

**IN THE DISTRICT COURT
AT TAURANGA**

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

**CRI-2022-070-003148
[2023] NZDC 15466**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

LEGACY FUNERAL HOMES LIMITED
Defendant

Hearing: 24 July 2023
Appearances: A Hopkinson for the prosecutor
T Conder for the defendant
Judgment: 31 July 2023

SENTENCING NOTES OF JUDGE DA KIRKPATRICK

Introduction

[1] Legacy Funeral Homes Limited faces two charges under the Resource Management Act 1991:

- (a) in CRN 22070501024 that between 11 December 2021 and 4 April 2022 at or near 383A Pyes Pa Road, Tauranga, it contravened or permitted a contravention of s 15(1)(c) of the Act by discharging a contaminant (namely cremation smoke comprised of particulates and/or metals and/or gases and/or odour) from industrial or trade premises into air, 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;

- (b) in CRN 22070501032 that 11 December 2021 and 4 April 2022 at or near 383A Pyes Pa Road, Tauranga, it contravened or permitted a contravention of abatement notice RA21-00125 dated 10 December 2021.

[2] The first charge is an offence under ss 15(1)(c) and 338(1)(a) of the Act. The second charge is an offence under s 338(1)(c) of the Act. For both charges the maximum penalty for a company is a fine not exceeding \$600,000.

[3] The two charges, while being contraventions of separate provisions of the Act, are in respect of the same offending. For sentencing purposes, they are to be considered together.

[4] The charges are representative charges and relate to five discharge events during a four month period.

Background

[5] The defendant (**Legacy**) was incorporated in July 2007. It is owned by a charitable trust called the Legacy Trust.

[6] A funeral home was established on the site at 383A Pyes Pa Road, Tauranga in 2002 by another trust. It was transferred to the Legacy Trust by gift in 2007.

[7] The site is approximately 13km to the south of the central business district of Tauranga, near a residential area known as The Lakes. There are four rural-residential properties close by.

[8] In 2011 Legacy planned to expand operations on the site, including establishing a crematorium and mortuary. In August 2011 it applied to the Bay of Plenty Regional Council for a certificate of compliance relating to discharges to air from the proposed crematorium. Information provided with that application stated that the cremator which was proposed to be used should produce no smoke emissions or other visible discharges and the levels and rates of discharge of contaminants would

be well below permitted levels. The certificate of compliance was issued on 1 September 2011.

[9] Legacy also applied for land use consent from the Western Bay of Plenty District Council to operate a crematorium and mortuary in a rural zone. This application received submissions in opposition but was ultimately granted by the Council. An appeal to the Environment Court appears to have been settled by a consent order on 9 February 2012. The crematorium and mortuary began operations in September 2012.

[10] The agreed Summary of Facts states that discharges to air from well operated crematoria will consist primarily of the products of combustion from LPG (which is the fuel for the cremator) and caskets and their contents, including the deceased person. The physical constituents of these discharges generally include small amounts of various elements and compounds as well as particulate matter. Visible smoke from a cremator is a sign of abnormal operation, indicating unburnt hydrocarbons and an increase in particulate matter emissions. During poor operation or a malfunction, there will be an increased level of discharge of products of incomplete combustion, including a wide range of volatile organic compounds, polycyclic aromatic hydrocarbons and dioxins.

[11] During 2014, the Regional Council received complaints from neighbours about smoke and odour discharges from the crematorium. Some of these complaints were supported by images of smoke discharging from the crematorium stack. No enforcement action was taken at that time.

Control of discharges to air

[12] Prior to 1 February 2020, discharges of contaminants to air from crematoria in the region that complied with certain conditions were a permitted activity under the Regional Air Plan. On 27 February 2018, proposed Plan Change 13 to the Regional Natural Resources Plan was notified and from 1 February 2020 discharges of contaminants to air from existing crematoria established prior to 27 February 2018 became a controlled activity under Rule AIR-R11.

[13] On 1 June 2021, Legacy applied for an air discharge permit, which was processed without notification.

[14] On 11 August 2021 the Regional Council granted a resource consent (reference RN21-0305) to discharge contaminants to air from the existing crematorium. Conditions attached to that consent include:

- (a) condition 4.1 – no discharges from any activity on site shall give rise to air emissions (particulates, metals, gas (es) and/or odour), to an extent which, in the opinion of an enforcement officer, is noxious, dangerous, offensive or objectionable beyond the site boundary;
- (b) condition 4.6 – the opacity meter shall assess the percentage of light attenuated by emissions from the stack. Opacity is to be measured at all times the cremator is operated;
- (c) condition 4.7(a) – in the event that the opacity alarm is triggered, and intervention is required, the consent-holder shall keep a record of the date and time of this occurring. Within one month of the exceedance occurring the consent holder shall investigate the reasons for the exceedance and keep a written record of the opacity reading, and remedial actions taken to avoid further exceedances.

[15] On 25 November 2021 there was a discharge of smoke from the cremator stack. A neighbour saw thick smoke outside his window and smelt an odour “a little like chemicals”. He made a video recording of thick black smoke discharging from the stack and passing over his property and immediately sent a complaint by email to Legacy. Legacy forwarded this complaint to the Regional Council with its explanation that there had been an ignition problem. Legacy contacted the manufacturer of the cremator in the United States and New Zealand-based technicians. Arrangements were made for a New Zealand-based technician to inspect the cremator on 16 December 2021. The US-based manufacturer advised that, as a result of COVID-19 lockdowns, they would be unable to visit the site for at least six weeks.

[16] Based on the information in the complaint, an enforcement officer of the Regional Council concluded that the discharge on 25 November 2021 contravened condition 4.1 of the resource consent. On 10 December 2021 the Regional Council issued an abatement notice to Legacy requiring it to cease breaching condition 4.1.

The offending

[17] On 11 December 2021 there was a discharge of smoke from the cremator stack. The same neighbour was mowing his lawns when he saw the smoke and he again made a video recording of it. Smoke entered the complainant's house and it and the chemical smell caused him and his wife to feel nauseous, disgusted and distressed. He reported the discharge to both the Regional Council and to Legacy. An enforcement officer viewed the complaint, including the video recording, and concluded that this discharge also contravened condition 4.1 of the consent.

[18] On 14 December 2021 the Regional Council obtained permission from the neighbours to set up a camera on their property to enable emittance from the crematorium to be monitored.

[19] On 16 December 2021 a New Zealand-based combustion technician inspected the cremator and identified two potential issues:

- (a) the volume of the main combustion chamber might be too small and so a layer of bricks was removed from the back of the chamber to allow more air to enter it; and
- (b) the LPG regulator was not operating correctly resulting in caskets self-igniting and smouldering, and arrangements were made to source and install a new regulator.

[20] An adjustment to the sensitivity of the opacity alarm was also made so that it would be activated by smaller particles.

[21] Further complaints about discharges of smoke were made on 15 January and 9 February 2022. On 10 February 2022 there was a discharge of smoke recorded by the Regional Council's camera and an enforcement officer concluded that this

discharge was offensive and objectionable, and contravened condition 4.1 of the consent. This discharge was detected by means of the Regional Council's camera and not by a complaint.

[22] On 15 March 2022 there was a discharge of smoke recorded by another neighbour. This complaint was confirmed by reference to the Regional Council's camera on the first neighbour's property. An enforcement officer concluded that this discharge was offensive and objectionable, and contravened condition 4.1.

[23] On 17 March 2022 there was a discharge of smoke observed by another neighbour who made video recordings of the discharge. As with the first incident, the neighbour also complained that the smell was toxic and caused a headache which took a few hours to go away. Again, an enforcement officer concluded that the discharge was offensive and objectionable, and contravened condition 4.1.

[24] On 2 April 2022 Legacy provided the Regional Council with a report in relation to the events on 8, 14 and 17 March 2022. The report identified as potential issues:

- (a) on 8 March there were three mechanical issues, being the setting of the burner flame, the rate of air being introduced to the primary combustion chamber and the lack of air in the secondary chamber;
- (b) on 13 March 2022 a failure of the computer model controlling the cremator;
- (c) on 17 March 2022 problems with manual operation; and
- (d) on 18 March 2022 an air inlet had closed itself and needed to be manually reopened and locked in place.

[25] On 4 April 2022 there was a discharge of smoke. The first neighbour smelled "horrid" burning and saw grey smoke from the stack of the cremator, making him feel sick and shaky. He again recorded a video showing the smoke and reported the discharge to the Council. Photographs taken from the Regional Council's camera at his property also showed the smoke discharging. Again, an enforcement officer

concluded that the discharge was offensive and objectionable and contravened condition 4.1.

[26] On 14 April 2022 Council issued a second abatement notice (reference RA22-00038) requiring Legacy to cease all discharges of contaminants to air from the cremator. Later that day, Legacy provided a copy of a letter from an expert consultant stating that the computer module had been replaced and that the expert was confident that the cremator would now be able to operate normally without problems. On the basis of that advice, the Council cancelled the second abatement notice.

[27] On 22 April 2022 there was a further discharge of smoke from the cremator stack and complaints from the neighbours. An enforcement officer concluded that there had been a significant discharge of dark black smoke, and issued a third abatement notice (reference RA22-00048) requiring Legacy to cease all discharges of contaminants to air from the operation of the cremator from 4 May 2022 onwards.

[28] No appeal was lodged by Legacy against the third abatement notice. Legacy has not carried out any further cremations using the cremator since this abatement notice was issued.

Investigation

[29] On 22 February 2022 an enforcement officer requested formal interviews with the managers of Legacy's operations and a representative of the company. Legacy declined to participate in interviews. Legacy's lawyers provided a written explanation on 29 July 2022. This included a list of cremations carried out between 2 July 2021 and 3 June 2022 indicating that 610 cremations had been carried out and that 307 technical faults had been recorded by the cremator during the same period. As I noted during the sentencing hearing, there is nothing before me to show what these technical faults consisted of or whether they were directly causative of any discharge or other contravention of the conditions of resource consent. Nonetheless, they tend to indicate problems with the cremator and presumably require investigation and action.

Effects on the environment

[30] Three distinct kinds of effect have been identified in relation to these discharges:

- (i) effects on human health;
- (ii) effects on amenity values; and
- (iii) cultural impacts.

[31] In relation to effects on human health, as noted above the discharges from combustion processes contain a mixture of gases and fine particles. Many of these are identified as hazardous air pollutants by the Regional Plan. The presence of visible smoke and significant odours indicate that these contaminants are present in greater concentrations than for normal cremator operations, which are designed not to result in smoke or odour. The contaminants can cause a range of health problems from acute experience of burning eyes and runny noses to chronic heart and lung conditions. Inhalation of fine particulate matter, including black carbon, is associated with asthma and other respiratory problems, low birth rates, heart attacks and lung cancer.

[32] Given all of the variables associated with this activity, it is not possible to estimate specific concentrations of contaminants to which people have been exposed. Based on the frequency and duration of the discharges, any physical effects of exposure were likely to be associated with acute health effects rather than chronic effects. Nonetheless, as the first objective for air quality in the Regional Air Plan states, people's discharges of contaminants should be avoided to protect the mauri of the air and human health from their adverse effects.

[33] In relation to effects on amenity values, the complainants have described the effects in the following terms, as recorded in the summary of facts:

- *disgusting chemical smell inside my house;*
- *smoky haze present inside my house;*
- *we were left feeling nauseous, disgusted, distressed, angry and sad;*

- *we feel unable to enjoy our home, we are unable to be outside when Legacy is in operation. We feel too embarrassed to have friends or family stay and now have friends who are not willing to come and stay because of the smoke;*
- *we are really worried about losing our tenant, he is getting smoked out and may want to leave;*
- *the smell is putrid, it burns your nostrils and made me feel sick;*
- *I was annoyed because my towels were hanging on the line and the smoke was right over them;*
- *I am worried that this smoke and smell might affect my health long-term;*
- *I feel really upset by it. I felt upset for the families of whose relation that is causing the smoke;*
- *I don't like to leave my windows open when I go out, I worry about health effects from it, I find it so uncertain;*
- *it stinks. I worry about my staff working in this environment and my clients coming in.*

[34] In relation to cultural impacts counsel referred to the perspective of Te Ao Māori, where human remains are considered tapu or sacred and the release of particulate matter from a crematorium offends against principles of tikanga and the appropriate care and respect to be afforded to the deceased. Ngāi Tamarawaho have told the Regional Council that they have a fundamental objection on cultural grounds to the discharge and release of any particulate matter into the air from Legacy's crematorium.

[35] During the hearing I noted to counsel that these cultural concerns are not only held by Māori but are also shared by people throughout the world. Respect for the dead and for human remains are deep concerns. The reactions of neighbours listed above in relation to effects on amenity values also indicate those concerns. The managers of crematoria should always keep these concerns at the forefront of their operations.

Prosecutor's submissions

[36] Mr Hopkinson for the prosecutor submits that an appropriate penalty in this case would be a fine and that an appropriate starting point would be \$100,000-\$120,000. Counsel submits that Legacy's culpability in this case is at the high end of the scale on the basis of:

- (a) its awareness of problems with the cremator;
- (b) its continued operation notwithstanding those issues;
- (c) its failure to cease operating the cremator until it had fully investigated, addressed and tested its operation; and
- (d) its contraventions of its resource consent.

[37] Counsel was unable to identify any comparable cases involving a cremator. Counsel cited four sentencing decisions involving unlawful discharges from commercial operations:

- *Bay of Plenty Regional Council v Ballance Agri-nutrients Ltd*,¹ involving a single discharge of sulphur dioxide as a result of a systemic error in the manufacturing process, with moderate potential for harm. A starting point of \$80,000 was adopted;
- *Bay of Plenty Regional Council v Ballance Agri-nutrients Ltd*,² involving a discharge of gaseous fluorides and sulphur compounds from roof vents resulting from a failure to check the processing speed in the fertiliser plant. A starting point of \$100,000 was adopted;
- *Bay of Plenty Regional Council v Ziwi Ltd*,³ involving one representative charge in respect of five separate odour discharges following numerous complaints, together with abatement notices and infringement notices. A starting point of \$80,000 was adopted. The defendant subsequently decided

¹ *Bay of Plenty Regional Council v Ballance Agri-nutrients Ltd* [2015] NZDC 4641.

² *Bay of Plenty Regional Council v Ballance Agri-nutrients Ltd* [2018] NZDC 13868.

³ *Bay of Plenty Regional Council v Ziwi Ltd* [2020] NZDC 24102.

to relocate its operation;

- *Waikato Regional Council v Open Country Dairy Limited*,⁴ involving three charges relating to discharges of odour between 1 March and 24 September 2018 resulting from processing of milk into various products.

Notwithstanding attempts to fix the problem, including substantial expenditure in upgrading the plant, the discharges recurred. A restorative justice process was undertaken. A starting point of \$250,000 was adopted and an order was made to pay reparation of \$2,000 to each of 17 identified victims.

[38] As counsel submitted, there are material differences in each case. Counsel submitted that a high starting point is warranted in this case given the high level of culpability which he submits the defendant has, the significant impact of the offending on people living and working nearby and the repeated offending on five separate dates over a four-month period. He submitted that such a starting point would provide for the principle of general deterrence and incentivise those involved in commercial combustion activities to take proactive steps to avoid discharges of contaminants to air.

[39] Counsel noted that if the two charges were to be dealt with separately, then the discharge should have a starting point of \$80,000 and the contravention of the abatement notice should have a \$40,000 starting point.

[40] In terms of personal factors relevant to sentencing, counsel for the prosecutor did not point to any relevant previous convictions that would warrant an uplift from the starting point. In relation to mitigating factors, counsel submitted that I should bear in mind the caution expressed by the High Court in *Stumpmaster v WorkSafe New Zealand*⁵ about how cumulative discounts can distort the sentencing process.

[41] Against that background, counsel acknowledged that in the absence of any previous convictions, the Court may well allow a discount for previous good character

⁴ *Waikato Regional Council v Open Country Dairy Ltd* [2019] NZDC 19755.

⁵ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [64] to [67].

of five per cent. Counsel submitted that there should be no discount for remorse, given the refusal to participate in a restorative justice process and the absence of any offers of amends or direct apologies to the victims. Counsel also submitted there should be no discount allowed for any expenditure on mitigation of odour issues, but submitted that in any event there is no evidence that the issues with this cremator have been addressed.

[42] Counsel acknowledged that Legacy entered guilty pleas at an early stage and would be entitled to a discount of up to 25 per cent for its early pleas.⁶

[43] Counsel also submitted that the Court should consider making an order for reparations for emotional harm to each of the three victims who have prepared victim impact statements under ss 12 and 32 of the Sentencing Act 2002. Counsel referred to this occurring in the *Open Country Dairy* case.

[44] I asked counsel for the prosecutor about whether any further action may need to be taken, and in particular whether or not I should consider making an enforcement order under s 339(5) of the RMA. Counsel said that the Regional Council's position was that its abatement notice provides a sufficient measure of control. At this stage, the cremator is not operating. I understand that there is a review of the conditions of consent for the crematorium being carried out under s 127 of the RMA. That process will enable a reconsideration of the effectiveness of the conditions of consent. It is not within the scope of that process to consider whether or not the resource consent ought to be cancelled. However, there is scope for that to be considered on an application for an enforcement order under s 314(1)(e) of the RMA. I will accordingly not consider that issue any further as part of the sentencing for these offences.

Defendant's submissions

[45] Mr Conder for the defendant acknowledged the sacredness of human remains both to clients of the defendant and to the defendant's neighbours. He reviewed the difficulties which the defendant had had in the operation of its cremator. He noted that

⁶ *Hessell v R* [2010] NZSC 135.

the restrictions imposed during the pandemic had compounded those difficulties. He acknowledged that, as matters presently stand, the cremator cannot be operated.

[46] In terms of the commerciality of the defendant's operation, he pointed out that it is owned by a charitable trust. While that ownership does not alter the need for the activity to internalise its adverse effects, he submitted that the continued operation during the four months when the discharges leading to these charges occurred was not motivated by pursuit of profit.

[47] In relation to the relative culpability of the defendant, by comparison to other cases, counsel submitted that the circumstances in *Ziwi* were the most comparable of the four cases cited by counsel for the prosecutor. On that basis, he submitted that an appropriate starting point was in the range of \$80,000 to \$100,000 rather than \$100,000 to \$120,000 as submitted by counsel for the prosecutor.

[48] Counsel pointed to the ongoing efforts which the defendant made to get technical assistance in the operation of what are apparently very complex machines. He also referred to the lack of control which the defendant had over things that might be placed in caskets with a deceased person and which could affect the cremation process.

[49] He acknowledged that a notice to review the conditions of resource consent had been issued and that that process of review was under way. He told me that he had no firm instructions on the future of the cremator.

[50] Counsel submitted that the breach of consent conditions should not be treated as an aggravating factor, as there was one underlying act in relation to each discharge and there should be no double counting for the purposes of assessing culpability. He submitted that any issues relating to the technical error messages or the servicing of the machine should be treated with care given the uncertainties as to what had caused the discharges.

[51] In relation to reparations, counsel acknowledged the emotional impact as expressed by the victims. He submitted that some care should be exercised as to the degree of harm that had occurred in the five incidents.

Evaluation

[52] In quantitative terms there is relatively little in issue between the prosecutor and the defendant, as may be indicated by the relative closeness of their submissions on starting points. Comparisons with the four cases referred to in submissions are not overly helpful. The two cases involving *Ballance* were essentially one-off failures of the operating system in the factory. The *Open Country Dairy* case related to problems over an extended period of time. The *Ziwi* case did not have significant effects on residential properties, although there were numerous complaints from commercial and industrial neighbours.

[53] The feature of this case is that the relevant planning controls at both district and regional level provided for a combustion activity in a rural residential area on the southern edge of Tauranga. From the information before me, it is an area that is increasingly being developed for residential purposes. It would not be appropriate for me to undertake an inquiry into these planning issues, but this case does appear to be an example of why the location of land use activities involving combustion processes in proximity to residential properties should be treated with care, both at the planning stage and at any consenting stage.

[54] In this case, a particular qualitative issue is that the activity of a crematorium presents an elevated risk. As well as the health and amenity effects that may be caused by discharges to air, the significant cultural considerations magnify the importance, for both applicants for consent and consenting authorities, of ensuring that the quality of the equipment and of the management of it will be at a very high standard.

[55] The issue is not so much that the cremator malfunctioned in this case, or that Legacy had difficulties in getting assistance from the manufacturer or others due to pandemic restrictions between November 2021 and April 2022, but that its response was not as immediate or as empathetic as it should have been given the nature of the discharge. It knew that its activity was of concern to its neighbours for cultural reasons.

I emphasise that this relates to all cultures of people living at Pyes Pa. The consequence of this is that any problem occurring with its discharges required both immediate attention and an effective alternative. The requirement for attention included both technical responses and reasonable care for neighbours. The requirement for alternatives, which may include stopping the process until a solution can be identified, applies even where there is some risk, as there is said to have been here, that stopping operations would cause adverse consequences during the pandemic.

[56] Bluntly, Legacy let its neighbours down. Having acquired a rest home in a rural-residential area, it made the decision to establish a crematorium and mortuary on the same site. That choice carried with it an increased responsibility for ensuring that it could control the effects of those new activities.

[57] For those reasons Legacy's culpability for this offending is reasonably high. In all the circumstances, I adopt an overall starting point for both charges of \$100,000. This is in part reflective of the submissions made by counsel, but also to ensure that the reparations that I will order do not result in any disproportionate effect for the overall sentence. I accept that a discount of five per cent is appropriate for a first offender. I also accept that a discount of 25 per cent for its early guilty plea is appropriate.

[58] In relation to reparations, I note that there was no reference of these charges to a restorative justice process and that there has been no offer of amends or apology by Legacy to its neighbours. There as also no specific request before me. The three victim impact statements do not set out any itemised financial costs, but their descriptions of effects make it clear that as well as elevated levels of emotional harm, there have been costs associated with getting counselling, cleaning properties and furnishings, losing a tenant, seeking legal advice and creating issues for staff and customers.

[59] On a fundamental level, as one of the victims stated in court, no transfer of money can fully address the effects which they have endured. Even so, as the name indicates, payments can go some way towards repairing the costs which the offending has caused. In all the circumstances, I consider that a sum of \$5,000 for each of the persons who provided a victim impact statements in this proceeding is appropriate.

[60] As discussed above, I have considered whether or not any further order should be made under s 339(5) of the RMA but have decided, on the basis of the submissions of the prosecutor, that the level of control able to be exercised correctly by the Council is, for present purposes, sufficient.

Sentence

[61] On that basis, and for the foregoing reasons, I convict Legacy Funeral Homes Limited on both charges and sentence it to pay a fine of \$70,000.

[62] I also order Legacy Funeral Homes Limited to pay the sum of \$15,000 as reparation for emotional harm under s 32(1)(b) of the Sentencing Act 2002 by a payment of \$5,000 to each of the following victims:

- (a) Kelsey Dew
- (b) Matthew Bear
- (c) Glenn Wilson

[63] I also order Legacy Funeral Homes Limited to pay court costs of \$130 and solicitors fee of \$113 on each of the two charges.

[64] Under s 342 of the RMA, I direct that the fine, less 10 per cent to be credited to a Crown bank account, is to be paid to the Bay of Plenty Regional Council.

Judge DAK Kirkpatrick
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 31/07/2023