

**IN THE DISTRICT COURT  
AT WHAKATANE**

**I TE KŌTI-Ā-ROHE  
KI WHAKATĀNE**

**CRI-2021-087-001312  
[2022] NZDC 12498**

**BAY OF PLENTY REGIONAL COUNCIL**  
Prosecutor

v

**WHAKATĀNE MILL LIMITED**  
Defendant(s)

Hearing: 23 May 2022 by AVL  
Appearances: V Brewer for the Prosecutor  
S Everleigh for the Defendant  
Judgment: 6 July 2022

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**SENTENCING NOTES OF JUDGE D A KIRKPATRICK**

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**Introduction**

- [1] Whakatāne Mill Limited pleads guilty to two charges:
- (a) In CRN 21087500596 that between 4 and 5 May 2021 it discharged a contaminant (namely plastic) into water contrary to s 15(1)(a) of the Resource Management Act 1991; and
  - (b) In CRN 21087500597 that between 31 August and 2 September 2021 it discharged a contaminant (namely plastic) into water contrary to s 15(1)(a) of the RMA;

when those discharges were 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.

[2] These contraventions of s 15(1)(a) of the RMA are offences under s 338(1)(a) of the Act for which the maximum penalty under s 339(1)(b) of the Act for a person other than a natural person is a fine not exceeding \$600,000.

[3] The defendant makes no application for a discharge without conviction under ss 106 and 107 of the Sentencing Act 2002. In terms of the sentencing principle in s 8(g) of the Sentencing Act which directs me to impose the least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences and orders set out in s 10A of that Act, I see no basis in this case on which a discharge would be warranted. It is common ground between the parties that a sentence of a fine would be appropriate.

[4] The defendant Whakatāne Mill Limited is accordingly convicted of the charges and I will proceed to consider the appropriate level of fine to be imposed.

### **Background**

[5] The Mill is a large industrial establishment engaged in recycling non-consumer card and paper clippings, such as from the manufacture of packaging materials. Its operation includes a liquid waste stream, and it holds the necessary resource consents to discharge the effluent from its plant into the Whakatāne River just upstream from the bridge carrying State Highway 2.

[6] The system including the wastewater treatment and disposal operation is only designed to process card and paper. Other materials must therefore be removed before or during processing or otherwise be prevented from being discharged into the river. Plastic is sometimes present in the recycled materials in various forms and is a known contaminant. The Mill's supply contracts require plastics to be excluded from materials supplied to the Mill and its operating systems require any material that is

supplied containing plastic to be identified so that it can be removed from the processing operation.

[7] It would appear that these arrangements are capable of preventing plastic from forming part of the effluent discharge to the river, at least to the extent that until the events in May 2021 and August/September 2021 that give rise to this prosecution, there had been no reported incidents of the discharge of plastics to the river by the Mill.

### **The first offence**

[8] In the early afternoon of 4 May 2021, a member of the public complained to the Regional Council about plastic material in the Whakatane River. The complainant provided photographs of the river between 1 and 1.5 km downstream of the Mill's wastewater outlet pipe showing shreds of plastic on the surface of the water.

[9] In response, two officers of the Regional Council went to the boat ramp at the end of Eivers Road, approximately 1.7 km downstream from the Mill's outfall, and scooped out some of the fragments. After confirming with the Council's science officers that the substance was human-made and appeared to be plastic, they worked their way up the river to determine the source. Finding nothing in the vicinity of the Whakatane Rowing Club which is upstream of the Mill, they worked their way back down the river until they saw plastic fragments a short distance downstream from the Mill's outfall.

[10] At approximately 3:30pm that afternoon the Regional Council officers met with the duty engineer at the Mill and inspected the outfall chamber and the clarifier of the wastewater system. The officers found plastic fragments in both of those locations, showed them to the duty engineer and asked about a possible source of the material. The duty engineer acknowledged that bales of wastepaper received for processing at the Mill could be contaminated with plastic.

[11] The duty engineer arranged for Mill staff to deploy booms to try and contain the plastic fragments while another employee went with the officers to inspect the

material awaiting processing. The officers found cardboard lined with a plastic layer and other plastic material and Mill staff were immediately directed to set any bales with plastic in them aside.

[12] The Council officers left the Mill at approximately 5:00pm and collected further samples both upstream and downstream of the Mill outfall. They then returned to the Eivers Road boat ramp to attempt a clean-up before nightfall. By that stage the tide was out leaving a layer of plastic fragments on the riverbank and the boat ramp.

[13] Returning to the area the following day, the Council officers found further plastic fragments in the river, attached to river structures and along the shoreline. Concerned that plastic was continuing to be discharged from the Mill, the officers went to the Mill and advised that the discharge needed to be stopped. The duty engineer advised that the outfall chamber could be shut off to contain wastewater in ponds on the Mill site. That shutdown commenced at approximately 10:30am and the wastewater system remained shut down until all plastics had been removed from the system.

[14] Investigation of the cause of the discharge of plastic showed that the Mill had been receiving material for processing which included paper-based products with plastic coatings or lined with plastics. At this time the only method in place to keep plastic out of the processing operation was by visually identifying products containing plastic and manually removing it at the start of processing. It appears that the Mill's employees had failed to identify or remove the plastic contamination that was in the bales that were processed on or about 4 May 2021. It also appears that at no stage had Mill employees checked the area around the wastewater outfall.

[15] While the wastewater treatment system was designed to ensure that effluent from the Mill met the standards required in the defendant's resource consents, the system was designed only to treat foam and fibrous material. The plastic fragments behaved differently than fibrous materials and were not captured by the clarifier. At that time, no further containment was provided beyond the clarifier in the outfall chamber.

[16] The scale and extent of the plastic contamination in the river led the Regional Council, together with the Whakatane District Council, to undertake a clean-up operation, with the Regional Council focussed on the river and the District Council focussed on the shore, both in the stretch of river between the Mill's outfall and the Eivers Road boat ramp. Clean-up works continued through 6 May 2021. The defendant did not contribute any personnel to the clean-up efforts but did pay both Council's for their costs which totalled over \$13,000.

[17] Following this event, the defendant carried out its own investigation and identified causes and preventive actions as follows:

- (a) Plastic was present in the bales of clippings – the defendant would implement visual quality checks of bales of clippings;
- (b) There was no adequate screening in the wastepaper or water treatment processes – the defendant would install screening equipment at the clarifier and the outfall and further investigate the design and operation of its wastepaper plant;
- (c) There were no effective checks of the clarifier, effluent or outfall streams – the defendant would carry out additional checks of the clarifier outlet and the outfall chamber for solid particles including taking samples and filtering samples through mesh.

[18] The defendant's final investigation report stated that by June 2021 it had:

- (a) addressed the delivery of incorrect raw material with its supplier;
- (b) added new information to its training material concerning the detection of raw material contaminated with plastic;
- (c) implemented a new form of checking and testing the treated effluent system;
- (d) installed new screening systems to screen out any plastics.

## **The second offence**

[19] Some time prior to midnight on 1 September 2021, the defendant became aware that there was plastic contamination in its wastewater treatment system. It continued its operations, relying on the new screens that had been installed at the outlet of the clarifier to filter out the plastic fragments. The new screens were arranged in duplicate so that one set could be lifted for cleaning while a second set remained in place. However, the design of the two sets of screens left a gap which allowed plastic fragments to be trapped between them and then released when the downstream screen was lifted for cleaning. It also emerged that there were times when one screen would become stuck, requiring both screens to be lifted to fix the issue. It appears that these problems occurred on the night of 1 September 2021.

[20] During the afternoon of 2 September 2021, the Regional Council received a complaint from a whitebait fisher that there were plastic fragments in the river approximately 250 m downstream of the Mill outfall. A Council officer checked the river in the vicinity of the Mill and found fragments on the steps of the Whakatane Rowing Club and approximately 100 m downstream of the outfall. The officer then went to the Mill to inspect the clarifier and the outfall chamber. Plastic fragments were visible in the system, including beyond the second set of mesh screens. The duty engineer acknowledged the presence of the plastics but thought that the screens would be catching it before it got to the river.

[21] At the clarifier outlet the Council officer found a set of screens on the ground. The duty engineer explained that these were screens that had been replaced by some with larger mesh to avoid blocking up the screen too quickly. Near the outfall chamber was a container with plastic fragments that had been cleaned from the mesh screens.

[22] Following this second event, the defendant undertook further investigations. It is presently in the process of acquiring an additional drum filter to be installed after the clarifier screening system to ensure that screening occurs all the time. It has also taken steps to change its supplier to guarantee that its supply of clippings does not include plastics or plastic coatings.

## **Environmental effects**

[23] The lower reaches of the Whakatane River and the harbour are major focal points for the community and are heavily used for recreational purposes. The entire river supports a wide range of native freshwater fish and other important species. The area affected by the discharge is approximately 80 m upstream of the boundary with the coastal marine area, and approximately 5 km upstream of the mouth of the river. The affected area is identified as an aquatic ecosystem in Schedule 1 to the Regional Natural Resources Plan being:

- (a) The habitat or migratory pathway for indigenous fish species;
- (b) The habitat or migratory pathway for indigenous avifauna;
- (c) A whitebait spawning site;
- (d) A regionally significant habitat of trout.

[24] The affected areas also identified as a freshwater bathing site in Schedule 10 to the Regional Natural Resources Plan.

[25] The area of the river approximately 500 m downstream is recognised as Indigenous Biological Diversity Area A in the Regional Coastal and Environment Plan, being an estuary of a rare ecosystem type, including the largest salt marsh in the Teteko ecological district and the habitat of a number of threatened species of birds.

[26] The area is one of major spiritual significance to Ngāti Awa for its wairua and mauri. There is a statutory acknowledgment in respect of the river and the relationship of Ngāti Awa with it. A report on cultural impacts was provided by Te Rūnanga o Ngāti Awa which stated the significance of wai and its mauri, referring to the contents of its recently launched Taiao Plan.

[27] While no plastic was observed in the downstream estuarine wetlands or dunes, it can be assumed that plastic fragments would likely have been transported downstream and dispersed through the area. It is not known what the actual duration

of each discharge was or what the total quantity of plastic discharged was. It is likely that, notwithstanding remediation efforts, only a small amount of the total quantity of plastic would have been successfully removed.

[28] The discharges were of plastic fragments directly into the Whakatane River. Plastic is known to have a wide range of effects on the environment including:

- (a) potentially being consumed by fish and birds, retained in their gut and causing damage to them;
- (b) over time, plastic may degrade and disintegrate and become consumable by a wider range of species including filter feeders such as mussels and oysters;
- (c) toxins in plastics can leach into the environment as the plastics degrade; and
- (d) the contamination of the river by plastics adversely affects its mauri.

[29] It can be expected that the plastics will persist in the environment for a long time. As the fragments break down the material poses a threat for ecosystems, marine species, food security and, ultimately, human health through the food chain.

### **Compliance history**

[30] The defendant has no previous convictions under the RMA. It was issued with an infringement notice in 2014 for the discharge of treated wastewater with a pH level in excess of the limits of its resource consent.

### **Prosecutor's submissions**

[31] Counsel for the prosecutor submitted that the offending was significant given the apparent volume of the first discharge and the reoccurrence of offending in the second discharge. Given the defendant's awareness of the risk, its failure to keep the risk in check demonstrated carelessness to a high degree.



[32] Counsel acknowledged that the defendant had followed up after the first event to improve its systems with better inspections and identifying new suppliers and its plant by installing screens and subsequently adding a further drum screen. Addressing the principle of consistency in the sentencing of offenders, counsel acknowledged that persons charged with unlawful discharges under the RMA were usually the producers of the material, such as effluent from farms or sediment from earthworks. Counsel was not aware of any case where a recycling operation, receiving material from third parties to be processed for reuse, had been charged for a discharge. However, counsel submitted that any issue about the chain of responsibility for the contaminant material was obviated by this defendant's recognition of the need to control plastics in the waste stream in order to ensure that its consented discharge remained within the bounds of its conditions.

[33] A number of sentencing decisions relating to discharges of contaminants to water were referred to. In terms of comparable circumstances, counsel submitted that the most relevant prior cases were *Bay of Plenty Regional Council v Ziwi Ltd*<sup>1</sup> and *Bay of Plenty Regional Council v Waiotahi Contractors Ltd*.<sup>2</sup>

[34] In *Ziwi* a manufacturer of pet food washed down its processing areas into a stormwater drain on three occasions and failed to comply with an abatement notice issued after the third discharge. The stormwater drain's outfall was to the Tauranga Harbour approximately 750 m away. Despite limited evidence of direct environmental effects, the Court characterised the offending as "an out of sight, out of mind approach" which would have had cumulative effects. The Court adopted a starting point of a fine of \$80,000.

[35] In *Waiotahi Contractors* the defendant operated an aggregate washing and crushing facility between the Whakatāne and Tauranga Rivers. Washwater overflowed from a settlement pond and discharged sediment laden water into the rivers. The defendant was criticised for failing to take adequate care in managing its activity. A starting point of a fine of \$55,000 was adopted.

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<sup>1</sup> *Bay of Plenty Regional Council v Ziwi Ltd* [2021] NZDC 946.

<sup>2</sup> *Bay of Plenty Regional Council v Waiotahi Contractors Ltd* [2018] NZDC 19938.

[36] Using those sentences as a guide, counsel for the prosecutor submitted that an appropriate fine would be in the region of \$49-56,000. She acknowledged that the defendant was entitled to a discount of 25% for making an early guilty plea and a further discount of 5% as it had not previously appeared before the court.

[37] Given the remedial action undertaken by the defendant to its plant and wastewater treatment system, and the clean-up operation undertaken by the Regional and District Councils and paid for by the defendant, counsel submitted that no further action was required and that there was no need for me to consider making an enforcement order.

### **Defendant's submissions**

[38] Counsel for the defendant emphasised its remorse and the steps it had taken to improve its systems following these discharges. She characterised the defendant's culpability for the offending as low in relation to the first discharge and careless to a low degree in relation to the second. She noted that the discharges resulted from uncommon system failures rather than any deliberate act or omission.

[39] Counsel submitted that the prosecutor had included for comparison cases of gross and deliberate pollution which went far beyond the circumstances in this case. She submitted that cases such as *Waikato Regional Council v B & B Singh Ltd*<sup>3</sup> and *Bay of Plenty Regional Council v Fletcher Concrete and Infrastructure Ltd*,<sup>4</sup> with starting points of \$80,000 and \$60,000 respectively, were at a level far greater than warranted by the defendant's offending.

[40] In the case of *B & B Singh Ltd* the defendant had repeatedly allowed discharges from a cracked pipe and had not acted on requests and warnings to improve its effluent disposal system. A starting point of \$80,000 was set and an uplift of 10% for prior convictions and failure to address the problem.

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<sup>3</sup> *Bay of Plenty Regional Council v B & B Singh Ltd* [2019] NZDC 15895.

<sup>4</sup> *Waikato Regional Council v Fletcher Concrete and Infrastructure Ltd* [2021] NZDC 20760.

[41] In the case of *Fletcher Concrete and Infrastructure Ltd* a consented stormwater treatment system had been removed and not replaced with any alternative. The defendant had been put on notice to rectify the situation and had not done so. A starting point of \$60,000 was set.

[42] In relation to the uplift that had been added to the sentence in the *Fletcher* case, given the defendant's financial means, counsel submitted that while a fine should not be treated as simply a licence fee, no uplift was required here given the defendant's payment of the costs of the two Councils and its previous history. She distinguished the *Singh* sentence given the unusual circumstances in that case.

[43] Counsel submitted that the sentencing decisions in *Ziwi* and *Waiotahi Contractors* should also be distinguished, or at least not treated as directly comparable, given the greater degree of deliberateness or otherwise the taking of known risks. She submitted that the Mill in this case holds an appropriate resource consent and has no prior record of discharging plastics. She submitted that the second discharge should not be characterised as repeat offending but as a problem in implementing new plant to address the first discharge.

[44] Counsel for the defendant submitted that an appropriate starting point would be closer to \$40,000, being \$20,000 for each offence. In her submission, mitigating factors included the defendant's early guilty plea, the absence of any previous appearances before the Court and its remorse. With discounts of 25% for the early plea and 10% each for the absence of previous appearances and for remorse, she submitted that the total fine should be \$24,000.

## **Evaluation**

[45] This is a case where, notwithstanding the risks associated with an industrial process and its substantial and reasonably sophisticated wastewater treatment system discharging into a river, there have been lapses in inspection and monitoring of the process and the system and these lapses have had serious consequences.

[46] I acknowledge the substantial steps that have been taken by the defendant to improve the plant at the Mill and to reinforce the warnings and guidance in its training and operations manuals. Those steps are to its credit. Even so, these discharge events and in particular the repetition of the offending relatively soon after the first offending must be kept in mind by the management of the defendant, including its duty engineers and the staff responsible for the wastewater system, as requiring ongoing vigilance.

[47] In identifying a starting point, I am mindful of the guidance in *Stumpmaster v Worksafe New Zealand*<sup>5</sup> warning against the way in which the application of several discounts can undermine the significance of identifying an appropriate starting point.

[48] In light of that, and taking into account the submissions of both counsel, I consider that an appropriate starting point is \$50,000. I accept that the defendant is entitled to a discount for its early guilty plea of 25%. In light of the starting point that I have identified, I allow a further discount of 5% generally in respect of the defendant's record and responsiveness. On that basis, I sentence Whakatane Mill Limited to pay a fine of \$35,625, apportioned equally to each charge.

[49] As required I direct that the fine, less a deduction of 10% payable to a Crown bank account, be paid to the Bay of Plenty Regional Council as the local authority which initiated this proceeding.

[50] I also make an order that the defendant pay court costs of \$130 and solicitor's costs of \$113 on each charge.

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Judge D A Kirkpatrick  
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe  
Date of authentication | Rā motuhēhēnga: 06/07/2022

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<sup>5</sup> *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020 at [64] – [67].