

**IN THE DISTRICT COURT
AT INVERCARGILL**

**CRI-2017-025-000586
[2017] NZDC 11466**

SOUTHLAND REGIONAL COUNCIL
Prosecutor

v

TE WAE WAE DAIRIES LIMITED
Defendant

Hearing: 30 May 2017
Appearances: B Slowley for the Prosecutor
H van der Wal for the Defendant
Judgment: 30 May 2017

NOTES OF JUDGE B P DWYER ON SENTENCING

[1] Te Wae Wae Dairies Limited (Te Wae Wae/ the defendant) pleads guilty to two charges brought by Southland Regional Council under the Resource Management Act 1991. They are that:

- On 22 September 2016, at Te Wae Wae near Tuatapere, it discharged a contaminant namely farm dairy effluent on to land at 1124 Tuatapere-Orepuki Road which resulted in that contaminant entering water (charging document ending 0159);
- On 22 September 2016, at Te Wae Wae near Tuatapere, it discharged a contaminant namely farm dairy effluent on to land at 145 Te Wae Wae Road which resulted in that contaminant entering water (charging document ending 0161).

[2] Te Wae Wae pleads guilty to both charges. Counsel agree that s 24A Sentencing Act 2002 is not applicable in this case. There is no suggestion that a discharge without conviction is appropriate so the Defendant is convicted of both charges accordingly.

[3] It will be seen from the charging documents that the charges arise out of offences detected on two separate farms owned by Te Wae Wae on the same day. The two farms are neighbouring properties, one is situated at 1124 Tuatapere Orepuki Road (the Tuatapere Orepuki property) and the other at 145 Te Wae Wae Road (the Te Wae Wae property). Both the farms had separate farm and herd managers but one overall operations manager responsible for them. Both farms hold discharge permits allowing the discharge of dairy herd effluent to land and both permits contain the standard conditions forbidding ponding, runoff and overland flow of effluent.

[4] On 22 September last year the Council received a complaint that pollution from one of the farms was discharging into a waterway. Two compliance officers went out to see what was happening. They found a waterway on Te Wae Wae Road was discoloured green with effluent being discharged into it while they watched. They saw a pod irrigation system operating on the Tuatapere Orepuki Road property. There was significant ponding and overland flow of effluent which the officers discovered was discharging into a field tile drain and then into the Te Wae Wae Road drain.

[5] While they were looking at this discharge they were approached by the person who lodged the complaint with the Council who advised that the complaint related to a discharge to a different drain. On checking further the officers found that the discharge from the irrigators was also discharging into a second tile drain running in the opposite direction to the first and discharging into a second waterway.

[6] Because the first waterway was discoloured upstream from the point where the tile drain entered into it the Council officers investigated further. They found another set of pods on the Te Wae Wae Road farm also surrounded by ponding which

was similarly entering a tile drain and then discharging into the Te Wae Wae Road waterway.

[7] In summary there were two separate discharges into the Te Wae Wae Road waterway, one from each farm and additionally a further discharge from the Tuatapere Orepuki Road property was entering another waterway altogether.

[8] Both of the Defendants' properties are situated in the lower catchment of the Waiau River, one of the four major rivers in Southland. Drainage from both flows to the Waiau Lagoon, a coastal estuary approximately 100 hectares in size. The lagoon is recognised as a habitat for trout, whitebait, flounder, eel and mullet. It has abundant birdlife and is a breeding and feeding ground for a range of native bird species. In short it is a sensitive and vulnerable habitat.

[9] The Council has been conducting a monitoring programme at the lagoon which has recorded a notable reduction in water quality over recent years. Dairy effluent has a significant adverse affect on the lagoon because E. coli and nutrients are not readily flushed from it and accumulate in the estuarine mud. As well as deterioration in water quality this pollution raises the risk of infection to recreational users of the lagoon through contact or the eating of shellfish. Although these outcomes cannot be attributed to any one single discharge it is the cumulative effect of the numerous individual discharges, (generally undetected) occasioned by dairying activities which lead to some of our waterways being in the condition they are.

[10] There is no dispute between counsel as to the purposes and principles which I must apply and undertake in this sentencing. As Mr van der Wal has acknowledged for the Defendant, harm done and culpability are significant components of the seriousness of offending and holding defendants accountable, deterrence and denunciation are key focuses of sentencing.

[11] The maximum penalty for each offence is \$600,000 or a total of \$1.2 million for both offences. Mr Slowley has suggested an all up penalty starting point of \$70,000, attributed \$40,000 for the Tuatapere Orepuki Road property where there

were two discharges taking place and \$30,000 for Te Wae Wae Road. Mr van der Wal suggests an appropriate all up starting figure for both of \$50,000.

[12] In my view the proper approach is to take a global starting figure for both offences. Although the discharges took place on two separate properties with two separate herds, the properties are owned by the one entity and were under the overall management of the one operations manager. They represent separate examples of identical management failures on the same day.

[13] The offending falls into the moderately serious band of offending identified in the *Waikato Regional Council v BA and GB Chick Ltd*¹ decision where starting points are commonly in the \$40,000 to \$80,000 range. This was an unintentional but careless discharge with no more than a moderate proven effect on the environment because of the difficulties of establishing the specific adverse effects of an individual discharge. There are a number of factors which influence my view as to where in that range this offending sits.

[14] Firstly, there was clearly a high degree of carelessness involved in this offending. Te Wae Wae has acknowledged that the operations manager who was apparently responsible for the system on the day in question had not undertaken the checks of the irrigators or disposal fields required by the Defendant's operating manuals and procedures. Apparently this was due to circumstances of extreme personal strain at the time but that does not mean that the offending was not extremely careless at best.

[15] The ponding and discharge to water bodies was readily apparent to Council officers as is demonstrated by some of the photos which I have seen and the discharge into the ditch was evident to the complainant as well. These could have been easily identified with any degree of adequate oversight. I note that at the time of a routine Council inspection only six days before the offending, the system was found to be working satisfactorily so that this offending can be put into the *one-off* category.

¹ *Waikato Regional Council v GA and BG Chick Ltd* (2007) 14 ELRNZ 291 (DC).

[16] Secondly, these discharge incidents each involved dairy effluent entering surface water systems from where they could be easily conveyed into the sensitive off-farm water environment. That is always a significant aggravating factor in my view.

[17] Thirdly, the offending took place in a catchment flowing to a very important estuarine environment which has already been subject to significant degradation, at least partly as a result of dairy activities.

[18] In my view the only matters which keep this offending out of the worst level of seriousness are that the manager's failings were directly contrary to the Defendants' instructions and systems requirements, the incidents appear to be one-off in nature rather than occurring over a long period of time and the extent of direct effect of this one-off incident cannot be established.

[19] For all of these reasons I find the offending to be at the upper end of the moderately serious band but the degree of carelessness gets it perilously close to the most serious band of offending.

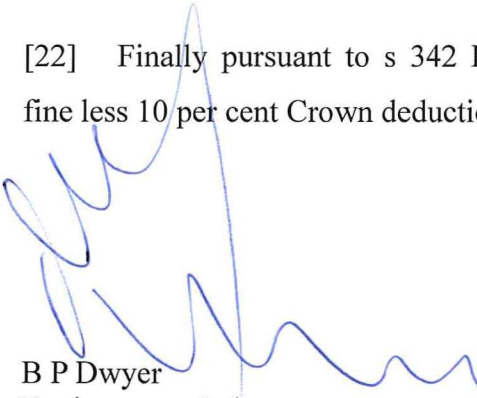
[20] I consider that an appropriate penalty starting point is \$70,000 so I arrive at the same conclusion as Mr Slowley via a different route. I will not make any reduction from starting point on account of past good character as the Defendant has previously been the subject of Council warning processes and an abatement notice regarding these farms. It is entitled to a 25 per cent reduction in starting point on account of its prompt guilty plea.

[21] Accordingly I determine as follows:

- On each charge Te Wae Wae Dairies Limited is fined the sum of \$26,250 (a total of \$52,500);
- It will pay the Council analyst's fee of \$1791.24 plus GST (I will attribute that to the charging document ending 0159);

- It will pay the Council's solicitor costs and disbursements on each charge in accordance with the Costs in Criminal Cases Regulations (to be fixed by the Registrar if need be)
- It will pay Court costs \$130 on each charge.

[22] Finally pursuant to s 342 Resource Management Act 1991 I direct that the fine less 10 per cent Crown deduction is to be paid to Southland Regional Council.



B P Dwyer
Environment Judge

