IN THE DISTRICT COURT
AT HAMILTON

CRI-2017-019-002623
[2017] NZDC 18293

WAIKATO REGIONAL COUNCIL
Prosecutor

v

ACORN FARMS LIMITED
First Defendant

and

A & T DAIRIES LIMITED
Second Defendant

Hearing:	10 August 2017
Appearances:	L Bielby for Prosecutor P Lang for Acorn Farms Limited J Forret and R Davies for A & T Dairies Limited
Judgment:	18 August 2017

NOTES OF JUDGE DA KIRKPATRICK ON SENTENCING

Introduction

[1] The charges against these defendants relate to events on 17-18 October 2016 on a dairy farm at 2877 State Highway 23 at Waitetuna, near Raglan.

[2] The first defendant, Acorn Farms Limited, is the operator of the farm. The second defendant, A & T Dairies Limited, is the operating entity of the sharemilker. The charges against these defendants, to which they have pleaded guilty, are:

(a) against Acorn Farms Limited (CRN-17019500805) that between 17 and

18 October 2016 at Waitetuna, it contravened s15(1)(b) of the Resource Management Act 1991 (**RMA**) in that it permitted the discharge of contaminant, namely farm animal effluent, from an irrigator onto land where it may enter water, namely groundwater and/or unnamed tributaries of the Waitetuna river, where the discharge was not expressly allowed by a national environmental standard, rule in a regional plan or proposed regional plan, or a resource consent;

(b) against A & T Dairies Limited (CRN-17019500803) that on 17 October 2016 at Waitetuna it contravened s15(1)(b) RMA in the same manner as the previous charge; and

(c) against A & T Dairies Limited (CRN-17019500804) that on 18 October 2016 at Waitetuna it contravened s 15(1)(b) RMA in the same manner as both the previous charges.

[3] These charges are all offences under s 338(1)(a) RMA and subject to a maximum penalty, in the case of a company, under s 339(1)(b) RMA of $600,000.

[4] Initially Acorn Farms faced two charges but at an earlier hearing the charge relating to 17 October 2016 was amended to be a representative charge for offending occurring between 17 and 18 October 2016, and the separate charge relating to 18 October 2016 was withdrawn.

[5] There were also similar charges laid against the directors of and shareholders in Acorn Farms, Mrs Greetje van der Helm and her son Mr Laurence van der Helm and against one director of A & T Dairies, Mr Leunis Adriaan Van Rooyen, but these charges were all withdrawn when guilty pleas were entered on behalf of the companies.

The farm

[6] The farm is on land straddling State Highway 23. The topography is described as "rolling to steep", but the discharges occurred on a maize paddock on the northern side of the state highway which appears from the photographs

accompanying the summary of facts to be fairly level. The property contains a number of watercourses that flow into the Waitetuna river which is on the northern boundary of the property and thence into Whaingaroa/Raglan harbour. One of the landowners, who is also an owner and director of Acorn Farms, Mrs van der Helm, lives on the property. The sharemilker, Mr Van Rooyen, also lived on the farm. The property carries about 550 cows. Mr Van Rooyen had a 50/50 sharemilking contract which has since been terminated, and he and his wife left the farm on 31 May 2017.

[7] The effluent system consists of a storage pond with a capacity of 5 million litres to collect effluent from the dairy shed, yard and wintering barn. From this pond, effluent is pumped and irrigated to land via a stationary cannon irrigator with pumping controlled by a manual timer. On a regular basis, contractors are engaged to de-sludge the pond and spread solids onto the paddocks prior to planting.

Relevant plan provisions

[8] Rule 3.5.5.1 of the Waikato Regional Plan permits the discharge of farm animal effluent onto land subject to a number of conditions, including:

> (f) effluent shall not enter surface water by way of overland flow, or pond on the land surface following the application ...

[9] There is no relevant national environmental standard, other regulation, resource consent or other rule permitting such discharges on this farm.

The offending

[10] The Council received a complaint from a member of the public at 4.55pm on Monday 17 October 2016. The complainant had driven past the farm and reported over-irrigation, ponding and runoff occurring from an irrigator. Officers of the Council arrived at the farm at 11.15am on Tuesday 18 October 2017. On their arrival, Council officers could see the irrigator operating in the maize paddock and that the surrounding ground was sodden with effluent, with ponding evident in several areas. Effluent could also be seen flowing down the paddock towards a lower-lying gully area.

[11] The Council officers then spoke to the sharemilker, Mr Van Rooyen, at the dairy shed. Mr Van Rooyen had just turned the irrigator off. Mr Van Rooyen stated that the irrigator had been placed in the paddock the previous morning and that irrigation had occurred later that day and again the next morning.

[12] Council officers then began inspecting the property. Effluent was seen flowing across the paddock for 70-80 metres before running down and ponding on a lower farm race. The overland flow at one point was measured at 50mm deep. A small amount was seen flowing into a nearby grassy area near the headwaters of a small stream, with most of the effluent flowing along a small drainage channel beside the farm race. Lower down, the effluent crossed the race and entered a lower-lying paddock, continuing overland and running into a tributary stream of the Waitetuna river. Effluent was also seen in watercourses variously described as a drain or a stream and then flowing into a pond used for irrigation on the farm.

[13] The Council officers gave directions to Mr Van Rooyen to cease the discharges and he immediately began creating earth bunds in various locations to contain the effluent.

[14] After these events, Council officers undertook off-site investigations with the farm's current and past farm consultants as well as undertaking formal interviews with Mr Van Rooyen, Mrs van der Helm and Mr van der Helm. The Council also subsequently issued an abatement notice to Acorn Farms.

[15] The further investigation indicated that a very poor relationship had developed between the owners and the sharemilker. Mr Van Rooyen was apparently unaware of the permitted activity rules and the standards relating to them, having received little or no training from the owners. The owners apparently regarded compliance with those rules as being a responsibility of the sharemilker.

[16] It emerged that there had been a plan for contractors to spread effluent, including sludge, on the maize paddock on or about 17 October 2106 but that the contractor had been delayed and Mr Van Rooyen had decided he should irrigate the paddock in the meantime. On the morning of that day, Mrs van der Helm had seen

equipment set up for irrigation and became angry because that was not consistent with the planned spreading of effluent. She told her son and her son then sent an email around mid-morning asking Mr Van Rooyen what he was doing. Mr Van Rooyen responded that he was using the irrigator because the contractors were not available until Friday. Later the same day Mrs van der Helm saw the irrigator operating and observed the ponding and the runoff. She then sent an email directly to Mr Van Rooyen telling him to shift the irrigator and Mr Van Rooyen responded promptly that he would do so. There was apparently no further communication between the owners and the sharemilker in relation to these discharges.

[17] The following day, 18 October 2016, the owners and the sharemilker held their regular farm management meeting at 10am. There was no discussion of any matter relating to effluent irrigation, notwithstanding the apparently urgent communications of the day before or the fact that the irrigator is easily able to be seen from the farm buildings. This meeting was over by the time the Council officers arrived.

Effects of the discharge

[18] The land on which the discharges occurred, its drainage channels, streams and irrigation pond all flow ultimately to the Waitetuna river. The river is classified as a significant indigenous fisheries and fish habitat under the regional plan. From the farm, the river flows west for approximately 6km before entering the Whaingaroa/Raglan harbour. The harbour is classified as an area of significant conservation value in the regional coastal plan, with its conservation values being its cultural significance to Tainui, the habitat of rare and threatened wading and coastal bird fauna and of Hectors dolphin, and being the recognised southern limit of mangroves.

[19] Samples were taken from a number of locations around the farm and analysed by Hills Laboratories, with the results being reviewed by the Council's water quality scientist, Dr Eloise Ryan. Analysis shows that contaminant levels were many times higher than those which at which adverse effects can occur in rivers and

streams, and hence could potentially cause a variety of localised adverse ecological effects. No samples were taken in the river itself.

Prosecutor's submission on sentence

[20] Counsel for the prosecutor (as well as counsel for each defendant) reminded me of the central provisions of the Sentencing Act 2002 and the clear guidance to be taken from the decisions of the higher courts in *Hessel v R*,[1] *R v Clifford*,[2] *Heenan v Manukau City Council*,[3] and *Thurston v Manawatu-Wanganui Regional Council*.[4]

[21] Counsel for the prosecutor relied heavily on the deterrence principle in support of her submissions. She highlighted as aggravating factors the flow towards the Waitetuna River and thence to the harbour, as well as the effects on the land itself, including the well-known cumulative effects of farm animal effluent on soil chemistry and groundwater. She laid stress on the deliberateness of the actions of both defendants in irrigating the paddock when there had been heavy rain, the lack of follow-up by the principals of Acorn Farms and the lack of observation by the principal of A & T Dairies. She acknowledged that both defendants had been cooperative with the prosecutor and that there was no profit element involved in the offending. She acknowledged that neither defendant has previously appeared before the Court in relation to any kind of offence under the RMA. Even so, she submitted that there were no mitigating factors and she submitted that the Court should be careful in relation to any attempt by either defendant to shift blame to the other.

Relevant authorities

[22] Counsel for the prosecutor referred to the guidance of this Court in *Waikato RC v GA & BG Chick Limited*,[5] and in particular the identification of three bands of offending based on the level of seriousness as set out at paragraphs [24] to [26] of that decision.

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1 [2010] NZSC 135; [2010] 1NZLR 607.
2 [2011] NZCA 360; [2012] 1NZLR 23.
3 [2007] DCR 354 (HC).
4 Unreported: HC Palmerston North, CRI 2009-454-24, 27 August 2010, Miller J.
5 [2007] 14 ELRNZ 291.

[23] In relation to comparable sentences, counsel for the prosecutor referred me to:

(a) *Otago RC v Liquid Calcium Limited*[6] where a single discharge found to fall within band 1 led to the adoption of a starting point of $25,000;

(b) *Otago RC v West Mains Farm Limited*[7] where two charges and clear evidence of discharge into a stream led to a finding at the more serious end of band 1 and a starting point of $35,000;

(c) *Waikato RC v McFarlane*[8] where a single charge related to the placement of an irrigation hose into a wetland and discharge for approximately 20 days led to a starting point of $80,000; and

(d) *Southland RC v Te Wae Wae Dairies Limited*[9] where there were two charges relating to offences on two neighbouring farms owned by the same defendant on the same day, with a finding that the offending was in the moderately serious band and a starting point of $70,000 established.

[24] On the basis of those decisions counsel for the Prosecutor submitted that the offending by these defendants fell into band 2, being moderately serious with a high degree of carelessness occurring over two days, although not categorising it as recurring offending. She also relied on high contaminant levels being found nearby. On that basis, she submitted that an appropriate starting point in each case would be $70,000 based on *McFarlane* and *Te Wae Wae Dairies*.

[25] She acknowledged that both defendants were entitled to a discount of 25 per cent for their early guilty pleas, but did not consider any other deduction was warranted. On behalf of the Prosecutor, she sought solicitors costs and court fees, together with the usual order pursuant to s342 of the RMA that 90 per cent of any fine be paid to the Prosecutor.

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6 [2017] NZDC 11458.
7 [2015] NZDC 18105.
8 CRI-2014-024-000042, DC Hamilton 3 November 2014.
9 [2017] NZDC 11466.

Submissions for Acorn Farms Limited

[26] Counsel for Acorn Farms noted that the effluent system had been installed on this farm in 1995 and upgraded in 2006, and that there had been no previous problems of this kind. On that basis, he submitted that there was no evidence of any systemic problem in relation to the farm and its effluent disposal system. Against that background, he submitted it was reasonable for the owners to expect the sharemilker to do things in accordance with established procedures on the farm. He acknowledged that the error made by the principals of Acorn Farms lay in not checking, and in particular in making an incomplete response to the discovery of runoff on 17 October. He also acknowledged that the principle of vicarious liability in s 340 RMA and the imposition of strict liability in s 341 RMA meant that Acorn Farms could not avoid liability for the discharge caused by A & T Dairies, but raised these matters as going to the degree of culpability of his client.

[27] Counsel referred to the decisions of this Court in:

(a) *Otago RC v Avenele Agriculture Limited & Joe Benbow*[10] where there were two discharges but the Court considered there was a single offending event so a single, global starting point was adopted, leading to a starting point of $35,000 in respect of the farm owner;

(b) *Otago RC v Liquid Calcium Limited*[11] referred to above; and

(c) *Bay of Plenty RC v Kahu Ma Farms Limited*[12] involving a travelling irrigator without a failsafe device which had demonstrated poor performance in the past and there was a high level of carelessness on the part of the defendant's employees, leading to a starting point of $40,000.

[28] Counsel submitted that the *Avenele Agriculture* case is the most directly comparable to the present case and that Acorn Farms took active steps to stop the discharge, so that a starting point of $30,000 would be appropriate.

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10 District Court, Dunedin 2 June 2016.
11 *Supra* fn 6.
12 District Court, Tauranga 9 May 2017.

[29] Counsel also laid stress on the good character of Acorn Farms and its principals, pointing to environmental improvements, the exclusion of stock from water courses and the remorse shown by them. As well as the discount for an early guilty plea, counsel submitted that a further 10 per cent would be justified in respect of those matters.

Submissions for A & T Dairies Limited

[30] Counsel for A & T Dairies laid stress on the nature of the company as a small family operation which was no longer trading and in dire financial circumstances attributable in large part to this discharge and the termination of the sharemilking contract.

[31] In terms of the bands of offending identified in the *Chick* decision, counsel described it as being on the cusp of bands 1 and 2, being careless but not reckless, not recurrent and not involving delays in cooperating and taking action, and with moderate local effects. Counsel referred to the decisions in *Liquid Calcium*, *West Mains Farm* and *Te Wae Wae Dairies*, referred to above. She submitted that the *West Mains Farm* decision was the most closely comparable and accordingly submitted that a starting point of $35,000 would be appropriate.

[32] As well as discount for an early guilty plea, she submitted that it would be appropriate for further discounts of 5 per cent for the cooperation immediately provided by Mr Van Rooyen and 10 per cent for the steps taken by him.

[33] Further, she submitted that the poor financial capacity of the defendant and its principals justified a further reduction in the fine. She presented, without objection, a bundle of e-mails evidencing the very difficult circumstances in which Mr and Mrs Van Rooyen are now.

Discussion

[34] As set out at the beginning of this decision, when charges were first laid there were a total of 10 of them, being two charges against each of Acorn Farms Ltd and its two principals and A & T Dairies Ltd and its active principal and with each set of

two charges involving one charge for the discharge on 17 October 2016 and another for the discharge on 18 October 2016.

[35] After the charges against the individuals were all withdrawn there remain three charges:

(a) one representative charge against Acorn Farms; and

(b) two charges against A & T Dairies.

[36] As I noted during the hearing, it is not my role to go behind the decisions the prosecutor has made, in its discretion, as to the charges to be laid or the subsequent withdrawal of those charges. It is, however, within my discretion, to be exercised in accordance with the purposes and principles of sentencing as set out in the Sentencing Act 2002, to take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances (s 8(e) Sentencing Act 2002).

[37] For that reason I asked the parties whether the withdrawal of one charge against Acorn Farms and the amendment of the remaining charge to be a representative one for the period 17-18 October should have any effect on my approach to sentencing. I was assured by all counsel that it should not and that a global approach was appropriate in this case.

[38] For similar reasons I also expressed concern to counsel for the Prosecutor about her reliance on the decision in *Te Wae Wae Dairies* where the starting point of $70,000 was based on two quite separate events on separate farms, albeit owned by the same entity. On review, I am satisfied that the circumstances in that case are not comparable to the circumstances in the present cases. In my view the offending here on two consecutive days in the same area of the farm should be viewed as a single event and I should approach sentencing of both defendants in the same way.

[39] I am satisfied that the case in *McFarlane* is not comparable to the present cases, because that case can be distinguished by its much higher level of

deliberateness in placing an irrigation hose near or in a wetland and the relatively lengthy period during which offending occurred.

[40] I see little to distinguish the defendants in terms of their culpability. I acknowledge that the principals of Acorn Farms were concerned when they observed the discharge and took steps to raise their concerns with the sharemilker. However, they did very little to follow up on that, even with a clear opportunity to do so at the farm management meeting. I also acknowledge that the sharemilker as the principal of A & T Dairies may have had little training in relation to this farm, but the failure to check on the irrigation and to ensure that the relocation of the irrigator did not cause further ponding after this had been drawn to his attention by the owners displays a similar lack of failure to take care. Had the principals of the two companies worked better together, the discharge could have been substantially mitigated or possibly even avoided. Ultimately, they must share the responsibility for what occurred.

[41] In these circumstances, and in light of the relevant comparable authorities referred to me, I am satisfied that an appropriate starting point in both cases is $35,000.

[42] I accept the submissions of all counsel that both defendants are entitled to a reduction of that amount by 25 per cent in light of their early guilty pleas. I also consider that a further reduction is appropriate in light of their having not previously been convicted of any offence under the RMA and I assess that to result in a total reduction of 30 per cent. I do not make any further reduction for remorse, which I consider in this case is an element of the early pleas. Nor do I make any reduction for cooperation or steps taken after the Council arrived on the farm as I consider that these are matters that responsible farmers should do in any event: while the absence of cooperation might well be an aggravating factor, I do not consider cooperation at the level shown here to be a mitigating factor.

[43] I have given careful thought to the submissions on behalf of A & T Dairies as to its financial circumstances in light of ss 40 and 41 Sentencing Act 2002. I accept that the company is no longer trading and from the e-mails presented to me it

appears that it may be insolvent, but there is no evidence of it being in receivership or liquidation. I also accept that the financial circumstances of its principals are dire and that this can be directly attributed to the events relating to the offending and the consequent termination of the sharemilking contract. I note, however, that the charges against Mr Van Rooyen personally have been withdrawn and I do not understand that he would have any personal liability for any fine imposed on A & T Dairies Ltd.

[44] I conclude that in these circumstances I should treat both defendant companies in the same way.

[45] For those reasons, I decide as follows:

(a) I convict Acorn Farms Ltd of the representative charge set out in the charging document referenced as CRN-17019500805 and sentence it to pay a fine of $24,500.00;

(b) I convict A & T Dairies Ltd of the charges set out in the charging documents referenced as CRN-17019500803 and CRN-17019500804 and sentence it to pay a fine of $24,500 apportioned equally in respect of each charge;

(c) I order each defendant also to pay Court costs of $130 and solicitor's costs of $113;

(d) I direct that the fines, less a deduction of 10 per cent payable to the Crown, shall be paid to the Waikato Regional Council under s 342 of the Resource Management Act 1991.

DA Kirkpatrick
District Court Judge and Environment Judge