Regulatory & Environment Insights

NSW GOVERNMENT | Crown Solicitor's Office

Through muddy waters: clarity on the question of duplicity in charging for environmental offences (*Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263)

KEY POINTS

- The general rule against duplicity should not be applied "more loosely" for environmental offences than in respect of the general criminal law.
- Disadvantage to the Court and the defendant is inherent in duplicitous charging: a defendant need not identify a procedural or other disadvantage for a charge to be duplicitous.

BACKGROUND

A summons or court attendance notice will generally be duplicitous if it gives rise to two or more separate offences. The consequences of a finding of duplicity range from the Court granting leave to the prosecutor to amend the charge, to striking out the charge altogether.

In *Kiangatha*, the two appellants sought leave to appeal from a decision of the Land and Environment Court which dismissed their notices of motion seeking that the charges against them be struck out or stayed on the basis that they were duplicitous. Each appellant had been charged with two offences of polluting waters contrary to s. 120 of the *Protection of the Environment Operations Act 1997* arising from the construction of an unsealed road. The appellants had allegedly failed to contain the flow of soil to prevent it from falling or being washed into drainage lines leading to various nearby watercourses.

ON APPEAL

The Court of Criminal Appeal held that each summons was bad for duplicity as each particularised multiple instances of breaching s. 120:

- The Court held the prosecutor was able to identify a series of discrete offences against s. 120, in particular because they had provided the defendants with a map marking three separate areas where soil was allegedly placed.
- The Court rejected the prosecutor's argument that construction of the road was a continuing offence or that there was a single intention of creating a road so that the offending conduct could be considered part of a single criminal transaction. Each instance of placement of material where it was likely to make its way into a dry gully was a complete offence.

The Court noted that there had been a number of cases in which NSW authorities had "endeavoured to prosecute multiple discrete infringements of environment protection laws on single count summonses", but the rule against duplicitous pleading is not to be applied "more loosely" in this context than in respect of the general criminal law. Smart AJ's observations in *Bentley v Gordon* [2005] NSWCCA 157 should not be taken to suggest otherwise (at [67] and [70]). Further, the Court observed that disadvantage to both the Court and the defendant is inherent in a duplicitous pleading. The rule should be followed regardless of whether the defendant identifies a procedural or other disadvantage (at [66]).

IMPLICATIONS FOR PROSECUTORS

Kiangatha is a warning for prosecutors about the strict approach to be taken to the rule against duplicity in prosecutions, including those in the environmental context. This is unless one of the rare exceptions to the rule can be established: a single criminal transaction (see [34]-[37]) or a continuing offence (see [48]-[50]).

In drafting particulars of a charge for any kind of offence, including environmental offences, a prosecutor must pay careful attention to ensure that only one offence is pleaded in a single charge.

The key step is to consider what evidence is available to support each element of the offence. If the evidence can support multiple offences, the prosecutor should either commence multiple charges (with the number reflecting overall criminality) or limit the evidence to a single charge.

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