



HMA

v

ICL Tech Limited and ICL Plastics Limited

28 August 2007

Today at the High Court in Glasgow Lord Brodie imposed a fine of £200,000 on ICL Tech Limited and a further fine of £200,000 on ICL Plastics Limited.

On sentencing Lord Brodie made the following statement.

"In imposing sentence in this case the court is required to respond to what both the Advocate Depute, on behalf of the Crown, and Mr Jones, on behalf of the companies, agreed was the tragedy of the explosion at Grovepark Mills on Tuesday 11 May 2004. That it was a tragedy is beyond question: 9 people were killed, 33 were injured (many very seriously indeed as we were reminded yesterday) and 12, while not physically injured, were placed at risk of death. And of course that bare summary takes no account of the psychological impact on survivors and the impact on families both of the families of those who were killed and those who were injured.

The nature of that response by the court is inevitably limited to the imposition of fines and, in that sense, inadequate. What was said to the press on 17 August on behalf of families of the deceased is clearly true "no court case or penalty imposed by the courts will bring our families back or provide an explanation as to why they died".

Insofar as there has been an explanation, by which I mean an explanation of the mechanism of the explosion and what led to the conditions that made it possible, it has come from the Advocate Depute in giving his narrative of the relevant events and from Mr Jones giving in his response. Can I just say a word about these statements? They have been a feature of our criminal procedure for a long time, although it is a relatively recent (and welcome) innovation to provide them in typed form. Providing a narrative as to the circumstances of an offence is essential if the judge is to pronounce an appropriate sentence. It is also a means of informing those with an interest as to what exactly an accused has pled guilty. Providing a typescript ensures that everyone has access to the same wording and it is an efficient way of communication where the relevant information is extensive. It is to be borne in mind that the defence is entitled to deny anything which is said by the prosecutor which is inconsistent with the plea. It is therefore necessary that the judge, who has to understand it, and the defence which must have notice of it, are given a copies of the Crown narrative in good time. Accordingly, in this case I would wish to express my

gratitude both to the Advocate Depute and Mr Jones for producing clearly expressed and comprehensive written statements and for their respective efforts in making them available in advance of this hearing.

The importance of the respective written statements is that in approaching sentence I rely on them entirely. I have no other access to relevant information and if I had it would be inappropriate if I took advantage of it. I therefore have to trust absolutely to the rigour and diligence of counsel, on both sides of the table, and that is what I shall do.

In considering the appropriate sentence I have attempted to take into account all of the information presented to me. I have considered the examples of what has previously been done by the courts in Scotland in analogous situations which are collected in Sheriff Morrison's *Sentencing Practice*, but for a statement of the principles by reference to which such cases should be dealt with I have also considered the collected English cases (*Current Sentencing Practice*) and in particular the leading case from the Court of Appeal in England - *R v F Howe and Son (Engineers) Ltd* [1999] 2 Cr App R (S) 37, [1999] 2 All ER 249. It appears to me that the general approach identified there is one that can properly be taken in Scotland.

In *Howe* it is explained that "...the objective of the prosecution for the health and safety offences in the workplace is to achieve a safe environment for those who work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home, where the defendant is a company not only to those who manage it but also its shareholders."

In arriving at a fine that is "large enough" to bring the message home, the approach of the judges in *Howe* was to identify the aggravating factors in the offence and the mitigating factors with a view to determining the gravity of the offence and then look to means of the offender in order determine what level of fine was appropriate for that offender.

Turning then to the relevant factors tending to aggravate or mitigate, I would identify the following.

Considering how far the accused companies here fell short of what the Advocate Depute, speaking on 17 August, described as the high standard set by the legislation, and on 27 August the strict liability which it imposed, the following points seem to me to be important

The Advocate Depute emphasised the fact that there was no risk assessment or system of inspection of the underground gas pipe work leading from the LPG holding tank and into the building but he specifically accepted that it was not suggested that the failure to assess risks in relation to the buried pipes was wilful. He added that individuals with management responsibilities and their families were also at risk from the hazard.

I understood the Advocate Depute to suggest that the failure to take steps to ensure the physical integrity of the gas supply line was negligent. Mr Jones, on the other hand, described it as inadvertent. I find it difficult to accept the word "inadvertent". With the benefit of hindsight it does seem remarkable that throughout the period covered by the indictment nothing was done by the accused companies to satisfy themselves that the pipe was sound and was likely to remain so. For the reasons set out in the case of *Galloway v Adair* 1947 JC 7, to which I referred the Advocate

Depute, I must accept what was said by Mr Jones in relation to the competence of those involved in the initial laying of the pipe. That was (contrary to a suggestion made by the Advocate Depute) that was that the pipe had been installed in 1969 by an independent contractor who specialised in the relevant area of work and that the installation was supervised by a second independent contractor. The companies may have placed some reliance on that, but more importantly, as against what I have said about nothing being done to check the integrity of the pipe, although the Health and Safety Executive had recommended excavation of part of the pipe work in order to check its state in 1988, in early 1989, after the companies had referred the matter to their then supplier, the HSE accepted a modified proposal for pressure testing of the pipe which did not involve visual inspection. Further, although the companies have pled guilty to failing to make suitable and sufficient risk assessments and no risk assessment addressed the underground pipe, the companies did carry out risk assessments for other aspects of their operations. Accordingly, whether or not the Advocate Depute was correct to use the word “negligent”, I would regard the blameworthiness of the companies as being towards the lower rather than the higher end of the range.

However, what I cannot ignore, irrespective of the level of blameworthiness, are the catastrophic consequences of the companies’ contraventions of sections 2, 3 and 4 of the Health and Safety at Work Act 1974. Mr Jones concedes that these consequences could have been prevented. That clearly is so, and at the quite trivial cost of replacing and re-routing the pipeline above ground. Mr Jones questions whether the catastrophe would in fact have been prevented. That is a speculation I do not require to embark upon. Because the accused companies have pled guilty in the terms that they have, I must have regard to the aggravating effect of the deaths and injuries which are accepted as having been caused by the statutory breaches.

As was observed in the English case of *Howe*: “...it is often a matter of chance whether death or serious injury results from even a serious breach. Generally where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence. The penalty should reflect public disquiet at the unnecessary loss of life.” And here the loss of life has been on a scale larger than in any factory accident in Scotland for nearly forty years.

There are mitigating factors.

This is not a case of failure to heed warnings or where a decision was taken to run a risk in order to save money. The companies apparently have a good safety record prior to May 2004, going back to the 1960’s.

In the circumstances I am satisfied that there was a prompt admission of responsibility and timely plea of guilty. There has been no need for a trial and, while at one stage a trial remained a possibility, its scope was severely restricted by the companies admissions. In relation to the allowance to be made for the pleas of guilty. Notwithstanding the current practice which is based on the guidance given by the Criminal Appeal Court in *Du Plooy v HMA* 2003 SLT 1237 I do not intend to ascribe a specific discount in respect of the pleas. I regard them as an important mitigating factor which I have had regard to but it would not be an accurate reflection of the way that I have approached sentence to suggest that I have applied a specific arithmetical discount.

There is then to be taken into account the ability of the companies to pay a fine and yet remain in business and provide employment – which Mr Jones specifically stated to be the companies’ intention. Section 211 (7) of the Criminal Procedure (Scotland)

Act 1995 requires me to have regard to that. It is in the following terms: "A court in determining the amount of any fine to be imposed on an offender shall take into consideration, among other things, the means of the offender so far as is known to the court."

In order to determine what are the means of the companies, in other words the assets which are available to them, I have been provided with a summary based on the group's accounts for the last three accounting years (Defence production 2). It includes a judgement as to the group's requirements for capital if it is to continue to operate. I am not in a position to check what appears in that summary. Mr Jones, however, assures me that it is full and accurate. I accept Mr Jones's assurance. He invites me to fix the fines at sums which will allow the group to trade, as he tells me it is its intention to do once alternative premises have been found which can be leased, and to continue to provide employment for its work force. Although I must impose separate fines on each company, Mr Jones presents the group as effectively one business with one fund of assets. He can suggest no more rational a basis for decision than imposing equal fines on each company, based on the amount of available assets.

I consider it competent to impose one *cumulo* fine in respect of each company, in other words a fine which covers charge (1) and charge (2) in respect of ICL Tech Limited and charges (3) and (4) in respect of ICL Plastics Limited and that it is appropriate so to do (cf *McDade v HMA* 1997 SCCR 52).

On that basis I shall impose a fine of £200,000 upon ICL Tech Limited and a further fine of £200,000 upon ICL Plastics Limited.

As I have attempted to explain, the sums of money fixed as fines are not intended as any sort of equivalent to the lives lost or the injuries and suffering caused. As I would take everyone involved to recognise, these are not things that are capable of being expressed in terms of sums of money".