IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2017-047-197/198
[2019] NZDC 13701

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

THOMAS WILSON RUKI
AARON DONALD JOHNSTONE
Defendant(s)

Hearing:	1 July 2019
Appearances:	A A Hopkinson for the Prosecutor T J Conder for both Defendants
Judgment:	16 July 2019

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

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[1] The defendants Thomas Wilson Ruki and Aaron Donald Johnstone were tried before me on 18–22 February 2019. In a reserved judgment delivered on 24 April 2019,[1] I found the charges against them proved beyond reasonable doubt.

[2] The defendants appeared before me on 1 July 2019 for sentence. Each defendant faces the same charge:

> That on 18 October 2016 at or near 1250 State Highway 35, Opape, each of them contravened or permitted a contravention of s15(1)(b) of the Resource

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1 *Bay of Plenty Regional Council v Ruki & Johnstone* [2019] NZDC 7581

Management Act 1991 (RMA) by discharging a contaminant, namely dairy effluent, onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water, when that discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region, or a resource consent.

[3] This is an offence under s338(1)(a) RMA for which the maximum penalty under s339(1)(a) RMA on conviction in the case of a natural person is imprisonment for a term not exceeding two years or a fine not exceeding $300,000.

[4] Having found the charge against each defendant proved beyond reasonable doubt and no other process has been taken by either of them, I accordingly convict each defendant and proceed to consider an appropriate sentence.

[5] The relevant facts are set out in detail in my earlier judgment. In brief summary, on 18 October 2016 Mr Johnstone, the farm manager, gave instructions to Mr Ruki, his senior assistant, to turn on the pump to send dairy shed effluent to a travelling irrigator in a paddock and then to turn it off after a certain period of time. The irrigator broke down some time after Mr Ruki turned it on and stopped moving. There being no failsafe device to turn off the pump, the discharge of effluent continued for a period until Mr Ruki turned the pump off. The discharge occurred in a location where it would flow to a spring-fed drain in a neighbouring paddock. Later that day a council inspector observed effluent on the ground around the irrigator and in the neighbouring paddock and took samples which showed elevated levels of faecal coliforms in the drain.

[6] Counsel for the prosecutor and for the defendants are agreed as to the sentencing process to be followed and the relevant sentencing principles and purposes to be taken into account and considered. The principal issue before the Court is setting an appropriate starting point for a fine in respect of each defendant.

[7] The Court must follow the three-stage approach as set out in *R v Clifford*,[2] identifying a starting point for the offending, making adjustments for personal aggravating or mitigating factors and applying a discount for an early guilty plea, if appropriate.

[8] All of the purposes and principles in ss 7 and 8 of the Sentencing Act 2002 must be borne in mind, as well as the purpose of the RMA to promote the sustainable management of natural and physical resources. Of particular relevance under the Sentencing Act 2002 are the purposes of accountability, promoting a sense of responsibility, denunciation and deterrence, and the principles relating to the gravity of the offending and the degree of culpability of the offender, the seriousness of the type of offence and the general desirability of consistency with appropriate sentencing levels.

[9] In considering the starting point, the Court should have particular regard to the factors that are commonly identified as being particularly relevant to offending against the RMA, as set out in *Machinery Movers Ltd v Auckland Regional Council*[3] and more recently, with particular reference to the Sentencing Act 2002, in *Thurston v Manawatu-Wanganui Regional Council*.[4] These include, relevantly, the offender's culpability, the sensitivity, vulnerability or ecological importance of the receiving environment and the extent of any damage to it, the deliberateness of the offending and the attitude of the defendant to it, the principle of deterrence, both for the offender and for others, and the capacity of the defendant to pay a fine. There is no tariff case.[5]

[10] Counsel for the prosecutor submitted that the most important purpose in the circumstances of the present cases is that of deterrence, citing *Southland Regional Council v Baird*[6] and *Burrows v Otago Regional Council*.[7]

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2 *R v Clifford* [2012] I NZLR 23 (CA) at [60]
3 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 (HC).
4 *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-25, 27 August 2010, Miller J at [41].
5 *Thurston* at [40].
6 *Southland Regional Council v Baird* [2018] NZDC 11941 at [41].
7 *Burrows v Otago Regional Council* [2015] NZHC 861 at [34].

[11] Additionally, in the context of the RMA, a key purpose of sentencing is to impose financial costs or penalties which cause the polluter to internalise the environmental cost and to foster the principle of environmentally responsible corporate citizenship and reflect general deterrence.

[12] In terms of the principles of sentencing, counsel agree that the most relevant principles in this case are:

(a) The gravity of the offending in the particular case, including the degree of culpability of the offender;

(b) The seriousness of the type of offence in comparison with other types of offences as indicated by the maximum penalties prescribed for the offences;

(c) The general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.

[13] In identifying a starting point and consistent with the purpose of consistency, counsel referred to the decision I gave in respect of the same circumstances in sentencing the four trustees of the Otanemutu Lands Trust who are the registered proprietors of the subject farm, in *Bay of Plenty Regional Council v Amoamo & ors*.[8]

[14] The prosecutor submitted that the culpability of these defendants should be considered lower than that of the trustees, given the primary responsibility of owners and consent holders for ensuring that the farm had appropriate effluent infrastructure and effluent management systems in place, and in particular in failing to ensure that the irrigator was maintained in good order and had a failsafe mechanism to stop the flow of effluent should the irrigator malfunction. Even so, the prosecutor noted that one reason why the trustees were discharged without conviction was because none of them were involved in the day to day on-site operations of the farm and so there was a great deal of trust and reliance on these defendants as the farm manager and the senior farm assistant.

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8 *Bay of Plenty Regional Council v Amoamo & ors* [2018] NZDC 9866.

[15] In this context the prosecutor characterised the culpability of Mr Ruki as reckless and that of Mr Johnstone as careless. The difference is attributable to their respective actions on the day in question, when Mr Johnstone gave instructions to Mr Ruki as to what he was to do and Mr Ruki was the person who did or failed to do those things. In particular, Mr Ruki was responsible for turning the effluent pump on and off and therefore responsible for checking on the irrigator during the time the pump was on, while Mr Johnstone was away from the farm. Mr Johnstone's instructions to Mr Ruki and his absence during the day reduces his culpability but does not eliminate it given his position as the senior manager on the farm.

[16] On the effects of the offending on the environment, the prosecutor acknowledges the difficulty in quantifying the extent of actual damage in the absence of knowing the duration and volume of the discharge. As I found in my decision after the trial, the evidence obtained from samples in the spring fed drain were sufficient to corroborate other evidence and support my finding that a discharge occurred, but did not show what the extent of the discharge was. I accept, however, the prosecutor's submission that the effects of such discharges on water resources should be considered as cumulative and serious. The connection of the spring-fed drain to other watercourses and then to the Waiaua River and the sea means that all such discharges of contaminants must be considered in the context of the broader environment, the importance of protecting water quality and the need to deter future discharges.

[17] While I discharged the trustees without conviction in *Bay of Plenty Regional Council v Amoamo & ors*,[9] for the reasons given in that decision, I also found that an appropriate starting point for a sentence would have been in the range of $40,000 – 50,000. I did not consider that there were any aggravating factors and that deductions should be made of 5% for good character and 20% for relatively early guilty pleas. On that basis I found that an appropriate level of fine would have been $30,000, apportioned equally among the four trustees, had they not been discharged without conviction. It is relevant to add that the trustees contributed that sum to the costs of the prosecutor and that they subsequently improved the environmental management and effluent disposal infrastructure at the farm.

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9 *Amoamo*, above fn 7.

[18] The prosecutor also referred to three other comparable sentencing decisions.

[19] In *Otago Regional Council v Avenal Agriculture Ltd & Benbow*,[10] the Court was sentencing both the owner and the manager for discharges which had ponded and entered water. Judge Dwyer accepted that the culpability of the manager was lower than that of the owner as the farm did not have adequate systems in place, but nonetheless held that there had been a real degree of carelessness on the manager's part in operating the system. Starting points of $35,000 for the owner and $20,000 for the manager were adopted. The prosecutor submitted that this case was similar to Mr Ruki's offending.

[20] In *Bay of Plenty Regional Council v Carter & Carter*[11] there were three separate discharges caused by poor management and maintenance for which Judge Harland considered the owner was culpable at a level of highly negligent, bordering on reckless. The employee's culpability related to failures to act to address obvious problems was assessed as negligent and extremely careless. A starting point of $60,000 was adopted for the owner and $25,000 for the employee. Her Honour agreed with a submission that a sterner approach needed to be taken in respect of basic failures in relation to effluent management. The prosecutor submitted that the present case is less serious that the case in *Carter* given the number and duration of the discharges.

[21] In *Otago Regional Council v Jury*[12] a farm worker had left a travelling irrigator operating over several days creating extensive ponding, but without evidence that the effluent had flowed to a watercourse. Judge Dwyer characterised the offending as showing a substantial degree of carelessness but was at the bottom end of the scale of seriousness. A starting point of $10,000 was adopted in light of other decisions where a range between $15,000 and $7,500 had been adopted for non-owner defendants. The Prosecutor submitted that the present case was more serious as there was evidence of effluent entering a watercourse.

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10 *Otago Regional Council v Avenal Agriculture Ltd & Benbow* [2016] NZDC 10171.
11 *Bay of Plenty Regional Council v Carter & Carter* [2018] NZDC 22257.
12 *Otago Regional Council v Jury* [2017] NZDC 8895.

[22] The prosecutor also relied on comments made in the decisions in other sentencing decisions, including in two appeals, in relation to deterrence and the appropriate level of fines under the RMA.

[23] In *Southland Regional Council v Baird*,[13] Judge Dwyer noted that the starting points for medium-level offending represented only a limited percentage of the maximum available penalties and so could not be said to be overloading the level and ongoing incidents suggest that there may be a need for an uplift on a deterrent basis.

[24] In *Burrows v Otago Regional Council*,[14] Gendall J observed that dairy effluent discharges involve a situation of particular importance given New Zealand's environmental image and the economic contributions of dairy farming. In that context he held deterrence to be important and the omission of proper precautionary instructions not to be a valid excuse for those responsible for day to day operations of a farm.

[25] In *Vernon v Taranaki Regional Council*,[15] Ellis J noted that a starting point of $60,000 was only 20% of the maximum available penalty, that farm dairy effluent has done massive damage to New Zealand's waterways with environmental and financial ramifications that "should not need to be repeated, and that in setting the levels of penalties Parliament has expressly recognised a particular need for deterrence.

[26] The prosecutor submits that a starting point of $20,000 would be appropriate in Mr Ruki's case, on the basis that he was directly responsible for operating the effluent system, the offending could easily have been avoided if he had checked the irrigator regularly, the discharge entered water and was moderately serious and greater deterrence of this kind of offending is needed.

[27] Acknowledging that the culpability of Mr Johnstone was less, the prosecutor submits that a starting point of $15,000 would be appropriate in his case, on the basis of his overall responsibility as the farm manager, the discharge entering water and the need for greater deterrence.

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13 *Baird*, above fn 5 at [25].
14 *Burrows*, above fn 6 at [34].
15 *Vernon v Taranaki Regional Council* [2018] NZHC 3287 at [32].

[28] Counsel for the defendants submits that Mr Ruki's failure lay in not checking the irrigator often enough, which was at the upper end of carelessness but not reckless. Further, the absence of a failsafe mechanism was not something that Mr Ruki had any control over: while it meant that he needed to be more careful, the absence of such a device is not something that he should be held responsible for. He submits that the appropriate starting point for Mr Ruki would be $15,000.

[29] Counsel for the defendants submits that Mr Johnstone's culpability is substantially reduced by the evidence at trial that his instructions to Mr Ruki on the day of the offending were appropriate and adequate, and that the finding of guilt on his part is on the basis of vicarious liability rather than personal fault. He submits that the appropriate starting point would be $5,000.

[30] In both cases, counsel for the defendants submits that the evidence from the water samples indicates that the contamination level was not particularly remarkable, consistent with a relatively limited discharge.

[31] Further, he notes that in similar cases charges are regularly pursued against a farming company but rarely against the farm workers. He refers to my decisions in *Bay of Plenty Regional Council v Tirohanga Farms Ltd*[16] and *Bay of Plenty Regional Council v Kahu Ma Farms Ltd*,[17] as well as my decision in relation to the trustees of this farm.[18] In reliance on those decisions he submits that the appropriate starting point for each defendant should be lower than those advanced by the prosecutor.

[32] Two issues are at the forefront of the assessment of the offending by these defendants:

(a) The culpability of each of them; and

(b) The general desirability of consistency in sentencing.

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16 *Bay of Plenty Regional Council v Tirohanga Farms Ltd* [2018] NZDC 14868.
17 *Bay of Plenty Regional Council v Kahu Ma Farms Ltd* [2017] NZDC 27675.
18 *Amoamo & ors*, above fn 7.

[33] In assessing culpability, the general approach discussed by Judge Whiting in *Waikato Regional Council v GA & BG Chick Ltd*[19] remains a useful guide for considering environmental offending, particularly in relation to the relative seriousness of the offending and the extent of damage to the environment. The notional starting points identified are now of course quite out of date and neither those nor the apparent relativities between them should be seen as anything more than a snapshot picture of sentencing at the time of that decision.[20] What are important to bear in mind are the principles identified in that decision as the basis for differentiating levels of seriousness of offending, and in that particular regard the analytical framework is still reasonably robust.

[34] An aspect of that scheme that merits additional consideration is the deliberateness of the offence and the attitude of the defendant, as recognised in *Machinery Movers Ltd v Auckland Regional Council*.[21] It is important to be clear about the relative levels involved and the terminology used to characterise them. In the context of offending under the RMA one may, broadly speaking, distinguish culpability for offending that is accidental, careless, reckless or deliberate, in increasing order. It is also important to recognise that these are broad concepts which usually overlap and which are highly dependent on the factual matrix of any case. Even so, and notwithstanding that the RMA is a strict liability regime,[22] these concepts clearly mean that the state of mind or attitude of the defendant will be relevant to an assessment of culpability. As noted in *Thurston*, deliberate or reckless conduct is an important aggravating feature of the offence, while inadvertence may earn leniency if appropriate efforts have been made to comply.[23]

[35] In this case, Mr Ruki's offending was clearly neither accidental not deliberate. He turned on the pump and then did not check the irrigator enough, but he did not intend to discharge effluent into the spring-fed drain. The prosecutor submits that he was reckless, but, while it is clear that Mr Ruki was aware of the risks involved in the

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19 *Waikato Regional Council v GA & BG Chick Ltd* (2007) ELRNZ 291 at [12] – [28] (DC).
20 *Thurston*, above fn 4 at [50].
21 *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492; see also *Thurston*, above fn 4 at [44].
22 Section 341 RMA.
23 *Thurston*, above fn 4 at [41](a).

operation of the effluent disposal system, I am not satisfied that there is any evidence that Mr Ruki intentionally took a risk, unreasonably or otherwise, to discharge effluent other than in accordance with the resource consent for the farm. In my judgment, and as acknowledged by his counsel, he was careless to a relatively high degree in failing to check the irrigator.

[36] Mr Johnstone's culpability follows from Mr Ruki's, because as his manager and having primary day-to-day responsibility for the effluent disposal system, the RMA makes him liable for Mr Ruki's offending.[24] While such liability under the RMA is *in the same manner and to the same extent as if he ... had personally committed the offence*, the Court, in sentencing, may take into account the degree of Mr Johnstone's culpability. I accept the submissions of both counsel that Mr Johnstone's culpability is less than that of Mr Ruki, given the evidence at trial that his instructions to Mr Ruki were appropriate and should have been adequate, but for Mr Ruki's carelessness, to avoid the discharge.

[37] In terms of consistency, the most directly relevant case for me to consider is my sentencing of the trustees,[25] as that concerned the same offending. It is also a relevant case, as counsel for the defendants submitted, because this is a case where not only the employers and consent holders but also the employees have been charged. As Mr Conder noted, in many cases under the RMA a prosecutor will seek to withdraw charges against employees, and even directors and shareholders of corporate defendants, where the corporate defendant pleads guilty. That is not always the case, as demonstrated by the cases referred to by Mr Hopkinson: *Avenal Agriculture Ltd & Benbow*,[26] *Carter & Carter*[27] and *Jury*.[28] Decisions as to who should be prosecuted are matters for the prosecutor's discretion, and not for the Court.[29] Even so, the principle of consistency of sentencing means that the Court must have regard to such circumstances where they may affect the relative treatment of defendants by the Court.

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24 Section 340 RMA.
25 *Amoamo & ors*, above fn 7.
26 *Avenal Agriculture Ltd & Benbow*, above fn 9.
27 *Carter & Carter*, above fn 10.
28 *Jury*, above fn 11.
29 *Fox v Attorney General* [2002] 3 NZLR 62 (CA) at [28] – [31].

[38] Taking all those various matters into account, I find that an appropriate starting point for a fine in respect of Mr Ruki's offending is $17,000, and in respect of Mt Johnstone's offending is $9,000. These are relatively low levels of fine in the context of the statutory maximum, but they reflect the degrees of culpability of these defendants, the extent of the offending and the circumstances of the outcome of the sentencing process for the trustees of the farm.

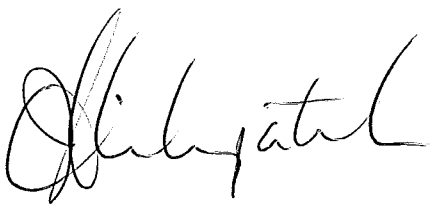
[39] At the second stage, I find that there are no relevant aggravating factors which would warrant an uplift to the starting point. In the absence of any previous relevant convictions, I will allow a discount of 5% each from the starting points for previous good character. At the third stage, as both defendants pleaded not guilty and were tried, no discount is available in respect of a guilty plea.

[40] I therefore sentence the defendants as follows:

(a) In respect of the charge in CRN 17047500092, Thomas Wilson Ruki is convicted and fined $16,150 and ordered to pay court costs of $130 and solicitor's costs of $113;

(b) In respect of the charge in CRN 17047500092, Aaron Donald Johnstone is convicted and fined $8,550 and ordered to pay court costs of $130 and solicitor's costs of $113;

[41] Under s 342 RMA those fines shall be paid to the Bay of Plenty Regional Council less deductions of 10% to be credited to the Crown.



D A Kirkpatrick
District Court Judge and Environment Judge