[2022] NZDC 10666
District Court, Gisborne

Gisborne District Council v Lane

CRI-2021-016-1822
Hearing: 3 June 2022
Decision: 3 June 2022
Judge Dwyer

Legislation Considered
Resource Management Act 1991 (NZ) s 9(1), s 10, s 10A, s 15(1)(b), s 20A, s 35(1)
Sentencing Act 2002 (NZ) s 24A

Party Names
Gisborne District Council *(Prosecutor)*, Michael Joseph Timothy Lane *(Defendant)*

Legal Representatives
A Hopkinson for the Prosecutor; *D Rishworth* for the Defendant

Opinion

NOTES OF JUDGE B P DWYER ON SENTENCING

Judge B P Dwyer

[1] Mr Lane you appear for sentence on four charges under the Resource Management Act 1991 brought by Gisborne District Council (the Council). The charges are contained in charging documents:

"• **CRN:21016500808**—Between 1 May 2021 and 1 July 2021 at or near Glenroy Road, Whangara contravened or permitted a contravention of s 9(1) of the Resource Management Act in that he used land in a manner that contravened regulation 35(1) of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 when that use was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act.
• **CRN:21016500818**—Between 4 June 2021 and 30 September 2021 at or near Glenroy Road, Whangara, contravened or permitted a contravention of abatement notice 2021-A098 dated 4 June 2021.
• **CRN:21016500820**—Between 1 May 2021 and 30 September 2021 at or near Glenroy Road, Whangara, contravened or permitted a contravention of s 15(1)(b) of the Resource Management Act by discharging a contaminant, namely, sediment, onto land in circumstances which may result in that contaminant entering water, when that discharge was not 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, or a resource consent.
• **CRN:21016500821**—Between 23 June 2021 and 30 September 2021 at or near Glenroy Road, Whangara contravened or permitted a contravention of abatement notice 2021-A106 dated 23 June 2021."

[2] The offending relates to unconsented earthworks at a 990 hectare farm on Glenroy Road at Whangara (the farm). They consisted of the construction of a 2.7 kilometre long forestry track to provide access to a 393 hectare forestry block which was being developed on the farm.

[3] You were one of the owners of the farm at the time of the offending as trustee of a family trust. You were also one of the persons who was responsible for carrying out the earthworks and the afforestation project. You carried out the earthworks in conjunction with your father who is unfortunately now deceased.

[4] You have pleaded guilty to all four charges. I do not understand s 24A of the Sentencing Act 2002 (which requires a restorative justice process) to be applicable. No suggestion has been made that you should be discharged without conviction. So, you are hereby convicted on all four charges.

[5] As I have observed the farm where the offending took place is a 990 hectare property situated approximately 17 kilometres north-east of Gisborne. At the time of the offending (which commenced in May 2021) your father was dying of cancer and has now passed on. He was determined to put an estate succession plan in place prior to his death. Part of that plan involved the planting of the 393 hectares in pine trees. The parts of the farm which were to be planted are within areas classified in the National Environmental Standards for Plantation Forestry as “red” zone, which means very high erosion susceptibility and “yellow” zone which means moderate erosion susceptibility. Additionally, they are in Land Overlay 3 of the Regional Plan being the most vulnerable land in the region to erosion.

[6] On 22 March 2021 you and your father applied for a resource consent to carry out planting of the 393 hectares. Consent was granted on 27 April 2021. The resource consent did not include approval for earthworks for tracks to the land which was to be planted. The need for such an approval had been brought to your attention by Council officers. On 7 April 2021 a Council officer had emailed an application form to you and/or your father and Council officers explained that consent for access was required because the proposed access route was through the red erosion zone.

[7] A planner was consulted about the need for earthworks consent on 3 May 2021 and confirmed that consent was required but no application had been made prior to the earthworks commencing.

[8] On 1 June 2021 the Council received two complaints about potentially illegal earthworks being carried out on a former forestry track on your farm. A Council officer went out and inspected the property on 3 June and discovered that a new track, approximately four hundred metres in length and seven to eight metres wide, had been constructed. You and your father explained to the officer that the access track was being created to enable planting crews to access the new forestry block. You explained that you were aware that a resource consent was required for the earthworks but that due to the commitment which had been made to the forestry contractor you would lose half a million dollars if planting operations were halted while a resource consent was obtained.

[9] You and your father told the officer that it was more cost effective to deal with the Council about the unconsented earthworks than to stop the planting operation. You acknowledged that winter was not a good time to construct new tracks due to increased erosion risks.

[10] The Council officer advised that work had to stop until you got a resource consent. She was told that a resource consent would be applied for but that work on the track would continue. The officer confirmed her verbal advice by email that same day. On 4 June an enforcement officer issued abatement notices to you and your father requiring the cessation of earthworks.

[11] What subsequently ensued was a process of ongoing Council visits to the farm, sometimes in response to complaints about the work that was being undertaken and sometimes for monitoring purposes.

[12] The summary of facts records a total of seven visits to the property by Council officers between 3 June and 20 September 2021 by which time a total of approximately 2,700 metres of tracking in length had been undertaken—1,950-odd metres of this was in the red zone and approximately 740 metres in the yellow zone.

[13] The various inspections identified a range of deficiencies and problems in the works undertaken. These included a saturated, cracked, scoured, unstable and muddy track, unstable batter faces, an absence of stormwater or erosion control structures, side-casting of earth downhill of the track in multiple locations, water from various sources running down the track and hill faces and sediment being conveyed from the earthworks into ephemeral streams and permanent water courses.

[14] On 23 June 2021 the Council had issued a further abatement notice requiring cessation of the discharge of sediment onto land which might result in that contaminant entering water. Water sampling on 21 June and 1 July 2021 identified what can only be described as massively high levels of suspended solids in streams at three locations. Photographs included in the summary of facts confirmed the officer's observations.

[15] What the summary of facts reveals is that earthworks of a very poor quality requiring extensive remedial works which are now being remedied through an abatement notice process, were undertaken by you and your late father over, as I have said, a linear distance in the order of 2,700 metres.

[16] The primary environmental effect of this work was the discharge of sediment from a number of sources which entered both permanently flowing and ephemeral streams on the farm. These streams flow into the Wairoa Stream which flows to the Waiomoko Estuary. The Wairoa Stream is identified in the Regional Plan as a protected water course. The Waiomoko River is identified in the Regional Plan as a key habitat for longfin eel. The Estuary is recognised in the Plan as an area of coastal significance. In short these are all important water bodies.

[17] An assessment of the effects of the offending on this environment was contained in tab 5 of the summary of facts and the effects are summarised in these terms in para [91](a) to (k): [1]

“(a) It appeared that sediment had discharged from the access road works to ephemeral streams in some locations. In a number of locations there was potential for that to continue to occur. This included in the area where the hay bales and silt fence were located, as well as further along the track. Most of this material appears to be fine sediment, which will transport into the Wairoa Stream and potentially the Waiomoko River as well as the coastal environment.

(b) In many other areas, overland flow paths connected the spoil material to the ephemeral streams. This was evident by the plumes of sediment in the grass between the spoil material and the ephemeral stream.

(c) A large area of ground has been disturbed by these works, generating a significant volume of sediment.

(d) Almost the entire track is unstable and uncompacted, creating a huge stability risk and the potential for erosion.

(e) This material would continue to discharge and the site would become progressively more unstable unless remediated.

(f) The manuka trees and grass below the road have been smothered by the side cast material.

(g) There had been no stabilisation or benching of cuts, which were already collapsing in places.

(h) Sediment is considered one of the most pervasive and negative stressors of freshwater ecosystems. It is also one of the strongest stressors of freshwater ecosystems in the Gisborne Region given Gisborne's highly erodible soils, steep catchments and contributing land uses.

(i) Council sampling of the water affected by the discharges indicated a degraded state.

(j) It is clear that the activities have had negative effects on at least one receiving environment. This could have been mitigated, except there was no sediment control plan and insufficient sediment controls.

(k) There were also potential effects to the intermittent stream system to the north and the receiving first and second order stream systems."

[18] It will be noted that the identified effects do not include specific examples of environmental outcomes such as habitat loss, fish deaths or the like. That is not uncommon with sediment discharge offending where it is often difficult, if not impossible, to quantify the effects of a single temporary discharge such as the one in this instance.

[19] The context in which such discharges must be viewed is found in the NIWA website page *Suspended Sediment Dynamics in New Zealand Rivers* (4 July 2019) which records that fine sediment is the most pervasive and significant contaminant in New Zealand's rivers, estuaries and coastal waters. I refer to paragraph [17] of the Thompson decision in this district where the Court noted: [2]

> "The effects of sediment deposition are well recognised. Sediment affects the clarity of the waters in which it is discharged, smothers the bed of water bodies and interferes with the ability of fish to feed, breathe and breed. Sediment accumulates with other depositions of sediment from other works and natural causes, is mobilised and travels downstream into our coastal waters. It is frequently not possible to identify the contribution to this process made by any one discharge event. The matter of concern to the Court is the cumulative effects of the myriad of small, individually insignificant discharges on our waterways. Individual sediment discharges which may be of little account in themselves are part of the wider picture which the Court must take into account."

[20] Further to that, I must say that I am not sure that the sediment discharge in this case was necessarily individually insignificant. It involved discharges of sediment from a track and other earthworks extending over a distance of 2,700 metres which (at least in part) was seven to eight metres wide. As I say, the effects are unknown but they are part of a much wider environmental picture.

[21] In fixing penalty I have determined to adopt two separate starting points. I will adopt a global starting point for the earthworks and discharge of sediment offences which were two separate instances of offending arising out of the physical works undertaken on the access tracks. I am then going to identify a global starting point for penalty on the two abatement notice charges which I consider to be significant offences in their own right (for reasons previously identified in a number of cases [3]) rather than just an aggravating factor in assessing penalty on the discharge offending. I note that that approach was implicitly accepted by the High Court in the *Thurston case* which confirmed the abatement notice penalties in that case. [4]

[22] In fixing a starting-point for this offending I have had regard to the various cases referred to by counsel. I am conscious of the desirability of consistency of appropriate sentencing levels in respect of similar offenders committing similar offences in similar circumstances. I note that it is not an absolute obligation but it is desirable for obvious reasons. [5]

[23] Application of that principle can be difficult in practice because there are, commonly, differences in circumstances and facts between otherwise broadly similar cases.

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[24] A factor of some considerable importance in terms of comparisons is what I consider to be a particular need for deterrence of offending on Land Overlay 3 land in the Gisborne Region. That land is highly vulnerable to erosion and the effects of earthworks.

[25] I consider that in terms of starting-point broad comparisons may be made with the Bracken and Thompson decisions in this region. [6] In Bracken, a starting-point of $80,000-$100,000 was identified in one charge under s 15(1)(b) of the Act. Bracken involved work to form an access track of considerably shorter length than this with side cast material entering a nearby water body as happened in this case. I was not told what land overlay area Bracken was in so I did not allow for any loading due to the fact that it was in Land Overlay 3. (Mr Hopkinson has advised today that it was in Land Overlay 2.)

[26] In Thompson, a joint global starting-point of $100,000 was adopted for three alter-ego defendants (in other words, defendants who were financially related) for unconsented earthworks and sediment discharges similar to this offending. The scale of that offending appears to have been substantial but not as substantial as this nor of such a seriously deficient standard as this. A starting-point of $100,000 in this case would have a direct comparability with Thompson. But I note that was not on Land Overlay 3.

[27] Regrettably there is a further distinguishing aggravating feature which must be taken into account regarding this offending, namely its deliberate nature. Council officers advised you and your late father as to the need for resource consents for access track works on a number of occasions, both verbally and in writing. The first advice to that effect was given on 7 April before the issue of the forestry consent on 27 April. Further verbal and written advice was given on 3 June confirmed by an abatement notice. There was no dispute on the part of you or your late father that a resource consent was required but you continued with the earthworks, nevertheless.

[28] I have to regrettably categorise what happened as an act of deliberate defiance of recognised legal requirements. That puts culpability for the offending at the very highest level. When that high level of culpability is combined with the fact that the offending took place on Overlay 3 land, I consider that would justify an uplift from the $100,000 starting-point in the range of 30 to 50 per cent. I am not going to try and refine that figure any further due to my following comments but that would put the starting-point in the range of $130,000 to $150,000. That said, as I have indicated to counsel, it must be recognised there are some mitigating factors.

[29] First, was the collapse of an arrangement with your neighbour who refused access which your father assumed would be available at what has been described at the *last minute*. You had had an informal access arrangement from time to time for normal farm working purposes, but the neighbour would not agree to allowing you access for planting. It was careless to make an assumption that that would be able to be continued but I accept that your father's health situation may well have led to him failing to tidy up any details in that regard and you were caught out at the last minute.

[30] Second, I also acknowledge that continuing the work was driven by your father's determination to put in place legacy arrangements in light of his terminal illness. Mr Rishworth describes this as “his obstinate and determined decision” to proceed with the succession plan prior to his death. You were left in a very difficult position in wanting to see your father's wishes through in a situation where he was in a very vulnerable state of health. You were put in a situation where it might be said that the train was already coming down the track by the time you became involved and caught up in this. I am going to try and recognise that. At a human level your participation in the works that were undertaken is entirely understandable and makes this sentencing a very difficult exercise indeed.

[31] Third, was the extremely difficult financial situation with which you and your father were faced where you would have been liable to the forestry contractor potentially for some hundreds of thousands of dollars had the works not

proceeded. I have commented to Mr Hopkinson for the Prosecutor that this was not a case of endeavouring to profit from the works which you undertook, but rather to avoid a substantial loss. I think counsel recognises that.

[32] When these factors are added to the mix, it leads me to the view that I should not increase the starting-point to the extent that I initially considered. However, those factors do not explain the very poor standard of work done, particularly the absence of appropriate stormwater and sediment controls and the side casting of material from the track onto steep slopes below. You were involved in that physical work. If a resource consent had been sought and obtained, as you knew was required, those shortcomings would have been avoided through the imposition of appropriate conditions on any earthworks consent.

[33] In a discussion with one of the Council officers, you and your father said that it was more cost effective to deal with the Council about the unconsented track than to stop the afforestation work. Regrettably the time has now come to pay the cost which you acknowledged would follow.

[34] Having regard to all of those factors, taking into account that this work took place on Land Overlay 3 where there is particular need for deterrence and that it was deliberately done and continued over a period of some months — but allowing for the personal factors which I have tried to identify — I have determined that the appropriate global starting-point for penalty considerations on the charging documents ending 0808 and 0820 is the sum of $120,000. That takes into account all of the above factors with particular regard to the degree of culpability for the offending in light of its deliberate nature and also the need for deterrence of illegal earthworks on Land Overlay 3 land in the Gisborne Region.

[35] I determine that the appropriate global starting-point for penalty considerations on the two abatement notice charges is the sum of $40,000. That reflects the longstanding breaches of abatement notices, with the breach continuing for five months in one instance and up to three months in the other. Again, deliberately. It is similar (but not identical) to the figure adopted in the *Huka View case* ($35,000), where there were two breaches of abatement notices. [7] Again the need to deter offending earthworks on Land Overlay 3 land at Gisborne is important in fixing the figure which I have.

[36] It is common ground that you should receive a 25 per cent discount from starting point on each charge.

[37] Additionally, there will be a further reduction of five per cent to recognise your past good character.

[38] No discount will be given for work remedying the effects of the earthworks which are being undertaken under abatement notice.

[39] On that basis I determine as follows:

“(a) On the charge contained in charging document ending 0808 you are fined the sum of $42,000.
(b) On the charge contained in charging document ending 0818 you are fined $14,000.
(c) On the charge contained in charging document ending 0820 you are fined $42,000.
(d) On the charge contained in charging document ending 0821 you are fined $14,000.”

[40] That gives total fines of $112,000. Looked at in the round I consider that it is an appropriate amount for deliberate offending persisting over a period of up to five months and involving earthworks on the most erosion vulnerable land in the Gisborne District. I have endeavoured to make such allowance as is appropriate for the unfortunate personal circumstances which you and your father were in. Additionally, you will pay solicitor costs of $113 and court costs of $130 on each charge.

[41] Finally, I direct that the fines, less 10 per cent Crown deduction, are to be paid to Gisborne District Council.

All Citations

[2022] NZDC 10666, 2022 WL 2236074

Footnotes

1 Summary of Facts at [91](a)—(k). Typographical error of two paragraph a's corrected in this version.

2 Gisborne District Council v A F Thompson Contracting Ltd [2021] NZDC 5533 at [17].

3 Waikato Regional Council v Torr [2022] NZDC 5011; Bay of Plenty Regional Council v Faulkner [2022] NZDC 2754; Auckland Council v Efficient Bobcats Ltd [2021] NZDC 13996; Southland Regional Council v Dodds [2021] NZDC 16836; Otago Regional Council v WG Limited Partnership [2021] NZDC 9408; Manawatu-Wanganui Regional Council v NZL Forestry Group Ltd [2020] NZDC 22557; Southland Regional Council v Carpenter [2016] NZDC 10013.

4 Thurston v Manawatu-Wanganui Regional Council HC Palmerston North, CRI-2009-454-24, 27 August 2010.

5 Orchard v R [2019] NZCA 529, [2020] 2 NZLR 37.

6 Gisborne District Council v Bracken [2020] NZDC 22312; and *Thompson*, above n 2.

7 Huka View Dairies v Manawatu-Whanganui Regional Council [2021] NZHC 1462.

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