

**IN THE DISTRICT COURT
AT GISBORNE**

**I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA**

**CRI-2019-016-001770
JUDGE VIA AVL
(GISBORNE)
[2020] NZDC 22312**

GISBORNE DISTRICT COUNCIL
Prosecutor

v

JOHN RICHARD BRACKEN
Defendant

Hearing: 29 October 2020
Appearances: A Hopkinson for the Prosecutor
Defendant appears in Person
Judgment: 29 October 2020

NOTES OF JUDGE B P DWYER ON SENTENCING

[1] Mr Bracken, you appear for sentence on one charge of breach of s 15(1)(b) of the Resource Management Act 1991 by discharging sediment onto land in circumstances where it might lead to water, as it did in fact, do.

[2] You were found guilty of the charge against you on 16 September 2020 after a defended hearing.

[3] The facts of the offending are set out in full in my decision of that date. I will return to them here only to a limited extent, I think they have been well covered in my previous decision.

[4] I start by addressing three preliminary issues.

[5] The first is that you again appear before the Court unrepresented by counsel, notwithstanding clear advice from me on a number of occasions that you should take legal advice. That of course is your choice, but I comment that it is a very unwise one.

[6] Secondly, in a document you described as a Notice of Response and Defence, you appear to apply for a discharge without conviction. My power to grant such a discharge is contained in ss 106 and 107 of the Sentencing Act 2002. I may only do so if I am satisfied that the direct or indirect consequences of a conviction would be out of all proportion to the gravity of the offence. The Court has previously observed that that test sets a very high bar. None of the material you have presented to the Court satisfies the test.

[7] It seems apparent from the notice you have filed that you have a grievance that you were found guilty of this charge. That is a matter you may pursue through appeal processes should you wish to do so. You have a right to appeal against your conviction and against sentence. Again, I advise you to take legal advice in that regard urgently.

[8] However, nothing in the material or submissions you have presented to the Court establishes grounds for a discharge without conviction. This offending was moderately serious. It involved the deposition of earthworks side castings in a situation where that earth material would inevitably move down a hillside and enter a watercourse. The work was done deliberately and in a situation where you were effectively on notice as to the Council's discharge rules as a result of earlier incidents on the farm. You have not identified any direct or indirect consequences of conviction which meet the proportionality test. Even if you had established some consequences, those consequences would be considered in light of the 20 previous convictions you already have.

[9] Your application for a discharge without conviction is declined and you are hereby convicted of the charge against you.

[10] Finally on a preliminary basis, I have considered such financial information as I have before me, primarily presented by the Prosecutor. I am satisfied that you do not have the financial capacity to pay a fine of any substance and that a community-based sentence is appropriate and available in your case. I will return to that matter in due course.

[11] The offending involved the discharge of sediment from earthworks on your farm into a tributary of the Motu River which is situated in close proximity. Fine sediment is the most pervasive and significant contaminant in New Zealand waters. A multitude of sometimes minor individual earthworks discharges accumulate in our waters and move through our river systems until they ultimately end up in our coastal ecosystems.

[12] Your admittedly small contribution to this process involved a land disturbance area somewhere in the order of 700 square metres and approximately 120 cubic metres in volume. I acknowledged that this is a comparatively small amount compared to many cases that come before the Court.

[13] In this case, an aggravating factor is that the sediment from your side castings would have entered the Motu River. In that regard, Mr Bracken, what I am going to do is incorporate in these sentencing notes paragraphs 48 to 50 of the Council's sentencing submissions, which tell me about the significance of the Motu. The fact that the discharge entered this protected river system is a significant aggravating factor of the offending:

48. The Motu River has exceptional natural science and ecological values. It is the habitat of numerous threatened species (Blue Duck, Grey Duck and Hochstetter's Frog) and a wide range of native fish species. The river has highly significant recreational values, high water quality and high ecosystem health. It is also a nationally significant trout fishery, which means that section 7(h) of the RMA is engaged.
49. A section of the Motu River that is downstream from the farm is the subject of the National Water Conservation (Motu River) Order 1984.

50. There is no direct evidence of the impacts of the discharges of sediment from the defendant's offending on the affected stream or the Motu River. However, the adverse impacts of sediment on watercourses in New Zealand are well recognised.

[14] Had I been inclined to impose a monetary penalty for this offending, I would have considered a starting point in the \$80,000 to \$100,000 range, having regard to the deliberateness of the offending, the degree of cynicism which I have detected in your attitude towards it and particularly the importance of the river system, but also reflecting the limited volume and extent of the discharge. However, I am not going to impose a monetary penalty.

[15] The two remaining options for a penalty I have considered are community detention and community work.

[16] I have discounted the first as, other than denunciation, it appears to achieve little in the somewhat remote area you live where electronic monitoring is not available.

[17] Accordingly, I am going to impose a sentence of community work which I note from the probation officer's report is feasible, although co-ordination and planning will be required.

[18] I note that although you have apparently raised some issues as to your farm commitments in the coming months, your primary obligation is to comply with the sentence imposed by the Court, and you must present yourself and undertake the work where and when directed by a probation officer.

[19] I am unaware of any formula for comparing appropriate levels of community work with the amount of a proposed fine. I note that my suggested monetary starting point between \$80,000 and \$100,000 is between just over 25 and 33 per cent of the maximum fine.

[20] Under the circumstances, I determine that the appropriate amount of community work to be undertaken by you is 150 hours. That, I think, has regard to

the need for deterrence and denunciation. It makes some realistic compensation to the community for your failure to pay a fine and it gives you the opportunity to give something back to the community.

[21] So, having regard to all of those matters, I determine and sentence you to 150 hours' community work.

[22] Additionally, you are to pay solicitor's costs as per the Costs in Criminal Cases Regulations 1987 and Court costs of \$130.

[23] Finally, I direct that you are to report to a probation officer at the Gisborne Court as soon as practicable, but in any event no later than 72 hours after this sentencing, for the purposes of giving effect to the sentence.


B P Dwyer
Environment/ District Court Judge