IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2022-070-004080
[2023] NZDC 27793

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

DAVID GRANT THOMAS
Defendant

Hearing:	15 May 2023
Appearances:	V Brewer for the prosecutor T Conder for the defendant
Judgment:	13 December 2023

SENTENCING DECISION OF JUDGE DA KIRKPATRICK AND JUDGE SM TEPANIA

Introduction

[1] The defendant has pleaded guilty to one charge[1] of unlawfully taking water for use at a kiwifruit orchard located at 936 Pongakawa Bush Road, Pongakawa (**the property**) between 22 December 2020 and 25 January 2022, in breach of ss 338(1)(a) and 14(2)(a) of the Resource Management Act 1991 (**RMA**).

[1] CRN22070501340.

[2] The maximum penalty for the offending is a fine not exceeding $300,000 or a term of imprisonment not exceeding two years. It is agreed that a fine is the appropriate sentencing outcome, with the prosecution proposing a starting point of $60,000 and the defendant proposing a starting point of between $10,000 – $25,000.

Background

[3] The property is a 216-hectare rural property located approximately 18km south-east of Te Puke, within the Kaikokopu-Pokopoko-Wharere groundwater management zone, in an area where a number of farms are currently being converted into large kiwifruit orchards. This property is across several titles and also includes an operational dairy farm.

[4] The defendant purchased the property in 2020 and began converting it into a kiwifruit orchard. At the time of the offending, the defendant was the owner of the property and was the person responsible for overseeing the property's water use.

[5] Kiwifruit orchards require large volumes of water for irrigation purposes in the summer. During the summer, at least 40m³ of water is required each day to irrigate one hectare of kiwifruit canopy. At the time of the offending, 18.81 hectares of kiwifruit was growing at the property, requiring 752m³ of water per day for summer irrigation.

[6] To address the irrigation needs for the kiwifruit orchard at the property, the defendant:

(a) intended to draw groundwater from bores; and

(b) pump that water to the water storage pond at the property, which has approximately 10 million litres of storage capacity.

Resource consents

[7] Pursuant to rule 40B of the Bay of Plenty Regional Natural Resources Plan (**RNRP**), a resource consent is required to drill a groundwater bore. Pursuant to rules 38 and 43 of the RNRP, a resource consent is required to take and use more than

35m³ of groundwater per day. Accordingly, the defendant required a resource consent to both drill a bore and to take groundwater from the bore to use at his kiwifruit orchard at the property.

[8] In June 2020, the defendant applied to Bay of Plenty Regional Council (**the Council**) for a resource consent to install three bores at three locations at the property.

[9] The defendant's consent application stated that the purpose of the bore was to provide irrigation with a maximum daily water take amount of 1,500m³ at a rate of 30 litres per second.

[10] The Council granted the defendant a land use consent (RM20-0355) to install water bores at three locations at the property.

[11] The consent did not authorise the taking of water and had an expiry date of 30 June 2021. Advice note 1 of the consent stated:

> The consent holder is advised that the granting of this consent does not remove the requirement to obtain any further consent(s) which may be necessary to authorise the taking of water from the bore. A further consent will be required to take water from the bore on an on going basis unless the take is authorised by section 14(3) of the … RMA or permitted by an operative or proposed rule in a Regional Plan. Section 14(3) RMA allows the take of fresh water for an individual's reasonable domestic use and animal's drinking water provided that the take does not, or is not likely to have an adverse effect on the environment. In a catchment that is over allocated, further takes of water may have an adverse environmental effect and the consent holder is advised that resource consent may therefore be required for the take of water. …

[12] Bore 1 (consent BN20-0123) is located in the northwest of the property and is closest to the Wharere Stream, with a depth of 222 metres. Drilling was completed in November 2020. Trenching and Irrigation NZ Limited (**T&I**) supplied the irrigation system, including the bore pump and headworks. T&I installed the water meter for BN20-0123 on 22 December 2020. The pumping rate for the bore was recorded as 22,000 litres per hour (5.55 litres per second). Bore completion documents were provided to the Council by 3 February 2021.

[13] Bore 2 (consent BN20-0124) is located on the eastern side of the property, further south and west from Site 1. It was drilled in 2021 to a depth of 148 metres.

T&I supplied the bore pump in September 2021. Pump testing was carried out over a 72-hour period and was completed by 20 September 2021. Bore 2 has a pumping rate of 19,000 litres per hour (5.27 litres per second).

[14] The third proposed bore authorised by the bore consent was never drilled.

[15] No resource consent was sought for water take after the two bores were installed at the property. Prior to the drilling of the second bore, Mr Thomas engaged consultants to assist with preparation of his application for a water take consent. However, this application was not lodged with Council until after the Council investigation relating to the current offending began.

The offending and subsequent investigation

[16] On 10 December 2021, the owner of a nearby property contacted the Regional Council to express concern about unconsented water takes in the Wharere Stream catchment associated with irrigation of large kiwifruit developments depleting water supply. As a result of this complaint, the Regional Council carried out compliance inspections of properties in the catchment that had consented bores. This included the defendant's property.

[17] On 25 January 2022, Council enforcement officers inspected the property.

[18] At the start of their inspection on 25 January 2022, the Council enforcement officers met the defendant, who said:

(a) he had two bores at the property and they were currently operating;

(b) these bores are filling a 10 million litre lined pond, which is storing water for irrigation of two blocks of kiwifruit;

(c) he had been using the water from the two bores to irrigate the kiwifruit orchard at the property;

(d) he is responsible for running the system. He turns the pumps on each day and then the system runs for a period of time and turns off automatically when the pond reaches a certain level;

(e) one bore runs at approximately 18m^3 per hour and the other at approximately 22m^3 per hour;

(f) he could not give a run time for the irrigation. He does not know how much water he uses per day or whether it exceeds 35m^3;

(g) the kiwifruit irrigation system was installed by Trenching and Irrigation. The irrigation system on the second block was installed in December 2021;

(h) he was not aware of the permitted activity limits for taking water; and

(i) he has engaged a consultant to prepare a resource consent application for the water takes from the two bores.

[19] The officers observed that the large water storage pond was being filled with water from the two bores and that the water from the bores ran through PVC pipes and a small hydrocyclone[2] and then into the pond.

[20] A surface pump run by a generator was pumping water out of the storage pond to irrigate two blocks of kiwifruit. The pump shed at the far end of the pond contained a surface pump and pump controller.

[21] The officers then inspected the two bores and found that each had an *Octave* water meter installed. The readings of the two bores' meters at 11am on 25 January 2022 were as follows:

(a) the meter for bore BN20-0123 showed that 31,930m^3 of water (i.e. 31.9 million litres) had been taken since the water meter was installed on 22 December 2020. This equates to an average water take over 399 days of approximately 80m^3 per day. This is more than double the amount the defendant was allowed to take from this bore as a permitted activity under rule 38 of the RNRP; and

(b) the meter for bore BN20-0124 showed that 8,611m^3 of water (i.e. 8.6 million litres) had been taken since the water meter was installed on 21 December 2021. This equates to an average water take over 35 days of approximately 246m^3 per day. This is approximately seven times the amount the defendant was allowed to take from this bore as a permitted activity under rule 38 of the

[2] A hydrocyclone is a device that separates solid material and particles from water.

RNRP.

[22] The defendant had not kept any records of the amount of water he was taking from the bores.

[23] On 27 January 2022, the Regional Council issued an abatement notice to the defendant requiring him to cease taking and using groundwater at the property in excess of 35 cubic metres per day. This abatement notice has not been appealed and remains in force. Mr Thomas has complied with the abatement notice.

Defendant's explanation

[24] On 18 March 2022, a Council enforcement officer sent the defendant a letter explaining that the Council was investigating exceedances of the permitted water take limits at the property and inviting the defendant to attend an interview or provide a written explanation. In that letter the officer said that it appeared that the defendant had taken water in excess of the permitted activity levels, and calculated that the defendant had taken 79m³ per day from bore BN20-0123 and 260m³ per day from bore BN20-0124.

[25] The defendant did not attend an interview or provide a written statement, but his lawyer later provided written explanations to the Council in May and June 2022.

Water take consent application

[26] On 14 October 2022, Mr Thomas applied through his company, Thomas Orchards Limited, to the Regional Council for resource consent to take water from bores BN20-0123 and BN20-0124.

[27] The consent application contained the following statements:

> Thomas Orchards Limited (the applicant) has been developing the orchard located at 936 Pongakawa Bush Road, Pongakawa since 2020. … The applicant is applying for a resource consent to take water from two bores, BN20-0123 and BN20-0124, for irrigation of a new 18.81 ha gold kiwifruit orchard ….
>
> The bores BN20-0123 and BN21-20124 were drilled by Carlyle Drilling Ltd in November 2020 and September 2021 respectively. The applicant seeks a

> resource consent to take water from the bores for irrigation at a maximum combined rate of 11.11 L/s (40 m3/hr). The total rate of take is comprised of abstraction from BN20-0123: 5 L/s (18m3/hr) and BN20-0124: 6.11 L/s (22m3/hr).
>
> The applicant is applying to take a weekly volume of 6,720 cubic metres[3] and an annual volume of 79,326 cubic metres for irrigation of 18.81 ha young gold kiwifruit. Bore BN20-0123 was drilled in November 2020, is 222 m deep and has 150 mm diameter casing to 168 m below ground level … [Bore] BN20-0124 was drilled in September 2021, is 148 m deep …
>
> The applicant will use monitoring systems to determine when to start and stop irrigating. The irrigation is automated and monitored via mobile phone.
>
> Water for irrigation is managed in a 2-stage process: 1) Water is pumped from both bores simultaneously into a large storage pond … and 2) pumped from the pond to specific orchard blocks as required. The irrigation system is designed to be operated in six separate but similarly sized zones. Water will be applied via under vine sprinklers. …
>
> Due to the inland location, orchard elevation and distance from any suitable surface water bodies in the vicinity, which would provide a sufficient quality or volume of water for this take. Therefore, surface water is not an option in this area.
>
> A consent term of 15 years is requested. Significant investment has occurred to develop the kiwifruit orchard and install irrigation infrastructure. Without water, a high value kiwifruit crop is at risk.

[28] The application stated that the two bores at the property draw from the Kaikokopu-Pokopoko-Wharere aquifer which:

(a) was currently 78% allocated;

(b) had an available allocation of 15,938,294 cubic metres per year, of which 12,449,762 cubic metres per year was already allocated.

[29] The application recorded that there were three consented bores at neighbouring properties within a two-kilometre radius of the defendant's property. These bores relate to irrigation for kiwifruit orchards.

[30] Ngāti Rangitihi and Ngāti Pikiao initially advised that they opposed the defendant's water take consent application. However, neither party responded to requests for clarification during the processing of the water take consent application.

[3] Which equates to 960 cubic metres per day.

[31] On 23 November 2022, the Regional Council granted the application and issued resource consent RM22-0543 authorising the taking of water at the property. Under that consent, water take records must be provided electronically to the Regional Council on a daily basis.

Sentencing principles

[32] The High Court in *Thurston v Manawatu Wanganui Regional Council*[4] provides a useful summary of the approach to be taken to sentencing of offences under the RMA, which includes consideration of the offender's culpability, the precautions taken to avoid harm, the vulnerability or importance of the affected environment, the extent of any damage, general and specific deterrence, the offender's capacity to pay a fine, any disregard for abatement notices, co-operation with enforcement agencies and any early guilty plea.

[33] Persons who plead or are found guilty of offences under the RMA are to be sentenced in accordance with the purposes and principles of both the Sentencing Act 2002 and the RMA.

[34] All the purposes and principles of the Sentencing Act 2002 are relevant.

[35] More generally under the Sentencing Act, the principles of accountability, denunciation and deterrence, the gravity of the offending, the degree of culpability of each defendant, the general desirability of consistency in sentencing and the effect of the offending on the community are important considerations.

[36] Under the RMA, the most relevant considerations are the statutory purpose of sustainable management of natural and physical resources and the matters to which particular regard is to be had including kaitiakitanga and the ethic of stewardship, the intrinsic values of ecosystems, maintenance and enhancement of the quality of the environment, and any finite characteristics of natural and physical resources.

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

Environmental effects

[37] We have adopted the two-step methodology outlined by the Court in *Moses v R,*[5] first by identifying an appropriate starting point for the offending and adjusting that to account for the personal factors relevant to the offender.

[38] The Summary of Facts records, at 53-58:

> The defendant's water take activities resulted in more than 31 million litres of water being abstracted from bore BN20-0123 between December 2020 and January 2022 and 8.6 million litres of water being abstracted between December 2021 and January 2022. In total, over the period of offending more than 40.5 million litres of water was abstracted, which is approximately 26 million litres more than would have been allowed as a permitted activity by rule 38 of the Bay of Plenty Regional Natural Resources Plan (**RNRP**).
>
> The Council has no evidence of what, if any, direct environmental effects arose from the defendant's unauthorised take and use of groundwater from the two bores during the offence period.
>
> It is difficult for the Council to assess the impact on the relevant groundwater catchment because not all groundwater allocation can be quantified. If water is allocated under a resource consent it can be tracked and monitored, however the taking and use of groundwater that is permitted under rule 38 of the RNRP or under section 14(3) of the RMA cannot be tracked and monitored. So the total volume of water actually used under the RMA and permitted activity rules in the RNRP is unknown, as are the cumulative effects of such takes on a groundwater catchment.[6]
>
> Also, the individual and cumulative impacts of unlawful water takes (i.e., water takes that are not consented and that exceed permitted activity levels) on the Kaikokopu-Pokopoko-Wharere groundwater catchment are unknown.
>
> As far as the Council can determine, the Kaikokopu-Pokopoko-Wharere Groundwater Management Zone (in which bores BN20-0123 and BN20-0124 are located) is currently 78% allocated with 3.5 million cubic metres of groundwater available per year. Regional Council records indicate that there are 109 consented bores drawing water from the Kaikokopu-Pokopoko-Wharere Groundwater Management Zone. These bores supply water to a number of households, farms and orchards on separate properties. The number of unconsented bores and water takes is unknown.
>
> Issues relating to water abstraction have been identified in the RNRP:
>
> (a) Issue 30 (5.1.1) states:
>
> **Increasing demand for water in the Bay of Plenty is placing pressure on streams, rivers, springs and groundwater.**

[5] *Moses v R* [2020] NZCA 296 at [45] to [47].

[6] *A model for assessing unconsented or permitted water use in the Bay of Plenty Region* (Bay of Plenty Regional Council Environmental Publication 2014/02), page iii.

> Increasing water demand in the Bay of Plenty is evident due to increasing amounts of water being abstracted for irrigation, domestic water supply (e.g. life-style blocks), and municipal water supply as a result of population growth. The lack of availability of water resources may limit land use intensification or urban growth in some areas of the region, as increased water abstraction may cause significant adverse effects on the environment.

(b) Issue 32 (5.1.1) of the RNRP states:

> **Over-abstraction of groundwater can degrade groundwater quality, and reduce water levels in aquifer systems and associated surface water bodies.**

Prosecutor's submissions

[39] The prosecutor submits that groundwater is an enormously valuable resource in New Zealand, for domestic and economic purposes and is associated with significant recreation, tourism and cultural values. Pressure on groundwater aquifers has increased in the Bay of Plenty region due to the significant number of dairy farms that have recently been converted to kiwifruit orchards. There are no known adverse environmental effects from the offending. However, unlawful water takes are an issue of concern, given the difficulty detecting such offending and regional and national concerns about water sustainability. The Council has been working with the kiwifruit industry for the past 15 years to encourage compliance with water take limits.

Defendant's submissions

[40] The defendant submits the harm caused is at the lowest end of seriousness and that there is no evidence of actual harm arising from the offending. The defendant emphasises that the low scale of harm is confirmed by the fact that the offending water take has now received a resource consent and notes that other than opposition from local hapū concerning earthworks (which did not form part of the consent sought), this was without opposition from any person.

[41] The defendant submits that assessments have determined that the impact on pumping from the defendant's bores on other bores in close proximity that are drawing on the same reservoir would be less than minor and suggests that the use of the bores does not have a material impact on the underlying water source. The expert advice also confirms that this resource remains under allocated by around 20 percent.

[42] The defendant therefore concludes that the environmental consequences of the offending are consistent with the overall scheme of sustainable management and that this is not a case where the defendant has either harmed or risked harm to others or to the natural environment.

[43] It is the defendant's position that it is material that not all of the water was taken intentionally for irrigation in that there were mechanical issues during the Christmas/New Year period in 2021/22 which resulted in the pump operating and water being taken for an extended period when it had been turned off. The malfunction occurred repeatedly and the bores were left unsupervised for significant lengths during that period. It cannot be assessed what volume of water was taken in this way, but the defendant suggests that with a pumping rate of around $40m^3/h$ across both bores, the volume that could be generated in this way would be significant.

[44] We record Counsel for the defendant's advice[7] that the prosecutor does not accept that the defendant would be able to make out the defence of mechanical failure in terms of the portion of the overtake caused by this issue. The defendant accepts that liability under the RMA is strict, and that the standard set by s 341(2)(b) is high. For the purposes of sentencing, Mr Thomas is prepared to accept that this threshold would not be met in this case.

[45] However, Counsel submitted that the fact that this part of the offending was unintentional seriously reduces the defendant's culpability for this portion of the offending.

Conclusion on environmental effects

[46] The Summary of Facts records that there is no evidence of what, if any, direct environmental effects arose from the defendant's unauthorised take and use of groundwater from the two bores during the offence period. We accept that there were no discernible environmental effects and that there was still allocation available in the Kaikokopu-Pokopoko-Wharere Groundwater Management Zone.

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[7] Updating Memorandum of Counsel for the Defendant, 15 May 2023

[47] We accept the prosecutor's submission that unlawful water takes are an issue of concern as identified in the RNRP and given national and regional concerns about water sustainability, the increasing demand for water, particularly in the Bay of Plenty region, the potential effects of over-abstraction of groundwater, and the difficulty in detecting such offending.

[48] While the defendant has submitted that bore testing and mechanical failure may explain a large part of the water take rather than irrigation, the agreed Summary of Facts records that the defendant told the Council the water was for irrigation of the kiwifruit orchard. As noted above, the property required 752 m^3 of water per day for summer irrigation in excess of the maximum daily water rate of 35 m^3. Even with mechanical breakdowns and/or testing, the defendant should not have been taking water beyond that permitted in the RNRP without a consent. The agreed Summary of Facts records that approximately 26 million litres more than would have been allowed as a permitted activity by rule 38 of the RNRP was taken.

[49] We also note here a concern with the lack of supervision the defendant has acknowledged and will discuss this further below.

Culpability

Prosecutor's submissions

[50] The prosecutor submitted the defendant's culpability in this case can be characterised as high. This is because:

(a) the offending was deliberate: The defendant knew that a water take consent was needed, both because the bore consent said so and because prior to the drilling of the second bore he engaged consultants to assist with preparation of his application for a water take consent. The defendant then proceeded to take significant volumes of groundwater. There is no evidence that the defendant made any attempt to comply with the permitted activity limits for water take. The prosecutor submits that an 18.81-hectare gold kiwifruit

orchard will generate returns of approximately $3.31 million per annum[8] and therefore considers it is important that fines for unlawful water takes are set at a level that incentivises legal compliance rather than being a relatively minor business cost;

(b) the scale of the offending was significant: The offending involved the unlawful abstraction of approximately 26 million litres of water from two groundwater bores for irrigation of the kiwifruit orchard.[9] The defendant had no resource consent and kept no records of daily water takes, therefore the precise exceedances on any given day during the offence period are unknown. The pumping rates of the two bores suggest a potential maximum daily take of 984,000 litres (984 cubic metres). Based on the total amount of water extracted during the offence period, the average daily water take was approximately 80 cubic metres per day from BN20-123 (i.e. more than double the permitted level for the 399 day period) and 246 cubic metres from BN20-0124 (i.e. approximately seven times the permitted level for the 35 day period).

(c) the duration of the offending was long: The offending continued for over 12 months. The defendant suggested that some of the water take was accidental due to software issues, however the prosecutor submits this appears to be a reference to problems with the irrigation system (i.e. water pumped from the storage pond to the irrigation lines) rather than issues with the manually operated extraction system (i.e. pumping of groundwater to the storage pond).[10] The prosecutor submits it is difficult to see how this

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[8] In the 2021/2022 season SunGold kiwifruit returned on average $176,000 per hectare: Zespri media release 25 May 2022.

[9] It has been suggested by the defendant in his affidavit sworn on 21 April 2023 that some of the water use was associated with pump testing and was allowed by Council. The initial pump testing carried out for BN20-0123 used approximately 1,584m3 and was authorized under consent RM20-0355. This occurred prior to the installation of the water meter so is not included in the unauthorised volumes. Initial pump testing of BN 20-0124 used approximately 1,368m3 and occurred after the expiry of RM20-0355, meaning this pump test was unconsented. It also occurred prior to the installation of the water meter. Further water take associated with a second round of pump testing carried out in March 2022 is outside the period of offending.

[10] On 25 January 2022, the defendant explained to Council officers that he switches the bores on manually and that the submersible pumps run until the power to them is cut by a level sensor in the pond. A separate surface pump run by a diesel generator pumps water from the storage pond to the orchard irrigation system.

mitigates the defendant's offending in circumstances where he chose to operate two groundwater bores without a water take consent for over 12 months, and failed to take any steps to manage water use within permitted activity limits; and

(d) the commerciality of the offending was apparent: The prosecutor submits that the defendant avoided the cost of obtaining water from other lawful sources to irrigate his orchard and chose to prioritise its commercial activity over compliance with the RMA. The prosecutor highlights that in an affidavit sworn on 21 April 2023, the defendant acknowledged he made the cost saving decision to delay applying for a water take consent until the second bore was drilled and a single application could be made for both bores.

[51] We note that the defendant's affidavit also confirms that in making his decision to delay application for consent, the defendant accepted advice that as iwi objections to the consent were likely, dealing with these together would be easier than dealing with them twice.

Defendant submissions

[52] The defendant acknowledges that, but for the mechanical failure issue outlined above, water was taken deliberately. However, Counsel submitted that the defendant's intention is less clear in regard to the water take exceeding the limits set out in the regional plan.

[53] The defendant submits the offending should be understood as being the consequence of poor advice rather than a cynical intentional act.

[54] Counsel submits the affidavit from the defendant provides information that:

(a) the defendant is functionally illiterate and therefore relies on others in the way he engages with his compliance with the RMA and related rules;

(b) while he accepts using the water to irrigate his crops, he had received advice to delay applying for a resource consent, which he accepted and was not in a position to assess the extent of water take that would comply with the regional rule;

(c) part of his water take was acquiesced to by the Council in that it consisted of pump tests that were advised to the Council without objection;

(d) part of his measured water take arose from a mechanical failure that he was unable to properly resolve. He was forced to turn off the generator for his pump to prevent the issue continuing;

(e) he has since obtained a resource consent for the water take at the property; and

(f) between receiving an abatement notice for his water take and receiving his resource consent, no water was taken at the property.

[55] The defendant submits these factors all point to a desire by the defendant to comply with the law, even though he was using water in excess of what was permitted.

[56] The defendant submits specific or general deterrence is of limited relevance in this case. The defendant has been deterred from like offending. It is submitted that despite any sentence the Court may impose, a person with the same dependencies as the defendant is unlikely to be assisted in weighing the reward or risk of non-compliance by a harsh sentence being imposed in this case.

Conclusion on culpability

[57] As the defendant submits, ignorance of the law is no excuse and this is a strict liability offence.

[58] The defendant was the person responsible for overseeing the property's water use. Notwithstanding that the legal and consenting frameworks may be complex, it is important for persons who use water for commercial purposes to familiarise

themselves with the relevant rules and comply with them. We accept the prosecutor's response that the evidence does not go so far as to suggest the defendant received poor advice. In his affidavit the defendant says he received advice that it would be better to apply for consent for the two bores together to save money and that, given the likely objections, dealing with these together would be easier than dealing with them twice. There is nothing in the evidence to suggest that he was then advised that abstracting water in excess of permitted levels in the meantime would be acceptable. We do not accept that the advice the defendant received could be a defence to the charges or otherwise exculpatory.

[59] We conclude the offending was deliberate. We consider that the matters of significance in making this finding are:

(a) the advice note to the land use consent for installation of bores stated the granting of that consent did not remove the requirement to obtain any further consents which may be necessary to authorise the taking of water from the bore;

(b) the defendant had no resource consent for taking of water;

(c) prior to the drilling of the second bore, the defendant engaged consultants to assist with the preparation of his application for water take consent. However, this was not lodged until after the Council investigation into this offending;

(d) the defendant has acknowledged he put off making an application in his affidavit; and

(e) the defendant was aware there was a limit on the amount of water he was permitted to take.

[60] In our view the defendant was on notice that there were requirements for the taking of water and it was up to him to ensure he met those obligations and to take reasonable steps to do so.

[61] We agree with the prosecutor that the scale and duration of the offending are concerning. The average daily water take far exceeded the permitted level. The Summary of Facts records that approximately 26 million litres of water was unlawfully abstracted. The Summary of Facts records readings for bore BN20-0123 showed the water take was more than double the amount of water than allowed as a permitted activity and bore BN20-0124 showed water taken was approximately seven times the amount allowed as a permitted activity. The offending continued for over twelve months.

[62] There is no evidence that steps were taken to manage the water use within permitted activity limits. The Summary of Facts records that the defendant told the Council officers he did not know how much water he used per day. There were no records of daily water takes. In his affidavit the defendant confirms he did not have a digital meter reading when the bores were first installed. However, the agreed Summary of Facts records that a water meter for BN20-123 was installed on 22 December 2020 and a water meter for BN20-0124 was installed on or about 21 December 2021. The agreed Summary of Facts also confirms that on 25 January 2022, the officers found that each bore had a water meter installed. It appears that the defendant simply chose not to have readings taken.

[63] The defendant has acknowledged that there was a lack of supervision, particularly during the period where there were problems with the pumps. We find it very concerning that there is no evidence of monitoring of the water take, no supervision during a period where the pumps were not operating properly, and no steps were being taken to ensure compliance. The defendant should have ensured more robust and effective management practices were in place.

[64] We accept that there was some aspect of commerciality to the offending. As set out above, the defendant stated in his affidavit that he delayed the application for water take consent to apply for the two bores together, to save money and to avoid twice dealing with any potential objections. Obtaining the appropriate consents provides transparency around the use of this precious shared resource which is particularly important to tangata whenua, the community and other users and ensures some consistency with national directives and expectations around the sustainable

management of this taonga. Instead, the defendant prioritised commercial interests over legal and environmental obligations.

[65] For those reasons, we find the defendant's culpability for this offending was high.

Starting point

Prosecutor's submissions

[66] The prosecutor referred us to: *Southland Regional Council v Horizon Flowers NZ Limited & Smak* (***Horizon Flowers***),[11] *Bay of Plenty Regional Council v Dyer* (***Dyer***),[12] and *Tasman District Council v Eden Road Farms Limited* (***Eden Road Farms***).[13]

[67] The prosecutor submits there are similarities between *Horizon Flowers* and the present case and that in determining the starting point of $50,000, Judge Dwyer considered a number of factors, the most relevant being that the offending involved a

[11] *Southland Regional Council v Horizon Flowers NZ Limited & Smak* [2018] NZDC 24896 – charges relating to the unlawful taking of water between 2005 and 2010. Horizon was also sentenced regarding the breach of an abatement notice relating to the unlawful take. Horizon was aware of limits regarding the permitted amount of take in the catchment. Horizon had made applications for resource consent to take water from the catchment but these had not been determined when the abatement notice was issued. Horizon was granted resource consent. The charges relate to water takes which were not in accordance with the terms of its consent. The Court took a global approach to sentencing for the offences (other than the breach of the abatement notice) which took place within a few days of each other and were part of an overall pattern of unsatisfactory management. The Court stated that the matters of significance in the offending were the sensitive nature of the streams, the drought and record low water levels, and the fact of Horizon's knowledge of the rules and its decision nevertheless to continue irrigation. The Court determined that Horizon showed a high degree of carelessness. Starting point of $50,000 for Horizon and $20,000 for R Smak (Horizon's manager), starting point of $25,000 for the abatement notice offence.

[12] *Bay of Plenty Regional Council v Dyer* [2016] NZDC 13904 – two charges: breach of an abatement notice and the unlawful take and use of water. The council issued infringement notices and ultimately the abatement notice when it became apparent that the defendant was failing to comply with the terms of the consent, had exceeded the limits and had not installed the required water meters. Further, the defendant had wrongfully irrigated four further hectares of orchard, not within the site, from the bores. It was accepted that the adverse effect on the environment was negligible, as the total take from the aquifer concerned was only 35 per cent. However, the Court found that deliberateness in the present case was at the high end. Starting point $30,000.

[13] *Tasman District Council v Eden Road Farms Limited* DC Nelson CRN-1304-2500-484, 485, 6 May 2014 – this was a resentencing following a successful appeal against sentence. Two charges of unlawfully exceeding the water take authorised by two resource consents. The management of the water takes was careless, with a lack of attention to detail and a failure to be proactive in management of its rights. The offending occurred in a drought period. Overall, the defendant's culpability was assessed as moderate. Starting point $30,000.

high degree of carelessness and occurred when the streams were at their most vulnerable. In both cases, the offenders prioritised their commercial interests over compliance with their environmental obligations. While the present offending did not involve breach of an abatement notice, it is submitted the scale, duration and deliberateness of the defendant's offending was more serious than in *Horizon Flowers*.

[68] The prosecutor submits that there are similarities between *Dyer* and the present case. In both cases, water was taken when the defendants were not authorised to do so and were aware this was the case. Unlike in *Dyer*, the defendant is the sole owner of the kiwifruit orchard, did not have resource consent for the large-scale irrigation requirements of its orchard, and did not keep records of his water use. The prosecutor submits the scale of exceedance is far greater in the present case.

[69] The prosecutor submitted that the present offending is more serious than the offending in *Eden Road Farms* as the scale and duration of this offending is significantly higher and was deliberate rather than careless.

[70] The prosecutor submits that a starting point in the vicinity of $60,000 would be appropriate.

Defendant's submissions

[71] The defendant submits that the combination of the environmental harm risked, being at the lowest end of the scale, and the offending being a consequence of poor advice rather than an intentional act, places the offending at the low end of seriousness. In the circumstances, a lower starting point – in the range of $10,000 to $25,000 is appropriate.

[72] The defendant considers *Horizon Flowers* should be viewed as significantly more serious than the present case. While the water take concerned was less than the total overtake in this case, it was taken from a vulnerable water source during a period of low flow. The risk of harm in those circumstances was substantially higher than in the present case. There is no suggestion that the defendant in *Horizon Flowers* was unable to understand the restrictions that applied to its consent. *Horizon Flowers* involved a corporate defendant, and therefore was subject to a higher maximum

penalty. The defendant submits the starting point in the present case should be significantly less than that imposed in *Horizon Flowers*.

[73] The defendant further submits that in *Dyer* the defendant was acting in breach of an abatement notice after already receiving an infringement notice for the same conduct; this is a wilful breach of the highest degree. The defendant also submits that the fact that Mr Dyer had a consent that he was disregarding does not reduce his culpability, so the defendant's situation cannot be said to be more serious. The defendant notes in both *Dyer* and this case, there was no identifiable environmental consequence. The defendant submits Mr Dyer's responsibility was significantly higher so the fine imposed must reflect that. The defendant therefore submits a starting point of less than $30,000 is appropriate in this matter.

[74] In relation to *Eden Road Farms*, the defendant submits that while the total volume in this case is higher (subject to the comments above), the culpability of the defendant is not significantly different. The defendant is an individual defendant and there was not the aggravation of drought conditions. The defendant submits these factors indicate a starting point of less than $30,000 is appropriate.

[75] The defendant referred me to *Canterbury Regional Council v Birchbrook Limited* (***Birchbrook***).[14] In *Birchbrook*, the defendant immediately ceased offending when the offending was identified, but the offending was also of a significantly higher volume and represented a level of deliberateness that exceeds even that which is suggested by the prosecutor in this case. The defendant submits the sentence should be less than that applied in *Birchbrook*.

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[14] *Canterbury Regional Council v Birchbrook Limited* DC Christchurch CRI-2010-009-11694, 22 September 2011 – charge relating to taking of ground water to irrigate crops without resource consent. The site was in the Christchurch Groundwater Recharge Zone of the proposed regional plan. The take limits were exceeded by approximately 104,000m^3. The Court found that, although the offending had only a very small and not directly observable effect on neighbouring permitted users, it would have made a small contribution to the overall cumulative draw-down to seasonally low water levels. The defendants had estimated that the cost of obtaining the necessary permit would be $40,000-$50,000 and the company could not justify the expense for a short-term leased property as the site. The Court noted that once detected, the offending was immediately terminated. The Court found the level of offending was moderately serious even having regard to its minor effects, because it was deliberate, occurred over five years and challenged the integrity and viability of water allocation schemes. Starting point $30,000.

[76] The defendant submits an appropriate starting point would be between $10,000 to $25,000 but would not exceed the $30,000 imposed in *Dyer* and *Birchbrook*.

Conclusion on starting point

[77] The prosecutor and the defendant take radically different views of the seriousness of this offending and accordingly the starting point that is appropriate. The issue is whether the Court should accept the defendant's suggested starting point of between $10,000 to $25,000 which is less than the relatively modest starting point of $30,000 suggested in cases such as *Dyer* and *Birchbrook* or be looking at a more significant starting point at or above that in *Horizon Flowers*. The prosecutor submits the suggested starting point in the vicinity of $60,000 is modest when considered against the maximum available penalties in this case.

[78] Having considered the several cases referred to us, we have been guided most by *Horizon Flowers*. While the defendant's position is that the offending was a consequence of poor advice rather than an intentional act, we disagree. As the Court observed in *Horizon Flowers*, "…persons who use water for commercial purposes have an obligation to familiarise themselves with the relevant rules and controls and to understand and comply with them."[15]

[79] Unlike the defendant in Horizon Flowers, Mr Thomas chose not to apply for a resource consent and deliberately took water far in excess of the permitted level for more than 12 months. In the case of one bore this was more than double the permitted amount and in the case of the second bore was approximately seven times the amount allowed.

[80] The amount of overtake was significantly more than in *Horizon Flowers*. While the defendant emphasises that the water take in that case was from a vulnerable water source during a period of low flow, there is no way of knowing whether the risk of harm in this case may have been substantially higher because the defendant failed to keep records of his daily water take despite meters being available to him nor to monitor the impact of his activity on a shared resource.

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[15] *Southland Regional Council v Horizon Flowers NZ Limited & Smak*, above n 24 at [18].

[81] Matters of national importance under the RMA include preserving the natural character of rivers and their margins and protecting them from inappropriate use. The term "river" includes streams. While no specific harm can be identified, an allowance for harm can be made on the assumption that any given offence contributes to increased pressure on the groundwater catchment and uncertainty of abstraction rates generally.

[82] We conclude that the offending is moderately serious and more serious than other water take cases, including *Horizon Flowers,* even having regard to the fact that there are no discernible adverse environmental effects. The factors which have led us to this conclusion are the deliberate nature of the offending, the lack of oversight and supervision of the system, the duration, scale and commerciality of the offending, and that unlawful takes challenge the integrity and viability of processes which aim to ensure equitable sharing and sustainable management of water resources. We agree with the prosecutor that the penalty should reflect the public interest in ensuring water resources are managed sustainably.

[83] Section 7 of the Sentencing Act 2002 seeks to hold offenders accountable for the harm they have done and promote a sense of responsibility. As Judge Smith considered in *Dyer*,[16] deterrence is the primary purpose of sentencing for offending of this nature and ensuring compliance is of utmost importance to achieve the protection of water. In *Glenholme Farms* Heath J held:[17]

> … The primary sentencing goal, in an environmental prosecution, must be deterrence; both of those before the Court and others who might commit like offences. Sentences should be pitched at a level that provides a disincentive for a person to take the risk of environmental damage to avoid the need to expend money on repairs and maintenance of critical equipment.

[84] We do not accept that specific and general deterrence are not needed in this case. On the contrary, deterrence is the most important purpose of sentencing relevant in this case: both specific deterrence to Mr Thomas and general deterrence particularly for those involved in the horticulture industry. We conclude that a strong deterrent message is necessary to reinforce that compliance with the requirement to obtain

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[16] *Bay of Plenty Regional Council v Dyer*, above n 25 at [8]
[17] *Glenholme Farms Limited v Bay of Plenty Regional Council* [2012] NZHC 2971 at [41].

resource consent for water takes is not a matter of preference as to timing and cost-effectiveness. This is not the first case where a clear message has had to be given about the need for compliance regarding water takes.

[85] We also agree that the penalty needs to have some bite to ensure that it is clearly unattractive to take the risk of offending on economic grounds, such that commercial interests are not prioritised over environmental compliance. The defendant avoided the cost of two rounds of resource consent water take processes. Accepting the defendant's starting point would not be a deterrent. As Judge Dwyer observed in *Horizon Flowers*, "…it was well recognised that fines ought to be set at a level which have some "bite" to them so that they do not constitute a licensing fee which is part of the cost of doing business".[18]

[86] We do not accept the defendant's submission that because *Horizon Flowers* involved a corporate defendant that is subject to a higher fine, that the starting point in this case should be significantly less.

[87] We determine that the appropriate starting point in this case is $60,000.

Personal aggravating and mitigating factors

[88] There are no personal aggravating factors that would justify an uplift in the penalty.

[89] The prosecutor accepted that discounts of five percent for previous good character and 25 percent for early guilty plea are appropriate. The defendant agrees and did not seek any credit for further personal factors. We will allow those discounts.

Outcome

[90] We convict David Grant Thomas on the charge in CRN 22070501340 and impose a fine of $42,000, court costs of $130 and solicitor's fee of $113.

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[18] *Southland Regional Council v Horizon Flowers NZ Ltd*, above n 24, at [32].

[91] We order under s 342 of the RMA that the fine, less a deduction of 10 per cent payable to a Court bank account, be paid to the Bay of Plenty Regional Council.

Judge D A Kirkpatrick | Judge S M Tepania
District Court Judges | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 13/12/2023