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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JOHN PAUL BRANIFF

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Before: Morgan LCJ, Weir LJ and McBride J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal against a determinate custodial sentence of 18 months (comprising nine months custody and nine months on licence) imposed for the unlawful deposit, keeping and treating of controlled waste on the appellant's land. The appellant further seeks leave to appeal the Confiscation Order made against him for the sum of £108,350. The parties indicated at the hearing that this aspect should more properly be brought before the learned Crown Court judge by way of variation and we need not deal with it here. Mr Grant QC and Mr Blackburn appeared for the applicant. Mr Magee appeared for the PPS.

Background

[2] At his arraignment on 1 April 2014 the appellant pleaded guilty to 4 counts on the basis of an agreed set of facts. These were 2 counts of treating controlled waste in a manner likely to cause pollution of the environment or harm to human health contrary to Article 4(1)(c) and Article 4(6) of the Waste and Contaminated Land (NI) Order 1997 ("the 1997 Order"), 1 count of depositing controlled waste, or knowingly causing or permitting controlled waste to be kept, on any land without there being in force a waste management licence authorising said deposit contrary to Article 4(1)(a) and Article 4(6) of the 1997 Order and 1 count of keeping controlled waste, or knowingly causing or permitting the controlled waste to be kept, on any land except under and in accordance with a waste management licence contrary to Article 4(1)(b) and Article 4(6) of the 1997 Order.

[3] Following the entering of his pleas of guilty, the appellant obtained various expert reports as a result of which he indicated that he wished to vacate his pleas. He then abandoned that approach but sought a *Newton* hearing to challenge the earlier agreed basis of plea. On the morning of the *Newton* hearing, however, the appellant indicated that he again accepted the original agreed statement of facts. This caused substantial delay. The learned judge eventually sentenced the appellant on 19 November 2015 to an 18 month determinate custodial sentence (comprising 9 months' custody and 9 months' licence) and made the Confiscation Order to which we have earlier referred.

[4] The agreed written basis of plea stated that the offences arose out of the operation of an unlicensed, unregulated dumping site at Carnreagh Road, Ballynahinch, a site close to the conservation site, Black Lough Area of Special Scientific Interest. Having inspected the site, the Northern Ireland Environment Agency (NIEA) estimated that in excess of 2000 tonnes of mixed commercial and household waste had been dumped at the site with significant loss to the revenue in terms of landfill tax and VAT avoidance as well as a potential impact upon the environment and health.

[5] The basis of plea included the following:

(a) On 14 October 2011 officers from NIEA attended at a farmyard and farm buildings owned and occupied by the appellant adjacent to his home. They found several piles of rubble and building waste. Aside from that material they viewed 4 piles of waste, each of approximately 100 tonnes, and a further pile of approximately 50 tonnes. This waste had been partially burned and the remnants contained rubble, wooden flooring, a fridge, furniture, glass and household bin bags. A newspaper dated 05/10/11 was visible. The following day, officers from NIEA noted deposits of bricks and tyres, insulation material, pallets and electrical items, cardboard packaging, glass windscreens as well as other material consistent with commercial waste amassed on 10-15 mounds adjacent to an unoccupied house and farm sheds. Mr Braniff attended on site and was interviewed. He claimed that all the waste seen by officers had been generated from a house which had been on the site and burned down five years previously. He was ordered by way of a notice to remove the waste but informed officers that he did not care if there was a court case, he would not be moving the material within 30 days, before claiming he would remove some within that period.

(b) On 30 November 2011, NIEA officers again attended the site. They noticed a skip lorry with the livery "NI Skips". The lorry was loaded with rubble. There were three bundles of waste visible next to a half built house. The first contained mainly burnt and charred wood mixed with metal. The second contained mainly plasterboard, wood and plastic. The final bundle contained mostly green waste. Mr Braniff was again present and was driving the lorry. He claimed that he was lifting the skip from the building site. He drove off towards his home. When officers arrived at his home they saw a large amount of mixed waste. The appellant was again provided with a notice in respect of

removal of the material. He accepted that he had previously received a notice requiring removal of the material but said that he needed more time.

(c) Officers from NIEA again attended the site on 20 December 2011. Officers noted that in addition to the waste seen on previous visits there was evidence of additional waste having been deposited. The NI Skips lorry was present and contained a full skip of controlled waste including wood, rubble and plastics. At the building site officers noted two piles of mixed builders' waste including wood and insulation material as well as cardboard packaging. It was clear this material had been dumped and was not part of the construction process. Mr Braniff was not present on the site on this occasion.

(d) On 19 April 2012, NIEA officers again attended the site. Waste which had been *in situ* on previous visits remained on the site including multiple plastic containers, mixed construction waste and household waste. There were signs that waste material had again been burnt on site.

(e) On 8 August 2012, NIEA officers made a further visit to the site. When they arrived a fire was smouldering in the yard at the appellant's home under which was controlled waste including building waste, cardboard, paper, insulating foam and charred metals. Amongst the paper were invoices and docket books from a building firm based in Downpatrick. To the rear of this waste pile was a steep bank of freshly infilled demolition waste comprising concrete, bricks, plastic pipe, buckets and tyres. A second fire was seen smouldering on a further, larger, pile of mixed waste next to some farm buildings. A newspaper dated June 2012 was also found lying amongst the waste. Again, there was significant evidence of burning. The smell of smouldering waste was acrid.

Amongst waste lying in the yard was asbestos piping and corrugated sheeting. It was analysed and found to contain white Chrysolite asbestos. Inappropriate handling and disposal of these materials could result in the release of asbestos fibres with the obvious consequential health risks.

The skip lorry was parked outside the applicant's house. An area of approximately 30m x 30m at this address had been filled with mixed waste, running from the yard to the adjoining field. The waste had been compacted and flattened off with a depth of between 1-2 metres. The waste included wood, bricks, plastic, cooking oil drums, green waste, black bags, burnt tyres, papers, cardboard and asbestos guttering. It was clear that further waste had been deposited on the site in spite of previous warnings.

Mr Braniff arrived on site and was again warned about the activity which clearly remained ongoing. He claimed that he had rented the farmyard to a Polish individual who brought all the waste and burnt it. He said he had called the PSNI about this. He claimed that all the waste at his home had come from his own home where he was building a new house which was unfinished. That was patently untrue. NIEA officers noted that the house was

habitable and was being lived in. He claimed that he had only bought the skip lorry for its hydraulic rams and that it was not working.

(f) On 30 August 2012 a further inspection was carried out by NIEA. They first examined the land to the rear of the dwelling house. As previously, there was an area of infilled and burnt waste. The surface of the infill was made from waste including bricks, tiles, concrete, plastic patio furniture, metal fragments, plasterboard, bitmac, PVC windows, carpet, insulation foam, household waste as well as other general waste. The majority of the material looked commercial in nature. Around the front edge of the flattened infilled waste was further waste which was piled and had been burnt. Officers noted that more waste had been added to this area since the previous visit. Similar waste could be seen at the right hand side of the house. A full skip (different to the skip lorry seen previously) containing domestic and commercial waste as well as a newspaper dated 07.03.11 and correspondence for a lady based in Newcastle could be seen.

Impact

[6] The burning of controlled waste has the potential to impact on land, air and water. The land at the site has potentially been contaminated by the ash and residues from burning plastics, in particular, and metals. Water in nearby watercourses, including the adjacent designated conservation site Black Lough Area of Special Scientific Interest could have been impacted by the release of particles of suspended material from waste carried from the site in rainwater and windblown dust. This can be ingested by farm animals. Evidence suggests that burning was a common feature of the appellant's waste disposal. The burning of materials, such as those found at this site, can also lead to human health concerns. The site did not meet even the most basic minimum standard of infrastructure necessary for incineration of controlled waste. It was the conclusion of the NIEA that, as a consequence, pollution to the environment and harm to human health could be expected from this activity.

[7] The total volume of waste on the site was estimated at 2000 tonnes. The prosecution did not dispute that up to 200 tonnes of waste present on the site could have been generated from the destruction of a dwelling house and assorted outbuildings on the site. It was also accepted that a small amount of waste may have been removed from the site after the initial survey.

[8] The material comprised a mixture of household and commercial waste and because it was mixed there was no prospect of recycling any of the waste which was only fit for disposal. The waste should have been disposed of at the Drumnakelly site run by Down District Council where in 2011/12 the price for disposing of non-hazardous waste was £118.80 per tonne. The total cost of removal therefore would be £238,431.60. Included in this cost was the avoidance of £112,392 of landfill tax and £39,738.60 of VAT which is an indicator of the impact on the revenue as well as the potential impact on the local environment. The cost of asbestos removal is typically in the region of £250-£500 per tonne and is not included in the calculation.

Personal circumstances

[9] The appellant has a total of 31 previous convictions dating back to 2002. Just over half relate to motoring and vehicle regulation offences for which the applicant has been dealt with by fines, penalty points and driving disqualification. In February 2014 he was sentenced to 2 years' imprisonment suspended for 3 years for fraudulently using a vehicle registration mark and eight counts of handling stolen goods. Those offences arose out of a police search of the applicant's property in May 2012 during which they discovered items which had all been stolen from a number of commercial premises and a graveyard in the previous months. The items were for use in the construction industry and included a lorry, mini-diggers, a pneumatic rock hammer and trailers. During police interviews the appellant stated that he had leased the land on which the items were uncovered to a Polish national and that he did not know that it was being used to store stolen goods. His subsequent plea indicates that this explanation was untrue.

[10] The appellant was 30-31 years old at the time of the present offences. He is married with four children, aged between one and ten years old. He qualified as a plasterer at the age of 18. He started up his own company two years later specialising in construction and haulage. The company was profitable and at its height employed 30 people. The company, however, went into bankruptcy following the collapse of the construction industry. The appellant had been trying to build a new company on a smaller scale and employed four people.

[11] During the interview with the Probation Board in relation to the present offences, the appellant accepted that he was guilty of depositing waste from building sites on his property without proper authorisation, but stated that the amount stored in this manner was a very small portion of the waste and maintained that the majority was created on site following a house fire in 2008. The Probation Officer notes that while he accepted a measure of guilt, he minimised and justified his offending. He further stated that the appellant was preoccupied during the interview with disputing the amount of waste and also who owned the various parts of the land where it was stored. The Probation Officer opined that he demonstrated little insight into the potential impact of his offending on the environment or others.

Guidelines

[12] The Sentencing Council issued Definitive Guidance on environmental offences with effect from 1 July 2014. Culpability was assessed in particular by reference to the state of mind of the offender with deliberate conduct at the top followed by recklessness and negligence. In respect of harm, dangerous or hazardous materials having a major adverse effect on air or water quality, amenity value or property were at the top and there was a recognition that the risk of harm should be taken into account although that was generally not as serious as a demonstration that harm had in fact occurred. The custody threshold was crossed where there was deliberate conduct causing significant adverse effects or damage to air or water quality, amenity value or property, significant adverse effects on human health and quality of life, animal health or flora or a risk of more serious harm.

[13] In R v Thames Water Utilities Ltd [2010] EWCA Crim 202 the English Court of Appeal gave general guidance for sentencing in environmental offences involving companies. Considerable stress was placed on the precious nature of our environmental heritage and the obligation on the present generation including the courts to play a part in preserving it for the future. Punishment, deterrence and reparation are particularly important purposes of sentencing in this type of case.

[14] There were two Crown Court decisions in this jurisdiction to which our attention was drawn. They were both considered on appeal in relation to the question of confiscation, being reported as R v Allingham and Allingham, R v McKenna [2012] NICA 29. Mr and Mrs Allingham were charged with two offences contrary to the 1997 Order in that they kept controlled waste in a manner likely to cause pollution of the environment or harm to human health and kept controlled waste in or on land otherwise than in accordance with the waste management licence. The offences were committed between December 2003 and July 2004. Despite a statutory notice being served indicating that the premises would be inspected they barred access to the lands by blocking the entrance to their farmyard. Eventually access was obtained which disclosed 4000 tonnes of decomposing controlled waste. A strong smell of decomposing waste and gas was escaping from puddles of water on the ground. The waste originated in the Republic of Ireland. Mr Allingham was sentenced to 9 months' imprisonment and his wife to 4 months' imprisonment suspended for two years.

[15] Mr McKenna, during the same period, was convicted of three offences contrary to the 1997 Order in that he kept or disposed of controlled waste in a manner likely to cause pollution of the environment or harm to human health, and treated and kept or disposed of controlled waste or knowingly permitted controlled waste to be treated, or disposed of except under and in accordance with a waste management licence. In his case the evidence was that 11,744 tonnes of household and commercial waste which had originated in the Republic of Ireland was present on the site owned by him. A survey of the site revealed that there was an emission of gas and the presence of a heavy polluting leachate. He was sentenced to a period of 12 months' imprisonment.

Consideration

[16] We agree with the aggravating factors identified by the learned trial judge. There was a large quantity of waste deposited on the site. It was submitted on behalf of the appellant that the quantities were not as large as those in Allingham and McKenna. That is undoubtedly correct but those cases related to events in 2003/2004. Since then the public interest in the maintenance of the environment has intensified. That is demonstrated by the fact that whereas landfill tax was £13 per tonne in 2003/2004 it is now £56 per tonne. When one adds in the price for acceptance of this waste at a landfill site the monetary advantage is the same as that in McKenna.

[17] The appellant showed persistence in his offending. This is not just a case of the applicant not taking adequate steps to remove the waste which had been

discovered. The evidence clearly indicates that the appellant continued to accumulate waste having already been detected by the regulators and in plain defiance of the statutory regime. That aggravating factor is compounded by his substantial criminal record for offences against the regulatory regimes in both planning and motor vehicles. He does not appear to think that the law applies to him. He is wrong.

[18] The accumulation of waste occurred close to a site of special scientific interest. The learned trial judge recognised that there was no evidence before him of actual harm to the environment but there plainly was evidence of the risk of serious adverse consequences. The waste was not inert. The most dangerous aspect appeared to be the presence of asbestos although this was in small quantities.

[19] The learned trial judge considered that he was entitled to some credit for his plea but the prevarication over the agreement of the factual circumstances considerably lessened the degree of mitigation to which he was entitled. Insofar as his plea may have suggested a degree of remorse, that was undermined by the minimisation of his responsibility in his engagement with the Probation Service. There were a number of character references indicating that he was hard-working and provided employment over the years. That was a factor which, if matched by compliance on detection and remorse, might have been of some significance. Against this background of persistent flouting of the environmental regime a deterrent sentence is plainly necessary and personal circumstances can, therefore, carry little weight.

[20] The learned trial judge did not indicate his starting point before making allowance for the plea. We accept that the appellant's case has to be approached on the basis that there was no actual evidence before the court of environmental damage beyond the actual deposit of the materials. The risk of environmental damage is itself a significant material factor but will generally not be as serious as actual harm. The quantity of hazardous materials in this case appears to have been small.

Conclusion

[21] In our view the starting point was in or about 15 months and taking a reasonably generous view of the mitigation for the plea we substitute a determinate custodial sentence of 12 months comprising 6 months in custody and 6 months on licence in substitution for that of 18 months imposed by the learned trial judge. For the reasons earlier given we make no order on the confiscation amount.