

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CRI-2019-070-002469
[2020] NZDC 16743**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

KAIMAI DAIRY FARM LIMITED
Defendant(s)

Hearing: 27 July and 9 September 2020 via AVL

Appearances: V Brewer for the prosecutor
PM Lang for the defendant

Judgment: 9 September 2020

SENTENCING NOTES OF JUDGE MJL DICKEY

[1] In a decision dated 25 August 2020 I gave a sentence indication that, for the reasons set out in full in that decision, I would be likely to fine the defendant \$34,650 with 90 per cent of that fine to be paid to the Council.

[2] On 9 September 2020, via AVL, the defendant confirmed that it accepted the sentence indication and entered a guilty plea to the charge.

[3] Accordingly, the defendant is convicted and fined \$34,650. I direct that 90 per cent of the fine be paid to the Council in accordance with s 342 of the Resource Management Act 1991.

[4] A copy of my decision dated 25 August 2020 is attached to these notes on sentencing. There is nothing to be added to the reasons for the decision.

[5] The embargo prohibiting publication of the sentencing indication is lifted.

A handwritten signature in black ink, appearing to read 'MJL Dickey', with a long horizontal stroke extending to the right.

MJL Dickey
District Court Judge and Environment Judge

NOTE: PUBLICATION OF THE JUDGMENT AND OF THE REQUEST FOR A SENTENCING INDICATION IN ANY NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE IS PROHIBITED BY SECTION 63 OF THE CRIMINAL PROCEDURE ACT 2011 UNTIL THE DEFENDANT HAS BEEN SENTENCED OR THE CHARGE DISMISSED. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3865734.html>

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Judgment: 25 August 2020

SENTENCE INDICATION OF JUDGE MJL DICKEY

Introduction

Kaimai Dairy Farm Limited is charged with discharging a contaminant (namely dairy effluent) onto land in circumstances where it may enter water. The charge relates to a farm located at the corner of Hanga Road and State Highway 29 (**the Farm**). The

maximum fine for an offence such as this is \$600,000 under the Resource Management Act 1991 (**the Act**). The defendant seeks a sentence indication. Counsel agree that a fine is the appropriate sentence response, but disagree on the starting point for the fine.

Counsel for the prosecutor, Ms Brewer, submitted that an appropriate starting point would be \$65,000. Counsel for the defendant, Mr Lang, submitted that a starting point in the range of \$30,000-\$35,000 would be appropriate.

Background¹

The Farm is located approximately 30 kilometres southwest of Tauranga in the lower Kaimai ranges on the corner of Hanga Road and State Highway 29. It is owned by Kaimai Dairy Farm Limited (**Kaimai Dairy**). Kaimai Dairy was incorporated in June 2013 and purchased the Farm in July 2013. There are two directors of Kaimai Dairy and two unrelated shareholdings.

The Agreed Summary of Facts records that Mr Ashford is one of the directors of Kaimai Dairy and together with his wife owns 20% of the shares. It also records that Mr Ashford lives at the Farm and is responsible for the day to day management of the farm and its effluent system. At the hearing Mr Lang informed me that Kaimai Dairy employs Priory Lands Limited (**Priory**) as Farm Manager and that Mr Ashford and his wife are the shareholders and directors of that company. Mr Lang provided me with a part copy of the Contract Milking Agreement between the two entities which sets out each party's responsibilities. Clause 6.1.4 states that the Farm owner is responsible for "obtaining the necessary resource consent to dispose of effluent and providing and maintaining adequate systems for the disposal of effluent in compliance with that resource consent." Priory is responsible under clause 7.1.8 for "operating any effluent disposal system in an efficient and workmanlike manner".

The Farm's terrain is undulating to hilly with some flat areas. The Momutu Stream flows through the Farm and is one of the headwater tributaries of the Wairoa River which flows north to Tauranga Harbour. There are also tributary streams of the Momutu Stream flowing through the Farm.

¹ Agreed Summary of Facts, paragraphs 1-13.

On 5 December 2016 Kaimai Dairy obtained a new resource consent for the operation of the Farm's effluent system (**Resource Consent**). That consent replaced a previous consent pursuant to which the Farm's effluent system was operated (**Previous Consent**). Prior to the issue of the Resource Consent the Farm's system consisted of three unlined storage ponds with a total capacity of 1,050m³. Wastewater from the dairy shed was collected in those ponds and then irrigated to pasture via movable pond sprinklers mounted on wire frames.

The Resource Consent authorises the discharge of dairy effluent to pasture irrigation and sludge to land subject to conditions, including the following: ²

- (a) The consent holder shall ensure that no effluent reaches surface waters by overland flow or direct discharge (condition 7.4).
- (b) The rate of application shall not result in excessive ponding of effluent (condition 7.6). Advice note 4 of the consent clarifies that "excessive ponding" refers to discharged effluent which does not drain away within 30 minutes.
- (c) By 15 July 2018 the fully lined and sealed effluent pond/tank shall be constructed and operational with all effluent generated onsite being discharged to the pond. This storage shall be constructed in full accordance with information and plans approved under condition 8.4 (condition 8.5).

At the time of the offending in December 2018, the new pond required by the Resource Consent was not operational. Instead, effluent from the dairy shed and yard was being stored in an unlined sump that had been constructed to collect and pump effluent to pasture irrigation until the new, lined pond was ready to be used.

Effluent was being collected in the unlined sump from where it was being irrigated to pasture via a stationary rain gun irrigator and pod sprinklers. The sump did not have a sand trap or stirrer. Mixing the effluent with a stirrer helps agitate the solids so that the solids are broken down and mixed with liquid in the pond, rather than settling at the bottom of the pond.

² Agreed Summary of Facts, paragraph 12.

The maximum herd size under the previous consent was 530 cows. The Resource Consent included conditions relating to the upgrade of the Farm's effluent system to allow for increased cow numbers up to a maximum of 750 cows from when the new pond was installed in July 2018. At the time of the offending approximately 578 cows were being milked at the Farm.

The Summary of Facts records compliance issues under the Previous Consent as follows:³

- (a) On 8 October 2013 evidence was found of an effluent discharge to a watercourse via stormwater diversion in contravention of condition 7.3;
- (b) On 10 December 2013 an officer found the effluent pond had inadequate freeboard in contravention of condition 10; and
- (c) On 13 October 2015 an officer found the cows exceeded the maximum herd size of 530 in contravention of condition 2.

Offending⁴

On 14 August 2018 the Council sent Kaimai Dairy a letter reminding it of upcoming Council compliance visits and the need for the company to check its effluent system and ensure it was complying with the terms of its resource consent.

On the morning of 17 December 2018, a Council enforcement officer telephoned Glen Ashford and arranged to meet him at the Farm for a compliance inspection later that day. The officer arrived at the dairy shed and met Glen Ashford at approximately 12:10pm.

The officer began with an inspection of the dairy shed and effluent pond, and noted that the new effluent storage pond was not in use. He was advised by Mr Ashford that the pond was a week away from being completed, and that a Council land management officer had given approval to delay the deadline of 15 July 2018 to late 2018 on account of the winter earthworks season. A later check by the officer revealed that no extension had been given.

³ Agreed Summary of Facts, paragraph 13.

⁴ Agreed Summary of Facts, paragraphs 14-30.

The officer then inspected the sprinkler pods, noting there was a build-up of effluent in one of the pods indicating that it had not been operating correctly. Mr Ashford shifted the pods.

The officer and Mr Ashford then drove to paddock 31 where the rain gun irrigator was situated and arrived at approximately 12.37pm.

The rain gun irrigator was a Sime brand irrigator that had been modified by attaching a nozzle from another brand of irrigator. This modification was not in accordance with manufacturer's specifications. The stainless steel arm near the nozzle of the rain gun was flicked up instead of pointing downwards. This arm is supposed to break the flow of effluent as it exits the nozzle of the irrigator. There was also a heavy build-up of effluent on the rain gun. Although the effluent pump was switched off, effluent continued to siphon through the effluent line and discharge from the nozzle of the rain gun irrigator.

It was clear from the large quantity of effluent ponding beside the irrigator that it had malfunctioned. Instead of rotating, it had discharged effluent in only one direction downhill during its operation, and there was a large quantity of effluent ponding beside it. There were also clean grass lines behind the irrigator from where the irrigator and/or hose were set up on a previous irrigation run, indicating the irrigator had not operated in a full 360 manner in its current position.

The Summary of Facts records that the over-irrigation was likely to have been contributed to by any of five factors or a combination of them as follows:

- (a) effluent build-up on the gun;
- (b) absence of the counterweight;
- (c) the fact that more than two applications had been made at that location;
- (d) the irrigator was not throwing correctly, due to the modified nozzle and the stainless steel arm not being set to break the flow of effluent ; and
- (e) by the siphoning of effluent after the pump turned off.

The effluent discharging from the irrigator was flowing approximately 42m overland to a fenceline, and from there down into a block of bush. From there it split into two separate flowpaths which discharged into a tributary stream of the Momutu Stream at two locations. These discharge points were located approximately 40m below the fenceline and were approximately 8m apart.

At approximately 12.45pm Mr Ashford turned off the effluent line in order to cease the discharge from the rain-gun irrigator. However, as effluent was continuing to flow down the paddock and into the bush block, Mr Ashford was instructed to dig a fence in the paddock to intercept the effluent flow. The flow of effluent into the bush block ceased when Mr Ashford completed the trench at approximately 1.30pm.

As the water in the affected tributary stream was green at the two points where effluent was flowing into that stream, the officer and Mr Ashford drove downstream to check how far the contamination extended. At the stream's confluence with the Momutu Stream the water appeared clear. This was a distance of approximately 180 metres downstream of the discharge points.

The officer took samples during his inspection on 17 December 2018. I set out the results of those samples later in this decision.

Subsequent events⁵

On 18 December 2018 an abatement notice was issued to Kaimai Dairy requiring it to cease contravening conditions 7.4 and 7.6 of the Resource Consent. In an email to the Council on 21 December 2018, Mr Ashford confirmed that he had held a staff meeting to go over consent requirements, reiterate environmental concerns and ensure that irrigation start-up procedures were correctly followed.

A follow-up inspection on 5 February 2019 showed that effluent was being diverted to the new pond, although the pond still required installation of a pond stirrer and completion of associated concrete works before it would be ready for irrigation. The

⁵ Agreed Summary of Facts, paragraphs 39-42.

Council requested that the company provide as-built certification for the new pond. That certification was provided on 12 May 2019.

Kaimai Dairy created an effluent management plan for the Farm and implemented a system for ensuring that the irrigator is regularly checked while in use and is regularly maintained. The Summary of Facts made it clear that there were no such plans or systems in place at the time of the offending.⁶

Explanations⁷

The Summary of Facts records the following from the formal interview with Glen Ashford:

- (a) He was the staff member operating the effluent system that day (Monday, 17 December).
- (b) He had fed the calves that morning but hadn't been to the irrigator because he was supposed to move it to a new paddock "*which is not a two minute job*".
- (c) Effluent is pumped twice per day (i.e. at night and in the morning) and the irrigator is usually shifted.
- (d) He was away Friday so had probably shifted the irrigator into the paddock on Saturday morning (ie 15 December). It might have been Sunday morning, but "*looking at the mess*" the irrigator looked like it had been in the paddock for more than two milkings.
- (e) It appeared that the rain gun irrigator was not spinning due to a lack of pressure in the line.

After the interview, Kaimai Dairy provided the Council with irrigator records which showed the rain gun irrigator had been in use in paddock 31 from 13-17 December 2018.

Sentencing principles

The Sentencing Act 2002 sets out the purposes and principles of sentencing. The High Court in *Thurston v Manawatu-Wanganui Regional Council*⁸ usefully summarised the

⁶ Agreed Summary of Facts, paragraph 42.

⁷ Agreed Summary of Facts, paragraphs 43 and 44.

⁸ *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-22, 25, 27 August 2010 at [41].

principles as they relate to resource management offences. They include the offender's culpability, any infrastructural or other precautions taken to prevent discharges, the vulnerability or ecological importance of the affected environment and the extent of the environmental damage, deterrence, size and wealth of the defendant and its capacity to pay a fine.

Ms Brewer submitted that when sentencing for environmental offences the Court must recognise the purpose of the Act, which is to promote the sustainable management of natural and physical resources. She also submitted that the purposes of sentencing from s 7(1)(a), (b), (e) and (f) of the Sentencing Act are relevant; with the most important being deterrence, both specific and general.

Environmental effects⁹

The stream into which effluent from the irrigator was found discharging on 17 December 2018 was a tributary stream of the Momutu Stream. The Momutu Stream is one of the headwater tributaries of the Mangakarengorengo River which in turn flows into the Wairoa River.

The Momutu Stream flows into the Mangakarengorengo River approximately nine kilometres from the discharge point at the Farm. The Mangakarengorengo River is listed in Schedule 1 of the Bay of Plenty Regional Natural Resources Plan as:

- (a) A habitat and migratory pathway of indigenous fish species, namely Banded Kokopu, Longfinned Eel, Koura, Giant Kokopu.
- (b) A regionally significant habitat of trout.

The samples taken during the inspection of 17 December 2018 showed very high faecal coliform readings at the point of discharge (9,500,000 cfu/100ml) and at the point of entry into the stream (560,000 cfu/100ml). The readings 22 metres downstream of the entry point (580,000 cfu/100ml) were over 1,500 times higher than the readings 3 metres upstream of the upstream entry point (360 cfu/100ml). The Summary of Facts recorded the following:

⁹ Agreed Summary of Facts, paragraphs 31-38.

36. Dairy wastewater is extremely high in organic matter and has high nutrient and bacterial loading. This can have various effects on waterways including the following:

- (a) Oxygen levels can be depleted resulting in fish kills.
- (b) The high suspended solids loading can cause smothering of the stream channel, which can result in increased fish and invertebrate mortality. Invertebrates are often the food source for other larger creatures such as native fish and trout.
- (c) High nutrient loadings can result, causing excessive weed growth. This can block the flow of water in the channel causing drainage and flooding issues.
- (d) High nutrient loadings contribute to algal blooms, which can sometimes be toxic and can render water unsuitable for contact recreation.
- (e) The discharge of high levels of bacteria can result in water being unsuitable for consumption by both humans and stock.
- (f) As sediment is disturbed and waters are flushed down the catchment, exposure of pathogens to the whole downstream catchment community is increased.

37. Faecal coliforms and E.coli are the most commonly used indicator of microbial contamination. High levels of faecal coliforms and E.coli indicate a high risk of other harmful microbial organisms (pathogens) being present. Examples of pathogens present include *Campylobacter*, *Cryptosporidium* and *Giardia*. Elevated levels of faecal coliforms indicate that water is unsafe for use and/or consumption.

38. Under the National Objectives Framework (within the NPS for Freshwater Management, 2017 amendment) E.coli levels exceeding 1,200 cfu/100 ml are associated with a heightened risk to recreational users of *Campylobacter* infection. The maximum allowable level of faecal coliforms present before stock drinking water becomes unsafe is 100cfu/100ml (ANZECC, 2000).

I accept that the adverse effects from dairy effluent discharges on groundwater and waterways are cumulative and serious. The potential for environmental damage from inadequate effluent infrastructure systems is significant.¹⁰

In this case, in addition to travelling over-ground the effluent entered surface water, namely a tributary stream of the Momutu Stream (which flows into the Mangakarengorengo River and then into the Wairoa River). Counsel for the prosecutor submitted that when effluent has entered water, this has been recognised as

¹⁰ *Plateau Farms Limited v Waikato Regional Council* HC Rotorua CRI-2007-463-16, 17/9/2007, at [15] and [56].

aggravating the offending above those cases where the effluent only had the potential to enter water, referring to *Southland Regional Council v MacPherson*.¹¹

Mr Lang for the defendant submitted that the faecal coliform concentrations measured at the point of entry into the stream, and 22 metres downstream, are moderate levels of contamination consistent with the effluent discharge crossing farmland before entering the stream. He submitted there was no information about the extent of contamination further downstream where the waterbodies are noted as having high ecological values. He submitted that the Court would be justified in taking the view that the stream contamination was moderate, but likely to have been short-lived.

I find that the effects on the environment of the effluent discharge were adverse and moderately serious, albeit occurring for a relatively short time. The effluent not only discharged to the ground but also made its way into the tributary. I note that at its confluence with the Momutu Stream, approximately 180m downstream of the discharge points the water appeared clear.

Culpability

Ms Brewer submitted that Kaimai Dairy's level of culpability, as the Farm owner and consent holder, is high. In short, it has the primary responsibility for ensuring compliance with the Resource Consent and ensuring that the necessary systems and infrastructure are in place to prevent effluent discharges.¹²

¹¹ *Southland Regional Council v MacPherson* [2017] NZDC 27751 at [16].

¹² Prosecutor's submissions on sentence indication, dated 14 July 2020 at [20].

Counsel submitted that Kaimai Dairy's culpability is elevated by the following factors:¹³

- (a) deficiencies with the Farm's infrastructure:
 - (i) an unlined sump that did not have a stone trap or stirrer was used for storage;
 - (ii) the irrigator had been modified, not in compliance with the manufacturer's specifications;
 - (iii) there was a heavy build-up of effluent on the rain gun;
- (b) deficiencies with the Farm's systems:
 - (i) there was no effluent management plan or system ensuring regular checking of the irrigator while in use, or regular maintenance;
 - (ii) there was no requirement to turn off the hydrant after irrigating to avoid siphoning of effluent through the line between irrigators;
- (c) duration of the discharge:
 - (i) the irrigator was left in the same paddock from 13-17 December;
 - (ii) the irrigator likely malfunctioned on the day it was last moved, given that there were clean grass lines behind the irrigator indicating it had not operated in a full 360 degree manner in its current position;
 - (iii) accordingly, that it operated on at least four occasions without monitoring;
- (d) the offending involved commercial benefit:
 - (i) the company avoided expenditure by choosing not to upgrade the Farm's infrastructure or implement a system for regular maintenance of its irrigator;

¹³ Prosecutor's submissions on sentence indication, dated 14 July 2020 at [21](a)-(g).

- (e) the stream into which the irrigator discharged was a tributary stream of the Momutu Stream, which is a headwater tributary of the Mangakarengorengo River, which is a habitat and migratory pathway of indigenous fish species, and a regionally significant habitat of trout;
- (f) the defendant had been forewarned of the Council inspection by telephone on the morning of the inspection and by letter written sometime prior; the defendant's failure to act demonstrated a complacent attitude towards its environmental responsibilities;
- (g) the offending involves a failure to comply with consent conditions, particularly that requiring that a fully lined and sealed pond be in use by 15 July 2018. Counsel submitted that the lack of available storage put the effluent system under pressure.

Overall, counsel submitted that Kaimai Dairy's failures amounted to a high degree of carelessness, particularly given it was aware of its obligations and the risks associated with the discharges of effluent because of previous compliance issues in October and December 2013.¹⁴

Mr Lang submitted that the Summary of Facts¹⁵ lists a number of factors that may have contributed to the over-irrigation in December 2018, but that it is not known what contribution each of those factors made. In relation to the absence of the irrigator counterweight, he submitted that the bolts holding the counterweight had failed; that the model of irrigator that was being used is a model that has a high standard of recognised reliability (as recorded in the statement of Mr K Osborne of Qubik Dairy Effluent Consultants).¹⁶

He submitted the irrigator had clearly malfunctioned during its operation and had also continued to discharge effluent at a low rate due to siphoning of the effluent that was left in the irrigator hose; that could have been avoided by turning off the tap at the effluent hydrant in the paddock that was being irrigated.¹⁷ He submitted that the other

¹⁴ Prosecutor's submissions on sentence indication, dated 14 July 2020 at [22].

¹⁵ Agreed Summary of Facts, paragraph 25.

¹⁶ Sentence indication submissions of counsel for the defendant, dated 21 July 2020 at [14]-[16].

¹⁷ Sentence indication submissions of counsel for the defendant, dated 21 July 2020 at [17].

factors referred to in the Summary of Facts as contributing to the over-irrigation are operational matters that were the responsibility of the Farm manager.¹⁸

He then addressed Ms Brewer's submissions regarding the company's level of culpability. As to the submission made that the company as Farm owner is best placed to invest in systems and infrastructure to avoid effluent discharges, he submitted that the company has invested the necessary resources; the effluent management system had been operating effectively and was in the course of a substantial upgrade to provide very substantial long-term usage; the equipment had been operating well until this event; the company had been spending substantial amounts on environmental enhancement; there is nothing to suggest a shortcoming in the company's attitude to infrastructure or environmental issues on the Farm.¹⁹

Mr Lang addressed the factors relied on by the prosecutor in elevating the defendant's culpability to a high degree of carelessness. He submitted:²⁰

(a) deficiencies with the Farm's infrastructure:

the storage system had nothing to do with the discharge, and that the discharge occurred because of operational errors and the unpredictable malfunction of the irrigator. The addition of a non-proprietary nozzle on the irrigator, and any build-up of effluent on the irrigator were day-to-day operational matters attended to by the manager, not the Farm owner;

(b) deficiencies with the Farm's systems:

the operation of the effluent system had been carried out successfully by the manager until the time of the incident. There was nothing to suggest to the Farm owner that this incident might occur, or that there was any infrastructural issue that could lead to this discharge;

(c) the duration of the discharge:

this was an operational error resulting from the decision-making of the Farm manager on the day; that the irrigator was moved to new locations within

¹⁸ Sentence indication submissions of counsel for the defendant, dated 21 July 2020 at [18].

¹⁹ Sentence indication submissions of counsel for the defendant, dated 21 July 2020 at [20].

²⁰ Sentence indication submissions of counsel for the defendant, dated 21 July 2020 at [21](a)(g).

the one paddock, and was not running in one location during the period 13-17 December;

(d) commercial benefit:

there is nothing to indicate deficient maintenance of the irrigator or other infrastructure that contributed to the offending. The effluent infrastructure was in the course of a major upgrade at the time;

(e) the stream into which the effluent fed:

this is a factor that relates to the environmental effect of the offending;

(f) the discharge occurred despite being forewarned of an inspection:

this does not indicate high culpability. Also it does not indicate any want of care or poor attitude;

(g) failure to comply with consent conditions:

this had no bearing on the offending; the over-irrigation did not occur because it was carried out in inappropriate circumstances or because irrigation had to occur due to lack of storage, it occurred because of operational decisions and accidental equipment failure. The company found its manager to be reliable and dedicated to the daily operations on the Farm, and that its responsibility in this case is vicarious as the owner of the property.

I place Kaimai Dairy's culpability higher than that of its Farm manager because it is the Farm owner and the consent holder, and as such it has the primary responsibility for ensuring compliance with the Resource Consent and the Act.

I do not consider that the storage system in use at the time of the offending contributed to the unlawful discharge. The Summary of Facts records that the irrigator malfunctioned, and identified certain factors as having contributed to the over-irrigation on their own or in combination; being effluent build-up on the gun, absence of the counterweight, more than two applications had been made at that location, the irrigator was not throwing correctly due to the modified nozzle and the stainless steel

arm not being set to break the flow of the effluent, and by the siphoning of effluent after the pump was turned off.

Mr Lang submitted that it was not known what contribution each of those factors made to the over-irrigation. His primary submission on those matters is that they were operational matters that were the responsibility of the Farm manager.

That may be so for some of the factors, but the quality of the irrigator is a matter for the Farm's owner; the effects of the absence of the counterweight and the modified nozzle are not clear but were noted as contributing factors to the over-irrigation. Also, I note that the Farm did not have an effluent management plan or a system for ensuring that the irrigator was regularly checked while in use or was regularly maintained. Nor does it appear that there was any requirement to turn off the hydrant after irrigating to avoid siphoning of the effluent through the line between irrigations.

I consider that the state and quality of the Farm's effluent infrastructure and its effluent management systems are matters that the Farm owner must bear primary responsibility for. For example, if there had been an effluent management plan or system in place for ensuring that the irrigator was regularly maintained and regularly checked while in use the malfunction may not have occurred, or if it did occur the discharge may not have lasted for as long. I categorise its conduct as careless.

Starting point

I am required to take into account the general desirability of consistency with appropriate sentencing levels in respect of similar offending. Ms Brewer referred me to five cases that she submitted were relevant. They are *Waikato Regional Council v Vinka Farms Limited (Vinka)*,²¹ *Waikato Regional Council v Were Te Kumi Limited (Were Te Kumi)*,²² *Waikato Regional Council v Crouch (Crouch)*,²³ *Southland Regional Council v Baird, Vendale Limited and Benlyon Limited (Baird)*²⁴ and *Taranaki Regional Council v Vernon (Vernon)*.²⁵ Mr Lang addressed the relevance of

²¹ *Waikato Regional Council v Vinka Farms Limited* [2020] NZDC 2896.

²² *Waikato Regional Council v Were Te Kumi Limited* [2019] NZDC 12580.

²³ *Waikato Regional Council v Crouch* [2019] NZDC 11517.

²⁴ *Southland Regional Council v Baird, Vendale Limited and Benlyon Limited* [2018] NZDC 11941.

²⁵ *Taranaki Regional Council v Vernon* [2018] NZDC 14037.

those cases and also referred me to *Bay of Plenty Regional Council v Kahu Ma Farms Limited (Kahu Ma)*.²⁶

In brief, the cases to which I was referred identified the following fundamental issues:

- (a) In *Vinka*, the issue was a failure to maintain a fit-for-purpose effluent disposal system as its collection point infrastructure was “an accident waiting to happen”. A starting point of \$70,000 was adopted.
- (b) In *Were Te Kumi* the farm’s sump had limited storage and it was usual practice to activate the irrigator at the commencement of a morning’s milking to prevent the sump from overflowing. The irrigator malfunctioned, possibly because of ground conditions. It was identified that there had been issues with the irrigator breaking down, and the farm manager knew of the need to monitor the irrigator and the irrigator had no fail-safe mechanism. A starting point of \$70,000 was adopted.
- (c) In *Crouch*, there were two offences. Irrigation needed to occur every day as storage capacity was limited and proceeded despite the weather having been very wet. A global starting point of \$75,000 was adopted.
- (d) In *Baird* the farm owner, the consentholder, and the herd owner each pleaded guilty to the offending. Mr Baird was the sole and managing director of the farm owner and consentholder. In this case a travelling irrigator had failed; it had been incorrectly set to operate in a stationary position rather than moving along the irrigation line. It had been left operating in the same position for 16 hours. The Court adopted a global starting point of \$55,000. It noted that it was necessary to check irrigators from time to time to make sure they are operating properly, and that it was very careless not to have checked on the irrigator for 16 hours.

²⁶ *Bay of Plenty Regional Council v Kahu Ma Farms Limited* [2017] NZDC 9592.

- (e) In *Vernon* it was discovered that a travelling irrigator had not been connected, and that untreated effluent had been discharged directly onto a paddock. The Court noted there was inadequate storage capacity, and that the system was reliant on effluent irrigation. A global starting point of \$60,000 was adopted.
- (f) In *Kahu Ma* there were two charges relating to discharges to land and one charge of breaching an abatement notice. Ponded effluent around an irrigator entered a farm drain and then a canal. A starting point of \$40,000 was adopted.

Ms Brewer submitted that the gravity of the offending in this case is most comparable with the offending in *Vinka* (which involved a significant deficiency in the farm infrastructure but was of shorter duration than the present case) and *Were Te Kumi* where the company failed to address vulnerabilities within the infrastructure. She also submitted that the offending in this case is more serious than the offending in the *Baird* and *Vernon* cases.

Ms Brewer submitted that the offending in this case is in the moderately serious category for offences of this nature because, although the offending was not deliberate, it involved a high degree of carelessness given the well-known risk of irrigator failures, the deficiencies with the Farm systems and infrastructure, and the duration of the discharge. She also pointed to the effects of the discharge. She acknowledged that while the offending was not recurring, it could have been avoided through ensuring there was a system for regular supervision and monitoring of the irrigator, and regular maintenance of the irrigator.

Ms Brewer speculated that the fact that the discharge was detected during a routine inspection suggests there may have been other failures which went undetected due to the lack of a monitoring system. Finally, she reiterated that there was a commercial benefit to Kaimai Dairy in choosing to avoid or defer expenditure necessary to upgrade the Farm's infrastructure or to implement a system for regular maintenance. Accordingly, she submitted that an appropriate starting point for the fine in the present case would be in the region of \$65,000.

Mr Lang submitted there is no infrastructure failure in the present case that would indicate a high level of culpability on the part of the Farm owner. Further, that there is no linkage between any deficiency in the effluent management system and the offending in this case. He distinguished this case from *Crouch* as involving no formal warnings or lack of storage capacity. He acknowledged some similarity between this case and the *Baird* case. He submitted, however, that the effluent discharge and its effects were worse in the *Baird* case. In the present case he submitted that the irrigator runs were for 40 minutes each, two runs a day, so there would have been a maximum total irrigation of 2 hours, 40 minutes irrigation in one location as opposed to *Baird* where the irrigator was left operating for 16 hours. He also observed there was no indication of effluent being detected kilometres downstream.

With reference to *Kahu Ma*, he referred to the starting point of \$40,000 that was adopted in that case. He submitted that the starting point in this case should not be higher than that which was adopted for Mr Ashford, the Farm manager. He submitted the offending is a one-off accidental over-irrigation of relatively short duration and with low to moderate environmental impact over a short period. He submitted that the defendant's liability is vicarious rather than through any particular carelessness or failure of its own. He submitted that an appropriate starting point would be slightly lower than that adopted for Mr Ashford, being in the range of \$30,000-\$35,000.

The cases cited to me were helpful but none are entirely similar to this case. This case has similarities with *Baird* save that the duration of the discharge there was longer. In the circumstances, I consider that it is appropriate to set a starting point of \$45,000 for Kaimai Farms Limited. It was responsible for Mr Ashford's actions but also has overarching responsibility to ensure the adequacy of the Farm's effluent infrastructure and management systems. It did not develop an effluent management plan or system for regularly checking and maintaining the irrigator until after the offending occurred.

Aggravating and mitigating factors

I was not advised of any aggravating factors relating to the defendant.

Mitigating factors

Ms Brewer drew my attention to past compliance issues at the Farm in 2013 relating to effluent discharge via a stormwater diversion, and the effluent pond having inadequate freeboard. In October 2015 the cows exceeded the maximum herd size. Given that past non-compliance, counsel submitted that there should be no discount for previous good character.

Mr Lang submitted there are various mitigating factors that would justify a 10-15 per cent reduction, which relate to Kaimai Dairy's serious commitment to farm development and environmental performance and the absence of previous convictions. He submitted that a further allowance should be made for a guilty plea should one be entered.

Mr Lang submitted that the company's commitment to responsible farming is demonstrated by the pre-offending expenditure on farm improvements and ecological enhancements, and by its post-offending actions:

- (a) the company developed standard operating procedures for effluent management immediately after the offence occurred;
- (b) with reference to the company's environmental programme dated 2018, guiding planned works and expenditure on environmental improvements in the period 2018-2021.

Mr Lang advised that works have been implemented as set out in that programme and will result in a total of nearly \$140,000 being spent on those works in addition to the amount spent on the effluent system upgrade. Those works related to protection of riparian areas and wetlands.

He also advised that the company and Mr Ashford have participated in a Synlait dairy programme "Synlait Lead With Pride" aimed at producing environmental best practice in dairying. The Synlait audit of farming operations conducted in December 2019 rated the company at 100% for social responsibility, 97% for environment, 91% for animal health and welfare, and 91% for milk quality. He submitted that these factors

indicate the high dedication of the company to its environmental performance and combined with no previous convictions would justify a 10-15 per cent reduction.

I consider that the development of standard operating procedures for effluent management is something for which the company should be commended but note that those standard operating procedures should have been in place well before now. I do consider, however, that the company should be commended for its environmental programme, particularly those works to which I was referred relating to riparian and wetland protection. I note that the Synlait Lead With Pride dairy programme is also something for which the company should be commended. I have also considered the upgrades that have occurred pursuant to the Resource Consent but note that the consent allowed for increased numbers of cows so allow no discount for that factor. I note the previous compliance issues but that they date (as they relate to effluent) back to 2013 and that the company has no previous convictions. I allow an eight per cent discount for the company's good character and environmental works.

Guilty plea

Ms Brewer noted that the matter was set down for trial to commence on 6 July 2020 and that the defendant's application to vacate the hearing dates and seek a sentence indication came at a very late stage of proceedings and after the prosecutor had prepared and filed its evidence. Counsel submitted that if the defendant entered a guilty plea it would be entitled to a discount of no more than 10 per cent for that plea.

In contrast, Mr Lang submitted that a 15 per cent reduction would be more appropriate and consistent with the approach taken by the Court in *Southland Regional Council v Erskine*.²⁷ In that case a 15 per cent reduction in the starting point was adopted when the defendant changed their plea only after dismissal of a s 147 application.

I consider that a 15 per cent reduction for a guilty plea is appropriate if this sentence indication was accepted.

²⁷ *Southland Regional Council v Erskine* [2019] NZDC 22179.

I record that I have adopted the two step approach to sentencing required by the recent Court of Appeal decision *Moses v R*²⁸

Outcome

If this sentence indication were accepted the defendant would be convicted and fined \$34,650. I would direct that 90 per cent of the fine be paid to the Council in accordance with s342 of the Act.

Judge MJL Dickey
District Court Judge

Date of authentication: 25/08/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

²⁸ *Moses v R* [2020] NZCA 296.