IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2020-070-003421
[2020] NZDC 24102

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

ZIWI LIMITED
Defendant(s)

Hearing: 5 October 2020

Appearances: A Hopkinson for Prosecutor
G Hughes for Defendant

Judgment: 23 November 2020

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

Introduction

[1] Ziwi Limited faces one charge that on five dates between 12 June 2018 and 18 October 2018 at or near 18 Boeing Place, Mount Maunganui, it contravened or permitted a contravention of section 15(1)(c) of the Resource Management Act 1991 by discharging a contaminant (odorous compounds) from an industrial or trade premises into air when a 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.

[2] As a body corporate the defendant is subject on conviction to a maximum penalty of a fine not exceeding $600,000 under s 339(1)(b) of the RMA.

Background

[3] Ziwi operates a pet food manufacturing plant at 18 Boeing Place, Mount Maunganui. The site is 2,832 square metres in area.

[4] The site is in an industrial zone near Tauranga Airport. There is a single factory building housing administration offices and processing rooms where pet food is made and packaged. Pet food is manufactured continuously. Each day approximately 10 tonnes of raw material is made into three tonnes of finished pet food product. The remaining seven tonnes is wastewater that is mostly converted into water vapour and discharged through the plant's exhaust stacks. The processing is done in five dryers located in one large processing room. Four of the dryers each have an exhaust stack, while the fifth does not have such a stack. The processing room itself is ventilated by ducting which allows hot air and odour to discharge from it. At the time of the offending between 12 June and 18 October 2018, the seals of the doors on the third dryer were not completely sealed which allowed cooking odours to escape into the processing room.

[5] The operation has a history of odour complaints: from 2008 to 2017 the prosecutor received 224 complaints from the public about discharges of odour from the site. The defendant installed a deodoriser spray system in 2013, but it ceased using this by November 2015. The system was repaired and reinstated during 2016 but only connected to one of the dryers.

[6] On 25 November 2016 the prosecutor issued an abatement notice to the defendant requiring it to cease discharging objectionable or offensive odour in breach of rule 17(b) of the Regional Air Plan. A revised abatement notice was issued on 19 July 2017 reflecting the company's change of name to Ziwi Limited. There was no appeal against the abatement notice.

[7] In 2017 the defendant installed a chemical deodoriser system and raised the stack heights, but these measures were unsuccessful.

[8] In 2017 the prosecutor issued four infringement notices to the defendant in respect of contraventions of the abatement notices on 24 January, 9 May, 30 May and

2 June 2017. On 8 February 2018 the prosecutor issued the defendant a formal warning in relation to verified offensive and objectionable odours detected on 7 and 25 September 2017.

[9] After a grace period to allow the defendant to install an effective odour mitigation system, the defendant installed ozone odour treatment systems on two dryers, one in May and the other in August 2018.

[10] The complaints from the public about odour from the defendant's site continued on 12 separate dates between 11 April and 11 June 2018. On each of these occasions the prosecutor's officers detected pet food odour but did not assess that odour to be objectionable or offensive.

Offending

[11] On five occasions, on 12 June, 20 June, 19 September, 24 September and 18 October 2018 offices of the prosecutor responded to complaints, assessed the odour from the pet food plant and concluded on each occasion that the odour was objectionable. These five occasions are the ones on which the charge was laid.

[12] On 25 September 2018 officers of the prosecutor interviewed Mr Coughlan, the general manager of operations of the defendant. Discussion included the steps which the defendant had taken to try and address odour issues, costing it approximately $100,000 for deodorising systems, increasing stack heights and engaging consultants. He stated that the defendant intended to install a centralised ozone system for each dryer. He thought that the complainants were over-sensitised and did not think the odour produced by the operations to be objectionable or offensive having regard to the standard FIDOL (frequency, intensity, duration, offensiveness and location) factors on which assessment under the Regional Air Plan is to be made. He noted that a neighbouring palm kernel storage facility might be a source of odour giving rise to the complaints.

[13] Six victim impact statements were presented to me, all from persons working in commercial and industrial premises in the vicinity of the defendant's site. All of them refer to having smelled significant odours for a number of years and

characterising the odour as smelling of, among other things, pet food. Some of the victims state that they have felt physically ill as a result of the odour.

[14] On behalf of the defendant I received an affidavit of Richard Lawrence sworn on 29 September 2020. Mr Lawrence is the managing director of the defendant and has held that role since November 2014. He gave evidence of the nature of the defendant's operations, the steps it had taken to deal with the escape of objectionable or offensive odours, the defendant's regret that there had been such escape, the difficulties in dealing with the problem, the apparent success of ozone treatment of the dryers and the installation of further ozone systems at a cost of approximately $200,000. He also produced two affidavits of Roger Cudmore, a chemical engineer with experience and expertise in air quality and wastewater management. These affidavits were affirmed on 2 October and 25 October 2019 and filed in enforcement proceedings in the Environment Court (ENV-2019-AKL-132). These statements provided further detail in relation to the investigations which had been made and the steps which the defendant had taken.

[15] Ultimately, enforcement orders were made by consent in those enforcement proceedings in the Environment Court on 20 February 2020. These orders included an order that within four months, the defendant would apply for a resource consent. As matters have turned out, I am advised that the defendant has decided to relocate its operations to Hawke's Bay seeking a site with greater segregation from other activities.

Prosecutor's submissions on sentence

[16] Counsel for the prosecutor submits that an appropriate starting point for the offending would be a fine of $100,000. Counsel stresses the sentencing purposes of:

(a) Holding the offender accountable for the harm done to the community;

(b) Promoting in the offender a sense of responsibility for that harm;

(c) Providing for the interests of victims of the offending;

(d) Denunciation of the offender's conduct; and

(e) Deterring the offender or other persons from committing the same or a similar offence.

[17] Of those, counsel submitted that the most important is deterrence. In that regard, counsel referred to decisions[1] which make it clear that a fine has to be a penalty with enough sting in it to be really felt on the offender's bottom line in order to be a deterrent both to the offender and, more importantly, to others, and not simply to become a *de facto* licence fee, so that the risk of offending is unattractive on economic grounds.

[18] In relation to the defendant's culpability, counsel submitted that it was high in this case because:

(a) The defendant was on express notice of the problems and its obligations, having had dealings with the prosecutor over a period of nine years;

(b) The prosecutor had made several attempts to secure compliance by means of abatement notices and infringement notices, but these did not result in the defendant taking adequate steps;

(c) A formal warning by the prosecutor to the defendant had also failed to result in adequate steps being taken.

[19] Counsel submitted that even the laying of charges had not resulted in adequate steps being taken, and that this did not occur until the Council applied for an enforcement order in the Environment Court.

[20] Counsel also pointed to the commercial element of the offending, as the odour arose from the business of manufacturing pet foot on an industrial scale. Counsel

[1] *Hawke's Bay Regional Council v Stockdale Pastoral Farms Ltd* DC Napier CRI-2008-081-96, 20 March 2009 at [16]; *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, -25 & -27, 27 August 2010, Miller J at [40].

submitted there was a need for the defendant to invest in appropriate equipment to mitigate the odour produced but for several years counsel submitted the defendant had adopted a series of cheaper measures which had turned out to be inadequate. Counsel submitted that this demonstrated an unwillingness to take responsibility for the environmental effects of the activity. This was exacerbated by senior managers describing complainants as over-sensitised, a number of the complaints as false and directing blame towards another operator.

[21] In terms of the environmental effects, counsel submitted that the victim impact statements demonstrated that people working at nearby sites were adversely affected by odour from the defendant's operations, sometimes to a significant degree.

[22] In relation to comparable cases, counsel for the prosecutor referred to the following:

Waikato Regional Council v Open Country Dairy Limited[2]

[23] In this case, the defendant pleaded guilty to three charges including one for contravening section 15(1)(c) of the RMA and one for breaching an abatement notice. The offending related to milk processing and cheese manufacture and a failure in associated waste treatment ponds. In August – September 2018 the waste in the ponds became anaerobic, causing significant objectionable odour. As a result, significant upgrades were proposed to the defendant's plant.

[24] A starting point for the two odour offences of $250,000 was adopted. An uplift of 5% was added because of a conviction in 2014 for similar offending. Reparation of $2,000 was ordered to each of 17 identified victims. Credit of 10% for cooperation and a further 10% for remorse and offers to make amends were allowed, together with 25% for early guilty pleas.

Taranaki Regional Council v South Taranaki District Council[3]

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[2] *Waikato Regional Council v Open Country Dairy Limited* [2019] NZDC 19755.

[3] *Taranaki Regional Council v South Taranaki District Council* CRI-2014-043-001196, 24 November 2014.

[25] The defendant Council allowed Fonterra to dispose of substantial volumes of buttermilk and raw milk in its wastewater treatment plant. Apparently, this excess product had been stored too long and it created significant odour problems at the plant. Ongoing compliance action was taken between November 2013 and May 2014. The Court adopted a starting point of $170,000 noting that this was 25% of the maximum penalty. Discounts of 10% were allowed for remedial work and remorse and 25% for early guilty pleas.

Taranaki Regional Council v Fonterra Limited[4]

[26] This related to the same offending as the South Taranaki District Council case. Fonterra defended the charge but was found guilty. The Court held that Fonterra's culpability was higher than that of the Council. The Court adopted a starting point of $240,000 and allowed a discount of 10% for cooperation and remorse but did not allow any discount for expenditure on treatment and mitigation.

Taranaki Regional Council v Glencore Grain (NZ) Limited[5]

[27] In this case the defendant pleaded guilty to three charges of contravening section 15(1)(c) of the RMA in relation to the storage of palm kernel. The Court found that the offending involved a high degree of carelessness, if not negligence, because the defendant was in the business of dealing with palm kernel and should have known how to manage its odours which were widely identified, there had been abatement notices and infringement notices since 2009 and the business had operated on the margins of acceptability. The Court adopted a starting point of $80,000. No discount was allowed for cooperation and remorse as the Court held the defendant had been doing no more than it should. Similarly, no discount was allowed for previous good character given previous infringement and abatement notices. A discount of 15% was allowed for guilty pleas entered at an early, but not the earliest, stage.

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[4] *Taranaki Regional Council v Fonterra Limited* [2015] NZDC 14962.

[5] *Taranaki Regional Council v Glencore Grain (NZ) Limited* CRI-2014-043-778, 24 November 2014.

[28] Considering these decisions, counsel for the prosecutor submitted that the offending was less serious than the first three, given the extent of severe odour effects on large numbers of people, and more serious than the fourth, given the greater number of events.

[29] For those reasons, counsel for the prosecutor submitted that a starting point of $100,000, or 17% of the maximum available penalty would be appropriate.

[30] In relation to personal aggravating and mitigating factors, counsel noted that the defendant has no previous relevant convictions that would warrant any uplift from the starting point. In relation to mitigating factors, counsel relied on *Stumpmaster v WorkSafe New Zealand*[6] in submitting that there should be no discount for cooperation or good character given the extent of previous enforcement action. Similarly, counsel submitted there should be no discount for expenditure on mitigating the odour issues because the defendant was always obliged to comply with its environmental obligations and should get no credit for having belatedly done so.

[31] In relation to its guilty pleas, counsel noted that not guilty pleas had been entered on 21 February 2019 and the defendant's change of plea came on 28 May 2020, three days before trial was due to commence on 2 June 2020. Counsel submitted that a discount of 10% would be appropriate to acknowledge that the change of plea avoided the costs of a trial and the stress and inconvenience to complainants.

Submissions of defendant

[32] Counsel for the defendant submitted that a starting point of around $60,000 would be appropriate, with a discount of 15% comprising 5% for personal mitigating factors and 10% for the change of plea, resulting in a sentence of $51,000.

[33] Counsel for the defendant submitted that the five discreet discharges of offensive odour during 2018 should be considered on their own and that the history of complaints are not the subject of the charges. Further, in counsel's submission the complaints derive significantly from reverse sensitivity effects. He advised that the

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6 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [64] to [67].

defendant maintains that its odour is not inherently objectively offensive, particularly when treated. However, as set out in the agreed summary of facts, the defendant accepted that the odour was objectively offensive on the particular days to which the charge relates and is generally offensive to some members of the community.

[34] Counsel observed that the defendant has used the same process for making pet food since 2002 and had operated without issue on the site up until 2016. Resource consent had not been required to discharge non-offensive odours until 2018, when the Regional Air Plan was changed to require consents for the production of pet food by the application of heat.

[35] Counsel referred to the enforcement proceedings and noted that the resource consent required by the enforcement order was submitted to the prosecutor on 16 July 2020. He observed that the increasing number of commercial businesses operating in the industrial zone at Mount Maunganui had led to a corresponding increase in amenity expectations, and that this coincided with increased numbers of complaints about the defendant's operations and odour.

[36] Counsel also advised that the defendant's method of producing pet food is relatively novel so that there are no tried and tested ways of minimising odour that are directly applicable. He submitted that the defendant had engaged with appropriate consultants and accepted their advice, but that their recommendations had not all been workable. The offending which is the subject of the present charge had occurred during a period when the defendant was implementing and testing its new ozone system.

[37] In terms of comparable cases, counsel referred to the following:

Hawke's Bay Regional Council v The Te Mata Mushroom Company Limited[7]

[38] In this case the defendant discharged odour on two occasions. The Court found there had been a severe impact on neighbours and that there were records of ongoing complaints and previous infringement notices. The defendant had been operating on

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7 *Hawke's Bay Regional Council v The Te Mata Mushroom Company Limited* [2018] NZDC 16898.

the same site for some 50 years, during which time Havelock North had expanded towards it. Significant amounts had been spent on changing the layout and operating processes and in seeking resource consent. The offending was found not to be deliberate or negligent. A starting point of $40,000 was adopted.

Hawke's Bay Regional Council v The Te Mata Mushroom Company Limited[8]

[39] This is an earlier case involving the same defendant, relating to offending in 2015. There had been ten recorded incidents of offensive odour over a period of eight months causing significant adverse effects on amenity values. The business had been operating nearly 50 years and had never previously been prosecuted under the RMA or had any other enforcement action taken against it. The resource consent for the operation required the composting and turning process for growing mushrooms to be moved into fully enclosed buildings equipped with ventilation through a bio-filter. That had not occurred, and alternative steps had been taken to control discharges of odour. Also relevant to the decision was that over the life of the plant the neighbouring town Havelock North had expanded with residential areas moving closer than 200 metres to the plant. On the basis that there should be an enforcement order made to require an alternative method of controlling odour to be put in place, the Court considered that a reasonable starting point would be $40,000. As well as deductions for an early plea and previous good record, the Court also allowed a deduction for work done to improve the operation, resulting in a fine of $15,000.

Taranaki Regional Council v Remediation (NZ) Limited[9]

[40] This case related to a composting and worm farm facility. There were five charges relating to five odour discharges over a period of about six weeks. There had previously been complaints about odour resulting in the issuing of a number of infringement notices, with odour detected up to 1,500 metres from the boundary of the site. The Court accepted that there had been discernible and repeated odour effects on neighbouring households. A starting point of $50,000 was adopted.

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8 *Hawke's Bay Regional Council v The Te Mata Mushroom Company Limited* DC Hastings CRI-2015-020-1551, 30 March 2016 and 18 April 2016.

9 *Taranaki Regional Council v Remediation (NZ) Limited* DC New Plymouth CRI-2010-042-2334, 17 November 2010.

[41] Considering those decisions, counsel for the defendant submitted that while consistency in sentencing is important, it is not an overriding consideration.[10] In counsel's submission, the decisions relied on by the prosecutor should be distinguished as being in a separate realm of offending to the present case. In particular, counsel submitted that the offending on those cases was more significant, lasting over a longer period of time and causing more significant adverse effects. In counsel's submission, cases such as *Te Mata Mushroom* are more similar. In particular, counsel relied on the reverse sensitivity effects from the changing nature of the industrial zone, resulting in people with higher amenity expectations moving closer to the Ziwi site.

[42] Counsel submits that the defendant's conduct in undertaking odour mitigation measures at the time of these discharges and in cooperating with the prosecutor should be taken into account. Counsel submits that its engagement of an independent expert, the undertaking of comprehensive analysis of the odour and agreement to the making of enforcement orders to develop odour management plans at significant expense, including applying ozone treatment to all stack exhausts, supports that. On that basis, counsel submits that there should be a discount of at least 5% from any starting point.

[43] While acknowledging that its change of plea came on the eve of trial, counsel supports the submission of the prosecutor that there should be a discount of 10% for that, recognising the work done during the period of the prosecution to reach agreement on an enforcement order.

Basis for sentencing under the RMA

[44] There was no issue between the parties as to the relevant statutory provisions and caselaw that I must be guided by in sentencing. The Court must follow the two-stage approach as set out in *Moses v R*,[11] first calculating the adjusted starting point incorporating any aggravating and mitigating features of the offence, and then incorporating all aggravating and mitigating factors personal to the offender together

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10 *Waikato Regional Council v Waikato By Products Limited* DC Auckland CRI-2009-057-001011, 17 May 2010 at [14].

11 *Moses v R* [2020] NZCA 296 at [45] – [47].

with any discount for a guilty plea (calculated as a percentage of the adjusted starting point).

[45] 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, the general desirability of consistency with appropriate sentencing levels and the effect of the offending in the community.

[46] 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 with particular reference to the Sentencing Act 2002 in *Thurston v Manawatu-Wanganui Regional Council*.[12] 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.[13] Additionally, in the context of the RMA, a key purpose of sentencing is to impose financial costs or penalties which cause an offender to internalise the environmental cost and to foster the principle of environmentally responsible corporate citizenship and reflect general deterrence.[14]

[47] In terms of the principles of sentencing set out in s 8 of the Sentencing Act, the most relevant in this case are:

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

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[12] *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-25, 27 August 2010, Miller J at [40] – [41].

[13] *Thurston* at [40].

[14] *Yates v Taranaki Regional Council* HC New Plymouth, CRI-2010-443-8, 14 May 2010,

(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.

[48] Relevant considerations under the RMA are not limited to direct damage and include cumulative effects: see s 3 RMA. It has been held in the case of the discharge of pollutants, even where no specific lasting harm can be identified, an allowance for harm may be made on the assumption that any given offence contributes to the cumulative effects of pollution generally.[15]

Evaluation

[49] I have carefully considered the submissions and evidence presented on behalf of the defendant, including the material relating to the changing nature of the local environment. Ultimately, the defendant operated under the provisions of the Regional Air Plan requiring it not to discharge objectionable or offensive odour beyond the boundaries of its site. On that basis, non-compliance with that standard amounts to a contravention of the RMA, whatever the quality of the neighbouring environment. As counsel for the prosecutor noted in his submissions in reply, being in an industrial area is not a licence to discharge offensive odour.

[50] It is not for me to judge the quality of the odour. That was done by the staff of the Council as reported in the agreed summary of facts and in respect of which the defendant has entered a plea of guilty. It is also not for me to try to work out how the defendant might have avoided any objectionable or offensive discharge of odour. I do however accept that the defendant made genuine efforts over time to control the odour in response to complaints.

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[15] *Plateau Farms Ltd v Waikato Regional Council* HC Rotorua CRI-2007-463-000016, 17 September 2007; *Thurston v Manawatu Wanganui Regional Council* fn 2 at [41](d).

[51] In relation to the previous decisions of the Court to which I have been referred and which might provide some guidance in the identification of a starting point for a sentence, I note, as so often is the case, that the circumstances of this defendant's offending are not fully matched by any particular case. I accept the submission of counsel for the defendant that the principle of consistency in sentencing should not be treated as an overriding consideration. I also accept the submissions of counsel for the prosecutor that the cases to which he referred, such as *Open Country Dairy*, *South Taranaki District* and *Fonterra*, are cases involving systemic failures warranting higher starting points.

[52] In my judgement, an appropriate starting point in this case is $80,000. I consider that a discount should be made of 5% for the defendant's efforts in trying to deal with discharges of odour. I accept that a discount of 10% should also be allowed for the defendant's change of plea shortly before trial. That results in a fine of $66,000.

[53] I accordingly convict the defendant Ziwi Limited of the charge in CRN18070501778 and fine it the sum of $66,000.

[54] I also order it to pay a solicitor's fee of $113 and court costs of $130.

[55] As required by s 342 of the RMA, the fine, less a deduction of 10% payable to the Crown, shall be paid to the prosecutor.

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Judge D A Kirkpatrick
District Court Judge

Date of authentication: 23/11/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.