IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2023-070-000953
[2023] NZDC 26439

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

PETER STEWART HOLDINGS LIMITED
Defendant(s)

Hearing:	24 July 2023
Appearances:	A Hopkinson for the prosecutor K Barry-Piceno for the defendant
Judgment:	29 November 2023

SENTENCING NOTES OF JUDGE DA KIRKPARTICK

Introduction

[1] Peter Stewart Holdings Limited has pleaded guilty to a representative charge in CRN23070500423 that between 1 February 2021 and 19 July 2022 at or near 71 Wright Road Aongatete, Western Bay of Plenty, it contravened or permitted a contravention of s 14(2)(a) of the Resource Management Act 1991 by taking or using water that was not open coastal water, when that taking or using of water was not allowed by s 14(3) of the RMA. The particulars are that geothermal water was taken from bore BN-12380 for use at a kiwifruit orchard.

[2] This is an offence under ss 338(1)(a) and 14(2)(a) of the RMA. The maximum penalty for that offence under ss 339(1) of the RMA by a person other than a natural person is a fine not exceeding $600,000.

[3] The defendant had faced one other related charge, and a trustee of the trust which owns the defendant, Peter David Stewart, faced two related charges. These three charges were withdrawn by leave when the defendant pleaded guilty to this charge on 15 May 2023.

Background

[4] The defendant operates a kiwifruit orchard at or near 71 Wright Road Aongatete. This is a 59.23ha rural property located approximately 20km west of Tauranga in an area where there are a number of horticultural and agricultural properties. It sits within a groundwater management zone called "Wai 1 Ignimbrite" which extends from Te Puna to Waihi Beach.

[5] The summary of facts notes that kiwifruit orchards require large volumes of water for irrigation purposes in the summer and for frost protection in the winter. Irrigation of kiwifruit requires at least $40m^3$ of water per day for each hectare during summer.

[6] Under the Bay of Plenty Regional Natural Resources Plan, resource consents are required to:

(a) drill a groundwater bore (Rule 40B);

(b) take and use more than $35m^3$ of groundwater per day (Rules 38 and 43); and

(c) take and use geothermal water as defined in the RMA (Rule GR R2).

[7] In 2015 Mr Stewart and his wife applied for resource consent to install a bore and take up to $200m^3$ of groundwater. On 10 November 2015 the Council granted a consent to drill the bore. The bore was drilled on or about 14 January 2016 to a depth of 548m and given the identification number BN-12380. That bore is located in the

Tauranga geothermal field and the bore driller's log records a groundwater temperature of 43° C, thus being geothermal water as defined in s 2 of the RMA.

[8] The consent to drill the bore included an advice note advising the consent holder that a further consent to take water from the bore would be required unless the take were authorised by s 14(3) of the RMA or permitted by an operative rule in the regional plan. No resource consent was sought to take water from Bore BN-12380.

[9] In 2017 the defendant constructed an unlined water storage pond at the property consisting of an earth bund constructed across a gulley. Between November 2020 and February 2021, a bore pump and water meter with associated pipe infrastructure was installed at Bore BN-12380. The water meter was set to zero at the time of installation.

[10] From 2021 over 23ha of kiwifruit was growing at the property. At $40m^3$ per hectare per day, that area would require some $920m^3$ per day of water for irrigation in summer.

[11] In 2021 the Council carried out a region-wide analysis of locations where bored drilling consents had been granted but no subsequent water take consent had been sought. Following this analysis, the Council wrote to Mr Stewart on 23 September 2021 advising that the take and use of geothermal water other than for the testing of the bore is a discretionary activity requiring resource consent. There was no response to that letter.

[12] On 19 July 2022, enforcement officers of the Council inspected the property to assess compliance. They found the water infrastructure and read the meter at 9.34am, which showed that $25,741.74m^3$ of water had been taken since the meter had been installed in early February 2021. This equates to an average water take of approximately $48m^3$ per day over 534 days, exceeding the permitted activity limit of $35m^3$ per day for non-geothermal groundwater abstraction and contravening the restriction on taking and using geothermal water.

[13] The officers spoke with Mr Stewart, who admitted to them:

(a) the bore had been operational for the past few seasons for both irrigation and frost protection;

(b) he had operated the bore on and off since late January or early February 2021;

(c) water was pumped from the bore to the water storage pond prior to application at the orchard; and

(d) the temperature of the water from the bore is about 40° C.

[14] On 20 July 2022 the Council issued an abatement notice to Mr Stewart requiring him to cease taking and using geothermal groundwater. There has been no appeal against that abatement notice.

[15] On 21 December 2022 officers of the Council inspected the property and observed a pump test being carried out, with water discharging into the storage pond. The water was warm to the touch with a sulphur-like odour, and steam was being produced. The officers took temperature readings and recorded a temperature of over 41° C every five minutes over a 30 minute period.

[16] On 14 September 2022 an officer of the Council interviewed Mr Stewart at the property and Mr Stewart said:

(a) the water meter and head works were installed in late January or early February 2021;

(b) the bore is manually operated by an on/off switch;

(c) he had operated the bore from early February 2021 and then filled the water storage pond;

(d) he used the bore again during the summer of 2021 until it rained and further water was not required for irrigation;

(e) the bore was used on and off during January and February 2022;

(f) he did not keep records of when the bore was used;

(g) he operated the bore most of the time but his workers operated the bore at other times;

(h) he intended to continue groundwater from the bore once he obtained resource consent and had paid a deposit to a consultant to commence preparing an application for consent;

(i) the bore does not supply water for stock or domestic needs; and

(j) the bore pumps water to the water storage pond.

[17] The officer inspected the meter on 14 September 2022, which showed that no water had been pumped since the abatement notice had been issued on 20 July 2022.

[18] An application for resource consent to take water was made to the Council on 21 July 2023, three days prior to the sentencing hearing.

Environmental effects

[19] Issue 48 in the Regional Plan identifies that over-abstraction of geothermal water, heat or energy can deplete a geothermal field and degrade geothermal ecosystems, so that a conservative approach to the management of the resource is taken where resource consent is sought to abstract geothermal water. The defendant's activity has resulted in more than 25 million litres of geothermal water being taken without consent. Even considered as non-geothermal groundwater, this volume is six million litres more than allowed as a permitted activity.

[20] There is a high density of kiwifruit orchards in the Tauranga Harbour Management Area, with 264 active consents to take groundwater from the Wai 1 Ignimbrite Groundwater Management Zone. That zone is currently 48% allocated. It is difficult to assess the impact of takes on the groundwater catchment because not all groundwater allocation can be quantified. The Council has no evidence of what, if any, direct environmental effects arose from the defendant's unauthorised take.

[21] There are four registered cold water bores within 1,000m of bore BN-12380, three of which also have groundwater take permits. There is potential for interference

between nearby bores, but the extent of such effects depends on a number of unknown variables. The nearest surface water body to the bore is an unnamed tributary of the Whatakao Stream, approximately 300m south-east of the bore.

[22] Issue 30 of the Regional Plan notes that increasing demand for water in the Bay of Plenty is placing pressure on streams, rivers, springs and groundwater. Issue 32 notes that over-abstraction of groundwater can degrade groundwater quality and reduce water levels in aquifer systems and associated surface waterbodies.

Prosecutor's submissions

[23] Counsel for the prosecutor submits that the key issue in this case is the need for general deterrence to protect the water management regime under the Regional Plan. On that basis, he referred to a number of decisions[1] which, in short, say that the level of a penalty for environmental offending should not be so low as to be treated as an ordinary cost of business but should cause enough sting to provide a real disincentive to such offending.

[24] At a fundamental level, the purpose of the RMA is to manage resources, including such valuable resources as groundwater and geothermal water, in a sustainable way so that they are available for the benefit of future generations. A resource consent regime is a method of promoting that purpose by avoiding or mitigating the adverse effects of depletion of resources which can be as much a harm to the environment as the unlawful discharge of contaminants into it.

[25] Counsel for the prosecutor acknowledged that Mr Stewart was facing personal issues, including the breakdown of his marriage, but submitted that this did not excuse such lengthy non-compliance. Counsel pointed to the significant exceedance here in terms of duration of offending and volume of water taken. The personal issues had been considered in deciding not to prosecute Mrs Stewart, who was also a director, and ultimately in withdrawing the charges against Mr Stewart.

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1 *Glenholme Farms Ltd v Bay of Plenty Regional Council* [2012] NZHC 2971 at [41]; *Thurston v Manawatu Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, 25 and 27, 27 August 2010 at [41(e)]; and *Hawkes Bay Regional Council v Stockade Pastoral Farms Limited* DC Napier CRI-2008-081-96, 20 March 2009 at [16].

[26] Even so, Mr Stewart essentially turned a tap on and generally left it on.

[27] The duration and volume taken are both significantly in excess of other cases of unlawfully taking water:

(a) *Southland Regional Council v Horizon Flowers NZ Limited*[2] where a global starting point of $50,000 was adopted for two offences, as well as a starting point of $25,000 for contravening an abatement notice in respect of taking 3,636m^3 of water during a week in December 2017;

(b) *Bay of Plenty Regional Council v Dyer*[3] where a starting point of $30,000 was adopted for two charges of unlawfully taking water and breach of an abatement notice. The amount taken was 1,000m^3 over a month in 2015; and

(c) *Tasman District Council v Eden Road Farms Limited*[4] where a starting point of $30,000 was adopted for two charges of exceeding the limits of resource consents by 1,547m^3 during a drought in March 2013.

[28] In light of those case, counsel for the prosecutor submitted that an appropriate starting point would be $60,000, recognising the commercial motivation for the offending, the duration of the offending and the absence of any obvious adverse environmental effects. Counsel submitted that the defendant's culpability is at the higher end of the scale. Counsel stressed the issue of general deterrence and the importance of demonstrating that water resources must be managed sustainably.

[29] Counsel acknowledged that the defendant has no previous convictions and has not previously been the subject of compliance action and so a discount of five per cent for good character could be given. As well, counsel acknowledged that the defendant entered a guilty plea at an early stage and so should receive a discount of up to 25 per cent for its early plea. With those discounts, the end point for a fine would be $42,000.

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2 [2018] NZDC 24896.
3 [2016] NZDC 13904.
4 DC Nelson CRN-130402500484, 485, 6 May 2014.

Defendant's submissions

[30] Ms Barry-Piceno, counsel for the defendant, stressed the absence of any indication of direct environmental harm. She noted that an application for resource consent had now been made and that the assessment of environmental effects lodged with that application indicated that the adverse effects of the proposal would be minor. Counsel submitted that the defendant, by Mr Stewart, had intended at the outset to do all things properly. She pointed to the installation of infrastructure, including a water meter (unlike the situation in *Dyer*). She noted that the other cases cited by counsel for the prosecutor where ones where prior warnings had been made.

[31] In relation to the duration of the offending, she submitted that while the overall period was 17 months, water was only taken during three months. In response to a question about why Mr Stewart had not simply turned off the valve, she submitted that the valve had not been left on throughout but had been turned on in order to fill the storage pond and that Mr Stewart was just operating from day to day. In relation to his personal culpability counsel referred to his family circumstances.

[32] On that basis, counsel referred to the cases cited by the prosecutor.

[33] In terms of the personal circumstances of Mr Stewart, counsel provided me with a copy of the decision of the High Court in *Stewart v Stewart*[5] where Harvey J recounted the difficulties between Mr and Mrs Stewart and the impact which that had on the management of the defendant company.

[34] On that basis, counsel submitted that an appropriate starting point would be $30,000. With discounts for good character and early plea the level of fine imposed should be $19,500.

Legal framework

[35] There is no dispute as to the approach which the Court should take on sentencing under the Resource Management Act. In sentencing an offender, the Court must follow the two-stage approach as set out in *Moses v R*,[6] first identifying the

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5 [2023] NZHC 1889.
6 [2020] NZCA 296 at [45] – [47].

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 starting point). The two stages involve separating the circumstances of the offence from those of the offender.

[36] All of the purposes and principles in ss 7 and 8 of the Sentencing Act 2002 must be borne in mind, as well as the purpose of the RMA to promote the sustainable management of natural and physical resources. Of particular relevance under the Sentencing Act 2002 are the purposes of accountability, promoting a sense of responsibility, denunciation and deterrence, and the 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.

[37] 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. Briefly, 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 their operations, the extent of efforts to comply with their obligations, remorse, profits realised and any previous relevant offending or evidence of good character.

Evaluation

[38] Proof of harm caused to the environment is not an element of an offence under s 338 of the RMA. While evidence of harm is generally likely to be relevant to an assessment of the gravity of any offending or the culpability of the offender, other

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7 [1994] 1 NZLR 492 at 503 (HC).
8 HC Palmerston North CRI-2009-454-24, 27 August 2010 at [39] – [66] and [100].

aspects of the offending or of the offender's behaviour can be sufficient to provide an appropriate foundation for a penalty, even a significant penalty.

[39] In this case, the requirements of the Regional Plan for resource consents to be obtained in order to drill a bore into an aquifer and to take groundwater over a certain limit, or to take any amount of geothermal water, have been established in order to promote the sustainable management of water in all of the ways in which sustainable management is defined in s5(2) of the RMA. The importance of water resources requires the maintenance of the integrity of the consenting system so that people know what is being taken from aquifers in order to understand the effects of such use and manage any adverse effects. Failing to comply with that consenting system threatens its integrity, reducing the extent to which the Regional Council can exercise integrated management of the resource and, cumulatively, reducing public confidence in the administration of the regional plan.

[40] Aggravating factors in this case are the length of time over which non-compliance occurred and the volume of water taken. While I can accept that the taking was not continuous, I do not see that as a mitigating factor. If the defendant was turning the tap on and off over time, then the defendant must have been aware, each time the tap was turned on, that water was being taken without a consent.

[41] I also accept that the personal circumstances of Mr Stewart, who appears to have been essentially in sole charge of the operations of the defendant, were difficult and that he would have had other pressing concerns during this period. But I do not accept that these concerns prevented him from engaging a consultant at an early stage to complete the process of obtaining all necessary consents to operate the bore and take water from it.

[42] I accept the prosecutor's submission that there was a commercial dimension to the offending given the need for water to protect the kiwifruit vines. As far as I can tell from the information put before me, it appears that the taking of water was to maintain productive capacity rather than to increase it. Even on that basis, however, it appears that the defendant was able to maintain its operations and so the aggravating factor is that, in the course of maintaining its operations, it did not take the time to apply for consent which it had clearly been told was needed.

[43] In these circumstances, I accept the prosecutor's submission that this offending is graver than in the three cases cited to me and the culpability of the defendant is high. On that basis, I consider that a starting point of $60,000 is clearly justified.

[44] I accept the submissions of both counsel that a discount of five per cent should be given in acknowledgement that the defendant is a first offender, noting also that the defendant's principal has not previously been before the Court.

[45] I also accept the submission that there should be a discount of 25 per cent in recognition of an early guilty plea.

Sentence

[46] I convict Peter Stewart Holdings Limited on the charge in CRN 23070500423 and sentence it to pay a fine of $42,000.

[47] As required under s 342 of the RMA, I direct that the fine, less a deduction of 10 per cent to be paid into a Crown bank account, be paid to the Bay of Plenty Regional Council.

[48] I order the defendant to pay Court costs of $130 and solicitor's fee of $113.

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Judge D A Kirkpatrick
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/11/2023