

**IN THE DISTRICT COURT
AT HAMILTON**

**I TE KŌTI-Ā-ROHE
KI KIRIKIROA**

**CRI-2019-039-415
[2020] NZDC 18034**

WAIKATO REGIONAL COUNCIL
Prosecutor

v

OPEN COUNTRY DAIRY LIMITED
Defendant

Hearing: 17 July 2020 and 7 August 2020

Appearances: T G Baine and J M O'Sullivan for the Waikato Regional Council
B A Alcorn and M A Atkinson for Open Country Dairy Limited

Judicial Telephone Conference: 24 July 2020

RESERVED SENTENCING NOTES OF JUDGE J A SMITH

[1] Open Country Dairy Limited is to be sentenced on one charge, being CRN-19039500083:

That between 3 January 2019 and 23 February 2019 at Waharoa it contravenes s 15(1)(c) of the Resource Management Act 1991 in that it permitted the discharge of a contaminant, namely odorous compounds, from an industrial premise, namely Open Country Dairy Limited Waharoa site, into air, where that discharge was not expressly allowed by a National Environmental Standard or other Regulations, a Rule in a Regional Plan, or a Resource Consent.

[2] This is an offence under s 338(1)(a) RMA for which the maximum penalty that can be imposed on a body corporate is a fine not exceeding \$600,000 plus an additional \$10,000 for each day or part thereof during which the offences continued.

[3] The discharge of odour in this case took place intermittently over the 47 days in question but was not continuous. The Prosecution suggests some 19 days on which discharge occurred whereas the Defendant suggests that it was on far fewer occasions and even then, only part of days. The rate of \$10,000 per day or part could add an additional \$190,000 on 19 days to the maximum penalty. However, given the dispute as to the number of days discharge occurred I will consider the offending as a whole within the \$600,000 fine limit.

[4] I understand that the parties agree that s 24A of the Sentencing Act 2002, relating to an Adjournment for Restorative Justice process, is not applicable in this case. No suggestion has been made for a discharge without conviction. The Defendant is therefore convicted and I proceed to consider an appropriate sentence. At the outset both Counsel are agreed that a fine is the appropriate sentence although issues of reparation in relation to victims arise.

[5] There were some 138 victim reports. Some covering multiple persons demonstrating a widespread impact on the local community. The key impacts on the community and individuals are subsumed within the Summary of Facts. The Victim Impact Statements reinforce the various matters agreed in the Statement of Facts.

[6] Under s 24 of the Sentencing Act it is clear that I must assume the facts essential to the charge are proven and also the Summary of Facts agreed between Counsel. To the extent that any submissions sought to derogate from those Facts, I disregard them.

Background

[7] The Defendant is a privately owned dairy Company. Among other assets, it owns a factory in Factory Road, Waharoa that produces both cheese and milk powder. The Factory has a Waste Water Treatment Plant (WWTP) into which drain whey solids from cheese production, condensate from milk powder production and all other waste produced by the factory. At the time of the offence, the WWTP consisted of a Waste Stream System as follows:

- a) Balance Tank;
- b) Dissolved Air Flotation Unit (DAF);
- c) Sequential Batch Reactor (SBR); and
- d) Decant or Irrigation Pond.

As explained to me, the discharge of waste water is into the Balance Tank from where it is then directed into the DAF Unit for treatment and then discharged into the SBR pond.

[8] There are 3 stages of treatment in the SBR pond, namely; Aeration, Settling and Decant:

- (i) The Aeration stage increases the level of dissolved oxygen in the waste water for the benefit of micro-organisms which break down organic components.
- (ii) When the pond reaches a certain level (around 92% of its design maximum) or about every 16 hours, aeration ceases, and the pond is allowed to settle.
- (iii) After settlement, liquid in the SBR pond is decanted into the Decant pond.

[9] The Decant or Irrigation pond is then used to irrigate neighbouring properties pursuant to appropriate resource consents and discharged to the river when conditions allow. If the levels of dissolved oxygen in the SBR pond fall too low the pond can become anaerobic reducing the activity of the micro-organisms and generating odorous gasses.

Waste Processing issues

[10] There are several constraints to this system. The first is the volume of the SBR pond in its operation. If the design volume of the pond is exceeded and levels become too high, it threatens the pond itself. This means the pond must cease aeration and allow for settlement and decant.

[11] The peak season generally is from August to November and during this period there is also heavy rainfall in the Waikato Region. Accordingly, the combination of heavy rainfall and heavy utilisation of the system can mean:

- (a) That the production volumes into the pond are at their peak or in excess of the peak; or
- (b) The pond must be settled and waste sent to the Decant/Irrigation pond more often; meaning a lower quality of water; and
- (c) There are times when discharge cannot occur to the river or to land because of constraints on those consents. This relates to either:
 - i. the water quality not being adequate to discharge to the river or the river not being in a state to receive the discharge; or
 - ii. for irrigation discharges that there is too much rain and ponding on the land to enable this to occur.

[12] Odour discharges can occur as a result of failure at any stage of the system. In particular, if the pond becomes overfull and the aeration cannot continue the SBR

pond can become anaerobic or start producing odorous gases. The discharge to the Decant/Irrigation pond can become full or overfull forcing either discharge by irrigation or otherwise which does not meet the parameters of the consent or requires alternative means to lower the level in the irrigation pond. In theory the Irrigation pond itself could become anaerobic although this is less likely given the treatment in the SBR system.

[13] As can be seen from the design of this system, it depends upon the volumes of input and rainfall and the ability to discharge from the Decant/ Irrigation pond for its operation. Over the last 13 years the factory has had a number of issues where it has discharged odorous gases leading to complaints and prosecutions.

[14] Originally the factory was under a different ownership when a prosecution occurred in 2007. The ownership changed by the time of the 2009 prosecution and there have been several configurations of the group. Nevertheless, it has been under the same basic ownership structure since 2008. There have been a number of occasions when it has been prosecuted, 2009, 2014 and more recently in 2019 relating to events in 2018. Given that the more recent sentencing occurred after the date of this offence I ignore that sentencing outcome for the current purposes. Nevertheless, I take into account that there has been a long history of non-compliance and systemic issues with the treatment system.

Systemic Issues

[15] As is clear from the earliest prosecution there have been difficulties in peak season with the system coping with the amount of waste water produced from the factory. There have been improvements conducted over time but quite simply they have not kept pace with the growth and operation of the factory.

[16] The factory enters into contracts with farmers to take the milk produced from that farm. In good years this may exceed the projected volumes and the Company is

obliged to take that milk. Open Dairy says, it has no proper way of disposing of the milk other than putting it through the production factories.

[17] On 1st November 2013, the Council issued an Abatement Notice requiring the Defendant to cease and prohibiting them from commencing the unlawful discharge of objectionable odour beyond the boundary of the site.

[18] The Defendant's Waharoa factory has unlawfully discharged offensive odours on a number of occasions over the past decade, typically during the period from December to March when there is a peak in dairy production.

Background to current offending

[19] In late 2017, leaks developed in the Waste Water System letting waste water collect under the liner of the SBR pond. In April 2018, the liner failed and the SBR pond became anaerobic resulting in discharges of odour and leading to replacement of the liner. In August and September 2018, the WWTP system became overloaded again causing the SBR pond to become anaerobic and discharge offensive odours. These discharges between December 2017 and September 2018 were the subject of charges against the Defendant to which it pleaded guilty and was sentenced in 2019.

[20] It was clear at that sentencing hearing that the charges relating to the 2017 and 2018 events did not relate to a discharge to ground or to water in respect of the August 2018 events. In relation to August 2018 the only charge that the Defendants faced was relating to discharge of odour to air at the sentencing stage.

[21] There is an argument in this particular case that the events of January and February 2019 was simply a continuation of the earlier offending noted in the charges relating to August/September 2018.

[22] TLS, the installers of the lining, advised the Council officers after the events subject of this charge that they had recommended the installation of pedestal snorkels on the liner both at the initial installation and at the subsequent installation to avoid the potential for liquid to travel through vents down the upper part of the lining and

enter under the liner itself. They had also recommended a discharge overflow pond to ensure excess volume was diverted from the SBR pond. This becomes highly relevant to the circumstances of this offending.

SBR Pond volumes

[23] Control of the levels of waste water in the SBR pond are intended to be managed automatically. There are sensors to monitor the level of waste water, the dissolved oxygen content and the transition between different treatment stages. Generally, the SBR pond would switch from aeration to settling when the volume reached 92 percent and an emergency decant would be triggered if the level reached 98 percent. There were also manual controls.

[24] I am advised that the manufacturer of this system recommends that the maximum level of the SBR pond be set 300mm – 500mm below the level of the gas vents which are near the top of the liner. This is to prevent an overflow of waste water out of the pond or into vents if there is an unexpected in-flow to the SBR pond in a heavy rain event.

[25] The Defendant submitted that the levels in the pond exceeded those permitted in August/September 2018 and therefore allowed liquid to flow down the sides of the lining and pond underneath. It is likely this did occur in August/September 2018 and the Defendant therefore relied upon that as being the same offending as that being the subject of the current charge.

[26] However, after repeated requests by the Court, data was finally produced by consent for September 2018 to January 2019 for the following parameters:

- (i) Volumes of discharge into the SBR pond;
- (ii) Rainfall; and
- (iii) Volumes of discharge from the irrigation/decant pond.

[27] It is clear from this information that there are other periods particularly in November 2018 when the discharge into the pond was far higher than that for

August/September. In November there were several days when no discharge could occur from the Decant/Irrigation pond although the SBR received maximum levels.

[28] Therefore, I conclude that there were multiple occasions between August and December 2018 when levels would have been sufficient for waste water in the SBR pond to enter through the gas vents and create ponding under the liner. This discharge itself is an offence but has not been charged as a discharge to ground.

[29] More importantly it demonstrates the significant systematic problems with the ponds. Given the events earlier in 2018 I am satisfied the risk of this was known to the Company by virtue of the operation design and manuals and the advice of TLS.

Circumstances of the odour detection

[30] On 22 December 2018, it was noticed that water in the leak detection system under the liner had gone from clear to sludge and at around the same time the liner began to show signs of lifting (referred to as “whaling”). This has occurred earlier in 2018 and was the reason for the replacement of the liner in July 2018. The mechanism apparently agreed between the parties is that the water under the liner began to decompose creating anoxic gases and causing the liner to lift. This in turn restricts the use of the aerators. In May 2018, it had meant that the aerators had cut through the lining therefore causing a release of gas and odour and meant that the pond could not be operated.

[31] In early January 2019, it meant there were difficulties with the aerators being used if they were to avoid cutting the liners. The aerators were therefore removed on 4 January 2019 and the pond then began to discharge gas and odour.

[32] Council began receiving odour complaints the same day. These complaints continued on almost a daily basis until 22 February 2019. Not all the complaints were found to be justified but I am satisfied that the odours from the pond were the cause of ongoing complaints and effect on the community on an intermittent basis during this period.

[33] On 5 January 2019, the Defendant contacted the liner contractor to assist it with repairs. The factory continued production attempting to use the Decant pond as its temporary SBR pond. However in order to replace the liner and regularise the production large storage bladders were brought in to provide additional storage. During this period there were some 5 days when excess production was sent to a competitor's factory. The bladders were seen as the additional storage.

[34] On 8 January 2019, Inspectors from the Council visited the Factory. On 9 January 2019, the Defendant sent letters to the residents in Waharoa relating to the issues with the pond. Various steps were taken in an attempt to address the odour issue, including treating the sludge, installing deodorisers and considering the release of gas from below the liner.

[35] On 12 January 2019, one of the milk powder dryers was disabled to reduce waste water production but cheese production was not curtailed. On 15 January 2019, the Defendant advised the Council and the community that it intended to vent the gas at 2:00 am on 16 January 2019. The Defendant proceeded to do this and completed draining the SBR pond exposing the sludge at the bottom of it.

[36] Apparently no expert advice had been sought on how to minimise odour issues resulting from these processes. On 17 and 18 January 2019, there was a spike in the number of odour complaints from the community. The adverse effects were more severe with people woken from sleep, gagging...

[37] Between 14-18 February 2019, the SBR pond liner was replaced and the pond put back into operation. Odour complaints continued in relation to the large storage bladders which were not aerated. The Defendant began to empty the bladders on 20 February 2019 completing the process by 22 February 2019. The final odour complaint was received that day.

Environmental effects

[38] The principle environmental effects caused by the offending has been on the people in the Waharoa community who suffered the effects of repeated strong odours.

The Council received 109 complaints from 43 separate complainants. The odour was described as nauseating causing people to seek medical attention, retching and vomiting, keep their homes and work places closed, not go outside, and have to clean clothing and furnishings. Associated effects included social isolation from not being able to go outside and economic impacts from fewer customers in shops.

[39] In total some 138 Victim Impact Statements were provided to the Court. These confirmed the Statement of Facts which indicated levels of adverse effects from highly offensive odours. It also indicated that there were impacts such as headaches, nausea, retching and vomiting associated with the odours as well as the inability for some people to work.

[40] I am satisfied that the impacts of the discharge of these odours was severe, particularly for those people who may have had respiratory conditions already. It appears that the decision to release the gas from under the liner at night had a particular impact on the residents given the relatively still conditions at the time in which the odour “ponded”.

Culpability

[41] The prosecution characterises the Defendant’s conduct as careless, resulting from 3 failures:

- (a) The failure to install appropriate infrastructure to avoid potential over-flows from the SBR pond;
- (b) The failure to properly manage waste water levels in the SBR pond;
and
- (c) The failure to curtail production when issues with the SBR pond became apparent in December 2018.

[42] The Prosecutor says, these failures are attributable to a systemic lack of investment, experience and training rather than to the recklessness of any particular person. However, when considered in light of previous problems at the same factory

especially the offending in 2018, the Prosecutor submits that the Defendants' conduct overall is grossly negligent and bordering on reckless. The Prosecutor also submits that the Defendant could have done more when the problems emerged specifically by radically curtailing production of cheese produced pressure on the WWTP.

[43] In relation to the adequacy of the infrastructure the Prosecutor submits that the factory was being run in excess of its true capacity in order to sustain production levels. Given the offending in 2018, the Defendant was on notice of the consequences of overflows in the SBR pond but failed to put in place any effective contingency plan. This limited what the Defendant could do when the SBR pond failed.

[44] In relation to the affected environment the Prosecutor submits that the Waharoa community has clearly been adversely affected and was extremely vulnerable to this offending. The Prosecutor points to the discharges of offensive odour being pervasive on-going and unavoidable by members of the community who could do little to mitigate the adverse effects except stay in-doors with windows sealed and even this was not always enough.

[45] Further, the Prosecutor submits that the Waharoa community was particularly vulnerable because of the on-going issues and repeated discharges of offensive odours which increased feelings of distress as compared to a one-off situation. In this regard, the Prosecutor notes that the period of the 2018 offending and subsequent prosecution almost over-lap with this offending.

[46] For those reasons the Prosecutor submits the deterrence should be a significant consideration on sentencing. The presence of systemic issues stemming from a lack of investment requires a sentence to recognise that the gains from production should not be based on the avoided costs of preventing pollution (see *Thurston*).¹ In a similar way, the Prosecutor submits that the failure to curtail production should be seen as a gain to the Defendant arising from not doing enough to reduce the unlawful discharges.

¹ *Thurston v Manawatu-Wanganui Regional Council*, HC Palmerston North, CRI-2009-454-24, 25,27, 27 August 2020 at [47].

Conclusions as to Culpability

[47] Having received the information for pond operation from October through to December I am satisfied that the Company continued to operate its system in a similar manner to that previously. Although the data does not actually record levels over 100 percent, it is clear to me that this must have occurred during key periods in November especially in periods of heavy rainfall. There is no evidence that the owner changed their operating procedure after the events of May or the replacement of the liner in July.

[48] In submissions to the Court the Defendants suggested that they were obliged to receive milk from the various providers and process this. I am satisfied that at times the amount of milk processed was in excess of the design of the system.

[49] The system appears to have been designed for around 2,400m³ per day and there were numerous occasions when the amount of waste product going through the system per day was in excess of 2,600m³. The peak was around 3,100m³ in November 2018. At the same time, during the period from 25th to 27th November, there was at least one occasion of 35mm of rain. Quite simply, this WWTP system was woefully inadequate to cater for the amount of waste water that it was having to deal with.

[50] The Applicant had recognised from 2014 that a system upgrade was required and they had commenced such up-grades but it was clear that this was being done on a “piece-meal” basis and over the following 4 years the system had still not been completed.

[51] In such circumstances I am satisfied that the actions of the Company were reckless and bordering on deliberate given the size of investment that was required to remedy the systemic errors. I am told the Company has now spent some \$20 million on a system which represents a significant increase in capacity and also in the quality of the discharge. This process should have been engaged much earlier and certainly

well before 2018. Accordingly, the offence must be seen as a serious one within its category.

Is this a duplication of an earlier charge?

[52] In entering a plea of guilty to the charge it cannot be said that the Defendant can therefore excuse its conduct by arguing for duplicity of charges. At best its argument would be that the discharge under the liner had not been detected before December and this would lead to questions as to what reasonable steps the owner had taken to check whether liquid was entering under the liner given the problems that had occurred in May/June and the liner replacement in July.

[53] However, given my conclusion that as a matter of fact it is likely that liquid entered under the liner in October/November as well as August/September little turns on the issue. In my view even if no further liquid had entered after August/September the owner still had an obligation, given the systemic failings of the system, to ensure that further liquid did not enter under the liner after the liner was replaced in June/July. It was clear that they did not do so and continued to operate the system with the same systemic error.

Reparation

[54] It is clear that the ongoing failure of the WWTP at Waharoa has created ongoing problems for the local Waharoa community. I am satisfied that they have been sensitised to other discharges due to the significant number of discharges that have occurred over the last 12 to 13 years. It is correct that some of the complaints made accused the factory in circumstances where it is other operators that have created the odour. However given the significant number of discharges that have occurred from Open Dairies, I am satisfied that this is as a result of the community being sensitised to such exposure.

[55] More importantly some of the descriptions in this case are similar to or more serious than those made in earlier cases and involve actual vomiting, headaches and breathing difficulties and at least some occasions, medical visits. These are not trivial odour complaints. It has had a significant impact on the community and the failure of the Company to address the systemic errors has been an ongoing source of complaint and concern.

[56] The question for this Court is how it could best address that reparation. The Defendant suggested that it should make a payment to a special Trust to benefit the people of Waharoa. On the last occasion the Judge made a payment of \$1,000 per victim (around 30). In their Victim Impact Statements, many (but not all) of the victims suggested there should be some compensation to the community as a whole.

[57] In the end, I have agreed with the Defendant that a Trust set up for the benefit of the community of Waharoa would be appropriate. To that end, a draft document has been produced which is **annexed hereto as A**. The intent being that there be two categories. A payment of a sum for the purposes of:

- (i) Benefiting the people of Waharoa through projects; and
- (ii) Allowing individuals to make claim against the Trust as well if they consider it appropriate.

[58] It would then be for the trustees to consider the approach to be adopted. To this end, the Defendant accepts that two representatives from Waharoa should be selected together with one for the Waikato Regional Council. I understand there is at least one Waharoa community group that could supply representatives and it may be that a consensus between the victims for the selection of one or two representatives on the Trust could be reached. Nevertheless, Waikato Regional Council has a trustee available and that trustee together with others to be appointed could hold the funds for the benefit of the people of Waharoa on the terms of the draft document **annexed hereto**. I leave the finalisation of that to the Waikato Regional Council and the Trust with the intent that the two Waharoa community members would be selected by some method agreed by the local community and/or the victims.

[59] I have concluded that a substantial payment should be made in reparation. Given the guideline adopted in the last case of \$1,000 per victim by Her Honour, this seems a reasonable sum to utilise. I acknowledge there is no particular rule nor can there be full compensation to all the parties for their perceived effects which are largely ephemeral although some relate to medical expenses over a long period. It is for this reason that I have adopted a figure of \$120,000 as being an appropriate reparation to the local community for the impact of this offending on them. I particularly take into account the cumulative effect over the earlier events and the need to mark out some benefits to the community to compensate for the significant effect of this offending on them.

Starting Point

[60] The parties are agreed that the Court of Appeal Decision in *Moses*² should be adopted for this case which essentially engages a two-step sentencing process. The first setting the starting point including aggravating mitigating features of the offence. The second stage makes any adjustments to that starting point of an aggravating or mitigating nature.

[61] The overlay in this particular case is that the Prosecutor has asked the Court to consider reparation. In light of the decision in *Stump Master*³ I have concluded that the reparation should be addressed first then the starting point and ending point without reference to reparation. Having reached an end point, the Court would then consider as part of the second stage of the *Moses*⁴ Decision, whether the Court can/should take into account the question of totality as mitigation if appropriate for reparation or otherwise.

[62] Parties have referred to a number of cases for starting point. However, I have concluded that the closest case on the facts of this matter is the starting point adopted by Her Honour in the *Open Country Dairy*⁵ from 2019. Although this case is not

² *Moses v R* [2020] NZCA 296

³ *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020

⁴ *Moses v R* [2020] NZCA 296

⁵ *Waikato Regional Council v Open Country Dairy Limited* [2019] NZDC 19755.

relevant as an aggravating feature it is nevertheless an excellent “on point” guide for the purposes of the appropriate starting point in this case.

[63] Given that I see this is as a separate significant failure I have concluded that the starting point in this case should be the same for this charge notwithstanding that there were two charges in the earlier case including a discharge to ground for the May/June period. I also acknowledge the Defendant saying that these offences covered a longer period discharge of odours. Nevertheless, the current case is one where the systemic error was undetected and continued and it had led to the failure in June/July and the odour complaints in the 2018.

[64] There was a heightened obligation therefore on the Company at that time to be aware of the systemic problems with the system. They knew that had been failing of the liner previously (April/May) and they should have known that the system was coping with too much product. That being the case, I have concluded that an appropriate starting point for this offence is 40 percent of the maximum, namely; \$250,000.

[65] I note for example, that in 2007 His Honour Judge Whiting had a starting point for the fine for the Company of \$80,000. In regard to the significant change in levels of fine since then and the differences in the systemic errors in this case, I consider my starting point in this case to be relatively conservative.

Adjustments to the starting point

[66] Having reached a starting point of \$250,000 I need to consider aggravating and mitigating features. In particular, I need to consider the relevance of the reparation payment of \$120,000 and whether this should lead to any adjustment to the starting point. This is not the first offending in relation to this matter and I cannot take into account the offending which occurred in 2018 and sentenced in 2019. I can however take into account the previous offences in 2009 and 2014. The offences in 2014

showed a systemic problem with the system reminiscent of that in 2009 and in fact for the earlier Company in 2007.

[67] I can also take into account the number of complaints that have been received in the interim and the issue of the Abatement Notice in 2013. The breach of the Abatement Notice was a serious matter however in the end was not the subject of further charge for sentencing. It is however an aggravating feature of this offending.

[68] Altogether I consider that the uplift to the starting point in such a case should be between 10 percent and 15 percent. I have adopted an uplift of 10 percent on a conservative basis, although I consider that something in the order of 15 percent could be appropriate in the circumstances of this case given the history of systemic errors evident.

Mitigating factors

[69] There is no dispute that the Company is entitled to a discount of 25 percent for its early plea. I am not satisfied that there is any basis to consider discounts for remorse or good conduct given the previous offending and the systemic nature of the problem.

[70] The core issue for this Court relates to two matters:

- (i) Whether there should be any credit for the substantial improvement to the system now adopted and constructed. Particularly, the significant improvement to the water quality which will occur; and
- (ii) Any allowance by way of mitigation for the reparation payments made.

Improvements to the System

[71] Clearly the remedial work to the systemic failure of the system cannot be allowed for in any form as a mitigating factor. The cost of \$20 million is largely to move to a hybrid system with significantly greater capacity in allowing for calamity and much improved aeration. One of the consequences of the improvements however is a significant improvement in the end water quality. In my view there are two aspects to this:

- a. That the water contaminants being discharged on a total mass basis will be around one-sixth/one-seventh of that under the current system.
- b. A move to a sludge removal system enables the improved application of nutrients to areas where they can be beneficial rather than the potential discharge to water that can occur from either discharge by irrigation or directly to the river.

[72] Overall this system represents an improvement to the environment of the Waitoa River and its environment if operated in accordance with its design.

[73] I therefore consider that there is some benefit greater than simply remedying the effects of this offending that will occur from the discharge. The amount of benefit can never be on a dollar for dollar basis with the expenditure nor can I say that the majority of the expenditure in this case is related to that aspect rather than repairing systemic errors.

[74] Overall my conclusion is some allowance should be made for the sum of possibly in the order of 10 percent to 15 percent.

Reparation

[75] In this particular case, the reparation is for a substantial sum. There are two aspects to this offending:

- (i) that which occurs in terms of the community as a whole represented by the council; and
- (ii) that which has occurred to the local community.

[76] The context of the Sentencing Act is a recognition of the impact offending has not only been on the victim but also on the wider community. At least in a case such as the present I might ask “what sentence would most help the community?”

[77] Compared with many cases the major effect in this case has been to the residents. There is little evidence of ongoing effect in the wider community or in terms of air sheds or air pollution. It is clear that there is an issue in relation to complying with the Council’s Plan and its Abatement Notice. A fine is therefore appropriate. The question in my mind is what adjustment should be made for the proposed reparation.

[78] When I look at the question of reparation and improvement of the overall system together, i.e., expenditure on improvement, I am satisfied that I should allow a total further allowance for both these mitigating factors of 30 percent plus 25 percent for the early plea. This amounts to a significant discount of 55 percent from the starting point of \$250,000 (plus allow for 10 percent uplift to starting point). Nevertheless, I consider that justified because from the perception of the Company it is providing direct recompense to the victims through reparation payment together with the fine.

Conclusion

[79] Overall therefore I have concluded that from the starting point of \$250,000 there should be an adjustment by reduction of 45 percent representing mitigating factors of 55 percent and uplift factors of 10 percent.

[80] Accordingly:

- (1) I order in the sum of \$120,000 for the benefit of the Community of Waharoa reparation on terms and conditions similar to those in the **attached** Trust Deed:

- a. to be finalised between Waikato Regional Council and the Defendant; or
- b. both appurtenant of initial Trustees for WRC, Mr Blunt, and the community nominees, Ms Wilson and Messrs Gillet and Mayo.
- c. by further Order of this Court if not settled within 30 days.

(2) I order the Defendant to pay the sum of \$137,500 fine together with Court costs of \$130 and solicitors fees for two and a half days being fixed by the registrar. Ninety percent of the fine is to be paid to the Waikato regional Council.

Judge J A Smith
District Court Judge

Date of authentication: 07/09/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

Appendix A

WAHAROA COMMUNITY TRUST

OPEN COUNTRY DAIRY LIMITED

Settlor

ALEX BLUNT, MOKORO GILLET, NATALIE WILSON AND ALAN MAYO

Trustees

DEED dated

2020

PARTIES

- (1) **OPEN COUNTRY DAIRY LIMITED** ("Settler")
- (2) **ALEX BLUNT, MOKORO GILLET, NATALIE WILSON AND ALAN MAYO**111("Trustees")

BACKGROUND

- A. Open Country Dairy Limited as the Settler wishes to establish a trust in New Zealand to benefit the Waharoa community and for the purposes described in clause 4.1 of this deed.
- B. On the date of execution of this deed, the Settler has provided to the Trustees the sum of [\$XX] to be held by the Trustees on trust for Charitable Purposes and Other Purposes on the terms set out in this deed.
- C. The Trustees may acquire from time to time further property and funds from businesses and other people and organisations in the Waharoa community, to be added to the Trust Fund and held and applied for Charitable Purposes and Other Purposes on the terms set out in this deed.
- D. The persons executing this deed as trustees are prepared to act as the first Trustees of the Trust Fund.
- E. The Trustees wish to set out and define the Trust and the conditions upon which the Trustees hold the Trust Fund and assets vested in them in their capacity as Trustees.

OPERATIVE PART:**1. DEFINITIONS AND CONSTRUCTION****1.1 Defined terms**

In this deed, unless the context requires otherwise:

- (a) **Balance Date** means 31 March or any other date which the Trustees adopt by resolution as the date up to which accounts are to be made in each year;
- (b) **Charitable Purposes** means the charitable purposes of the Trust set out in clause 4.2 of this deed.
- (c) **Designated Gift** means a gift which is subject to a trust for a specific purpose that comes within the Charitable Purposes;
- (d) **Eligibility Criteria** means the criteria set out in clause 4.4 of this deed for individuals to receive reparation and/or benefits through the Other Purposes of the Trust.
- (e) **Income Year** means any year or other accounting period ending on a Balance Date;

- (f) **Other Purposes** means the other purposes of the Trust set out in clause 4.3 of this deed.
- (g) **Purposes** means any one or more of the Charitable Purposes and the Other Purposes.
- (h) **Qualified Auditor** has the same meaning as that term is defined in sections 35 and 36 of the Financial Reporting Act 2013;
- (i) **Related Person** for the purposes of clause 9.2 and in relation to any business to which section CW 42 of the Income Tax Act 2007 applies, means a person specified in paragraphs (i) to (iv) of subsection (5)(b) of that section, the persons currently specified being:
- (i) a settlor or trustee of the trust by which the business is carried on; or
 - (ii) a shareholder or director of the company by which the business is carried on; or
 - (iii) a settlor or trustee of a trust that is a shareholder of the company by which the business is carried on; or
 - (iv) a person associated with a settlor, trustee, shareholder or director already mentioned in this definition;
- (j) **Teleconference Meeting** for the purposes of rule 18 in the First Schedule means a meeting where the participants are contemporaneously linked by telephone or some other means of instant audio or audio and visual communication;
- (k) **Trust Deed** when appearing in the rules set out in the First Schedule, means this deed;
- (l) **Trust Fund** means the assets and other property held by the Trustees on the date of this deed and includes any money, investments or other property paid or given to or acquired or agreed to be acquired by the Trustees after this deed has been signed with the intention that it be held by the Trustees subject to the trusts and other provisions set out in this deed;
- (m) **Trustees** means:
- (i) **Trustees Prior to Incorporation:** the trustee or trustees for the time being of the Trust, whether original, additional or replacement trustees; and
 - (ii) **Trustees Incorporated as a Board:** if the Trustees are eligible and have incorporated as a board under the Charitable Trusts Act 1957, either the Trustees acting as a board or the Trustees for the time being constituting the board, as the context requires.

1.2 Construction

In the construction of this deed, unless the context requires otherwise:

- (a) a reference to "Trustees" is a reference to the trustees for *the* time being of the Trust, whether original, additional or substituted;
- (b) a reference to a person includes a corporation sole and also a body of persons, whether incorporated or unincorporated;

- (c) the First Schedule forms part of this deed;
- (d) headings appear as a matter of convenience and shall not affect the construction of this deed;
- (e) if there is a conflict between the rules and the other provisions of this deed the other provisions of this deed shall prevail.

1.3 Statutes and Regulations

References to any statutory provision include any statutory provision which amends or replaces it, and any subordinate legislation made under it or under any such amendment or replacement provision.

2. ACKNOWLEDGEMENT OF THE TRUST

2.1 Acknowledgement of trust

The Trustees acknowledge, that the Trustees hold the Trust Fund upon the trusts and with the powers set out in this deed.

2.2 Name of trusts

The trusts governed by this deed shall continue to be known as the **WAHAROA COMMUNITY TRUST** unless and until the Trustees determine by resolution from time to time some other appropriate name reflecting the Background and the source of the Trust Fund.

3. REGISTRATION

3.1 Incorporation under the Charitable Trusts Act 1957

The Trustees may at any time, if eligible, following a resolution of the Trustees to that effect, apply to become incorporated under the Charitable Trusts Act 1957 but the Trustees are not obliged to make such application.

4. PURPOSES

4.1 Purposes

The Trust is established to facilitate restorative justice, through the following Charitable Purposes and Other Purposes.

4.2 Charitable Purposes:

- (a) To provide for, assist in and promote the development of new and the enhancement of existing projects, facilities and/or initiatives whose purpose is to benefit the community and environment in Waharoa;
- (b) To assist in and promote the development of projects that provide a benefit or advance education within the Waharoa community;
- (c) To support people and organisations which operate to relieve poverty or advance education within the Waharoa community; and
- (d) To provide for, assist in, and promote the development of any other charitable purposes as the Trustees consider will benefit and enhance the Waharoa community.

4.3 Other Purposes:

(a) To benefit, through the payment of reasonable reparation (determined by the Trustees) for actual out of pocket expenses, those residents of the Waharoa community who meet the Eligibility Criteria.

4.4 **Eligibility Criteria:** An individual or group of residents of the Waharoa community will be eligible for consideration by the Trustees (in their sole discretion) to receive reparation from the Trust (in such amount as is determined by the Trustees in their sole discretion) if:

(a) The individual or group has suffered actual out of pocket costs and expenses as a result of the odour discharges from the Settler's milk processing factory located on Factory Road, Waharoa between 4 January 2019 and 22 February 2019; and

(b) The individual or group provides the Trustees with any information reasonably requested by the Trustees to support that individual's or group's claim for reparation (at the individual's or group's expense) together with reasonable evidence of the out of pocket expense(s) having been incurred.

4.5 Purposes Independent

The Trustees shall be empowered to carry out any one or more of the purposes of the Trust independently of any other purpose of the Trust.

5. INCOME TRUSTS

5.1 Power to pay, apply or appropriate Income

The Trustees may pay, apply or appropriate, or decide to pay, apply or appropriate as much of the income arising from the Trust Fund in an Income Year as they think fit for or towards one or more of the Purposes. If the Trustees provide for more than one Purpose, they need not treat each purpose equally.

5.2 Provisions relating to payments, applications and appropriations of income

(a) The Trustees, by written resolution, may appropriate any investments for one or more of the Purposes in anticipation of a payment or application under clause 5.1.

(b) In any Income Year, the Trustees may appropriate all or part of the income derived or to be derived from the Trust Fund during that Income Year even though, at the time of appropriation, they have not received the income being appropriated.

(c) If the Trustees appropriate any income for any Purpose the recipient of that income shall take an absolute and indefeasible interest in that income as from the date on which it is appropriated.

5.3 Power to retain income

The Trustees need not distribute all of the income arising from the Trust Fund in an Income Year, but may retain or decide to retain all or part of that income to establish or augment any reserve fund, which may be used at any later time for any purpose for which income arising from the Trust Fund may be used.

6. CAPITAL TRUSTS

At any time, the Trustees may, or may decide to, pay, apply or appropriate as much of the capital of the Trust Fund as they think fit for or towards one or more of the Purposes. If the Trustees so provide for more than one Purpose they need not treat each Purpose equally. Any payment, application or appropriation of capital may be made either in addition to or in place of any payment, application or appropriation of income.

7. RECEIPTS

7.1 Receipt of gifts

The Trustees may receive solicited and unsolicited gifts of any property for the Purposes or for any specific purpose that comes within the Purposes.

7.2 Separate specific trusts

- (a) If the Trustees accept a Designated Gift they must keep that Designated Gift and any income derived from it separate from the general assets of the Trust Fund, and administer it as a separate specific trust in terms of the trust under which it was given.
- (b) The Trustees shall not use the assets of any separate specific trust to make good any deficit, loss, damage or breach of trust relating to any other separate specific trust. Similarly, the Trustees shall not use the general assets of the Trust Fund for such purposes.
- (c) Each separate specific trust shall bear its own administration expenses plus a fair proportion (determined by the Trustees) of the administration expenses applicable to the general Purposes.

7.3 Receipts for payments

The receipt of the secretary, treasurer or other person or persons appearing to the Trustees to be authorised to give receipts on behalf of the recipient of any payment made under the terms of this deed, shall be a complete discharge to the Trustees for that payment.

8. INTERESTED TRUSTEES

8.1 Disclosure of interests

- (a) A Trustee will be interested in a transaction to which the Trust is a party if the Trustee:
 - (i) is a party to, or will derive a material financial benefit from that transaction;
 - (ii) has a material financial interest in another party to the transaction;
 - (iii) is a director, officer or trustee of another party to, or person who will or may derive a material financial benefit from the transaction, not being a party that is wholly owned by the Trust;
 - (iv) is the parent, child, spouse or relative of another party to, or person who will or may derive a material financial benefit from the transaction; or
 - (v) is otherwise materially directly or indirectly interested in the transaction,

but a Trustee will not be interested in a transaction under this clause 8 if the Trustee is acting in the capacity as a director, officer or trustee of another party to the transaction for the purposes of representing the Trust.

(b) As soon as a Trustee becomes aware of the fact that he or she is interested in a transaction or proposed transaction with the Trust, he or she must disclose to his or her co-trustees at a meeting of the Trustees:

(i) the nature and monetary value of that interest (if the monetary value of the Trustee's interest is able to be quantified); or

(ii) if the monetary value of the Trustee's interest cannot be quantified, the nature and extent of that interest.

(c) A disclosure or interest by a Trustee must be recorded in the minute book of the Trust.

8.2 Dealing with interested Trustees

Subject to clause 8.1 and to rule 12 in the First Schedule, each Trustee may act as a Trustee and still contract or otherwise deal with the Trustees in his or her personal capacity or in any other capacity as if he or she had not been appointed as a Trustee. This right to continue to act as a Trustee shall apply even though a Trustee's interest or duty in a particular matter may conflict with his or her duty to the beneficiaries of the Trust Fund.

9. RESTRICTIONS ON PRIVATE PECUNIARY PROFIT AND ON BENEFITS IN BUSINESS ACTIVITY

9.1 No private pecuniary profit of any individual and exceptions

(a) No private pecuniary profit shall be made by any person involved in the Trust, except that:

(i) any Trustee shall be entitled to be reimbursed out of the assets of the Trust for all expenses which he or she properly incurs in connection with the affairs of the Trust;

(ii) the Trustees may employ and pay reasonable and proper remuneration to any officer or servant of the Trust (whether a Trustee or not) in return for services actually rendered to the Trust;

(iii) any Trustee shall be entitled to such remuneration for his or her services as a Trustee as may be fair and reasonable having regard to his or her duties, in an amount approved by the Trustees;

(iv) any Trustee may be paid all usual professional, business or trade charges for services rendered, time expended and all acts done by that Trustee or by any firm or entity of which that Trustee is a member, employee or associate in connection with the affairs of the Trust;

(v) any Trustee may retain any remuneration properly payable to that Trustee by any company or undertaking with which the Trust be in any way concerned or involved for which that Trustee has acted in any capacity whatever, notwithstanding that the Trustee's connection with that company or undertaking is in any way attributable to that Trustee's connection with the Trust.

- (vi) the Trustees, in determining all reimbursements, remuneration and charges payable in terms of this clause, shall ensure that the restrictions imposed by clause 9.2 of this deed are strictly observed.

9.2 Prohibition of benefit or advantage in business activity

- (a) In the carrying on of any business under this deed no benefit, advantage or income shall be afforded to, or received, gained, achieved or derived by any Related Person where that Related Person, in his or her capacity as a Related Person, is able in any way (whether directly or indirectly) to determine, or to materially influence the determination of:
- (i) the nature or amount of that benefit, advantage or income; or
 - (ii) the circumstances in which that benefit, advantage or income is, or is to be, so afforded, received, gained, achieved or derived.
- (b) A person who, in the course of, and as part of the carrying on of his or her business of a professional public practice, shall not, by reason only of him or her rendering professional services to the Trust or to any company by which any business of the Trust is carried on, be in breach of the terms of this clause 9.2.

10. TRUSTEES' POWERS

It is intended that in the exercise of their discretion the Trustees shall have the fullest possible powers in relation to the Trust Fund, and that they may do anything they think necessary, expedient or desirable even though it is something which they would not normally have power to do in the absence of an express power or an order of the Court. However:

- (a) this general power does not authorise the Trustees to do anything which may prejudice the charitable nature of the Charitable Purposes and any discretion exercised by the Trustees under the Other Purposes must be subject to claimants (individual and/or group) meeting the Eligibility Criteria; and
- (b) all the Trustees' powers, authorities and discretions shall be subject to any direction to the contrary in any instrument evidencing or conferring a gift accepted by the Trustees, whether the gift is a Designated Gift or is generally for the Purposes of the Trust Fund.

11. ADVICE OF COUNSEL

If the Trustees are in doubt over any matter relating to the administration of the Trust Fund, or over the exercise of any power vested in them, the Trustees may obtain and act upon the opinion of a barrister of the High Court of New Zealand of at least 7 years' standing. The Trustees may act upon the barrister's opinion without being liable to any person who may claim to be beneficially interested in respect of anything done in accordance with that opinion. This right to obtain and act upon a barrister's opinion, however, will not restrict the Trustees' right to apply to the High Court of New Zealand for directions.

12. LIABILITY OF TRUSTEES

A Trustee shall be liable only for any loss attributable to his or her dishonesty or to his or her willful commission or omission of an act which he or she knows to be a breach of trust. In particular, no Trustee shall be bound to take, or liable for failing to take, any proceedings

against a co-Trustee for breach or alleged breach of trust.

13. INDEMNITY

Each Trustee (including any former Trustee) shall be entitled to exoneration and indemnity out of the assets of the Trust for any liability which that Trustee incurs in relation to the Trust and which is not attributable to that Trustee's dishonesty or to his or her wilful commission or omission of an act which he or she knows to be a breach of trust.

14. WINDING UP

(a) Subject to clause 1S(b), the Trustees may by resolution wind up the Trust if in their opinion it becomes impossible, impracticable or inexpedient to carry out the Purposes or the Trustees consider, in their absolute discretion, that the Purposes are or may be better served by doing so.

(b) On the winding up or dissolution of the Trust, the Trustees must give or transfer all surplus assets after the payment of costs, debts and liabilities:

- (i) to some other charitable organisation or body within New Zealand having similar objects to the Charitable Purposes of the Trust; or
- (ii) for some other charitable purpose or purposes within New Zealand,

in accordance with the resolution of Trustees under clause 15(a) or otherwise at the direction of the High Court of New Zealand.

15. RULES AND APPOINTMENT OF TRUSTEES

The rules (with any valid alterations, which must be made in accordance with clause 17 below) set out in the First Schedule which govern the appointment, removal, retirement and proceedings of the Trustees subject to the provisions of this deed, will bind the Trustees.

16. ALTERATIONS TO DEED

(a) Subject to clause 17(b), the Trustees may from time to time by resolution modify or amend any term of this deed (including the First Schedule), provided that any such resolution must be passed by a number of Trustees that equals or exceeds 75% of the total number of Trustees for the time being.

(b) The Trustees power in clause 17(a) above may only be exercised with the consent of the person or persons for the time being holding the power of appointment and removal of Trustees (pursuant to clause 3 of the First Schedule to this deed).

17. GOVERNING LAW

This deed shall be governed by and construed in accordance with New Zealand law.

EXECUTED as a Deed

SIGNED by ALEX BLUNT

in the presence of:

Witness signature:

Witness name:

Occupation:

Address:

SIGNED by MOKORO GILLET

in the presence of:

Witness signature:

Witness name:

Occupation:

Address:

SIGNED by NATALIE WILSON

in the presence of:

Witness signature:

Witness name:

Occupation:

Address:

SIGNED by SIGNED by ALAN MAYO

in the presence of:

Witness signature:

Witness name:

Occupation:

Address:

FIRST SCHEDULE**RULES GOVERNING THE APPOINTMENT, REMOVAL, RETIREMENT AND PROCEEDINGS OF THE TRUSTEES****1. The Trustees**

The Trustees at the time of adoption of this new deed are:
Alex Blunt, [Trustee 2] and [Trustee 3].

2. Number of Trustees

The total number of Trustees must be not less than 3 and not more than 6.

3. Appointment of Trustees

The Trustees shall be appointed as follows:

- (a) Up to two Trustees may be appointed by Waikato Regional Council or its nominee;
- (b) One Trustee from the Waharoa community may be appointed by the Councillors of the Matamata-Piako District Council which represent the Matamata Ward, acting jointly, or their nominee;
- (c) One representative from the Waharoa community may be appointed by the Trustees;
- (d) The Trustees, by resolution passed by at least 75% of Trustees, may appoint up to two new and additional Trustees to the Trust who have been nominated by any Trustee or any nominations committee formed by the Trustees for that purpose.

4. Eligibility to be a Trustee

The following persons shall not be eligible for appointment, or to remain in office, as a trustee:

- (a) a person who has been adjudicated bankrupt.
- (b) a person who has been convicted of any criminal offence.
- (c) a person who has been sentenced to imprisonment for any offence.
- (d) a person who is prohibited from being a director of a company.
- (e) an individual who is under 16 years of age.
- (f) a person who is disqualified pursuant to the Charities Act 2005 from being an officer of a charitable entity.

5. Quorum

The majority of the Trustees in number for the time being shall constitute a quorum at meetings of the Trustees. For example, if there are 6 Trustees, 4 would constitute a quorum.

6. Termination of office

A Trustee shall cease to hold office if he or she:

- (a) is removed by the person or persons which appointed that Trustee pursuant to clause 3 above;
- (b) retires from office by giving written notice to the other Trustees;
- (c) refuses to act;
- (d) is absent without leave from 2 consecutive ordinary meetings of the Trustees;

- (e) becomes physically or mentally incapacitated to the extent that in the reasonable opinion of all of the other Trustees expressed in a resolution, he or she is unable to perform the duties of a Trustee properly;
- (f) ceases to be a person who would be eligible to be a Trustee pursuant to clause 4 above; or
- (g) is removed by a resolution of at least 75% of the other Trustees.

7. Record of changes of Trustees

Upon every appointment, removal, retirement, re-appointment or termination of office of any Trustee, the Trustees will ensure that an entry is made in the minute book of the Trust to that effect and that any statutory requirements as to the vesting of the Trust Fund in the Trustees or updating of records are satisfied.

8. Validity of Proceedings

- 8.1 Where, for any reason, a Trustee is not properly appointed, re-appointed or is disqualified from holding office, anything done by that Trustee (or by a meeting at which that Trustee was present as a Trustee or committee member) before discovery of the irregularity, shall be as valid as if that Trustee had been duly appointed, re-appointed or had not been disqualified (as the case may be).
- 8.2 If at any time the Trustees number less than two, anything done by the Trustees in accordance with the provisions of the Trust Deed pending the appointment of a new Trustee or Trustees shall be as valid as if the requirement for a minimum number of Trustees had been met during that period.

9. Appointment of secretary and others

The Trustees may appoint a secretary and any other officers or employees that the affairs of the Trust may require on such terms and conditions as they think fit. The Trustees may also remove and replace any persons so appointed.

10. Meetings

- 10.1 The Trustees shall meet as often as they consider desirable for the efficient and proper conduct of the affairs of the Trust, but in any event at least four times in each Income Year. If a Trustee is unable to attend a meeting in person, that Trustee may elect to attend the meeting by telephone, and the relevant parts of clause 18 of this Schedule shall apply, mutatis mutandis.
- 10.2 A meeting may be called at any time by 50% or more of the Trustees.

11. Notice of meetings

- 11.1 Written notice of every meeting, shall be either hand delivered, posted or sent by email to each Trustee at least 7 days before the date of the meeting. The secretary or some other person acting under the direction of the Trustees shall give the notice of the meeting. No

notice shall be required for adjourned meetings except to those Trustees who were not present when the meeting was adjourned.

11.2 Every notice of a meeting shall state the place, day and time of the meeting and may also state the subject matter of the meeting.

11.3 The requirement for notice of a meeting may be waived if all the Trustees give their written consent to such a waiver.

12. Interested Trustee may not vote

A Trustee who is interested (as defined in clause 8 of the Trust Deed) in a transaction entered into, or to be entered into, by the Trust may not vote on a matter relating to the transaction and may not be present while a matter relating to the transaction is discussed, but may:

- (a) attend a meeting of the Trustees at which a matter relating to the transaction arises provided that the Trustee is not present while the relevant matter is discussed, and be included among the Trustees present at the meeting for the purpose of a quorum;
- (b) sign a document relating to the transaction on behalf of the Trust;
- (c) do anything else as a Trustee in relation to the transaction, as if he or she were not interested in the transaction.

13. Chairperson

The Trustees shall by resolution select one of the Trustees to be the chairperson of the Trust from time to time. The chairperson shall have a casting vote in the event of the voting being declared even.

14. Adjournment

If a quorum is not present within 30 minutes after the time appointed for any meeting, the Trustee or Trustees present may adjourn the meeting. The chairperson may adjourn any meeting on the adoption of a resolution for its adjournment.

15. Committees

The Trustees may appoint sub-committees, ad hoc committees or executive committees as they may from time to time think expedient for carrying out the Purposes. Any such committee may co-opt any other person, whether a Trustee or not, to be a member of that committee. Subject to these rules and to any directions that the Trustees might give, each committee may regulate its own procedure. The Trustees may delegate any of the powers, authorities and discretions conferred upon them to any such committee whether or not any such person or member of a committee is a Trustee. Delegation may be with such functions and authority and subject to such restrictions as the Trustees may think fit and from time to time direct or redirect.

16. Resolutions

16.1 Except where these rules or the Trust Deed provide otherwise, a resolution is validly made when it is passed by a majority of all Trustees present and voting.

16.2 The Trustees may vary or cancel any resolution at a meeting by the same majority by which that resolution was passed.

16.3 A written resolution signed by all the Trustees or by all the members of a committee shall be as effective for all purposes as a resolution passed at a properly convened and conducted

meeting of the Trustees or of that committee (as the case may be). Such a resolution may comprise several counterparts or duplicated documents, each signed by one or more of the Trustees or members of the committee (as the case may be).

17. Minutes

- 17.1 The Trustees shall keep a proper record in a minute book of all decisions taken and business transacted at every meeting of the Trustees.
- 17.2 Any minute of the proceedings at a meeting which is purported to be signed by the chairperson of that meeting or by the chairperson of the next succeeding meeting shall be evidence of those proceedings.
- 17.3 Where minutes of the proceedings at a meeting of the Trustees have been made in accordance with the provisions of this rule then, until the contrary is proved, the meeting shall be deemed to have been properly convened and its proceedings to have been properly conducted.

18. Teleconference Meetings

For the purposes of these rules a Teleconference Meeting between a number of Trustees or committee members who constitute a quorum, together with the secretary or another person acting as a secretary, shall be deemed to constitute a meeting of the Trustees or the committee members (as the case may be). All the provisions in these rules relating to meetings shall apply to Teleconference Meetings so long as the following conditions are met:

- (a) all of the Trustees or committee members (as the case may be) for the time being entitled to receive notice of a meeting shall be entitled to notice of a Teleconference Meeting and to be linked for the purposes of such a meeting. Notice of a Teleconference Meeting may be given on the telephone;
- (b) throughout the Teleconference Meeting each participant and the secretary or person acting as a secretary must be able to hear each of the other participants taking part;
- (c) at the beginning of the Teleconference Meeting each participant must acknowledge his or her presence for the purpose of that meeting to all the others taking part;
- (d) a participant may not leave the Teleconference Meeting by disconnecting his or her telephone or other means of communication without first obtaining the chairperson's express consent. Accordingly, a participant shall be conclusively presumed to have been present and to have formed part of the quorum at all times during the Teleconference Meeting unless he or she leaves the meeting with the chairperson's express consent;
- (e) a minute of the proceedings at the Teleconference Meeting shall be sufficient evidence of those proceedings, and of the observance of all necessary formalities, if certified as a correct minute by the chairperson of that meeting and by the secretary or person acting as a secretary.

19. Annual report and financial statements

- 19.1 **Financial Information:** The Trustees must ensure that:
- (a) **Records and Accounts:** Full and correct records and accounts are kept of all their receipts, credits, payments, assets, liabilities, transactions and all other matters necessary for showing the true state and condition of the Trust Fund;

- (b) **Financial Statements:** Financial statements are prepared as soon as practicable after the end of each Income Year for approval by the Trustees, which comply with the requirements of the law and applicable financial reporting standards;
 - (c) **Auditing of Accounts:** If required by law or the Trustees so resolve, the financial statements of the Trust referred to in clause 19.1(b) will be audited or where permissible, reviewed, by a Qualified Auditor appointed for that purpose by the Trustees;
 - (d) **Annual Return:** An annual return attaching the financial statements is completed and filed in accordance with the Trust's obligations under the Charities Act 2005 (if any);
 - (e) **Change of Balance Date:** The Trustees may amend the Balance Date for the Trust from time to time, provided that approval of any such change has been obtained, if required, from any relevant body.
- 19.2 **Annual Report:** As soon as practicable after the end of each Income Year, the Trustees will produce a report regarding the activities of the Trust for the year, to which the financial statements of the Trust for the year (audited or reviewed as applicable) will be attached.
20. **Control of funds**
All money received by or on behalf of the Trust shall be paid immediately to the credit of the Trust in an account or accounts with a Bank or Banks selected from time to time by the Trustees. All cheques and other negotiable instruments, withdrawal slips and receipts for money shall be signed, drawn, accepted, endorsed or otherwise executed (as the case may be) on behalf of the Trust in such manner as the Trustees decide from time to time.
21. **Custody and use of common seal**
If incorporated as a board under the Charitable Trusts Act 1957, the Trustees shall have custody of the common seal, and from time to time by resolution, they may adopt any seal they think fit. The common seal must not be affixed to any document unless the Trustees have already authorised its use on that document. When a document is to be sealed on the prior authority of the Trustees the seal must be affixed to the document in the presence of two Trustees who must sign the document.