IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2022-070-000648
[2023] NZDC 3031

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

JOHN NETTLEINGHAM
FRANCIS JOHN NETTLEINGHAM
Defendant(s)

Hearing:	19 September 2022 via AVL
Appearances:	A Hopkinson for Prosecutor L Burkhardt for Defendants
Judgment:	21 February 2023

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

Introduction

[1] The defendants each are charged that on or about 13 October 2021 at 228 Matahui Road at Aongatete in the western part of Bay of Plenty, they discharged a contaminant, namely diary effluent, onto or into land in circumstances where it may enter into water.

[2] Such a discharge contravenes s 15(1)(b) of the Resource Management Act 1991 (**RMA**) and is an offence under s 338(1)(a) of the RMA. The maximum penalty on conviction for the offence is a fine not exceeding $300,000 or two years imprisonment.

[3] The defendants are father and son. Francis Nettleingham is the landowner and the consent holder. He is 92 years old and has owned and operated a farm on the property for more than 70 years. His son John Nettleingham is the farm manager. To avoid confusion I will refer to each by his first name.

[4] John is the person who operates the effluent system, including a stormwater diversion from the cow shed area. The diversion is manually operated: when it is closed, effluent and washed down water is directly to a storage tank for pasture irrigation; when it open, the runoff from the cow shed area will lead to the farm's gully and drain system.

[5] The farm presently operates as a small calf-rearing enterprise, milking about 30 cows to feed the calves. It has not operated with larger dairy herds since 2019. Milking is now seasonal. Apart from a handful of house cows, a small herd is not milked from April to September or so.

[6] The discharge of untreated dairy effluent to pasture by irrigation is authorised by a resource consent granted in February 2013.

The offending

[7] In August 2021 the Council sent Francis a letter advising that the Council intended to inspect his farm in the next few months and recommending that he check his effluent system and refamiliarize himself with his resource consent.

[8] On 13 October 2021, a Council compliance officer phoned Francis to advise that the inspection would occur that day. The officer arrived at the farm at approximately 1.35pm. John confirmed that 30 cows had been milked that morning and the yard had been washed down.

[9] The officer inspected the effluent storage system accompanied by John. The inspection found:

(a) A pipe system from the cow shed was set to divert the flow of washdown water into the stormwater diversion pipe leading to a gully rather than directing it into the farm's effluent storage system;

(b) Green effluent had discharged from the pipe onto land and into the gully below; and

(c) There was ponded effluent on the ground at the outlet of the stormwater diversion pipe. Effluent from the pipe was flowing along a channel in the gully.

[10] The Council officer followed the flow of effluent along the gully, observing green effluent and solids. The gully passed through a culvert into a drain that flowed into Tauranga Harbour approximately 450 metres downstream. The effluent flow was continuous. The officer measured the flow rate near the culvert to be 0.5 litres per second.

[11] The officer collected a sample from the ponding at the outlet of the stormwater diversion pipe into the gully. Analysis showed the sample to have levels of *E. coli* of 4,000,000 CFU/100ml.

[12] After taking the sample, the Council officer told Francis about the flow of effluent into the gully. Francis responded that he had a dual consent for effluent discharges. The officer advised that the ability to discharge effluent to the gully had ceased in 2014 and that effluent from the cow shed was now supposed to be discharged into the storage tank and then to pasture by the irrigator.

[13] The officer then collected further samples. He took a sample from the culvert inlet, approximately 140 metres downstream from the stormwater diversion pipe. Analysis showed the sample to have *E. coli* levels of 190,000 CFU per 100 ml. Another sample was taken from the farm drain 280 metres downstream from the culvert and 170 metres upstream from where the drain flowed into the harbour. Analysis showed this sample to have *E. coli* levels of 50,000 CFU/100 ml.

[14] The officer then cautioned John before asking further questions and obtaining the following information:

(a) Both Francis and John had milked the cows that morning;

(b) John is responsible for managing the effluent system;

(c) John has seen the farm's dairy effluent resource consent;

(d) John washed down the yard that morning but did not check the stormwater diversion and said it was "probably" his job to check that;

(e) There had been a couple days of rain recently which meant that John had to "juggle" the diversion gate;

(f) John was not sure when he had last changed the gate;

(g) John accepted that there appeared to be effluent in the gully;

(h) John said that the discharge was a result of "forgetfulness";

(i) John and Francis had not operated the irrigator since before winter; and

(j) John confirmed that he did not keep records of the irrigation.

[15] The officer then told John to dig a bund or else remove the effluent from the gully to prevent further discharges to the drain and beyond. The officer also noticed that the effluent storage tank was overgrown with grass and weeds.

[16] On 14 October 2021, the Council officer served abatement notices on both Francis and John. The notices have not been the subject of appeals and remain in force. The notices require both Francis and John to immediately cease contravening conditions of the resource consent relating to effluent discharges.

[17] The Council officer carried out a follow up inspection on 18 October 2021. The officer found that weeds had been removed from the top of the effluent storage tank and that the stormwater diversion gate was set to divert washdown water from the diary shed and yard to the effluent pond. The drain below the stormwater diversion pipe had been dug out and a bund had been installed across the gully in accordance with the directions given on 13 October 2021. The water flowing in the gully to the culvert appeared to be clear.

[18] On 22 October 2021, Council officers carried out a dye test at the farm to confirm the flow path from the stormwater diversion pipe to the gully.

[19] On 10 November 2021, an environmental scientist employed by the Council assessed the receiving environment at the farm.

[20] The Council sought to undertake formal interviews with both defendants, but they both declined.

[21] On 4 February 2022, the Council officer met with both defendants at the farm and requested copies of the irrigation records required to be kept by conditions of the resource consent. A handwritten note was ultimately provided on 1 March 2022 setting out that effluent had been irrigated and specified paddocks on seven dates in 2020, eight dates in 2021 and one date in 2022. The document did not contain any information as to the depth of effluent applied to the paddocks, the total volume of effluent applied to each paddock per annum nor to the irrigator having been calibrated, in contravention of conditions of the resource consent and of the abatement notice.

Environmental effects

[22] The Council's environmental scientist prepared an ecological assessment of the receiving environment and the environmental effects of the discharge on 13 October 2021. At the hearing before me, there was an issue raised by Ms Burkhardt on behalf of the defendants about some of the conclusions drawn by the scientist, particularly those that depended on the duration of the discharge. As there is no evidence before the Court as to the duration of the discharge, Ms Burkhardt submitted that any inference relating to the impact of the duration of the discharge was unsafe.

Acknowledging that the correctness of that is a matter of evidence, nonetheless there are certain findings that do not depend on that knowledge in which I can take into account for the purposes of sentencing.

[23] The relevant findings are:

(a) The farm's catchment drains to watercourses that flow to Tauranga Harbour through tidal flap gates.

(b) Tauranga Harbour is identified in the Regional Coastal Environment Plan as being an area of Outstanding Natural Features due to its high natural science values, transient values, and aesthetic and natural character values. The area immediately downstream of the farm, being Aongatete estuary, is classified in the plan as an indigenous biological diversity area due to the presence of threatened birds and fish, high quality estuarine vegetation and its national significance.

(c) The main gully and wetland into which the effluent from the stormwater pipe flows is dominated by water pepper, buttercup, watercress and dock.

(d) The effluent discharge affected a drain downstream of the gully and wetland. It is likely that eels use the drain and inanga/whitebait were observed there during an assessment in 2011, but no fish were observed in the drain during the Council's investigation in 2021.

(e) Dairy effluent is high in organic matter and has very high nutrient, ammonia and bacterial levels which can have the following effects on waterways and coastal areas:

(i) Increased nutrients can cause excessive weed growth and can contribute to algal blooms which can be toxic and render water unsuitable for contact recreation.

(ii) Ammonia can be directly toxic to aquatic life and can contribute to overall nutrient loading and reduced oxygen levels in the water.

(iii) Bacterial contamination can pose a heightened risk of recreational uses falling ill. Faecal coliform levels are used as an indicator for assessing the human health risk from ingesting shellfish and for livestock drinking water guidelines.

(iv) High levels of suspended solids in dairy effluent can adversely affect aquatic life by reducing light penetration, smothering organisms and blocking fish gills.

(f) Sample results and photographs taken by the Council officer on 13 October 2021 indicate a discharge which was consistent with dairy effluent.

(g) The impact on the receiving environment would be related to the duration of the discharge which is unknown.

(h) While the farm drain is of only low to moderate ecological value due to historical and current land use, the harbour has a high or very high ecological value.

(i) Based on the analysis of the samples, the effect on the receiving environment was moderate to high with the ammoniacal heightened nitrogen levels being above the identified protection values and likely to have been toxic to invertebrates such as snails and worms.

(j) The recovery period would have been dependent on the flushing of the gullies.

(k) The discharge would have acted as a potential stressor on the larger receiving environment with potential cumulative effects on the harbour including a contribution to bacterial contamination issues.

(l) The adverse effects of the discharge are expected to be short term depending on rainfall and assuming no further discharges occur.

Previous compliance record

[24] Neither defendant has previously been convicted for an offence against the RMA. John has four previous convictions for offending under the Animal Welfare Act 1999. Francis has received abatement notices and infringement notices in 2013 and 2018, and warnings were given about the effluent system in 2016.

Prosecutor's submissions

[25] Mr Hopkinson for the prosecutor submitted that the key failure in this case was not managing the stormwater diversion system properly, leading to the discharge to the gully and from there to the harbour. He submitted that the main principle of sentencing to be applied in this case was that of deterrence, both individually for the defendants and generally.

[26] Counsel characterised the culpability of both defendants as high given the degree of carelessness or forgetfulness. While acknowledging the small scale of the farm and the dairy operation, he pointed to a number of instances of poor management including the neglected state of the effluent storage tank, the absence of records as required by the resource consent, the failure to check the diversion gate and the error by Francis as to the current scope of the resource consent.

[27] While acknowledging that the prosecutor was unsure for how long any discharges may have been occurring or how much effluent may have been discharged, he referred to the decision of the High Court in *Waslander v Southland Regional Council*[1] and to the decision of this Court in *Bay of Plenty Regional Council v Withington*[2] as clear statements of the importance of preventing adverse effects on the environment from occurring at all by proper management in accordance with the requirements of applicable resource consents.

---

1 *Waslander v Southland Regional Council* [2017] NZHC 2699 at [24].
2 *Bay of Plenty Regional Council v Withington* [2018] NZDC 1800.

[28] Counsel also referred to the matters noted by the High Court in *Vernon v Taranaki Regional Council*[3] where Ellis J took notice as follows:

> [1] Since the 1990s, dairy cow numbers in New Zealand have increased by 69%. For every 10 New Zealanders there are now 13 dairy cows, and each cow has the potential to produce nine times the amount of effluent (by weight) as the average person. More particularly:
>
> (a) the average dairy cow produces 70 litres of faeces and urine per day;
>
> (b) 10% of this is generated during milking; and
>
> (c) depending on the efficiency of the wash down system, the total effluent generated in a cow shed is between 35 – 100 litres per cow per day.
>
> [2] Farm dairy effluent…contains contaminants that can have adverse effects on water quality. Although [farm dairy effluent] management is a high risk activity carrying significant consequences for human and environmental health if not handled perfectly, [farm dairy effluent] is also the most easily managed pollution source.

[29] Counsel cited other relevant decisions which stressed the importance of deterrence for the sake of avoiding ongoing offending, including:

(a) *Thurston v Manawatu-Wanganui Regional Council*[4] where Miller J said that penalties should ensure that it is unattractive to take the risk of offending on economic grounds.

(b) *Glenholme Farms Limited v Bay of Plenty Regional Council*[5] where Heath J said that the primary sentencing goal, in an environmental prosecution, must be deterrence, both of those before the Court and others who might commit like offences, and that sentences should be pitched at a level that provides a disincentive for a person to take the risk of environmental damage to avoid the need to expend money on repairs and maintenance of critical equipment.

---

3 *Vernon v Taranaki Regional Council* [2018] NZHC 3287 at [1] – [2].

4 *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North, CRI-2009-454-24, 27 August 2010 at [41(e)].

5 *Glenholme Farms Limited v Bay of Plenty Regional Council* [2012] NZHC 2971 at [41].

(c) *Southland Regional Council v Baird*[6] where Judge Dwyer said that it is well recognised that deterrence of both offenders and the wider industry is a significant factor in dairy effluent offending and will be reflected in sentencing outcomes as the need for the community, through the Court, to denounce offending which pollutes waterways and to deter such offending continues to be a major consideration in sentencing for this offending.

(d) *Burrows v Otago Regional Council*[7] where Gendall J said:

> The offence that has been committed as I see it involves a situation of particular importance in New Zealand where increasing reliance both nationally and internationally is placed on our environmental image and also the economic contribution to the country of our dairy farming industry. It is important that the dairy industry does its best to maintain a clean image and for this to happen requires compliance from all members of the industry. Deterrence from offending is therefore important and omission of proper precautionary instructions should not serve as a valid excuse for a person who is ultimately in control and takes responsibility for day to day operations of a farm.

[30] Mr Hopkinson undertook a review of cases where the courts have held that higher starting points are needed for dairy effluent offending, particularly where the offending involves discharges into waterways and is the result of basic systemic failures. The cases he cited are:

(a) *Southland Regional Council v Baird*[8] where an irrigator did not turn off automatically, resulting in significant ponding and a discharge to a waterway. An application for discharge without conviction was refused. The offending was assessed at level 2 with fines in a range of between $40 – 60,000. A starting point of $55,000 was adopted, with discounts for co-operation and guilty pleas but not for past good behaviour given previous failures. The fine was apportioned equally among the three related defendants. An enforcement order was made requiring a peak flow control structure to be installed.

---

6 *Southland Regional Council v Baird* [2018] NZDC 11941 at [41].
7 *Burrows v Otago Regional Council* [2015] NZHC 861 at [34].
8 *Southland Regional Council v Baird* fn 6 at [25].

(b) *Waikato Regional Council v Brunt*[9] where there was an inadequate effluent storage system which overflowed. Judge Dwyer noted that the range of sentences for level 2 offending in 2021 was between $50,00 to $100,000, adopted a starting point of $70,000, and allowed deductions for past good character and early guilty plea.

(c) *Huka View Diaries v Manawatu-Wanganui Regional Council*[10] where Palmer J dismissed an appeal from a sentence for a discharge and breach of an abatement notice. The District Court had set a starting point of $80,000 for the discharge and $35,000 for breach of the abatement notice with a small deduction for the entry of guilty plea on the morning that trial was to commence.

(d) *Bay of Plenty Council v DJK Limited and David Kehely*[11] where a pipe diversion system was left on, allowing effluent to flow into a drain and then into a stream. A starting point of $65,000 was adopted with discounts for good character, remorse shown by participation in a restorative justice process and guilty pleas. The fine was imposed on the company, and Mr Kehely was convicted and discharged.

(e) *Bay of Plenty Regional Council v Rere Lake Farm Limited*[12] where a stalled irrigator discharged a significant volume of effluent which ponded and then flowed to a stream. There were no formal processes for training in the use of or monitoring the irrigator and no awareness of the resource consent and the Farm's effluent policy. Culpability was assessed as moderately careless and a starting point of $55.000 was adopted, with discounts for good character and for a relatively early guilty plea. An application for discharge without conviction was refused. The farm manager was convicted and discharged.

---

9 *Waikato Regional Council v Brunt* [2021] NZDC 1714 at [11].
10 *Huka View Diaries v Manawatu-Wanganui Regional Council* [2021] NZHC 1462 at [18].
11 *Bay of Plenty Council v DJK Limited and David Kehely* [2020] NZDC 7710 at [60], [63] – [66] and [79].
12 *Bay of Plenty Regional Council v Rere Lake Farm Limited* [2020] NZDC 15295 at [50], [61](e), [64] – [65] and [80].

(f) *Southland Regional Council v Keystone Dairies Limited*[13] where an effluent sump was overflowing into the drains leading to a stream. Both the pump and the associated alarm had failed, but the extent of the flow indicated a lack of supervision. A lack of data about water quality and of evidence about actual effects meant that the assessment was in terms of likely cumulative effects. A starting point of $45,000 was adopted at the lower end of level 2, with discounts for good character and a prompt guilty plea.

(g) *Bay of Plenty Regional Council v Kaimai Dairy Farm Limited*[14] where a rain-gun irrigator malfunctioned, leading to ponding and flows into a stream causing moderately serious effects for a relatively short time. The Court found there was no plan or system in place to maintain and check on the irrigator. A starting point of $45,000 was adopted, with discounts for good character and environmental works and a relatively early plea.

(h) *Bay of Plenty Regional Council v Tirohanga Farms Limited*[15] where an irrigator remained stationary with a broken seal for some time, with effluent ponding and flowing to a stream that then flowed to the harbour. The Court said that the offending was "unfortunately in a standard fashion" and while it was a one-off event resulting from equipment failure, there had not been adequate monitoring and it took the event for the equipment to be upgraded. A starting point of $45,000 was adopted.

(i) *Otago Regional Council v Greg Cowley Limited*[16] where a travelling irrigator was not working properly leading to ponding of effluent and a flow to a river. While the breakdown was a one-off event involving a well-maintained plant, the failure to check regularly on its operation

---

13 *Southland Regional Council v Keystone Dairies Limited* [2019] NZDC 17875.
14 *Bay of Plenty Regional Council v Kaimai Dairy Farm Limited* [2020] NZDC 16743.
15 *Bay of Plenty Regional Council v Tirohanga Farms Limited* [2018] NZDC 14868.
16 *Otago Regional Council v Greg Cowley Limited* [2019] NZDC 13639.

was moderately careless. A starting point of $55,000 was adopted with discounts for good character, cooperation and an early plea.

(j) *Taranaki Regional v Vernon*,[17] upheld on appeal in *Vernon v Taranaki Regional Council*,[18] where a travelling irrigator was not connected, so effluent had ponded and some had flowed to a watercourse. As well, there was inadequate storage making the system dependant on regular irrigation given that the farm was in a high rainfall area and notwithstanding the relatively small herd size of 100 cows. The court considered that the defendants had been reckless and adopted a global starting point of $60,000, which was upheld by the High Court on appeal.

[31] Reviewing those cases, the prosecutor submitted that the defendants, as father and son farming together, should be sentenced on a global basis and that a combined global starting point for both defendants in this case would be in a range of $40,000 to $50,000.

[32] In relation to aggravating factors, counsel acknowledged that neither defendant had any previous convictions under the RMA but submitted that John's convictions under the Animal Welfare Act and Francis' history with compliance issues under the RMA, while not justifying an uplift, nonetheless stood in the way of any discount for previous good character.

[33] In relation to mitigating factors, Mr Hopkinson reminded me of the High Court's concerns in *Stumpmaster v WorkSafe New Zealand*[19] that large discounts can distort the sentencing process and undermine the integrity of the starting points adopted. In this case, counsel submitted that there was no evidence of remorse or particular cooperation over and above what ought to be expected from any defendant in dealing with the regional council. However, counsel acknowledged that guilty pleas

---

17 *Taranaki Regional v Vernon* [2018] NZDC 14037.
18 *Vernon v Taranaki Regional Council* [2018] NZHC 3287.
19 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [64] – [67].

had been intermated at a relatively early stage and so a discount of 25% for those early guilty pleas should be allowed.

[34] Taken those matters into account, counsel submitted that the end point would be in the range of $30,000 to $37,500, and that the fine should be divided equally between the two defendants.

[35] Counsel also sought the order required to be made that 90% of the fines be paid to the prosecutor as required by s 342 of the RMA.

Defendants' submissions

[36] Ms Burkhardt for the defendants took me through the history of effluent disposal consents on the farm since the RMA came into force in 1991. She submits there had been some misunderstanding about requirements in 2012 which resulted in a gap in the chain of consents in 2013. On that basis, she submits that the enforcement action in January and August 2013 should be seen in that context.

[37] She pointed out that in the almost eight years since a new effluent disposal system had been in place only relatively minor issues had been identified, with none having been identified since the calf-rearing operation replaced the dairy operation. As previously noted, Ms Burkhardt said some care needed to be taken with inferences or projections about the effects of the discharge given the lack of evidence about its duration.

[38] Counsel submits that in terms of s 24 of the Sentencing Act 2002, the Court is required to adopt the most favourable inference that it is not implausible in relation to any aggravating fact. In reliance on that, she submits that John's admissions about juggling the stormwater diversion and being unsure about when he last changed it do not prove beyond reasonable doubt that shed wash down had been directed to the gully prior to 13 October 2021. Similarly, she said that weed growth on the storage tank meant that the tank was not in regular use. In her submission, it is plausible that the discharge only occurred on 13 October 2021 so that beyond that discharge, there is uncertainty.

[39] On the issue of culpability, counsel submitted that this is not a case of intentional or reckless offending or where there is no adequate dairy effluent system. While accepting that this is a case of carelessness, she submits it was not to the high degree suggested by counsel for the prosecutor. She notes that the effluent system was set up as the consent required it to be and that the absence of additional features such as a warning system or being "unsophisticated" begs the question why the conditions of consent did not require greater sophistication. On the other hand, the small scale of the operation might suggest that the system was quite adequate. In terms of the content of the consent, counsel submits that care should be taken in relation to remarks that Francis made in conversation, given the very long period that he had been farming on the site and fact that only since 1991 had there been a requirement for consents for effluent disposal and only since 2014 had the discharge of effluent of the gully not been authorised.

[40] Ms Burkhardt's submission was that none of the matters raised by counsel for the prosecutor would suggest that this is a failing farm or is otherwise poorly managed. Instead, she submits that this was a one-off event and the scale of the milking for calf-rearing purposes suggests there was no strong commercial element involved.

[41] In relation to comparable cases, counsel submits that there are none with facts directly or closely comparable to this case. She suggested that this might indicate an absence of prosecutions in relation to animal effluent discharges from small scale or hobby farms. In relation to the seven cases addressed in some detail by counsel for the prosecutor, she noted that all of them involved much larger operations with herd sizes ranging from 200 to 600, with consequent material differences to the factors in play, and also involving discharges over much longer periods.

[42] On that basis, counsel submits that starting points in the cases identified by the prosecutor, from $45,000 to $65,000 as summarised above, put those cases in a higher band than the present case which should be treated as an unintentional one-off incident with relatively low adverse effects on the environment. In her submission, an appropriate starting point would be $25,000 to $30,000. Ms Burkhardt agreed that a global approach should be taken to the starting point which should then be divided equally.

[43] In relation to personal aggravating and mitigating factors, Ms Burkhardt points to this being first appearance before the Court for Francis and first charges under the RMA for John. In relation to his previous offending, she submits that there is context to that relating to other matters occurring when that offending occurred. She points out that John did undertake the remedial and preventative steps as directed by the Council officer and that there was cooperation and the ongoing investigations, including further sampling at a later stage.

[44] Against this background, she submits that the 10% reduction should be allowed for Francis and a 5% reduction for John. Noting that these reductions are personal to each of them, she submits that after each gets a 25% discount for guilty pleas the range would be:

(a) For Francis between $8,440 to $10,125; and

(b) For John between $8,900 and $10,690.

Evaluation

[45] There is no dispute as to the basis on which sentencing of offenders against the RMA should proceed[20] or the basis on which the Court should assess such sentences.

[46] In *Thurston v Manawatu-Wanganui Regional Council*[21] Miller J provided a comprehensive summary of the principles applicable to environmental offending. Persons who plead or are found guilty of offences under the RMA are to be sentenced in accordance with the purposes and principles of both the Sentencing Act 2002 and the RMA.[22] Particularly relevant considerations include:[23]

(a) The offender's culpability. Deliberate or reckless conduct is an important aggravating feature of the offence. Inadvertence may earn leniency if appropriate efforts have been made to comply;

---

20 *Moses v R* [2020] NZCA 296 at [5]-[7].
21 *Thurston* fn 4 at [39] – [51].
22 *Thurston* fn 4 at [40].
23 *Thurston* fn 4 at [41] – references omitted.

(b) Any infrastructural or other precautions taken to prevent discharges;

(c) The vulnerability or ecological importance of the affected environment. The extent of the environmental damage, including any lasting or irreversible harm, and whether it was of a continuing nature or occurred over an extended period of time. Where no specific lasting harm can be identified, an allowance for harm may be made on the assumption that any given offence contributes to the cumulative effect of pollution generally;

(d) Deterrence. Penalties should ensure that it is unattractive to take the risk of offending on economic grounds;

(e) The offender's capacity to pay a fine;

(f) Disregard for abatement notices or Council requirements. Abatement notices are designed to allow a Council to put a stop immediately to unlawful discharges. If they are to work as intended the Court must treat non-compliance as inherently serious; and

(g) Co-operation with enforcement authorities and guilty pleas.

[47] More generally under the Sentencing Act, the principles of accountability, denunciation and deterrence, the gravity of the offending, the degree of culpability of each defendant, the general desirability of consistency in sentencing and the effect of the offending on the community are important considerations. Under the RMA, the most relevant considerations are the statutory purpose of sustainable management of natural and physical resources and the matters to which particular regard is to be had including kaitiakitanga and the ethic of stewardship, the intrinsic values of ecosystems, maintenance and enhancement of the quality of the environment, and any finite characteristics of natural and physical resources.

[48] It is generally also relevant to consider the seriousness of this type of offending as indicated by the maximum penalties that may be imposed under s 339 of the RMA,

but some care needs to be taken as s 339 provides the same penalties for any offence under s 338 of the RMA, however minor or egregious the offending may be, including a maximum penalty for a natural person of two years imprisonment. There is no tariff case. As numerous cases demonstrate, the range and variation in the kinds of offending that occur under the RMA means that the maximum penalty, by itself, may not be as useful in determining an appropriate sentence as a careful assessment of the gravity of the particular offending, the culpability of the particular offender and, where the nature of the offending is similar to previous cases, some consideration of similar cases for the sake of consistency in sentencing.

[49] Some systemisation was attempted by this Court in *Waikato Regional Council v GA and BG Chick Limited*,[24] where three levels or bands of culpability were identified by Judge Whiting in the following terms:

> **Level 1 - least serious …**
>
> [24] This range of offending reflects unintentional one off incidents occurring as a result of a system failure. The range of penalty reflects the spectrum from the rarely used but wide discretion to discharge without conviction, to offending which encompasses some failure to adequately maintain the system, or failure to take timely restorative action. It also reflects little or no effect on the environment.
>
> **Level 2 - moderately serious …**
>
> [25] This range of offending reflects unintentional but careless discharges usually of a recurring nature over a period of time, or of incidents arising from the malfunction of different parts of the system. The offending is often manifested by a reluctance to address the need for a safe system of effluent disposal, resulting in delays in taking restorative action. It also reflects little or at the most a moderate effect on the environment.
>
> **Level 3 - more than moderately serious …**
>
> [26] This range of offending reflects the more serious offending. Offending that is deliberate, or if not deliberate, is occasioned by a real want of care. It is often associated with large plural discharges over time or one large one off event. It often exposes a disregard for the effects on the environment.

[50] As well, the Court identified a range of starting points that might appropriate in each band but as may be readily appreciated, the levels of fines identified in 2007 have become quite outdated both as a result of inflation and because the maximum

---

[24] *Waikato Regional Council v. GA and BG Chick Limited* (2007) 14 ELRNZ 291.

penalties were substantially increased when s 339(1) of the RMA was replaced by section 139(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009. So, while the decision in *Chick* should not be referred to for guidance as to the starting point for any fine imposed under s 339, the analysis of the range of offending still provides some real utility in differentiating levels of culpability based on degrees of intentionality and fault. These are the levels often referred to in sentencing decisions under the RMA, including those summarised above.

[51] Even so, while this may facilitate consistency, it may also inhibit the Court's response to developing trends in offending and evolving community norms.[25] I also refer to the decision of the Court of the Appeal in *Trent v Canterbury Regional Council*[26] and the observation that there is growing public concern about the quality of New Zealand waterways and the discharge of contaminants into them which is a relevant matter for a sentencing judge to take into account.

[52] Further, care needs to be exercised when characterising a defendant's culpability in terms of the application of the *Chick* levels or bands, particularly on the issue of whether discharges were "accidental", "careless", "reckless" or "deliberate" and the consequences of that for environmental offending. Often the offending which causes real environmental harm is not deliberate in the sense of intentional wrongdoing but is foreseeable and avoidable, occurring due to some systemic failure or as a result of poor management or otherwise is so lacking in precaution that an unauthorised discharge is a matter of "when" rather than "if".

[53] That must always be considered in the context of s 341(1) of the RMA which provides that in any prosecution for an offence of contravening ss 9 and 11 – 15 of the RMA it is not necessary to prove that the defendant intended to commit the offence. While intention need not be proved as an element of such an offence, it is well settled that even for an offence of strict liability the offending act or omission must still be within the defendant's conduct, knowledge or control.[27] Even where the defendant pleads guilty, the proper approach to sentencing requires an assessment of the degree

---

25 *Thurston* fn 4 at [50]. See also *Sowman v Marlborough District Council* [2020] NZHC 1014, [2020] NZRMA 452 at [64] – [68].

26 *Trent v Canterbury Regional Council* [2021] NZCA 123, [2021] 22 ELRNZ 617 at [46].

27 *Kilbride v Lake* [1962] NZLR 590 (NZSC).

of their culpability in the context of the gravity of their offending, that is, the extent to which they are at fault and deserving of blame.[28]

[54] In that broader context of the law of sentencing offenders, the use of the levels or bands in *Chick* is a simple method of ascribing blame for unlawful discharges of contaminants in a consistent way. While divided into three, it is clear that the levels or bands are not wholly discrete. While the overall range may be continuous. it would also be an error to merge the levels or bands because that would derogate from the scheme and limit its utility by reducing its flexibility. Similarly, the descriptions of the levels or bands in *Chick* demonstrate the range of both intention and blameworthiness that may be attributed to offending acts or omissions and it would be an error to reduce those simply to single words such as "accidental", "careless", "reckless" or "deliberate" which may fail to describe the offending adequately.

[55] A further consideration is the relative culpability between or among two or more defendants and the effect, if any, of their relationships (whether familial or contractual or otherwise) on their culpability. This is not based on the different maximum penalties in s 339 of the RMA between corporate entities and natural persons.[29] Rather, it concerns how the fine or fines should be divided or apportioned between related defendants, especially where so closely related that the fine imposed on one will effectively come out of the pocket of the other. This is not automatic, and consideration must be also be given to the differing roles played by different defendants even where they are related.[30]

[56] Ultimately, these cases require proper consideration of the role and circumstances of each offender. A fine that may be appropriate for an individual is not always to be reduced simply because another offender was also involved. On that basis, I must consider each defendant individually, even though both counsel submitted that in this case the familial relationship and the way in which the

---

28 Sentencing Act 2002, s 8(a); *R v Taueki* [2005] 3 NZLR 372 (CA) at [28]-[30] and [42]-[43].

29 *Trent* fn 26 at [33]-[35].

30 *Taranaki Regional Council v Farm Ventures Limited* [2019] NZDC 10803; *Manawatu-Wanganui Regional Council v PPG Wrightson Limited* [2019] NZDC 7331; *Waikato Regional Council v Pollock Farms (2011) Limited* [2019] NZDC 2204 and *Calford Holdings Limited v Waikato Regional Council HC Hamilton* CRI-2008-419-94, 26 May 2009, (2009) 15 ELRNZ 212, [2009] NZRMA 563.

management and operation of the farm was handled means that a global assessment is appropriate.

[57] In this case, a relatively simple system for diverting stormwater and cowshed effluent to appropriate destinations was not operated properly. There does not appear to have been any fault or problem with the elements of the system, only with the way in which the defendants used it. The circumstances observed by the inspecting Council officers suggest that the system was not regularly operated as it was meant to be. I have already noted that proof of the duration of any discharge is not available on the summary of facts, but even so, the occurrence of the discharge on one day is the basis for the entry of guilty pleas. It is also of concern that a simple system caused the defendants trouble and that they could be careless in operating it.

[58] Fortunately, the scale of the milking operation on this farm meant that the consequences were less than regularly seen in cases coming before the Court. Some allowance should be afforded to the defendants for that, but their culpability for what did occur is nonetheless similar to that of other dairy farmers who fail to properly manage the effluent systems on their farms. The notion that the scale of effects is determinative of the level of penalty is not supported by the RMA or sentencing caselaw under it. Where effects occur which have cumulative consequences for the environment, such as discharges of contaminants to waterways, then the nature of the offending must be considered in that wider context.

[59] Even where the farm is relatively small and the risk of unauthorised discharges is relatively low, it is still incumbent on farmers to put the design, operation, maintenance and inspection of their effluent management systems at the forefront of their work, for their own sake in avoiding penalties and for the sake of the environment that we all share.

[60] For those reasons, I do not accept that the offending can be considered as falling within level 1 of the *Chick* framework. I consider that an appropriate starting point is at the lower end of level 2 of the *Chick* framework as identified from the range of decisions discussed above, at $40,000 on a global basis. That fine shall be apportioned equally between the two defendants.

[61] I accept that neither defendant presents with any personal aggravating factors.

[62] In relation to personal mitigating factors, I accept that both defendants have not previously appeared before the Court on charges under the RMA. Other compliance issues and offending against other legislation which is not directly related to this offending may be put to one side. I allow each defendant a deduction of 5% for their relatively good records.

[63] I do not consider that remedial and preventive steps taken after the offending were more than a prudent person, reminded of their obligations to comply with the resource consent, should have done and so I make no deduction for that.

[64] Both counsel submit that a 25% deduction for early guilty pleas is appropriate in terms of the guidance in *Hessell v R*[31] and I make that deduction in each case.

Decision

[65] In CRN 22070500206, I sentence John Nettleingham to a fine of $14,000.

[66] In CRN 22070500207, I sentence Francis John Nettleingham to a fine of $14,000.

[67] In each case, the defendant is order to pay $130 as court costs and $113 as a solicitor's fee.

[68] Under s 342 of the Resource Management Act 1991, I order that the fines be paid to the Bay of Plenty Regional Council, less a deduction of 10% which shall be credited to a Crown Bank Account.

Judge D A Kirkpatrick
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/02/2023

[31] *Hessell v R* [2010] NZSC 135; [2010] 1 NZLR 607 (SC) at [73] – [77].