

**IN THE DISTRICT COURT
AT TAURANGA**

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

CRI-2020-070-003421

[2021] NZDC 946

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

ZIWI LIMITED
Defendant

Hearing: Tauranga on 25 November 2020

Appearances: A Hopkinson for Prosecutor
G Hughes for Defendant

Judgment: 22 January 2021

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

Introduction

[1] Ziwi Limited faces four charges under the Resource Management Act 1991:

- (a) that on three occasions, being on 19 and 20 April 2018 and 13 November 2018, it discharged a contaminant onto or into land in circumstances where it may enter water in contravention of s 15(1)(b) of the RMA; and
- (b) that on 13 November 2018 it contravened or permitted a contravention of an abatement notice under s 338(1)(c) of the RMA.

[2] Ziwi holds no resource consent that would authorise the discharge of contaminants under s 15(1) of the RMA and there is no national environmental standard or other regulation or rule in a regional plan or proposed regional plan that authorised these discharges.

[3] The maximum penalty in respect of all four charges for a person other than a natural person is a fine not exceeding \$600,000 under s 339(1)(b) of the RMA.

Background

[4] Ziwi operates a pet food manufacturing plant at 18 Boeing Place, Mount Maunganui. The site is 2,832 m² in area. It is situated in an industrial zone near Tauranga Airport in a single factory building housing administration offices and processing rooms.

[5] Stormwater at the site is captured in several grates that direct it to a nearby open drain that ultimately discharges into the Tauranga harbour approximately 750 metres from the site. One of the grates was located at the southern end of the factory's wash bay area on the western side of the factory building and another is located on the driveway on the eastern side of the building.

[6] In the course of its usual manufacturing process, Ziwi washes down the trays on which pet food mixture has been dried using a water blaster in the wash bay area. This area has a concrete floor draining to a wastewater cesspit. There is a bund around this area to stop washwater flowing from the back of the wash bay to the driveway. The cesspit is connected to two sets of grease traps which are cleaned out twice weekly by a liquid waste disposal company. In April 2018 there was no barrier or bund between the wash bay area and the stormwater grate at its southern end.

[7] The Ziwi site has been inspected by both regional and district council officers in early 2017 as part of an audit programme of industrial sites at Mount Maunganui. During this inspection, the auditors had found that washwater from the drying trays was flowing into the stormwater drain. An audit form recorded that the stormwater drain needed to be covered and this was counter-signed by Ziwi's site manager. On 8

February 2017 the city council required the drain to be covered during the washing down of equipment to prevent discharges from entering the stormwater network within 90 days.

[8] On 28 July 2017 two officers of the regional council inspected the Zivi site in response to a complaint about odour and found scummy foamy water pooled on the driveway in front of the wash bay. The officers spoke to the plant manager and the site manager about this and shortly afterwards Zivi installed a bund between the wash bay and the driveway.

[9] On 19 April 2018 the regional council received a complaint that the open stormwater drain near Aviation Avenue, approximately 100 metres north of the Zivi site, was running with a yellow coloured pollutant. An enforcement officer visited the site at 12:30pm that day and saw a yellow foam substance discharging into the drain from the stormwater outfall from the Zivi property. The drain was clear upstream of that outfall. Downstream the yellow foam had built up and there was also an oily sheen visible on the surface of the water as well as a pungent non-chemical odour. Samples and photographs were taken. The enforcement officer also heard water blasting occurring on the Zivi site. The officer went with a colleague to the Zivi site and spoke to the plant manager. Together they inspected the stormwater grate. They saw clean water from the washdown area discharging into the grate. Lifting up the grate, they saw waste material on the ladder and brown foam at the bottom.

[10] The following day on 20 April 2018 a city council officer contacted the regional council to report having seen a milky discharge in the open stormwater drain. At about 10:00 am regional council officers inspected the drain and observed small white flecks and fatty white deposits on top of the water at the point of the outfall from the Zivi property. Samples and photographs again were taken. Other outlets and culverts along the open drain were checked for any other signs of discharge, but none were found.

[11] At 11:15 am that day the regional council officers went to the Zivi site and asked the plant manager if they could inspect the stormwater system. They went to the wash bay area where they observed blood from defrosting meat products on a pallet

and saw washdown water flowing over the concrete and into the stormwater grate. The officers noted that there was no bund or gutter between the washdown area and the stormwater grate and that although there was a slight fall towards the wastewater cesspit, the fall from the southern end of the wash bay was towards the stormwater grate.

[12] Ziwi's plant manager advised that the wash bay set up had been this way for 3-4 years, that meat products were washed down the stormwater grate, that he was not aware of any plans to remedy the stormwater issue but that he knew it was not good so workers were aware not to spray towards the stormwater grate.

[13] The officers again inspected the grate and observed meat residue on the underside of the grate and on the ladder together with discoloured water and brown foam at the bottom. The officers noted it was greasy underfoot.

[14] On 23 April 2018 the city council sent an email to the plant manager setting out its concerns about the stormwater grate, noting the breach of the council's stormwater pollution prevention bylaw and advising that the council would now replace the stormwater grate with a sealed lid. On 24 April 2018 Ziwi's plant manager responded that Ziwi would minimise any washdown and in the medium to long-term would engage a drain layer to look at options to direct any washdown to the cesspit.

[15] On 27 April 2018 the city council replaced the cover of the stormwater grate. On the same day the regional council issued abatement notice RA18-00026 to Ziwi requiring it immediately to cease discharging contaminated washdown water onto and into land in circumstances which may result in it entering water. There was no appeal against that abatement notice.

[16] On 15 June 2018 the regional council carried out dye testing to confirm the flow of stormwater from the grates to the open stormwater drain. Further dye testing on 19 March 2020 indicated that water in the open stormwater drain adjacent to the Ziwi site flowed into the harbour 38 minutes later.

[17] On 13 November 2018 at approximately 4:30 am waste meat was being moved when a quantity spilled approximately 10 metres from the eastern stormwater grate. Ziwi's employee scraped up the solid waste and put it in a waste bin. He then used a squeegee bottle to remove some of the spilled liquid which was put in the nearby grease trap. He then hosed down the area for approximately 10 minutes, washing the residue into the stormwater catch pit.

[18] At about 1:25 pm that day the regional council received a complaint that a yellow discharge was coming out of a pipe into the creek on Aviation Avenue. At approximately 1:50 pm a regional council enforcement officer investigated the complaint and observed a yellow discharge coming from the Ziwi outfall. Samples and photographs were taken. No evidence of the discharge was found upstream from the outfall. The officer went to the Ziwi site and spoke to the plant manager, inspected the catch pit and took samples and photographs. During the course of that, the plant manager advised of the spill that morning. The officer spoke to the employee who had spilled the waste meat and cleaned up after it and who thought that such a small amount of washwater would not be a problem but advised that he did not know that he wasn't supposed to wash meat into the stormwater drain.

Environmental effects

[19] I note that wastewater from meat processing plants can be harmful to receiving waters. Fatty solids and organic material can smother aquatic organisms and solid residues can limit the transmission of light, adversely affecting plants and algae. Space used as refuges by fauna can be clogged and the availability of food resources can be altered.

[20] In this case, the prosecutor acknowledges that, given its urban setting, the open stormwater drain is likely to have had poor water quality and an elevated biochemical oxygen demand independently of the effect of these discharges. However, both testing and visual observations undertaken by the council in relation to these events indicate an increased level of degradation below the stormwater outfall from the Ziwi site. This includes elevated chemical oxygen demand and five day carbonaceous biochemical oxygen demand levels in the presence of elevated *E.coli* and suspended solids. These

indicate a heightened risk of microbial pathogens making their way to the harbour, being a concern to recreational users and shellfish gatherers. No physical impact on or death of aquatic biota in the open stormwater drain or the coastal receiving environment was observed.

Prosecutor's submissions

[21] The prosecutor submits that an appropriate starting point overall for this offending would be \$80-90,000. He emphasises the importance of the sentencing principle of deterrence, both specific in relation to this offender in general and in relation to industrial activities which may discharge washdown water to the reticulated stormwater system. He submits that the contravention of the abatement notice is a significant offence in its own right and characterises the offending overall as reckless, where Ziwi staff were aware that waste should not be washed down into the stormwater grates.

[22] The prosecutor submits that a further aggravating factor is that Ziwi was on express notice of the problem during 2017. While it installed a bund around the wash bay area, staff admitted that washdown into the grates still occurred. These factors are particularly serious because only simple steps were required to avoid such discharges.

[23] While acknowledging the limited evidence of biophysical effects beyond a portion of the stormwater drain, counsel for the prosecutor relies on the proposition that the purpose of the RMA is to control effects generally, including cumulative effects and so penalties for offending involving polluting acts are not to be determined solely on the extent of evidence of biophysical effects.¹

[24] In response to the submission on behalf of the defendant about dividing the four charges into two tranches and treating the offending on 19 and 20 April 2018 together, the prosecutor noted that the application of the totality principle should result in a similar level of fine. He submitted that the two offences in April 2018 were distinct events relating to distinct acts of discharging contaminants and should not be treated as a single offence. In answer to my questions, he advised that the prosecutor

¹ *Waslander v Southland Regional Council* [2017] NZHC 2699.

approached the drawing of charges on a case by case basis: where an offence can be clearly identified, then it will form a separate charge; if the offence is not clear, then the prosecutor will consider laying a representative charge.

[25] Aggravating factors personal to the defendant were its poor compliance history and the fact that it had a separate trade waste system, including collections of trade waste, and so could have been expected to have used that system rather than washing down into the stormwater system. Counsel for the prosecutor submitted that there was no evidence of any particular cooperation or exceptional remorse. In relation to the timing of a guilty plea, counsel for the prosecutor pointed to the passage of 15 months so that the maximum discount in terms of the guidance in *Hessell v R* should be no more than 15%. On that basis, counsel for the prosecutor submitted that a fine of approximately \$68-76,500 should be imposed.

Defendant's submissions

[26] Counsel for the defendant submitted that the offending should be divided into two tranches because the circumstances of the offending on 13 November 2018 were very different to those in April 2018. In relation to the offending on 19 and 20 April, counsel did not dispute that the prosecutor could lay separate charges but submitted that the second offence was a continuation from the day before.

[27] In relation to the causes of the offending, counsel referred to management issues arising from imperfect information being available, resulting in actions which he submitted were thoughtless or careless rather than reckless and which failed to take the risk of the washdown into account.

[28] Counsel also submitted that this behaviour had to be balanced against the actual volume of material discharged and the actual environmental impact of it. He accepted that the cumulative effects of the discharges had to be considered, but submitted that these were discharges at low levels, estimating less than one cubic metre on 19 April and even less than that on 20 April. As well as the lack of evidence of direct environmental impact, he submitted that the state of the open drain, receiving discharges from other sources, should also be taken into account.

[29] On that basis, counsel submitted that an appropriate starting point would be \$40,000. He submitted that cases such as *Blue Sky*² and *Affco*³ should be distinguished because the volume of discharges was substantially greater. He submitted that *Chemwash*⁴ should be distinguished because it involved discharges of chemicals which had a significant effect on biota.

[30] Turning to the offending on 13 November, he submitted that this was in a different category. While intentional, the volume again was at a low level and substantially less than in *Nicks Petfoods*.⁵ The bulk of the waste meat had been shovelled up and squeegeed off and only the residue was hosed down. While acknowledging that the defendant, through its staff, should have known better given compliance action by the regional council and training which the company had undertaken, he submitted that there was little else that the staff member could have done, as leaving the residue on the ground would still have been contrary to s 15(1)(b) of the RMA.

[31] In those circumstances, counsel submitted that an appropriate starting point for this offending, including the breach of the abatement notice, would be \$15,000.

[32] Counsel raised an issue as to the length of time between the laying of charges and the entering of guilty pleas. He noted that the effects of lockdown due to COVID-19 also played a part.

[33] In response to my question, he advised that the defendant intended to vacate the site and relocate its business sometime later in 2022.

[34] In reply, counsel for the prosecutor noted that the remedial work had been done on the wash bay 12-19 months after the offending had occurred. He referred to the

² *Southland Regional Council v Blue Sky Meats (NZ) Ltd* [2018] NZDC 2904.

³ *Manawatu-Wanganui Regional Council v AFFCO New Zealand Ltd* DC Palmerston North, CRI-2013-054-001920, 11 June 2014.

⁴ *Waikato Regional Council v Chemwash Hamilton Ltd* [2017] NZDC 3284.

⁵ *Canterbury Regional Council v Nicks Petfoods*, DC Christchurch CRI-2011-012-004313, 24 April 2013

guidance in *Thurston v Manawatu-Wanganui Regional Council*⁶ that there should be no credit for work that should have been done in the first place.

[35] Counsel for the prosecutor accepted that the discount for guilty pleas should take into account the timing of the separate charges and acknowledge that his reference to 15 months was too long.

Basis for sentencing under the RMA

[36] There was no issue between the parties as to the relevant statutory provisions and caselaw that I must be guided by in sentencing. The Court must follow the two-stage approach as set out in *Moses v R*,⁷ first calculating the adjusted starting point incorporating any aggravating and mitigating features of the offence, and then incorporating all aggravating and mitigating factors personal to the offender together with any discount for a guilty plea (calculated as a percentage of the adjusted starting point).

[37] All of the purposes and principles in ss 7 and 8 of the Sentencing Act 2002 must be borne in mind, as well as the purpose of the RMA to promote the sustainable management of natural and physical resources. Of particular relevance under the Sentencing Act 2002 are the purposes of accountability, promoting a sense of responsibility, denunciation and deterrence, and the principles relating to the gravity of the offending and the degree of culpability of the offender, the seriousness of the type of offence, the general desirability of consistency with appropriate sentencing levels and the effect of the offending in the community.

[38] In considering the starting point, the Court should have particular regard to the factors that are commonly identified as being particularly relevant to offending against the RMA, as set out with particular reference to the Sentencing Act 2002 in *Thurston v Manawatu-Wanganui Regional Council*.⁸ These include, relevantly, the offender's culpability, the sensitivity, vulnerability or ecological importance of the receiving

⁶ *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-25, 27 August 2010, Miller J at [67].

⁷ *Moses v R* [2020] NZCA 296 at [45] – [47].

⁸ *Thurston v Manawatu-Wanganui Regional Council* fn 5 at [40] – [41].

environment and the extent of any damage to it, the deliberateness of the offending and the attitude of the defendant to it, the principle of deterrence, both for the offender and for others, and the capacity of the defendant to pay a fine. There is no tariff case.⁹ Additionally, in the context of the RMA, a key purpose of sentencing is to impose financial costs or penalties which cause an offender to internalise the environmental cost and to foster the principle of environmentally responsible corporate citizenship and reflect general deterrence.¹⁰

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

- (a) The gravity of the offending in the particular case, including the degree of culpability of the offender;
- (b) The seriousness of the type of offence in comparison with other types of offences as indicated by the maximum penalties prescribed for the offences;
- (c) The general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances.

Evaluation

[40] The significant problem with the defendant's offending is the use of the municipal stormwater system to receive washdown water from an industrial process. It is difficult to avoid the conclusion that the defendant and its staff proceeded on an "out of sight, out of mind" approach. While there is limited evidence of direct effects on the environment caused by this offending, it is not difficult to understand the extent to which every discharge, no matter how small, may have cumulative effects across the catchment and through time.

[41] Those considerations mean that the most significant sentencing principle in this case is that of general deterrence. Every operator of a commercial or industrial activity which may involve the washdown of any part of their premises must contain

⁹ *Idem*.

¹⁰ *Yates v Taranaki Regional Council* HC New Plymouth, CRI-2010-443-8, 14 May 2010,

the contaminants mobilised by that washdown for disposal either to an authorised wastewater outfall or by some other lawful method.

[42] In considering the four charges and their relationship to one another and bearing in mind the totality principle in s 85 of the Sentencing Act, I find that this is a case of repeat offending. Notwithstanding the issuing and acceptance of an abatement notice and the reasonably straightforward steps which could have been taken after the initial offending to prevent any recurrence of discharges, no or no adequate steps were taken by the defendant.

[43] In making this assessment, I recognise, as this court has on numerous occasions, that the breach of the abatement notice is a significant offence in itself, as the process of issuing abatement notices has the purpose of avoiding repeat offending.

[44] On that basis, I consider that an overall starting point for a fine of \$80,000 is warranted.

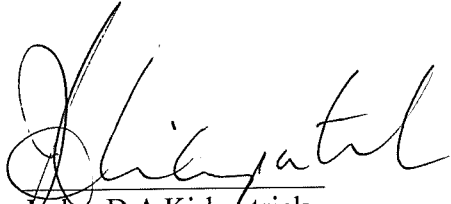
[45] The defendant is entitled to some credit for its change of pleas. The guidance of the Supreme Court in *Hessell v R*, while setting an apparent maximum of 25% is otherwise in broad terms. I do not think there is any particular calculus that would produce a specific figure in a case where separate charges have been laid at different times. In my judgement, and all the circumstances of this case, I will allow the defendant a credit of 20%.

[46] For the foregoing reasons, I convict Ziwi Limited and sentence it to pay a fine of \$64,000, apportioned as follows:

- (i) CRN18070501720 - \$16,000
- (ii) CRN18070501721 - \$16,000
- (iii) CRN19070500857 - \$16,000
- (iv) CRN19070500858 - \$16,000

[47] In respect of each charge, Ziwi Limited shall pay a solicitor's fee of \$113 and court costs of \$130.

[48] Pursuant to s 342 of the RMA those fines, less 10% payable to the Crown, shall be paid to the prosecutor.

A handwritten signature in black ink, appearing to read 'D Kirkpatrick', written over a horizontal line.

Judge D A Kirkpatrick
District Court Judge

Date of authentication: 25/01/2021

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