

**IN THE DISTRICT COURT  
AT HAMILTON (ex MORRINSVILLE)**

**CRI2014-039-000213**

**WAIKATO REGIONAL COUNCIL  
Prosecution**

v

**ORION HAULAGE LIMITED  
Defendant**

Hearing: 28 October 2014  
Appearances: Ms E Woolley for the prosecution  
Mr B Harris for the defendant  
Judgment: 3 November 2014

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**RESERVED SENTENCING DECISION**

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**Introduction**

[1] Orion Haulage Limited has pleaded guilty to unlawfully contravening s15(1)(b) of the Resource Management Act 1991 (“**the Act**”) on 31 October 2013 by permitting the discharge of farm animal effluent and dairy by-products from the manufacturing of cheese onto land, in circumstances which may have resulted in those contaminants entering water. The appropriate sentencing response is to fine the defendant, with a fine not exceeding \$600,000.00 being available for that purpose. The prosecution submitted that the appropriate starting point was a fine of \$45,000-\$50,000, but the defendant submitted that it should be \$28,000.00.

## Background

[2] The defendant is primarily a stock feed transportation company operating from Morrinsville, but about 10% of its business involves irrigating farm dairy effluent and/or milk by-products via farm ponds owned and managed by local farmers. This is done with the consent of the farmers and the Council and occurs most frequently during the spring flush.

[3] The offending in this case occurred at a dairy farm situated at 421 Landsdowne Road in Walton. This farm comprises approximately 150ha and in October 2013, when the offending occurred, was used to milk a herd of about 400 cows. The farm is owned by Matijacevich Kaihere Limited, and the day-to-day management of the farm is carried out by a farm manager and the Matijacevich family.

[4] The farm has a stream running through the property, which is an unnamed tributary (“**the tributary**”) of the Mangapapa Stream (“**the stream**”). The tributary is near to the effluent ponds and flows approximately 906 metres until it meets the stream within a neighbouring property.

[5] The defendant has an agreement with Matijacevich Kaihere Limited to add dairy by-products to the farm’s operational effluent pond (“**the main pond**”) and it has resource consent to then irrigate the combined by-product and effluent onto the paddocks on the farm. The by-product added to the main pond is predominantly waste from cheese-making processes, often referred to as “*whey permeate*”. Whey permeate is a lactose product and is the watery part of milk. The major environmental issue associated with lactose and whey products is that they can promote bacterial growth in soil and cause oxygen depletion in waterways.

[6] The defendant is responsible for the management of the effluent and irrigation system on the farm in accordance with the conditions of its resource consent. This includes managing the level of the main pond.

[7] There are two decommissioned effluent ponds next to the main pond. The resource consent which enabled their operation was surrendered by the farm owners

in November 1999. Since that time the farms effluent system has operated under the permitted activity rule in the Waikato Regional Plan. The two old ponds continue to hold liquid and effluent, and are the responsibility of the farm owner. The defendant has no right or agreement to manage or to utilise these two ponds.

[8] The main pond is sealed with a membrane liner and is gravity fed from the dairy shed. There are pipes leading into the pond which enable the defendant to discharge dairy by-products from its truck to the pond. The defendant adds the dairy by-product to the effluent pond throughout the usual 9-10 month milking season. Most of the dairy by-product is however added to the pond between August and November, in line with the milking “flush” or peak.

[9] When the main pond contains dairy by-product, the defendant operates under the conditions of its resource consent to apply the product to land via travelling irrigators. Typically irrigation occurs when by-product is discharged from the trucks to the pond.

[10] In order to irrigate from the main pond, a pump attached to a tractor is placed into the pond, and the contents of the pond are then pumped out to one of two travelling irrigators, which then apply the product to the paddocks on the farm. The operation of the system is arranged between the defendant and the farm’s workers. The system is a manual one, which requires a worker to operate the pumps and the irrigators.

[11] The combined farm animal effluent and dairy by-product is a contaminant pursuant to s2 of the Act. There are no national environmental standards or other regulations, rules in a regional plan or resource consent that expressly allow for the discharge that occurred on 31 October 2013.

### **The offending**

[12] The week before 31 October 2013 the farm manager observed that the level of the main pond was high and he phoned the defendant’s dispatch manager alerting him to this. The farm manager advised the defendant’s dispatch manager to arrange for someone to come to the farm and irrigate. A staff member was sent to the farm to

undertake this task, but the pump tractor was being used by the farm workers, which meant that the irrigation could not occur.

[13] On 30 October 2013 the Council received a complaint from a member of the public about effluent flowing in the tributary. The Council staff attended, and observed the water in the tributary to be cloudy, with a light froth or scum on the surface. They also noted a strong odour consistent with dairy product and effluent coming from the tributary.

[14] The Council staff went to the confluence of the tributary and the stream, where they observed a clouded plume entering the clear water of the stream. The Council staff traced the tributary back to the property at 421 Landsdowne Road and they undertook an inspection of the farm's effluent system. They observed that the three ponds on the farm appeared to be near capacity, with little, if any, free-board. The two non-operational ponds had filled with water and some had overflowed from the main pond. The lowest corner of the main pond showed signs of over-topping, as the vegetation had been flattened and burnt in a pattern indicating the liquid had flowed into the unused pond below. This had been caused because the main pond was overly full.

[15] When inspecting the unused pond below the main pond, the Council staff found a white PVC pipe, which led from the pond to a discharge point on the banks above the tributary. The contents of the pond were discharging from the pipe and flowing down into the tributary. The unused pond's PVC pipe had not been plugged by the farm owner, despite the fact that this pond was no longer in use.

***The defendant's explanation for the offending***

[16] The defendant accepted responsibility for the offending at the earliest opportunity, and promptly arranged for the problem to be fixed. It is likely that the problem was fixed within 24 hours.

[17] Furthermore, the defendant has decided to no longer be involved in disposing of whey by-products on farms where it is required to manage irrigation ponds.

## **Starting point**

[18] The principles that are applicable are well known and need not be repeated. Deterrence is an important purpose of the sentencing exercise, and key aspects to consider in setting the starting point are the effect of the offending on the environment (which takes into account the nature of the environment affected) and the defendant's culpability for it. Much of the latter depends on the deliberateness of the offending.

### ***Environmental effect***

[19] The tributary runs across farmland in an area that has been highly modified and cannot be described as having high or sensitive environmental values. The channel of the tributary is open and poorly shaded, and the bank of it is generally vegetated with grasses rather than trees and shrubs.

[20] The water quality of the stream is also modified. Whilst describing it as being far from pristine, Ms Woolley also submitted that "*neither are conditions dire.*"<sup>1</sup> The pH is neutral, dissolved-oxygen concentrations are moderately depleted and the water appears somewhat murky.

[21] Samples were taken from the confluence of the tributary and the stream and from the discharging pipe and the tributary below it. The samples were later analysed. The usual tests were undertaken to test for CBOD, faecal coliforms, total suspended solids, total kjeldahl nitrogen and total ammoniac.

[22] The testing revealed that just before the tributary entered the stream the level of CBOD was 600g/m<sup>3</sup>. At concentrations higher than 4g/m<sup>3</sup> the resulting low levels of dissolved oxygen in the water can stress and kill sensitive fish and other aquatic animals. At this point, the level of suspended solids was 36g/m<sup>3</sup>. At concentrations higher than this the water can be too murky for the healthy functioning of aquatic ecosystems and sensitive bottom-dwelling organisms can be smothered by a fine layer of silt.

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<sup>1</sup> Prosecution submission, paragraph [5.5]

[23] In the stream itself, results of samples taken 5m downstream of the confluence were:

- (a) the level of CBOD was 15g/m<sup>3</sup>, almost four times the level at which adverse effects are observed; and
- (b) the level of suspended solids was 10g/m<sup>3</sup>, the same level at which adverse effects are observed, although the guidelines would classify this as “*satisfactory*” (with 2g/ m<sup>3</sup> being “*excellent*”).

[24] I agree with counsel that these results need to be treated with caution because they were affected by a laboratory refrigeration error, but it was not suggested that the error would increase the resulting figures. It was accepted that the discharges contained levels of contaminants known to cause adverse effects on fresh water.

[25] Whilst the precise damage caused by the discharge of effluent and dairy by-product to the wider environment cannot be known, it would have had some unquantifiable negative effect more particularly on the tributary than on the stream. As already outlined, the major environmental issue with lactose and whey products is that they promote bacterial growth in soil and oxygen depletion in waterways. The fact that the contaminant contained a mixture of effluent and lactose/whey by-products is worse for the environment than had then discharge been only effluent.

[26] The discharge was bad enough for a member of the public to notice it and make a complaint to the Council, but it was promptly remedied by the defendant. I accept that the time over which the discharge occurred was likely to be about 24 hours. It seems to me that the length of time over which a discharge occurs can exacerbate the environmental effect of it, but it does not follow that a discharge that occurs over a shorter period of time will *of itself* have less of an environmental effect. The important point is the resilience of the environment and its ability to respond to the effect. In this case there is no material before me to help me determine how long the effects would have been experienced in this environment. The best that can be said is that it would have been worse had it continued for a longer period of time.

[27] The prosecution pitched the effect of the discharge on the tributary as “*significant*” and on the stream as “*moderate*.” I agree with this assessment.

***The defendant’s culpability for the offending***

[28] The offending was not deliberate. The prosecution submitted that it was reckless, whereas the defendant submitted that it was careless.

[29] The defendant did not have in place an appropriate call-back or call-up contingency plan in place. Having been told that the pond was almost full and having identified that the tractor used to irrigate the pond was unavailable to its employee, the defendant should have followed the matter up later the same day or at least the next day. This was a systems failure, but there is nothing to suggest that this kind of problem had occurred in the past.

[30] For these reasons I agree with Mr Harris that the offending was careless rather than reckless.

***Setting the starting point***

[31] Both counsel helpfully referred to decisions which the Court might find useful by way of comparison. They both addressed the similarities and differences apparent in *Taranaki Regional Council v Inwood & Goble*<sup>2</sup> and *Waikato Regional Council v Wyebrook Farms Limited*.<sup>3</sup> Mr Harris also referred to *Waikato District Council v High Tech Irrigation Services Limited*.<sup>4</sup> *Inwood & Goble* and *Wyebrook Farms Limited* concerned dairy effluent discharges, whereas *High Tech Irrigation* concerned the discharge of liquid dairy manufacturing by-products.

[32] In *Inwood & Goble* Dwyer DCJ allocated a global starting point of \$75,000 for two charges relating to the discharge of dairy effluent from a storage pond. The discharges occurred into an unnamed tributary and resulted from three inspections in the month of December 2012. The Court accepted that the discharges had persisted for a fortnight after the Council had discovered the offending. The discharges in

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<sup>2</sup> DC New Plymouth CRI-2013-021-004144-4155, November 2013, Dwyer DCJ

<sup>3</sup> DC Hamilton CRN-12-0725-00035-36, 25 June 2012, Harland DCJ

<sup>4</sup> DC Auckland CRN-0503-95500145, 13 February 2006, McElray DCJ

*Inwood & Goble* continued over a number of days and could properly be characterised as “continuing”, however the contaminant in this case was more toxic because it included not only dairy effluent but also whey by-products. The maximum fine available to the Court is *Inwood & Goble* was a fine not exceeding \$300,000 in respect of each defendant on each charge, but here it is \$600,000.

[33] *Wyebrook Farms* concerned two charges of unlawful discharges of dairy farm effluent onto land in circumstances where it entered surface water and may have entered groundwater. The effluent system consisted of two holding ponds and the charges related to an overflow from the second storage pond onto land in circumstances where the effluent continued down a hill into a stream, and also involved the piling of effluent on the paddock surface. A global starting point of \$50,000 was adopted. The discharge had continued for several days, and was the result of a failure to properly maintain the effluent system. The effluent discharge was not as toxic as the discharge in this case, because it did not include whey permeates.

[34] *High Tech Irrigation* is more similar because it involved the discharge of liquid dairy manufacturing by-products onto land in circumstances which may have resulted in it entering an unnamed tributary. The offending occurred over a five day period in January 2005. A starting point of \$27,500 was adopted, but since that time the maximum penalty available to the Court has increased from \$200,000 to \$600,000. Because of the continuing nature of the offending, McElrea DCJ considered that the maximum fine available to him was a fine of \$240,000 taking into account the continuing nature of the offences.<sup>5</sup>

[35] None of the above cases are on all fours with the present factual situation, but have been helpful to assist me in reaching my view that the prosecution’s nominated range for the starting point is appropriate. In reaching this view I take into account the effect on the environment, and the fact that the discharge was careless. I take into account the fact that the defendant acted promptly to remedy the situation, and that it has taken steps to ensure that this problem does not occur again. I also take into account that the maximum fine available to the Court is one of \$600,000.00. I have

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<sup>5</sup> A continuing offence can to be met with an additional maximum penalty of \$10,000 per day.



not found it helpful to try and categorised this case in terms of the levels outlined in *Waikato Regional Council v GA & BG Chick Limited*<sup>6</sup> as it does not neatly fit into either level 1 or level 2 and in any event, the levels of fines attributed to each level are out of date.

[36] I adopt a starting point of \$45,000.00.

### **Mitigation**

[37] The defendant submitted that there should be additional deductions over and above the early guilty plea to reflect its previous good character and its remorse. Mr Harris submitted that a further 15% should be allowed for this. A deduction of this amount would be beyond that which should normally be permitted for these factors.

### ***Previous good character***

[38] The defendant has no previous convictions, but has received two previous warnings from the Council as follows:

- (a) in May 2012 for the discharge of whey/dunder from a different irrigation operation; and
- (b) in April 2013 for discharge of oil and grease from a workshop.

[39] Whilst the prosecution submitted that the defendant cannot be given any credit because of these warnings, it should in my view be given some credit for its lack of previous convictions. No infringement notices have issued; neither have there been any Abatement Notices. The warning for the discharge of oil and grease from the workshop is not particularly relevant to this type of offending. I normally allow five percent for previous good character where there are no previous convictions or warnings or other enforcement steps taken against the particular defendant. In this case I allow a deduction of four percent.

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<sup>6</sup> (2007) 14 ELRNZ 291

### ***Remorse***

[40] I accept that the defendant is remorseful and that it cooperated and acted promptly to remedy the situation. Its response to the offending has been taken into account by me in setting the starting point. There is nothing to suggest any remorse over and above that which is evidenced in the guilty plea. Mr Harris submitted that there was nothing further the defendant could do to express its remorse for the offending, but there are on occasions situations where defendants have taken additional steps to show their remorse-for example by funding some sort of environmental enhancement directly relevant to the environment affected.

[41] I am not persuaded there should be any additional deduction for additional remorse over and above that evidenced in the guilty plea.

### ***Guilty plea***

[42] The defendant has pleaded guilty at the earliest opportunity. A full discount of 25% is appropriate.

### **Result**

[43] The defendant will be convicted and fined the sum of \$32,400. Ninety percent of the fine will be paid to the Council in accordance with s342 of the Act. Court costs of \$130.00 and a solicitor's fee of \$113.00 will also be imposed.



Judge M Harland  
District Court Judge and Environment Judge