IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2022-070-002738
[2023] NZDC 2078

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

MANIATUTU HEIGHTS LIMITED
Defendant

Hearing:	15 May 2023
Appearances:	V Brewer for the prosecutor S Gunatunga for the defendant
Judgment:	2 February 2024

SENTENCING DECISION OF JUDGE DA KIRKPATRICK
AND JUDGE SM TEPANIA

Introduction

[1] The defendant company, Maniatutu Heights Limited (**MHL**), has pleaded guilty to one charge in CRN2200500866 of unlawfully taking water for use at a kiwifruit orchard at 1050 Maniatutu Road, Pongakawa (**the property**) between 14 September 2021 and 25 January 2022, in breach of ss 338(1)(a) and 14(2)(a) of the Resource Management Act 1991 (**RMA**).

[2] The maximum penalty for the offending is a fine not exceeding $600,000. The prosecution proposes a starting point in the vicinity of $50,000 while the defendant proposes a starting point of between $35,000-40,000.

Background

[3] The property is a 77-hectare rural property located approximately 16 km south-east of Te Puke within the Kaikokopu-Pokopoko-Wharere groundwater management zone, in an area where a number of pastoral farms are currently being converted into large kiwifruit orchards.

[4] MHL purchased the property in July 2020. Included in MHL's purchase of the property was an easement to drill bore BN20-0200.

[5] Prior to MHL purchasing the property, earthworks had begun to recontour the property and convert it from a dairy farm into a kiwifruit orchard. The earthworks were completed by 2021 and by September 2021, 26.34 hectares of kiwifruit had been planted at the property. A further 5.92 hectares of kiwifruit canopy was planned to be planted in 2022/2023 and by September 2022, 32.26 hectares of kiwifruit had been planted.

[6] Kiwifruit orchards require large volumes of water for irrigation purposes in the summer and frost protection in the winter. Depending on variables such as soil, rainfall and field capacity, at least 40m³ of water may be required each day to irrigate one hectare of kiwifruit canopy in the heat of summer.

[7] To address the irrigation and frost protection needs for the kiwifruit orchard at the property, the defendant:

(a) intended to draw groundwater from bores; and

(b) pump that water to a water storage pond on the property which has approximately 20,000m³ (i.e. 20 million litres) of storage capacity.

Resource consents

[8] 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 its kiwifruit orchard at the property.

[9] In December 2020, MHL applied to the Bay of Plenty Regional Council for a resource consent to install a single bore at the eastern side of the property, near the accessway from Maniatutu Road.

[10] MHL's consent application stated that the purpose of the bore was to provide irrigation with a maximum weekly water take amount of 4,536m³.

[11] The Council granted MHL the bore drilling resource consent RM20-0877. However, when the bore was drilled in 2021 no water was found at the consented location and the bore hole was filled in.

Bore BN20-0020

[12] On 5 August 2021, MHL applied to the Council for a resource consent to take water from bore BN20-0020 located on an adjacent property owned by David Thomas. That bore had been installed in October 2020 under resource consent RM20-0087. That consent authorised the drilling of the bore but did not authorise the taking of water from the bore in excess of the volume permitted by the RNRP.

[13] MHL's original application to take and use water from bore BN20-0020 stated:

> Maniatutu Heights Limited (the applicant) is applying for a resource consent to take water from bore BN20-0020. … The applicant proposes to take water from the bore for irrigation, frost protection and domestic use of a new 50.79ha kiwifruit orchard.
>
> The 300 mm diameter cased bore is 42 m deep …. The static water level of the bore at the time it was drilled was 7.78 metres below ground level …
>
> The applicant requests to take water from the bore and pump it into a 20,000 cubic metre storage pond, the water from the pond is proposed to be used for horticultural irrigation and frost protection as well as for domestic use.
>
> The applicant seeks a resource consent to take water from the bore for irrigation, frost protection and domestic use at a maximum rate of 7.5 L/s. A weekly volume of 4,536 cubic metres and an annual volume of 231,865.5 cubic metres is requested for irrigation of kiwifruit.

> A daily volume of 270 cubic metres is requested for frost protection of 2 ha of gold kiwifruit for up to 15 frost events per year. An annual volume of 4,050 cubic metres per year is requested for frost protection.
>
> Water is also required for domestic use, at a maximum rate of 7.5 L/s. There is a 3-bedroom house that has a maximum of 5 occupants. Also, water is requested for staff facilities, which is required for approximately 50 staff 200 days per year. The total water requested for domestic use is 677.5 cubic metres per year.
>
> The applicant proposes to take a total annual volume of up to 236,593 cubic metres for irrigation, frost protection and domestic use.
>
> A consent term of 15 years is requested.

[14] The application stated that bore BN20-0020 draws from the Kaikokopu-Pokopoko-Wharere aquifer which:

(a) was currently 77% allocated; and

(b) had an available allocation of 15,938,294 cubic metres per year, of which 12,352,391 cubic metres per year was already allocated.

[15] The application also stated:

> A significant amount of investment has occurred to establish the kiwifruit crop and to install the infrastructure and this investment must be protected.

[16] On 16 August 2021, Mr Nicholl sent an email to the Council officer who was processing the water take consent application and said that he was planning to install an additional bore at the property because the current bore (BN20-0020) would not yield enough water for the kiwifruit orchard project.

[17] On 19 August 2021, a Council consents officer emailed Mr Nicholl and his planning consultant to advise them of issues with their water take consent application, namely:

(a) the constant rate pumping test was flawed and a further pumping test was required;

(b) although the requested rate of take of 7.5 L/s was not excessive, the defendants were requesting an essentially continuous groundwater abstraction at the requested maximum rate of take for 24 hrs a day, 7

days a week, for nearly 52 weeks a year;

(c) the application stated that there was no active bore within 1 km (although there is at least one bore 1.24 km away) but MHL should assess an expanded radius of influence.

[18] The Council placed the defendant's water take consent application on hold until further information was provided that addressed these issues.

Bore BN21-0175

[19] In September 2021, MHL obtained a resource consent to install another bore on Mr Thomas' property. That bore was installed in October 2021 and the bore was assigned the number BN21-0175. However, no resource consent was sought to take water from this bore until December 2022.

RM21-0481 – Notification of application for water take from bore BN20-0020

[20] After drilling bore BN21-0175 in October and November 2021, MHL provided further information to the Council regarding the application to take water from bore BN20-0200, amending it by removing the frost protection element and reducing the total amount of water required, along with the extent of planted area.

[21] After assessing the further information from MHL, the bore testing was considered inadequate by the Council which concluded that the potential effects of MHL's proposed water take from bore BN20-0020 on nearby consented bores in the same catchment would be more than minor. Council identified three potentially affected parties who should be notified of MHL's application.

[22] The three potentially affected parties all made submissions opposing MHL's water take application. They each stated that the protection of the water supply in this catchment was of high importance to them and raised concerns about:

(a) the impact that MHL's water take would have on their existing rights to take groundwater from the relevant catchment;

(b) the fact that a cluster of bores were being installed in this catchment

> and they were concerned that if all proposed bores and water takes were not assessed on a combined basis, the Council would allow unsustainable water takes from the catchment.

[23] Another submitter stated:

> Our water supply provides water for 8 homes and a dairy farm. Access to clean water is necessary for our existing operations. We do not want any adverse effects to our existing water supply or additional costs.
>
> The volumes of water required for a kiwifruit orchard are large and need to be taken from a sustainable source. Until BOPRC has aquifer mapping done it cannot allocate sustainable water takes or accurately predict the adverse effects on existing users.

[24] After receiving the submissions, MHL asked that its water take consent application relating to bore BN20-0200 be placed on hold while it obtained further information to respond to the submissions.

New water take consent application

[25] A public hearing for MHL's consent application RM21-0481 to take water from bore BN20-0020 was heard at the Whakatane office of the Council in November 2022.

[26] However, before the Council decided this application:

(a) MHL applied for a resource consent on 8 December 2022, to take groundwater from bore BN21-0175 to irrigate 48.79 hectares of gold kiwifruit. Bore BN21-0175 is approximately 500 metres north of bore BN20-0020 and was drilled in September 2021;

(b) on 20 December 2022, the Council granted resource consent RM22-0630 which authorises MHL to take up to 226,289 cubic metres of water per annum from bore BN21-0175;

(c) on 4 April 2023, MHL withdrew consent application RM21-0481 to take water from bore BN20-0020 on the grounds that an alternative consent had been granted to take groundwater.

[27] At the time this prosecution was commenced, resource consent application RM21-0481 relating to bore BN20-0200 remained on hold and had not been granted.

The offending and subsequent investigation

[28] In September 2021, the defendant engaged Verification Services Limited to test and verify the water meter attached to BN20-0020. On 14 September 2021, Verification Services verified the water meter for bore BN20-0020. It confirmed that at the conclusion of the testing and verification process on 14 September 2021, the water meter reading showed that 2,177.1m^3 of water had been taken from bore BN20-0020.

[29] On 10 December 2021, a resident of a nearby property contacted the 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 Council carried out compliance inspections of properties in the catchment, that had consented bores. This included the defendant's property.

[30] On 25 January 2022, Council enforcement officers inspected the property and the adjacent property where bore BN20-0020 is located. At the start of their inspection, the officers met David Thomas who owns the property where bore BN20-0020 is located. Mr Thomas confirmed that the defendant has exclusive use of bore BN20-0020.

[31] When the officers inspected bore BN20-0020 at 11:54am on 25 January 2022, they observed that the bore's water meter had a reading of 14,748m^3. This meant that 12,571m^3 (i.e. 12,571,000 litres) of water had been abstracted from bore BN20-0020 since the verification date on 14 September 2021 (when the meter reading was 2,177.1m^3).[1] This equates to an average water take over 134 days of approximately 93.8m^3 per day. This is 2.7 times more than the defendant was allowed to take from this bore as a permitted activity under rule 38 of the RNRP.

[32] On 1 March 2022, the Council issued an abatement notice to the defendant requiring it to cease taking and/or using groundwater from bore BN20-0020 in a manner that contravenes section 14(2)(a) of the RMA and / or in contravention of Rule 43 of the RNRP. This abatement notice has not been appealed and remains in force.

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1 14,748 m^3 - 2,177.1 m^3 = 12,570.9 m^3.

[33] Regional Council officers inspected BN20-0020 again on 22 March 2022. During this inspection the officers observed that the bore's meter reading was still 14,748m^3, which indicated that no additional water had been drawn from the bore since 25 January 2022.

Defendant's explanation

[34] On 17 and 18 February 2022, a Council enforcement officer sent Walter Nicholl, one of MHL's directors, emails advising him that the Council had inspected the defendant's property after receiving a complaint regarding potential unlawful water takes in the Maniatutu catchment area. In those emails, 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 91.47m³ per day between 14 September 2021 and 25 January 2022.[2]

[35] On 18 February 2022, Mr Nicholl sent an email to the Council containing the following explanations:

> That's probably correct …, it's important to work within the rules to preserve our water resources. We have exceeded the daily permitted activity of 35m3 at 2.5ltr per second abstraction rate by pumping more hours, the bore has the ability to pump sustainably at 28m3 per hr. According to my calculations we have rationalised the water we have used to minimize waste.
>
> [W]e don't have consent to take as yet.
>
> Our consent process has taken quite some time to process through unfortunate events like covid, …. an earthquake that collapsed the bore, …. submitters oppos[ed] our consent based on very little evidence [and] the bore test results which twice have been not professionally done by the contractor involved.
>
> I am very [conscious] of my obligations as a steward of this land to protect our precious resources. Water being one of those. …
>
> Some people drive past and often make assumptions it's not fair why aren't we doing this and so on. Tall poppy alive and well.
>
> They don't realize it's all risk. When stock are not watered then the farmer is persecuted by others and its similar for kiwifruit growing where the vines can at times come under extreme conditions through no fault of their own and live to within an inch of their lives through lack of water. Owners such as myself

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[2] Although Council's calculations on 18 February 2022 included an allowance for stock drinking water, stock drinking water at the property was not supplied from BN20-0020 but from two water storage tanks supplied by a surface water take.

> have to make hard decisions sometimes contradicting their own values in order to survive.
>
> To that end I have been operating the bore in a sustainable manner albeit slightly above permitted activity.

[36] When Mr Nicholl was later invited by the investigating Council officer to attend a formal interview, both his lawyers and the defendant's lawyers declined the invitation on his behalf. Mr Nicholl's lawyers asked the Council to provide questions so they could provide a written response to those questions.

Sentencing principles

[37] The High Court decision in *Thurston v Manawatu Wanganui Regional Council*[3] 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.

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

[39] More specifically 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.

[40] 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

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

intrinsic values of ecosystems, maintenance and enhancement of the quality of the environment, and any finite characteristics of natural and physical resources.

[41] The two-step methodology for sentencing set out by the Court of Appeal in *Moses v R*[4] involves first identifying an appropriate starting point for the offending and then adjusting that to account for the personal aggravating and mitigating factors relevant to the offender.

Environmental effects

[42] The Agreed Summary of Facts records at 46-52:

> The defendant's water take activities resulted in more than 12 million litres of water being abstracted from BN20-0020 over a four month period between September 2021 and January 2022. This is almost 8 million litres more than 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 defendants' unauthorised take and use of groundwater 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.[5]
>
> 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 BN20-0020 is 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 is unknown.
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> Issues relating to water abstraction have been identified in the RNRP:

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

5 *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.

(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.**
>
> 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.**

Since the offending was detected, the defendant has carried out testing of the potential environmental effects of continuous pumping of water from BN20-0020.[6] This testing indicated that (unless some unusual bore anomaly occurs), BN20-0020 can sustainably draw water from the aquifer for long periods of time without adverse environmental effects. A Groundwater Assessment report in relation to Bore BN20-0020 was prepared on 20 October 2022 and deemed effects on surrounding water takes and/or the environment to be less than minor. This has been confirmed by Council appointed hydrologists in a Groundwater Peer Review report dated 27 October 2022. However, the defendant kept no records of BN20-0020's use over the offence period and it is unknown if the bore was operated sustainably over the offence period or whether any adverse effects of the offending were less than minor.

[43] The prosecutor submits that groundwater is an enormously valuable resource in New Zealand for both 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 identified adverse physical environmental effects from the offending. However, unlawful water takes are an issue of concern given regional and national concerns about water sustainability and the difficulty detecting such offending. The Council has been working with the kiwifruit industry for the past 15 years to encourage compliance with water take limits.

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[6] A constant rate pumping test carried out in April 2022 showed an unusual drawdown response and therefore a stepped rate test and another constant rate test were conducted in August 2022.

[44] The defendant does not dispute the prosecutor's position in relation to environmental effects. It is submitted that there are no proven adverse physical environmental effects from the offending, so that this is not a case where water was unlawfully taken from a particularly vulnerable environment or one home to endangered or susceptible fauna, and that in those circumstances, the environmental effects must be considered to be low. Nevertheless, as Mr Nicholl set out in his affidavit, it is acknowledged that the protections are important to avoid adverse effects and he and MHL are motivated to do what they can to protect the environment and its resources.[7]

Conclusion on environmental effects

[45] The Agreed Summary of Facts records that the Council has no evidence of what, if any, direct physical environmental effects arose from the defendant's unauthorised take and use of groundwater during the offence period. It notes that it is difficult for the Council to assess the impact on the relevant groundwater catchment because not all groundwater allocation can be quantified. The Court accepts that there were no discernible physical environmental effects and that there was still allocation available in the Kaikokopu-Pokopoko-Wharere Groundwater Management Zone.

[46] Under s 7(g) of the RMA, we must have particular regard to the finite characteristics of the freshwater resource. We accept the prosecutor's submission that unlawful water takes are an issue of concern identified in the RNRP given the following:

(a) national and regional concerns about water sustainability;

(b) the increasing demand for water, particularly in the Bay of Plenty region where the Council has been working with the kiwifruit industry for the last 15 years to encourage compliance with water take limits;

(c) the potential effects of over-abstraction of groundwater; and

[7] Affidavit of Jonathan Walter Nicholl dated 8 May 2023, at [26] to [33].

(d) the difficulty in detecting such offending.

[47] We note that the Agreed Summary of Facts records that since the offending was detected, the defendant has carried out testing of the potential environmental effects of continuous pumping of water from BN20-0020. This testing indicated that unless some unusual bore anomaly occurs, BN20-0020 can sustainably draw water from the aquifer for long periods of time without adverse environmental effects.

[48] However, the Agreed Summary of Facts also records that Mr Nicholl told the Council MHL had exceeded the maximum daily water rate of $35m^3$ and that its consent had taken quite some time to process. MHL should not have been taking water beyond that permitted in the RNRP without a consent. The Agreed Summary of Facts records that approximately 8 million litres more than would have been allowed as a permitted activity by rule 38 of the RNRP was taken.

Culpability

[49] 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, because the company was in the process of applying for a water take consent but knew its application was on hold. Rather than wait for the consent to be granted, MHL proceeded to take significant volumes of groundwater to irrigate its kiwifruit orchard. The prosecutor submits that a 26-hectare gold kiwifruit orchard will generate returns of approximately $4.5 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: 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. However, based on the total amount of water extracted during the offence period,

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

the average daily water take was at least 93m^3 per day, which is more than double the permitted daily limit of 35m^3;

(c) the duration of the offending: MHL's offending continued for over four months (134 days);

(d) the commerciality of the offending: the prosecutor submits that the defendant avoided the cost of obtaining water from other lawful sources, to irrigate its orchard, and chose to prioritise its commercial activity over compliance with the RMA. The prosecutor highlights that in his email to Council of 18 February 2022, Mr Nicholl stated, "Owners such as myself have to make hard decisions sometimes contradicting their own values in order to survive."

[50] The defendant submits the offending was unintentional and should be considered careless. It is submitted that MHL had no reason to deliberately exceed the permitted daily take and that there was no commercial gain or other benefit in doing so. MHL had only seedlings planted at the time of offending. It also had sufficient stores of water throughout the offending period and did not require the amounts carelessly extracted in exceedance of that permitted by the RNRP.

[51] Counsel submits the defendant's culpability should be characterised as moderate because:

(a) MHL knew that consent was needed to take water in excess of 35m^3 per day and MHL did not require the additional water during the offending period or summer of 2022;

(b) the offending was accidental (as explained in the affidavit of Mr Nicholl). MHL used a manual pump which a contractor was tasked with turning on and Mr Nicholl was responsible for turning off. However, Mr Nicholl was frequently required to divert his attention to his medical emergencies, and in those circumstances, if the pump was on, he says he would forget to turn the pump off. He was not himself at that time due to his wife's illness;

(c) the offending occurred because of poor processes and communications between MHL personnel and its contractor;

(d) the offending was not commercially motivated, nor did MHL benefit commercially from it.

[52] Counsel further notes that this is MHL's first enforcement event. Prior to the offending MHL had never been on notice of, or received any infringement notice or warning relating to, non-compliance or offending. In addition, as soon as the offending was brought to light and an abatement notice was issued, MHL ceased taking water from Bore 20 altogether.

Conclusion on culpability

[53] This is a strict liability offence and, as the defendant accepts, the scale and duration of the offending is accepted. Even if the offending was not deliberate and resulted from a combination of poor communication with a contractor and inadequate equipment, this could not be a defence to the charges or otherwise exculpatory.

[54] MHL as the owner of the property has responsibility for the property's water use. MHL knew the relevant rules and regulations having applied for a resource consent for bore BN20-0200 and knew the application was on hold pending receipt of further information. Notwithstanding that the consenting framework may take time, it is important for commercial enterprises and persons who use water for commercial purposes to familiarise themselves with the relevant rules and comply with them.

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

(a) the defendant knew that consent was needed to take water in excess of $35m^3$ per day;

(b) the defendant had no resource consent for taking of water and kept no records of daily water takes;

(c) despite the defendant obtaining no commercial gain or other benefit from offending, MHL accepts taking the water to store in its pond with the obvious intention to irrigate its orchard over the summer period. That

the irrigator was not ready to irrigate until December 2021 and the water subsequently was not needed, is not a defence to the charge or otherwise exculpatory;

(d) by the comments in his email of 18 February 2022, Mr Nicholl acknowledged the need to protect the crop if necessary, overshadowed the duty to comply.

[56] In our view MHL was aware that there were requirements for the taking of water and it was up to MHL to ensure it met those obligations and to take reasonable steps to do so.

[57] 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 12 million litres of water was unlawfully abstracted from bore BN20-0020 over a four-month period between September 2021 and January 2022. This is almost 8 million litres of water more and more than double than allowed as a permitted activity.

[58] There is no evidence that steps were taken to manage the water use within permitted activity limits and no records of daily water takes were kept.

[59] The Court expresses sympathy for the personal circumstances of Mr Nicholl and his family. We accept that as soon as the offending was brought to light and an abatement notice was issued, MHL ceased taking water from bore BN20-0200 altogether and both parties acknowledge that this is MHL's first enforcement event. We note that the charges against the director, Mr Nicholl, have been withdrawn by leave.

[60] We emphasise that there should have been more effective management practices in place but note that MHL now has the tools to ensure compliance. We accept, as the defendant states in his affidavit, that this offence is an absolute outlier for MHL.

[61] We therefore characterise the defendant's culpability as moderate.

Starting point

Prosecutor's submissions

[62] The prosecutor referred us to:

(a) *Southland Regional Council v Horizon Flowers NZ Limited & Smak* (***Horizon Flowers***),[9]

(b) *Bay of Plenty Regional Council v Dyer* (***Dyer***),[10]

(c) *Tasman District Council v Eden Road Farms Limited* (***Eden Road Farms***),[11] and

(d) *Waikato Regional Council v WRB Coates* (***Coates***).[12]

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[9] *Southland Regional Council v Horizon Flowers NZ Limited & Smak* [2018] NZDC 24896 – charges relating to the unlawful taking of water. Horizon was aware of limits regarding the permitted amount of take in the catchment but prioritized their commercial interests over compliance with their environmental obligations. The Court stated that 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. 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.

[10] *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 and deterrence was the primary purpose of sentencing for offending of this nature. Starting point $30,000.

[11] *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 considered 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.

[12] *Waikato Regional Council v WRB Coates* DC Auckland CRN-1306-350-2038, 2039, 2040, 2041, 2 April 2014 – damming a spring and the unlawful take and use of water. The effects were seen as minor however in terms of deliberateness the defendant knew it was illegal to take the water but continued to do so in any event which Judge Smith considered, must move the offence into a more moderate category, even though the volumes of water were likely to be less than 10,000m^3. The Starting Point for the 2011 offence was $20,000. The Starting Point was $15,000 in respect of the 2012 offence given the smaller volumes involved and $30,000 for the 2013 offending given the

[63] The prosecutor submits there are similarities between *Horizon Flowers* and the present case. 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 that the scale, duration and deliberateness of the defendant's offending was more serious than in *Horizon Flowers*.

[64] The prosecutor submits that there are also 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*, MHL did not have resource consent for the large-scale irrigation requirements of its orchard and did not keep records of its water use. The prosecutor submits the scale of exceedance is far greater in the present case.

[65] The prosecutor submitted that the present offending is more serious than the offending in *Eden Road Farms* because not only is the scale and duration of this offending significantly higher than the *Eden Road Farms* offending, but MHL's offending was deliberate rather than careless.

[66] The prosecutor submits that a starting point in the vicinity of $50,000 would be appropriate to recognise that MHL's offending was deliberate, commercially motivated, and continued for over four months but that there are no obvious adverse environmental effects. It should also be appropriate to deter those involved in the horticultural sector from prioritising significant financial reward above environmental compliance and should also reflect the public interest in ensuring water resources are managed sustainably.

Defendant's submissions

[67] MHL submits that a starting point in the range of $35,000 to $40,000 is appropriate, is in line with similar offending and would balance the particular circumstances by which the offending occurred, including that MHL's offending:

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higher volumes taken and during a period of drought, also impacting on adjacent properties with existing consents. An uplift to the extent of 10% for each of the charges was applied due to the existence of an Abatement Notice.

(a) was careless, but not deliberate or commercially motivated;

(b) did not involve any disregard to any previous communication from the Council, infringement notice or other warning;

(c) involved a volume of unlawful water take that could be considered moderate over a significant period of time, justifying a starting point greater than $30,000.

[68] The defendant submits that *Dyer* is distinguishable from the present matter because it involved the defendant's repeated failure to comply with various conditions, the issue of an infringement notice, following which further offending occurred, and the issue and contravention of an abatement notice; this is a wilful breach of the highest degree. The defendant submits that the deliberateness of offending elevated Mr Dyer's offending to the high end, whereas once MHL found out about its offending it immediately ceased taking water from Bore 20 altogether, engaged a third party to manage the platform and progressed installing measures to promote compliance.

[69] In relation to *Eden Road Farms*, the defendant submits that while MHL's volume of unlawful take was greater and across a greater period, its offending was not deliberate and there was not a breach of consents and the aggravation of drought conditions. It is submitted that while this matter is broadly comparable with *Eden Road Farms*, these contrasting factors indicate a starting point of less than $30,000 is appropriate.

[70] The defendant addressed the prosecutor's submission that *Horizon Flowers* is similar to the present case in terms of prioritisation of commercial interests over environmental obligations. The defendant distinguishes the case given factors including sensitive environment impacts, deliberateness and repeat offending were present in *Horizon Flowers*, but absent in the present matter.

[71] MHL also submitted that the decision in *Coates* should be distinguished on the basis that in *Coates* the offending was deliberate and had clear commercial motivation as the defendant admitted that there were alternative legal avenues available, but they

were not pursued due to high costs and the farm's poor financial position. By contrast in this case, MHL considers there was no deliberate decision to take extra water and no commercial motivation to do so and therefore submits the sentence should be less than that applied in *Coates*.

Conclusion on starting point

[72] The prosecutor and the defendant take 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 $35,000 to $40,000, which is more than the relatively modest starting point of $30,000 suggested in cases such as *Dyer, Eden Road Farms, Coates* and *Birchbrook*, to reflect a volume of unlawful water take that could be considered moderate over a significant period of time 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 $50,000 is modest when considered against the maximum available penalties in this case, being approximately 8 percent of the total available maximum penalties of $600,000.

[73] Having considered the several cases referred to us we accept that a starting point higher than that suggested in cases such as *Dyer, Eden Road Farms* and *Coates* is warranted to reflect the scale and duration of offending in this case. We have been guided most by the decision in *Horizon Flowers*. While the defendant's position is that the offending was careless but not deliberate or commercially motivated, given the combination of poor communication and personal reasons which gave rise to the offending, and the stage of the orchard at the time, we disagree.

[74] MHL's offending was deliberate and in the full knowledge that a water take consent was required and that its application for consent was on hold. MHL did not have resource consent, did not keep records of its water use, taking more than double the permitted daily limit of 35m^3 for a period of over four months. While the defendant may have had no commercial gain or other benefit from the offending, MHL accepts taking the water to store in its pond, avoiding the cost of obtaining water from other lawful sources, with the intention to irrigate its orchard and/or protect the crop if

necessary over the summer period, essentially prioritising its commercial activity over compliance with the RMA.

[75] While the defendant considers the offending was accidental because Mr Nicholl was required to turn off the manual pump, given the scale and duration of MHL's offending it is evident that MHL should have ensured more effective management practices and monitoring systems were in place to prevent a breach of the rules.

[76] We accept, as the defendant submits, that this matter does not involve the breach of an abatement notice or repeat offending and that upon being advised about its offending, MHL immediately ceased taking water from Bore 20 altogether, engaged a third party to manage the platform and progressed installing measures to promote compliance. However, this is what the Court would have expected MHL to do in any event. Those matters are relevant to determining the mitigating factors that might be appropriate to justify any subsequent discount.

[77] We accept that the scale and duration of MHL's offending was more serious than in *Horizon Flowers* but while the Court determined in that case that Horizon showed a high degree of carelessness and the deliberateness of offending in *Dyer* elevated Mr Dyer's offending to the high end, we have already characterised the defendant's culpability here as moderate. For that reason, we consider a similar starting point to, but not more than, that suggested in *Horizon Flowers* is necessary.

[78] While the defendant emphasises that the waterway at issue in that case was at its most vulnerable, was a sensitive environment, home to at-risk fish species and water had been taken 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 and to monitor the impact of his activity on a shared resource.

[79] Matters of national importance under the RMA include in s 6(a) 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.

[80] We conclude that the offending is moderately serious, notwithstanding that there are no discernible adverse physical environmental effects. The finite characteristics of freshwater resources require its sustainable management, including by keeping accurate records through a comprehensive system of water permits of where water may be taken from and how much may be taken. Actions which contravene the rules of this system are therefore a challenge to it, with potential consequences for the sustainability of the resource.

[81] In that context, the factors which have led us to the conclusion that this offending was moderately serious are:

(a) the scale and duration of the offending;

(b) the lack of effective management practices and monitoring systems;

(c) the commerciality of the offending; and

(d) that unlawful takes challenge the integrity and viability of processes which aim to ensure sustainable management, including equitable sharing of water resources.

[82] We agree with the prosecutor that the penalty should reflect the public interest in ensuring water resources are managed sustainably. 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*,[13] 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:[14]

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[13] *Bay of Plenty Regional Council v Dyer,* above n 10 at [8].
[14] *Glenholme Farms Limited v Bay of Plenty Regional Council* [2012] NZHC 2971 at [41].

> … 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.

[83] We consider that specific and general deterrence are needed in this case. Deterrence is the most importance purpose of sentencing relevant in this case: both specific deterrence to MHL 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 resource consent for water takes is not a matter of preference as to timing. This is not the first case where a clear message has had to be given about the need for compliance regarding water takes.

[84] 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 obtaining water lawfully. 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".[15]

[85] For all those reasons, we determine that the appropriate starting point in this case is $50,000.

Personal aggravating and mitigating factors

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

[87] MHL has no previous enforcement history with the Council.[16]

[88] The defendant submitted that a discount of 5 percent is justified given that MHL has demonstrated significant remorse, good character and has no prior history

[15] *Southland Regional Council v Horizon Flowers NZ Ltd*, above n 9, at [32].
[16] Agreed Summary of Facts at [53].

of offending. It was also submitted that a discount of 25 percent for early entry of a guilty plea is appropriate.

[89] The prosecutor accepted that discounts of 5 percent for previous good character and 25 percent for early guilty plea are appropriate.

[90] The defendant also sought a further 5 percent discount for being heavily involved in environmental initiatives demonstrating dedication to protection of the environment and resources. The defendant submitted this would also recognise the substantial measures MHL has implemented and continues to undertake to ensure future compliance, including installation of telemetric monitoring at its bores and engagement of a manager.

[91] In the normal course of events, a discount of 5 percent for good character is given to recognise a defendant's prior history. Good character is also an ongoing matter in our view and in these particular circumstances where the defendant has not just obtained consent, rectified equipment issues and improved its technology to ensure ongoing compliance but has also engaged in positive environmental initiatives and is leading research and development committed to protection of the environment, that ongoing good character and positive contribution also reflects remorse and can be appropriately recognised. We do not think a further discount of 5 percent is necessary to reflect that ongoing good character, but a discount of 3 percent is warranted.

[92] We will therefore allow the agreed discounts of 30 percent for good character and early guilty plea with the additional 3 percent to reflect ongoing good character, remorse and positive environmental contributions.

Outcome

[93] We convict Maniatutu Heights Ltd on the charge in CRN 22070500866 and impose a fine of $33,500, Court costs of $130 and solicitor's fee of $113.

[94] We order under s 342 of the RMA that the fine, less a deduction of 10 percent 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: 01/02/2024