22A/79

SUPREME COURT OF VICTORIA

BLAZER v AAKJAER

Murray J

20 February 1978

ENVIRONMENT – POLLUTION – OIL FUEL SPILLAGE INTO HARBOUR WATERS WHEN VESSEL UNLOADING OIL – "DISCHARGE" OF OIL – DEFENCES – ONUS OF PROOF ON DEFENDANT – MEANING OF "LEAKAGE" – WEIGHT OF HEARSAY EVIDENCE – FINDING BY MAGISTRATE THAT DEFENDANT HAD MADE OUT A STATUTORY DEFENCE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: ***NAVIGABLE WATERS (OIL POLLUTION) ACT*** **1960, SS6, 7.**

HELD: Order nisi absolute. Dismissal set aside. Defendant convicted and fined $300.
1. Under s6 of the *Navigable Waters (Oil Pollution) Act* 1960 ('Act'), it is an offence if there is a discharge of oil into waters within the jurisdiction from any ship and, if the discharge is from a ship, the owner and the master of the ship are severally liable. For the defendant to make out a defence under s7 of the Act, the defendant carried the onus of proof on a number of matters.

2. In the present case, the defendant had to show that the oil escaped in consequence of a leakage which could not have been foreseen and avoided, and that all reasonable steps were taken for prompt discovery of the leakage, and after such discovery for stopping or reducing the escape of the oil or mixture.

3. The term "leakage" where it is used in the Act is a term which is applied in contradistinction to terms such as "discharge", "escape" and "overflow" and involved a leakage of fluid from a vessel through a crack or hole which was not intended to be there.
***Glover v MacDougall* (1976) 2 NSWLR 359, applied.**

4. Having regard to this restrictive meaning, the magistrate was in error in finding that the defendant had established that the oil had escaped in consequence of a leakage.

5. There was no evidence, hearsay or otherwise, to prove one of the elements of s7(1)(b)(iii) of the Act namely, that all reasonable steps were taken for prompt discovery of the leakage.

MURRAY J:
This is the return of an order nisi to review a decision of a Stipendiary Magistrate sitting at Geelong on 17 June 1977.

The respondent was charged with an offence under s6 of the *Navigable Waters (Oil Pollution) Act* 1960 pursuant to an information and summons issued by the informant, who is the Assistant Harbourmaster employed by the Geelong Harbour trust Commissioners at Geelong.

After hearing the evidence called on behalf of the informant, the Magistrate dismissed the information on the basis that in his view the defendant had made out a defence under s7(1)(b)(ii) of the Act.

The informant obtained an order nisi to review the decision of the Magistrate upon a number of grounds, but it is not necessary, in my opinion, for me to set out those grounds in full.

The evidence showed that in the evening of the 5th April the ship "Dansborg" was taking on a quantity of oil fuel from a pipeline run from the wharf and at some stage the bunker apparently became full and oil escaped through an air vent, presumably on to the deck of the ship, and some escaped over the side into the waters of the harbour. The informant produced a letter from the defendant in which it was admitted that the substance which escaped was in fact oil fuel.

On behalf of the defendant Mr Kenneth Wright was called, who deposed that he was the Shore

Supervisor for the Shell Oil Refinery and that on the evening in question he was the officer in charge of the loading of the "Dansborg" at Corio Quay North. He deposed that the vessel had ordered some 1,200 metric tonnes of marine fuel oil and that the terms of the order involved that the crew of the vessel would not supervise the monitoring of the meter at the pumping station, and that the signal to stop pumping would be given by the shore establishment and not from the ship. Mr Wright then deposed that, due to the fact that the meter which measured the flow of oil being loaded was faulty, some 1,318 tonnes of oil was delivered to the vessel over and above the amount ordered. It was no doubt this error which caused the ship's bunker to fill and to overflow through the air vent.

The respondent then called Mr Anthony Martin Woolford, who was a Marine Surveyor and Master Mariner. Mr Woolford gave evidence of inspecting the scene on the following day and expressed the view that he believed that the crew of the vessel took all precautions in accordance with standard marine practice to avoid an overflow of oil and that he believed that the bunkers aboard the ship were dipped by the Chief Engineer every ten minutes while the vessel was taking on fuel. Under cross-examination he said that he did not agree that it was poor practice not to dip the bunkers more than every ten minutes at the loading rate which was then in operation. He said that the over-supply of oil was not detected until there had been an overflow from the vent and a consequent spillage.

Under s6 it is an offence if there is a discharge of oil into waters within the jurisdiction from any ship and, if the discharge is from a ship, the owner and the master of the ship are severally liable. For the defendant to make out a defence under s7, it seems to me clear that the defendant carries the onus of proof on a number of matters.

In the present case, the defendant had to show that the oil escaped in consequence of a leakage which could not have been foreseen and avoided, and that all reasonable steps were taken for prompt discovery of the leakage, and after such discovery for stopping or reducing the escape of the oil or mixture.

Mr Mandie, who appeared for the informant, to move the order absolute, based his submission broadly on two grounds. In the first place Mr Mandie argued that the evidence did not disclose what could properly be called a leakage and secondly, he argued that the defendant had not satisfied the onus of proof cast upon him under s7 by reason of the fact that all the evidence given by Mr. Woolford was, on its face, hearsay.

In fairness to the Magistrate it should be said that neither of these arguments were put to him and that his attention was not directed to the term "leakage" or to any of the authorities to which my attention has been directed in which the meaning of that word has been discussed. Furthermore, no objection to the evidence of Mr Woolford was taken before him and he no doubt proceeded upon the basis that the parties were happy to have the matter determined by him upon the assumption that the information given to Mr Woolford was correct namely, that one of the ship's officers had dipped the bunker every ten minutes.

Mr Mandie referred me to the decision of *Glover v McDougall* (1975) 2 NSWLR 359. In that case Yeldham J discussed at some length what the meaning of the term "leakage" is and he referred to a number of decisions under legislation in precisely the same terms as the Victorian legislation. It is not, I think, necessary for me to quote at any length, or even at all, from the judgment of Yeldham J. It is clear from that judgment that His Honour took the view that a "leakage" was a term which applied in contradistinction to terms such as "discharge", "escape" and "overflow", and involved a leakage of fluid from a vessel through a crack or hole which was not intended to be there.

An examination of His Honour's reasons for judgment and of his quotations from other decisions seems to me to establish clearly enough that the term "leakage", where it is used in the Victorian Act, should be given this same restrictive meaning, particularly in view of the various pieces in which wider terms are used principally the term "discharge" which obviously is wide enough to cover the escape of oil in a number of different ways. It is true, I think, to say, that a leakage is ordinarily a discharge but that not all discharges can be properly called leakages. In a result, and on the basis of the decisions to which I have referred, with which I agree, save in one minor respect,

it appears to me that the Magistrate was plainly in error when he found that the defendant had established that the oil had escaped in consequence of a leakage, and for this reason the order nisi will be made absolute.

In relation to Mr Mandie's second point, the hearsay evidence having been admitted without objection, Mr Mandie submitted that I could not attach sufficient weight to it in order to hold that the defendant had discharged the onus of proof passed on him by terms of s7. I am inclined to think that argument is correct, but in any event there was no evidence of any description, hearsay or otherwise, to prove one of the elements of s7(1)(b)(iii) namely, that all reasonable steps were taken for prompt discovery of the leakage. The evidence of Mr Woolford simply does not cover what sort of steps were taken for the discovery of the discharge from the vent when it happened.

If the hearsay evidence is to be accepted, the Magistrate may have been justified in taking the view that the leakage could not have been foreseen and avoided by the exercise of reasonable care (if one imports that term) because it may well be that the defendant was entitled to assume that the meter at the refinery would have been properly maintained and in good and proper working order. There is a very small amount of hearsay which would support the view that once the leakage had been discovered reasonable steps were taken for stopping or reducing the escape of oil from the vent. At all events, it does appear that the steps taken by the ship's crew were the appropriate ones, once the escape of oil had been discovered. However, it is in my opinion clear that the event in question could not properly be categorised as a leakage within the meaning of that term in the setting in which it is used in s7 and, as I have already said, for those reasons the order nisi must be made absolute.

(Discussion ensued.) HIS HONOUR: The order nisi will be made absolute. The order of the court below will be set aside, and in lieu thereof the defendant will be convicted and fined $250. (Discussion ensued as to costs.) I order that the defendant pay $30 costs of the proceedings in the court below and the costs of the order to review not exceeding $200. I grant a certificate under the *Appeal Cost Fund*. I may say that I have imposed a fine which, compared with the maximum of $10,000, is a very moderate one, but I have done that for the reasons that I indicated namely, that it appears to me by far the major part of the fault lay with the refinery and secondly, it does not appear to me that a great quantity of oil actually got into the waters of the harbour and thirdly, that it does appear to me that once the spillage was discovered, that the ship took all reasonable action.
