

**IN THE DISTRICT COURT
AT TAURANGA**

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

**CRI-2023-063-001574
JUDGE VIA AVL
[2023] NZDC 24610**

BAY OF PLENTY REGIONAL COUNCIL

Prosecutor

v

CHLOROFIELD LIMITED

Defendant

Hearing: 6 November 2023

Appearances: H Sheridan for the Prosecutor
L Burkhardt for the Defendant

Judgment: 9 November 2023

ORAL SENTENCING NOTES OF JUDGE J A SMITH

Introduction¹

[1] This is a prosecution relating to a discharge from a travelling irrigator at a farm at Dalbeth Road, Hamurana, in October 2022. The directors of the company are present today and appear for the company on sentencing. The company is convicted and it is agreed a fine is the appropriate course.

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 discharge resulted in dairy effluent ponding and flowing overland to the Waitetī Stream. The Waitetī Stream feeds in due course into Lake Rotorua.

[3] The farm had a recent consent issued in 2020 and consists of around 114 hectares and 265 dairy herds, I assume plus some replacements. The farm had been recently acquired by the company and the directors and was operating on equipment that came with the farm, including the travelling irrigator and pump, sump and pond system.

[4] The effluent from the cowshed washed into two PVC pipes that led to a stone trap. The stone trap was directed to the effluent pond or the effluent sump using manual diversion. The effluent pond had a storage capacity of 2,108m³. The sump on the other had an assumed capacity of some 13m³, with an operating capacity of around 7.5m³. The pump operates on a floating activation switch, and that switch is controlled, as I understand it, in the cowshed.

[5] There are separate systems that can also irrigate from the pond system, but the travelling irrigator itself uses a connection system to particular outlets and is then fixed in the usual way to a post, a tree or other device and then propels itself along that line dragging the irrigation hose behind it.

[6] The farm worker was responsible for setting the irrigator on the days in question and operated it with too short a drag hose. When it reached the end of the length of the hose, it disconnected from the hose and then the hose continued to pump onto land, in turn ponded, and then flowed overland through the fence and into the stream.

[7] At the time of the offending, the effluent system had no fail-safe or monitoring devices. As far as I can see it had no logs of inspection that were kept. Although there was a requirement to check the positioning of the irrigator itself, it did not appear that there was any precise instruction as to when the irrigator was checked and how often.

[8] It appears that it may have discharged over two days in the morning, and that could be up to a maximum of nine cubic metres going into the stream, being around

60 per cent of the effluent. It seems more probable to me that it was somewhere in the order of four to six cubic metres depending on the amount of time the irrigator hose was disconnected.

[9] The farm operates under a consent which has standard conditions. I see no particular reason to refer to those. They contain the sort of conditions one would expect, that effluent is not to reach any water body, that the irrigator should never be closer than 20 metres to any surface water body, and there should be no excessive ponding. These would be described generally as relatively light-handed requirements.

[10] There had been no previous problems to the company's knowledge with the operation of the irrigator system, and certainly none during the short time they had been operating the farm.

[11] Apparently after the irrigator was disconnected, it also ran the next morning before Council checked as a result of a complaint. On 9 October 2022 when Council staff arrived, the stream was running clear.

[12] The photographs show the stream discoloured, and I accept that was clearly from effluent. There was clearly ponding in the field which flowed overland and into the stream. It appears not only had the irrigator not been checked, but the power had been switched on during the previous two days. There is no direct evidence that it was switched off.

Court's Approach

[13] There is no dispute that the approach in this case should be based upon that in *Moses v R*². It is essentially a two-step process. A starting point is set relating to the features of the offence, any aggravating or mitigating features of the offence itself. The second stage is to look at the personal circumstances of the offender and allow for any mitigating or aggravating features personal to that offender.

² *Moses v R* [2020] NZCA 296.

The starting point

[14] The most significant discussion in this case relates to the starting point of the given facts. I have said many times previously that irrigators constantly fail, it is to be expected. The litany of cases before this Court proves that travelling effluent irrigators require not only constant supervision but a series of fail-safe devices to try and mitigate the effect of any untoward discharge.

[15] This irrigator did not have any fail-safe devices at all which I find, frankly, quite outstanding. This may be explained by the fact that the defendant company had recently taken over the farm and there had been no previous problems.

[16] Nevertheless, there is little that can be said in defence of the position of operating a travelling irrigator without checking on it very frequently during the period of discharge. To see it once from a distance is not sufficient and it requires regular inspections during the discharge period, and I suggest that that would be more than once per application. Fail-safe devices may reduce the amount of discharge on failure but the irrigator still requires constant vigilance.

[17] The next feature of this offending is that the environment in which the discharge occurred is particularly sensitive. The stream itself is a trout stream and therefore has high values and feeds into Lake Rotorua eventually.

[18] Lake Rotorua has been subject to Government and other interventions to try and reduce the nutrification of the lake. That includes a diversion from Rotoiti to avoid the water flowing into that lake and directing exit through the river. To suggest that the defendant company should not be aware of the fact that discharges will have a particular effect on the environment, again, I find difficult to follow.

[19] There are two features of the offence itself however that differentiate it from many of the other cases put before me, and I am particularly looking at cases such as *Southland Regional Council v Baird*, *Bay of Plenty Regional Council v Rere Lake Farm Ltd*, and *Bay of Plenty Regional Council v DJK Ltd* which seem to

me the closest on the facts³. Those cases seem to involve larger volumes of effluent. There was a very limited volume in this case, and thus although discolouring the stream and adding further nutrients to the lake the damage was relatively limited.

[20] The second element is that the new operator of the farm was not fully aware of the various contingencies that needed to be addressed in operating the farm itself and I take that into account, although I recognise that that should lead to greater diligence till you are fully aware of them.

[21] One of the issues that came up in this case is whether all these factors are systemic failures or not. Ms Burkhardt's fundamental proposition to the Court was that these were not failures of the system per se, but rather a failure to check the installment of the irrigator regularly and correctly.

[22] It seems to me there are elements of this which do go further to a systemic issue, but do not take it into Category 3. The elements nevertheless place this offending firmly in the mid-band of Category 2 of the *Chick* categories,⁴ or putting it another way, this needs to be treated as one of the more serious offences.

[23] The starting point that I have been considering is in the range of \$55,000 to \$65,000, which was suggested by the prosecutor. Ms Burkhardt suggests that a figure closer to \$50,000 was appropriate, but I disagree. I think the following factors lead me to adopt a starting position at the upper end of the field:

- the sensitivity of the environment;
- the nature of the travelling irrigator and its incorrect installation;
- the requirement for regular inspection while discharging effluent; and
- the travelling irrigator's potential for disconnection which requires vigilance.

³ *Southland Regional Council v Baird* [2018] NZDC 11941; *Bay of Plenty Regional Council v Rere Lake Farm Ltd Codijoslin* [2020] NZDC 15295; and *Bay of Plenty Regional Council v DJK Ltd* [2020] NZDC 7134.

⁴ *Waikato Regional Council v GA and BG Chick Limited* (2007) 14 ELRNZ 291.

[24] In the end, I have concluded that a starting point of \$60,000 appropriately reflects those elements of the offence in this case but reducing it from what would have been a higher figure in my mind if this had not been a new owner.

Stage two

[25] Having reached a starting point, I immediately take into account the 25 per cent discount which is undisputed for an early plea.

[26] Ms Burkhardt pressed on the Court that I should provide a discount of 10 per cent for remorse and a first offence. In my view, the first offence has been taken into account earlier, but I do acknowledge that the new operation does give some room for consideration.

[27] I am also prepared to make some allowance for the fact that the company has treated this seriously and demonstrated remorse by installing fail-safe devices and getting their operating procedure into order.

[28] Overall, I consider that would warrant a further discount of 8 per cent to a total discount of 33 per cent, which on a starting point of \$60,000 leads to an end point of around \$40,200.

Outcome

[29] Accordingly, I fine the company a total of \$40,000 (which I round down from \$40,200), together with the court costs of \$130 and the solicitor's fee of \$113. Ninety per cent of the fine is to be paid to the Regional Council.

Judge J A Smith

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 10/11/2023