IN THE DISTRICT COURT
AT THAMES

I TE KŌTI-Ā-ROHE
KI PĀRĀWAI

CRI-2019-075-000232
CRI-2019-075-000234
[2019] NZDC 16796

WAIKATO REGIONAL COUNCIL
Prosecutor

v

DEAN MARK BERTLING
and
MATTHEW MARK BERTLING
Defendants

Hearing:	14 August 2019 and reconvened on 7 November 2019.
Appearances:	T Bain for the prosecutor DS Quinn for the defendants
Judgment:	19 November 2019

RESERVED SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] The defendants have pleaded guilty to one charge each of contravening s 15(1)(b) of the Resource Management Act 1991 (**RMA**). The charge against each defendant relates to the unlawful discharge of contaminants, namely farm animal effluent from an effluent irrigator, onto land where it may enter water, namely groundwater, where that discharge is not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan or resource

consent. The charges relate to unlawful activities associated with effluent disposal on a dairy farm at 95 Bush Road, Pipiroa (**the Farm**) on or about 17 October 2018.

[2] In respect of Dean Mark Bertling (**Mr D Bertling**) there has been no suggestion that he should be discharged without conviction and he is convicted accordingly. For Matthew Mark Bertling (**Mr M Bertling**) an application for discharge without conviction has been made.

[3] The maximum penalty for the charges against each defendant is a fine not exceeding $300,000 and two years' imprisonment. Counsel agreed that a fine is the appropriate sentencing response and I agree. The differences between counsel were in respect of the starting point that I should adopt for each, with the prosecution submitting that a starting point in the range of $60,000 is appropriate for each defendant. For the defendants it was submitted that $10,000 is an appropriate starting point for a fine for both of them.

Regulatory framework

[4] The Farm is within the Waikato region. The Waikato Regional Plan (**Plan**) is the relevant planning document. It allows dairy effluent management by way of a permitted activity rule (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.

[5] Section 15(1)(b) of the RMA stipulates 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 processes) entering water unless the 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.

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

Background[1]

[7] The agreed Summary of Facts describes the background to the offending, including information on the environmental effects of the offending. As it is agreed, I must accept as proven all facts, express or implied (s 24 Sentencing Act 2002).

[8] The Farm comprises an area of approximately 130ha. From 2007 it was owned by Van Lieshout Family Trust and from 15 October 2015 by Van Lieshout Trustees Limited. The sole director of this company is Rene Van Lieshout (**Mr van Lieshout**).

[9] The Farm has been operating under the permitted activity rules for discharging farm animal effluent.

[10] Since 2007 the defendant Mr D Bertling has been contracted by the owner as a 50/50 sharemilker and now employs his son Mr M Bertling as a farmhand on the property. They have responsibility for all aspects of management and day-to-day operations, including of the effluent system.

[11] The Farm is on flat country. The main infrastructure consists of a rotary cowshed with a standalone feedpad that enables supplement feed to be fed to the milking herd. The Farm peak milks around 375 cows and milks twice a day through the season of July through May.

[12] At the time of the offending, the effluent management system consisted of effluent and wastewater from the dairy shed and feedpad fed into a sump that then pumped effluent into two holding ponds. Liquid from Pond 2 is piped back to Pond 1 to enable a stirrer to operate and effluent is pumped from this pond to a travelling irrigator.

Past history of non-compliance

[13] On 26 September 2013 an inspection at the Farm by Council staff during the course of routine monitoring observed effluent ponding around and behind a travelling

[1] Summary of Facts, paragraphs 14-26.

irrigator. The ponding extended approximately 16m behind the irrigator. Effluent runoff had flowed to the side of the paddock, where it entered a drain containing water.

[14] On 8 October 2013 a re-inspection was undertaken by Council officers, who observed that both effluent storage ponds had been lowered further, providing additional capacity. They were advised that a pumping contractor had been used to pump the ponds, and it was noted that there were several rings of heavy effluent sludge application, including effluent ponding and "a significant amount of sludge in the hollows" in the paddocks where the effluent had been spread.

[15] On 7 October 2013 Mr D Bertling was issued with an infringement notice for over-irrigation and an abatement notice was issued to Mr van Lieshout giving notice that he must cease and was prohibited from the unlawful discharge of farm animal dairy effluent at the Farm.

[16] The abatement notice was served personally on Mr van Lieshout on 21 November 2013 and a copy of this notice was posted to Mr D Bertling on 25 November 2013. The prosecutor advised at the sentencing hearing that Mr D Bertling had not been named in the abatement notice.

The offending[2]

[17] On 17 October 2018 the Farm was visited by Council officers as part of the high-risk dairy effluent monitoring programme that focussed on dairy farms with a history of non-compliance.

[18] They noted that Pond 1, nearest to the dairy shed, was heavily laden with solids, with Pond 2 appearing to have less solids. There was freeboard available for additional effluent storage in both ponds.

[19] Mr D Bertling acknowledged that Pond 1 had a lot of sludge in it, and said he had a contractor booked for January to deal with this. He confirmed that they had not irrigated that day and the irrigator was currently at the back of the Farm.

[2] Summary of Facts, paragraphs 27-43.

[20] The Council officers went to the back of the Farm, and to a paddock located along a race about 650m north-east of the dairy shed. They observed an oval-shaped area of thick, black-sludgy applied effluent covering an area of approximately 42m x 27m. In the centre of the discharge was a disconnected dragline. It was not possible to walk across the discharge area due to the depth of effluent, which was at least half gumboot height.

[21] On the south-western part of the over-irrigation area, effluent had accumulated and was flowing into an adjacent farm drain about 10m away, liquid was observed flowing over the lip of the drain and was noted to be a bubbling green. This drain forms part of the Farm's drainage network, but at that time appeared to be stagnant with no discernible flow in either direction.

[22] A "Williams" brand travelling irrigator was observed at the far end of the paddock about 60m away, and when inspected it was noted that it was set at mid-speed and the nozzles were in good condition.

[23] The ponding of effluent to the extent noted by Council officers breaches Rule 3.5.5.1 of the Plan and s 15(1)(b) RMA.

Explanation

Matthew Bertling

[24] When spoken to Mr M Bertling stated that he had set the irrigator to run at about 5.00pm the previous day for about seven or eight hours and had discovered the over-irrigation issue the next morning. He said that he then disconnected the dragline from the irrigator, moving it further along the paddock. He said he had over-estimated the amount of liquid available in the pond, and this meant that the irrigator began sucking up a thick layer of effluent sludge. He said they should have waited for at least two or three milkings for more liquid to go into the pond to dilute the solids, and in hindsight they possibly could have done better by not irrigating after dark and ensuring there was sufficient liquid in the pond.

Dean Bertling

[25] When spoken to, "Dean Bertling stated that he and Matthew shared the decision-making about effluent management and in hindsight they had been stupid to run the irrigator at night and had since ceased that practice, only using it during daylight hours now".[3] He could not recall getting a copy of the abatement notice issued to Mr van Lieshout in 2013.

Rene Van Lieshout

[26] When spoken to, he stated that Mr D Bertling's contract outlined that he was to deal with the effluent management system on the Farm, and that Mr D Bertling had not raised any issues with him about that. He recalled receiving the abatement notice referred to in 2013 and had taken steps since then to update the effluent infrastructure in consultation with Mr D Bertling, such as purchasing an effluent stirrer and new pumps.

[27] He said that he would normally speak with Mr D Bertling by phone around once a week about the Farm, but physically would only go there periodically.

Defendants' assertions about the Summary of Facts

[28] During the sentencing hearing the defendants' counsel disputed the depth of effluent ponding outlined in the Summary of Facts. He relied on affidavits filed by Michael Charles Fagan and Ricky Colin Duggan, both farm owners, to the effect that the over-irrigation looked worse than it was because the effluent had discoloured the grass[4] and that the over-irrigation was not particularly deep or widespread.[5] I note that Messrs Fagan and Duggan formed their view having only looked at the photographs of the ponding.

[29] As the Summary of Facts was agreed and no disputed facts hearing was held, I accept the statement made as to the depth of the ponding being "at least half gumboot

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[3] Summary of Facts, paragraph 39.
[4] Affidavit of Michael Charles Fagan dated 23 July 2019, at paragraph 2.
[5] Affidavit of Ricky Colin Duggan dated 24 July 2019 at paragraph 3.

height".[6] I note that the statement was based on an observation made by the Council's Services staff who inspected the Farm at the time of the offending.

Sentencing principles

[30] Against that background I must 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 me to the principles outlined in *Thurston v Manawatu-Wanganui Regional Council*.[7] 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.[8]

[31] Cases establish increasing concern about the incidence of dairy effluent offending and emphasise the need for deterrence.[9]

[32] I now turn to consider each of the above factors.

Nature of the environment and the effects of the offending on the environment[10]

[33] The ponded effluent did not flow directly into a surface watercourse but did flow into a Farm drain. At the discharge point to the drain samples recorded Faecal coliforms of 1,500,000 cfu/100ml and E. coli of 1,400,000 cfu/100ml. Forty metres from the discharge point (downstream) samples recorded Faecal coliforms of 2,400,000 cfu/100ml and E. coli of 1,900,000 cfu/100ml. This was far in excess of

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6 Summary of Facts, paragraph 32.
7 *Thurston v Manawatu-Wanganui Regional Council* HC, Palmerston North, 27/8/2010, CRI-2009-454-24, Miller J, (*Thurston*).
8 See above n 7, paragraphs [41] and [42].
9 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.
10 Summary of Facts paragraphs 44 to 46.

the sample results upstream from the discharge, which showed readings for both Faecal coliforms and E. coli of 900,000 cfu/100ml respectively.

[34] The effects of the over-application of farm animal effluent to land are addressed in two reports that formed part of and are attached to the Summary of Facts. The reports are from Robert James Dragten, an expert on the effects of effluent on groundwater (*Land Treatment of Farm Dairy Effluent* – Appendix C), and William Nisbet Vant, a water quality scientist (*Potential Adverse Effects of Dairy Shed Effluent in Rivers in the Waikato Region* – Appendix D).

[35] Mr Dragten concluded:[11]

> The over-application of dairy effluent can result in contaminants from that effluent, or contaminants that would otherwise have been taken up by plants, entering 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.

[36] Mr Vant records that the National Guideline Value for contact recreation in fresh water is an E. coli level of < 550 cfu/100ml. For concentrations greater than this there is an unacceptable risk of people becoming sick after being in contact with the water (eg by swimming or playing in it). Adverse effects can occur in rivers and streams. As a result, unless an input of effluent is very highly diluted after it enters a river, it can cause a variety of adverse effects there.[12]

[37] In this case I conclude that the ponding of the effluent on the paddock could have contributed to a cumulative adverse effect on the environment.

Culpability of the defendants for the offending

[38] Counsel for the prosecutor submitted that the defendants' decision to irrigate effluent when there was insufficient liquid in the ponds, after working hours and when there was no supervision of its application, was reckless or negligent. Mr Bain referred to the defendants' admissions that they should have waited a few days before deciding

[11] Summary of Facts, Appendix C, paragraph 17.
[12] Summary of Facts, Appendix D, paragraphs 4 and 5.

to irrigate given the need to dilute the solids in the pond, to the fact that the irrigator had been left running for seven or eight hours overnight, and that this was a usual practice on the Farm until this incident occurred. He submitted that the offending is at a low to moderate level of culpability.

[39] For the defendants Mr Quinn submitted that the offending did not arise out of systemic issues at the Farm; it arose out of a one-off human error. He submitted that this was an over-irrigation issue in circumstances where there was storage available such that the irrigation need not have been carried out. He also submitted that the effluent ponds were responsibly managed, pointing to the fact that a pump-out of the effluent ponds had already been scheduled for December 2018. I note that the Summary of Facts, at paragraph 30, refers to a pump-out planned for January 2019.

[40] Mr Quinn did acknowledge that the infrastructure at the Farm was capable of improvement and had, in fact, been improved since the offending. However, he submitted that the infrastructure was not the cause of this offending. That was submitted to be important because it was acknowledged that there have been systemic issues at the Farm in the past that were remedied around late 2013 and early 2014.

[41] Mr Quinn, in responding to the prosecutor's submission that irrigation took place outside of daylight hours, submitted that the irrigation commenced during daylight hours and had concluded after dark. He confirmed that the defendants have said that they no longer follow this practice but submitted that it doesn't necessarily follow that the over-irrigation would not have occurred if irrigation had not taken place at night. Given the nature of the mistake it could have happened during the day.

[42] Defence counsel took care to explain the nature of the culpability for each of Mr M Bertling and Mr D Bertling. Mr M Bertling's actions were the direct cause of the over-irrigation. It was submitted that his actions were careless but were not intentional, that the actions were out of character, and that he simply made a mistake. In stating that the actions were out of character he relied on affidavit evidence from Mr D Bertling.[13]

[13] Affidavit of Dean Mark Bertling dated 26 July 2019, paragraph 20.

[43] As to Mr D Bertling, counsel submitted that he had pleaded guilty because he is, essentially, vicariously liable for Mr M Bertling's actions as his employer. He acknowledged that both Bertlings were involved in day-to-day decision-making at the Farm, and at the time of the offending shared responsibility for issues relating to effluent management. He stated that Mr D Bertling accepts his culpability but believes that he acted reasonably in trusting Mr M Bertling.

[44] This is not a case where the effluent discharge infrastructure was not up to standard. It is clear that there was an error of judgement on the part of Mr M Bertling to irrigate on the day and night prior to the offending, and that he should have waited at least two or three milkings for more liquid to go into the pond and dilute the solids. He did not need to irrigate that day as there was freeboard available for additional effluent storage in both ponds.[14] The mistake was compounded by the decision to irrigate at 5.00pm for about seven or eight hours, meaning that the over-irrigation issue was discovered the next morning. It seems clear from the explanation of Mr D Bertling in the Summary of Facts that this had been a regular practice, since ended.

[45] I acknowledge that both Bertlings shared responsibility for effluent management. I consider, however, that Mr D Bertling has had considerably more experience than Mr M Bertling and should have taken more care in his supervision. I characterise Mr M Bertling's conduct in this matter as highly careless, while noting that he is an employee of Mr D Bertling and has been for some 6 years. I characterise Mr D Bertling's conduct in this matter as highly careless given that as employer he must bear a measure of responsibility for the management practices on the Farm relating to effluent discharge. I consider that the practice of irrigating paddocks well into the evening hours to be of concern as the irrigator is not able to be checked or properly supervised.

[14] Summary of Facts, paragraph 29.

Sentencing levels in comparable cases

[46] I was referred to *Waikato Regional Council v GA & BG Chick Limited*[15] (***Chick***) as to its guidance in assessing levels of offending relating to dairy farm effluent discharges.

[47] I was also referred to the acknowledgement by the Courts in recent times that the level of penalties must now be higher than those set out in *Chick*. Particularly, in *Bay of Plenty Regional Council v Hedley Farms Limited*[16] (***Hedley Farms***) the Court left open the possibility of a general review of fine levels being undertaken. The prosecutor submitted that it is appropriate for the Courts to reconsider the appropriate levels for offending in light of the increase in the maximum penalty rather than continue to apply the levels of fine identified in *Chick.*

[48] Mr Bain submitted that assistance in setting appropriate bands for offending may be taken from the approach adopted to health and safety legislation by the High Court in *Stumpmaster v WorkSafe New Zealand* (***Stumpmaster***).[17] I have addressed the same submissions regarding the use of *Stumpmaster* bands in an earlier decision. For the reasons outlined there I do not consider that there is a need for the Court to adopt the *Stumpmaster* approach. I adopt that reasoning.[18] However I adopt Judge Harland's statements in *Waikato Regional Council v Nagra Farms Limited & Singh* (***Nagra Farms***) that starting points typically adopted for dairy effluent offending need to be elevated to better relate to the maximum penalty available. Further, 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. 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.[19]

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[15] *Waikato Regional Council v GA & BG Chick Ltd* (2007) 14 ELRNZ 291 (DC) (*Chick*).
[16] *Bay of Plenty Regional Council v Hedley Farms Limited* [2018] NZDC 20884 at [40] (*Hedley Farms*).
[17] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 (*Stumpmaster*).
[18] *Waikato Regional Council v Crouch* [2019] NZDC 11517 (*Crouch*).
[19] *Waikato Regional Council v Nagra Farms Limited & Singh* [2019] NZDC 2382 at [79] and [80] (*Nagra Farms*).

[49] While it was acknowledged that each case turns on its own facts I was also referred by counsel to the following decisions: *Southland Regional Council v Baird* (***Baird***),[20] *Glenholme Farms Limited v Bay of Plenty Regional Council* (***Glenholme***),[21] *Otago Regional Council v Hannah* (***Hannah***).[22] Defence counsel did not cite any other cases but sought to distinguish those cited by the prosecutor.

[50] The prosecutor submitted that leaving the irrigator running overnight and not checking it for at least 7-8 hours was reckless or negligent. He submitted that in *Baird*[23] similar inaction was regarded as a "fairly high level of carelessness". He also submitted that the mitigating steps taken were not to the same level as occurred in *Glenholme*[24] and that the apparent practice of running the irrigator overnight reflects a systemic failure in the management of the effluent, similar to the circumstances outlined in *Hannah*.[25]

[51] Finally, the prosecutor submitted that the general approach to sentencing should be that set out in *Calford Holdings Limited v Waikato Regional Council* (***Calford***) where the Court noted that "a fine that is appropriate for an individual defendant is not to be reduced simply because other offenders were involved".[26] Mr Bain submitted that the roles of Matthew and Dean Bertling must be considered separately, and that a starting point of $60,000 per defendant is appropriate.

[52] For the defence, Mr Quinn argued that the *Baird*[27] case was less serious than the present because the improper irrigation went on for about 16 hours whereas in this

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[20] *Southland Regional Council v Baird* [2018] NZDC 11941 (*Baird*): significant ponding from a stationary irrigator, flowing overland into a waterway; worker had misread the irrigator's computer screen, haybale put into the waterway to try and contain the flow; irrigator operating in a stationary position for 16 hours – starting point $55,000.

[21] *Glenholme Farms Limited v Bay of Plenty Regional Council* [2012] NZHC 2971 (*Glenholme*): a travelling irrigator stalled, causing significant ponding; effluent travelling into a drain; had previously suffered a mechanical failure 2 months prior – a starting point of $45,000 was adopted.

[22] *Otago Regional Council v Hannah* [2015] NZDC 13563 (*Hannah*): 3 charges relating to discharges of dairy effluent onto land breaching no-ponding rule, 3 separate incidents from a travelling irrigator – farm had no storage capacity. Starting point of $60,000 for the company (owner) and $30,000 for the sharemilker company and director.

[23] *Baird*, above n 20.

[24] *Glenholme*, above n 21.

[25] *Hannah*, above n 22.

[26] *Calford Holdings Ltd v Waikato Regional Council* HC Hamilton, CRI-2008-419-94, 26 May 2009, Allan J (*Calford*) at [34].

[27] *Baird*, above n 20.

case it went on for about two hours,[28] a sensitive waterway was affected, and the pollution was evident 2.6km downstream two days later. He asserted that the irrigator over-irrigated for two hours because of the length of the affected area.

[53] As to *Glenholme*[29] he submitted that the reliability of the irrigator in that case was questionable and the amounts of effluent flowing into the relevant river were significant. He maintained that the offending was less serious having regard to the totality of the offending and the infrastructure issues. He also noted that the starting point of $45,000 was apportioned between two defendants, $30,000 for the company and $15,000 for its director. As to *Hannah*,[30] he maintained that that case is more serious than the present case as the offending took place on three separate days over almost one month and there were ongoing systemic issues on the farm as the result of an absence of effluent holding ponds – that was seen as the primary cause of the offending.

[54] He again submitted that the offending did not arise out of systemic issues but points to the steps taken since the offending to improve the effluent management system, in particular the installation of a third pond and purchase of a new irrigator.[31]

[55] Mr Quinn suggested that $10,000 is an appropriate starting point for a fine for both defendants.

[56] I place the offending at Level 1 of *Chick*.[32] This was an unintentional one-off incident. There was no system failure but there was an error of judgement that resulted in the ponding. The range of starting points in the cases I was referred to was between $45,000 and $60,000. I do not consider any of the cases to be similar to the present case as the offending in this case was a result of human error. I have considered the prosecutor's submission that separate starting points for each defendant are appropriate. I accept that when unrelated parties have separate and distinct roles in relation to the offending that it will normally be appropriate and necessary to adopt

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[28] Defence counsel submissions, paragraph 23, referring in turn to paragraph 4 of Dean Bertling's affidavit.
[29] *Glenholme*, above n 21.
[30] *Hannah*, above n 22.
[31] Defence counsel submissions, paragraph 26, Dean Bertling's affidavit, paragraphs 16 and 17.
[32] *Chick*, above n 15.

separate starting points. In this case however as the defendants are closely related I consider that a global fine is appropriate for the offending and set a starting point of $55,000. I consider that Mr D Bertling must bear the bulk of responsibility for what happened on the Farm on the day of the offending, given that he is Mr M Bertling's employer, and that as employer he is ultimately responsible for the management practices at the Farm.

[57] I now turn to consider Mr M Bertling's application for discharge without conviction.

Application for discharge without conviction – Mr M Bertling

[58] Mr M Bertling has made an application for discharge without conviction. Applications for discharge without conviction are available as a sentence response under s 106 of the Sentencing Act 2002. The analysis required is outlined in s 107. The leading case is *Z v R*.[33] I am required to assess:

(a) the gravity of the offending, which includes a consideration of personal mitigating and aggravating features as well;

(b) the likely direct and indirect consequences of the conviction on the defendant;

(c) whether those consequences are out of all proportion to the gravity of the offence; and

(d) whether the Court should exercise its discretion to grant the application.

[59] Submissions were made in support of Mr M Bertling's application for discharge without conviction. The prosecution opposed the application.

Factors relevant to the gravity of the offending

[60] The factors relevant to the gravity of the offending include the nature of the environment affected, the effect on the environment of the offending, the

[33] *Z v R* [2012] NZCA 599.

deliberateness of the offending, the defendant's response to it and other factors relevant to Mr M Bertling specifically.

Deliberateness of offending

[61] I have determined that the defendant was highly careless. He made a mistake in deciding that he had to irrigate the effluent from Pond 1 without properly checking it to determine if it contained sufficient liquid. He made a further mistake in irrigating at 5.00pm for 7-8 hours, meaning he would not have been able to check if the irrigator was running properly.

Nature of the environment and the effect of the offending on the environment

[62] I have outlined the nature of the environment and the effects of the offending on the environment at paragraphs [33] to [37].

Offer to make amends

[63] No offer to make amends has been made. I note, however, that there have been infrastructural improvements at the Farm (the third pond and a new irrigator) but that they have been paid for by the Farm's owner.

Other factors

[64] Mr Quinn submitted that Mr M Bertling should be given the same chance as was afforded Mr D Bertling and Mr van Lieshout in 2014. By that he meant an abatement notice was issued to Mr van Lieshout and a copy served on Mr D Bertling in respect of offending on the Farm relating to 'fairly serious systemic issues'.[34] An infringement notice was issued to Mr D Bertling but no prosecution was initiated against Mr Bertling or Mr van Lieshout. There was no warning given to Mr M Bertling in this case. He submitted that Mr M Bertling is entitled to draw an inference that the decision to lay charges against him "has been influenced by historical offending at the farm that had nothing whatsoever to do with him".[35] He seeks the same chance that Dean Bertling and Mr van Lieshout had. Mr Quinn submitted that he is a more

[34] Defence counsel submissions, paragraph 40.
[35] Defence Counsel submissions, paragraph 40.

meritorious candidate for such a chance given his comparative youth and level of experience.

Similar cases

[65] The prosecutor referred me to several relevant cases, being *Burrows v Otago Regional Council*,[36] *Withington v Bay of Plenty Regional Council*,[37] and *Baird*.[38] I have had regard to those cases but consider that each case must turn on its own merits.

Assessment of gravity of the offending

[66] The factors that I have previously identified mean that there is a degree of seriousness that attaches to this offending. It is clear from counsels' analysis of comparable cases that effluent discharge offences are not trivial. They are serious and carry with them the potential for significant fines. In this case I have determined that an appropriate starting point is $55,000. I have, however, placed the offending at Level 1 of *Chick*[39] as an unintended one-off incident and determined that the discharge could have contributed to a cumulative adverse effect on the environment.

Direct and indirect consequences of the offending

[67] For Mr M Bertling it was submitted that his future will be affected by a conviction. Evidence was provided by two farmers, Michael Fagan and Ricky Duggan, to the effect that any conviction may weigh against him in a competitive setting and affect his future employment prospects in the dairy industry.[40] Mr M Bertling stated in evidence that he wishes to become a sharemilker, and this will necessitate him moving on from working for Mr D Bertling.[41]

[68] Mr Bain submitted that it cannot be assumed that an employer will not look at the circumstances behind the conviction, particularly as the defendant is generally a

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[36] *Burrows v Otago Regional Council* [2015] NZHC 861.
[37] *Withington v Bay of Plenty Regional Council* [2018] NZHC 1237.
[38] *Baird*, above n 20.
[39] *Chick* see above n 15.
[40] Affidavits from Michael Fagan dated 23 July 2019 and Ricky Duggan dated 24 July 2019.
[41] Affidavit of Matthew Mark Bertling dated 26 July 2019, paragraph 7.

person of good character.[42] Mr Bain also submitted that current and future employers are generally entitled to know about offences committed.[43]

[69] Mr Quinn also submitted that any conviction would need to be disclosed to financiers and insurers, and that "these institutions may well be troubled by him having a conviction."[44] In response, Mr Bain submitted that was speculative.

[70] I consider that a conviction may cause an impact on Mr M Bertling given his relative youth and experience. He is 26 years old and, in effect, in his first job (on a farm) and working for his father.[45] He has yet to test himself in the job market.

Proportionality

[71] In considering this matter I have found the Court's comments in *R v Smyth*[46] to be helpful. The requirement of ss 106 and 107 Sentencing Act 2002 is that it is not enough that the consequences of a conviction outweigh the gravity of the offending. Significantly more is required. The consequences must be out of all proportion to the seriousness of the offending. These provisions set a high bar.

[72] Mr Bain submitted that the consequences of a conviction, essentially an alleged possible impact on future employment opportunities, are not out of all proportion to the gravity of the offending, having regard to the seriousness of the offence and the particular aggravating features. Mr Bain submitted that the s 107 threshold is not met.

[73] I have carefully considered this matter and the case law cited to me. The matter is finely balanced, but I consider there to be a real potential for Mr M Bertling's future career prospects to be impacted by a conviction. It would be different if Mr M Bertling had some years of experience behind him working for different employers. But he does not – he has only worked for his father, he is still relatively young, and he has yet to test the job market. The question I must decide is whether the potential impact on his job prospects is out of all proportion to the gravity of the offending. I have

[42] Relying on the dicta in *Edwards v R*, [2015] NZCA 583.
[43] *Police v Roberts*, [1991] 1 NZLR 205 (CA).
[44] Defence counsel's submissions, paragraph 41.
[45] I note that he worked at McDonalds while at school and after school.
[46] *R v Smyth* [2017] NZCA 530 at [12].

concluded that the gravity of the offending is at the 'least serious' end of the spectrum. I consider that the potential impact on Mr M Bertling out of all proportion to the gravity of this offence.

[74] Mr Bain urged me not to exercise my discretion under s 106, even if I decide that the s 107 threshold is met. He submitted that the purpose and principles of sentencing must be considered, particularly the principles of denunciation and deterrence. I acknowledge the relevance of those principles and their importance but consider that the circumstances of this offending, and Mr M Bertling's own circumstances, to be such as to enable me to exercise my discretion to discharge Mr M Bertling without conviction. In so doing, I consider it would be helpful, however, if Mr M Bertling were to undertake a course in managing farm effluent discharges. I reconvened the sentencing hearing to ask if Mr M Bertling is prepared to undertake such a course. He agreed to undertake the course within 12 months and to advise the Council once he had completed it. I will therefore discharge Mr M Bertling without conviction under s 106 of the Sentencing Act 2002.

[75] My decision is made on the facts of this case and should not be taken as a precedent.

Fine – Mr D Bertling

[76] I have adopted a starting point for the fine of $55,000.

Aggravating and mitigating factors

[77] Mr D Bertling was given an infringement fine on 7 October 2013 in respect of over-irrigation on the Farm. I consider that a discount of three per cent for good character is appropriate.

[78] I note the further works that have occurred on the Farm since the offending, but as they were not at the defendant's cost I allow no discount for that.

[79] The prosecution accepts that Mr D Bertling is entitled to a credit for his early guilty plea. In terms of *Hessell v R*[47] I have determined it appropriate to allow a 25 per cent discount for his early guilty plea.

Financial capacity

[80] I am not aware that there are any issues with Mr D Bertling's financial capacity.

Result

[81] Mr D Bertling is convicted and fined the sum of $40,012.50. Ninety per cent of the fine is to be paid to the informant Council pursuant to s 342 of the RMA.

Mr M Bertling

[82] Mr M Bertling has agreed to undertake a level 3 or 4 course '*Dealing with Farm Effluent*' within 12 months of the date of this decision and advise the Council once completed. A link to the Primary ITO and the course in question is https://primaryito.ac.nz/courses-for-you/dairy/dairy-farming/#course-62..

[83] Under s 106 of the Sentencing Act 2002, Mr M Bertling is discharged without conviction.

Judge MJL Dickey
District Court Judge and Environment Judgew

Date of authentication: 19/11/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[47] *Hessell v R* [2009] NZSC 135, 1 NZLR 607.