IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2023-087-001113
JUDGE VIA AVL
[2023] NZDC 24644

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

TERAHU ORCHARD LIMITED
Defendant

Hearing:	6 November 2023
Appearances:	H Sheridan for the Prosecutor L Murphy on behalf of T Conder for the Defendant
Judgment:	10 November 2023

ORAL SENTENCING NOTES OF JUDGE J A SMITH

Introduction[1]

[1] The company appears before the Court today on a single charge of unlawfully taking groundwater for use at a kiwifruit orchard at Paroa Road, Poroporo, Whakatāne. The director of the company is before the Court today, and the company is convicted. Both counsel agree that a fine is the appropriate sentence. The question the Court today is the appropriate fine.

Background

[1] This is a written record of an oral decision delivered on 6 November 2023. The Court has made changes to improve grammar and expression but not to matters of substance.

[2] The property is a 10.9-hectare property with around 5.5 hectares of kiwifruit planting in the gold variety. The property was developed into a kiwifruit orchard in around May 2021.Before,that the site had been used for maize cropping.

[3] I understand that the company is familiar with kiwifruit developments, and they obtained a licence to grow gold kiwifruit on the property. This would have involved a sizable licence fee , the work required to locate and purchase the various grafts, planting, irrigation, and all the other work which costs millions to establish the activity.

[4] They have installed eight 30,000-litre water storage tanks, irrigation controllers and water metres. It is clear to me that the intention from the beginning was that this would be run as a commercially operated kiwifruit orchard with full irrigation. Nothing I have heard in the summary of facts suggests anything to the contrary.

[5] The company applied and obtained a consent to install bores around October 2021 and from approximately the end of November 2021, they began to irrigate the orchard.

The Offending

[6] The discussions between the Regional Council enforcement officer and the company director demonstrate that it was always the plan to ensure that the plants did not die. Statement 35(h) of the summary of facts provides the following:

> "He and his staff would look at the plants and give them water if they were wilting. He had instructed his staff to do this. The plan was to use 35 metres per day, but sometimes the plants needed more water so they used more. If the tanks had not been connected, they could not store water."

[7] In relation to his understanding of rules, the director said "(we intended) to use 35 cubes a day, but when plants are dying like I can't do anything, I have to use".

[8] Similarly, there was another exchange that shows the director had started the consent process, I presume for the water extraction, and had a consultant assisting:

> "The consent process was delayed as the bore wasn't providing enough water for the orchard's expected needs. The plants were already planted and needed water. I've got not option left, like otherwise all the plants were dying, but I was not intentionally ignoring 'cos I was on my way of consent."

[9] I take from this that the application of the water was deliberate, knowing that it was in breach of the rules and that a consent was required.

[10] As to the volume of water extracted, there were around 18,500 cubic metres of water extracted. The Council calculates that:

(i) there were some seven days where the use volume exceeded 500 cubic metres per day;

(ii) three days where the exceedance was between 400 and 499 cubic metres;

(iii) seven days where the exceedance was between 300 and 399 cubic metres;

(iv) 20 days where the exceedance was between 200 and 299 cubic metres;

(v) 30 days where the exceedance was between 100 and 199 cubic metres; and

(vi) 15 days where the exceedance was between 36 and 99 cubic metres.

[11] Accordingly during the period of the charge (between 30 November 2021 and 24 February 2023 which is nearly 15 months), there were up to 14 times the permitted volume on some days and significant periods of excess considerably over the amount as a permitted activity.

[12] Ms Murphy, for the defendant, makes the point that averaged over the entire period, this was only three times the permitted maximum. But of course, that includes periods of heavy rainfall where the plants do not require water.

[13] Overall, I am satisfied that this was a significant and deliberate take at the more serious end of the offences that the Court has seen.

Environmental harm

[14] The key point in this case was that the aquifer involved is less than 8 per cent utilised by consents, and accordingly, Ms Murphy says there is no evidence of adverse effect on the aquifer. Given that 18000 cubic metres is only a very small portion of the 2.6 million cubic metres available from the aquifer, Ms Murphy submits that in the absence of any clear effects, this should be reflected in a relatively minimal amount of fine.

[15] As I have said in previous cases, (those cases include *Bay of Plenty Regional Council v Dyer* at [8] and in *Waikato Regional Council v Coates* at [40]), the taking of water advantages the taker who has no right over those who hold a consent, and also general public compliance becomes extremely important[2].

[16] The fact that it is argued that there can be no harm ignores two things:

(a) Firstly, the aquifer is a limited resource, and its exact extent and use are not known.

(b) Secondly, there are tangata whenua interests in these waters and they have strong views as to the preservation of the resource. The illegal taking of it is an anathema to the tikanga and kawa of how such extractions should be properly undertaken.

The Court's approach to sentencing

[17] Having regard to the facts, I now turn to the two-stage process identified in *R v Moses* relating to setting a starting point, and then subtracting from that starting

[2] *Bay of Plenty Regional Council v Dyer* [2016] NZDC 13904; and *Waikato Regional Council v Coates* [2014] NZDC 619.

point, the cumulative percentages allowed for discounts for aggravating and mitigating features personal to the offender[3].

Starting point

[18] Several cases have been referred to me and those that have spent the most time and discussions are *Southland Regional Council v Horizon Flowers NZ Limited,* a case from 2011 relating to offences between 2005 and 2010;[4] *Bay of Plenty Regional Council v Dyer*, a small take, but with high deliberateness in flagrant disobedience of an abatement notice; and *Canterbury Regional Council v Birchbrook Ltd*[5].

[19] The issue is whether the Court should take the relatively modest starting point of $30,000 suggested in cases such as *Bay of Plenty Regional Council v Dyer* and *Canterbury Regional Council v Birchbrook Ltd* or be looking at a more significant starting point at or above that in *Horizon Flowers*.

[20] Firstly, I note that the issue of water takes has become far more important in recent years with the increasing droughtiness due to climate change and the move by a number of orchardists to larger scale operations. These orchards involve significant capital expenditure such as the avocado orchards in the Aupouri region of Northland and kiwifruit orchards in the Bay of Plenty and Gisborne areas (particularly the licenced gold and red varieties).

[21] The cost of a licence for gold kiwifruit is significant. It relates to a particular piece of land and is difficult to transfer. There is also a significant requirement for the planting and maintenance of those varieties in terms of the licence. They have become a significant capital expenditure which requires significant investment to get a significant return. The possibility of not being able to have adequate water to feed these plants defies any commercial sense of reality.

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[3] *Moses v R* [2020] NZCA 296.
[4] *Southland Regional Council v Horizon Flowers NZ Ltd* [2018] NZDC 24896.
[5] *Canterbury Regional Council v Birchbrook Ltd* DC Christchurch CRI-2010-009-11694, 22 September 2011.

[22] I am satisfied that the company in establishing this business never intended to let the plants die and would give them whatever water was required. That is clear by the fact that they had not applied for a consent but continued to water the plants as required during the 2022/2023 seasons.

[23] I conclude a strong deterrent message needs to be given, one that indicates that it is not cost-effective to avoid obtaining a resource consent for water takes. This is going to become more important as the surety of water supply becomes more critical for Bay of Plenty kiwifruit orchardists and others needing the resource.

[24] Looking at all these matters, I consider that the case of *Southland Regional Council v Horizon Flowers NZ Ltd* provides a starting point that keeps relatively close to the decisions of the superior Courts that the fining must be meaningful, and simply not a cost of doing business.[6] The *Horizon Flowers* case is very different on its facts and was related to water takes over a much longer period.

[25] Nevertheless, things have moved on significantly from 2010 and I am satisfied that that fines in *Horizon Flowers* would have been assessed in light of the legislation that applied between 2005 and 2009 with a maximum of $200,000. I keep in mind that the fines have continued to increase in recent years, and a major increase was signalled in the recent change to the NBEA for new offences. In short, I conclude that the starting point in this case should be $50,000.

Features relevant to the offender

[26] The question for the Court then is what discounts should be made in the second step of the process. No aggravating features have been suggested, and a 25 per cent discount for an early plea is agreed by both counsel and is appropriate.

[27] The question is what, if any, further discount should be provided. I had initially taken the view that no discount should be provided as this is a company operating which has a clear duty to comply but did not over a period of time. However, I do take on board Ms Murphy's point that the company had operated from 2014 without any

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[6] *Southland Regional Council v Horizon Flowers NZ Ltd*, above n 4, at [33]- [35].

offending, and I think in those circumstances I should give some modest credit for that.

[28] The Company has since obtained a consent, and I think that demonstrates some remorse, although not a great deal. In the end, I have decided that I will allow a discount of 5 per cent for conduct/ remorse, bringing to a total discount of 30 per cent. From a starting point of $50,000 that takes us to $35,000 as an end point.

[29] Accordingly, the company is convicted and fined $35,000 together with the solicitor's costs of $113 and the court fees of $130. Ninety per cent of the fine is to go to the Regional Council.

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Judge J A Smith
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 10/11/2023