MC/CRIM/32-35/13

RULING

Regina

V

Zhen Man Fishery Co Limited
Sheng Hsign Wu

before
Carl Gumsley, Senior Magistrate

GIVEN ON

29th May 2013

Heard on 10th & 11th May 2013

Representation	*Representation*
Alison Inglis	*Crown Counsel*
Mark Neves	*Both Defendants*

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IN THE MAGISTRATE'S COURT
OF THE FALKLAND ISLANDS

MC/CRIM/ 32/13, 33/13, 34/13, 35/13

REGINA

-v-

ZHEN MAN FISHERY CO LTD
and
SHENG HSING WU

JUDGMENT ON PRELIMINARY ISSUE

BEFORE THE SENIOR MAGISTRATE sitting at the Law Courts, Stanley, Falkland Islands on 10th and 11th May 2013.

Alison Inglis, Senior Crown Counsel for the Crown
Mark Neves, Falkland Islands Legal Practitioner, for both Defendants

1. This case first came before me on 10th May 2013. It is a case relating to breaches of fishing legislation in the Falkland Islands. The owners and the master of the vessel, Hua Sheng 626, were both charged with 4 offences in total, namely:
    - On 1st April 2013 – Failing to give 72 hours notice of an intention to leave the Falklands Islands fishing waters to the Director of Fisheries contrary to Section 161(1)(a) of the Fisheries (Conservation and Management) Ordinance 2005.
    - On 1st April 2013 – Failing to make a FISHEND REPORT to the Director of Fisheries prior to departure from Falkland Islands waters contrary to Regulation 16(1) of the Fishing Regulations Order 1987.
    - On 6th April 2013 – Failing to give 72 hours notice of an intention to leave the Falklands Islands fishing waters to the Director of Fisheries contrary to Section 161(1)(a) of the Fisheries (Conservation and Management) Ordinance 2005.
    - On 6th April 2013 - Failing to make a FISHEND REPORT to the Director of Fisheries prior to departure from Falkland Islands waters contrary to Regulation 16(1) of the Fishing Regulations Order 1987.

2. It is right to say that the two dates of the 1st and 6th April 2013 above were meant to be specimen charges and it was accepted by the Defence that they reflected a deliberate course of conduct over 4 nights.

3. The allegations, in brief, were as follows. It was alleged that the vessel Hua Sheng 626 was fishing on the border between Falkland Islands and

Argentinean territorial waters during the end of March/beginning of April 2013. When the fish moved from one territory to another, or were spotted to be in one territory rather than another, the vessel would "follow the fishing", irrespective of whose waters they were in, on one occasion going as much as 14 miles into Argentinean waters. No notice was given to the Director of Fisheries of the intention of the vessel to leave Falklands waters and the relevant FISHEND REPORTS were not made.

4. On the 10th May I was informed that there was a preliminary matter that required resolution, namely what was the maximum sentence in respect of the offence of Failing to make a FISHEND REPORT to the Director of Fisheries prior to departing from Falklands waters, contrary to Regulation 16(1) of the Fishing Regulations Order 1987.

5. The difficulty was first brought to my attention just before coming into court on 10th May. I am grateful to Ms Inglis who quite properly brought this ambiguity and resulting problem to my attention, although the lateness with which I became aware of it, and the necessity to sit early on 10th May, in order to deal with a number of other matters, meant that I could not consider the point in the depth that it deserved on that date.

6. As a result I felt there was no alternative but to adjourn the matter and invite skeleton arguments on the issue to be prepared. This is what I did. Regrettably, I was told that adjourning the case until there was a slot in the court list to hear the case again, would cause significant and largely insurmountable problems. Consequently I felt there was no alternative but to sit the following day, on 11th May, a Saturday.

7. After receiving written skeleton arguments from both the Crown and the Defence, for which I was most grateful and which were both extremely helpful, I was able to reflect upon them during the morning of 11th May and hear further submissions from both when the case came back in for hearing that afternoon.

8. I delivered my ruling on this point on the afternoon of 11th May and thereafter heard the case opened in full. I then moved to sentence. However, I indicated that I would hand down my full judgment on the matter and the reasons for my ruling later. I do this now.

9. I should say that in considering this matter I am relying upon the law as it is set out in the Blackhall disc provided to me by the Attorney General's Chambers as being the most authoritative version available. Although anyone who uses the disc does so with extreme caution I have received no representations that the version on the disc, in relation to this area of law, is anything but accurate and I proceed on this basis.

10. Let me then turn to the problem with which the Court is seized.

11. As I have said, the offence with which we are concerned is one of failing to make a FISHEND REPORT contrary to Reg.16(1) of the Fishing Regulations

Order 1987 (as amended by the Fishing Regulations (Amendment) Order of 1989) ("the 1987 Regulations").. It is important for the purposes of this matter to note that these Regulations were made under the enabling provisions contained in the Fishing Ordinances of 1986 to 1991.

12. The Fisheries (Conservation and Management Ordinance) of 2005 ("the 2005 Ordinance") is now the main substantive legislation on the subject of fisheries regulation in the Islands. It is a lengthy Ordinance and deals with all manner of issues surrounding the fishing industry. Amongst other things it provides for the power for regulations to be made for the purpose of carrying out or giving effect to the Ordinance. It is important to note that, of course, this Ordinance post dates the 1987 Regulations which were made by the 1987 Order.

13. As the 2005 Ordinance post dates the 1987 Regulations it is necessary to first clarify whether the bringing into force of the 2005 Ordinance in itself affects the validity of the 1987 Regulations.

14. Section 224 of the 2005 Ordinance deals with *"Repeals and Savings"*. It states that:

    "(1) The Fisheries Ordinances 1986-1991, the High Seas Fishing Ordinance 1995, the Fishing (CCAMLR) Ordinance 1999 and the Fishing (CCAMLR) (Amendment) Ordinance 2002 are hereby repealed".

    However, s.224 goes on *"(2) Notwithstanding subsection (1)-*
    (b) any regulations made under any of the Ordinances repealed by subsection (1) which were in force immediately before the commencement of this section shall, in so far as they are not inconsistent with this Ordinance, continue in force until they are revoked by regulations made under s.223 of this Ordinance".

15. It is not disputed by the parties in this case that, although the Fisheries Ordinances 1986-1991, which were the enabling Ordinances under which the 1987 Regulations were made, have been repealed, the effect of s.224 is to generally save the 1987 Regulations themselves (until they are revoked by regulations made under s.223). I say generally because of the provision "*in so far as they are not inconsistent with this Ordinance"* to which I will return in a moment.

16. It is further common ground that no regulations have ever been made revoking the 1987 Regulations. As a result both the Crown and the Defence agree that the 1987 Regulations are still in force and that Failing to make a FISHEND REPORT contrary to Reg. 16 of the 1987 Regulations is still an offence.

17. I agree with this. Section 224 could have revoked all previously made regulations but it does not do so. Neither does it choose to revoke some regulations by way of listing them within the Ordinance or in a Schedule attached thereto.

18. Having established that the offence under Reg. 16 is still in force the next question, and the one to which this judgment is directed, is as to what the maximum sentence is in relation to this offence.

19. The starting point is perhaps the 1987 Regulations themselves. Reg. 61 of the 1987 Regulations states *"Any person who, being the owner, master or charterer of any vessel or the owner, charterer or pilot in command of any aircraft or owner of any land store or a person engaged as a member of the crew of any vessel, who contravenes any provision of Parts I to V or of any licence applicable to such vessel or aircraft commits an offence"*. The penalty is stated in the 1987 Regulations to be *"£50000"*.

20. The question which therefore falls to be considered is this. If the offence of Failing to make a FISHEND REPORT continues to apply, does the penalty of £50000 continue to apply?

21. The Crown submits that it does. The Defence submit that it does not. The Defence say that the maximum sentence is now (and has been since the coming into force of the 2005 Ordinance) one of £10000.

22. In order to adjudicate on these submissions I first remind myself of what s.224(2) of the 2005 Ordinance says:

    Notwithstanding subsection (1)-
    (b) any regulations made under any of the Ordinances repealed by subsection (1) which were in force immediately before the commencement of this section shall, in so far as they are not inconsistent with this Ordinance, continue in force until they are revoked by regulations made under s.223 of this Ordinance".

23. As I have said, section 224(2) clearly states that regulations made under the earlier Ordinances continue in force "*in so far as they are not inconsistent"* with the 2005 Ordinance, or to remove the double negative (which it seems to me to be permissible to do) that they only remain in force in so far as they are consistent with the 2005 Ordinance.

24. What does this mean? What does it take for a regulation not to be inconsistent with the 2005 Ordinance?

25. To try to come to a conclusion as to this particular question it is necessary to look at the provisions of the 2005 Ordinance itself which deal with the powers to make regulations. These powers are contained in s.223.

26. Section 223(1), of the Ordinance and which is headed *"Regulations"*, states:

    "The Governor may make regulations, not inconsistent with this Ordinance, prescribing all matters required or permitted by this Ordinance to be prescribed or necessary or convenient to be prescribed for the purpose of carrying out or giving effect to this Ordinance."

Section 223(2) goes on to say:

"Without prejudice to the generality of subsection (1), The Governor may make regulations-
a) providing that offences against the regulations shall be punishable on conviction by such fine, not exceeding the maximum of Level 6 on the standard scale, as is specified in the regulations in respect of that offence."

27. On a first reading of the above it would therefore seem that the 2005 Ordinance permits regulations to be made, which include those which may prescribe that offences against those regulations, can be punished by a fine as long as that fine does not exceed Level 6 (presently £10000).

28. The matter, however, is perhaps further complicated by s.223(3) of the 2005 Ordinance. Remembering that this is within the same section, section 223(3) provides:

"Regulations made under this section may provide that any contravention of a provision of such regulations specified therein for the purpose shall be punishable on conviction by such fine not exceeding the maximum of Level 12 on the standard scale as may be specified therein."

29. Although different language is used, and indeed there appears to be a different style of drafting used, s.223(3) on first blush, seems to create a power to make regulations that are punishable by fine not exceeding Level 12 (presently £650000).

30. And so, within not only the same Ordinance, but within the same section of the same Ordinance (namely s.223) there appears to be two powers which are inconsistent and conflicting.

31. The Defence submission can perhaps be summarised as follows:

    (i) It is accepted that Reg.16 of the 1987 is in force and is not, in itself, inconsistent with the 2005 Ordinance. The dispute relates to the penalty attached to any breach of Reg.16, as set out in Reg.61 of the 1987 Regulations.
    (ii) The terms in s.224 of the 2005 Ordinance make it clear that the regulations predating the Ordinance only remain in force *"in so far as they are not inconsistent with the Ordinance itself."*
    (iii) The 2005 Ordinance has, in s.223(2), created a specific provision which deals with the maximum sentences relating to offences that are contrary to regulations. This is set out as being a fine which must not exceed Level 6 on the standard scale.
    (iv) The intention of the law is clear. It is meant for fines imposed for offences made by regulations to be limited to Level 6.
    (v) Consequently if the penalty prescribed by Reg.61 of the 1987 Regulations is not to be inconsistent with the 2005 Ordinance the fine level must be reduced from £50000 to Level 6 (which is presently £10000).

(vi) Section 223(3) should be ignored altogether when considering whether a £50000 fine under Reg.61 of the 1987 Regulations is inconsistent with the Ordinance. Section.223(3) deals solely with regulations made "under this section". That is, regulations which were made after the 2005 Ordinance came into force. In contrast they say s.223(2) does not refer to regulations made under that section but more generally refers to "the regulations". This therefore refers to the previously made regulations.

32. The Crown's submissions are, in summary, as follows:

(i) It is agreed that Reg.16 of the 1987 is in force and is not, in itself, inconsistent with the 2005 Ordinance. It is further agreed that the dispute relates to that is the correct penalty to be attached to any breach of Reg.16, as set out in Reg.61 of the 1987 Regulations.

(ii) Section 224 says that regulations *"continue in force until they are revoked by regulations made under section 223 of this Ordinance"*.

(iii) As s.224 does not expressly say that regulations preserved by s.224 are to be interpreted "as if made under the 2005 Ordinance" all provisions in the 1987 Regulations continue to apply in the same form that they were before the 2005 Ordinance, including the penalty provisions in Reg.61.

(iv) In support of this argument reference should be had to the explanatory memorandum to the Bill which was published in the Falkland Islands Gazette on 31st May 2005 and which says "*Any regulations made [under the Ordinances referred to in section 223(1)] which were in force immediately before the commencement of clause 224 would remain in force until they are revoked by regulations made under clause 223*".

(v) As the penalty was £50000 before the commencement of clause 224 and as there is no specific reference to penalties changing as a result of the 2005 Ordinance the penalty remains at £50000.

(vi) Further, the purpose of the 2005 Ordinance is to "reform and restate the law relating to fisheries resources and fisheries management, control and conservation" and "sets out the regulatory framework within which vessels are licensed to fish in the Falkland Islands Conservation Zones."

(vii) In addition s.202 of the 2005 Ordinance requires the Court to take into account the difficulty in catching and prosecuting offences and the need for deterrent sentences.

(viii) For the purposes of interpreting s.224 the term "inconsistent" should, in effect, be read as meaning 'with the spirit of the Ordinance which is to protect the fisheries'.

(ix) Consequently, the penalty imposed by Reg. 61 the 1987 Regulations is *"not inconsistent"* with the 2005 Ordinance as it is of a nature which protects the fisheries.

(x) Further, although, at first blush, there appears to be a conflict between s.223(2) and s.223(3) given that both provisions are expressed in terms that empower the Governor (rather than limiting the Governor's powers) and also given that section 223(2) is

expressed to be *"without prejudice to the generality of subsection (1),"* the conflict is not irreconcilable.

(xi) The effect of s.223 is to grant the Governor two separate powers to make regulations. He can make regulations creating penalties up to Level 6, under s.223(2), and he can also make regulations creating penalties, under s.223 (3), up to Level 12. Therefore, the power to create regulations prescribing penalties up to Level 6 is subsumed in the wider power to create regulations prescribing penalties up to Level 12. As a fine of £50000 is not inconsistent with the greater power at s.223(3), the fine of £50000 remains.

(xii) If, notwithstanding the above, it is felt that there is still an irreconcilable conflict the Court should look to, and apply, the rule in Wood v Riley to resolve the issue.

33. Firstly I have considered the submissions from both Crown and Defence to the effect that there are ways of interpreting the legislation so that there isn't really a problem to solve at all. I have come to the following conclusions:

(i) The argument advanced by the Crown that, as s.224 does not say that the regulations remain in force "as if made under the 2005 Ordinance" it must mean that the whole of the previously made regulations including the previously made penalty regulation remains in force, chooses to avoid and ignore the words which appear in s.224, and make it clear that the 1987 Regulations apply *"in so far as they are not inconsistent with this Ordinance"*. The draftsman chose to put these words into the provision and the Legislature accepted them. The 2005 Ordinance specifically provides that there is a limit of the level of fines that can be made under regulations (albeit there are two different Levels stated).

(ii) In addition, although the Crown refer to the wording of the memorandum to the 2005 Ordinance, this, in my judgment, does not assist to advance matters at all. The memorandum says that *"any regulations made [under the Ordinances referred to in section 223(1)] which were in force immediately before the commencement of clause 224 would remain in force"*. That is not dispute. It is agreed that Reg.16 and Reg 61, in themselves, remain in force. It is the level of penalty (and the effect of the phrase *"in so far as they are not inconsistent with this Ordinance")*that is in issue and the memorandum is silent about that.

(iii) If the intention of the legislators was to maintain the regulations exactly as they had been prior to the enactment of the 2005 Ordinance, including the penalty, it would have been a simple enough task to say so. It would also have been a simple enough task not to include the words *"in so far as they are not inconsistent with this Ordinance"*in the 2005 Ordinance itself. Neither course was taken. Those words were included. The Court must assume that they were included because they were meant to mean something. In my judgment the meaning is clear. The regulations only survive, as is clearly stated *"in so far as they are not inconsistent with this Ordinance."*

(iv) I am also not attracted by the argument that is advanced by the Crown to the effect that the retention of the £50000 penalty is not inconsistent with the 2005 Ordinance simply because the purpose of the Ordinance is to protect the fisheries and the 1987 Regulations and the penalty under Reg.61 does just this, and so are consistent with the Ordinance. The difficulties in this case relate to the interpretation of the details of the 2005 Ordinance and the intention of the legislators in the making of the 2005 Ordinance. The argument of the Crown seems to me to be little more than a sweeping submission that, as a £50000 fine is in line with a general objective or policy, it is therefore consistent.

(v) The Crown also seek to suggest that what s.223(2) and possibly s.223(3) does is merely to give examples as to the type of regulations that might be made and that they were merely indications of what might be done and was not intended to have any real force as prescriptive sections of legislation. This seemed to be based upon the wording of s.223(2) which says *"without prejudice to the generality of subsection (1)"* and an argument that this gives the Governor a wide discretion to make such regulations as he thinks fit. It would be a rare piece of legislation to merely set out a list of examples, especially without making it clear that they were only meant to be examples. There is nothing within s.223 to suggest that this was the intention of the legislators. In addition, this submission seems to me to fail to give any real account to the principle of *generalibus specialia derogant* (special provisions override general ones). As the legislators haven chosen to specify the level of fines (that is make specials provisions), application of this principle suggests that it is to be presumed that the issue was meant to be dealt with by the very specific provisions that they chose to make. In my judgment, as s.223(2) deals with specifics it is meant to take precedence over and define and restrict the general power as set out in s.223(1). Of course, this only takes us so far as the same can be said for s.223(3) which also deals with specifics.

(vi) However, I am equally not persuaded by the Defence that s.223(3) can simply be ignored. This submission that s.223(3) seems to be based upon the argument that it refers to regulations "made under this section" and the 1987 Regulations were not made "under that section". However section 223(2) refers to regulations that the Governor "may make". Both refer to the future tense. Section 223(3) refers to regulation made under this section which must include those made under s.223(2). In my judgment s.223(2) and s.223(3), whilst slightly differently phrased, are, in reality, a distinction without a difference.

34. In my judgment:

(i) The legislators intended that regulations that "may be made" under s.223 included regulations that had been made under previous legislation (including the 1987 Regulations) and which are 'saved' by s.224.

(ii) The 1987 Regulations will only survive to the extent that they are *"not inconsistent"* with the 2005 Ordinance.
(iii) Section 223 is a specific provision which deals with the level of fines that can be prescribed for breaches of any regulations made.
(iv) It is not possible to conclude that s.223(2) and s.223(3) are anything but inconsistent and contradictory.
(v) It is not possible to read them in such away as to be able to apply both.

35. Consequently, however one might strain to read the legislation, there is a problem here which must be resolved. There are clearly two separate subsections in the same section of the 2005 Ordinance that deal with the same issue in inconsistent and contradictory ways. The question that is to be resolved now is which of those sections is to take precedence.

36. As the Court is left with at least two apparently wholly inconsistent subsections within the same section (that is s.223) of the 2005 Ordinance, it is the obligation and duty of the Court to try to do what it can to resolve the issue.

37. The Crown invite me to conclude that in order to do this s.223(2) should be simply subsumed into s.223(3).

38. In Institute of Patent Agents v Lockwood (1894) AC 347 Lord Hershall suggested that the approach a court should take, where there is a conflict between two sections in the same Act, is that *"You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which is the subordinate provision, and which may give way to the other"*. I have ruled that it is not possible to reconcile the two different provisions.

39. By making the submission that they do the Crown can only be suggesting that s.223(3) is the dominant provision and s.223(2) is the subordinate one. This immediately begs the question as to why that should be? If the intention of the legislators was to create a power to prescribe penalties to be up to Level 12 for breaches of regulations, why was s.223(2), creating a power to prescribe penalties to be up to Level 6, ever created at all and fully set out in the 2005 Ordinance itself? I can see no basis for simply concluding that the principle set out by Lord Hershall should be simply allowed to manifest itself in a rule that the power to prescribe a smaller fine should simply give way to a power to prescribe a greater one.

40. Although there is general a principle of interpretation that the subordinate should give way to the dominant, this is usually advanced where there is primary legislation in conflict with secondary legislation. In this case, application of that principle would assist in concluding that the 1987 Regulations (which are secondary legislation) and the penalties as set out in Reg.61 should give way to the 2005 Ordinance (which is primary legislation). This, however, does no more than supporting my finding above that the 1987 Regulations must be read so that they are not inconsistent with 2005

Ordinance. Regrettably, it does not assist in deciding which of the two sections within s.223 is to be preferred.

41. In order to try and resolve a conflict within a statute the Crown then invite me to have reference to Bennion on Statutory Interpretation and invite me to apply the rule in Wood v Riley (1867) LR 3 CP 26. This rule invites the Court to adopt the principle that the enactment nearest the end of the instrument prevails.

42. It is a rule that is not without its own fair share of criticism, as the Crown quite properly concede. As was said by Nicholls LJ in 1990 *"Such a mechanical approach…is altogether out of stop with the modern, purposive, approach to the interpretation of statutes and documents"*.

43. It is also said that the rule in Wood v Riley is to be used where there is no other way of dealing with problems of inconsistency. It is a rule of last resort.

44. Whilst there may be merit in such a rule, e.g. where something needs to be decided and there is really no other way of deciding it at all, it does provide a way of at least coming to some answer, it seems to me to be the statutory interpretation of the equivalent of tossing the proverbial coin.

45. However, need it apply in this case? Is there really no other way of properly coming to a conclusion as to how to interpret which of the conflicting provisions apply? I am not so sure that we have come to the end of the interpretation road.

46. In particular I have considered the Rule of Lenity. This rule is said to have been developed by the judiciary in years gone by to allow them to mitigate the harsh and oppressive consequences of penal legislation but remains as a principle today. It says that, in penal statutes any ambiguity should be resolved against the government and in favour of the Defendant. This seems to me to a perfectly sensible rule and one which is consistent with modern principles and human rights legislation. A person who offends, or is considering offending, is entitled to know what the consequences of their behaviour may be.

47. As the Court has looked into this issue it is clear to all that it becomes more and more complicated and regrettably more ambiguous. The Crown have been candid enough to concede that they had no idea why there were two apparently contradictory subsections in s.223 of the Ordinance itself, and accept that the situation caused by the apparent contradiction is far from satisfactory. Indeed Ms Inglis had already indicated in an email to the Court dated the 9th May 2013, in which she raises this issue and identifies the problem, that *"this inconsistency is expected to be rectified in the near future by amending legislation"*. In addition, in the skeleton argument submitted on behalf of the Crown it is said that *"It is desirable for the inconsistency within section 223 to be resolved by legislation to put the matter beyond doubt"*.

48. If the Crown themselves concede that the ambiguity is sufficient to call for the need for change by the Legislature it seems to me that it would be wrong to expect a Defendant to guess as to what his punishment may be in the meantime.

49. In my judgment, in applying the Rule of Lenity a resolution to this case can found and the Court can make a decision without having to apply the rule of last resort in *Wood v Riley*.

50. Consequently, and in all the circumstances and in my judgment, the maximum sentence for an offence under s.16 of the Fishing Regulations Order is Level 6, that is £10000.

51. This case has served to demonstrate the problems that this Court has to face on a frequent, if not day to day basis. The importance of clear and accurate drafting cannot be over emphasised. Ambiguity in respect of the law is bad for all and may well lead the law itself coming into disrepute. It is a much too common occurrence in these Islands as the Court as the practitioners before me can attest to.

52. According to Bennion, Lord Hewart CJ once said of Counsel in a case involving Sunday Trading that "Sir William Jowitt, appearing on one side in this case, frankly admitted that the provisions of these Schedules, taken together, and compared and contrasted with each other, were, to his mind, unintelligible". This Court knows how he feels.

Carl Gumsley
The Senior Magistrate s
Falkland Islands

Handed down on 29th May 2013