



Subject: Tawai Dairy Farm Prosecution

Prepared by: Trevor Freeman (Environmental Services Manager)

Meeting Date: 9 February 2011

Report to ENVIRONMENT & POLICY Committee for noting

SUMMARY

Following a suspected discharge of dairy effluent in December 2009, Council laid seven charges in the District Court. One charge was subsequently withdrawn. In a reserved judgement issued on 26 January 2011, Judge RG Whiting found Tawai Dairy Company Ltd guilty of three charges, Mr Peter McCarthy (a director of the company) not guilty of one charge and Mr Stewart Rolls (sharemilker) guilty of one charge. Mr Rolls had previously pleaded guilty on one charge. Sentencing is scheduled for 21 February 2011.

This is a pleasing outcome as it includes both the farm owner and sharemilker. It demonstrates Council is encouraging of progressive farming practices, but is also serious about protecting our waterways from the sort of effluent effects that are all too common in other regions.

The full judgement is attached.

RECOMMENDATIONS

That the Committee

1. receives the report

Trevor Freeman
Environmental Services Manager

Hans van Kregten
Group Manager Environment and Policy

**IN THE DISTRICT COURT
AT GISBORNE**

**CRN10016500625
CRN10016500626
CRN10016500627
CRN10016500631
CRN10016500628
CRN10016500629
CRN10016500630**

GISBORNE DISTRICT COUNCIL
Informant

v

**TAWAI DAIRY COMPANY LIMITED
PETER JOHN MCCARTHY
STEWART ROLLS**
Defendants

Appearances: Mr G R Webb for the Informant
Mr M Lawson for the Tawai Dairy Company Limited
Mr P McCarthy for himself
Mr D Sharp for Mr S Rolls

Date: 26 January 2011

RESERVED JUDGMENT

Introduction

[1] At the relevant time, Tawai Dairy Company Limited owned (and still does own) a dairy farm at Matawai between Gisborne and Opotiki. Mr Peter John McCarthy was (and still is) a director and shareholder of the company. Mr Stewart Rolls and his partner were sharemilkers on the property.

[2] On, or about, 23 December 2009, dairy effluent was discharged from an irrigation system, on the farm onto land, where it ponded and entered a water course. As a result the Gisborne District Council laid charges under the Resource Management Act against the company, its director Mr McCarthy and the sharemilker on the property Mr Rolls.

The Charges

[3] Tawai Dairy Company Limited face three charges:

- 1) Permitting the discharge of dairy effluent onto land in circumstances which led to that contaminant entering water (CRN10016500627);
- 2) Permitting the discharge of dairy effluent contrary to condition 11 of the relevant resource consent, which provided "*there shall be no overland flow of solid or liquid waste into water courses or beyond property boundaries at any time*" (CRN10016500626); and
- 3) Permitting the discharge of dairy effluent in contravention of condition 16 of the relevant resource consent which provided "*records of all effluent and fertilizer applications, location and time of applications and soil quality test results shall be held and made available during farm visits and inspections requested and arranged by the consent authority*" (CRN 10016500625).

The company has pleaded ^{not} guilty to all these charges.
^

[4] Mr McCarthy, a director of the company, faces one charge:

- 1) Permitting the discharge of dairy effluent in contravention of condition 16 of the relevant resource consent – which relates to the keeping of records (CRN10016500631).

Mr McCarthy has pleaded not guilty to the charge.

[5] Mr Rolls faces three charges:

- 1) Permitting the discharge of dairy effluent onto land in circumstances which led to that contaminant entering water (CRN 10016500630) – Mr Rolls has pleaded guilty to this charge and is awaiting sentence;
- 2) Permitting the discharge of dairy effluent contrary to condition 11 of the relevant resource consent (relating to overland flow of solid or liquid waste into water courses or beyond property boundaries) - this charge has, with leave of the court, been withdrawn;
- 3) Permitting the discharge of dairy effluent in contravention of condition 16 of the relevant resource consent – which relates to the keeping of records (CRN 10016500630) – Mr Rolls has pleaded not guilty to this charge.

Agreed Facts

[6] An agreed summary of facts was lodged with the court. It is relatively succinct. I set it out below:

...

Agreed Summary of Facts

Tawai

The defendant, Peter McCarthy, is a director of the co-defendant ~~Towai~~ Dairy Company Limited which owns a dairy property at Towai Station a few kilometers from Matawai Township.

The Station owner contracted a sharemilker, Stewart Rolls to milk a herd of dairy cows on the Station, some of which are owned by the sharemilker and other co-defendant Stewart Rolls.

Tawai Dairy Company Ltd has a resource consent in the form of a discharge permit. This enables liquid dairy shed effluent to be pumped from a holding pond on to the farm land.

A number of conditions attach to the consent and they include:

11. There is to be no overland flow of solid or liquid waste into water courses or beyond property boundaries at any time.
16. Records of all effluent applications, location and time of applications are to be held and made available during farm

visits and inspections requested and arranged by the Council.

The farm operation for discharging effluent to land used a travelling irrigator, to which effluent from the holding pond was pumped. The operation of the farms effluent disposal system is contracted to Stewart Rolls.

On about 23 December 2009 the pipe conveying effluent to the irrigator separated when the coupling was pulled apart 50m from the irrigator. Effluent continued to be pumped but instead of it being spread across a designated paddock by the irrigator, it poured out of the end of the pipe where the pipe had been pulled apart.

The effluent ponded to such an extent that it ran out of the paddock and into a watercourse.

The watercourse flows into a stream and eventually into the Motu River on the other side of Matawai Township.

Samples of the liquid taken, on 24 December 2009, from the watercourse from neighbouring down-stream properties were analysed and showed elevated total nitrogen levels.

Inspections of the adjoining watercourse and streams revealed dairy shed effluent in the waterways and the presence of dead eels was observed.

Tawai Dairy Company Limited accepts that effluent was discharged from the end of the pipe and that a breach of condition 11 of the resource consent has occurred, and that the material discharged was a contaminant.

The Defendants have advised that they wish to raise the defences provided by section 340 of the Resource Management Act. The Informant accepts that remedial measures were undertaken by and on behalf of the Company met the requirements of section 340 (2) (b) of the Resource Management Act 1991.

The Charges Against the Company

[7] The main defences raised on behalf of the company and its director Mr McCarthy was the statutory defences provided for in section 340 of the Act which says:

340 Liability of principals for acts of agents

(1) Where an offence is committed against this Act –

- a) by any person acting as the agent (including any contractor) or employee of another person, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if he, she, or it had personally committed the offence; or

- b) by any person while in charge of a ship, the owner of the ship shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if he, she, or it had personally committed the offence.
- (2) Despite anything in subsection (1), if proceedings are brought under that subsection, it is a good defence if –
- a) the defendant proves,
 - (i) in the case of a natural person (including a partner in a firm),-
 - (A) that he or she did not know, and could not reasonably be expected to have known, that the offence was to be or was being committed; or
 - (B) that he or she took all reasonable steps to prevent the commission of the offence;
 - or
 - (ii) in the case of a person other than a natural person,
 - (A) that neither the directors (if any) nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed; or
 - (B) that the defendant took all reasonable steps to prevent the commission of the offence; and
 - b) the defendant proves that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.
- (3) If a person other than a natural person is convicted if an offence against this Act, a director of the defendant (if any), or a person involved in the management of the defendant, is guilty of the same offence if it is proved-
- a) that the act or omission that constituted the offence took place with his or her authority, permission, or consent; and
 - b) that he or she knew, or could reasonably be expected to have known, that the offence was to be or was being committed and failed to take all reasonable steps to prevent or stop it.

[8] It was submitted that neither the director nor any person involved in the management of the company knew, or could reasonably be expected to have known, that the offences were to be or were being committed. I note that one offence relates to the discharge per se. The other two charges relate to a discharge contrary to specific conditions of the relevant resource consent.

[9] The offence relating to the discharge per se alleges the permitting of a discharge of dairy effluent from an irrigation pipe onto land in circumstances which led to that contaminant entering water. The discharge is an offence if it is not expressly allowed by a national environment standard or other regulations, a rule in a

regional plan as well as a rule in a proposed regional plan, or a resource consent. There was no national environment standard or rule in a regional plan or proposed plan which allowed the discharge. There was a resource consent, but it is alleged that the discharge was in breach of two conditions of that resource consent.

[10] It is clear from the admitted facts that the discharge was in breach of condition 11 of the consent which provides that there shall be no overland flow of solid or liquid waste into watercourses or beyond property boundaries.

[11] The third charge alleges that the discharge was not in accordance with the resource consent as condition 16, relating to the keeping of irrigation records, had not been complied.

[12] All three charges relate to the same incident but because they relate to specific statutory prohibitions they are not duplicitous. In my view they are effectively alternative charges although they have not been laid as such.

The Relevant Circumstances

[13] There is no dispute as to how the discharge occurred. Mr Rolls, the sharemilker, gave the following uncontested evidence:¹

[9] Later that afternoon the irrigator was set up by one of the workers but he left out two sections of the pipe. He told me he had done this. Because the pipe was considerably less than normal, I set the pump timer for one hour and switched it on. Later that day I checked the pump timer and noticed that it had been changed to a 2 hour setting. Running the irrigator for the extra hour on a shortened pipe would mean it would run out of pipe but still be pulled along on the wire cable. That "pull" would have caused one of the pipe couplings to give way and come apart. The effluent in the pipe and from the pond would continue to be pumped out until the pump ceased operating. Had the time remained 1 hour duration, then the operating irrigator would not have run out of hosepipe.

[14] During cross examination, Mr Rolls gave the reason for the removal of the lengths of pipe:²

¹ Brief of Evidence, at [9]

² Transcript page 70, line 32

It hadn't been taken off, it was not connected, because it had a damaged connection.

[15] Mr McCarthy, a director of the company said in evidence:³

[84] I do not believe that there is any way that the company or any of its directors could have reasonably been expected to have known that the mistake of putting insufficient pipe on the irrigator would occur and give rise to this discharge and therefore this offence by the contractor.”

And:⁴

[86] I am at a loss to explain how or why an oversight such as failing to connect all of the lengths of pipe could have occurred and I certainly do not believe that either the company or I could have foreseen that omission. For some unknown reason the method of operation that had been successfully implemented in the preceding three months was changed. The only thing that I can put the matter down to is human error, and that human error was completely unknown and unforeseen by me and by Tawai Dairy Company Ltd.

[16] Mr Rolls, both in his evidence-in-chief and during cross-examination, alleged that Mr McCarthy had been to the farm on the day of the spillage, had seen effluent run off from an earlier application on another paddock and instructed Mr Rolls to continue irrigating. This was disputed by Mr McCarthy, who told me that he had been on a business trip to Rotorua on 22 December, and which the evidence clearly established was the day of the actual spillage.⁵ On this matter, I accept the evidence of Mr McCarthy. Mr McCarthy impressed as a truthful, careful and reliable witness. Mr Rolls had earlier recanted on the same allegation at a company management meeting.

[17] I am satisfied, on the balance of probabilities, that with regard to the directors and in particular Mr McCarthy, he or the other directors of the company did not know or could not reasonably be expected to have known that the irrigator would be run for a time that would exceed the capacity of shortened pipes.

³ EIC at [84]

⁴ EIC at [86]

⁵ Transcript, page 31, lines 10-14

[18] In so doing I adopt the test applied by Judge Thompson in *Taranaki Regional Council v Hinton*⁶ and adopted by Judge McElrea in *Waikato Regional Council v Tim Coombes Deer and Stock Limited*.⁷

In terms of paragraph (i) of sub (2) (a) if they can demonstrate on the balance of probabilities that they did not know or could not reasonably be expected to have known *that specific event* [emphasis added] was going to occur, then they can bring themselves within the terms of that paragraph.

[19] Mr Webb submitted, that the liability of the company could be sheeted home under the phrase “*any person involved in the management of the defendant*” in Section 340(2)(a)(ii)A. It was his submission that Mr Rolls, as sharemilker was a contractor (a relationship accepted by the defendant company), the evidence established that he was “*involved in the management of the defendant*” company, notwithstanding that he was not a director or employee of the company.

[20] On the other hand, Mr Lawson submitted, that as a “*contractor*” his relationship with the company was too remote. He was responsible for his own business of a sharemilker and his responsibilities did not extend to the company. To be “*involved in the management*” of the company one had to be either a director, shareholder or employee of the company.

The Evidence of Mr Rolls’ involvement

[21] In his cross-examination of Mr McCarthy, Mr Webb laid the evidential foundation for his submission. Rather than summarise the exchange that took place, I set it out in full:⁸

- Q. Good morning Mr McCarthy
- 5 A. Good morning
- Q. Can I just start please with asking you a few general questions about farming, particularly based on your obvious extensive experience in this particular area? Would you accept that as a general proposition that being a farm manager on a pastoral property in the East Coast of the
- 10 North Island, Gisborne area generally, it’s largely at 24/7 position?
- A. Yes

⁶ CRN0021007308 - 9, 5 November 2001 at [13]

⁷ CRN0073005299, 12 February 2002

⁸ Transcript pages 35-39 line 20

- Q. You accept that. And it would be difficult, again as a general proposition, to carry out that day to day management by a farm manager unless that person was living on the property?
- 15 A. Yes.
- 1020
- A. Yes
- Q. And again, generally speaking, that in terms of a farm manager's duties, that person would normally have someone to report to?
- 20 A. Yes
- Q. That person would need to use his best endeavours to protect and enhance the productive capacity of the land.
- A. Yes
- Q. And he'd also have to maintain the security of the property that he was managing.
- 25 A. Yes.
- Q. And that person would need to have a proper professional approach and attitude to farming.
- A. Yes
- 30 Q. A farm manager would, at frequent intervals, have to provide a management report to either his supervisor or the owner, is that right?
- A. Yes.
- Q. And that would contain such things as stock on hand, births and deaths, is that right?
- A. Yep.
- Q. Any sales?
- 5 A. Yes.
- Q. And a measurement of actual production against budget?
- A. Yes.
- Q. So it as an owner or a supervisor, you'd expect to get that from a manager?
- 10 A. Correct
- Q. Would a manager normally in your experience keep a farming diary?
- A. I would expect, yes.
- Q. One of the manager's jobs would be to eradicate noxious weeds on a farm.
- 15 A. Yes.
- Q. He'd need to maintain and look after all the machinery and equipment.
- A. Yes.
- Q. Manager's responsible for the total care in the husbandry of all stock on the farm.
- 20 A. Yes
- Q. He'd be the one to call on a vet if it was needed.
- A. Yes.
- Q. If I take you back to those things, and now look at it specifically in the case of Mr Rolls, out at Tawai Station, he had to report to someone and that was you?
- 25 A. Yes.

- Q. And your directors?
A. Yes.
Q. He had to use his best endeavours to protect and enhance the productive
30 capacity of the property
A. Yes.
Q. Part of his role. Based on the CV and the application that he submitted
to you, at that time and following his interview, would you say that he
had a professional approach and attitude?
A. Yes.
Q. Be fair to say you might differ now.
A. No comment.
Q. All right thank you.
5 **THE COURT:**
Q. Well, you have asked a question, are you not going to answer the
question?
A. Oh sure, um, um, I do, yes, I do, um, differ to, um, agree with that now.

CROSS EXAMINATION CONTINUES: MR WEBB

- 10 Q. And again, as part of Mr Rolls' position on the farm, he had to give the
owners, the company, a monthly management report.
A. Yes.
Q. And i think the form of that was set out in the sharemilkers' agreement,
is that right?
15 A. Yes
Q. And he was expected to maintain and look after all the machinery and
equipment –
A. Yes.
Q. - on the place. He was responsible for total care in the husbandry of all
20 the herd.
A. Yes
Q. He might have needed to call in the vet and he would have done that?
A. Yes.
Q. And as we've seen from your exhibits you've produced, he attended
25 regular meetings with some or all of the directors.
A. Yes.
Q. And those, both the agenda of those meetings and the minutes were
shown to be management meetings weren't they?
A. Yes.
30 1025
Q. Am I correct that the dairy farm at, or near Matawai, was the only
farming property that was owned by Tawai Dairy Company Limited?
A. Yes.
Q. And according to the sharemilkers agreement, Mr Rolls was required to
operate the effluent system in accordance with the consent conditions,
wasn't it –
5 A. Yes.

- Q. - it was part of his job. And from your perspective and that of the company y, the correct operation of that system was vitally important to the company?
- A. Yes.
- 10 Q. Were you ever aware or ever told what the penalties for offences under the Resource Management Act, were?
- A. Yes.
- Q. Quite substantial aren't they?
- A. Yes
- 15 Q. And I would assume from your perspective that operation of that effluent system was also vital for you to maintain the company's environmental integrity and also because you regarded it as a show-piece farm?
- A. Yes.
- Q. And Mr Rolls employed staff that worked for him on the farm?
- 20 A. Yes.
- Q. And he paid for them?
- A. Yes
- Q. And those staff answered to him?
- A. Yes
- 25 Q. And it would be fair to say that in the course of their work on the farm those staff contributed to its overall productivity?
- A. Yes.
- Q. And again, those staff worked with the herd and that again was vital to ensure that milk production was kept it, wasn't it?
- 30 A. Yes.
- Q. So it's fair to say, isn't it, that the successful operation of the dairy unit, relied on Mr Rolls?
- A. Yes.

WITNESS REFERRED TO BRIEF OF EVIDENCE

- Q. Please turn to the evidence-in-chief you gave, the statement, and at paragraph 45, the second sentence, "It was always intended we would contract the sharemilker to operate the dairy farm." That's correct?
- A. Yes.
- 5 Q. And that a little bit later on in that paragraph, you say that none of the – yourself and the other two directors – were involved in the operation of the farm. That's right, isn't it?
- A. Yes
- Q. So it was all left to Mr Rolls and his staff?
- 10 A. Yes
- Q. And if we go on a little bit please to paragraph 62, again you confirm there don't you that the operation of the farm and of the effluent disposal system was contracted to Stewart Rolls?
- A. Yes
- 15 Q. Can I summarise this by way of a question to you that, with you and your fellow directors living away from the property, and that the duties that Mr Rolls had, he was a very important cog in the wheel. Is that right?
- A. Yes.

- 20 Q. Would you go so far as to say he had a key role in the farm operation?
A. Yes.

The Law

[22] It was Mr Webb's submission, that the evidence established that Mr Rolls was involved in important management decisions of the defendant company, and in particular discussions relating to effluent disposal by way of irrigation. A process which, if not managed appropriately, can cause adverse effects on the environment, particularly waterways.

[23] Mr Webb relied on the High Court decision of Wild J in *Wallace Corporation Limited and others v Waikato Regional Council*⁹ where the learned High Court Judge held that the appropriate test as to who is "involved in the management of the company" is not restricted to those "directing the mind and will" of the company as was held in *Tesco Supermarkets Limited v Natrass*¹⁰ and applied in New Zealand in *Nordik Industries Limited v Inland Revenue*.¹¹

[24] Wild J found that the appropriate test was that enunciated in *R v Newth*¹² where Quilliam J said:¹³

The enquiry should be whether upon the evidence, the accused took a hand in the real business affairs of the company.

[25] Quilliam J, was dealing with section 188 (1) of the Companies Act 1955, which (save with the court's leave) prohibited an undischarged bankrupt "directly or indirectly taking part in or being concerned in the management of any company". Quilliam J also observed "that the object of the statutory provision is ... the protection of the commercial community."

[26] In Victoria, Ormiston J followed *Newth* in *Commissioner of Corporate Affairs (VIC) v Bracht*¹⁴ where he said:

⁹ HC Hamilton, 7 October 2010

¹⁰ [1972] AC153

¹¹ [1976] 1ZLR194

¹² [1974] 2NZLR760

¹³ At page 761

¹⁴ [1998] 14ACLR, Settlement 28

... Perhaps I have given the word “management” a somewhat wider meaning, but the level of participation to which the section refers may be relatively modest ... I would see the prohibition as covering a wide range of activities relating to the management of a corporation, each requiring an involvement of some kind in the decision making process of that corporation. That involvement must be more than passing, and is certainly not of a kind when merely clerical or administrative acts are performed. It requires activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision making processes, and execution of its decisions going beyond the mere carrying out of directions as an employee, would suffice.

[27] Wild J, had this to say in *Wallis*.¹⁵

[83] In terms of what is required under s 340(2)(b)(i) to be “concerned in the management of” a company, the Judge was correct to adopt the approach of Ormiston J in *Bracht*. Chisholm J had done likewise in *Thompson v District Court at Christchurch* (2002) 9 NZCLC 262,824 at [24], as had Fisher J in *Tregurtha v New Zealand Police* HC Auckland AP123’93, 15 October 1993 at 6. Applying the *Bracht* formula, Mr Dew was “concerned in the management of” WCL. He had a level, albeit comparatively low, of management responsibility. His title “Electrical Manager” reflected that. He attended meetings of the management of the Rendering Division of WCL to give advice about electrical and associated matters. He made decisions and gave directions, including his direction to Mr Ellis, and following Mr Ellis’ refusal to act on it, to Mr Workman, to bury the capacitors.

[84] Further, Judge McElrea was on firm ground in interpreting s340(2) so as to achieve the aims of the RMA. Restricting those “concerned in the management of” WCL to those “directing the mind and will” of WCL (the *Tesco* test) would not be the purposive interpretation called for by s 5 Interpretation Act 1999. Lower level managers such as Mr Dew are exactly the sort of people who make, for companies, decisions which affect the environment. It is not realistic to suggest that the decision to bury these capacitors would be taken by WCL at Board level. If the lower level managers who make those sort of decisions (and in this case did make the decision) are excluded for the purposes of the s340(2) defence, then the purposes of the RMA will be thwarted.

[28] The earlier paragraph [78] Wild J had this to say:

[78] ... that focus on the purpose of the legislation resonates with equal force in the RMA context. Judge McElrea (at [120] – [127] referred to s 5 RMA, in particular the objects of safeguarding water and soil, and avoiding or remedying adverse effects of activities on the environment. He pointed out that the narrow interpretation of s 340(2) contended for by Mr Casey would work “against the preventative purposes of the Act”, relieving a company from liability for the decisions of lower tier managers. In this

¹⁵ At [83] and [84]

case, it would relieve WCL of liability for Mr Dew's decision to bury the capacitors.

[29] Relying on the principles enunciated in *Wallis*, Mr Webb submitted that the evidence established that Mr Rolls was “*a person involved in the management*” of the defendant company and the company could thus not invoke the defence available to a defendant company in section 340. Mr Lawson sought to differentiate the *Wallis* decision. He pointed out that the manager in *Wallis* was an employee of the company. Mr Roll was not an employee. He was an independent contractor and was therefore too remote from the decision making process of the defendant company.

[30] Because of the distinction raised by Mr Lawson, I invited counsel to carry out more research in an endeavour to find any relevant case law under the Resource Management Act or analogous legislation. Mr Lawson filed a memorandum dated 21 January 2011. Mr Webb filed a memorandum dated 24 January 2011.

[31] Mr Lawson referred to Sections 126, 127, and 128 of the Companies Act. Section 126 defines the term “*board*” and Section 127 defines the term “*director*”. I accept that Mr Rolls was not a “*director*” or member of the “*board*” as those terms are defined. But, as Mr Webb pointed out, Section 128 is pertinent. It says:

128 Management of company

- (1) The business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company.
- (2) The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
- (3) Subsections (1) and (2) are subject to any modifications, exceptions, or limitations contained in this Act or in the company's constitution.

[32] As Mr Webb said, Section 128 clearly proceeds on the basis that management can involve persons other than “*directors*” as it provides that the business and the affairs of the company may be managed **under the direction or supervision** of the board. This allows persons other than directors to be involved in the management. It is not limited to employees.

[33] Mr Webb also referred to two earlier authorities that are in accordance with the authorities previously quoted. In *Tregurtha v NZ Police*¹⁶, Fisher J quoted both *Newth* and *Bracht*, and of relevance said:

I agree, and would add only this. One cannot escape the fact that in the end there is a question of degree. In deciding whether the degree has been reached, one can consider the object of the statute on this point.

[34] Clearly the defendant company is liable, in the absence of the section 340 defence, as it is accepted that Mr Rolls was a contractor. Mr McCarthy said:¹⁷

[516] As a result, I believe that at all times Mr Rolls was acting as an agent or contractor of Tawai Dairy Company Ltd and that his contractual obligations included the operation of the effluent disposal in an efficient and workmanlike manner in accordance with the discharge consent.

[35] Section 340(2)(a)(ii) provides a good defence if “*neither the director (if any) nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed.*” Mr Rolls was not a director. But he would come within the ambit of “*any person*”. The term is expansive.

[36] The word “*any*” has many nuances of meaning as defined in the *Concise Oxford Dictionary*. Relevantly it is defined:

- One, no matter which, of several; and
- Whichever might be chosen.

[37] The word anybody is also relevantly defined as:

- A person, no matter who; and
- A person of any kind.

[38] The ordinary meaning of the words in the section do not limit any person involved in the management of the defendant to employees. The only qualification

¹⁶ HC, Auckland, AP123/93

¹⁷ EIC at [56]

is that "*the person*" must be "*involved in the management of the defendant*". That is a question of fact. Such an interpretation is, in my view, in accord with the purposive interpretation called for by Section 5 of the Interpretation act 1999. Section 5 of the Resource Management Act seeks, among other things, to safeguard water and soil, and avoid adverse effects of activities on the environment.

Evaluation

[39] Tawai Dairy Company purchased the farm with the intention of converting it into a dairy operation. An important aspect of a dairy operation is the management of the farm and herd and in particular the discharge of dairy effluent. The day-to-day management of the farm, including the discharge of dairy effluent, was the responsibility of Mr Rolls. A responsibility that Mr McCarthy acknowledged was vitally important to the company. So much so, that Mr Rolls was part of the regular management meetings. The minutes of these meetings reflect that the management not only included him, but also relied on his input, particularly in relation to effluent disposal.¹⁸

[40] In the end, it is a question of fact to be assessed in the light of each particular circumstance. Mere reporting by the agent to the principal on its own may well be insufficient. But an agent having full responsibility to administer one aspect of the principal's business, may well, on the particular facts, deem that agent to be involved in the management of the principal.

[41] I am satisfied on the evidence that Mr Rolls was "*a person involved in the management*" of the defendant's company to such an extent that the defence under Section 340 is not available to the company. Accordingly the company is convicted of the charge of permitting the discharge of effluent in contravention of condition 11 of the resource consent.

[42] It also follows that the company is guilty of the charge of discharging the effluent per se.

¹⁸ For example, see transcript at 51 lines 1 - 10

The Charge Relating to Record Keeping

[43] The company was also charged with an offence of permitting the discharged dairy effluent in contravention of condition 16 of the resource consent. Condition 16 required records of all effluent application and in particular the location and time of the applications. The records were to be held and made available during farm visits and inspections.

[44] Mr Lawson adopted an argument put forward by Mr Sharp with respect to a similar charge laid against Mr Rolls. Mr Sharp submitted, that no offence has been disclosed by the information and therefore it is a nullity. He submitted that the offence purported to be disclosed in the information is an offence of failing to comply with a resource consent condition, and there is no such offence under the Resource Management Act.

[45] Section 15(1)(b) of the Act provides that no person may discharge any contaminant onto or into land in circumstances which may result in that contaminant entering water, unless the discharge is expressly allowed by (as in this case) a resource consent. Tawai Dairy Company Ltd's resource consent provides for "*the discharge of dairy effluent to land via effluent ponds*". But the consent is "*subject to the conditions specified in the ... resource consent decision.*" Accordingly, any discharge under the resource consent is subject to compliance with condition 16. If condition 16 is not complied with, then the discharge is not a valid discharge under the consent. While, I accept the wording of the charge could be more elegant and clear, I am satisfied that there is sufficient information in the charge to adequately inform the defendant of the ingredients of the charge. I reject the submission that the charge is a nullity.

[46] I am satisfied from the evidence produced, namely the dairy shed records, that the condition was not complied with as the time of application was not specified, as required by condition 16. Without specifying the time it would not have been possible to determine the volume of effluent applied during any one application.

[47] It was Mr Rolls who was directly responsible for writing the records. He did not comply with the resource consent. For the reasons given earlier I find he is a person involved in the management of the defendant company. Therefore the company is liable.

[48] Because the three charges are effectively alternative charges relating to the same incident I propose to sentence the company on the lead charge of discharging effluent contrary to condition 11 and to convict and discharge the company on the remaining two charges.

Mr McCarthy

[49] Mr McCarthy was charged with one offence of permitting the discharge of dairy effluent in contravention of condition 16 of the resource consent. Condition 16 requires records of all effluent application and in particular the location and time of the applications.

[50] I have already dealt with the defence raised by Mr Lawson relating to nullity. The company having been convicted of the offence, Mr McCarthy, as director, is also liable to conviction under Section 340(3) of the Resource Management Act unless he can invoke subsections (a) and (b).

[51] I find on the evidence that the manner in which the records were kept were not done with Mr McCarthy's authority, permission or consent, and that he did not know or could not reasonably be expected to have known that the offence was being committed. Mr McCarthy told me that he provided Mr Rolls with the form that is attached to exhibit A as document 6 of the defence exhibits. This form is headed "*Record of Effluent Application*". This form was part of an Effluent Management Plan discussed and approved at a management meeting on 2 September 2009. This was reflected in the minutes of that meeting which were signed by Mr McCarthy and Mr Rolls.¹⁹ Mr McCarthy understood Mr Rolls was using that form when he told later management meetings that effluent information was being recorded.²⁰

¹⁹ See transcript at 50, lines 14-26

²⁰ See transcript at 51, lines 1-17

[52] Mr Rolls' evidence was at variance to what Mr McCarthy told me. But for the reasons set out earlier I prefer the evidence of Mr McCarthy.

[53] Accordingly the charge against Mr McCarthy is dismissed.

Mr Rolls

[54] Mr Rolls has pleaded guilty to the charge of discharging effluent per se. The informant has, with leave of the Court, withdrawn the charge of discharging effluent in contravention of condition 11 of the resource consent. Mr Rolls has pleaded not guilty to the charge of discharging effluent in contravention of condition 16 (relating to the keeping of records).

[55] I have already referred to Mr Sharp's submission, that the information was a nullity, when considering the same charge against the company. For the reasons given I reject that submission. I propose to convict and discharge Mr Rolls on this charge when he has been sentenced on the charge to which he has pleaded guilty.

Determination

[56] The Company having been found guilty of all three charges is to be sentenced in the Gisborne District Court at 10.00am on Monday 21 February 2011.

[57] Mr Rolls' having pleaded guilty on one charge and having been found guilty of the other is to be sentenced in the Gisborne District Court at 10.00am on Monday 21 February 2011.

[58] Mr McCarthy having been found not guilty is discharged.



R G Whiting
District Court Judge