

**IN THE DISTRICT COURT
AT TAURANGA**

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

**CRI-2019-070-002470
[2020] NZDC 22656**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

GLEN JOHN ASHFORD
Defendant

Hearing: 21 January 2020 and 13 October 2020 via AVL

Appearances: V Brewer for the Prosecutor
JS Gurnick for the Defendant

Judgment: 9 December 2020

FINAL SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] In a decision dated 29 May 2020 I gave a sentence indication that, for the reasons set out in full in that decision, I would convict and fine Glen John Ashford \$24,937.50.

[2] On 13 July 2020 Mr Gurnick confirmed that Mr Ashford had considered the sentence indication and elected to change his plea to guilty on the basis he will be sentenced in accordance with the sentence indication given. The matter was then adjourned to enable restorative justice conferencing to occur. There were several more

adjournments following that date to enable the completion of the restorative justice conference and report.

[3] Mr Ashford came before me again on 13 October 2020. At that hearing the restorative justice report was addressed and submissions made by both counsel as to the implications of that report on sentencing.

[4] In my sentence indication I referred to advice I had received from Mr Gurnick regarding the WOF, standard operating procedures, the “Synlait Leading With Pride” certification and Mr Gurnick’s submission that Mr Ashford should be afforded a distinct credit for the remediation efforts and attention to the environment that he and Kaimai Dairy Company Limited (**Kaimai Dairy**)¹ have achieved. In my decision I said:

[64] I have some difficulty with two matters. First, in determining to what extent the initiatives and work that has been described to me arises from obligations under the Resource Consent. Secondly, separating the company’s efforts from those of the defendant. I note that all the matters Mr Gurnick pointed to are company initiatives. If further information could be provided which makes it clear what relates to the Resource Consent obligations and what does not, together with information as to who was the primary driver of those initiatives, that would assist me in determining whether a further discount is appropriate.

[5] There is also the matter of any effect that attending restorative justice conferencing might have on sentencing.

[6] Ms Brewer submitted that there was no new information that would justify a further discount. She advised that the Council is unaware of any new information relied on by Mr Ashford as evidence of remediation efforts or attention to the environment separate from initiatives carried out by Kaimai Dairy or which do not arise from obligations under the Resource Consent.²

¹ Kaimai Dairy Company Limited is the owner of the Farm, and was also charged and convicted in respect of the same discharge of dairy effluent.

² Counsel for the prosecutor’s submissions on sentence dated 7 October 2020, paragraph 15 (**Prosecutor’s submissions**).

[7] Ms Brewer acknowledged that the defendant's participation in restorative justice, and the resulting report, is new material that may be relevant. She drew my attention to aspects of the report:

18. The restorative justice report records that during the conference:
 - (a) Mr Ashford said that it was "*somewhat aggravating*" to only be given 45 minutes of the enforcement officer's intended inspection, and that 24 hours' notice would "*allow a farm to reschedule the day's activities*".
 - (b) Mr Ashford felt that the enforcement officer was like "*a dog with a bone*" once he discovered the malfunctioning irrigator and was not interested in looking at how well the rest of the farm was operated.
 - (c) Mr Ashford expressed his view that the irrigator had not been leaking for days and days.
 - (d) Mr Ashford was critical of the enforcement officer collecting a sample "*in a creek that is 10cm deep and 20cm wide*" as to his mind this was just measuring effluent.
 - (e) Mr Ashford said he felt targeted by Council for pursuing its prosecution against him.
 - (f) When asked if he denied the offending, Mr Ashford said he did not.
 - (g) When asked how he viewed the effects of the discharge, Mr Ashford stated that his children regularly use the waterway and often go eeling and catch koura. He said "*I don't want to be a part of degrading the stream and the environment. The water quality (on the farm) is outstanding, but at the end of the day everything goes downhill and ends up in the harbour. It has been stressful. I'm not accustomed to speaking to solicitors or being involved in the court process.*"

[8] Ms Brewer submitted that the defendant's comments during the conference are more consistent with frustration and regret that he had been subject to a prosecution than genuine remorse. She noted that it did not appear that Mr Ashford had offered an apology for the offending, rather using the conference as an opportunity to query the Council's approach to enforcement, and emphasise the improvements the company has made at the Farm since purchasing it.

[9] In terms of outcomes, Ms Brewer submitted they were "vague commitments requiring minimal effort on Mr Ashford's part or relate to Kaimai Dairy rather than Mr Ashford personally". She submitted they were:³

³ Prosecutor's submissions, paragraph 20.

20. ...

- (a) The Regional Council compliance team attending the farm for its annual dairy training day;
- (b) Mr Ashford seeking to establish social connections with downstream water user groups so as to be able to discuss any future environmental matters if they arise; and
- (c) Over the last three years and in association with the Regional Council, Kaimai Dairy has invested \$250,000 into creating buffer zones and other riparian planting. Mr Ashford has a good relationship with the Regional Council on this project and wishes to continue with this.

[10] Ms Brewer submitted that mere participation in restorative justice is not sufficient to justify an additional discount at sentencing. She acknowledged that it is not necessary to find extraordinary remorse, but there must be some demonstrable remorse before that warrants consideration as a personal mitigating factor separate from the discount given for a guilty plea. She submitted that the defendant has not demonstrated remorse sufficient to justify a separate discount at sentencing.

[11] For Mr Ashford Mr Gurnick noted that in the sentence indication, discounts had been foreshadowed of 25 percent for a guilty plea and five percent for good character. The question now is what further credit should be available for remediation and works that have been undertaken, and for the riparian planting programme, which Mr Ashford and Kaimai Dairy has in place for the next two years – being an investment of \$250,000.

[12] Mr Gurnick strenuously objected to Ms Brewer's characterisation of Mr Ashford as not demonstrating remorse sufficient to justify a separate discount. He submitted that the offending needs to be looked at in its context, and that the exhibition of remorse has to be proportionate to that offending. He characterised the offending as an accident. He submitted that he has not seen more responsible farmers than Mr Ashford and Kaimai Dairy appearing on charges such as this. He pointed to the riparian planting and fencing programme, the Synlait Leading With Pride programme, among others. He submitted there should be a credit offered to Mr Ashford for participating in restorative justice. He observed that other groups could have been involved in the restorative justice conference, for example iwi, and chose not to.

[13] I regard Mr Ashford's participation in restorative justice as positive and something for which he should be given credit. In making that finding, I observe that the annual training day with the regional council has not yet been organised but is proposed for some time next year; and Mr Ashford has endeavoured to make contact with one of the main downstream water users but is still to open dialogue with them.

[14] Mr Gurnick then addressed the interplay between Kaimai Dairy and Mr Ashford. With reference to my query regarding responsibility for the initiatives proposed by Kaimai Dairy as opposed to Mr Ashford, Mr Gurnick submitted that Mr Ashford is the farmer on the Farm and is a director of Kaimai Dairy and a 20 percent shareholder. While acknowledging that Kaimai Dairy has gone through the Court process and been fined, he submitted that there was not any recognition by the Council and the Court of Mr Ashford's contributions. He submitted that it is appropriate to give an additional 10 percent credit for remorse, and for various environmental initiatives undertaken by Kaimai Dairy, particularly the riparian planting programme. He submitted that if those initiatives were not recognised as being initiatives for which Mr Ashford, at least in part, had contributed to – he would be doubly penalised. By that I take him to mean that Mr Ashford is a contributor to the works as a director and shareholder in the company.

[15] I do not accept Mr Gurnick's submission that Mr Ashford would be doubly penalised if he is given no discount for what are, in effect, company initiatives on the Farm. In my decision sentencing Kaimai Dairy, I allowed a discount for the company's good character and environmental works. In Mr Ashford's sentence indication, I asked for further information as to the extent to which the company's initiatives were separate from those of Mr Ashford. I did not receive any further information about that save a submission that I could take judicial notice of Mr Ashford being a 20 percent shareholder in the company. I was already aware of that when making my sentence indication decision and do not see that that changes anything with regard to the allowance of discounts.

[16] In the circumstances I propose to allow a further discount of three percent to recognise Mr Ashford's attendance and participation in the restorative justice

conferencing and the outcomes from that conference. That brings the total discount allowed to 33 percent.

[17] A copy of my decision dated 29 May 2020 is attached to this decision. There is nothing to be added to the reasons for that decision save for what appears here addressing the matter of further discounts. Accordingly,⁴ the defendant is convicted and fined the amount of \$23,450. I direct that 90 percent of the fine is to be paid to the Council in accordance with s 342 of the Act.

Judge MJL Dickey
District Court Judge

Date of authentication: 09/12/2020

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

⁴ Applying the two-step sentencing methodology set out in *Moses v R* [2020] NZCA 296 at [46].

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

**IN THE DISTRICT COURT
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**CRI-2019-070-002470
[2020] NZDC 4509**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

GLEN JOHN ASHFORD
Defendant

Hearing: 21 January 2020
Appearances: V Brewer for the Prosecutor
JS Gurnick for the Defendant
Judgment: 29 May 2020

SENTENCING INDICATION OF JUDGE MJL DICKEY

Introduction

[1] The defendant seeks a sentence indication in respect of one charge of discharging a contaminant (dairy effluent) onto or into land in circumstances where it may enter water, against ss 15(1)(b) and 338(1)(a) of the Resource Management Act

1991 (**RMA**). The charge relates to a farm property situated on the corner of Hanga Road and State Highway 29 (**the Farm**).¹

[2] The maximum penalty for the charge against Mr Ashford is two years imprisonment or a fine not exceeding \$300,000. It was agreed between counsel that a fine is the appropriate sentencing response, and I agree.

[3] The differences between counsel were in respect of the starting point that I should adopt. The prosecution submitted that an appropriate starting point is \$40,000 and for Mr Ashford, Mr Gurnick submitted that a starting point of no more than \$30,000 is warranted.

[4] Mr Gurnick advised that there were some minor aspects of the Summary of Facts that are disputed. However, he indicated that they are unlikely to have a material effect on the sentence indication and on that basis the Summary of Facts is accepted for present purposes.

Regulatory framework²

[5] The Farm discharges dairy effluent pursuant to resource consent RM15-0064 (**Resource Consent**) which was issued by Bay of Plenty Regional Council (**the Council**) to Kaimai Dairy Farm Limited (**Kaimai Dairy**) on 5 December 2016. Kaimai Dairy has owned the Farm since July 2013. Mr Ashford is one of its directors and lives at the Farm and is responsible for the day-to-day management of the effluent system. Together with his wife, he owns a 20 percent shareholding in Kaimai Dairy.

[6] Under the Resource Consent, the Farm's three unlined effluent storage ponds were to be replaced by one lined pond with a capacity of 2,270m³ by 15 July 2018. However at the time of the offending, in December 2018, the new pond was not operational. Two of the unlined ponds had been decommissioned and effluent was being collected in an unlined sump, from where it was being irrigated to pasture via a stationary rain-gun irrigator and pod sprinklers.

¹ Kaimai Dairy Farm Limited owns the Farm and is also charged in relation to the 17 December 2018 discharge of effluent. It has pleaded not guilty.

² Summary of Facts, paragraphs 2-10.

[7] 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 from when the new pond was installed. At the time of the offending approximately 578 cows were being milked at the Farm.

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

- (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 that 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).

Background³

[9] The Farm is located approximately 30km south-west of Tauranga in the lower Kaimai Ranges. It is approximately 277ha.

[10] 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.

³ Summary of Facts, paragraphs 1-2, 5 and 11.

[11] The Summary of Facts detailed previous compliance issues found at the Farm during inspections relating to a previous consent, namely:

- (a) on 8 October 2013 evidence was found of an effluent discharge to a watercourse via a stormwater diversion;
- (b) on 10 December 2013 a Council officer found that the effluent pond had an inadequate freeboard; and
- (c) on 13 October 2015 a Council officer found that the maximum herd size of 530 had been exceeded.

[12] The Council inspection on 17 December 2018 was the first compliance inspection relating to the Resource Consent.

Offending on or about 17 December 2018 – discharge of effluent onto land where it may enter water⁴

[13] On 14 August 2018 the Council sent Kaimai Dairy a letter reminding it of the upcoming Council compliance visit and the need for the company to check its effluent system and ensure it was complying with the terms of its consent. The letter referred to common compliance issues including effluent irrigation causing serious ponding and/or runoff to waterways.

[14] On the morning of 17 December 2018 a Council enforcement officer telephoned Mr Ashford and arranged to meet him at the Farm for a compliance inspection later that day. At the inspection, the officer made the following observations:

- (a) the new effluent storage pond was not in use, contrary to the Resource Consent. Mr Ashford stated that the Council's land management officer had given approval to extend the deadline of 15 July to late 2018 on account of the winter earthworks season. However, the Council officer subsequently checked with that person who stated that no extension had been given;

⁴ Summary of Facts, paragraphs 12-22.

- (b) a build-up of effluent in one of the sprinkler pods, indicating that it had not been operating correctly. Mr Ashford then shifted the pods;
- (c) at approximately 12.37pm the officer and Mr Ashford, having driven to Paddock 31 where the rain-gun irrigator was situated, noted that it was discharging effluent but had malfunctioned. Instead of rotating, it was discharging effluent in only one direction, and there was a large quantity of effluent ponding beside it.

[15] Photographs were taken of the effluent discharge and the Council officer observed that the discharge was flowing approximately 42m overland to a fence line and from there down into a block of bush. From there it split into two separate flowpaths that discharged into a tributary stream of the Momutu Stream at two locations. The discharge points were located approximately 40m below the fence line, and were approximately 8m apart.

[16] Mr Ashford turned off the effluent line at approximately 12.45pm. However, as effluent was continuing to flow down the paddock and into the bush block, the officer instructed him to dig a trench in the paddock to intercept the effluent flow and halt the discharges to the stream. The flow of effluent into the bush block ceased when Mr Ashford completed the trench at approximately 1.30pm.

[17] As water in the affected tributary stream was green at the two points where effluent was flowing into it, 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 approximately 180m downstream of the discharge points.

[18] The officer took samples during the inspection of 17 December 2018.

Explanation⁵

[19] When formally interviewed, Mr Ashford said:

- (a) he was the staff member operating the effluent system that day;
- (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 a day (at night and in the morning) and the irrigator is usually shifted;
- (d) he was away Friday, so he probably shifted the irrigator into the paddock on Saturday morning (i.e. 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.

[20] After the interview, Kaimai Dairy provided the Council with irrigator records that showed the rain-gun irrigator had been in use in Paddock 31 from 13-17 December 2018.

Subsequent events⁶

[21] On 18 December 2018 the Council issued an abatement notice to Kaimai Dairy, requiring it to cease contravening conditions 7.4 and 7.6 of the Resource Consent. Mr Ashford confirmed receipt of the Notice and advised that he had held a staff meeting to go over consent requirements, reiterate environmental concerns to staff, and ensure that irrigation start-up procedures were correctly followed. When the Council carried out a follow-up inspection on 5 February 2019 it found 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

⁵ Summary of Facts, paragraphs 33, 34.

⁶ Summary of Facts, paragraphs 30-32.

irrigation. The Council requested that Kaimai Dairy provide as-built certification for the new pond. On 12 May 2019 the company provided the Council with that certification.

Sentencing principles

[22] Against that background I adopt a starting point for the fine. The purpose and principles of sentencing under the Sentencing Act 2002 are relevant insofar as they are engaged by a particular case. The principles outlined in *Thurston v Manawatu-Wanganui Regional Council (Thurston)* are relevant to sentencing. The factors that are frequently considered in RMA sentencing cases include an assessment of the offender's culpability for the offending, any infrastructural or other precautions taken to prevent the discharges, the vulnerability or ecological importance of the affected environment, the extent of the environmental damage, deterrence, the offender's capacity to pay a fine, disregard for abatement notices or Council requirements, remedial steps taken to mitigate the offending or prevent future offending, and the cooperation with enforcement authorities.⁷

[23] The cases evince an increasing concern about the incidence of dairy effluent offending and emphasise the need for deterrence, particularly general deterrence, to be reflected in these sorts of cases.⁸

Environmental effects of the offending⁹

[24] A number of samples of the discharge were taken. Readings taken from effluent flowing down the gully embankment 44m from the rain-gun irrigator were faecal coliforms of 9,500,000 cfu/100mL, with *E.coli* being 10,000,000 cfu/100mL. In stream where effluent was flowing into the stream, the readings were faecal coliforms of 560,000 cfu/100mL and *E.coli* 290,000 cfu/100mL. In contrast, in stream, 3m upstream of the effluent flow point into the stream the readings for faecal coliforms were 360 cfu/100mL and for *E.coli* 290 cfu/100mL. In stream and 22m

⁷ *Thurston v Manawatu-Wanganui Regional Council* HC, Palmerston North, CRI-2009-454-24, 25 & 27, 27 August 2010, paragraphs [41], [42].

⁸ See *Watt v Southland Regional Council* [2012] NZHC 3062 and *Yates v Taranaki Regional Council*, HC, New Plymouth CRI-2010-443-8, 14 May 2010.

⁹ Summary of Facts, paragraphs 22-29.

downstream of the second discharge point, faecal coliforms were 580,000 cfu/100mL and 660,000 cfu/100mL for *E.coli*. The prosecutor submitted that the readings 22m downstream of the entry point were over 1,500 times higher than the readings 3m upstream of the entry point.

[25] The stream into which effluent was discharged is 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 9km from the discharge point at the Farm. The River is listed in Schedule 1 of the Bay of Plenty Natural Resources Plan as a habitat and migratory pathway of indigenous fish species, namely Banded Kokopu, Long-finned eel, Koura, Giant Kokopu; and a regionally significant habitat for trout.

[26] Dairy wastewater is extremely high in organic matter and has high nutrient and bacterial loading. The Summary of Facts described the various effects from dairy wastewater that can occur on waterways including:

- Oxygen levels can be depleted, resulting in fish kill;
- 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;
- High nutrient loadings can result, causing excessive weed growth. This can block the flow of water in the channel causing drainage and flooding issues;
- High nutrient loadings contribute to algal blooms, which can sometimes be toxic and can render water unsuitable for contact recreation;
- The discharge of high levels of bacteria can result in water being unsuitable for consumption by both humans and stock;
- As sediment is disturbed and water is flushed down the catchment, exposure of pathogens to the whole downstream catchment community is increased.

[27] Faecal coliforms and *E.coli* are the most commonly used indicators for microbial contamination. High levels of those elements indicate a high risk of other harmful microbial organisms (pathogens) being present. Elevated levels of faecal coliforms indicate that water is unsafe for use and/or consumption.

[28] Under the National Objectives Framework (within the NPS for Freshwater Management, 2017 amendment) *E.coli* levels exceeding 1,200 cfu/100mL 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 100 cfu/100mL (ANZECC, 2000).

[29] Ms Brewer submitted that it is generally accepted that the effects from dairy effluent discharges on water resources are cumulative and serious. She referred to a decision of the High Court in *Vernon v Taranaki Regional Council*¹⁰ that discussed the impact of such discharges. The Court accepted that farm dairy effluent contains contaminants that can have adverse effects on water quality.

[30] Ms Brewer noted that the effluent had entered surface water, namely a tributary stream. She submitted that when effluent has actually entered water, this has been recognised as aggravating the offending above those cases where the effluent only had the potential to enter water.¹¹

[31] For the defence, Mr Gurnick submitted there were no specific environmental effects from the discharge other than the general environmental effects that discharges of effluent can have on groundwater and when entering a tributary. He acknowledged however that there was discolouration of the water in the tributary caused by the discharge and high faecal coliform readings.

[32] I note that the effluent travelled some way from the irrigator into the bush block and from there into the stream. Further, that the samples taken in stream demonstrated high levels of faecal coliforms and *E.coli*, and the stream was discoloured along its length for approximately 180m. I find that the discharge would have given rise to

¹⁰ *Vernon v Taranaki Regional Council* [2018] NZHC 3287 at [1] and [2].

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

adverse effects on the environment that are moderately serious, albeit occurring over a relatively short duration.

Culpability of the defendant for the offending

[33] Ms Brewer submitted that Mr Ashford's level of culpability is high, given that he is the person responsible for the day-to-day management of the Farm and for ensuring compliance with the Resource Consent. Further, he is one of the directors of Kaimai Dairy which owns the Farm. He was also the staff member operating the effluent system on the date of offending.

[34] Ms Brewer submitted that Mr Ashford's culpability is elevated by a number of factors being that:

- (a) the irrigator was left in the same paddock from 13-17 December without being moved;
- (b) it was not supervised or monitored during this time;
- (c) the stream into which the effluent discharged was a tributary stream of the Momutu Stream, being a headwater tributary of the Mangakarengorengo River, a habitat and migratory pathway of indigenous fish species and a regionally significant habitat of trout;
- (d) despite the warnings given of the impending compliance visit, Mr Ashford failed to take action;

all of which demonstrate a complacent attitude towards his environmental responsibilities.

[35] Ms Brewer also referred to a breach of condition 8.5 of the Resource Consent, which required that the new, fully lined and sealed effluent pond be in use by 15 July 2018. It was not operational in December 2018. Finally, she referred to the abatement notice issued to Kaimai Dairy on 18 December 2018 regarding breaches of conditions of the Resource Consent.

[36] With the above factors in mind, Ms Brewer submitted that Mr Ashford's failures amounted to a high degree of carelessness.

[37] Mr Gurnick submitted that the offending ought to be considered no more than accidental and, at its highest, careless.

[38] Mr Gurnick advised me that the discharge occurred because the the rain-gun irrigator malfunctioned; that the malfunction was caused by two fixing bolts for the counterweight failing, causing the irrigator head to remain in a fixed position without rotating. He provided a statement from an accredited effluent system designer, Kyle Osborne,¹² regarding the general reliability of the model of rain-gun used at the Farm. He confirmed the model of rain-gun is very commonly used because it has very few moving parts and is very reliable. Ms Brewer noted that Mr Osborne had not actually inspected the irrigator.

[39] Mr Gurnick submitted that the irrigator could only have run for a maximum of 80 minutes. The maximum run-time for the irrigator after each milking is 40 minutes. He stated that the irrigator was set up in Paddock 31 on 13 December 2018 and was moved on 14 and 15 December 2018. It was not running in one spot from 13-17 December 2018 as alleged by the prosecution. He stated that the irrigator had been in the position it was in for two milking cycles. In response, Ms Brewer observed that there was no reference to the the irrigator having been moved in the Summary of Facts.

[40] Mr Gurnick referred to a number of other matters that he said demonstrated that the defendant and Kaimai Dairy took their responsibilities seriously.

Upgrade

[41] Mr Gurnick submitted that at the time of the offending, Kaimai Dairy was in the process of upgrading the effluent system, which indicated that the defendant and Kaimai Dairy took the treatment of effluent and its discharge very seriously.

¹² Kyle Matthew Osborne, Qubik TMC Ltd.

Dairy Effluent Warrant of Fitness

[42] Mr Gurnick provided me with a copy of the Dairy Effluent Warrant of Fitness that Kaimai Dairy obtained on 26 November 2019 (**WOF**). The overview from the WOF recorded that the estimated new pond volume exceeded the FDE Design Standards and Code of Practice v3, September 2015. It also recorded that the effluent application depth test showed the consent condition was met. Further, it stated that the irrigator itself is very well maintained. My attention was drawn to the WOF having noted that there were several examples of good effluent infrastructure identified on the Farm. Mr Gurnick confirmed that Mr Ashford had also completed the ITO effluent management course in September of 2019.

Standard Operating Procedures

[43] I was provided with a copy of Kaimai Dairy's standard operating procedures for effluent management, which Mr Gurnick submitted was extensive. I was also provided with a copy of Kaimai Dairy's environmental programme dated 12 July 2018 (pre-dating the discharge) which sets out the environmental works programme and the \$136,470 investment Kaimai Dairy would make over the 2018-2021 seasons.

"Synlait Lead with Pride" programme

[44] Finally, I was advised that Mr Ashford and Kaimai Dairy have joined the "Synlait Lead with Pride" programme to ensure environmental best practice in dairy farming. The programme focusses on farming across four key pillars, namely social responsibility, milk quality, animal health and welfare, and environment. On 9 December 2019, Synlait completed an audit of farming operations and gave Kaimai Dairy and Mr Ashford 100% for social responsibility, 97% for environment, 91% for animal health and welfare and 91% for milk quality. I was advised that the only reason marks were deducted under the heading "environment" was because the Farm's fertiliser spreader was not "Spreadmark certified"; that is currently an issue Synlait is working on as there is currently no authorised certifier in the North Island.

[45] I note that Kaimai Dairy had in place at the time of the offending standard operating procedures for effluent management, and that its environmental works

programme for the 2018-2021 seasons included a sizeable investment in infrastructure. I have considered those matters as they demonstrate a responsible approach to management of the Farm. However, on the face of it most of the initiatives occurred after the offending, and are more properly considered after I set the starting point. Further, they are Kaimai Dairy's procedures and works and not Mr Ashford's initiatives. The point remains that Mr Ashford was responsible for the day to day management of the Farm and the effluent management system.

[46] I find the defendant's culpability in this case to be low. I consider that the discharge that resulted from the failed irrigator was accidental, and could not have been foreseen. I acknowledge the submissions made on the prosecutor's behalf to the effect that the irrigator's operation could have been monitored more closely, however in these circumstances I consider that the failure to check has to be put in the context of the defendant's knowledge that, while not checking it on the morning of the offending, he knew it would only run for 40 minutes and he would be visiting the paddock later that day as part of the Council's inspection, which he knew was occurring that day. Having said that, the irrigator was in Paddock 31 for five days, and it would have been prudent if the defendant had checked it on 16 December to ensure it was running properly. I only have information about the irrigator being moved on 14 and 15 December 2018, and that statement is queried by Ms Brewer as it was not in the Summary of Facts.

[47] I do not consider Kaimai Dairy's failure to complete the effluent pond as required by the Resource Consent to have contributed to the offending. It is clear to me that the offending resulted from the mechanical breakdown of the irrigator and was not an effluent storage issue.

Starting point

[48] The Court is required to take into account the general desirability of consistency with appropriate sentence levels in respect of similar offending. Counsel for the prosecutor referred me to four cases: *Waikato Regional Council v Crouch*

(**Crouch**);¹³ *Waikato Regional Council v Graze Limited (Graze)*;¹⁴ *Taranaki Regional Council v Vernon (Vernon)*;¹⁵ and *Southland Regional Council v Baird, Vendale Limited and Benlyon Limited (Baird)*.¹⁶ Counsel for the defendant referred me to *Bay of Plenty Regional Council v Kahu Ma Farms Limited (Kahu Ma)*¹⁷ and *Waikato Regional Council v GA & BG Chick Limited (Chick)*.¹⁸

[49] *Crouch* involved two charges of discharging dairy effluent to land. At one site effluent had ponded around the travelling irrigator and at the other site effluent had been manually scraped into drains outside the cowshed. That case involved a lack of storage capacity. Mr Crouch had previously received two formal warnings concerning over-irrigation. A starting point of \$75,000 was adopted, which took into account the defendant's awareness of the deficiencies in the farm's effluent system from previous warnings, as well as his lack of sufficient remedial action.

[50] In *Graze* the company was in the process of upgrading its effluent infrastructure at the time of the offending. The company was charged with two offences arising from the same issues, namely the breakdown of an irrigator and a decision to proceed with milking resulting in overflow from the sump. The offending was characterised as highly careless, but viewed as a one-off case in light of steps being taken to improve the infrastructure. A starting point of \$70,000 was adopted.

[51] In *Vernon*, a husband and wife each pleaded guilty to a charge of discharging dairy effluent. The defendants held a consent to discharge effluent. On an annual compliance inspection the travelling irrigator was found not to be connected, and untreated effluent had been discharged directly into the paddock. Effluent had ponded over an area of about 200m², and was flowing into a watercourse. The Judge accepted the defendants had acted recklessly in carrying out farming without an adequate effluent storage system. A global starting point of \$60,000 was adopted.

¹³ *Waikato Regional Council v Crouch* [2019] NZDC 11517.

¹⁴ *Waikato Regional Council v Graze Limited* [2019] NZDC 15963.

¹⁵ *Taranaki Regional Council v Vernon* [2018] NZDC 14037.

¹⁶ *Southland Regional Council v Baird, Vendale Limited and Benlyon Limited* [2018] NZDC 11941.

¹⁷ *Bay of Plenty Regional Council v Kahu Ma Farms Limited* [2017] NZDC 9592.

¹⁸ *Waikato Regional Council v GA & BG Chick Limited* (2007) 14 ELRNZ 291 (DC).

[52] In *Baird*, Mr Baird contacted the Council to advise that effluent from the farm's irrigation system had discharged to a waterway. Investigations showed that there had been a large discharge caused by a farm worker incorrectly setting the irrigator to operate in a stationary location. The irrigator had been left operating for 16 hours. A starting point of \$55,000 was adopted.

[53] Ms Brewer submitted that the offending in this case is moderately serious because, although not deliberate, it involved a high degree of carelessness given the well-known risk of irrigator failures, the lack of supervision of the irrigator, the lack of monitoring systems and the lack of available storage at the time of the offending. Counsel referred to the significance of the receiving environment and to the duration of the discharge, which she submitted may have been occurring for up to five days. Ms Brewer also referred to the volume of the discharge, which while unknown had contained high faecal coliform and *E.coli* levels in the samples taken.

[54] Ms Brewer submitted that, while the offending was not recurring, it could have been avoided through better supervision and monitoring of the irrigator. She submitted that the offending is more serious than the offending in *Baird* and *Vernon*, but marginally less serious than the offending in *Crouch* and *Graze*. She observed, however, that Mr Ashford's role at the Farm was different to that of the defendants in the *Baird*, *Vernon* and *Crouch* cases, which involved farm owners and holders of resource consents. She submitted that a starting point in the region of \$40,000 was appropriate. If Mr Ashford had been a consent holder or owner she would have suggested a starting point of \$65,000.

[55] Mr Gurnick submitted that an appropriate starting point of no more than \$30,000 is warranted. He submitted that was appropriate when assessing the culpability of the defendant here compared with the defendant in the *Kahu Ma* case. He submitted that the culpability of the defendant in that case was more serious and a starting point of \$40,000 was adopted. In *Kahu Ma* there was one charge of discharging dairy effluent onto land and one charge of contravening an abatement notice. Effluent had ponded around an irrigator, which flowed across a paddock, into a drain close to where the drain entered a canal, approximately 200m from the outfall to the sea. The prosecution had sought a starting point of \$60,000 and the defendant

a starting point of \$35,000. The Court considered that the level of offending was at the less serious level and adopted a starting point of \$40,000.

[56] Mr Gurnick also referred to the sentencing bands identified in *Chick*.¹⁹ He submitted that the offending sits on the cusp of Levels 1 and 2 of *Chick* based on the following factors:

- the offending should be considered no more than accidental and at its highest careless;
- the company Kaimai Dairy was in the process of upgrading the effluent system;
- the offending comprised a single incident due to the mechanical failure of a rain-gun irrigator; as the irrigator is programmed to run for a maximum 40 minutes after each milking, the maximum time the irrigator could have been operating in the one position was 80 minutes. He rejected any notion that the discharge was occurring for days.

[57] Mr Gurnick acknowledged that closer monitoring of the irrigator would have reduced the period over which the discharge occurred, but submitted the short period of programmed operation gave only limited opportunity to observe that such a malfunction had occurred.

[58] Mr Gurnick referred also to the scale of the offending, submitting that it was moderate as there were no specific environmental effects other than the general environmental effects that discharges of effluent can have on groundwater and when entering a tributary. He did acknowledge, however, that there was discolouration of the water caused by the discharge, and high faecal coliform readings.

¹⁹ *Chick*, paragraphs [24] to [26]. Level 1 offending (least serious) – unintentional, one-off incidents occurring as a result of system failure, with little or no effect on the environment; Level 2 offending (moderately serious) – unintentional but careless discharges, usually of a recurring nature over a period of time, or of incidents arising from the malfunction of different parts of the system. The offending is often manifested by a reluctance to address the need for a safe system of effluent disposal, resulting in delays in taking restorative action. It also reflects little or, at the most a moderate, effect on the environment. Level 3 offending (more than moderately serious) – deliberate, or if not deliberate, is occasioned by real want of care. It is often associated with large plural discharges over time, or one large one-off event. It often exposes a disregard for the effects on the environment.

[59] Finally, Mr Gurnick referred to the fact that Mr Ashford took all available steps to remediate the issue and mitigate any ongoing effects, immediately placing a bund in the area to stop any more effluent escaping the farm paddock and digging a trench to stop the flow. Further, that it is apparent from the WOF and the “Synlait Leading with Pride” audit that significant steps have been taken to ensure the Farm is fully compliant.

[60] I regard the cases I was cited as useful, but not determinative of the matter of the appropriate starting point. I consider that the offending sits between Levels 1 and 2 of *Chick*. I have found that the discharge occurred as a result of the malfunction of an irrigator that is known in the industry to be reliable. I have determined that the discharge will have caused adverse effects on the environment that, in the circumstances, can be described as moderate. I note that the defendant is not the Farm’s owner or the holder of the resource consent, but was responsible for the day-to-day management of the Farm. I determine that a starting point of \$35,000 is appropriate.

Aggravating and mitigating factors

[61] No aggravating factors are apparent. The prosecutor pointed to compliance issues at the Farm since Kaimai Dairy purchased it, and submitted there should be no discount for previous good character. However, I note the prosecutor’s advice that no formal enforcement action was taken in respect of these compliance issues – they were simply noted on the field sheets.

[62] Ms Brewer submitted that there is no evidence of exceptional remorse or cooperation beyond what is to be expected of defendants, and therefore there is no justification for a discount for any personal mitigating factors in that regard.

[63] I consider it is appropriate to allow a discount of five percent for Mr Ashford’s good character. I note Mr Gurnick’s advice that two of the three compliance issues arose shortly after Kaimai Dairy purchased the Farm in July 2013. I accept that upgrades were required to the Farm and that work was in train.

[64] I note the advice I received regarding the WOF, standard operating procedures, the “Synlait Leading with Pride” certification, and Mr Gurnick’s submission that Mr Ashford should be afforded a distinct credit for the remediation efforts and attention to the environment that he and Kaimai Dairy have achieved. I have some difficulty with two matters. First, in determining to what extent the initiatives and work that has been described to me arises from obligations under the Resource Consent. Secondly, separating the company’s efforts from those of the defendant. I note that all the matters Mr Gurnick pointed to are company initiatives. If further information could be provided which makes it clear what relates to the Resource Consent obligations and what does not, together with information as to who was the primary driver of those initiatives, that would assist me in determining whether a further discount is appropriate.

Guilty plea

[65] I record that if the defendant were to enter a guilty plea in response to the sentence indication the prosecutor has accepted he would be entitled to a discount of up to 25 percent. I accept that the full discount should be applied in those circumstances.

[66] Subject to any further information I may receive, if the defendant were to plead guilty the fine that would be payable would amount to \$24,937.50.

[67] I have received no information about the defendant’s ability to pay a fine of this amount. If there is an issue I would need to receive information from the defendant pursuant to s 41 of the Sentencing Act.

Judge MJL Dickey
District Court Judge and Environment Judge

Date of authentication: 29/05/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.