

**IN THE DISTRICT COURT  
AT TAURANGA**

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

**CRI-2021-063-001521  
JUDGE VIA AVL (AUCKLAND)  
[2022] NZDC 1128**

**BAY OF PLENTY REGIONAL COUNCIL**  
Prosecutor

v

**KLEADMAK FARMS LIMITED**  
Defendant

Hearing: 25 January 2022  
Appearances: A Hopkinson and S Revell for the Prosecutor  
S Ryan for the Defendant  
Judgment: 25 January 2022

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**NOTES OF JUDGE J A SMITH ON SENTENCING**

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[1] Mr Aldridge, you appear today as director of Kleadmak Farms Limited which entered a plea of guilty to four charges under the Resource Management Act 1991. Two of those charges relate to disturbing the bed of two tributaries of Ngongataha Stream. The third and fourth charges relate to contravening the regional rule by van use, namely allowing the pigs into an area which was adjacent to a stream and finally, discharging contaminant on land (being the effluent from those pigs), adjacent to the waterway and thereby resulting in its likely entering the stream. The charges are:

- (a) In CRN21063503458, contravening or permitting a contravention of s13(1)(b) of the RMA by disturbing the bed of a river, when that disturbance was not expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional

plan for the same region, or a resource consent, for which the maximum penalty is a fine not exceeding \$600,000;

- (b) In CRN21063503459, contravening or permitting a contravention of s13(1)(b) of the RMA by disturbing the bed of a river, when that disturbance was not expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region, or a resource consent, for which the maximum penalty is a fine not exceeding \$600,000;
- (c) In CRN21063503460, contravening or permitting a contravention of s9(2) of the RMA by using land in a manner that contravenes a regional rule, namely rule LM R18 of the Bay of Plenty Regional Natural Resources Plan, when that use was not expressly allowed by a resource consent and was not an activity allowed by s20A of the RMA, for which the maximum penalty is a fine not exceeding \$600,000; and
- (d) In CRN21063503463, contravening or permitting a contravention of s15(1)(b) of the RMA by discharging a contaminant (namely pig effluent), onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water when that discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region, or a resource consent, for which the maximum penalty is a fine not exceeding \$600,000.

[2] Kleadmak Farms Limited has entered a plea of guilty to these four charges. You, yourself, were also charged personally with five offences but for the likely guilty plea at sentencing today all of those charges are withdrawn with no costs in issue.

[3] Kleadmak Farms Limited is, accordingly, convicted of the charges and the question for today is the appropriate penalty. Both counsel agree, and so does the

Court, that a fine is the appropriate outcome and also consideration of an enforcement order.

### **Enforcement order**

[4] Prior to considering the sentencing outcome, the parties discussed a draft enforcement order, which was provided and has been the subject of a separate minute. An enforcement order on the terms attached are made as part of this decision.

[5] The enforcement order requires the company and its representatives to cease pig farming by the end of this month and not keep any pigs at the property. There are further orders excluding any form of grazing, including pigs from particular areas and to fence those areas. The order is intended to be supported by a covenant over the property, and those actions are intended to be complete by 31 March.

[6] What I can take from the enforcement order is that there is a clear and certain way forward in respect of this site and that the predations of the pigs on the stream area will not continue into the future. Furthermore, there will be broader riparian protection on this property into the future.

[7] I see these outcomes as a long-term benefit beyond the prosecution itself, or any fine outcome that might be applicable. I will take that into account in due course.

### **Sentencing principles and context**

[8] There is no argument between the parties as to the sentencing principles, which have been set out by the prosecutor as agreed by the defendant's counsel. The key purpose of such proceedings is to hold the offender accountable, particularly for the principle of deterrence.

[9] Clearly, ongoing damage to riparian areas (not only within the Bay of Plenty but throughout New Zealand) requires a relatively strong response to ensure that there is protection of valuable environments into the future. The difficulty in a case such as this is that there is no doubt that once the pigs had access to this area they saw the advantages of the water, both for drinking, wallowing and general riparian grazing as

being of advantage to them, and it appears they saw this as a preferred area within the site.

[10] The consequences of that have been significant. I need only mention that the sewerage fungus was found below the site and over the approximately five months of stock access, to demonstrate long-term adverse effects stock (and in particular pigs) can have on this type of environment.

[11] The Mount Ngongataha Stream is formed around 2.3 kilometres downstream but there are several sub-tributaries on the company property, two of which were affected by this offending. Those, however, are fairly small but gathered together into the Ngongataha Stream which then goes into Lake Rotorua some distance away. Lake Rotorua and Ngongataha are particularly sensitive environments and I accept that there is some particular interest in maintaining biodiversity around the stream margins in these areas. These matters are not in dispute.

### **Land Improvement Agreement**

[12] The prosecutor identified a Land Improvement Agreement registered on the title of the property. I am satisfied that whatever the intent may have been it was not reflected in the document registered, and it was not clear exactly what was covered by the Land Improvement Agreement. Certainly, no fencing had been constructed in accordance with it and the council accepts that the subsidy proposed through that expired nearly decade ago and has not been utilised.

[13] I put that Agreement to one side for current purposes, and deal with this as a breach of the regional rules and provisions of the regional plan.

### **Background**

[14] It appears that the exact mechanism for how the pigs got in there is not really a matter that I can take terribly far. Your information is that a tree fell over a fence and that allowed the pigs to get access to the area. Once they were in there, you left the gate open in the hope that would mean they would come out again. But, as

Mr Hopkinson notes, that is not entirely consistent with the statement you made to the Regional Council officers.

[15] Overall, I am satisfied that there was a lack of any long-term animal husbandry and maintenance of the area to ensure that the pigs did not enter it. There is no evidence of the use of electric fences, or any other form of restraint or removal of stock, after it was identified to you that they needed to be taken away. Those delays show a course of conduct which I would have to see, although not deliberate in the sense of putting the stock there, being indifferent to the effects they were having.

[16] Given the importance of the area, I have to see this as a moderate rather than a minor failure.

#### **Inter-relationship of the offences**

[17] The four offences are effectively all aspects of the same offending - namely, allowing stock into the riparian area. Two relate to disturbing the water in the tributaries; one to land disturbance and another to effluent discharge to land in circumstances where it entered water. I accept that this is a course of conduct, namely allowing pigs into the area and pigs utilising the area both for feeding, wallowing and defecating. That, in my view, influences how the charges are dealt with when we come to the starting point.

[18] I now move on to consider the offences individually then how they come together as a starting point.

[19] Mr Hopkinson suggested the two offences relating to disturbing the bed and stream could be fixed at somewhere between \$15,000 and \$20,000 each. After discussion he said that the better starting point for the two might be \$30,000. With respect I think the conflation of the two, because they are sub-tributaries rather than a single waterway, really adds nothing to the offence at all. It does seem to me that I will treat this as one offence of a more serious nature, because it was over two parts of the stream. I have concluded that a starting point for each offence would be \$10,000 or in totality \$20,000.

[20] The next issue is using land in the manner that contravenes the regional rule. This is a matter which I would have thought was interconnected with the disturbance of the bed of the river, and I would have thought would add another \$10,000 to that starting point to make a total of \$30,000 for the three offences.

[21] This leaves us with the discharge of contaminant in circumstances where it may enter water. Mr Ryan conceded that could be regarded as more serious than the other land disturbance offence, and I agree. I think \$15,000 is an appropriate starting point given its association with the other activities.

[22] Therefore, by looking at them individually but taking into account that they are interconnected, I come to a figure of \$45,000. I conclude that also recognises the totality of the offending which, in my view, would properly be reflected in a figure of around \$45,000 as a starting point.

[23] I appreciate there are a range of cases that go as high as \$80,000 or more and Mr Hopkinson argues for a \$65,000 to \$80,000 starting point. This is not one of those cases. The consequences of this offending, although for over a period of five months, will repair, especially with the covenants for the protection of the area. I would expect a long-term improvement in the riparian margins because of the long-term exclusion of stock and the fencing.

#### **Adjustments to starting point**

[24] Having reached a starting point the arguments between the parties were relatively narrow, and I only deal with the matters that were really in contention at this sentencing hearing. Both counsel agree at 25% for early plea and I have no issue with that. It is entirely appropriate.

[25] The next question is the discount for the Enforcement Order which has been made. Again, both parties agreed on that at 5% and I endorse that. I must say that I consider the real benefits of the covenant and the fencing will be an enduring advantage to this property and the environment beyond enforcement of the rules.

[26] Mr Hopkinson did not have the same view. But, I must say having been on the Court and seen many sites over the last 20 years, riparian fencing is one of the most significant things that can be done to improve water quality and aquatic habitat, and has long-term gains along entire waterways. I note the Regional Council used to operate a system of subsidised fencing, but I do not know if that still continues. Nevertheless, we are achieving the same outcome through this enforcement order and I commend both the Council and Kleadmak Farms for taking a responsible and progressive approach.

[27] Mr Ryan, however, accepts that costs of fencing will never be reflected in a dollar for dollar payment. That is a question that the court take into account when I am looking at the personal circumstances of Kleadmak Farms Limited, their character and their remorse.

[28] Mr Hopkinson reminds the Court that the general figure allowed for those factors, described as ordinary remorse and co-operation, would be 5%. The Court should therefore be reluctant to grant more unless it is satisfied that there has been some exceptional level of remorse and co-operation.

[29] I have concluded that there are extra levels of remorse and co-operation demonstrated by the following:

- (a) An agreement to enter into a restrictive covenant and fencing of the property in question, to secure the long-term future of this riparian margin. That is beyond what is required in the rules and in my view represents a long-term benefit.
- (b) It also demonstrates remorse by Kleadmak Farms Limited for what has occurred and its acknowledgment that there should be remedial action long-term.
- (c) The facts demonstrate immediate acceptance of Kleadmak Farms Limited of responsibility and its candid acceptance of its role. In my view, this should be encouraged as it demonstrates community

responsibility which is one of the objectives of the Sentencing Act 2002.

[30] Accordingly, I consider these factors justify a 10% discount.

### **Outcome**

[31] Adding the discounts together comes to a total of 40%. I would discount the fine of \$45,000 by 40%, yielding \$27,000 fine. I am intending to divide those as follows:

- (a) In respect of the disturbance of the riverbed, on each charge \$7,500 plus court costs of \$130 and solicitor's fee of \$130.
- (b) On the discharge of contaminants on the land in circumstances where it may enter water, that would be \$8,000.
- (c) On the breach of the land disturbance that would be \$4,000.
- (d) Each is with court costs of \$130, and solicitor's fee of \$130.
- (e) The outcome is a total fine of \$27,000, together with court costs and solicitor's fees.
- (f) The Court also notes that it has made the enforcement orders as part of these proceedings, but these will be registered by separate number also in the Environment Court to ensure they can be enforced if necessary readily through that mechanism.
- (g) Finally, 90% of that fine is to be paid to the Regional Council.

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Judge J A Smith

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe  
Date of authentication | Rā motuhēhēnga: 27/01/2022



IN THE ENVIRONMENT COURT  
I TE KŌTI TAIAO O AOTEAROA

AT TAURANGA  
KI TAURANGA MOANA

[2022] NZEnvC 003  
ENV-2022-AKL-000009

AND

IN THE DISTRICT COURT  
AT TAURANGA

I TE KŌTI-Ā-ROHE  
KI TAURANGA MOANA

[2022] NZDC 1128  
CRI-2021-063-001521

BETWEEN

BAY OF PLENTY REGIONAL COUNCIL

Applicant/Prosecutor

AND

KLEADMAK FARMS LIMITED

Respondent/Defendant

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**ENFORCEMENT ORDERS**

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**Basis of Orders**

1. These enforcement orders are made under ss 314(1)(a)(i), 314(1)(b)(i) and (ii), 314(1)(c) and 339(5)(a) of the Resource Management Act 1991.

**Scope of Orders**

2. The land to which these enforcement orders apply is the property at 637 South Road, Mamaku, Rotorua, more particularly described as Lot 1 Deposited Plan South Auckland 88580, identifier SA70A/448 (“**the property**”).



3. These enforcement orders will apply to the defendant, Kleadmak Farms Limited, and to the personal representatives of Kleadmak Farms Limited.

#### **Cessation of pig farming**

4. By no later than 31 January 2022 the defendant shall cease pig farming at the property.

5. From 1 February 2022 no pigs shall be kept at, or allowed on, the property.

#### **Stock exclusion area**

6. From the date on which these enforcement orders are made, no grazing stock is to be kept within the stock exclusion area except for the purposes of movement of stock over the culvert crossing, as marked on the **annexed plan**.

7. The defendant is to undertake works (at its expense) to:

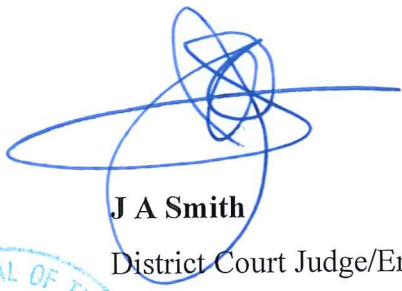
- a. Fence the area identified as 'fence to do', as marked on the annexed plan.
- b. Prevent stock from entering or having access to the stock exclusion area.
- c. Ensure fencing between the stock exclusion area and areas used by stock are maintained in stock proof condition appropriate for the stock grazed on the property.
- d. Register a covenant against the property's title to the satisfaction of the Council which secures the continued protection of the stock exclusion area to the extent provided by these orders by subsequent property owners.



8. The actions required by orders 7(a) and 7(d) are to be completed by no later than 31 March 2022 or the date of any sale or transfer of ownership of the property (whichever date is the earlier).

**Monitoring**

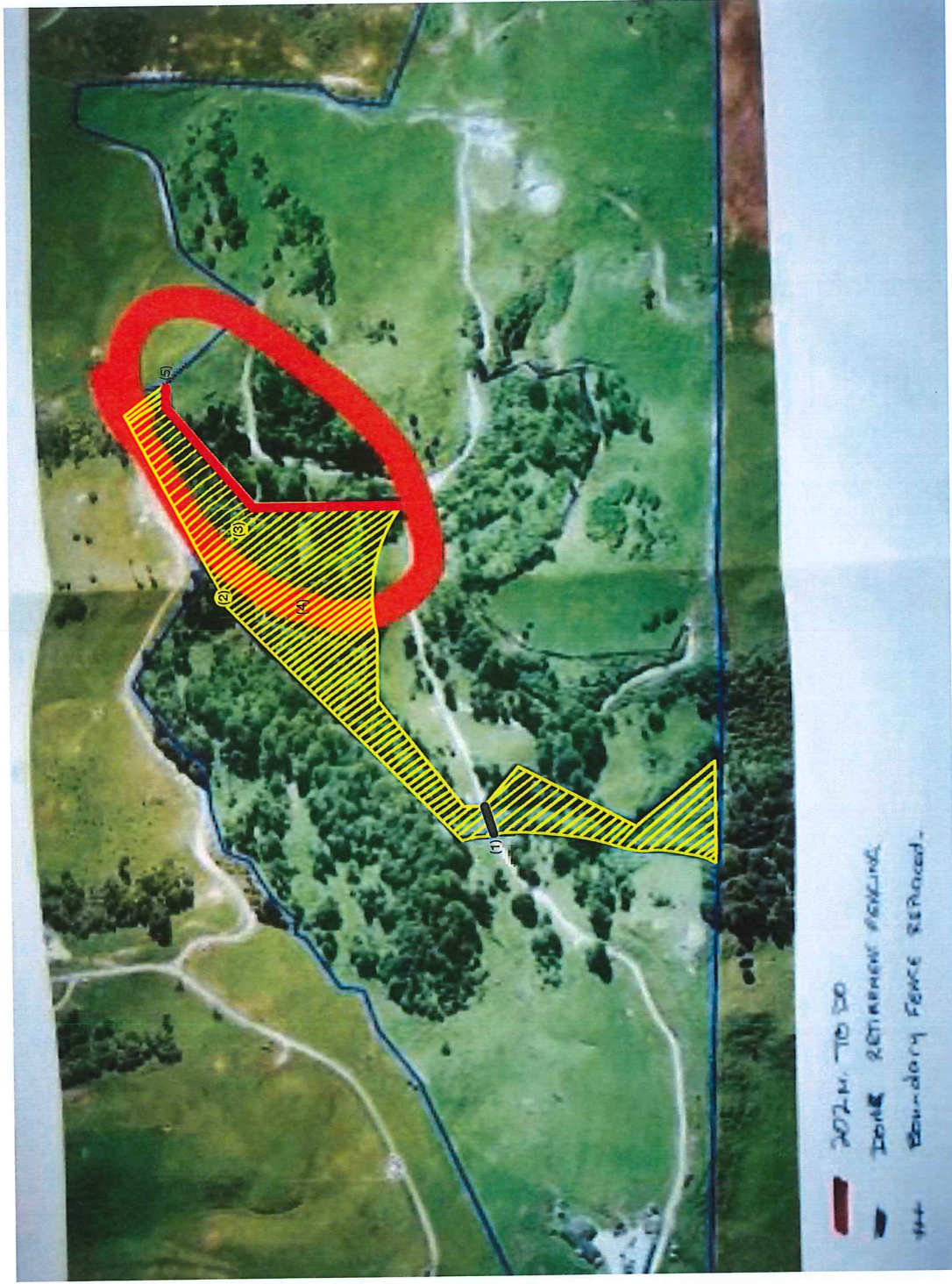
9. The defendant will allow Council enforcement officers access to the property for the purpose of monitoring the defendant's compliance with these enforcement orders.



**J A Smith**

District Court Judge/Environment Judge





**Fencing Plan-Kleadmak Farm**

- 1 - Culvert Crossing
- 2 - Solar Panels (for Pump)
- 3 - Spring (Pump)
- 4 - Stock Exclusion Areas
- 5 - Fence to do