

**IN THE DISTRICT COURT
AT AUCKLAND**

CRI-2014-044-000073

AUCKLAND COUNCIL
Informant

v

JEFFREY CLYDE BROWNE
Defendant

Hearing: 1 May 2014
Appearances: V Tamatea for the Informant
J Hickey for the Defendant
Judgment: 1 May 2014

SENTENCING NOTES OF JUDGE J A SMITH

[1] Mr Browne, you appear today on a single charge of contravening a district rule in the Rodney Section of the Auckland Council District Plan, namely removing a notable tree listed in Appendix 18A, being a norfolk pine at a property at 496 Unit 2 Hibiscus Coast Highway, Orewa. You have entered a plea of guilty to the charge and you are convicted. The question for this Court is the appropriate penalty.

Background Facts

[2] You were contracted through your company, Coastline Treeworks Limited, of which you are a principal and director, to perform works at 1/496 Hibiscus Coast Highway. It appears that either you or the owner had contacted the Council to check the status of the tree and were advised that the tree in question on that property had no notation in respect of it.

[3] The letter from the Council read:

... We have looked into these circumstances in relation to your application and site and have determined that a resource consent is no longer necessary as the subject trees are no longer protected. Your arborist report incorrectly identifies the norfolk pine on your property as a Scheduled tree, when in fact the tree listed in Appendix 18A of the District Plan is to the rear of your property at no. 2/496.

[4] When you were on site undertaking the removal of that tree, the next-door neighbour at No. 2 approached you to remove that tree also. They pointed out that the tree had suffered damage during a recent storm and was dying. You consulted with the neighbours in the area who all confirmed to you that the tree was not protected and, as I understand it, you record the terms of the letter that indicate that subject trees were not protected.

[5] You also inspected the tree and saw that it was in an unhealthy state, that there were branches which had fallen onto the house causing damage adjacent to the front entrance and some branches were overhanging three skylights on the roof and visible from the upper-storey.

[6] From photographs I have seen of the site, the tree had been subject to earlier branch removals; the top had been lost and photographs of some of the branches after removal show that they had rotten cores. Apparently you and your partner took photographs of these trees before and after removal but those photographs were lost in the intervening period before interview with the Council due to your changing phones.

[7] In the end, given that your machinery was already on site, which appears to have included a crane, you undertook the removal work and during that one of the branches broke and damaged the roof which you had to meet the cost of.

[8] It was some months before the Council interviewed you concerning the matter and laid the charge. Your position was that you thought that the tree no longer had a notation on it because of that letter and that it was in a poor condition and it was a danger to the residents in the area.

[9] Nevertheless, you do regret that you did not undertake detailed examination in consultation with the Council prior to the removal and it is most unfortunate that the photographs on your camera were lost.

[10] In the period since the charge was laid your partner has given birth to a baby and as she was an active partner in the business she has taken maternity leave leaving you as the single income earner in the business. This is relevant at the later stage but I note has led to an adjournment while your wife gave birth. You have entered your plea at the earliest possible opportunity.

The Legal Basis for Determination

[11] There is no argument as to the approach to be adopted in this matter. The parties are agreed that we look at:

- (a) the nature of the environment affected and the extent of that effect;
- (b) the degree of deliberateness; and
- (c) factors under the Sentencing Act 2002.

[12] Essentially I am adopting the two-stage process from the Court of Appeal in *Hessell v R*¹ and the parties addressed their submissions orally in this way.

The Effect on the Environment

[13] Norfolk pine trees are somewhat of a disputing issue on the North Shore. To some they are of high value and to others they are a pest. It appears that the owners of these properties were finding the trees inconvenient.

[14] Nevertheless, Mr Browne appears to have been swayed by his personal inspection of the trees and the letter received from the Council in reaching the conclusion as to whether the trees should be removed. Overall I see the effects on the environment as minimal.

¹ [2010] NZSC 135; [2011] 1 NZLR 607

The Degree of Deliberateness

[15] In relation to the question of deliberateness, Mr Tamatea for the Council acknowledges that there is no element of deliberateness of this and that the letter from the Council to the owner of 1/496 could be misread as suggesting it applied to number 2 also. I think a close reading of the letter shows that it did not.

[16] As I have already said it appears to me that you were driven more by your inspection of the tree on the date that it was in poor condition and the assurances of the residents there that it was not protected and, in those circumstances, one must see the deliberateness in this case at the very lowest end.

[17] In fact I would describe it as a failure to investigate the matter with the Council. I suspect if you had done so they would probably have approved the removal of the tree on the basis of its health given your experience as an arborist.

Sentencing Principles

[18] This leads me to the sentencing factors. Clearly questions of denunciation and deterrence are important. It is important that arborists dealing with trees do make proper enquiries.

[19] Nevertheless, I think the circumstances of this case are mitigated but I acknowledge your serious remorse in this case and the fact that you have indicated that it is your intention to always check in the future. That must be the appropriate course of action.

[20] I do acknowledge that the change to the legislation brought about by the Government has confused many people as to what trees are protected and not protected and there needs to be a settling in period while parties recognise that some trees remain protected under various plans.

The Starting Point

[21] This is clearly not a case of deliberateness and wilful removal of trees on other people's properties as was discussed in cases such as

*Tauranga City Council v Kent*². In this case there is a bare failure to consult with the Council in circumstances where it is likely that they would have approved the immediate removal of the tree.

[22] Nevertheless, a signal needs to be given that consultation with the council should be undertaken even when the tree looks like it should be immediately removed and I have concluded that a starting point of \$10,000 is appropriate to mark that responsibility.

[23] I do not think I can gain any assistance by the cases of deliberate removal particularly on public property and this case fits into quite a different category where somebody who is in the business of removing trees has legitimately believed they can do so.

Aggravating and Mitigating Features Personal to the Defendant

[24] No aggravating features have been suggested and Mr Tamatea acknowledged that you have been co-operative throughout and that there have been no previous problems between yourself and the council in relation to your business.

[25] I acknowledge, as I have already said, that you have considerable remorse about this and wish that you had consulted with the Council and that you intend to do so in the future. I think your early plea in this case can be regarded as demonstrating that extra remorse.

[26] In the circumstances, I consider that an amount of 10% should be allowed in total for these features which would reduce the amount to \$9,000.

[27] Mr Hickey has now raised with me issues as to your financial circumstances. Your wife has had to cease working and earning in the company due to the birth of your first baby and I gather that there has been some background to having your first child and at the same time your father has developed a serious illness.

² Tauranga DC, CRI-2012-070-004916, 18 March 2013

[28] This has reduced you to the only income earner in the family and in circumstances where you are spending around a day a week assisting your father. In my view these do constitute exceptional circumstances, particularly when I take into account that your current earnings of \$800 per week are nearly offset by your mortgage payments of \$700 per week.

[29] Nevertheless, you have indicated that you can pay a reasonable fine and I think some fine needs to be imposed to mark out the offence. With the deduction of 25% from the \$9,000 figure, we would have a figure of \$6,750.

Conclusion

[30] I have concluded that that is significantly too high and that, in the circumstances of the case, a fine of \$2,750 should be imposed together with Court costs of \$132.89 (reduced to \$130.00 since 1 July 2013) and a solicitor's fee of \$113.

[31] The reason for the significant reduction is due to your personal financial circumstances and your limited earning ability at the time.

[32] I should just point out that 90% of that fine is to be paid to the Council.


J A Smith
Environment/District Court Judge