IN THE DISTRICT COURT
AT TAURANGA

CRI-2016-070-001749
[2017] NZDC 3273

TAURANGA CITY COUNCIL
Prosecutor

v

JACKO BASIL HOLDINGS LIMITED
ROBERT WILLIAM FULCHER
Defendants

Hearing: 10 February 2017

Appearances: A Hopkinson for the Prosecutor
N King for the Defendants

Judgment: 10 February 2017

NOTES OF JUDGE J A SMITH ON SENTENCING

Introduction

[1] Mr Fulcher, you appear today on your own behalf and also for Jacko Basil Holdings Limited in which you are a shareholder together with your wife. The company has been charged with similar offence to you personally, which is using land in a manner that contravenes r 14B.7 of the Tauranga City Plan. In respect of the company that carries a penalty of $600,000, for you individually a maximum penalty of 300,000 or two years' imprisonment.

Issues on sentencing

[2] The matter before the Court today relates to sentencing and conviction. It appeared that a discharge without conviction was sought for both the company and

yourself. Mr King has clarified that today, and the company is convicted of the offence. The only question in respect of the company is the quantum of a fine.

[3] In respect of yourself, personally, Mr King has made an application for discharge under s 106 which is opposed by the council. Also there is an application for any fine to be on payment basis or as a community sentence in the alternative. In that regard the fine is the starting point and if the Court is satisfied that a fine is not the appropriate outcome it can look at a more significant sentence, including community service.

[4] As the case transpired it appears that the s 106 application is now accompanied by an acceptance that a modest contribution towards the council's costs could be paid in the order of around $5000 and this is identified in support of an application for a discharge under s 106.

The Court's approach

[5] In order to deal with the various issues in the case I intend to start firstly with a summary of the facts, then to move onto a starting point in respect of each party. I will then move onto any aggravating and mitigating factors personal to both the company and the defendant. I reach an end point before I take into account the totality principle.

[6] At that point, it seems appropriate that I should consider the application under s 106 for Mr Fulcher personally to try and reach an appropriate and integrated solution, taking into account the totality principle and the other principles of the Sentencing Act 2002 and the Resource Management Act 1991.

The facts

[7] The dwelling is in a residential part of Tauranga and was subdivided in around January 2007. Subsequently a building was built on it and the building consent specifically noted that it was to be used only as a single residential building. Issues arose subsequently after the building was built in 2008. These included issues

around day- lighting, but also issues about the use of the property and whether it was being used as two independent dwelling units.

[8] An abatement notice was issued in May 2010. It required the building to cease being used as two independent dwelling units. There were also Notices to Fix under the Building Act 2004.

[9] Matters appear to have resolved after that but in 2014 the council received another complaint that the building was being used as two independent dwelling units. Council officers found an advertisement for the lower floor on TradeMe. They wrote to the company advising of the problem. I understand Mr Fulcher responded and indicated that one of the two units was being occupied by a cousin and there were also some exchanges which were unhelpful in the end.

[10] I will not go through the history but it would be true to say that from that point on the council had some concerns about the use of the property and there were various visits and the matter is discussed in significantly more detail in the Court's previous decision, [2016] NZDC 17674. Suffice to say that it is clear that there was a breach of the abatement notice and that there were elements of complaint and obstruction which had as their purpose delaying and/or preventing council officers from undertaking their role under the RMA and under the Building Act.

[11] It is not necessary to revisit that in particular detail but Mr Hopkinson does say that these matters are relevant generally to the question of a starting point in relation to wilfulness and deliberateness. He also notes that the question of the breach of the abatement notice could be seen either as an aggravating feature, both of the company and Mr Fulcher personally, or would go to a lift in the starting point.

The facts of the offences

[12] As I have said, there is no doubt in the end that there was a breach of the council plan and the plan clearly requires these controls to maintain a low density suburban residential development. Other cases have cited the primary reasons for that being to do with infrastructure and to do with amenity. Quite simply for the purposes of this case the main purpose of plan rules is to provide certainty for parties

as to what can and cannot be done within the district. A breach of those has a long-term and insidious effect upon the planning process itself as well of course upon the general objectives of the plan in seeking to maintain low density residential development.

[13] It is clear and accepted that the adverse effects on the environment are minimal and can be disregarded for current purposes under the de minimis rule. The essential problem is the breach of the rule and the breach of the clear directives of Council staff on numerous occasions to comply.

[14] There is no suggestion that either of the companies has had previous convictions in respect of this matter but it would be fair to say that there has been a long and difficult history over this site.

Principles applying

[15] There is no doubt in this case that the Court is involved in a three-step process. Firstly, establishing a starting point for the offending generally, then looking at particular mitigating and aggravating features personal to each of the two offenders and finally, allowing for the general discounts and other factors such as the totality principle in reaching a firm conclusion. There is the complication of this case that s 106 needs to be considered in respect of Mr Fulcher and that matter will need to be dealt with at that point also.

General principles

[16] There is no doubt that the general principles of the Act apply and these have been summarised in decisions such as *Machinery Movers*[1].

[17] The principles of the Sentencing Act also apply and in particular the key principle of deterrence has been identified in many cases as being the first and most important principle. This must be particularly true in respect of those offences which

[1] *Machinery Movers Ltd v Auckland Regional Council* [1994] NZLR 492 (HC).

do not have direct environmental harm but represent wider policy goals for districts such as the density rule.

[18] Looking at the general principles which apply from *Machinery Movers Ltd*, the first is the environment and the effect which we have already identified as being de minimis for current purposes. The next point is the question of deliberateness/attitude.

[19] In this regard the key question which is important to sentencing is Mr Fulcher's role as either a principal of the company or on his own behalf. When I look at this issue it seems to me that Mr Fulcher's interest in this matter derives from his shareholding of Jacko Basil Limited. Jacko Basil Limited appears to have been used as an investment device for Mr Fulcher and his wife and has a property, which is relatively highly geared, from which they anticipated receiving some benefits in due course as part of their retirement fund. Mr Fulcher is now 65 years of age and the date on which these events could have been in contemplation of their subsequent retirement.

[20] Accordingly, it seems to me that Mr Fulcher's actions were motivated by his desire to act as an appropriate shareholder and principal of the company. The primary party responsible for the actions is the land owner in this case, which is Jacko Basil. The actions of Mr Fulcher must be seen primarily as actions by an officer of the company. This does not mean that officers of the company have no personal responsibility, but I have concluded that the company is the primary party liable here. The actions of Mr Fulcher, primarily, were actions on behalf of the company rather than himself.

[21] The end result of that is that it seems to me that when one looks at the offending in this regard one must distinguish between the offending of the company and that of Mr Fulcher which I see as secondary and simply as an officer of the company.

Starting point

[22] I come to the starting point. The case law on the starting point is not in dispute, and the key cases that were referred to the Court were the cases of *Calford Holdings Ltd & Anor v Waikato Regional Council*[2], *Auckland City Council v Hannay*[3] and *Dunedin City Council v Kennedy and McMillan*[4]. I have looked at those cases, and I have concluded that this is more serious. The major distinction is the level of diversion/obstruction and the issue of an abatement notice which was breached.

[23] I have considered whether I should treat the abatement notice as an aggravating feature; but have considered that, as long as it is taken into account once only, it can also be considered as lifting the starting point. If I take those factors into account I note that the starting point in *Dunedin City Council v Kennedy and McMillan* was $20,000. In respect of the company this must mean that the starting point is somewhat higher and the abatement notice issue also lifts this slightly higher. I have concluded that a starting point for the company should be $30,000.

[24] In respect of Mr Fulcher individually I have concluded that his actions were those of the company. Notwithstanding that he holds some culpability as an officer of the company in his own right, it cannot be a defence that you are acting on behalf of the company only, and I do not think Mr King takes that point either. The question, then, is what is the appropriate starting point having regard to the liability? Overall I have concluded that an appropriate starting point for Mr Fulcher, given my conclusion as to the level of culpability, is $10,000.

Application of aggravating and mitigating factors

[25] Mr Hopkinson allows a discount of 10 percent for early plea. I take into account this matter went to a substantive hearing in respect of the issue as to whether or not the offences were filed within time and there has been a significant delay since the commencement of the proceedings. Nevertheless given that Mr Hopkinson is

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[2] *Calford Holdings Ltd & Anor v Waikato Regional Council* [2009] NZRMA 563
[3] *Auckland City Council v Hannay* DC Auckland CRI-2014-004-40454, 2 October 2014
[4] *Dunedin City Council v Kennedy and McMillan* DC Dunedin CRI-2014-012-1706, 18 August 2014

prepared to allow 10 percent discount I will allow it in the circumstances which will yield a figure for the company of $27,000, and for Mr Fulcher individually, $9,000.

[26] There are suggestions about other discounts for good character and the like. It seems to me that although such arguments might be made for Mr Fulcher personally his actions are ones which tend to run against that given the long history of non-compliance at the site. I would be prepared to look at a small discount to Mr Fulcher personally of $1000 which would make a figure of $8000 taking into account those matters but I would not be prepared to allow any further discount for any other mitigating factors for the company.

[27] This would then yield figures, without the application of a totality principle, in the range of $35,000 total, with $27,000 to the company and $8,000 to Mr Fulcher.

The s 106 application

[28] Section 107 provides guidance as to the application of s 106 and provides:

> The Court must not discharge an offender without conviction unless the Court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[29] Mr King makes submissions that Mr Fulcher would find it difficult to travel overseas as part of their retirement, given that he would be convicted of an offence carrying a maximum penalty of two year (ie, a category 3 offence under the Criminal Procedure Act 2011). No particular evidence is produced of this effect.

[30] This has been a common problem in the Court, and often no border authority will give a definitive statement as to whether an individual will be allowed into a country if they declare an offence.

[31] I take into account Mr Fulcher is now 65 years of age, and as I understand it is either retired or near retirement and his intention was to have the freedom to be able to travel as part of that retirement.

[32] I also take into account that he has no previous offences and it appears that the actions in this case may have been militated by the investment property, which has a significant mortgage on it, and a desire to see that provide some positive return. As it transpires, the breach of the Act was probably not responsible for any particular benefit for them because Mr King tells us that the rental now achieved as a single unit is either similar to or slightly above that received for two units.

Assessment of effect

[33] The question needs to be that I must be satisfied that the consequences of the conviction is out of all proportion. Before the application of the totality principle the outcome would be around $8000. Nevertheless, when I look at the total involved of some $35,000, that does seems to me somewhat high, and I would have thought that a figure closer to $30,000 represented an appropriate total outcome. If that figure was represented by something in the order of $5,000, one would have to say Mr Fulcher's culpability (as distinguished from that of the company) would be at the lower end of liability on RMA matters. In those circumstances s338 of the RMA does not distinguish between an action of low culpability and that of serious culpability such as Jacko Basil Holdings. The offence under s338 is the same, and carries the category 3 ranking.

[34] In the circumstances of this case I consider that the culpability has been properly visited upon the company and that the penalty to be imposed upon them properly recognises their culpability under the Resource Management Act. Therefore, the question is what particular benefit would there be in marking out the role of Mr Fulcher personally by a conviction on his record?

Outcome

[35] If Mr Fulcher can pay to the Council, and the council can confirm by the next hearing date in this Court (13 March 2017), that they have received as a contribution towards their costs a payment of $5,000 under s 106(3)(a) and/or (c), then Mr Fulcher's further appearance is excused and the Court will proceed to discharge Mr Fulcher without conviction.

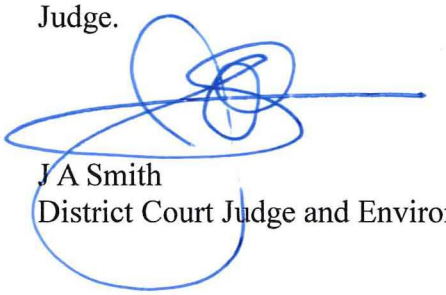
[36] In the event that does not occur, the Court will have to revisit the question of sentencing on that date. However, it appears to me that looking at the totality principle the Court is able to proceed now to sentence the company, and the question is the appropriate overall penalty to be achieved.

[37] I have concluded that a penalty of $23,000 against the company, taking into account the overall culpability of the parties and the totality principle, would mean a figure of around 80 percent of the total that would otherwise be levied against both parties, and represents an appropriate and proportionate response to the culpability of each party while taking into account the overall fairness and appropriateness of the total fines.

[38] For the sake of clarity the fine against the company will carry Court costs and solicitor fees but there would be no additional fees in respect to the $5,000 payment by Mr Fulcher personally. I need to make it clear, Mr Fulcher, that if the sum is not paid you will need to reappear on 13 March at 10 am, and the Court will have to consider the appropriate sentence at that point in time.

[39] So the company is convicted and fined $23,000 together with Court costs and solicitor fee, with 90 percent payable to the Council. The payment by Mr Fulcher is to be paid directly to the Council, who will confirm in writing to the Court that they have received it. If the Council receives a direct payment towards its costs of $5,000 and confirms that in writing to the registrar, I will just deal with it on the papers, excuse appearance and enter a discharge without conviction.

[40] If any payment scheme is sought, it is to be referred to an Environment Court Judge.



J A Smith
District Court Judge and Environment Judge