ORDER PROHIBITING PUBLICATION OF ADDRESS WHERE OFFENDING OCCURRED PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2023-070-004249
[2024] NZDC 10857

BAY OF PLENTY REGIONAL COUNCIL
Prosecutor

v

YONITA GWEN HARPUR
BERNARD DALE HULL
Defendants

Hearing: 13 May 2024

Appearances: H Sheridan for the Prosecutor
E Stewart for the Defendants

Judgment: 13 May 2024

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] Ms Harpur and Mr Hull you each appear for sentence on four charges of breach of provisions of the Resource Management Act 1991 and Natural and Built Environment Act 2023 brought by Bay of Plenty Regional Council as follows:

Ms Harpur

(a) CRN 23070501886 - discharging a contaminant, namely septage, onto or into land where it may enter water; s15(1)(b) and 338(1)(a) RMA; offence date between 1 January 2019 and 19 December 2022.

(b) CRN 23070501887 - contravening abatement notice RA22-00222; s338(1)(c) RMA; offence date between 20 January 2023 and 15 May 2023.

(c) CRN 23070501928 - discharging a contaminant, namely septage, onto or into land where it may enter water; s15(1)(b) and 338(1)(a) RMA; offence date 30 October 2023.

(d) CRN 23070501930 - contravening abatement notices RA22-00222 and RA22-00224; s338(1)(c) RMA; offence date 30 October 2023.

Mr Hull

(a) CRN 23070501932 - discharging a contaminant, namely septage, onto or into land where it may enter water; s15(1)(b) and 338(1)(a) Resource Management Act 1991 …; offence date between 1 January 2019 and 19 December 2022.

(b) CRN 23070501933 - contravening abatement notice RA22-00220; s338(1)(c) RMA; offence date between 20 January 2023 and 15 May 2023.

(c) CRN 23070501934 - discharging a contaminant, namely septage, onto or into land where it may enter water; s15(1)(b) and 338(1)(a) RMA; offence date 30 October 2023.

(d) CRN 23070501936 - contravening abatement notices RA22-00220 and RA22-00223; s338(1)(c) RMA; offence date 30 October 2023.

[2] The charges against each of you mirror those against the other. Two of the charges against each of you (charging documents ending 1886, 1928, 1932 and 1934) involve the discharge of septage from a domestic septic tank. Septage is the term used in the Council's Regional Effluent Treatment Plan for waste from domestic waste systems. It will be seen from the charging documents that one of the septage discharges was ongoing between 1 January 2019 and 19 December 2022 (the ongoing discharge). The second charge relates to a discharge on a single day, 30 October 2023 (the October 2023 discharge).

[3] The two remaining charges against each of you relate to failure to comply with abatement notices issued by the Council seeking to terminate the discharges which breached Regional Plan rules. The first abatement notice charges allege non-compliance between 20 January and 15 March 2023 (charging documents ending 1887 and 1933). The second abatement notice charges allege non-compliance at the same time as the 30 October 2023 discharge was discovered (charging documents

ending 1930 and 1936). I note that the four offences on 30 October 2023 were committed at a time when the Natural and Built Environment Act 2023 was in force.

[4] You have each pleaded guilty to the four charges against you. Section 24A of the Sentencing Act 2002 is not applicable. No suggestion has been made that you should be discharged without conviction so you are each hereby convicted on the four charges against each of you.

[5] You are life partners. Since 2016 you have owned a tenanted rural property [redacted]. The house on the property is serviced by a septic tank and field drain system which had been installed sometime in 2018. In December 2022 the Council received a complaint about sewage from the property being pumped into a drain which flows into the Kaituna River.

[6] Council officers undertook inspections of the property on 19 and 20 December 2022. On 19 December officers located the septic tank which photographs taken by them show was full to overflowing with effluent ponding on the ground beside the tank. A grey flexi pipe was laid across the lawn from the tank and connected near the dwelling to a PVC pipe which ran for approximately 25 metres through the property boundary into an area of grass and swamp outside the boundary which in turn drained to a farm drain. The farm drain appeared to flow in two directions. Either way the drain's contents ultimately drained to the Kaituna River, 300 metres or so away.

[7] Sample tests taken for analysis by Council officers on 20 December showed levels of faecal coliforms, E. coli, suspended solids and total ammoniacal nitrogen in the ponding and pipe discharge points at massively elevated levels and at reduced but still highly elevated levels at the point where the farm drain enters a culvert leading to the Kaituna River itself. There is no dispute that these discharges were in breach of the Regional Plan and they form the basis of the continuing offence charges against each of you.

[8] On 22 December 2022 a Council enforcement officer issued two abatement notices against each of you. The requirements of the abatement notices are described in paragraphs [48] and [49] of the agreed summary of facts:

> 48. One set of notices (RA22-00220 and RA22-00222) required each defendant to take the following actions by 20 January 2023:
>
> i. remove the PVC pipe used to discharge untreated human sewage to land
>
> ii. pump out and suitably dispose of the contents of the septic tank
>
> iii. pump out and suitably dispose of the contents of the excavated area by the septic tank
>
> iv. pump out and suitably dispose of the ponding near the culvert beneath the railway line
>
> 49. The other set of notices (RA22-00223 and RA22-00224) required each defendant to immediately cease the unauthorised discharge of domestic wastewater onto and/or into land in contravention of Rule 22 of the Council's Onsite Effluent Treatment Regional Plan.

[9] On 20 January 2023 a compliance officer checked the septic tank system to see if the abatement notices had been complied with. The septic tank had not been pumped out as required by the abatement notices nor had the white PVC pipe discharging to the drain been removed from the system. Accordingly the requirements of abatement notices ending 220 and 222 were not complied with.

[10] Another visit on 23 January 2023 found that work was underway on a new septic tank but there was ponding of effluent around the new tank. The white PVC pipe discharging to the drain remained in place and operative so that the abatement notices ending 220 and 222 were again not complied with.

[11] An enforcement officer inspected the property again on 15 May 2023 and found the new septic tank to be operating. The grey flexi pipe however was still connected to the PVC pipe which still discharged to the drain and there was a ponded area at the outlet, so again the two abatement notices I have referred to were not being complied with.

[12] These incidents between 20 January and 15 May 2023 are the basis of the first abatement notice charges.

[13] A Council enforcement officer carried out a further inspection of the property on 30 October 2023. The grey flexi hose from the septic tank was still connected to the white PVC pipe which had been split approximately halfway along its length. This was in breach of abatement notices ending 220 and 222. However instead of flowing to the drain over the boundary, septage from the PVC pipe now emptied to a man-made pond on the property. The pond smelled of wastewater and analysis showed the contents to have similar contaminant levels as raw septic tank effluent. The new discharge to land was in breach of the Regional Plan and the requirements of abatement notices ending 223 and 224.

[14] The environmental effects of the offending were described in these terms in the agreed summary of facts:

> **Environmental impact**
>
> 80. The septic system was inappropriately designed with the liquid from the septic tank being discharged onto land beside the septic tank and onto a neighbouring property. This resulted in surface ponding of effluent and the potential contamination of groundwater and surface water by overland flow.
>
> 81. Surface ponding of septic waste is a significant risk to human health, as exposure to this material puts individuals at the risk of contracting diseases, particularly skin and gut infections. The effluent disposal system at the property posed an ongoing risk to human health.
>
> 82. People can be exposed to harmful microorganisms through hand to mouth contact or skin contact with wastewater or contaminated water. Gastro- enteritis is the main health effect associated with human exposure to contaminated water but respiratory and skin effects can also occur. Most illness is short-lived but more serious diseases such as hepatitis A, giardiasis, cryptosporidiosis, campylobacteriosis and salmonellosis are possible.
>
> 83. Faecal indicator bacteria are commonly measured to detect faecal contamination (i.e., faecal coliforms, Escherichia coli and Enterococci). The presence of faecal indicators shows that the water has been contaminated with faecal matter and it may therefore contain other pathogens (disease causing organisms) that can cause illness.
>
> 84. Septic tank wastewater typically has high organic loading and concentrated nutrients. This was evident in the samples from the septic tank.
>
> 85. Where material containing high nutrient levels is applied in a manner that overloads the soils capacity, the material can contribute to elevated levels of nutrients in surface water and groundwater. Sediment and nutrients have the capacity to alter ecosystem dynamics, encouraging

growth of nuisance species (e.g., macrophytes, periphyton) and displacing native species. In addition, when biodegradable organic materials are broken down by bacteria and other organisms (decomposers), oxygen in the water column is consumed and this can result in low dissolved oxygen levels that can threaten the survival of fish and other aquatic life.

86. The discharge took place approximately 300m from the Kaituna river. The Kaituna River is recognised in the Regional Natural Resources Plan as:

    (a) A habitat and migratory pathway of indigenous fish species, namely Common Smelt, Redfinned Bully, Giant Bully, Inanga, Shortfinned Eel, Koura, Common Bully, Longfinned Eel.

    (b) A habitat of threatened indigenous flora and fauna, namely Blue Duck.

    (c) A whitebait spawning site.

87. The Kaituna River is highly valued by iwi. The water flows from Lake Rotorua over Okere Falls to the Ongatoro/Maketu Estuary and out to sea at Te Tumu. The Kaituna River traverses through areas that are the ancestral home of Tapuika, Ngati Whakaue ki Maketu, Ngati Pikiao, Waitaha, Ngati Makino and Ngati Whakahemo. Other iwi also have ancestral connections to these areas. Iwi refer to this area as the traditional "food bowl" of the Arawa people. This environment is valued for the river and estuary lifestyle it provides to tangata whenua and the wider community who want to sustain and celebrate river and estuary life.

88. It is likely that breakdown and absorption of much of the discharged material occurred before reaching the Kaituna river. Furthermore, any material that did enter the river (such as in periods of rainfall) would have been subject to a large amount of dilution, reducing the concentration of contaminants and therefore their impact on the river environment.

89. While direct impacts of the discharge on the environment likely cannot be measured, discharges of this nature contribute in a cumulative nature to elevated levels of nutrients and pathogens in surface water and groundwater, and to the total load of nutrients entering sensitive receiving environments.

[15] The issue of culpability was addressed in paragraphs [14] to [18] of Ms Stewart's submissions in these terms:

Culpability

14. Counsel submits that the defendants' level of culpability prior to receipt of the abatement notices is best assessed as careless. The defendants strongly refute the submission that their offending was deliberate. It is accepted that the defendants were responsible for having a proper

system in place for management of their property's wastewater. They were aware of the shortfalls of the existing system due to the high water table and over time had made modifications in an effort to improve the system such as installing a larger tank and digging field drains.

15. Their carelessness arises from the failure to seek appropriate advice from Council or other qualified professionals as to whether this work could be undertaken without resource consent. It was a failure to turn their minds to whether the work undertaken was repairs, or like-for-like replacement as they believed it to be. It was not a deliberate disregard for the law and environmental standards.

16. The defendants' conduct may approach recklessness following service of the abatement notices. Counsel submits this must be viewed with some perspective; the defendants had never been served with or even seen an abatement notice, had not heard of the OSET plan and were unaware the system as it was, would require resource consent. Guilty pleas to the breaches of the abatement notices are an acknowledgement it would have been prudent to seek professional advice, but the defendants genuinely believed they could resolve matters with the Council. Their ongoing uncertainty as to what was required to comply with the abatement notices and why is evident from the emails send to Council.

17. While ignorance of the law is not a defence the defendants' state of mind is relevant to assessing their level of culpability and setting an appropriate starting point.

18. Counsel submits that there was no commercial element to the offending. Instead, there was a lack of financial resources paired with various attempts by the defendants to fix the issues themselves. The rent the defendants receive from their tenants does not cover their home loan repayments and any potential financial reward is limited to long-term capital gains.

[footnote omitted]

[16] The discharge off site to the farm drain was obviously deliberate. The septic tank system was set up to do precisely that. This was immediately apparent to the Council officers who visited the property in December 2022 and must have been known to yourselves. You had owned the property since 2016. It was not necessary to be familiar with the provisions of the Regional Plan to appreciate that a system discharging into a farm drain leading ultimately to a river was unsatisfactory and that there were wider issues with the system. That is apparent from the photographs taken on 19 December 2022.

[17] I appreciate that you probably did not turn your mind to the legalities of this situation but the fact that the system needed fixing should have been abundantly

apparent and on the basis of the charging documents this situation continued for nearly four years. Although you took some steps to rectify the situation after issue of abatement notices you apparently did not take appropriate advice as to what was required so that the system remained in breach of Regional Plan requirements and abatement notices which had been served. I concur with the Prosecutor's submission that it was incumbent on you to have a proper system in place to manage the wastewater that your tenants would inevitably create. I find your culpability for the offending to be high.

[18] This was a domestic discharge, acknowledged as occurring over a four-year period. The volumes and effects of the discharge would have been driven by the numbers of residents of the dwelling on the property at any time, how often they might be away and other unknowns. This situation is typical of those which regularly come before the Court, where the direct effects of any one individual discharge cannot be measured but that discharge still contributes in a cumulative way to the wider problem of elevated levels of nutrients and pathogens in our surface water bodies, rivers, creeks and drains and in groundwater. What we do know is that the Regional Plan contains rules which manage septic tank discharges to avoid such discharges of effluent. In other words the Regional Plan seeks to keep this sort of waste out of our water bodies.

[19] Counsel have cited a number of cases for starting point guidance. However, they are of little direct comparative value:

- The *Body Corporate 355972* case (starting point $70,000) and *110 Formosa* case (starting point $90,000) involved commercial-scale discharges;[1]

- *Pete's Takeaways* (starting point $50,000) involved accidental runoff from a biosolid waste pile;[2]

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1 *Waikato Regional Council v Body Corporate 355972* [2018] NZDC 23918 and *Auckland Council v 110 Formosa (NZ) Ltd* [2020] NZDC 16708.

2 *Bay of Plenty Regional Council v Petes Takeaways Ltd* DC Tauranga CRI-2011-070-6483, 12 March 2012.

- The *Maitai* case (starting point of $7,800) which did involve septic tank waste, arose from a one-off deliberate discharge from two septic tanks by an employee who was the Defendant and the starting point was significantly reduced.[3]

[20] The dairy effluent cases referred to by both counsel involved industrial-scale discharges from dairy effluent systems.

[21] The only case with any factual similarity to this offending was the *Barrett* case, involving a discharge of human effluent to a ditch where a starting point of $15,000 was adopted.[4] That decision is now 16 years old and predated the 2009 penalty increases. Ms Stewart cited that case in support of the proposition that the Court would modify the starting point of fines to reflect the offenders' financial capacity. I think the correct approach is to modify the end outcome, but the ultimate result should be the same in any event.

[22] Counsel appear to agree that it is appropriate in this case to adopt global starting points for penalty for the two of you, notwithstanding the *Calford* principle.[5] It is common ground that you are life partners with two children and jointly own the property which you rent out so that any fine imposed against one of you effectively comes out of the pocket of the other. I am going to adopt a single global starting point for penalty accordingly.

[23] Ms Sheridan for the Council submits that appropriate starting points are $70,000 to $80,000 for the ongoing discharge (charging document numbers ending 1886 and 1932) with these being regarded as the lead charges. I concur with that approach. She then suggests a starting point of $25,000 for all the remaining charges, an overall starting point of $95,000.

[24] Ms Stewart for the Defendants submits that appropriate starting points are $50,000 for the lead charge and $20,000 for all remaining charges, an overall $70,000 figure.

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3 *Bay of Plenty Regional Council v Maitai* [2022] NZDC 9929.
4 *Southland District Council v Barrett* DC Invercargill CRI-2008-025-1031, 24 September 2008 at [25].
5 *Calford Holdings Ltd v Waikato Regional Council* HC Hamilton CRI-2008-419-94, 26 May 2009.

[25] I make the observation that although counsel disagree as to precise amounts, even the minimum figures we are debating show the seriousness attached to offending in breach of the Resource Management Act. These are very substantial figures, whoever is right or wrong in that regard. I have determined as follows.

[26] The global starting point for the two Defendants on the lead charges (charging documents ending 1886 and 1932) will be the sum of $75,000, which I note is 25 per cent of maximum penalty for an individual. That reflects the uncertainties as to volumes of discharge and the like. If we had been considering dairy farm offending over that period there would have been a much higher starting point. Nevertheless this is a figure of some weight and recognises that this situation, even at domestic volumes, was allowed to continue for nearly four years without appropriate remedial steps.

[27] A global starting point for the two Defendants on the first abatement notice charges (charging documents ending 1887 and 1933) will be the sum of $25,000. That recognises that breaches of abatement notices are serious offences in and of themselves and reflects the failure of the Defendants to put remedial measures promptly in place as they were required to do, and had failed to do for nearly five months after the initial issue of the abatement notices.

[28] I have no information before me which enables me to adequately assess the causes or effects of the 30 October 2023 discharge offending contained in charging documents ending 1928 and 1934. I note that this discharge was to land on the rented property and not to the offsite drain. Similar comments apply to the second abatement notice charges on 30 October 2023 contained in charging documents ending 1930 and 1936.

[29] Consistent with the approach as to the charges in respect of the ongoing discharge as being the lead charges and the significant starting point which I have indicated for the first abatement notice charges which involved ongoing discharges to the offsite drain, I will convict and discharge both of you on these four charges pertaining to the 30 October 2023 offending.

[30] That gives all up starting points of $100,000. I am unaware of any aggravating factors pertaining to the offending or offenders which warrant any uplifts from starting points. Neither Defendant has any previous convictions for environmental offending, so they should receive reductions from starting point of five per cent on account of past good character and further reductions from the reduced starting point of 25 per cent on account of prompt guilty pleas. That would normally result in overall penalty outcomes of $53,437.50 for the ongoing discharge and $17,812.50 for the first abatement notice charges.[6]

[31] However, that finding brings me to the matter of s 40 Sentencing Act and the obligation on the Court to take the financial capacity of an offender into account when fixing the amount of a fine. This is a matter raised by Ms Stewart in her submissions for the Defendants in the following terms:

> **Capacity to pay a fine**
>
> 54. In accordance with section 40 of the Sentencing Act and *Thurston* the defendants' capacity to pay a fine must be taken into account. Put simply, the defendants have no capacity to pay a fine remotely close to that proposed in the prosecution submissions.
>
> 55. The defendants in their evidence have set out their financial position including their income, assets, and current liabilities.
>
> 56. Counsel does not propose to repeat their evidence other than to say the defendants only asset is a single property secured by a mortgage with three home loans. Based on the current level of debt secured against the property and its value, the defendants are unlikely to be able to borrow further. The alternative is to sell. Once the various home loans are repaid alongside real estate fees, there it is unlikely to be sufficient, if any, equity remaining that would enable a substantial fine to be paid.
>
> 57. The sale of their only property jeopardises the defendants' retirement and likely terminates the occupancy of the current tenants and their business. In Counsel's submission this is a grossly disproportionate result. The nature of the offending is not such that public interest would favour such an outcome. A substantial fine is something from which the defendants simply would not recover.
>
> 58. Counsel submits that any fine the Court might otherwise deem appropriate must be reduced once the defendants' financial capacity has been considered.

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[6] An error in my calculation of the fines was discovered after I had given these sentencing notes in open court. The correct amounts are $52,500 and $17,500. Nothing turns on that error.

> 59. Applying the methodology of what could reasonably be paid by the defendants over the course of a five-year period Counsel submits a fine in the region of $15,000 is appropriate.
>
> 60. To off-set the reduction in fine the defendants are both willing and able to undertake a sentence of community work. This approach was taken by the Court in *Maitai* and *Taylor* where a substantial fine was held to be inappropriate due to a defendants' financial circumstances.
>
> 61. The defendants are parents to two children aged 15 and 7. They are both in full-time employment and spend weekends supporting their children's sporting endeavours. The defendants respectfully seek that these factors are in the Court's mind when determining the number of community work hours to be completed.
>
> 62. The defendants seek that any fine imposed is payable by way of instalments.
>
> [footnote omitted]

[32] Ms Stewart's submissions were initially accompanied by an affidavit sworn by Ms Harpur as to the Defendants' financial capacity. Subsequently, after enquiry from the Court, further financial information was provided, including an income and expenditure spreadsheet, a statement as to Ms Harpur's KiwiSaver balance and a copy of the rating valuation of the property.

[33] Having considered all of those documents I am satisfied as to the merits of Ms Stewart's submissions that the Defendants do not have the financial capacity to meet the fines in the amounts that I have initially indicated. I have accordingly determined as follows:

- On the charge contained in charging document ending 1886, Ms Harpur is fined the sum of $4,000. Additionally, she will undertake 75 hours' community work;

- On the charge contained in charging document ending 1887, Ms Harpur is fined the sum of $2,000;

- On the charge contained in charging document ending 1932, Mr Hull is fined the sum of $4,000. Additionally, he will undertake 75 hours' community work;

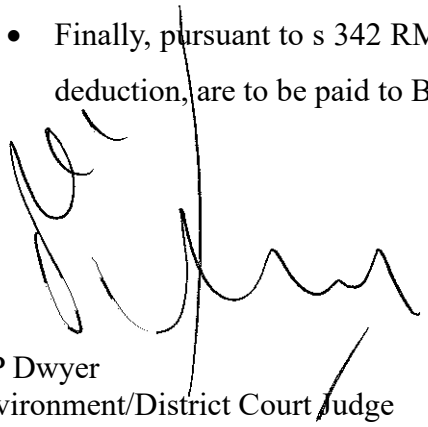
- On the charge contained in charging document ending 1933, Mr Hull is fined the sum of $2,000;

- On the charges contained in charging documents ending 1928, 1930, 1934 and 1936, the Defendants are convicted and discharged;

- On each charge the Defendants will pay solicitor costs in accordance with the Costs in Criminal Cases Regulations 1987 (fixed by the Registrar if need be) and Court costs $130;

- I record that it may be appropriate for the fines to be paid over a period of time. The appropriate period is a matter to be determined by the Registrar;

- Finally, pursuant to s 342 RMA I direct that the fines, less 10 per cent Crown deduction, are to be paid to Bay of Plenty Regional Council.



B P Dwyer
Environment/District Court Judge

Correction under r 1.6 of the Criminal Procedure Rules 2012

The written record of this sentencing was initially issued to parties without a suppression statement under s 202 Criminal Procedure Act 2011. I directed that the suppression statement be added and the notes be re-issued.