IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2019-070-000602
JUDGE VIA AVL
(AUCKLAND)
[2020] NZDC 17531

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

GREGORY VERCOE
G & J VERCOE CONTRACTING LIMITED
Defendants

Hearing: 28 August 2020

Appearances: A Hopkinson and M Schofield for the Prosecutor
M Beech for the Defendants

Judgment: 28 August 2020

NOTES OF JUDGE J A SMITH ON SENTENCING

Introduction

[1] Mr Vercoe you appear today both as a Director of G & J Vercoe Limited and on your own behalf as a Defendant in relation to a single charge against each of those Defendants of discharging sediment in breach of the Regional Plan and any consents applying on or about 7th and 8th August 2018.

[2] As a result of a hearing before this court over several days other charges relating to this were discharged but a single charge against each Defendant in relation to 7th and 8th August 2018 were found proven. The purposes of the hearing today is to

move to sentencing. Both counsels accept that this is a case where conviction can be entered and I do, so both the Company and yourself are convicted of the offence.

[3] The question for this Court is the appropriate sentencing outcome. Again, both counsels agree the appropriate outcome in this case is to be a fine only against both yourself and the Company.

Background

[4] I therefore move to discuss the question of sentencing. The facts are clear and extensively covered in the decision of this Court on the various charges.

[5] What is clear in respect of the offending generally is that the work you were doing in recontouring this land was at the instruction and pursuant to a consent held by Baygold Holdings Limited. That Company has been dealt with by the court previously and it is accepted by everyone in this case that they were the principal offender. The question therefore is your role in that offending and how that affects the starting point.

[6] As is clear from the factual decision you were responsible for the earthworks involved. Although you worked in co-operation with the grass sowers of the land behind you they were not under your direct control.

[7] Furthermore, it appears that your obligations and ability to perform works in accordance with the Resource Consent was controlled by Baygold Holdings Limited. I agree with Mr Beech that one of the factual matters of importance in this case is that your communication with the Council officer at the initial stage, led you to the view that he was going to allow an alternative method of water sediment treatment (at least in the meantime) to that which was displayed in the consent.

[8] In that regard I consider your exchange whereby you said:

> you had a clear preference to install the ponds as per the consent and Mr Mooney indicated that he would get back to you.

would be indicative that the council officer was minded to look at an alternative.

[9] From then on it appears your instructions through Baygold Holdings and the monitoring reports you received seemed to confirm that an alternative could be adopted.

[10] By the beginning of July 2018, it was clear (as it is in the Decision) that things were going wrong. The grass coverage was not occurring as was anticipated. You were then advised on/or around 20th or 21st July 2018 by Mr Mooney that he wanted the ponds installed. You stopped work on/or around 24th or 25 July 2018 and of course was not on site when the events of 7th and 8th August 2018 occurred. Nevertheless, this Court considers you still had some responsibility for what did occur as a result.

[11] I agree with Mr Beech that the culpability is at the lower end of the range. I do not conclude that the effects were low but I do consider that the effects of the breach in terms of the sedimentation from this single event were low to moderate. It is certainly clear that the events later in August 2018 were far more severe in their impacts but they are not the subject of the current charge.

Starting Point

[12] When I have regard to the fact that Baygold was convicted of charges including the much more serious discharge later in August 2018 the starting point needs to reflect your lower culpability. This is a lesser charge to those relating to the events later in August 2018.

[13] It appears to me from submissions of both counsel that the range is somewhere between $15,000 and $25,000. In sentencing you in mid-July 2018 on earlier charges his Honour adopted a starting point in respect of each offence for similar levels of offending of $30,000 per charge.

[14] I have concluded that I should reduce that starting point in this case because of the particular factors relating to whether the ponds would be installed which I have

discussed earlier in this Decision. This issue is discussed in far more detail in the Decision on the charges itself.

[15] However, I consider that the starting point should still be higher than $15,000 and I have adopted a figure which I think represents a fair level of culpability at $16,000 for a starting point. Both counsels agree that that is a total starting point for the two Defendants and I should then apportion that between you.

[16] There has been some discussion as to whether the majority of that fine should be visited on the Company or on you equally. Mr Hopkinson has been very clear that the Regional Council considers that your role should be noted more clearly in this case even if it means that the role of the Company seems a little lower than might otherwise appear on the previous decisions.

[17] I have concluded that he is right and I apportion the starting point of $8,000 to each Defendant. In accordance with the adjustments to the starting point in light of the Decision in *Moses v R*[1] both counsels agree this should apply and it is necessary for me to consider all of the relevant factors in mitigation to reach a conclusion as to the outcome.

[18] I accept Mr Hopkinson's submission that it is important for the purposes of sentencing that the reasoning to reach the mitigating or aggravating feature overall needs to be transparent. There should be an explanation of what discounts or uplifts are being allowed and why.

Uplifts

[19] The only uplifts sought by the Prosecution in this case is in respect of the Company and they seek an uplift of 15 percent in respect of previous charges. They point out there are four previous charges all of which have occurred within the recent past of this offending date. Two of those charges were not determined until 10 July 2018 which is a date on which I considered that the "dye was cast" as far as this offending is concerned (or "nearly cast"). Nevertheless, the previous convictions in

[1] *Moses v R* [2020] NZCA 296.

the last few years would demonstrate a higher uplift than 10 percent. I conclude that Mr Hopkinson is correct to uplift the starting point by 15 percent for the Company. There is no uplift for you personally.

Mitigating factors

[20] There has been some dispute in respect of the question of mitigation as to whether or not some allowance should be made for avoiding the costs of a full hearing especially in circumstances where most of the charges were dismissed. Mr Beech has set out clear reasoning for this argument which is strongly opposed by Mr Hopkinson.

[21] His position is that to give a discount even where a matter has gone to a full hearing would create a difficult precedent for prosecutors in the future and encouraging parties to avoid the cost of trials as a whole. In doing so Mr Hopkinson acknowledges openly that Mr Beech assisted in the efficient disposition of this case. I can confirm that Mr Beech's co-operation in dealing with matters that were not in dispute and also disposing of witnesses whose evidence was not critical to the Defence argument saved a significant amount of time before this court. I commend him for doing so and the question for this court is whether that should be reflected in a discount.

[22] Given that I have taken into account the circumstances of the offending as part of the starting point I conclude it is not necessary to do so. In the absence of the defendant having many of the factors which support a lower starting point could not have been established. I also note that other offences on which Mr Vercoe was found not guilty would have obviously proceeded to sentencing which would have made a significant difference to the starting point particularly in relation to the events of 15th and 16th August 2018. Accordingly, I have concluded that no mitigation should be allowed to the Company or Mr Vercoe for efficient disposition of the case.

[23] The further issue that Mr Beech relates is that some discount should be made for a first offence for Mr Vercoe. Mr Hopkinson opposes this on the basis that Mr Vercoe was a principal of the Company charged with the previous offences. I have taken that into account but in the end, I consider Mr Beech is correct that where a person appears for their first offence before the Court some allowance should be made

for that. I also take into account that part of the opposition to discount was that there has been no remorse by Mr Vercoe. This is not really made out on the facts of the hearing itself.

[24] It was clearly worrying Mr Vercoe, that the grass was not taking and that coverage had not been achieved. The fault that this Court found is that once he was concerned from early July he did not take any steps until 24th July 2018 to remedy the situation and stop further work. To that end I do not consider this disqualifies him from a discount. I conclude a modest discount of 5 percent is appropriate for those factors. That is only for Mr Vercoe personally.

[25] Accordingly, the end result is that with uplifts the fine for the Company is $9,200 and the fine for Mr Vercoe personally is $7,600. On each charge the Defendant is convicted.

[26] In respect of the company the fine is $9,200. Ninety percent of that is to be paid to the Regional Council. Solicitor's fees fixed at $113 with Court costs of $130. In respect of Mr Vercoe he is convicted and fined $7,600 with ninety percent to be paid to the Regional Council together with solicitor's fee of $113 and Court costs of $130.

District Court and Environment Court Judge

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Judge J A Smith
District Court Judge

Date of authentication: 15/09/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.