

**IN THE DISTRICT COURT
AT TAURANGA**

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

**CRI-2018-070-2903
[2020] NZDC 7710**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

DJK LIMITED

and

DAVID JUSTIN KEHELY
Defendants

Hearing: 3 March 2020
Appearances: V Brewer for the prosecutor
P Lang for the defendants
Judgment: 13 May 2020

**FINAL RESERVED SENTENCING DECISION OF
JUDGE M HARLAND**

Introduction

[1] The defendants have each pleaded guilty to one mirror charge each alleging a contravention of s 15(1)(b) of the Resource Management Act 1991 (**RMA**) during the period from 2 to 10 January 2018 by discharging contaminants (dairy effluent) to land in circumstances where it may have entered the Waimapu Stream at McPhail Road, Oropi, near Tauranga.

[2] DJK Ltd (**the company**) faces a maximum penalty of a fine not exceeding \$600,000 and the maximum penalty available to me in sentencing Mr Kehely is a fine not exceeding \$300,000 and/or a term of imprisonment not exceeding two years. It was common ground that a fine was the appropriate sentencing response. The issue for me to determine was the starting point for the fine.

Background

[3] The farm where these discharges occurred is located approximately 20 kilometres south of Tauranga on McPhail Road, Oropi (**the farm**).¹

[4] The farm is owned by the trustees of Keystone Trust, namely Joan Kehely, Graham Kehely and Diprose Miller Trustees Limited (**the trustees**). Keystone Trust also holds the relevant resource consent for the farm.

[5] Keystone Trust's nominated contact person registered with Council is Graham and Joan Kehely's son, Jason Kehely.

[6] At the time of the offending, the trustees had engaged the defendant David Kehely, and his wife as the farm's contract milkers. David Kehely is Graham and Joan Kehely's grandson.

[7] At all material times, David Kehely was the person responsible for the day-to-day running of the farm. At the time of the offending, Mr Kehely also ran another farm and operated an agricultural contracting business. He had 12 years' experience as a dairy farmer, which included 3 years' operating this farm.

[8] David Kehely employed staff to work at the farm through the DJK Limited. David Kehely is the sole director and shareholder of that company.

[9] At the time of the offending David Kehely and his wife were living at the farm but after it they were given notice by the Keystone Trust that their contract would not be renewed for the next season.

¹ An aerial photograph showing the location of the farm is attached at **Tab 1**.

[10] Mr Kehely has since decided to abandon dairy farming as a career. He and his family, which now includes a new baby, have moved to the Far North. Through the company, he now operates a takeaway food business in Houhora, Northland as well as a mussel spat catching business. More will be said of this later.

[11] The farm is located within the catchment area for the Waimapu River and has several streams flowing through it, including the upper Waimapu Stream, which is a tributary of the Waimapu River. The Waimapu River discharges into Tauranga Harbour, approximately 20km from the farm.

[12] In 2016, Keystone Trust purchased the farm from Oropi Bushlands Limited, a company owned by members of the Kehely family, including Graham and Joan Kehely. This change in ownership occurred after the farm's previous farm manager, Shaun Kehely, left the farm. Keystone Trust use Oropi Bushland Limited's property to the east of the farm as part of Keystone Trust's farming operation.

[13] At the time of the offending, approximately 360 cows were being milked on the farm. Wastewater from the dairy shed was collected in a 3,089m³ effluent pond and discharged to pasture via a travelling irrigator or a slurry tanker.

[14] Discharges of dairy effluent to pasture irrigation at the farm were authorised by resource consent 68332 (**the consent**), which was issued to Oropi Bushlands Limited on 23 November 2015 and transferred to Keystone Trust on 12 December 2016. That consent included the following conditions:

- (a) The consent holder shall ensure that no effluent reaches surface waters by overland flow or direct discharge (condition 6.3).
- (b) The rate of application shall not result in excessive ponding of effluent (condition 6.5). (Advice note 4 states that for the purpose of this consent, "excessive ponding" refers to discharged effluent which does not drain away within 30 minutes.)
- (c) The effluent system shall be operated and maintained in good functional order so that it can meet the performance requirements of the consent at all times to

the satisfaction of the Chief Executive of the Regional Council or delegate (condition 9.1).²

Stormwater diversion system

[15] The farm operated a clean water diversion system that allowed clean stormwater from the cowshed yard and the cowshed roof to be captured and diverted away from the farm's effluent storage pond. The diversion system directed water to a drain which flowed to the Waimapu Stream. The purpose of the stormwater diversion was to allow greater storage capacity for effluent in the effluent pond because clean stormwater could be diverted away from the pond. To achieve this, a stormwater diverter near the cowshed would be manually switched on. Water from the yard would then be directed through the stormwater diversion system to the Waimapu Stream, rather than to the effluent storage pond and it would continue to be diverted in this fashion until the diverter was switched off.

[16] The problem with this system was however obvious. If the stormwater diverter was left on during milking or a yard wash down, then effluent from the yard would be washed into the stormwater system and into the stream rather than into the effluent storage pond.

The offending

[17] At about 6pm on the evening of 7 January 2018, the complainant and her family members went to have a barbeque at a swimming hole located at 329 McPhail Road, Oropi. The swimming hole is in the upper part of the Waimapu Stream, a short distance downstream from where that stream flows through the farm.

[18] When the group arrived at the swimming hole, the complainant found that the stream was heavily discoloured and smelt very strongly of effluent. This was a surprise, as earlier in the day, another family member had visited the swimming hole and had observed that the stream was running clear.

² A copy of the consent is attached at **Tab 2**.

[19] One of the family members (Mr Ake) followed the discolouration upstream and saw that dairy effluent was flowing from a drain on the farm into the Waimapu Stream. He followed the stream further and found that the stream was running clear upstream of the farm. While on the farm looking at the effluent discharging into the stream, Mr Ake pointed out the discharge to someone who was working on the farm.

[20] The complainant reported the discharge to Council's pollution hotline the following day.

[21] It is not known exactly when the discharge of effluent occurred at the farm on 7 January 2018, nor what caused it.

[22] At 10:15am on 10 January 2018 a Council enforcement officer met the complainant at the swimming hole at 329 McPhail Road, Oropi so she could show him where the family had observed effluent in the Waimapu Stream. The stream was still discoloured at this time.³

[23] The officer then went to the farm to look for the source of the contamination. There were no staff members in sight.

[24] The officer inspected the cowshed. He found that the effluent level in the effluent storage pond was very high and the pond's freeboard was far less than the required freeboard of 300mm. In a paddock beside the cowshed, the officer observed a large amount of dried effluent from a previous discharge from the stormwater diverter. Effluent had flowed from the diverter to a farm drain which flowed into the Waimapu Stream approximately 300 metres from the diverter.

[25] The officer took photographs and video footage of the discharge from the diverter and collected samples at various locations. He tracked the effluent flow path from the stormwater diverter, overland, along the drain and into the Waimapu Stream.

³ Photographs taken by the complainant at the swimming hole in the Waimapu Stream on the morning of 10 January 2018 are at Tab 3 of the Summary of Facts.

Analysis of Council samples relating to discharge from diverter

[26] The results of the laboratory analysis of the Council samples taken on 10 January 2018 were as follows:

No	Sample location	Faecal coliforms cfu/100mL	E.coli cfu/100mL
1	Bottom of drain, at culvert inlet prior to discharge into the Waimapu Stream	380,000	380,000
2	Point of discharge from culvert into the Waimapu Stream	70,000	130,000
3	In the Waimapu Stream, upstream of the discharge point	180	150
4	In the Waimapu Stream, downstream of the discharge point	4,900	3,900
5	Immediately below the discharge point in the Waimapu Stream	32,000	35,000

Environmental effects

[27] The effluent from the discharges at the farm during the period from 7 to 10 January 2018 flowed into the Waimapu Stream. That stream is a tributary of the Waimapu River, which discharges into Tauranga Harbour approximately 20km from the farm.

[28] The Waimapu Stream is listed in Schedule 1 of the Bay of Plenty Regional Natural Resources Plan (**RNRP**) as having regionally significant trout habitat and fishery values.

[29] The Waimapu River is listed in Schedule 1 of the RNRP as being the habitat or migratory pathway for indigenous fish species (Common Bully, Longfinned Eel, Shortfinned Eel).

[30] Prior to 2012, the Waimapu Stream had the worst *E.coli* contamination rates in the Bay of Plenty, with levels above the Ministry of Health guideline levels for safe swimming much of the time. Since then, the Regional Council has worked with landowners in the catchment to improve water quality through jointly funded

initiatives to exclude stock, restore vegetation beside waterways, manage properties at risk of erosion, and reinstate wetlands.⁴

[31] 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.

[32] 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.

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

⁴ The Tauranga Harbour sub-catchment action plan progress report 2013-16 was attached as Tab 6 to the Summary of Facts.

associated with a heightened risk to recreational users of *Campylobacter* infection. The *E.coli* level at the discharge point into the Waimapu Stream on 10 January 2018 was 130,000 cfu/100mL and was 3,900 cfu/100mL approximately 3 metres downstream from the discharge point.

[34] The maximum allowable level of faecal coliforms present before stock drinking water becomes unsafe is 100cfu/100ml (ANZECC, 2000). The faecal coliform level at the discharge point into the Waimapu Stream on 10 January 2018 was 70,000 cfu/100mL and was 4,900 cfu/100mL approximately 3 metres downstream from the discharge point.

Subsequent events

[35] On 11 January 2018 Council issued David Kehely and Jason Kehely (on behalf of Keystone Trust) with abatement notices requiring them each to cease contravening conditions 6.3 and 6.5 of the resource consent.

[36] On 15 January 2018, the Council received another complaint of effluent in the Waimapu Stream near the farm. The complainant reported that he had taken photographs of the discolouration to the stream and had been onto the farm and seen that the effluent pond was extremely full. The complainant was concerned that if it overflowed the effluent would end up in the stream. Although this is referred to in the Summary of Facts to which the defendants' have pleaded guilty, it does not form part of the offence for which they are to be sentenced. This is because the dates of the offending are limited to what occurred between 7 and 10 January 2018. The relevance of the complaint on 15 January is limited therefore to what happened next in relation to dealing with reducing the pond levels.

[37] Because of this complaint, a Council enforcement officer telephoned David Kehely to check that he was working to get pond levels down ahead of forecast rain. David Kehely confirmed that he was lowering the pond levels.

[38] The Council officer carried out a site inspection on 18 January 2018. Jason Kehely (representing the trustees of Keystone Trust), David Kehely, an irrigation

contractor (Think Water), and a contractor specialising in dairy effluent management (Hi Tech Enviro Solutions) were present during the inspection.

[39] During the inspection, the officer observed that the pond had storage available and the Waimapu Stream was flowing clear.

[40] During the inspection David Kehely advised the officer that:

- (a) There were two areas of concrete within the yard that the hoses could not get to, which were causing an issue with the build-up of effluent residue in the stormwater diverter;
- (b) More hosing had now been purchased for the cowshed yard;
- (c) The diverters are used for rain events of 50-100mm or more. When the diverter is on, a flag and chains are put in place to prevent access to the cowshed pit;
- (d) Hi Tech Enviro Solutions had been engaged to train the farm's three staff members about the appropriate procedures to follow and to show them and how the system works;
- (e) Other improvements to the farm's effluent management and diversion system were being considered.

Explanations

[41] When interviewed, a trustee of Keystone Trust said:

- (a) It was David Kehely's responsibility as contract milker to manage the farm. The trustees did not have much to do with the day to day running of the farm.
- (b) The trustees had relied on their farm consultant to ensure that David Kehely was aware of his responsibilities under the RMA and the resource consent.
- (c) After the discharge in January 2018, the trustees discussed the effluent spill with David Kehely when they met with him at the farm. Prior to this

discussion the trustees had not discussed effluent issues with David Kehely because they had not had any effluent spills.

- (d) The trust had now engaged a new farm consultant, a new contract milker, a new farm manager and a new farm worker.
- (e) It was not possible for the trustees to be at the farm 24/7.
- (f) The Trust considered it had a contract with a contract milker and it was his responsibility and he was aware he had to use the effluent system in accordance with the resource consent.
- (g) The trustees were not aware of the discharge from the diversion system but after their discussions with the Council they were going to make sure that water from the diverter did not flow directly to the Waimapu Stream.
- (h) David Kehely had not managed the farm well and had not been as “hands on” as they would have liked due to his contracting business.

[42] When interviewed David Kehely said:

- (a) The discharge into the stream from the stormwater diverter was due to a build-up of effluent in parts of the yards that they were unable to wash down properly and then when there was heavy rain, his staff had turned the diverters on.
- (b) His staff had forgotten to change the diverters over, which is why the effluent pond was so full when the Council inspected the farm on 10 January.
- (c) Since the offending additional hosing had been installed to enable more effective washdowns of the yard and prevent effluent from the yard getting into the diverter.
- (d) Consideration was being given to directing the flow from the diversion system into a pond of its own.

- (e) Because of the volume of water flowing through the diversion system it had turned the channel running from the diverter to the Waimapu Stream into a watercourse.
- (f) After the offending additional protocols had been put in place to make the diversion system more fool-proof so as to avoid further accidents.

Rainfall data

[43] Rainfall data taken from the nearest site at Glue Pot Rd (Waimapu) shows that the highest rainfall between 1 and 10 January 2018 fell on Friday, 5 January 2018 (126.053mm). On 7 January 2018 the rainfall was only 5.41mm. 14.067mm fell on 8 January 2018 and there was no rainfall on 9 and 10 January 2018.

[44] The relevance of this data is to confirm that there had been heavy rainfall before 7 January 2018 which would have justified the diverter being turned on.

Starting point

[45] The purposes and principles are set out in the Sentencing Act 2002 and the RMA.

[46] The purposes for which a court may sentence or otherwise deal with an offender relevant to this case are to hold the offender accountable for harm done to the community by the offending; to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; to denounce the conduct in which the offender was involved; and to deter the offender or other persons from committing the same or a similar offence.

[47] The principles of sentencing that are relevant in this case include the requirement that I must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalty prescribed for the offence; 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; any

information provided to the court concerning the effect of the offending on the victim; any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; any outcomes of restorative justice processes that have occurred (including, without limitation, anything referred to in section 10).

[48] As well as this there is the purpose of the RMA set out in s 5, and the principles set out in ss 6-8 which must inform the sentencing decision as well.

[49] The principles and purposes set out above have been considered in many cases involving offending against the provisions of the RMA. In relation to the need for deterrence, which has been described as the primary sentencing goal in environmental prosecutions,⁵ Mr Lang submitted there is no real need for individual deterrence in relation to Mr Kehely because he has left the dairy farming industry⁶ and because although there is uncertainty about how the discharge occurred, it is likely that there as an error made by an employee that would have been difficult to prevent.

[50] In this decision I undertake the usual analysis that commences with an assessment of the defendants' culpability for the offending, the effect of the offending on the environment and a consideration of similar cases. Following this analysis the starting point for the fine is adopted and then matters of mitigation relating to the offender deducted to reach an end result.

[51] In this case, counsel for the prosecutor submitted that a starting point for the fine should be \$70,000 and counsel for the defendants submitted it ought to be \$50,000. There was also an issue about whether the fine should be divided equally between the defendants (the prosecutor's position) or whether the fine should be imposed against the company and the defendant convicted and discharged.

⁵ *Glenholme Farms Ltd v Bay of Plenty Regional Council*, [2012] HC 2971 at [41].

⁶ Mr Lang noted that Mr Kehely still provides contracting services to the industry, but this does not include farm or effluent management.

[52] Because the latter scenario was suggested by me and counsel had not had an opportunity to reflect on it, they filed further submissions on the point.⁷ My main concern was to establish whether the company would remain an entity against which the fine could be enforced or whether there was a risk that the company was likely to be wound up in the future. This is relevant to the statutory imperative that 90 percent of the fine be paid to the prosecutor under s 342 of the RMA, a provision which, in part, covers the costs of prosecution. The idea behind this is that the offender rather than the community should fund such prosecutions.

Defendants' culpability

[53] Ms Brewer submitted that the offending was the result of a failure by the defendants to ensure that staff at the farm were properly managed. She submitted there was also a failure monitor the operator of the stormwater diverter. She submitted that the defendants' culpability is elevated by the following factors:

- Despite effluent issues first being brought to Mr Kehely's attention by a member of the public on 7 January 2018, the discharge of effluent continued until 10 January 2018. No steps had been taken to ensure that the effluent that had discharged from the diverter prior to the Council officers' arrival on 10 January was prevented from continuing to discharge to the stream, e.g. by bunding or use of a sucker truck.
- The discharges could have easily been avoided by the defendants ensuring staff were properly trained about the use of the stormwater diverter and ensuring that there was a system in place for staff to regularly check the diverter. This was important because of the high risk of effluent discharging downhill towards the stream if effluent flowed to the diverter while it was in the wrong position. The necessary systemic improvements and further training were not implemented by the defendants until after the Council investigated the offending on 10 January 2018. Both systems included installing a flag to go up when the diverter was activated, installing chains that prevented access to the cow shed pit when the

⁷ Submissions by prosecutor dated 27 March 2020 and for the defendants dated 3 April 2020.

diverter was activated, installing additional piping so staff are able to hose down the entire yard after milking, and engaging an effluent company to train the farm's three staff members in relation to the use of the diverter.

- Mr Kehely's involvement in running a separate farm and an agricultural contracting business led to his management of the farm at the time of the offending being inadequate.

[54] For these reasons, Ms Brewer submitted that the defendants' offending involved a high level of carelessness.

[55] Mr Lang submitted that in the absence of evidence about the exact cause of the discharge, the role played by Mr Kehely and his culpability in relation to the offending are more difficult to assess than in other cases. Mr Lang noted that it is suspected that there was very likely a failure by staff to correctly operate the stormwater diverter or to correctly wash down the dairy shed yard at some time, probably on 7 January 2018.

[56] In relation to the listed points above, which the prosecutor submitted elevated the defendants' culpability, Mr Lang submitted:

- Mr Ake's attitude and demeanour when he entered the farm on 7 January 2018 allowed no time for discussion about exactly what had happened, and where any discharge may be occurring. Mr Lang submitted that Mr Kehely's view at that time, which he expressed to Mr Ake, was that if there was any effluent in the stream it would have been from stock crossing a bridge that led across the stream to the dairy shed.
- The defendants contend that the staff were properly trained about the use of the stormwater diverter and had been completely reliable in operating the shed and the diverter in the past. The manager responsible each day for staff around the shed had been working for the company for four years prior to this incident, and there had been no prior problems with the operation of the system in the past to the best of Mr Kehely's knowledge.

- In relation to the diversion system, after 10 January Mr Kehely noted there could have been effluent reaching the diversion system from the main exit race following washdown, and so made physical changes to that exit to prevent this from occurring.

[57] Accordingly, Mr Lang submitted that, given the uncertainty about how the discharge occurred, and the relatively high experience and reliability of employees, the defendants' culpability for the offending cannot be described as displaying a high level of carelessness. He submitted that the likelihood in this case was that there was an error by an employee that would have been difficult to prevent.

[58] This case is difficult to pitch in terms of culpability. On the one hand there are aspects of carelessness because there was insufficient length of hosing available in the shed to direct the washdown into an area where it did not run the risk of entering the diverter, and Mr Kehely's other businesses may well have distracted him from paying as much attention to what was happening on this property as he ought to have done. There was also a failure to deal with the issue when it was drawn to his attention by Mr Ake on 7 January, with the result that the discharge continued intermittently until 10 January.

[59] On the other hand, even though it is not exactly clear who caused the discharge, I agree it was likely a staff member failing to turn off the diverter. I give less weight to Mr Lang's submission that the effluent that entered the stream could have flowed from the main exit race, rather than the diverter, as if this was the case, it was likely to have occurred previously during washdown and would therefore have been noticed before. Mr Lang submitted (and there is nothing to suggest otherwise) that staff members had been trained about the use of the diverter and because there had not been problems like this before, Mr Kehely had no reason to suspect there were further training was required.

[60] Weighing up all the above, I have reached the view that there were management (oversight of staff) and infrastructural issues (insufficient length of hosing) at play in this case which led to the offending. For the reasons outlined above, in my view Mr Kehely was not highly careless for the entire period of the offending,

but by the end of the period, it is fair to describe his culpability for the offending as such.

Effect of the offending on the environment.

[61] The contamination on 7 January meant that the complainant's family were unable to enjoy the stream. The victim impact statement from the complainant records that the water in the swimming hole "smelled strongly of cow effluent and it ruined our family gathering as we were unable to swim or have our barbecue in that environment when we arrived at 5pm".

[62] The photographs taken by the complainant and included in the Summary of Facts reveal obvious discolouration consistent with effluent so that, even if the swimming hole has recovered quickly, possibly following the rainfall event on 8 January, the level of contamination was still, in my view, a significant impact on the environment in the short term.

[63] As this waterbody has significant cultural significance to the Ake family and other members of their hapu, what they experienced on 7 January was particularly offensive. The cultural significance of the stream to the Ake whanau and their hapu must be recognised as a matter of national importance under s 6 (e) of the RMA and their kaitiaki role in relation to it is also a matter to which I must have particular regard under s 7(a) of the RMA. Although I have been able to identify these issues from the evidence I heard during the pre-trial hearing I presided over and the restorative justice report, it would have been helpful for the victim impact statement to have been more fulsome in this regard. This is particularly so because of the reference in s 5(2) to cultural wellbeing and the definition of "environment" which includes people and the cultural conditions which affect them. Although these comments are specific to the Ake whanau and their hapu, I also have no difficulty finding that all people would have found the discharge the Ake whanau observed on 7 January to be offensive.

[64] The regional significance and scheduling of both the stream and the river must be acknowledged. As must the efforts made by the Council to clean up the stream over the years from contamination of this kind.

[65] The samples taken during the Council visit on 10 January revealed levels of faecal coliforms and *E.coli* that are well beyond relevant guidelines approximately three metres downstream from the discharge point. Even though Mr Lang submitted that the readings downstream on 10 January were not particularly high, in the context of dairy effluent discharges, the fact of the matter is that any discharge over the guidelines will have an impact, even if short-lived, and the concern is that such effects are minimised because they are viewed as individual events rather than looked at through a lens of potentially cumulative adverse effects. Having said that, I acknowledge, as did Ms Brewer, that it is difficult to quantify the extent of damage from dairy effluent discharge offences because the duration of an effluent discharge and the amount of contamination resulting from that discharge are normally unknown, as is the case in this prosecution. Ms Brewer rightly identified that the effects from such discharges on water resources are cumulative and serious.

[66] Given that the mischief that s 15(1)(b) of the RMA seeks to address is prohibiting the *potential* for environmental harm from contaminants being allowed to enter water, I agree that the offending is aggravated when contaminants have *in fact* entered water as occurred in this case.⁸

[67] In my view, because the offending was over a period of time (although it is accepted it did not occur for the entire period identified in the charge) and taking into account that the effect of the discharge was to prevent the Ake family from enjoying their planned event on 7 January, I categorise the effect on the environment as serious in the short term, even if there was no long-lasting damage to the stream.

Similar cases

[68] Counsel referred me to several cases to assist me to establish an appropriate range for the starting point for the fine. I was referred to *Otago Regional Council v Greg Cowley Ltd*⁹(starting point \$55,000), *Taranaki Regional Council v Vernon*¹⁰ (starting point \$60,000), *Southland Regional Council v Baird*¹¹(starting point

⁸ *Waslander v Southland Regional Council* [2017] NZHC 2699, paragraph [26].

⁹ [2019] NZDC 13639.

¹⁰ [2018] NZDC 14037.

¹¹ [2018] NZDC 11941.

\$55,000), *Waikato Regional Council v Graze Ltd*¹²(\$70,000) for the prosecutor, and in addition for the defendant I was also referred to *Waikato Regional Council v Crouch*¹³ (starting point \$75,000), *Bay of Plenty Regional Council v TNN Holdings Ltd*¹⁴ (starting point \$45,000), *Bay of Plenty Regional Council v Kahu Ma Farms Ltd*¹⁵ (starting point \$40,000) and *Waikato Regional Council v GT & AB Ltd & Troughton*¹⁶ (starting points of \$55,000 for the company and \$40,00 for the individual).

[69] Counsel for the prosecutor submitted that this case was most like *Graze Ltd*, more serious than both *Baird* and *Cowley*, and even though had some aspects of similarity with *Vernon*, that comprised a smaller farm of 100 cows.

[70] Counsel for the defendant submitted that *Cowley* was a similar case but involved one-off offending with culpability no worse than the current case. *Graze Ltd* was more serious, as was *Vernon* because the defendants' culpability, Mr Lang submitted, was lower here. He also submitted that *Crouch* involved higher levels and more deliberate offending in the context of previous warnings and was therefore more serious. Mr Lang submitted that the most similar cases were *TNN Holdings* and *Kahu Ma Ltd*.

[71] *Graze Ltd* was a case in which there were two charges of unlawfully discharging dairy effluent. One charge related to a discharge from an effluent sump onto land resulting in significant ponding (an area about 300m²), with a depth in the main section of that ponding exceeding the foot of a gumboot. The second discharge was from a travelling irrigator, again resulting in ponding estimated at around 80m² also at depths above the foot of a gumboot. The ponding from the travelling irrigator discharged directly into a farm drain, the confluence of which is the Piako River from the point of discharge being approximately 660m. Both discharges occurred over the period of a day. Judge Dickey found that both charges arose from one primary issue which was the breakdown of the travelling irrigator and the decision to proceed with milking, the inevitable result of which was that the sump would overflow.¹⁷ Judge

¹² [2019] NZDC 15963.

¹³ [2019] NZDC 11517.

¹⁴ [2018] NZDC 16751.

¹⁵ [2017] NZDC 9592.

¹⁶ [2017] NZDC 3353.

¹⁷ At paragraph [58].

Dickey characterised the offending as falling into Level 2 of *Chick* as it was moderately serious offending.

[72] In *Greg Cowley Ltd* there was one charge of unlawfully discharging dairy effluent onto land in circumstances where it may have entered water. It was established that, although the effluent had flowed over the surface of the paddock under a cow lane and down a swale for approximately 80-90m until it disappeared, a discharge of green liquid could be seen entering the left bank of a tributary that ran through the property approximately downslope from where the liquid disappeared. This discharge followed through from the tributary to the Pomahaka River. Judge Dwyer found that the offending fell into the Level 2 *Chick*, or moderately serious band. He accepted that there was a one-off element to the offending caused by the breakdown in the travelling irrigator, which was equipped with a fail-safe device and which complied with best industry practice and was well maintained, but on the day in question the irrigator was not adequately monitored and operated while syphoning effluent for a period of about six hours. Judge Dwyer found that the offending resulted in a little or at most moderate effect on the environment before finding that the starting point of \$55,000 was justified because the offending reflected a “certain degree of carelessness”, no more than moderate proven environmental effects, and it was consistent with *Baird* even accepting that there were some differences.¹⁸

[73] In *Baird*, the sentencing of which included two corporate entities, the unlawful discharge of effluent resulted from the failure of a large irrigator gun to turn off automatically after four hours, but rather it had operated in a stationary position for 16 hours resulting in ponding and an overland flow into a waterway. A haybale had been put into the waterway to try and contain its flow, but some effluent or contaminated water was still getting past it. The watercourse was significantly discoloured, such discolouration was seen up to 2.6km downstream and was still visible a couple of days later. Forty-three thousand litres of contaminated liquid were pumped out of the watercourse. Judge Dwyer characterised the effect on the environment as moderately adverse and found that it was very careless for the irrigator to not have been checked for 16 hours, accepting that it had been placed in that position by a farm worker. Judge

¹⁸ At paragraph [17].

Dwyer characterised the offending as falling within Level 2 of *Chick* and adopted a starting point of \$55,000. He noted that an uplift in penalties on a deterrent basis might be required for other such cases.¹⁹

[74] In *Vernon* the charge to which the defendants pleaded guilty spanned a period of eight days. During an annual inspection of the effluent system, the Council officers found the travelling irrigator had been disconnected from the irrigator hose with the result that untreated effluent had been discharged from the pipe directly onto the paddock. Effluent ponded over an area of about 200m² and was flowing into a tributary of Rum Keg Creek, which was about 35m away from the end of the pipe. There was only a small volume of water in the creek at the time, and it was flowing at a slow rate. The creek was significantly discoloured and odorous for about 400m downstream. Judge Dwyer considered the offending fell within Level 2 of *Chick* and was moderately serious. He adopted a starting point of \$60,000 for each defendant, but it must be borne in mind that the maximum penalty for individuals is half that of corporate defendants.

[75] *TNN Holdings Ltd* again concerned the unlawful discharge of dairy effluent from a rain gun irrigator resulting in ponding in a paddock. From the ponded area the effluent entered a fast-flowing stream approximately 130m away. The faecal coliform readings at the discharge point into the stream were significantly higher in this case, being 17,000,000 cfu/100ml as opposed to 70,000 cfu/100ml here. The defendants' employee was responsible for the discharge, although I found that he had been inadequately trained and supervised. I found the offending was in the mid-range of moderately serious offending and adopted a starting point for a fine of \$45,000.

[76] In *Kahu Ma Ltd*, heard before Judge Kirkpatrick, the defendant faced two charges, one of unlawful discharging dairy effluent and the other of contravening an abatement notice. This was another case where a travelling irrigator was operating approximately 20m from two farm drains and a canal. Effluent had ponded around the irrigator and was flowing approximately 20m across a paddock into a farm drain close to where that drain entered the canal approximately 200m from the outfall to the

¹⁹ Paragraph [25].

sea. There had been a history of warnings about these kinds of matters. Judge Kirkpatrick characterised the offending as falling within the lower level of *Chick* because it was a one-off incident occurring because of carelessness rather than a system failure. For this reason, he adopted a starting point of \$40,000.

[77] Although no two cases are alike, there are some similarities with *Graze Ltd*, however unlike Judge Dickey I do not view this case as a one-off situation given the period over which the discharges occurred (three days as opposed to overnight). There are also some similarities with *Baird* although I assess the effect on the environment of the offending in this case as likely to have been worse and I make a similar finding in respect of the *Greg Cowley Ltd* case.

[78] I have categorised the defendant's culpability for the offending to be highly careless by the end of the offending period and the effect on the environment to be serious in the short term (over the three-day period) but would have dissipated over time. I characterise the offending as falling within Level 2 of *Chick*, but at the upper end of it being moderately serious offending.

Setting the starting point

[79] In my view a starting point of between \$60,000-\$70,000 is justified. I adopt a starting point of \$65,000.

Mitigation

[80] Neither defendant has any previous convictions. They are entitled to a five percent discount to reflect their respective previous good character. Although Mr Lang submitted that such a discount could justify a 10 percent reduction, in my view that would only be appropriate if there was evidence of good environmental stewardship over and above a lack of previous convictions. There was nothing to independently support that this was the case.

[81] More significantly, the defendant attended restorative justice and actively participated in that process. I was impressed with the outcomes achieved during the

conference, which reflect very well both on the defendants and the complainants. There was an apology that I accept was sincere and heartfelt.

[82] When the cultural significance of the river was explained to Mr Kehely he noted that:

...hearing your side of it, it brings the river to life...I just want to give my sincere apology, not just to you but to your whanau and [acknowledge] how I affected everyone at the time. And I hope they can understand my side of it and I hope they can accept my apology. I just wanted to say sorry to your whanau for the impact I've made and that what I needed to get across. I wasn't trying to be malicious, it was an accident and I'm sorry.

Ms Ake replied: "On behalf of our whanau we'll accept your apology and take that back to them."

[83] Both parties wished the outcome to involve the payment of any fine to go towards riparian planting rather than "paying Council".

[84] As well as this apology and because of the offending, as signalled above, Mr Kehely has left the farming industry and has relocated to Northland. He is involved in other employment. I agree with Mr Lang that as well as the statutory imperative that I must take into account any restorative justice outcome, it is important to recognise and therefore incentivise such positive outcomes by an appropriate deduction. In my view, a discount of between 5 and 10 percent could be available, depending on what results from the conference. In this case I consider a 10 percent discount is warranted to reflect the very sincere apology and outcomes from the conference. More of a discount would have been available had there been some environmental remediation such as the riparian planting offered. The reality, however, is that even though the outcome suggested (that the fine be used to fund riparian planting) would be a good outcome, it is not something I can direct. This is because s 342 requires 90 percent of any fine to be paid to the Council.

[85] Then there is the guilty plea. Mr Lang submitted it ought to be 20 percent whereas Ms Brewer submitted it should be 15 percent. The lesser amount was suggested because the defendant challenged the admissibility of certain evidence pre-trial and had previously entered a not guilty plea to the charge. I agree that in these

circumstances a 15 percent discount for the guilty plea is justified rather than 20 percent.

[86] The result is therefore be a fine of \$46,962.50

Should the fine be divided equally between the defendants?

[87] In this case there is no distinction between the actions of defendants. The company is Mr Kehely and his actions bind it. In many circumstances like this where a company and its sole director (and in this case shareholder) are charged, prosecutors will elect to proceed against one defendant and seek leave to withdraw charges against the other. Typically, this results in a company bearing the conviction and fine, largely because the company is the entity which attracts the higher maximum penalty and the company typically owns the assets if not the land, that comprises the farming enterprise. It is not for the Court to interfere with the prosecutor's decision against whom it wishes to proceed, this is simply noted as a relatively common practice that has developed throughout the country.

[88] Ms Brewer submitted that the purpose of deterrence would not be met if Mr Kehely was convicted and discharged, however I disagree. In this case, there is no need for individual deterrence. It is clear from the restorative justice report that Mr Kehely has decided to give up farming because of the stress of this prosecution. He is a young man and a new father. He has impressed me by his genuine expression of remorse for what happened here. As to general deterrence, in my view on the facts of this case, this can be met by the company bearing the burden of a conviction and the fine and Mr Kehely bearing the burden of a conviction.

[89] The next question is whether there is a risk of the company not paying any fine I impose and therefore indirectly the Council being out of pocket because of not being able to receive 90% of the fine. I observe that this situation could arise whether the person convicted is a corporate entity or an individual.

[90] In this case, the material provided to me after the hearing reveals that the company has more than enough equity to meet a fine. The accountant's letter provided supports this and Mr Kehely gave an assurance that the company would pay the fine,

which considering the above, I am prepared to accept. In the interim, however, the COVID-19 crisis has arisen, and I was concerned this may have impacted on the ability of the company to pay a fine of the level outlined above. Mr Lang has since confirmed however, that the company is in a position to pay a fine at this level.

[91] In my view the purposes and principles of sentencing in this case are more than adequately met by the company being convicted and fined and Mr Kehely being convicted and discharged. I consider that this is the least restrictive outcome for Mr Kehely and on the facts of this case, is the appropriate outcome.

Result

[92] The company, DJK Limited will be convicted and fined the sum of \$ 46,962.50. In accordance with s 342 of the RMA, 90% of the fine will be paid to the Council.

[93] Mr Kehely will be convicted and discharged.

Judge M Harland
District Court Judge and Environment Judge

Date of authentication: 13/05/2020

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