IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2019-039-000163
[2019] NZDC 15963

WAIKATO REGIONAL COUNCIL
Prosecutor

v

GRAZE LIMITED
Defendant

Hearing:	5 August 2019
Appearances:	JM O'Sullivan for the prosecutor JB Forret for the defendant
Judgment:	21 November 2019

RESERVED SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] The defendant has pleaded guilty to contraventions of the Resource Management Act 1991 (**RMA**). There are two charges of permitting the unlawful discharge of a contaminant onto land in circumstances which may have resulted in that contaminant entering water, against s 15(1)(b) of the RMA. Both charges relate to unlawful activities associated with effluent disposal on a dairy farm at 123 Number 8 Road, Morrinsville (**the Farm**) on 27 and 28 September 2018.

[2] The defendant has pleaded guilty to the charges. There has been no suggestion that the defendant should be discharged without conviction and it is convicted accordingly.

[3] The maximum penalty for each charge is a fine of $600,000.

[4] The differences between counsel were in respect of the starting point I should adopt. For the prosecution it was submitted that a starting point of $100,000 as a global starting point is appropriate. For the defendant it was submitted that the appropriate global starting point for the fine is $35,000.

Regulatory framework

[5] The Farm is within the Waikato Region. The Waikato Regional Plan (**Plan**) is the relevant planning document. The Plan allows dairy effluent management by way of a permitted activity rule (3.5.5.1). In order for the discharge of farm animal effluent onto land to be a permitted activity it must comply with certain conditions.

[6] Section 15(1)(b) of the RMA states that no person may discharge any contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural process from that contaminant) entering water – unless that discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

[7] Farm animal effluent is a contaminant pursuant to s 2 of the RMA.

Background[1]

[8] The agreed Summary of Facts describes the background to the offending, including information on the environmental effects of this offending. As the Summary of Facts is agreed, I must accept as proven all facts, express or implied.[2]

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[1] Summary of Facts, paragraphs 13-33.
[2] Sentencing Act 2002, s 24.

[9] The Farm is owned by Matijasevich Alexandra Limited (**MAL**). Graze Limited (**Graze**), of which Kelly Gray is the sole director and 80 per cent shareholder, is a company employed by MAL in the role of 50 per cent sharemilker on the property.

[10] The Farm originally comprised a parcel of land of 140ha, having been purchased in 2008. It was subsequently amalgamated with the neighbouring land owned by MAL to create one single larger dairy farm comprising approximately 225ha. The newly-created farm utilised the milking shed and related infrastructure of the property which included a feedpad. The herd owned by the defendant increased to approximately 550 cows.

[11] The effluent infrastructure of the Farm remained unchanged from its purchase up until the early part of the 2018/2019 dairying season, at which time improvements to that greater effluent system were commissioned by MAL, with the works commencing around August-September 2018.

[12] MAL has the ultimate and overarching role across Farm management-related decisions, with any business decisions in regard to capital improvements or extraordinary expenditure being made primarily by MAL company directors. The daily oversight of the Farm management on the property is ostensibly undertaken by Graze, which had a level of authorisation with expenditure on behalf of MAL to maintain the operation of the Farm.

[13] At the time of the offending there were two separate effluent systems at the Farm. The main effluent infrastructure comprised a 30,000 litre in-ground effluent sump with an electric motor-driven pump mounted within it that operated off a float switch.

[14] There were a quantity of segmented sections of above-ground effluent pipelines sufficient to irrigate to approximately 67ha, a travelling irrigator and a newly constructed in-ground lined effluent pond with a capacity of approximately 2,500m^3 – 2,600m^3. There is no stormwater diversion.

[15] The second effluent system comprised a sump within the road underpass which contained a submersible pump that discharged the liquid contents of the underpass through an open-ended effluent pipeline onto ground in the paddock area beside that underpass. The Summary of Facts records that a formal warning was issued to MAL, Graze and Kelly Gray for an offence pursuant to s 15(1)(b) of the RMA in relation to the discharge of effluent and wastewater from the underpass as part of this investigation. However, no charges have been laid in respect of the discharge of effluent from the underpass.

[16] Effluent and Irrigation Design were commissioned by MAL to undertake improvements at the Farm, with works commencing around August-September 2018.

[17] The design for the main effluent system included the newly constructed effluent pond, a new effluent line trenched underground from the sump to the pond and a different effluent application area through the installation of a further effluent pipeline and hydrants. The plan also included an additional pump connected to a receiving tank at the underpass to enable irrigation of the underpass effluent.

[18] All the new infrastructure has been installed since the offending and is operational.

[19] There are no documented farm protocols or procedures for the operation and management of the effluent system. The directors of MAL state that the management of the system is solely Graze's responsibility.

[20] The Farm is managed all year round in an attempt to conform to the permitted activity rules of the Plan for effluent discharge.

The offending[3]

CRN ending -030 – permitted discharge from effluent sump onto land – 27 and 28 September 2018

[21] At approximately 2.40pm on 27 September 2018 a Council monitoring flight observed potential non-compliance at the Farm at the locations of the travelling irrigator and feedpad.

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[3] Summary of Facts, paragraphs 38-53.

[22] On the following morning, 28 September 2018, monitoring officers attended the Farm for the purposes of assessing compliance.

[23] An inspection at the location of the effluent sump discovered significant ground ponding of farm animal effluent. The area comprising that saturation was estimated to be about 300m^2, with the depth in the main section of that ponding exceeding the foot of a gumboot.

[24] Samples were taken of that ponding, which revealed extremely high levels of contamination with farm animal effluent.

CRN ending -031 – permitted discharge of farm animal effluent from travelling irrigator onto land – 27 and 28 September 2018

[25] An inspection was then made at the location of the travelling irrigator, which ostensibly was in the same location as observed through the aerial monitoring on the previous afternoon. The ground area surrounding the irrigator was saturated with what appeared to be farm animal effluent. A pooling of farm animal effluent was observed within the paddock hollow adjacent to the irrigator, the length of that pooling estimated at around 80m, also at depths above the foot of a gumboot. Samples taken from that ponding revealed extremely high levels of contamination with farm animal effluent in the realms of raw effluent.

[26] The ponding within the hollow was observed to be discharging directly into the farm drain situated immediately behind the location of the irrigator. The confluence of that drain into the Piako River from the point of discharge is approximately 660m.

[27] An inspection of the newly constructed effluent pond recorded that the pond was approximately 50 per cent full, meaning a substantial amount of capacity remained.

[28] The above discharges are in breach of rule 3.5.5.1 of the Plan and s 15(1)(b) of the RMA.

Investigation and explanation[4]

[29] On 27 September 2018 Mr Gray instructed his staff to set up the travelling irrigator within a paddock on the western side of the Farm behind the feedpad. That paddock is bordered by a farm drain that flows towards the Piako River. To enable the irrigator to be used, the overland effluent pipeline that had been delivering the effluent to the pond was required to be disconnected in sections and dragged to the area between the sump and the travelling irrigator. During that week, in the daytime hours, Mr Gray had off-farm commitments.

[30] Around 1.00pm on that day, shortly after the travelling irrigator had been turned on, one of Mr Gray's staff members noticed that it had stalled and was applying effluent from a static location. It appeared that the drive chain had been thrown off its drive sprockets. It was reinstated, but the problem kept occurring. Upon realising that the irrigator wasn't operating correctly a call was made to report the problems to Mr Gray. Instructions from Mr Gray were to leave the irrigator and that he would look at it when he returned to the Farm later that day. As a result, the staff members continued to operate the Farm as usual and milked the herd that afternoon. It was on that afternoon that the Council's monitoring flight observed the potential non-compliances.

[31] Inquiries with Effluent and Irrigation Design revealed that, at this time, the further improvements to the effluent system were being implemented.

[32] Inquiries with Mr Gray and a member of his staff identified that the sump's capacity is less than a milking's worth of wastewater and effluent, therefore the decision to remove the effluent line from the pond necessitated a requirement that the sump content needed to be irrigated to land daily.

[33] Mr Gray stated he had chosen to irrigate to the area of the Farm that hadn't received any recent irrigation, as the rest of the available irrigation area had. He advised that he turned off the effluent pump during milking on the morning of 28 September as he had identified that the irrigator was again not travelling, that he

[4] Summary of Facts, paragraphs 38-57.

had made some adjustments to the chain drive when he inspected it that previous evening in the expectation that the irrigator would operate correctly.

[34] The Summary of Facts records that the logical conclusion from the setup of the effluent system on the morning of 28 September was that, if the effluent pump was turned off, the effluent sump would likely overflow.

Sentencing principles

[35] Against that background I adopt a starting point for a fine. The purpose and principles of sentencing under the Sentencing Act 2002 are relevant insofar as they are engaged by a particular case. The prosecution referred to the principles outlined in *Thurston v Manawatu-Wanganui Regional Council* (***Thurston***).[5] The factors that assume relevance in RMA sentencing include: an assessment of the offender's culpability for the offending, any infrastructural or other precautions taken to prevent the discharges, the vulnerability or ecological importance of the affected environment, the extent of the environmental damage, deterrence, the offender's capacity to pay a fine, disregard for abatement notices or Council requirements, remedial steps taken to mitigate the offending or prevent future offending, and cooperation with enforcement authorities and guilty pleas.[6]

[36] Cases establish increasing concern about the incidence of dairy effluent offending and emphasise the need for deterrence.[7]

Nature of the environment and effects of the offending[8]

[37] The Farm is located adjacent to the Piako River, which is classified as a Significant Indigenous Fisheries and Fish Habitat in the Plan.

[38] Sampling of the discharged material recorded extremely high levels of faecal coliforms and E. coli bacteria. The results of samples taken from the ponding beside

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5 *Thurston v Manawatu-Wanganui Regional Council* High Court, Palmerston North, 27/8/2010, CRI-2009-454-24.

6 *Thurston*, above n 5, paragraphs [41] and [42].

7 See *Watt v Southland Regional Council* [2012] NZHC 3062 and *Yates v Taranaki Regional Council* HC New Plymouth CRI-2010-443-8, 14 May 2010.

8 Summary of Facts, paragraphs 58 and 59.

the sump recorded Faecal Coliforms of 39,000,000 cfu/100ml and E. coli of 29,000,000 cfu/100ml. The results of samples taken from the ponding within the hollow adjacent to the travelling irrigator recorded Faecal Coliforms of 71,000,000 cfu/100ml and E. coli of 55,000,000 cfu/100ml.

[39] The effluent ponding from the irrigator went directly into a tributary drain that flows into the Piako River. The area of ponding near the sump was significant.

[40] The Summary of Facts contained a statement from Robert James Dragten, an expert on groundwater contamination in the Waikato Region, who addressed the effects of land treatment of dairy farm effluent. He outlined that the saturation of soils with effluent creates hydraulic conditions that pose a high risk of a direct loss of untreated or partially treated effluent to groundwater. Groundwater provides the "base flow" for surface waterways during periods between rainfall. Contaminants that enter groundwater may, therefore, eventually enter surface water, particularly so for nutrients such as nitrogen.[9] I take notice of the adverse effects that these discharges can have cumulatively on groundwater and stream water, both from the general statements of Robert Dragten and in the context of widespread concern about natural water quality referred to in numerous decisions of this Court and acknowledged by the higher courts.[10]

Culpability of the defendant for the offending

[41] For the prosecutor, Ms O'Sullivan submitted that the discharges can be characterised as wilfully reckless. Despite being informed that the irrigator was not operating properly, Mr Gray's response was to direct the farmhand to leave the irrigator set up as it was, and he would look at it later. Ultimately, the result of leaving the travelling irrigator where it was has led to the offending with effluent ponding at the irrigator and effluent ponding and overflowing from the sump.

[42] Ms O'Sullivan submitted that the defendant's management practices more generally increased the risk of an effluent discharge. Only one set of lines could be

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[9] Statement from RJ Dragten, Appendix B to Summary of Facts.
[10] *Watt v Southland Regional Council,* above n 7 at [29].

used at a time. The decision, therefore, to move the lines that had been pumping to the pond so as to pump to the irrigator meant that if the irrigator wasn't working, the sump could overflow. The sump had a maximum capacity of approximately one milking's worth of effluent, so any issue that meant the travelling irrigator could not be used was likely to result in the sump overflowing.

[43] Counsel for the defendant Ms Forret did not accept that the defendant was wilfully reckless or negligent. She submitted that the offending was a one-off related to a system malfunction, and no re-offending has occurred. Further, that as soon as the defendant was aware of a compliance issue it took immediate action to remedy the problem and fully cooperated with the investigation.

[44] Ms Forret submitted that this was a one-off case of trying to manage the system infrastructure, and that every effort was being made to keep up with the irrigation that was required. This is a case where deficiencies with the existing system had been identified and steps taken to begin improving the system. The first step of construction of a new effluent pond had already taken place at the time of offending. That pond had a capacity of approximately 2,500-2,600m^3.

[45] Ms Forret considerably expanded on the background to the offending, beyond that set out in the Summary of Facts. Counsel submitted that at the time of the offending, and relevant to the decision to re-commence irrigation, the defendant had been pumping effluent to the new pond for approximately two weeks, and was surprised at the rate the pond was filling. Mr Gray had understood its capacity to be 4,000m^3. Further, that he had never managed a system with an effluent pond, and that he suspected it would be some weeks, perhaps months, before the system was fully functional. In fact it was not until February 2019 that the system was fully operational.[11]

[46] Ms Forret also submitted that the effluent plant was well maintained, and that employees were instructed at each milking session to check that the sump was not full, that the travelling irrigator was moving and was not blocked, and to check the capacity of the new pond once a day (to ensure there was reserve capacity until it was

[11] Defence counsel submissions, paragraph 10.

commissioned). If issues were observed they were to remedy the problem and, failing that, to contact Mr Gray.[12]

[47] I disagree with Ms O'Sullivan's characterisation of the offending as wilfully reckless. Mr Gray's direction to leave the irrigator where it was, in the full knowledge that an afternoon milking would occur and irrigation would result, was, in my view, highly careless. I am prepared to view it as a one-off case in light of the steps to improve the Farm's effluent infrastructure that were already underway at the time of the offending.

Sentencing levels in comparable cases

[48] Counsel assisted by drawing my attention to certain cases that may be of assistance in addressing the sentencing principle that similar offending by similar offenders in similar circumstances ought to be generally consistent in terms of outcome. Ms O'Sullivan submitted that once overall culpability has been assessed, there might be minimal benefit gained by comparison with other cases which "inevitably will have their own particular facts and points of difference".[13]

[49] Ms O'Sullivan also submitted that some caution should be used in drawing comparisons, as each case must turn on its own facts and especially in light of the risk that the benchmark for effluent cases may have, in some instances, insufficiently accounted for the increase in the maximum penalties.[14] However, counsel referred to two cases, *Vernon v Taranaki Regional Council* (***Vernon***)[15] and *Bay of Plenty Regional Council v Hedley Farms Limited* (***Hedley Farms***).[16]

[50] In *Vernon*,[17] the appellants unlawfully discharged untreated dairy effluent to land from a pipe (the irrigator was disconnected) into a paddock, causing ponding. From there the effluent flowed into a stream which joined a creek 2.2km away. The explanation was that the effluent and irrigator nozzles were blocking, and they

[12] Defence counsel submissions, paragraphs 14 & 15.
[13] *Waslander v Southland Regional Council* [2017] NZHC 2699, 6/11/2017 (*Waslander*).
[14] Prosecutor's submissions, paragraphs 64 & 65.
[15] *Vernon v Taranaki Regional Council* [2018] NZHC 3287 (*Vernon*).
[16] *Bay of Plenty Regional Council v Hedley Farms Limited* [2018] NZDC 20884 (*Hedley Farms*).
[17] *Vernon* See above n 15.

removed the irrigator to allow effluent to discharge directly but had intended to move it regularly. Judge Dwyer found that carrying on farming without an adequate effluent storage and irrigation system in place can only be described as reckless.[18] A starting point of $60,000 was adopted. In *Hedley Farms*,[19] there was a discharge from an effluent pond overland and into a stream. The Court found that the defendant did not monitor or maintain the pond adequately. Further, the irrigator and hose were not properly deployed. A starting point of $60,000 was also adopted.

[51] Ms O'Sullivan submitted that, given the deliberateness of the offending in *Vernon*,[20] a higher starting point was available to the sentencing Judge. She also submitted that the present case is more serious in nature than *Hedley Farms*, because Mr Gray had been advised that the irrigator was not functioning but did not properly address the issue.

[52] In addition to referring to comparable cases, Ms O'Sullivan made other submissions in support of her suggested starting point of $100,000 as follows:

(a) it is appropriate for the Court to reconsider the appropriate level of fines for offending, with reference not only to recent District Court authorities,[21] but rather by stepping back and looking at the appropriateness of the fine levels for the conduct in relation to the level of offending and proportionate to the range of penalties available;

(b) it is relevant to consider where a fine sits in relation to the maximum penalty (or total fines maxima, which is elevated where there are multiple charges or continuing offending);[22]

(c) starting points for offending ought to be higher for companies than individuals. She pointed out that the maximum fine for an offence by a company is $600,000 as opposed to $300,000 for an individual.

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[18] *Vernon*, above n 15 at paragraph [26].
[19] *Hedley Farms*, above n 16.
[20] See *Vernon*, above n 15.
[21] *Taranaki Regional Council v Farm Ventures Limited* [2019] NZDC 10803 at [33] and *Hedley Farms* [2018] NZDC 20884 at [40].
[22] Prosecutor's submissions at paragraph 36.

Reliance was placed on the High Court's statement in *Waslander v Southland Regional Council*:[23]

> …The higher penalty for corporate defendants reflects both the need for the Court to be able to impose meaningful penalties that will carry the necessary punitive and deterrent effect on large commercial organisations and the absence of any alternative non-monetary sentences such as imprisonment, which are available when natural persons appear before the Court for this type of offending.

(d) assistance can be taken to the approach to culpability banding in other regulatory sentencing areas, referring to the High Court decision in *Stumpmaster v Worksafe NZ* (***Stumpmaster***).[24]

[53] In response, Ms Forret accepted Ms O'Sullivan's submissions regarding sentencing principles and her summary of the relevant case law. However, Ms Forret did not accept the application of those decisions to the offending in this case. Counsel also did not accept the prosecutor's submission as to the use of the *Stumpmaster* culpability bands. In effect, Ms Forret accepted the relevance of the established framework for levels of fines in sentencing set out in *Waikato Regional Council v GA & BG Chick Limited* (***Chick***).[25]

[54] Ms Forret accepted that, while the maxima of fines are higher for a company, the penalty needs to be considered against the facts of the offending. She submitted that the defendant is not a large commercial enterprise but is a small shareholding that has structured its dairy operation with Mr Gray as a sole director and the shareholding divided between himself and his wife.

[55] Counsel submitted that Graze was not wilfully blind to the requirements of an effluent system and that Mr Gray's actions in preparing for the season, and his response to the identified concerns, show that there was both understanding and care.

[56] Ms Forret distinguished this case from *Vernon*[26], in which case the defendants knew of the system's deficiencies for 3-4 years and had breached an abatement notice.

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[23] *Waslander v Southland Regional Council*, above n 13 at [53].
[24] *Stumpmaster v Worksafe NZ* [2018] NZHC 2020, [2018] 3 NZLR 881 (*Stumpmaster*).
[25] *Waikato Regional Council v GA & BG Chick Ltd* (2007) 14 ELRNZ 291 (DC) (*Chick*).
[26] *Vernon*, above n 15.

The *Hedley Farms*[27] case was also said to differ, as it was found that the effluent pond was not monitored or maintained. She submitted that the defendant did not fail to take responsive action and that steps were taken to trouble-shoot and remedy the irrigator at each turn. Had that approach not been taken, there would have been much greater effluent ponding.

[57] Ms Forret submitted that the level of offending in terms of *Chick*[28] falls at the upper end of Level 1 – least serious. In contrast, Ms O'Sullivan submitted that the offending is moderately serious and falls into Level 2 of the *Chick* categories.

[58] In the present case, two charges arose from one primary issue, which was the breakdown of the travelling irrigator and the decision to proceed with milking, the inevitable result of which would have been the overflow from the sump. There is potential for cumulative effects on the Piako River as well as on groundwater from the ponding caused by the unlawful discharges.

[59] There is a need for deterrence. There has been considerable education in the area of effluent disposal, and the standards for such disposal expected of farmers. The prosecution states that there is a need to maintain deterrence and incentivise investment in compliance measures.[29]

[60] As to the level of fines, I adopt Judge Harland's statement in *Waikato Regional Council v Nagra Farm and Singh* (***Nagra Farms***)[30] to the effect that the Courts have signalled over the past eighteen months that starting points "typically adopted for dairy effluent offending need to be elevated to better relate to the maximum penalty available".

[61] As to the differences in fines between companies and individuals, I agree with Ms Forret's submission that while the maxima of fines are higher for a company, the penalty needs to be considered against the facts of the offending. In this case the

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[27] *Hedley Farms*, above n 16.
[28] *Chick*, above n 25.
[29] Prosecutor's submissions, paragraph 35.
[30] *Waikato Regional Council v Nagra Farm and Singh* [2019] NZDC 2382, paragraph [79] (*Nagra Farms*).

defendant is not a large commercial enterprise; it is a small company, of which Mr Gray is the sole director and 80% shareholder.

[62] Finally, I address Ms O'Sullivan's submission that the Court would gain assistance in assessing the appropriate starting point by reference to the 'culpability band' approach adopted by the Court in *Stumpmaster*.[31] I have addressed the same submission in *Waikato Regional Council v Crouch*.[32] In short, I do not see any need for the Court to adopt the *Stumpmaster* approach. However, I adopt Judge Harland's statement in *Nagra Farms*[33] that there is a need for the Courts to more carefully assess culpability, have more regard to the maximum penalty, and be prepared to depart from the *Chick* level approach if it is not immediately applicable in any case before it.[34] Circumstances giving rise to that are where there is a series of events that result in discharges in different parts of the effluent system and where such discharges involve combinations of management and system failures.

[63] Having regard to the decision taken by Mr Gray to continue with milking in the knowledge that the irrigator was inoperable, I consider that the offending falls into Level 2 of *Chick* as being moderately serious. A starting point in this case of $70,000 is appropriate. I record that, were it not for the steps that had already been taken to upgrade the effluent discharge infrastructure, the starting point for this offending would have been higher.

Aggravating and mitigating factors

[64] Ms O'Sullivan made no submission regarding aggravating factors and advised that the defendant has no former history of non-compliance. Counsel noted the upgrades that had been commenced to the Farm's effluent management system, but submitted that as that is not work done by the defendant, no credit should ensue.

[65] Ms Forret submitted that a 10 per cent discount should be allowed for cooperation and good character, and a five per cent discount for the remedial action

[31] *Stumpmaster*, above n 24.
[32] *Waikato Regional Council v Crouch*, [2019] NZDC 11517.
[33] *Nagra Farms*, above n 30.
[34] *Nagra Farms*, above n 30 at [80].

taken. Counsel records that the new effluent infrastructure is operational, that different management provisions and procedures have been put in place and discussed with staff, and that the new system has decreased the area required for irrigation and increased the storage available. Ms Forret also advised the Court that these offences are the first faced by the defendant in its history of farming, and that the prosecution has severely impacted Mr Gray's confidence. Counsel submitted that, as a deterrent, the prosecution is already very effective.

[66] I will allow a five per cent discount for good character but make no allowance for remedial action taken given that the upgrades to the infrastructure have been made at the cost of the Farm's owner.

Guilty plea

[67] The prosecution accepted that the defendant is entitled to credit for its early guilty pleas and acknowledged that the defendant's guilty pleas were entered at the first reasonable opportunity. According to *Hessell*,[35] the maximum credit available is 25 per cent. The defendant is therefore entitled to a further 25 per cent deduction.

Result

[68] Graze Limited is convicted on both charges and fined the sum of $49,875.00. Ninety per cent of the fine is to be paid to the informant Council pursuant to s 342 of the RMA.

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Judge MJL Dickey
District Court Judge and Environment Judge

Date of authentication: 21/11/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[35] *Hessell v R*, SC 102/2009 [2010] NZSC 135.