

**IN THE DISTRICT COURT
AT GISBORNE**

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

**CRI-2020-016-000353
CRI-2020-016-000369
CRI-2020-016-000355
[2020] NZDC 19146**

GISBORNE DISTRICT COUNCIL
Prosecutor

v

**KURU CONTRACTING LTD
RICKY THOMAS KURU
TE-RANGI MATANUKU PARATA**
Defendants

Hearing: 14 September 2020
Appearances: A Hopkinson for the Prosecutor
P Harman for the Defendants
Judgment: 14 September 2020

NOTES OF JUDGE B P DWYER ON SENTENCING

[1] Kuru Contracting Limited (Kuru Contracting), Ricky Thomas Kuru and Te-Rangi Parata each appear for sentence on two charges brought by Gisborne District Council under the Resource Management Act 1991. The three Defendants are charged with:

- Firstly, modifying a wetland without consent in breach of s 9(2) of the Resource Management Act. Charging documents ending 471 for Kuru Contracting, 480 for Mr Kuru, and 477 for Mr Parata;

- Secondly, they are charged with damming or diverting water in the Kopuaroa Stream in breach of s 14(2)(a) of the Resource Management Act. Charging document ending 472 for Kuru Contracting, 481 for Mr Kuru and 478 for Mr Parata.

[2] The Defendants have each pleaded guilty to the charges against them. Section 24A of the Sentencing Act is not applicable in this case. No suggestion has been made that the Defendants should be discharged without conviction although their counsel seeks conviction and discharge in respect of the wetland offending. I will return to that matter in due course.

[3] The Defendants are all convicted on both charges against them respectively.

[4] The offending occurred at a rural property near Ruatōria in May 2019. Kuru Contracting holds a resource consent to operate a quarry on the property which is accessed from Waiomatatini Road, across the Kopuaroa Stream on the property itself. Mr Kuru is the managing director of Kuru Contracting whose shares are owned by himself and his wife. Mr Parata is operations manager of Kuru Contracting.

[5] The environment affected by the offending is described in these terms in the summary of facts.¹

3. At the property, to the south of the quarry, is an area containing a wetland. Wetlands in the Gisborne Region have been reduced to 1.75% of their original extent, which makes them a highly threatened ecosystem type. The wetland area at the property is not identified in the Tairāwhiti Resource Management Plan (TRMP) as a regionally significant wetland, nor is it recorded on the Gisborne District Council's wetland database.

4. The Waiapu River flows along the northern boundary of the property. The Kopuaroa Stream flows through the property. The Kopuaroa Stream is normally dry from early spring to the end of summer but the stream flows when the water table is high – particularly during winter.

5. The Kopuaroa Stream is identified in schedule G15A of the Tairāwhiti Resource Management Plan (TRMP) as a 'significant habitat and migratory route for indigenous fish', including longfin eel, torrentfish, īnanga, kōaro, shortfin eel, common bully, redfin bully and smelt. (Longfin eel, torrentfish, īnanga, and kōaro are all classified as 'At Risk-Declining'.)

6. The Waiapu River is also identified in schedule G15A of the TRMP as a 'significant habitat and migratory route for indigenous fish', including

¹ Summary of Facts at [3] – [6].

longfin eel, torrentfish, īnanga, shortfin eel and smelt. It is identified in schedule G15B as an additional key habitat for longfin eel. The Waiapu catchment is identified in Schedule G15E as an important trout habitat.

[6] The summary of facts described the offending in these terms:²

18. In May 2019 the defendants carried out earthworks at the property to divert the Kopuaroa Stream away from the point where the access road to the quarry crossed the stream. Those earthworks involved the excavation of a 380 metre long channel (the diversion channel) and the creation of a bund in the Kopuaroa Stream to direct the flow of the stream to the west through that channel (rather than flowing along its original path to the north toward the point where the access road crossed the stream).

19. However, the defendants' diversion of the stream directed water towards the wetland area where it caused ponding and flooding near the quarry. The defendants later excavated a 200 metre long and 3 metre wide channel to drain the pooled water from the paddock and wetland area to reduce the flooding risk to the quarry (the drainage channel).

[7] The works described required resource consents as discretionary activities under the Council's Resource Management Plan. The Defendants held no such consents so the work which they undertook was illegal. Their guilty pleas acknowledge that.

[8] The environmental effects of the offending were identified in these terms in the summary of facts:³

42. Wildlands prepared an ecological assessment report, the main points of which are as follows:

- (a) The diversion of the Kopuaroa Stream involved the abrupt dewatering of approximately 1.7 kilometres of the stream and the excavation of a new 380 metre long stream channel.
- (b) The excavated channel area within the wetland is approximately 200 metres long and 3 metres wide and at the time of the site visit, water was flowing from the wetland via the channel into the Waiapu River.
- (c) In terms of the wetland:
 - (i) The potential adverse effects of the works on wetland values are likely to be significant in extent due to the reduction in fauna habitat (particularly indigenous wading birds), loss of natural hydrological functions and the loss of indigenous wetland vegetation.

² Summary of Facts, at [18] – [19].

³ Summary of Facts, at [42] – [43].

- (ii) The substantial reduction in wetland area that resulted from the excavation of the channel shows that this habitat would likely revert to pasture if the channel was to remain in its current open state. The wetland is fed by both ground water and surface water run-off, so in its natural state it would have hydrological inputs all year round. With the current open excavated channel, these groundwater inputs are likely to be lost during warmer parts of the year.
 - (iii) Eight indigenous and fifteen exotic plant species were recorded in the wetland and are all common species, typical of the habitats present.
 - (iv) Although the wetland at the quarry is dominated by exotic species, it still provides ecological functions, although the overall values are considered to be low. This is mainly due to the dominance of exotic plants, with the vegetation consisting primarily of clumps of *Juncus* amongst exotic pasture grasses. Extensive cattle pugging and grazing within the wetland area have also degraded the habitat.
 - (v) The excavation of the channel in the downstream area of the wetland has resulted in water flowing from the wetland area and into the Waiapu River. This has resulted in decreased water levels and a reduction in the wetted extent of the wetland. The reduction in wetted extent means a loss of wetland vegetation and a potential shift of plant species composition to terrestrial species. This may in turn reduce foraging habitat for common indigenous bird species.
- (d) In terms of the diversion of the Kopuaroa Stream:
- (i) The potential adverse effects of the works on the Kopuaroa Stream are likely to be significant due to the abrupt elimination of fish habitat downstream of the diversion.
 - (ii) The diversion of the Kopuaroa Stream has increased the sediment inputs into the wetland. The movement of substrate from the stream has lined the diverted stream channel with gravel and cobble material, and deposited fine sediment in the wetland extent. This was visible during the site visit in an area that had been drained, with a large area of sediment deposition. The channel excavation within the wetland would have released a large sediment load of existing wetland sediment and sediment originating from the Kopuaroa Stream into the Waiapu River and the receiving marine environment.
 - (iii) The diversion of the Kopuaroa Stream when the water was flowing in winter would have reduced fish habitat quality and availability, and may have resulted

in fish being stranded. Since the stream is dry in the downstream reaches for prolonged periods, connectivity to upstream habitat is crucial for fish movement when the stream is flowing in winter and for fish migration up and downstream.

- (iv) The stream where the channel was diverted did not have surface water flowing at the time of the site visit; however, due to the presence of At-Risk Declining fish species that have been recorded in the TRMP and the stream's close proximity to the sea, it is likely that the stream and its upper reaches have high ecological values.
- (e) The Waiapu River and receiving marine environment would have also sustained minor negative effects from the addition of sediment from the wetland area.
- (f) While these works have had negative ecological effects on both the wetland and stream ecology, it will be possible to mitigate and remedy these effects. The key remedial steps included:
 - (i) the closure of the excavated channel that is draining water from the wetland,
 - (ii) stock exclusion, and
 - (iii) planting in the wetland.

43. The Council issued abatement notices to the defendants on 27 February 2020 requiring them to fill in the excavated channel that is draining the wetland at the property and to fill in the channel that is diverting the Kopuaroa Stream. The date for compliance with that notice is 1 May 2020.

(Footnote omitted)

[9] The Wildlands Report (which is appended to the Summary of Facts) described what happened as a result of the offending in these terms (Latin names of fish omitted):⁴

The Kopuaroa Stream is scheduled (G15A) in the TRMP for the migration of indigenous fish including the following species: longfin eel, torrentfish, īnanga, kōaro, shortfin eel, common bully, redfin bully and common smelt. Longfin eel, torrentfish, īnanga and kōaro are all classified as 'At-Risk-Declining'.

The diversion of the Kopuaroa Stream has resulted in the abrupt dewatering of c.1.7 kilometres of stream a new stream channel flowing through the paddock (c.380 metres in length). The Kopuaroa Stream was directed towards a wetland area in the paddock. As the water from the diverted stream flowed

⁴ Wildlands Report (for Gisborne District Council) at [4.2].

into the wetland area, the water spilled across the paddock where it threatened to flow through the fence and into the quarry. ...

During the site visit the stream diversion was observed, as was the new channel that had been created following the diversion. ... This channel has a cobble substrate and was still open to the main Kopuaroa Stream. There was no surface water flowing at the time of inspection.

[10] Finally the Wildlands Report said this:⁵

The diversion of *c.* 1.7 kilometres of the Kopuaroa Stream when the water was flowing in winter would have reduced fish habitat quality and availability, and may have resulted in fish, (including those classified as ‘At-Risk-Declining’) ... being stranded. Since the stream is dry in the downstream reaches for prolonged periods, connectivity to upstream habitat is crucial for fish movement when the stream is flowing in winter and for fish migration up and downstream.

[11] That is why we are here today as far as I am concerned – the environmental consequences of the offending.

[12] In fixing a starting point for penalty I will adopt the same approach as counsel; namely, treating Kuru Contracting and Mr Kuru as effectively the same financial entity, calculating a global penalty for both and identifying a global starting point for the two offences. In Mr Parata’s case I will similarly identify a global starting point for both offences.

[13] I note the maximum penalty for each charge is \$600,000 for Kuru Contracting and \$300,000 for Messrs Kuru and Parata. I do not propose any loading because Kuru Contracting is a corporate entity.

[14] The environmental effects of the offending as they have been described are a matter of significance in my penalty considerations. The fact that the Kopuaroa Stream does not flow all year round is not unusual and does not diminish its importance for the reasons which are set out in the Wildlands Report. It is identified in the Resource Management Plan as a significant habitat and migratory route for indigenous fish which use it when it is running. The Summary of Facts and the Wildlands Report make very clear the important role which the stream plays in providing connectivity for fish movement.

⁵ Wildlands Report at [10.4].

[15] I accept that the effects of the offending were temporary and can be remedied by appropriate remedial works. That means that the offending is not as serious as it might have been, but it is clear that there was a significant (albeit temporary) adverse effect on the migratory function of the stream.

[16] Mr Harman for the Defendants, queries the significance of the wetland and its extent. He seeks a conviction and discharge for the wetland offence. His submissions in that regard must be viewed in light of the fact that his clients have pleaded guilty to the offence of modifying a wetland, so that there is acceptance that at least part of the area in question constituted a wetland. I have determined that the proper context to view the wetland issue is that it is a separate identifiable part of the overall environmental offending on this occasion.

[17] The next issue I consider is that of culpability. I concur with the Prosecutor's submission that the Defendants' culpability in this case can be characterised as being at the deliberately reckless end of the spectrum. There are a couple of reasons for that:

- The first is that during the processing of Kuru Contracting's resource consent, Council officers raised a concern about a culvert in the stream and it was removed from the application;
- The second is that on 15 October 2018, a Council compliance officer emailed Mr Parata stating that diversion of a water course was not permitted by the resource consent and asking if there were any plans to install a culvert in the stream. Accordingly the Defendants were on notice that they could not go and do works in the stream without consent.

[18] Mr Harman says that his clients did not intentionally set out to breach the Regional Plan. But that claim has to be considered in light of withdrawal of the culvert from the resource consent application and the advice contained in the Council email of 15 October.

[19] Unfortunately, it is clear that the Defendants initially adopted an aggressive attitude towards Council officers during an evidential interview, something for which they have formally apologised through their counsel and personally. However, what

happened at the interview supports the proposition that the Defendants did not have proper regard to their legal obligations. I accept that there is a reasonable degree of culpability on their part. Additionally the offending was undertaken for business reasons to obtain access to the quarry, as I understand it.

[20] Kuru Contracting has been in the business of earthworks, road construction and forestry harvesting for about 23 years now. Mr Kuru has been a director of the company throughout that time. Mr Parata has been operations manager for three years. The significance of that is that people operating in the commercial world and doing works of this sort can reasonably be expected to understand the rules under which they have to operate. That is a factor in my considerations.

[21] Finally in this regard, I have considered the various cases that counsel have referred to me pursuant to s 8(e) of the Sentencing Act 2002:

- In *Gill*, a starting point of \$50,000 was adopted;⁶
- *Bunn Earthmoving* where a starting point of \$70,000 was adopted;⁷
- *Wilson*, where a starting point of \$80,000 was adopted;⁸
- *Clear Ridge* where a starting point of \$70,000 was adopted.⁹

That is an indication of the level of penalties which the court has imposed for similar offending which has come before it, between \$50,000-80,000. All of the cases I have referred to have similarities and dissimilarities to this offending.

[22] Having regard to all of the matters I have referred to, but particularly the assessment contained in the Wildlands Report as to the migratory function performed by the Kopuaroa Stream and the effect which the diversion would have had on fish habitats, I have determined that Mr Hopkinson's starting points of \$70,000 for Kuru

⁶ *Marlborough District Council v Gill Construction Company Ltd & Gill* [2017] NZDC 20237.

⁷ *Taranaki Regional Council v Bunn Earthmoving Ltd* DC New Plymouth CRI-2013-021-473, 5 November 2013.

⁸ *Bay of Plenty Regional Council v Wilson* DC Hamilton CRN-13047500178, 14 February 2015.

⁹ *Northland Regional Council v Clear Ridge Station Limited & Webster* DC Whangārei CRI-2013-088-2354, 21 May 2014.

Contracting and Mr Kuru jointly and \$30,000 for Mr Parata, are appropriate. I think that the \$70,000 figure is consistent with levels in other sentencings and the \$30,000 for Mr Parata recognises a greater degree of responsibility on the part of the consent holder and entity actually undertaking the activity, so he should be subject to lesser level of penalty.

[23] I make the observation that if longer-term effects of the offending had been identified the starting point would have been substantially higher. I do not propose any uplift from starting point for penalty for aggravating factors.

[24] Having heard from counsel and Mr Parata personally this morning, I am going to reduce the starting point by five per cent in each case because I am satisfied there is genuine remorse on the part of the Defendants. I note the stated intention of Kuru Contracting to upgrade its environmental performance and the steps which Mr Kuru has taken in that regard.

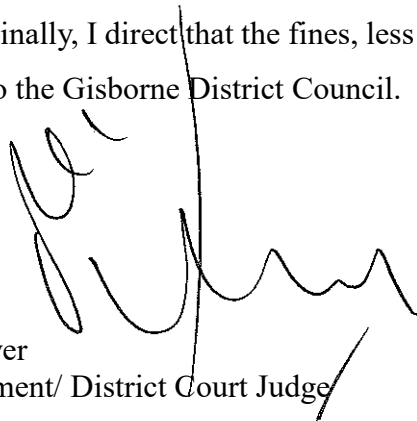
[25] I do not give any credit to Kuru Contracting and Mr Kuru for past good behaviour because they have previously been subject to abatement notices. I am going to reduce the starting point in Mr Parata's case by a further five per cent because of his past good conduct. Each of the Defendants receives a 25 per cent reduction from starting point because of their prompt guilty pleas. So there will be a reduction in starting point in total of 30 per cent for Mr Kuru and Kuru Contracting and 35 per cent for Mr Parata.

[26] I have indicated that I am going to treat the diversion offending as the lead charge and impose the full penalty on that charge. I am not going to make an enforcement order as sought by the Council as it requires work to be undertaken on land owned by a third party who is not a defendant in these proceedings.

[27] Accordingly, the penalty outcomes are:

- In the case of Kuru Contracting and Mr Kuru, the total penalty will be \$49,000 which I will divide equally between the two of them;

- On the charge in charging document ending 472 Kuru Contracting Limited is fined the sum of \$24,500. On the charge in charging document ending 471 (the wetland charge) Kuru Contracting is convicted and discharged;
- On the charge in charging document ending 481, Ricky Thomas Kuru is fined the sum of \$24,500. On the charge in charging document ending 480, he is convicted and discharged;
- On the charge in charging document ending 478, Te-Rangi Parata is fined the sum of \$19,500. On the charge in charging document ending 477, he is convicted and discharged;
- In each case the Defendants will pay solicitor costs of \$113 and Court costs of \$130;
- Finally, I direct that the fines, less 10 per cent Crown deduction, are to be paid to the Gisborne District Council.

A handwritten signature in black ink, appearing to read 'B P Dwyer', is written over the text of the final bullet point. The signature is fluid and cursive, with a long vertical stroke extending downwards from the end of the signature.

B P Dwyer
Environment/ District Court Judge