

**IN THE DISTRICT COURT
AT TAURANGA**

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

**CRI-2022-047-170/171
[2023] NZDC 17655**

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

**BROOKLYN DAIRY FARM LIMITED
RIVERLOCK LAND AND PROPERTY LIMITED**
Defendant(s)

Hearing: 7 November 2022 via AVL

Appearances: A Hopkinson for Prosecutor
E Harrison for Defendants

Judgment: 23 August 2023

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

Introduction

[1] Both defendants are charged under ss 15(1)(b) and 338(1)(a) of the Resource Management Act 1991 (**RMA**) with discharging a contaminant, namely dairy effluent, onto or into land in circumstances where it may enter water. Under s 339 of the RMA, the maximum penalty for this offence for a person other than a natural person is a fine not exceeding \$600,000.

[2] The offending occurred on or about 2 November 2021 on a farm at 126 McGinley Road, Otara, Opotiki. The defendant Riverlock Land and Property Limited (**Riverlock**) is the owner of the farm. The defendant Brooklyn Dairy Farm

Limited (**Brooklyn**) is the lessee and operator of the farm, which is known as Brooklyn Farm. The two defendants are related companies, with the same directors and shareholders. Brooklyn Farm is one of three dairy farms in the Opotiki area owned by Riverlock. Brooklyn Farm occupies 280 hectares located approximately 5.5 kilometres southeast of Opotiki immediately west of the Otara River, into which it drains. A dairy herd of 750 cows are milked at the farm. Riverlock owns two other farms in the area with a total dairy herd of 2,900 cows.

[3] Brooklyn holds a discharge consent for dairy effluent granted in February 2006 which expires in December 2025. It provides for effluent to be contained in ponds and discharged to pasture irrigation subject to a number of conditions which are intended to prevent any discharge of effluent into any drain or natural water course either directly or by overland flow.

[4] The effluent containment and disposal system consists of three ponds:

- (a) Pond 1 is an unlined storage pond which receives effluent from the cowshed through a large sediment trap and also effluent from a loafing pad;
- (b) Pond 2 is a second unlined storage pond connected to Pond 1 by a PVC pipe; and
- (c) Pond 3 is a contingency pond installed in March 2012 which is lined and has a volume of approximately 5,000 cubic metres into which effluent can be pumped from ponds 1 and 2.

[5] The essential effluent disposal plan is for effluent in Pond 1 to be irrigated to paddocks every one to two days through ground pipes to a travelling irrigator. There is also provision for effluent to be pumped from Pond 3 to be pumped to an irrigator.

Circumstances of the offending

[6] On 2 November 2021 an enforcement officer of the Council carried out a compliance inspection at Brooklyn Farm commencing at 10:47am. There were four

workers present at the farm but none of them had responsibility for day to day management and they were not able to confirm who the farm manager was or who was responsible for the effluent disposal system. One of the workers said that the farm manager had left two or three weeks earlier and had not returned and that the effluent ponds had been full since the farm manager had left.

[7] The enforcement officer observed that the cowshed yard was still covered in effluent from the morning milking. The officer checked the two unlined storage ponds and observed that they were both full. The officer saw effluent from Pond 2 overflowing into a nearby stormwater drain and then approximately 120 metres into the farm's main drain. From that point, the main drain flows approximately 500 metres before discharging into the Otara River.

[8] The officer measured the flow in the stormwater drain at 5.6 litres per minute and took photographs showing the overflow from Pond 2 and into the stormwater drain. The officer observed dried effluent adjacent to Pond 1 indicating overflows toward the stormwater drain.

[9] The enforcement officer asked the workers who she should speak to about the discharge and was told to speak to the manager of the neighbouring farm which is also owned by Riverlock. That person arrived a short time later and said he had been teaching the workers at Brooklyn Farm what to do in the absence of the farm manager who had left, but that it would be best if the officer spoke with Mr Geoffrey Brown, a director and shareholder of the two defendants. The enforcement officer then called Mr Brown. He arrived at the farm a short time later and spoke to the enforcement officer under caution.

[10] The enforcement officer advised Mr Brown that he needed to:

- (a) Stop the discharge from Pond 2;
- (b) Engage a contractor to pump out the two ponds; and

- (c) Use a tractor to bund the drains to stop effluent flowing into the Otara River.

Mr Brown then made arrangements for these things to be done.

[11] The enforcement officer took samples from a number of locations in the effluent flow as well as upstream from discharge locations and downstream to the point of discharge into the Otara River. Analysis show elevated levels of faecal coliforms and E. coli in all the downstream locations.

[12] After taking the samples, the enforcement officer attempted to locate farm records relating to effluent irrigation but was unable to find any for the 2021-22 season although she did find some for the 2020-21 season.

[13] While working with farm workers to control the discharges, Mr Brown returned to the farm and asked the enforcement officer if he could pump effluent into Pond 3, the lined contingency pond. The enforcement officer asked to see this pond, which is located a little distance away from ponds 1 and 2. On being taken there, the enforcement officer observed that Pond 3 was relatively empty and accordingly directed Mr Brown to pump effluent into the contingency pond. She asked Mr Brown why they had not been using the contingency pond and he responded that it was because the farm manager had not shown the workers how to do this.

[14] A follow-up inspection was conducted on 11 November 2021. By that time the levels in ponds 1 and 2 were very low and Pond 3 had 1.5 metres of freeboard. The officer checked the travelling irrigator and found it was spreading effluent but not travelling. Ponding around the irrigator was measured to be 15-25 millimetres deep. There was no sign of run off to surface water. There were not irrigation records at the cowshed for that day. The irrigator was subsequently repaired.

[15] On 12 November 2021 the enforcement officer issued abatement notices to both defendants requiring them to cease discharging farm dairy effluent. No appeals were lodged and those abatement notices have not been cancelled.

Subsequent investigation

[16] The Council's subsequent investigation was based on information provided by the defendants' solicitors, as the directors and the farm workers declined to engage in formal interviews. The information provided included information about the farm manager, Alan Loomans. Apparently, Mr Loomans began working as a farm assistant at Brooklyn Farm in 2020, was promoted to assistant manager in February 2021 and then promoted to farm manager in May 2021. Later in 2021, concerns were raised about aspects of his management including poor record keeping. After being asked to attend a meeting with the directors of the companies he provided a medical certificate on 20 October 2021 and did not return to Brooklyn Farm after that date. His employment was terminated on 13 December 2021. Mr Brown took over management after Mr Loomans left the farm. There were problems locating documents relating to farm management, including instructions for operating the effluent system and in December 2021 Mr Brown had to telephone his brother to find out how all of the pipework was connected and operated.

[17] On 2 November 2021 there was no effluent management policy or effluent operating procedure for Brooklyn Farm. The defendant Riverlock had prepared a farm environmental plan for all of its farms in May 2019 which noted that an effluent management plan needed to be developed for each farm, but no such plan had been created for Brooklyn Farm by 2 November 2021.

[18] Riverlock has subsequently decided to restructure its management for its farms and create a new position of operations manager.

Effects on the environment

[19] The Otara River comes from the Raukumara Ranges and has a catchment area of 350 square kilometres. The upper catchment in the mainly forest covered ranges has high water quality. The river then travels through farming and horticultural land south of Opotiki before flowing into the sea. The river is used for swimming and kayaking downstream of Brooklyn Farm. It is listed in Schedule 1 (Aquatic

Ecosystem Areas) of the Bay of Plenty Regional Natural Resource Plan as a whitebait spawning site and a locally significant trout habitat with brown trout fishery values.

[20] The main drain for Brooklyn Farm has moderate ecological values with small fish being observed downstream.

[21] As is or should be well known, dairy effluent is high in organic matter and has very high nutrient, ammonia and bacterial levels that can have a range of adverse effects on waterways and inshore coastal areas. These include excessive weed growth, potentially toxic algal blooms, potentially toxic ammonia levels and reduced oxygen levels, bacterial contamination presenting a risk to recreational users and livestock drinking water and heightened levels of suspended solids reducing light penetration, smothering benthic organisms and blocking fish gills.

Previous compliance record

[22] The defendant Riverlock and Mr Brown have previous convictions under s 15(1)(b) of the RMA relating to dairy effluent discharges on three previous occasions:

- (a) *Bay of Plenty Regional Council v Riverlock Farms Limited and Others* District Court Tauranga CRI-2010-047-000111, 14 July 2011;
- (b) *Bay of Plenty Regional Council v Riverlock Farms Limited and Others* District Court Whakatane CRI-2012-047-000051-54, 29 November 2012; and
- (c) *Bay of Plenty Regional Council v Geoffrey Thomas Brown and Riverlock Farms Limited* District Court Rotorua CRI-2012-047-000608, 16 May 2013.

[23] The defendant Brooklyn has no previous convictions.

[24] As well as these convictions, the agreed summary of facts sets out an extensive history of compliance issues between 2005 and 2020 in relation to Brooklyn Farm,

including abatement notices, infringement notices and directions following inspections.

Prosecutor's submissions

[25] The prosecutor submits that the defendants should be sentenced on a global basis as they are closely related, both financially and in terms of their roles and their culpability in the offending. A starting point of \$80,000 is submitted as being appropriate. An uplift of 10% is sought to reflect previous relevant offending and a discount of 25% allowed for early guilty pleas. This would result in a fine of \$66,000 which the prosecutor submits should be divided equally between the two defendants.

[26] It is notable that on the entry of guilty pleas by the two defendants, the prosecutor sought and was granted leave to withdraw a corresponding charge against Mr Geoffrey Brown.

[27] In terms of culpability, counsel for the prosecutor noted an issue of degree as to whether the defendants' culpability should be characterised as careless or reckless. In response to the suggestion that the discharge was the result of problems with a rogue employee, counsel submitted that the root cause of the discharge lay in systemic or managerial problems. Given the large scale of Riverlock's operations, counsel submitted that one would expect there to be appropriate management systems that could deal with issues caused by an individual farm manager. As well, counsel submitted that given the location of Brooklyn Farm on low-lying land adjacent to the Otara River, one would expect that care would be taken to prepare and implement an effluent management plan, especially after previous compliance issues, including previous convictions. However, counsel characterised what the prosecutor's enforcement officer found on 2 November 2021 as a shambolic state of affairs where no-one at the farm appeared to know, or had been trained in, how to operate the effluent system. Counsel submitted that this indicated dysfunction at a high level.

[28] Counsel submitted that this is the fourth prosecution of Riverlock in 11 years and advised that no other dairy farm operator has been prosecuted so many times by this Council. As well, counsel submitted that this is the seventh time that some form

of enforcement action has been taken by the Council in respect of Brooklyn Farm. Counsel acknowledged that this has led to the installation of Pond 3, the lined contingency pond, but on 2 November 2021 it appeared that no one at the farm knew how to use it.

[29] Against this background, counsel submitted that the conduct of the defendants had been reckless in that the management of the companies was aware of the risk but ran it anyway by not implementing appropriate systems and safeguards. Counsel submitted that this was a case where extreme carelessness reached the level of recklessness. Counsel submitted the offending falls within *Chick*¹ Level 2.

[30] In relation to the requirement in s 40 of the Sentencing Act to take into account the financial capacity of the offender in determining the amount of a fine, counsel submitted the defendant is a large-scale farmer. No issue of capacity was raised.

[31] Counsel submitted that in recent cases² the courts have held that higher starting points are needed for dairy effluent offending, particularly in cases, such as the present, where the offending involves a discharge into a waterway and is the result of basic systemic failures.

[32] Counsel referred to *Waikato Regional Council v Brunt*³ and *Waikato Regional Council v Aitchison*.⁴ Both cases involved discharge of dairy effluent and offending which fell within the moderately serious band of offending (Level 2 in *Chick*). The Court noted the inadequacies and shortcomings in the farm effluent systems that left no room for error. A starting point of \$70,000 was adopted for *Brunt* and \$75,000 for *Aitchison*. The Court noted in both cases that the starting point would have been higher if there was evidence the effluent had had impact beyond potential effects on groundwater.

¹ *Waikato Regional Council v GA & GB Chick* (2007) 14 ELRNZ 291 (DC).

² Counsel referred to *Southland Regional Council v Baird* [2018] NZDC 11941; *Waikato Regional Council v Brunt* [2021] NZDC 1714; *Huka View Dairies v Manawatu-Whanganui Regional Council* [2021] NZHC 1462.

³ *Waikato Regional Council v Brunt* [2021] NZDC 1714.

⁴ *Waikato Regional Council v Aitchison* [2020] NZDC 22164.

[33] Counsel also referred to the earlier Riverlock Farms sentencing decisions.⁵ Counsel submitted the present offending is more serious than the offending in 2010 given the defendants' higher culpability and noted that the starting point of \$60,000 was adopted at a sentencing hearing in 2010 and sentencing levels have increased since then. Counsel submitted in the 2012 offending (for which a starting point of \$52,500 was adopted) the Court placed a lot of weight on the defendants' investment in infrastructure which had recently been installed. Counsel noted that the present case demonstrates that investment in effluent infrastructure will not result in compliance unless there are appropriate management systems and training in place to ensure the effluent storage and disposal infrastructure is actually used.

Defendant's submissions

[34] Counsel for the defendants submitted an appropriate starting point would be \$60,000 rather than the \$80,000 sought by the prosecutor.

[35] The defendants accepted that the offending falls within Level 2 of *Chick* but did not accept they acted recklessly. Counsel acknowledged that the absence of a standard operating procedure for the effluent system was not ideal but submitted that various management problems contributed to the circumstances. In response to questions about why the farm manager had not been confronted with the issues earlier, she submitted that the directors were acting on advice in dealing with the disciplinary process. She submitted that it had become apparent that Mr Loomans had undertaken unauthorised modifications of the system, which contributed to uncertainty on the part of Mr Brown and others of how to deal with the overflow issue.

[36] In relation to the compliance history, counsel submitted that the convictions had occurred 10 years ago and that there had been no subsequent offences until this case. On that basis, while not denying the history of Riverlock and Mr Brown, she submitted that the current offending should be considered separately. By way of comparison:

⁵ *Bay of Plenty Regional Council v Riverlock Farms Limited* DC Tauranga CRI-2010-047-111, 14 July 2011; *Bay of Plenty Regional Council v Riverlock Farms Limited* DC Tauranga CRI-2012-047-000608, 16 May 2013.

- (a) in 2011 there had been a discharge because of inadequate infrastructure, which had now been addressed by the provision of Pond 3; and
- (b) in 2012 there had been an instance of deliberate pumping of effluent to a drain which was treated as reckless.

[37] In the present case, counsel submitted that the most serious aspect was not prioritising the blocking of the drain to prevent any further discharge.

[38] In terms of aggravating and mitigating factors personal to the offenders, the defendants accepted a small uplift is appropriate for previous offending, submitting an uplift of five percent is appropriate. The defendants agreed that a discount of 25 percent for an early guilty plea is appropriate. The defendants further submitted that a modest discount is available for cooperation with the investigation and their extensive efforts to address the root causes of their offending.

Reply

[39] In reply, counsel for the prosecutor acknowledged that Mr Brown had had a lot on his plate in late October 2021 but submitted that the environmental responsibilities at Brooklyn Farm should have been prioritised and that the management failure should not be condoned.

Legal framework

[40] Under the Sentencing Act 2002 the Court must follow the two-stage approach as set out in *Moses v R*,⁶ first identifying an appropriate starting point incorporating any aggravating and mitigating features of the offence, and then assessing and applying all aggravating and mitigating factors personal to the offender together with any discount for a guilty plea calculated as a percentage of the identified starting point. The two stages involve separating the circumstances of the offence from those of the offender.

⁶ *Moses v R* [2020] NZCA 296 at [45] – [47].

[41] All of the purposes and principles in ss 7 and 8 of the Sentencing Act must be borne in mind, as well as the purpose in s 5 of the RMA to promote the sustainable management of natural and physical resources. Of particular relevance in environmental offending are the sentencing purposes of accountability, promoting a sense of responsibility, denunciation and deterrence, and the sentencing principles relating to the gravity of the offending and the degree of culpability of the offender, the seriousness of the type of offence, the general desirability of consistency with appropriate sentencing levels and the effect of the offending in the community.

[42] As to the overall sentencing approach for offending against the RMA, *Machinery Movers Ltd v Auckland Regional Council*⁷ and *Thurston v Manawatu-Wanganui Regional Council*⁸ are the leading decisions of the High Court which provide a comprehensive summary of the applicable principles. The RMA seeks not only to punish offenders but also to achieve economic and educational goals by imposing penalties which deter potential offenders and encourage environmental responsibility through making offending more costly than compliance. Relevant considerations include the nature of the environment affected, the extent of the damage, the deliberateness of the offence, the attitude of the defendant, the nature, size and wealth of operations, the extent of efforts to comply with obligations, remorse, profits realised, and any previous relevant offending or evidence of good character.

[43] In that wider context, this Court's decision in *Chick*⁹ provides a general approach to the assessment of the gravity of offending and the offender's culpability for it in a way that assists in evaluating cases in order to promote the principles of sentencing in s 8 of the Sentencing Act, and in particular in s 8(e) the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances. While the levels of fines identified 16 years ago in *Chick* no longer represent current sentencing levels, the process of assessing appropriate levels according to the gravity of the offending and the culpability of the offender remains useful.

⁷ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 503 (HC).

⁸ *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 27 August 2010.

⁹ Fn 1.

Evaluation

[44] The prosecutor and defendants agree that the offending falls within Level 2 of *Chick*, being moderately serious offending, which currently may warrant a starting point for a fine of between \$50,000 and \$100,000. The main point of difference between the parties is that the prosecutor has submitted the defendants acted recklessly, whereas the defendants submitted the degree of carelessness was low and was not reckless.

[45] I would classify the offending as reckless. The discharge occurred because there was nobody at the farm responsible for effluent management. The farm manager left on or about 20 October 2021, with the offending occurring on 2 November 2021. The farm workers lacked the experience and/or expertise to operate the system unsupervised. The defendants would have known they were operating without a farm manager on site and that the remaining staff lacked adequate training and expertise and should have been aware of the risks of this in term of effluent management. I would expect management systems to be in place and other staff to have been trained or brought in to assist, such that the farm could deal with a staff member not being on site. The defendants did not have sufficient safeguards and oversight.

[46] The defendants have advised that there had been some unauthorised and unknown modifications of the effluent management system by the old farm manager. The defendants do accept that, following identification of the modification to the systems, they should have taken more proactive steps to reduce the risk of discharge. I agree.

[47] I also note that there was no effluent management plan or operating procedure, despite Riverlock having identified in May 2019 that an effluent management plan needed to be developed for the farm. While it is unfortunate that the person tasked with developing such a plan fell sick, this period for which no plan was in place is significant and alternative actions should have been taken to ensure a effluent management plan and/or operating procedure was put in place.

[48] I adopt a global starting point of \$75,000. This starting point reflects that the effluent reached the waterway and the resulting environmental effects, that the offending falls within Level 2 of *Chick*, and that the defendants form part of a relatively large farming operation, while also acknowledging the difficulties arising from a significant weather event and that the defendants were let down by an employee who made unauthorised modifications and abandoned their employment.

[49] Both parties submit a discount of 25 percent for early guilty pleas is appropriate, I agree.

[50] The parties agree that some uplift is appropriate in light of previous effluent spill offending by Riverlock, the amount of that uplift is disputed. I note that Brooklyn Dairy has no previous convictions. As the previous offending by Riverlock was over 10 years ago now and part of this offending arises from the actions of a staff member rather than systemic issues as in the earlier cases I will impose a small uplift of five percent.

[51] The defendants have submitted the steps taken to improve their management, compliance and administrative systems are worthy of modest credit. The steps taken since the offending include staff training, hiring of a Business Manager, appointing an additional independent director, updating operating procedures, weekly meetings of farm managers and a director, weekly on-farm visits (planned and unplanned for inspection purposes), farm managers attending board meetings, an external independent third-party review of effluent management across the group, installation of electronic metering of effluent pond levels, employment of a full-time in-house Health and Safety adviser, monthly management meetings specifically focussed on group-wide issues including regulatory compliance and system resilience, and engaging a new consultant to review processes and provide new ideas. I accept a modest discount is appropriate to acknowledge the steps taken to address the systemic issues within the group of companies. I apply a discount of five percent.

Conclusion

[52] On that basis:

- (a) I convict Brooklyn Dairy Farm Limited and sentence it to pay a fine of \$28,125.00; and
- (b) I convict Riverlock Land and Property Limited and sentence it to pay a fine of \$28,125.00.

[53] As required by s 342 RMA of the RMA I direct that the fines less a deduction of 10% payable to a Crown Bank Account, be paid to Bay of Plenty Regional Council as the local authority which commenced this proceeding.

[54] I also make an order that the defendants each pay court costs of \$130 and solicitor costs of \$113.

Judge DAK Kirkpatrick
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 23/08/2023