IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CRI-2021-454-1
[2021] NZHC 1462

BETWEEN	HUKA VIEW DAIRIES and DEREK BERENDT Appellants
AND	MANAWATU-WHANGANUI REGIONAL COUNCIL Respondent

Hearing: 10 June 2021 (by VMR)

Appearances: P J Drummond for the Appellant
E R Pairman and B D Vanderkolk for the Respondent

Judgment: 18 June 2021

JUDGMENT OF PALMER J

Solicitors:
Tauranga Law, Pahiatua
BVA The Practice, Palmerston North

Summary

[1] Mr Derek Berendt and Huka View Dairies (Huka View) pleaded guilty to criminal offences under the Resource Management Act 1991 of unauthorised discharge of dairy effluent and silage refuse and failing to comply with abatement notices prohibiting that. He appeals the sentence imposed by the District Court of fines of $103,500. But fines were the most appropriate penalty here, given the policy goals of the Act and Mr Berendt's consistent attitude of flouting authority and ignoring the effects of his actions on the environment. I agree it was reasonable to expect Huka View, with net equity of between $2.5–$2.9 million, to be able to meet the fine, especially when payment over time is possible. I dismiss the appeal.

What happened?

[2] Mr Berendt is the director, 50 per cent shareholder, and day-to-day manager of Huka View Dairies. Michelle Matheson, his wife, owns the other 50 per cent of the shares. Huka View owns and operates a dairy farm near Eketahuna, carrying around 300 cows.

[3] Huka View holds a resource consent permitting it to discharge dairy effluent to land. The consent is subject to conditions, including a prohibition on effluent runoff to flowing surface water and a prohibition on effluent encroaching closer than 20 metres to any open drain or flowing watercourse. Under the Regional Plan, Huka View is able to store silage on the farm as long as runoff from the storage is prevented and silage is not stored within 20 metres of surface water bodies or artificial watercourses.

[4] Mr Berendt and Huka View had several interactions with the Council before charges eventuated:

(a) On 3 October 2017, two Horizons Regional Council compliance officers observed silage solids one to two metres from a flowing stream near the feed pad. Huka View was requested to remove it by 11 December 2017.

(b) On 31 January 2018, the officers returned and discovered an overflow of effluent from the sump near the feed pad. The effluent travelled downhill in a dry stream bed for 150 metres before stopping.

(c) On 9 February 2018, compliance officers issued Huka View with an abatement notice requiring it to immediately cease unauthorised discharge of effluent into or onto land which may enter a waterway. An infringement notice was also initially issued but was withdrawn by agreement subject to Huka View installing an effluent pond to manage the issues.

[5] The offending occurred between 17 August and 23 October 2018:

(a) On 17 August 2018, after a public complaint, compliance officers observed effluent runoff and grass and maize silage leaching into a stream. Water samples revealed high levels of E-coli, nitrogen and biological oxygen in the waterway.

(b) On 3 September 2018, after further public complaints, Mr Berendt denied access to compliance officers, citing concerns about Mycoplasma bovis entering the property. On leaving, the officers saw the pile of silage in the same position as it was during their previous inspection. On 5 September, two abatement notices were issued to Huka View requiring the immediate cessation of the unauthorised discharge of silage into or onto land where it may enter water, removal of silage and effluent solids, and storage of them consistent with the resource consent.

(c) On 23 October 2018, compliance officers, accompanied by the Police, observed the effluent solids had not been removed, runoff from the solids was still entering the water, the silage was still next to the waterway, and liquid effluent was ponding close to the travelling irrigator and in a section of dry waterway.

[6] Huka View and Mr Berendt faced two charges each of discharging a contaminant (dairy effluent and silage refuse) onto land where it may enter water when not expressly allowed, and two charges of failing to comply with abatement notices by failing to cease the unauthorised discharge and failing to remove the silage refuse, under ss 15(1)(b), 338(1)(a), 338(1)(c), 339(1) and 340(3) of the Resource Management Act 1991 (RMA). The maximum penalty for each for these charges is $600,000 for Huka View and $300,000 or two years' imprisonment for Mr Berendt.

[7] On 23 January 2020, Judge B P Dwyer gave a sentencing indication based on the 18 charges Huka View and Mr Berendt then collectively faced.[1] Judge Dwyer accepted that dairy effluent offending could be separated into three categories with different financial bands, as per *Waikato Regional Council v GA& BG Chick Ltd*, and that the bands in *Chick* needed to be increased.[2] He agreed that a global penalty should be fixed for each category.[3] He noted that characterising the defendant's culpability as gross recklessness amounting to knowing omission was "generous".[4] Taking into account the financial position of Huka View and Mr Berendt, he concluded that if they entered guilty pleas he would impose total fines of $140,250. On 10 February 2020, the morning the trial was to commence, Mr Berendt and Huka View pleaded guilty.

[8] Mr Berendt did not engage with Corrections in their first provision of advice report to the court, which recommended imprisonment. The Judge adjourned sentencing to allow a second report to be prepared. That report focussed on Mr Berendt's hostile attitude to the Council and dismissive attitude to the offending, which he blamed on disputes with his neighbour. It recommended a sentence of community work or community or home detention rather than a fine, after Mr Berendt said to the report-writer "they're not going to get a dime out of me".

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1 *Manawatu-Whanganui Regional Council v Huka View Dairies Ltd* DC Wellington CRI-2019-054-000337, 23 January 2020 [Sentencing Indication].
2 *Waikato Regional Council v GA & BG Chick Ltd* (2007) 14 ELRNZ 291 (DC).
3 Sentencing Indication at [15].
4 At [24].

The sentencing decision

[9] On 14 December 2020, Judge Dwyer sentenced Huka View and Mr Berendt to a fine of $103,500 on a global basis.[5] Mr Berendt did not turn up. The Judge had regard to: penalty levels (and the joint nature of the defendants); the environmental effects of the offending; the cultural effects of the offending; culpability; cooperation with Council; the commercial aspects of the offending; the need for deterrence; and comparable cases.[6]

[10] The Judge found the imposition of a fine was the appropriate penalty, consistent with other offending arising in the course of a commercial enterprise. He had reservations about the effectiveness and enforceability of a sentence of community work or community detention, particularly in light of Mr Berendt's attitude which he described as "aggressive non-cooperation".[7] The Judge considered fines of a similar level should be imposed on both defendants to reflect the reality of their relationship as, effectively, alter egos.

[11] The Judge took a global approach to the offences related to discharge of effluent and silage refuse. Because of the gross recklessness of the offenders, he assessed the offending as moderately serious, level 2, in terms of the bands of offending in the guideline judgment of *Chick*.[8] He adopted a starting point of $80,000 for the discharge offences, at the higher end of level 2. He adopted a global starting point of $35,000 for the abatement notice offences. So, the total global starting point was $115,000. He made a 10 per cent discount for the guilty pleas (as opposed to the 17.5 per cent discount in the sentence indication), on the basis of the High Court decision in *Te Kinga Farms Ltd*.[9] This brought the total penalty to $103,500.

[12] The Judge considered the financial capacity of Huka View and Mr Berendt under ss 8(h) and 40 of the Sentencing Act 2002. He considered a company with equity of somewhere between $2.5 and $2.9 million and a gross income of

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5 *Manawatu-Whanganui Regional Council v Huka View Dairies Ltd* [2020] NZDC 26051.
6 At [13].
7 At [15].
8 At [28] and [34] citing *Waikato Regional Council v GA & BG Chick Ltd*, above n 2.
9 *Te Kinga Farms Ltd v West Coast Regional Council* [2015] NZHC 293.

approximately $900,000 would have the financial capacity to pay the fine.[10] Mr Berendt and Huka View both appeal.

Submissions

[13] Mr Drummond, for Mr Berendt and Huka View, submits the Judge was wrong in principle to impose a fine. He submits an alternative sentence of community work should have been imposed, though imprisonment would have been a step too far. He submits Mr Berendt does not have the means to pay because the income of him and his wife from Huka View is approximately $30,000 per year. His only asset is the shareholding in Huka View which is running at a loss and not readily realisable. He submits there is a risk of double punishment of both Mr Berendt and Huka View. He submits Mr Berendt's comments regarding dimes simply meant he could not afford a fine. He acknowledges Mr Berendt's compliance with the RMA was not impressive and does not seek to justify his attitude. Alternatively, Mr Drummond submits the level of the fine was manifestly excessive and should have been adjusted to reflect Mr Berendt's limited financial means. He submits there should have been an adjustment for totality. Huka View does not have the financial means to pay out of gross income of $900,000 because its expenses mean it is running at a loss. But he acknowledged recent prices for milk solids had increased so the business is now marginally profitable. Mr Drummond submits Huka View cannot raise capital as the bank is uncomfortable with the current level of borrowing. He also submits the Judge did not provide a sufficient discount for the guilty pleas.

[14] Ms Pairman, for the Council, submits the fine imposed gave proper consideration to the importance of environmental compliance and the principles and purposes of resource management sentencing. She submits the principle of economic deterrence of environmental offending means failure to comply must be met with financial penalties to ensure it is not economically advantageous to run the risk of non-compliance. She submits the fine could be paid off over five years, given the assets and equity of the business. She submits a global penalty, divided proportionally among the offenders, as the alter egos of one another, is appropriate. Ms Pairman submits Mr Berendt's engagement with the Council and court process could only be

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[10] *Manawatu-Whanganui Regional Council*, above n 5, at [40]–[49].

described as appalling and his offending reflected gross recklessness. So, a sentence of community work would have been insufficient and would not serve the purpose of denouncing the offending. She submits Mr Berendt's attitude demonstrated he would not be able to comply with a sentence of community work.

Should the appeal be allowed?

[15] Under s 250 of the Criminal Procedure Act 2011, I must allow the appeal if satisfied there is a material error in the sentence and a different sentence should be imposed. The focus is on whether the end sentence is within the available range.[11]

[16] I do not consider Judge Dwyer erred in determining that fines were the most appropriate penalty here. That is usually the case in environmental cases, as Miller J stressed in *Thurston v Manawatu-Wanganui Regional Council*.[12] That reflects the policy goal of internalising economic externalities and the goal of setting the penalties high enough to deter commercial decisions to breach environmental regulations. A fine was particularly appropriate in this case because of Mr Berendt's consistent attitude of flouting authority and ignoring the effects of his actions on the environment. In his blatant disregard for the Council's warnings, in committing the criminal offences he eventually pleaded guilty to committing, in disdaining contact with the Department of Corrections and the Court, Mr Berendt has been his own worst enemy. His behaviour raises doubts as to whether he would comply with a sentence of community work or detention. His statement that he would put his farm first does not assist him in that regard.

[17] Consistent with *Hardegger v Southland Regional Council*, I also agree that it is appropriate to adopt one global starting point for two closely related defendants, as Mr Berendt and Huka View are here.[13]

[18] I do not consider Judge Dwyer erred in setting the starting point for the fines. The guidelines in *Waikato Regional Council v GA & BG Chick Ltd,* relating as they

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11 *Ripia v R* [2011] NZCA 101 at [15].

12 *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-24, CRI-2009-454-25, CRI-2009-454-27, 27 August 2010 at [44]–[45]. See also *Sowman v Marlborough District Council* [2020] NZHC 1014, [2020] NZRMA 452 at [67].

13 *Hardegger v Southland Regional Council* [2017] NZHC 469, [2017] 2 NZLR 852 at [78].

do to financial amounts 14 years ago, are now out of date.[14] In 2009, the maximum penalties in the RMA were increased by 50 per cent from $200,000 to $300,00 for individuals and a penalty of $600,000 was created for corporate defendants.[15] The starting points adopted by the Judge were reasonable and open to him on the evidence. The final penalty is substantially lower than that indicated in the sentencing indication, of $80,000 for the effluent offences, $50,000 for the silage offences, and $40,000 for four abatement notice infringements. Mr Berendt and Huka View presumably pleaded guilty on that basis of that indication, modified by the withdrawal of 10 specific charges and conversion of the remaining charges to representative charges.

[19] If financial capacity is an issue, it is appropriately considered in relation to a discount from the level of fines. Judge Dwyer considered the financial capacity of the defendants. He concluded that, despite Huka View's losses in the last two financial years, it still maintained a net equity of between $2.5–$2.9 million. I agree that makes it reasonable to expect that the defendants would be able to meet a fine of the amount imposed. The fines are not manifestly excessive. Mr Drummond conceded that milk solid prices have only increased since then, turning marginal losses into marginal profit. There is no reason to think the Court Registry would ignore the suggestion of arranging payment over time, if Mr Berendt genuinely cooperated in that. In *Vernon v Taranaki Regional Council*, Ellis J considered a fine was still an appropriate penalty even when she accepted the cause of the offending was an inability to pay.[16] And there is no good reason to regard fines as such an imposition that they should be converted to community detention, given Mr Berendt's propensity to ignore official requirements of him. There is no evidence that Mr Berendt has yet complied with his obligations.

[20] The Judge also made no error in relation to the discount for guilty pleas. A 10 per cent discount for pleading guilty on the morning of trial was generous. It was only open to the Judge because of the charges that had been withdrawn. But that point is somewhat blunted by the fact that key original particularised charges were replaced with representative charges.

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14 *Waikato Regional Council v GA & BG Chick Ltd*, above n 2, at [23].
15 Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 139.
16 *Vernon v Taranaki Regional Council* [2018] NZHC 3287 at [41].

Result

[21] I dismiss the appeal.

Palmer J