attention during the sentencing hearing on 18 August 2021.

25. Andrew Bird, a director of Tilstone Industrial Limited, landlords of Deeside had provided a victim impact statement dated 9 June 2021.

26. The judge took into account the appellant's lack of previous convictions and his previous good character. The judge was satisfied, as regards culpability, that the offences were deliberate, given the appellant was an experienced waste operator who had sole control of the company. He was aware it was his responsibility to ensure safety at Deeside. He was familiar with the regulations because of his experience in the industry and he nonetheless chose to ignore them. In relation to Penrhos, the appellant knew that there was a limited 500-ton exemption, but he continued to bring waste to Anglesey, thereby blatantly disregarding the regulations.

27. As to harm, the judge determined that count 8 straddled the two higher categories, but she applied category 2 on account of the appellant's mitigation. The judge assessed that the relevant cost of cleaning up the two sites came to a total of £2,631,740 which fell in her judgment within the significant cost category. She reached this conclusion on the basis that once PCR had gone into liquidation, it was necessary for the entirety of the site at Deeside to be cleared of waste. It was "nonsensical" in those circumstances to suggest that for the purposes of the Guideline the costs of the clear up at Deeside were to be confined to the excess waste stored at the site, namely that which was over the permitted levels. The starting point in consequence was 1 year's imprisonment, within a range of 26 weeks to 18 months.

The offence was aggravated because it was committed for financial gain, and the business had not been run for altruistic reasons given it was a commercial venture. The judge determined that the appellant had sought to minimise his criminality. The judge took into account the impact of the proceedings on the appellant's mental health. She considered that the custody threshold had been crossed but an immediate custodial sentence was properly to be avoided on account of the impact of the COVID pandemic, the appellant's previous good character, the fact that he had not offended since the commission of these offences and his new employment. The judge found clear grounds for concluding that the appellant had a realistic prospect of rehabilitation.

28. Following a trial, in the judge's view the shortest possible term was 18 months' imprisonment, concurrent on each count, and applying 15% credit for the appellant's guilty plea, that resulted in a sentence of 15 months, which was suspended for 18 months. He was, additionally, required to undertake 250 hours of unpaid work. Given the extensive nature and seriousness of the offences, together with the fact that the appellant blatantly ignored the relevant provisions, the judge imposed the maximum period of disqualification.

The Grounds of Appeal

29. There are six grounds of appeal, albeit there is a high degree of overlap between them.

I. The Guideline

30. It is submitted the judge erred at step 3 of the Guideline relating to Environmental Offences entitled "Individuals: Unauthorised or harmful deposit, treatment or disposal etc of waste/illegal discharges to air, land and water" (the "Guideline") when she assessed, vis-à-vis the level of harm, that the offending fell at the top of category 2 having taken into account the cost of the removal of the entirety of the waste at Deeside (including the 12,000-tonne permitted external and 3,000-tonne permitted internal waste) following the liquidation of the company. It is submitted the judge should have limited the assessment to the clear-up costs arising from the appellant's offending – the excess over 12,000 and 3,000 tonnes respectively – for which two brackets of costs were provided: £284,800 to £545,650 (see [3.2.8] of Simone Aplin's report dated 14 May 2021, based in turn on the Ashfield Solutions' report) and £231,650 to £310,750 (see [3.2.7] of the same report, based on the last reported tonnage). As the prosecution have indicated, the uncontradicted, albeit unagreed, evidence was that 17,410 tonnes of waste were removed from Deeside, at a cost exceeding £1.85 million (see the statement of Andrew Bird). The 8,686.3 tonnes of waste at Penrhos have yet to be removed, although the landlord is subject to an enforceable requirement to undertake this work. The estimated costs for removing this waste range between £781,740 (for disposal under the most favourable conditions) and significantly over £1m if the waste is sent to landfill.

31. The "Post Works Verification Report" concerning Deeside was served over 3 months before the sentencing hearing, and it was exhibited in the witness statement of Paul Challender dated 13 May 2021. The statement and the report were served on the defence on 14 May 2021. Although the appellant has called into question elements of this report, no request was made at any stage for the judge to conduct a Newton Hearing; indeed, as set out above, on 17 May 2021 the appellant encouraged the court to resolve any evidential issues on the basis of the documentary material before the court.

32. The essence of the appellant's argument, therefore, is that only part of the operation at Deeside was relevant (*i.e.* the excess waste, together with the close proximity of the stacks). The breach of the permit condition did not necessitate removing all the waste from the site. It is argued that section 33B of the Environmental Protection Act 1990 ("EPA"), albeit in the context of a claim for compensation, relates to the clean-up costs for breach of a permit condition specifically resulting from the offence. It is accepted that as regards Penrhos the entirety of the waste falls to be removed because the operation *in toto* was unlawful.

33. It is further submitted that the judge was wrong to conclude that the appellant had abandoned the sites. In making this and other determinations adverse to the appellant, there was, it is submitted, no justification for "piercing the corporate veil", given, *inter alia*, the appellant was not the permit holder. PCR was the permit holder and in consequence was the holder of the waste. It is averred that PCR, along with its liabilities, was sold to A & D Recycling Ltd, a company that had been identified as potential purchaser prior to PRC entering administration.

34. It is argued there was no proper basis for determining that Mr Anderson had committed these three offences "deliberately"; instead, it is suggested that he did not intentionally breach the law. He had actual foresight of the offending but nonetheless took the risk to try and trade through the problem within the confines of financial constraint. At the Penrhos site, whilst storage occurred in breach of the exemption, PRCL was seeking to regularise the site by submitting an application for an environmental permit, which took many months for NRW to process. At Deeside, efforts were being made to comply with the storage conditions and the company was appealing the regulator-led permit variation following a change in guidance which required a new fire prevention plan to be submitted. In due course the appeal was abandoned due to lack of finances.

35. In all the circumstances, it is contended that the starting point identified by the judge was excessively high.

II. The judge erred in her approach to resolving evidential disputes

36. It is submitted that once the judge had determined that a Newton Hearing was unnecessary and sentencing would proceed by way of submissions, she erred in relation to points of evidential conflict whenever she rejected elements of the factual basis relied on by the appellant. It is suggested this approach led her erroneously to conclude that the case was one of high category 2 harm for counts 8 and 9, and category 3 for count 12. In support of this submission, the appellant relies on the well-known authority of *R v Newton* (1983) 77 Cr App R 13, and particularly the latter part of the oft-quoted passage from the judgment of Lord Lane CJ when his lordship was dealing with the three approaches to conflicting evidence following a guilty plea by a defendant:

> "The third possibility in these circumstances is for him to hear no evidence but to listen to the submissions of counsel and then come to a conclusion. But if he does that, then […] where there is a substantial conflict between the two sides, he must come down on the side of the defendant. In other words where there has been a substantial conflict, the version of the defendant must so far as possible be accepted."

37. In the appellant's skeleton argument, it is indicated that the principal factual disagreements that are of relevance were set out in the Basis of Plea document, dated 8 March 2020. We need not rehearse them in detail; instead, we highlight that in the main they are directed at evidence concerning Orthios, the owner or the proprietor of Penrhos (see [13] above): it was not accepted that Orthios was a "victim" of these offences or that it had provided reliable evidence, and the suggested disposal costs of £1,318,661.51 were disputed. It was set out that the witness statements of Philip McCormick (a chartered architect and a director of the Orthios Group) were challenged.

III. The judge impermissibly "rejecting/ignoring" the defence expert report without warning or reason

38. It is argued that at the time of the sentencing hearing there was no suggestion that the defence expert, Simone Aplin, was not a suitably qualified expert who could assist the court. It is suggested that her evidence was to be preferred to the position advanced by NRW as regards the risk of pollution, namely that she concluded there was only a risk of harm from fire. Ms Aplin had been instructed to review the evidence and to give an opinion on whether environmental harm resulted from the charges and, if so, to give an opinion as to the scale of harm.

IV. The judge wrongly "pierced the corporate veil"

39. The appellant submits that the judge "pierced the corporate veil", without legal argument, and incorrectly "attributed the liabilities of PCR to the appellant". It is emphasised that the appellant "did not have any liability independent of PCR". The latter was the tenant at both sites, the permit holder at Deeside, the exemption holder at Penrhos, the permit applicant at Penrhos, the holder of the waste (given the contracts were in the name of PCR) and the legal entity which engaged advisers to consider waste disposal. Against that background it is said

that the judge "conflated" the position of the appellant with PCR, thereby "effectively piercing the corporate veil". In particular, the appellant critically highlights the following observations by the judge: "you leased the premises in Deeside from Tilestone Limited. At that time you were only authorised to hold 12,000 tonnes on the outside of the site"; "you also took a lease in Penrhos on the old Anglesey Aluminium Site. You obtained an S2 exemption that allowed you to keep 500 tonnes of waste on the site"; "I know that you have made an application for […] an environment permit to have more waste at the site"; "you had sole control of the company (*viz.* PCR)"; and "the aggravation here is that, in my judgment, this is for financial gain, you were not running that business for altruistic reasons, you were running that business as a commercial venture and, of course, the extent of the costs of the clean-up moves it up through the range". It is argued that the judge's approach had the result that "the liability of PCR was treated as a financial gain of the appellant personally and assessed as a major aggravating feature in effect extinguishing the mitigation".

40. The appellant relies on the positive submission that his financial gain was limited to his salary (*viz.* £27,000 before tax). Set against this modest benefit, it is emphasised that jointly with his wife he loaned the company £218,000 "to ensure its viability and long-term future". Furthermore, by way of mitigation the court is asked to have in mind that "(the appellant) had been involved in the management of PCRL since 1985. Neither the company, nor Anderson had any previous convictions. He had in place a proper management structure and a detailed environmental management system. In 2017, the Deeside site was assessed as a band C site which equates to a top performing site".

V. The judge incorrectly took into account complex liability issues.

41. During mitigation, the appellant advanced the position that A&D Recycling Ltd (who ultimately took over the lease at Deeside) was an investor who he had secured prior to the intervention the NRW. It was suggested that A&D Recycling purchased PRC from the liquidators and, at least potentially, a reduction was made to reflect the waste present on the site, along with the position of the landlord.

42. It is averred that the details of the contractual arrangements between the parties relating to the sale of PCR and its liabilities are unclear. Against that background, it is suggested these issues should not have been explored as part of the sentencing exercise. Additionally, submissions were made during the course of mitigation about the reliability of the figures appearing in the Post Verification Report in relation to the quantity of waste. The appellant relied on the report of Ms Aplin as to the absence of any evidence to substantiate actual harm and her assessment of the risk of harm. There was said to be no evidence before the court to make good the bare assertion by the prosecution relating to risk to the nearby water

course which flows to the River Dee. Instead, the risk of harm of this kind would depend on the drainage at the site and the topography of the land, along with similar factors, and no such evidence was led by the prosecution.

43. The appellant argues that the judge erred in taking into account a victim impact statement from the landlord of Deeside, Tilstone (as provided by Andrew Bird) seeking compensation. It is suggested that this raised complex liability issues which should not be determined during a sentencing hearing. Having set out the difficulties that followed PCR entering voluntary liquidation on 14 June 2018, including particularly the final £1.85 million cost of clearing Deeside, at the conclusion of the statement, he states, "If possible, we would like to seek compensation from the court". It is suggested that PCR alone was liable for any loss incurred and that the statement reveals that the reputational damage has been kept to a minimum.

VI. The 15-year period of disqualification was manifestly excessive

44. In arguing that the period of disqualification was unjustifiably long, the appellant relies on his age (now 67); his long-term and honourable involvement in the waste industry, running his own business for over 25 years with no previous convictions, cautions, warning letters or disqualification orders; the positive character evidence from his current employer; his guilty plea; and the absence of any pollution in the present case, as opposed to the risk of pollution, thereby indicating that this was less than a "particularly" serious case. It is highlighted that the administrators of PCR raised no concerns with the insolvency service as to the conduct of the appellant, who continued to provide assistance after PCR entered administration.

45. It is emphasised that in *Re Sevenoaks Stationers (Retail) Ltd* [1990] 3 WLR 1165; [1991] Ch 164 the Court of Appeal (Civil Division) identified the following three brackets in relation to disqualifications under section 6 of the Company Directors Disqualification Act 1986:

i) the top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.
ii) the middle bracket of disqualification for from six to 10 years should apply for serious cases which do not merit the top bracket.
iii) the minimum bracket of two to five years' disqualification should be applied where, though the disqualification is mandatory, the case is, relatively, not very serious.

46. Since *R v Millard* (1994) 15 Cr App R (S) 445, the criminal courts have consistently applied these brackets to disqualifications under section 2 of the 1986 Act.

Discussion

I. The Guideline

47. We are wholly unpersuaded that the judge was wrong to take into account the entirety of the clean-up costs. The court was neither dealing with confiscation proceedings nor an application for compensation. Section 33 B of the Environmental Protection Act 1990, relied on substantively by the appellant, is irrelevant for these purposes. The section, as potentially germane, provides that:

> "(2) The reference in section 133(a) of the Sentencing Code (**compensation orders**) to loss or damage **resulting from the offence** includes costs incurred or to be incurred by a relevant person in—
>
> (a) removing the waste deposited or disposed of in or on the land;
>
> (b) taking other steps to eliminate or reduce the consequences of the deposit or disposal; or
>
> (c) both."
>
> (our emphasis)

48. The present case involves an entirely separate exercise from assessing compensation: the sentencing judge was enjoined by the Guideline to assess at Stage 3 whether the costs incurred through clean-up, site restoration or animal rehabilitation are major (category 1), significant (category 2) or low (category 3), when considering the harm caused by the offending. The judge's approach to this decision is not limited in the restricted way advanced by Ms Riggs (on behalf of the appellant) to loss and damage **resulting from the offence**, relying on section 33 B. We stress, therefore, that the application of the Guideline for the purposes of sentencing is an entirely separate exercise to any decision on compensation and the statutory provisions that relate to that exercise. Furthermore, we indicate that we are not expressing any view as to whether Ms Rigg's interpretation is correct as regards section 33 B in the context of an application for compensation.

49. Returning to the Guideline, there is in our judgment a clear and sufficient nexus between the appellant's offending as a director of PCR, on the one hand, and the harm as reflected in the need to clear the entirety of the waste, on the other. The appellant was guilty of count 8 on the basis that the offence in count 1 had been committed with his consent or connivance or was attributable to his neglect as a director of PCR. As Ms Riggs accepted in the course of her submissions, it was the appellant's case that PCR only became insolvent as a result of the NRW's investigation into these offences, which led to the present prosecutions. Put otherwise, it is the appellant's contention that absent this offending and the attendant prosecution, the necessity for the site to be cleared would not have arisen. The offending reflected in count 8, therefore, substantively contributed to the requirement for the landlords

to clear the site at Deeside: as set out by Andrew Bird in his statement of 9 June 2021, following the demise of PCR, Tilstone was only able to grant a lease to AD Recycling Ltd – thereby once again being able to collect rent on the yard – after this critical step had been taken. Although it is suggested by Ms Riggs this was a complex scenario, no credible alternative option has been advanced by the appellant as regards this consequence of the appellant's criminality. It has not been suggested, furthermore, that the landlords expended this considerable sum of money (or part of it) needlessly, for instance because another body had, or credibly may have had, responsibility for undertaking this work of returning the yard to a state of being a commercially viable site. Any dispute as to the **extent** of the appellant's responsibility for what occurred, for instance vis-à-vis PCR, fell to be resolved by the judge when considering culpability. We note in that regard that Mr and Mrs Anderson were the only directors and shareholders during the period of the charges, and the appellant was the sole active director.

50. Although the judge suggested that PCR and the appellant had "abandoned" the sites, the reality of the situation has been described in the preceding paragraph: the result of this criminality was that the landlords were obliged to clear up the entirety of the site because there was no credible suggestion that the remedial work would be undertaken by someone else.

51. The argument that there was no proper basis for determining that the appellant had committed these three offences "deliberately" is equally devoid of traction. As the appellant is compelled to accept, he "had actual foresight of the offending", albeit he may well have hoped that, serendipitously, his criminality would be unremarked and have a trouble-free ending. Given his experience and his position in the company, it is inevitable that he was aware of each of the infringements, to which he pleaded guilty, at the time they occurred. The "deliberate" nature of his actions was not extinguished by a wish that an environmental permit would in due course be granted (it was refused) or that an appeal against a permit variation would be successful (in the event, he did not pursue the appeal).

52. It follows that we reject the criticisms that are made to the judge's approach to the Guideline.

II. The judge erred in her approach to resolving evidential disputes

53. We reject unhesitatingly the submission that once the judge had determined that a Newton Hearing was unnecessary and sentencing would proceed by way of submissions, she erred when points of evidential conflict arose in rejecting elements of the factual basis relied on by the appellant. This argument is fundamentally flawed in two main respects.

54. First, although in advance of the hearing on 17 May 2021 there were clear areas of significant difference between the prosecution and the defence as to the facts, which led the judge to consider and the Crown to submit that a Newton Hearing was necessary, the appellant strongly encouraged the judge not to adopt that course and instead invited the court to resolve any disputes on the basis of the documents. The appellant, furthermore, did not change this stance at any juncture after 17 May 2021 (see [22] – [24] above). It is

unsustainable for an appellant expressly to forgo the opportunity for a Newton Hearing, encouraging the judge to resolve contested facts on the documents, only thereafter to complain that the court failed to adopt the position preferred by the defendant. It had not been contended at any stage prior to sentence that the judge was, as a matter of course, required to resolve the disputed issues in the appellant's favour.

55. Second, the factual disagreements that had an impact on the sentencing exercise were few and far between. The appellant suggests that those of consequence were set out in the Basis of Plea document, dated 8 March 2020. For convenience, we summarise that in the main these related to the evidence concerning Orthios, the owner or the proprietor of Penrhos (see [13] above): it was not accepted that Orthios was a "victim" of these offences or that it had provided reliable evidence; furthermore, it was submitted that the suggested disposal costs for Penrhos of £1,318,661.51 were disputed. We note, however, that the judge adopted the bracket of £781,740 to over £1m and Ms Aplin (who provided the appellant's expert report) did not challenge a bracket of £781,740 to £894,658. Otherwise, there are no significant factors relating to Orthios that the appellant challenged and on which the judge placed any reliance.

56. The judge set out in relation to Deeside that "a fire at that site would have had the potential to be extremely dangerous, risking serious extensive harm to the environment, there is a nearby water course which flows into the River Dee […]". This was consistent with the findings of Ms Aplin:

> "3.4.12 The parkway site is located within an industrial estate and there are other businesses located adjacent to it. Although the site is not within a groundwater source protection zone, the River Dee, Bala Lake SAC and the River Dee SSSI are 1km or more to the south west of the facility. There is a small watercourse to the rear of the facility, behind the public footpath which runs along the perimeter at points and a series of small lakes to the west, one within 200m of the site. […]
>
> 3.4.14 Had there been a fire in the bales on the yard, it is likely that it would have been difficult to identify and control as the stack layout would have limited access to the seat of the fire and the ability to remove unaffected bales in order to limit the spread. This could result in a much larger and longer-burning fire than might have occurred if the stacks conformed with the FPP and were readily accessible. The CAR form generated following an inspection by Pal Challener and Gerraint Hugues a NWFRS officer confirms this stating "Should a fire occur towards the rear of the stack this would hinder firefighting operations as there is no vehicular access to the rear. North Wales Fire and Rescue Service would have to depend on hose lines operating from the cycle path with the need for an aerial appliance in the yard."
>
> 3.4.15 Given that some of the site surface was hardstanding and not impermeable, there was the potential for contaminated firewater to leave the site and enter the small watercourse running along the perimeter. This was mitigated slightly by a small soil bund running along parts of the perimeter. However, it alone would have been

> unlikely to be effective in containing a significant amount of contaminated run-off as it was not continuous and did not look to be engineered. […] As such they are likely to take measures to prevent any discharge where possible and mitigate harm if it does occur with pollution prevention equipment. Overall, the likelihood and severity of potential pollution would depend on the volume of water, local topography, and pollution control measures.
>
> 3.4.16 The potential impact of emissions to air is harder to estimate given that it will be determined by the scale of the fire, and weather conditions. Waste plastics are known to produce dark, noxious smoke and, depending on the wind direction, it would have the potential to impact on amenity, quality of life and if sustained, human health. This could have been exacerbated by the challenges of fighting a fire on site which, because of the stack sizes and lack of access, would have been more difficult to control and bring to an end."

57. In the context of the impact of the offence vis-à-vis fire, Ms Aplin assessed that both the excessive waste and the stockpile size and layout at Deeside put the case in either category 2 or category 3 (*i.e.* there was a risk of category 1 harm or there was a risk of category 2 harm, depending on the severity of the fire). The judge found that the risk of fire came within category 2 (*viz.* there was a risk of category 1 harm). This was not, therefore, inconsistent with Ms Aplin. We add that the drone footage of Deeside shows that the site fuel storage area was surrounded on three sides by waste stacks of excessive height, packed too closely together without separation distances/firebreaks.

58. As to the clear-up costs, the judge referred to the £1.85 million figure for Deeside, potentially allowing for a discount of @ £110,000. It is not disputed that this was the bill submitted by Lancashire Waste. As set out above, for Penrhos, the judge used the bracket of £781,740 - £1m for the clear-up costs. This led to a total sum of £2,631.740, which the judge considered to be significant. Although Ms Aplin touches on the costs of moving the excess waste, she does not materially dispute these figures.

59. We reject, therefore, the appellant's submission of principle (*viz.* that in the absence of a Newton Hearing all the disputed facts needed to be resolved in his favour) and in any event we are unable to identify within the sentencing remarks any significant disputed factual issues in relation to which the judge accepted the evidence introduced by the prosecution in favour of evidence introduced by the applicant.

III. The judge impermissibly "rejecting/ignoring" the defence expert report without warning or reason

60. This submission in relation to Ms Aplin is without merit. The judge did not make any findings in her sentencing remarks which materially contradicted or rejected the contents of Ms Aplin's statement. It was for the judge to assess where within the Guideline these offences fell, but the facts on which the judge relied for her conclusions were not

significantly inconsistent with the conclusions of Ms Aplin. In any event, for the reasons set out under the preceding ground of appeal, the judge was applying the defence suggestion that she should make decisions on the facts based on the documentary material.

IV. The judge wrongly "pierced the corporate veil"

61. The appellant in the lengthy submissions that he advanced on the subject of "piercing the corporate veil" has essentially asked the court to consider the impact of what is, in the context of the present appeal against sentence, an entirely irrelevant legal concept. There is a prohibition on "piercing the corporate veil" in the sense that ordinarily the courts will not disregard a company's separate legal personality in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (see Baroness Hale of Richmond JSC in *Petrodel Resources Ltd v Prest* [2013] UKSC 34; [2013] 3 WLR 1 at [92]). This principle can be avoided in limited circumstances, as described by Lord Sumption JSC in *Petrodel*:

> "35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. […] But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

62. The appellant had pleaded guilty to offences that he had committed as a Director of PCR. The judge stated in passing sentence as regards the appellant: "you leased the premises in Deeside from Tilestone Limited. At that time you were only authorised to hold 12,000 tonnes on the outside of the site"; "you also took a lease in Penrhos on the old Anglesey Aluminium Site. You obtained an S2 exemption that allowed you to keep 500 tonnes of waste on the site"; "I know that you have made an application for […] an environment permit to have more waste at the site"; "you had sole control of the company (*viz.* PCR)"; and "the aggravation here is that, in my judgment, this is for financial gain, you were not running that business for altruistic reasons, you were running that business as a commercial venture and, of course, the extent of the costs of the clean-up moves it up through the range". It is argued that the judge's approach had the result that "the liability of PCR was treated as a financial gain of the appellant personally and assessed as a major aggravating feature in effect extinguishing the mitigation". In this sense, the corporate veil had been impermissibly pierced.

63. We do not accept that contention. Given this principle is essentially concerned with the limited circumstances in which the "the separate personality of the company" can be disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone, it has no relevance to the fact-finding exercise that a judge undertakes in passing sentence. The judge was assessing the correct punishment to be imposed as a consequence of this criminality (see *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19; [2016] 4 WLR 63 at [90]), criminality which was admitted. The judge was considering, vis-à-vis culpability, issues such as whether the appellant had intentionally breached or flagrantly disregarded the law, and as regards harm, the extent of the environmental impact, or risk thereof, including the costs of the clean-up operation. These considerations do not involve piercing the corporate veil in the sense prohibited by the established jurisprudence; instead, the judge was assessing the extent of the punishment that was appropriate for the appellant's role as a director in what had taken place, bearing in mind the harm caused and his culpability. In a similar vein, the judge is enjoined by the Guideline to take into account the appellant's motive as a director of the company, namely whether he was acting altruistically or for commercial advantage (one of the non-statutory aggravating features of the offence is whether it was committed for financial gain).

64. The appellant's submissions in this context are misconceived.

V. The judge incorrectly took into account complex liability issues.

65. We have essentially dealt with this in the analysis set out above. The judge did not engage with complex liability issues and instead analysed the matters that were relevant for determining the level of sentence, as required by the Guideline.

VI. The 15-year period of disqualification was manifestly excessive

66. The court made an order under section 2 of the Company Directors Disqualification Act 1986 that the appellant should be disqualified from being a director of a company etc., for a period of 15 years. This is the maximum permitted. The Crown candidly accepts this was a longer disqualification period than would have been expected in the case of a man of otherwise good character who, albeit late in the day, pleaded guilty and who had never previously been subject to a disqualification order. It is conceded that the order should have been within the middle bracket (see [45] above). We agree.

Conclusion

67. For the reasons set out above we consider that the judge's approach was entirely correct and we have no doubt that the sentence was neither manifestly excessive nor wrong in principle, save as regards Ground VI. We quash the period of 15 year's disqualification and substitute a period of 6 years. To that extent only this appeal against sentence is allowed.