IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2023-079-0000077
[2023] NZDC 26441

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

WOODLAND ORCHARDS LIMITED
Defendant

Hearing:	25 July 2023
Appearances:	H Sheridan for the prosecutor
	I Qwek for the defendant
Judgment:	29 November 2023

SENTENCING DECISION OF JUDGE DA KIRKPATRICK

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[1] The defendant Woodland Orchards Limited has pleaded guilty to a charge in CRN23079500041. This is an offence under ss 338(1)(a) and 14(2)(a) of the Resource Management Act 1991 (**RMA**) that at 469 State Highway 2, Tahawai between 8 December 2021 and 16 September 2022 it unlawfully took water for use at a kiwifruit and avocado orchard. The maximum penalty under ss 339(1) of the RMA for an offence by a person other than a natural person is a fine not exceeding $600,000.

[2] The property is a 26ha rural property located approximately 4km north of Katikati in an area where there are a number of horticultural and agricultural properties. The Tuapero Stream flows to the north of the property, and the property

sits within the Wai1 Ignimbrite Groundwater Management Zone of the Bay of Plenty Regional Natural Resources Plan.

Background

[3] Woodland Orchard installed a bore on its property in March 2021 (reference BN 20-0204) with the necessary resource consent. Resource consent was also required to take and use more than 35m^3 of groundwater per day, but the defendant did not seek consent at that time.

[4] The defendant's water use records show that between 8 December 2021 and 16 September 2022 the permitted limit of 35m^3 per day was exceeded on 97 days, with exceedances ranging from 41.4m^3 to 605m^3 per day and the total volume of groundwater taken without consent was 24,264m^3.

[5] In October 2022 the defendant applied to the Council for consent to take and use groundwater from the bore for the purpose of carrying out an aquifer pump test.

[6] On 11 August 2022 an enforcement officer of the Council carried out a site inspection. At that time the irrigation line water meter displayed a reading of 31,444m^3. The officer did not read the display unit of the bore water meter at this time.

[7] The enforcement officer did observe four 30,000 litre water storage tanks which were full of water and connected to irrigation lines and sprinkler heads throughout the adjacent kiwifruit and avocado orchards.

[8] On 14 November 2022 Mr Nathan Dowling, a principal of the defendant, provided water records to the Council for the period 7 December 2021 to 16 September 2022 showing the volume of water used on a daily basis. Those records show the exceedances to which I have already referred.

[9] On 16 September 2022 the Council issued an abatement notice to Woodland Orchards requiring it to cease taking and/or using groundwater from Bore BN 20-0204

in a manner that contravened s 14(2)(a) of the RMA or rule 43 of the Regional Plan. There was no appeal against that abatement notice.

[10] When interviewed under caution on 3 November 2022, Mr Nathan Darling stated:

(a) he is the orchard manager and responsible for environmental compliance;

(b) at the time the bore became operable in November 2021 he was aware that the groundwater take and use permitted activity limit was $35m^3$ per day;

(c) the orchard has a peak water demand of about 650-$700m^3$ per day;

(d) the bore does not supply water to any other property;

(e) a resource consent to take water was not applied for after the bore was drilled because the bore was not providing the required yield as the original pump was too small and when a larger pump was installed it turned out that it needed a larger power supply; and

(f) he did not realise the significance of what he was doing in that he did not realise how much the take went over the permitted level.

[11] The managing director of Woodland Orchard, Mr Andrew Dowling, was also interviewed under caution on 3 November 2022. He also stated that he did not realise the amount by which the operation was exceeding the permitted level of $35m^3$ per day.

[12] On 2 June 2023 the Council granted Woodland Orchard a resource consent to take groundwater.

Environmental effects

[13] The Council has no evidence of any direct environmental effects arising from the unauthorised take and use of groundwater. It is difficult for the Council to assess the impact on the catchment because not all groundwater allocation can be quantified. If water is allocated, it can be tracked and monitored, but water that is taken under

Rule 38 as a permitted activity, or under s 14(3) of the RMA for domestic or stock needs, cannot be tracked and monitored.

[14] The WAI 1 Ignimbrite Groundwater Management Zone is currently 48.6 per cent allocated. Regional Council records indicate that there are 264 consent bores drawing water from the WAI 1 Ignimbrite Groundwater Management Zone.

[15] 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

[16] Ms Sheridan for the prosecutor submitted that an appropriate starting point for this offence would be around $60,000 - $70,000.

[17] In support, counsel submitted that the gravity of the offending is related to the maintaining the integrity of the resource consenting system, which relies on engagement by resource users with consent authorities. She submitted that, given the potential cumulative effect of unknown takes of unknown scale, there needs to be a consenting system to manage a precious resource. On that basis, counsel submitted that the principle of general deterrence should be given weight even in the absence of any specific harm. Further, the sting of any find should be sufficient to be a disincentive rather than treated as a cost of doing business.

[18] In terms of the culpability of the defendant, counsel submitted that this is at the higher end because of the awareness of the defendant's principals of the limits in the Regional Plan, and awareness of the need for consent to take water.

[19] Counsel acknowledged that the defendant had available to it consent to take water from the nearby stream, but use of that consent would have required further infrastructure and the defendant chose to use the bore in the meantime. Counsel also acknowledged that the defendant has proceeded to apply for consent but submitted there is no adequate explanation in making that application.

[20] In the circumstances, counsel submitted that the offending occurred through more than carelessness and that there is an element of deliberateness or at least wilful blindness on the part of the defendant.

[21] Counsel referred to the following cases:

(a) *Southland Regional Council v Horizon Flowers NZ Limited*[1] 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*[2] 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;

(c) *Tasman District Council v Eden Road Farms Limited*[3] 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; and

(d) *Waikato Regional Council v Coates*[4] where a starting point of $20,000 in respect of unlawful take of about 1,600m^3 of water over four months, $15,000 in respect of unlawful take of an unspecified lesser amount of water over four months, and $30,000 in respect of an unspecified higher quantity of water unlawfully taken during a period of emergency drought over four months. The starting point was uplifted by 10 per cent to reflect that the offending was in breach of an abatement notice.

[22] The prosecutor submitted the volume of water unlawfully taken in the present case is significantly higher than the cases referred to above. The duration of the offending in the present case (over nine months) is also significantly greater than the above cases. The prosecutor acknowledged some of the above cases involved drought conditions, which is not a factor in this case. The prosecutor submitted the present case

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1 [2018] NZDC 24896.
2 [2016] NZDC 13904.
3 DC Nelson CRN-130402500484, 485, 6 May 2014.
4 [2014] NZDC 619.

is more serious than *Dyer*, *Eden Road Farms* and *Horizon Flowers*. The prosecutor submitted the offending is comparable to *Coates*, although this involves a corporate defendant. While *Coates* involved a fully allocated catchment and some offending in drought conditions, the present offending involved a substantially higher volume of water being taken.

[23] The prosecutor acknowledged a discount of 25 per cent for an early guilty plea is appropriate. The prosecutor submitted that given the relatively short duration of the defendant's corporate existence (incorporated in June 2017) and the lengthy duration of the offending, this is not a case where a discount for previous good character is necessary. If anything, a discount of no more than five per cent is warranted for previous good character.

Defendant's submissions

[24] Ms Qwek for the defendant Counsel submitted the offending involved a volume of water taken that was not significant in scale or effect in the context of the absence of any evidence of adverse environmental effect or vulnerability, given the aquifer was only 48.6 per cent allocated.

[25] Counsel submitted that the facts show that the defendant started on a path of obtaining all the consents that would be necessary to comply with the requirements of the Regional Plan, but it met unexpected delays. She submitted that the defendant had a genuine belief as to the likely grant of consent. She submitted Woodland Orchards culpability should be characterised as moderate at most; the offending was careless arising out of a failure to closely monitor the water take and not deliberate or commercially motivated.

[26] In response to questions from me about there being good reason for having a consenting system, counsel accepted that but pointed to the comparable sentencing decisions in relation to unauthorised water takes. Counsel submitted that care should be taken when looking solely at the quantitative factors when considering other decisions and submitted that regard should also be had to the qualitative factors. In this case, she submitted that a key factor was the taking of water when an application for consent was delayed. She referred to the interviews with principals of the defendant

and their statements that they had not realised that the scale of the unauthorised take was as great as it was. She also submitted that there had been no warning of non-compliance or abatement notice prior to the period of offending. She noted that in both *Dyer* and *Coates* there had clearly been flouting of the relevant controls. In this case, counsel submitted that the offending take had ceased immediately when notified of it and the defendant had used its alternate source of water from the stream. She submitted that there had been no gain from any deliberate non-compliance. Rather, counsel submitted that there had been one period of non-compliance which had ceased when the defendant was told to do so, and which was now consented.

[27] While accepting the applicability of the principle of general deterrence in sentencing, counsel submitted that care needed to be taken not to make an example of a defendant for the purpose of general deterrence when the circumstances indicated that specific deterrence may not be as significant an issue.

[28] Counsel submits that a starting point in the range of $30,000 - $50,000 is appropriate.

[29] Counsel submitted that mitigating factors included the clean record of the defendant and its principals and their compliance with the requirements of the Regional Council. She submitted a discount of five per cent is appropriate for previous good character. As well, she submitted that a discount of 25 per cent for an early guilty plea would be appropriate.

Legal framework

[30] 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*,[5] first identifying the 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

5 [2020] NZCA 296 at [45] – [47].

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

[31] 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.

[32] As to the overall sentencing approach for offending against the RMA, *Machinery Movers Ltd v Auckland Regional Council*[6] and *Thurston v Manawatu-Wanganui Regional Council*[7] 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

[33] 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 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.

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6 [1994] 1 NZLR 492 at 503 (HC).
7 HC Palmerston North CRI-2009-454-24, 27 August 2010 at [39] – [66] and [100].

[34] The Regional Plan requires resource consents to be obtained in order to drill a bore into an aquifer and to take ground water over a certain limit. These requirements have been established to promote the sustainable management of water, in all the ways in which sustainable management is defined in s 5(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, accumulatively, reducing public confidence in the administration of the regional plan.

[35] I consider there was an element of wilful blindness in this offending. The defendants were aware of the need for a resource consent. They should have been monitoring the scale of the take. I acknowledge the defendants ceased when notified of the take.

[36] In all the circumstances, I consider an appropriate starting point is $60,000.

[37] I note the relatively short duration of the defendant's corporate existence, but I also note that Woodland Orchards has no history of offending, they have not received any Infringement Notice or warning from the Council, and Nathan and Andrew Darling were involved in a similar process for the installation of a bore on another orchard without issue. I will allow a discount of five per cent for prior good character.

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

Sentence

[39] I convict Woodland Orchards Limited and sentence it to pay a fine of $42,000.

[40] 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.

[41] 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