IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2018-016-002404
[2019] NZDC 24075

GISBORNE CITY COUNCIL
Prosecutor

v

JUKEN NEW ZEALAND LIMITED
Defendant

Hearing:	22 November 2019
Appearances:	A Hopkinson for the Prosecutor S Corlett for the Defendant
Judgment:	22 November 2019

SENTENCING NOTES OF JUDGE B P DWYER

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[1] Juken New Zealand Limited (Juken/the Defendant) appears for sentence on one charge brought against it by Gisborne District Council (the Council) for breach of s 15(1)(b) Resource Management Act 1991 by discharging a contaminant (slash logging debris, waste logging material and sediment) onto land between 3 June 2018 and 12 June 2018 in circumstances where it may enter water. In this case, the contaminant did enter water, namely various tributaries of the Mangapoike River.

[2] Juken has pleaded guilty to the charge. I understand that enquiry was made as to whether reference of these proceedings to a restorative justice process was appropriate in the circumstances, but no such reference was made. That was because

the victim of part of the discharge was satisfied with remedial actions undertaken by Juken relating to his adjoining property. No suggestion has been made that Juken should be discharged without conviction. It is hereby convicted accordingly.

[3] The offending took place on a 1096 hectare plantation forest known as the Waituna Forest situated about 30 kilometres south-west of Gisborne. Juken carries out the forestry operation under Crown licence and holds resource consents granted in 2013 and 2014 allowing the formation of forestry roads and skid sites as well as the harvesting and extraction of logs. The consents contain a range of conditions which are described in paragraph 13 of the agreed summary:

> 13. These consents were both subject to conditions, including the following:
>
> (a) The construction of roads and the harvesting of vegetation shall be in accordance with the maps and application lodged with the Council unless altered by specific conditions (Condition 1 of both consents);
>
> (b) On slopes greater than 25 degrees, fill used in construction of road and landing formations or sidecast to waste shall be held in place by benching, compaction, armouring or a combination of these, such that it does not directly or indirectly enter a watercourse (Condition 7 of the 2014 consent);
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> (c) Roading and landing fills on slopes greater than 24 degrees are to be benched and fill compacted or armoured so that fill does not progressively slump down the slope (Condition 7 of the 2013 consent);
>
> (d) Cut-offs and culverts shall be spaced to avoid watertable erosion and shall not discharge directly on to fill or sidecast material (Condition 3 of the 2014 consent);
>
> (e) Sidecast material shall not be deposited into any watercourse (Condition 4 of both consents);
>
> (f) Runoff onto landings is to be intercepted by cut-off drains and is to discharge clear of all fill (Condition 6 of both consents);
>
> (g) Cut-offs are to be installed at a maximum spacing of one every 50 metres along arterial tracks to disperse water and prevent ponding and scouring (Condition 11 of both consents);
>
> (h) No unstable accumulation of slash, log ends, tree heads or waste logging material - including mixed in soil - are to be left on or beneath landing edges at the conclusion of logging (Condition 20 of 2013 Consent and Condition 21 of 2014 Consent).

I observe that (unsurprisingly) none of the conditions allows discharge of slash, logging debris, waste logging material or sediment into water.

[4] The Gisborne District (including the Waituna Forest) was subject to two rainfall events on 3 and 4 June and 11 and 12 June 2018. These events led, among other things, to major landslides in the Waituna Forest together with a number of discharges from the forest of harvesting slash and silt into a neighbouring property and into various water bodies contained within the forest itself.

[5] Juken self-reported these incidents to the Council on 25 June 2018. Council officers went and inspected the forest on 30 and 31 July 2018. The officers observed as least 11 major sediment and debris slides from skid sites in the forest which flowed or proceeded into water bodies contained in the lower parts of the forest. The summary of facts sets out the officers' observations in these terms:

> 24. On 30 and 31 July 2018 two Council officers inspected Waituna Forest. They observed the following:
>
> (a) Runoff from roads was being directed though cut-offs and culverts (where culverts were found) onto fill and side-cast material (breach of condition 3 of both consents);
>
> (b) Water on landings was being directed onto fill and logging debris including waratah/logging waste mixed with soil on the edge of landings (breach of condition 6 of both consents);
>
> (c) In a number of locations there was little or no benching, compaction or armouring of fill on landings and roads constructed on slopes greater than 25 degrees (breach of condition 7 of both consents);
>
> (d) A number of cut-offs were on the outside edge of the access roads and runoff was directed into fill or side-caste material causing rilling and scouring (breach of condition 11 of both consents);
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> (e) There were no cut-offs or any form of water control on some of the tracks in the forest and scouring was noticeable at the discharge point of some cut-offs (breach of condition 11 of both consents);
>
> (f) Landings where harvesting operations had been completed had unstable accumulations of logging debris, slash, and/or waste logging material mixed with soil that had been left on the edges of landings, with many landings having perched slash/slovens overhanging the landings and below the landings (breach of conditions 20 and 21 of the 2013 and 2014 consents respectively).

[6] The Council issued abatement notices requiring compliance with the terms of Juken's resource consents. Juken has largely complied with these notices and has undertaken extensive remedial work in Waituna Forest and on the neighbour's property.

[7] The environment affected by these incidents (excluding the neighbour's property where I was given no details of effects and whose owner has accepted Juken's remediation works) comprises watercourses within the forest catchment. These watercourses are tributaries of the Mangapoike River.

[8] The adverse effects on this environment occasioned by the offending were summarised in these terms in a Council ecological report contained in the summary of facts:

> Ecological effects
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> The ecological effects resulting from harvest practice in Waituna forest have been extensive throughout the forest visited. There have been multiple areas where there have been landing and slope failures that have resulted in large amounts of sediment and woody debris to migrate into freshwater systems. All the skid sites that were visited on inspection had some form of landing failure or sediment migration down to a stream, as well as woody debris migration down slopes and into waterways. Wood material has been used to build landings and as this material starts to rot, water erodes the soil and there is risk of further slope failures. Any side cast material that is on the slope can be undermined by water and will move down the slope as the water loosens the soil.
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> The Waituna forest has been harvested 3-5 years ago, and the trees have been cut down right to the edge of the tributaries of the Mangapoike River and the ephemeral streams that drain the steep slopes. No riparian buffer has resulted in the direct input of sediment and woody material into the freshwater systems. The resulting effects of this are that there is no stream shading, water temperatures increase and direct inputs of sediment and woody debris into the stream as there is no vegetation buffer. The effects from the increased amounts of sediment on the stream bed include; the smothering of interstitial space and instream habitat, directly smothering invertebrates, and the sediment binds to the periphyton on rocks that directly effects the nutritional quality and the invertebrates that are grazers.
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> There were high (>50%) deposited sediment loads in all of the streams that were observed. The fine weather on the day of inspection and the days leading up to the inspection meant that the streams were at ambient flow and were not discoloured or turbid. In rain events however, it was observed that the amount of bare sediment leading down towards streams, that there would be an increase in turbidity levels following rainfall.
>
> Increased deposited and suspended sediment levels can have dramatic effects on stream ecosystems, and this was observed within Waituna forest. The ephemeral streams that were inspected had no macroinvertebrate species present, and the stream bed was completely covered in deposited sediment, removing the habitat available for invertebrates and fish. In the larger streams at the bottom of the gullies, there was in some areas where there was low flow >50% deposited sediment cover resulting in loss and degradation of instream habitat. The larger flow capacity of these streams has allowed some flushing of sediment in faster flowing areas of the stream and the presence of macroinvertebrate species indicates this.
>
> The damage caused by woody debris and sediment movement from the flood has caused the scouring of the stream bed, with some areas of the stream now having a bedrock base. The stream has a cobbled bottom, but in areas of the stream where there

has been debris and large flows, the substrate has been scoured leaving bedrock. The effects of this are that there is a decreased available habitat for macroinvertebrates and fish, and a damage to stream banks causing increased erosion.

Woody logging debris has damaged stream banks and has been deposited in areas of the stream bed which has resulted in large areas of deposited sediment to build up and will continue to impact the Mangapoike River tributary and the ephemeral streams within the forest. There is a significant area on the Mangapoike river tributary where a debris dam has blocked the stream and caused a large plume of sediment to accumulate upstream. This will have a significant negative effects on instream habitat and species.

Potential ongoing ecological effects

The landslides and slope failures within the Waituna forest are extensive, and have had severe negative impacts on stream ecology. Large areas of sediment and wood migration are still occurring down the steep slopes, and this will eventually lead into the streams and waterways below, resulting in the continuation of damage to the freshwater ecosystems. The harvest practice in the Waituna forest has resulted in severe amounts of sediment migration that continue to pose a high risk to freshwater systems. Further migration of wood and sediment into tributaries and then the main Mangapoike River is at risk, and this will potentially continue to occur following the use of wood to build roads and landings, and the incorrect practice in construction of roads and landings.

The migration of wood down the steep slopes poses a further risk to more debris entering the stream system. The debris catcher located at site 9, was full following the storm event and there is a significant debris dam below skid 35. Further risk of wood migration means that there is potential for this to occur again, and repeating the negative environmental effects that have already occurred.

Conclusions

A site visit of Waituna forest was undertaken in October 2018 to evaluate the effects of landslides that have occurred as a result of forest harvesting. The site comprises of harvested areas of radiata pine, mature areas of radiata pine, road lines landings and side cast material.

Multiple landing failures through the forest have resulted in the migration of sediment and woody debris into streams. Invertebrate species observed on site indicate the Mangapoike River tributaries and the ephemeral streams within the forest have been negatively impacted by the activities within the forest resulting from harvest practice. The ephemeral streams show severe degradation and the Mangapoike river tributaries show some degradation.

A large debris dam below skid 35 has resulted in severe upstream sedimentation and a blockage of woody debris within the stream. All debris has originated from the harvested forest and includes cut radiata logs and stumps. Woody debris and flood flows have damaged stream banks causing erosion and further in stream sedimentation. Woody debris and sediment has been deposited on the stream bed and on stream banks and flood plain areas within the forest, reducing and destroying instream habitat and effecting ecosystem processes and species present.

Remediation is needed to address the issues resulting from the landslides and potential ongoing sedimentation and erosion. The future harvesting of Waituna forest needs to follow best practice erosion control methods including drainage, bunding, benching and monitoring.

[9] The above statement is a summary only. The ecological report contains detailed assessments of nine slip sites out of the 11 slips which occurred. Photographs attached to the report graphically illustrate the extent of actual damage at the nine identified sites. I am satisfied from the ecologist's report that the adverse effects of the discharges of sediment and debris on the stream ecosystems within the forest were substantial and widespread.

[10] I record that the information provided to the Court does not identify effects on any specific fish populations, plant varieties, populations or species. The effects which are described to me in the report are sometimes referred to as generic effects, typically arising from the discharge of sediment and other material into streams. That, undoubtedly happened here. Had there been evidence of direct effect on significant fish populations or the like, for example, that would have considerably increased the seriousness of the offending.

[11] The information before me also establishes that there was deposition of logs and sediment into what is described as "a lake" on an adjoining property, but I am given no further information regarding that matter because the owner of that property was satisfied with remediation. Accordingly I have not taken into account any effects on that water body in my assessment. Had I done so that may have elevated my assessed starting point for penalty. My assessment of effects of this offending relates only to the water bodies described in the ecologist's report.

[12] There is a further effect not mentioned in the summary of facts which has been the source of regular comment from Environment Judges sentencing pollution offences in the District Court over a period of many years. That is the cumulative effect of the myriad of discharges which arise from human activities on land and affect our waterways and marine environment.

[13] The Mangapoike River flows into the Wairoa River, which discharges to the coast at Wairoa. Sediment discharge to waters in the Mangapoike catchment will make a real but undefinable contribution to the levels of contaminant in the rivers and the sea where it ultimately ends up. The relationship between human activity on land and marine degradation is well recognised. I refer in that regard to examples given by

the Court in the recent *Laurie Forestry*[1] case and in the Ministry for the Environment publication "*Our Marine Environment 2019.*"

[14] In the *Laurie Forestry* case I noted the insidious effect of a myriad of discharges. That was referring to the fact that it is usually impossible to attribute the recognised diminution of the quality of our rivers and marine environment to any one incident or source but the effect of land activities on our rivers and marine environment is real. That means it is incumbent on those undertaking activities which might pollute our waters to act responsibly in accordance with "best practice" and, where those activities are authorised by resource consent, to abide by the terms of consent conditions imposed to prevent the discharge of sediment into water bodies.

[15] The maximum penalty for this offending is the sum of $600,000. Mr Hopkinson for the Prosecutor has identified an appropriate penalty starting point of $150,000. Mr Corlett for Juken has submitted that an appropriate starting point is $75,000.

[16] In fixing a starting point I have had regard to the various matters identified in paragraphs 5 to 13 of the Prosecutor's submissions. I highlight what I see as being the important issues for my consideration in this case, namely:

- The vulnerability of the affected environment and the extent of damage to it;
- The breach of conditions of resource consent;
- The business activity aspect of the offending;
- The need for deterrence;
- The Defendant's culpability for the offending;
- Comparable cases.

I am going to address all of those issues in that order.

[17] Turning first to the vulnerability of the affected environment, the summary of agreed facts records that approximately 25 percent of the Waituna Forest is on land

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1 *Marlborough District Council v Laurie Forestry Services Ltd* [2019] NZDC 2602.

identified in the Council's planning maps as Land Classification 3A, which is described in the summary as "the worst eroding land in the Gisborne District." The remaining 75 percent is hill country. The Forest Owners Association Environmental Guide and Code of Practice (the Code of Practice) notes the numerous challenges and often significant environmental risks involved in earthworks on steeper erosion prone land.

[18] Further to that, the possibility of the East Coast area being exposed to extreme weather events is well recognised. Between 1994 and 2015 there were six major storm and extreme weather events in the Gisborne region where large amounts of forestry slash and sediment were mobilised and washed downstream. Although I understand that previous events had not impacted on the Waituna Forest, the potential for that to happen should have been obvious.

[19] Under those circumstances a forest owning entity such as Juken might reasonably be expected to be aware of the need for rigorous management of its activities in this environment as well as compliance with the Code of Practice and with the conditions of its resource consent. Juken clearly failed to meet such expectation.

[20] Paragraph 19 of the Council's submissions identifies the following departures from the Code of Practice:

> 19. NZFOA Code of Practice requirements Juken departed from included:
>
> (a) The Code of Practice requirement to monitor slash piles to ensure that they are always stable.
>
> (b) The Code of Practice requirement to maintain water and sediment control structures in effective operating condition to prevent water building up in slash piles and adjoining landings to avoid possible landing collapse.
>
> (c) The Code of Practice requirement to remove slash offsite where onsite slash storage sites are insufficient.
>
> (d) The Code of Practice requirement to make every reasonable effort to avoid damage to restricted areas. (The offending in this case resulted in damage to protected watercourses.)

I note that in Juken's resource consent application it stated that it would comply with the Code of Practice. In other words, compliance with the Code of Practice was part

of the proposal which Juken put to the Council when seeking consent to allow it to undertake earthworks and harvesting activities in the forest.

[21] I refer to my earlier quotation from the Council ecologist's report as to the adverse effects brought about by the discharges. There were 11 significant slip sites extending over a wide area resulting in large amounts of sediment and woody debris entering freshwater systems many of which are classified as "protected watercourses" in the Gisborne Fresh Water Plan. This case involved seriously adverse impact on a vulnerable environment which the Code of Practice recognises as requiring a high degree of management..

[22] That brings me to the matter of breach of resource consent conditions on Juken's part. I have previously noted the breach of a number of the conditions of Juken's consents observed by Council officers, when they inspected the forest in July 2018. Not only do these breaches point to very poor management on Juken's part, but the breaches are inherently serious matters in themselves – a point which I cannot stress enough.

[23] Resource consents granted by consent authorities commonly incorporate conditions intended to avoid, remedy or mitigate adverse effects of activities. Persons operating under resource consents have an obligation to comply with conditions integral to the grant of such consents. The breach of conditions of consent undermines the very basis on which consents have been granted. That proposition is demonstrated by the Council decision on Juken's resource consent application granted in July 2014, which records that the effects of Juken's activities will be minor or less than minor… "with appropriate consent conditions in place and being adhered to." (my emphasis). In short, the consent formally recorded and noted the necessity for the conditions to be adhered to if adverse effects of the consented activities were to be avoided.

[24] Notwithstanding Juken's claims as to the manner in which it managed the Waituna Forest, it is apparent from the material before the Court that there were significant failures on its part in compliance with its conditions of consent as these related to the management of logging slash, landings and water.

[25] Juken raised in its submissions the fact that prior to these incidents the Council had not undertaken any inspections of the forest to ensure that Juken was complying with the terms of its consents over the five or six years that the consents have been in place. As it recognises, that does not excuse its compliance failures. However, I record the Court's real concern as to the Council's failure in that regard. Section 35(2)(d) RMA requires that every local authority shall (my emphasis - the word "shall" is used in s 35(2)(d)) monitor the exercise of resource consents that have effect in their regions or districts.

[26] The erosion prone nature of the land in the forest and the vulnerability of the region to extreme weather events to which I have referred earlier, make the failure of the Council to monitor exercise of Juken's resource consents reprehensible and irresponsible, to say the least. The Council contended that the failure to comply with conditions must have extended over a period of one year prior to this offending. It is only possible to speculate as to whether or not appropriate inspection by the Council would have discovered the failures and prevented this offending. I can take that matter no further.

[27] The next matter is the fact that this offending involved a substantial commercial forest entity undertaking its core business. In those circumstances, it might reasonably be expected to be aware of the rules under which it must operate, to ensure that its employees and contractors are similarly aware of the rules and to supervise their compliance with them. Juken submitted that it had systems in place to ensure that happened. I can only observe that those systems failed badly. Again, I note that Juken advised the Council as part of the resource consent process that it would undertake its activities in accordance with the Code of Practice and it failed to comply with the Code (being a forest industry document) in a number of respects.

[28] Finally on this topic, I note the principle that penalties imposed on commercial entities should be pitched at a level where they have some bite and do not simply constitute a cost of doing business.

[29] Turning to the matter of deterrence, I note that the purposes of sentencing include deterring defendants and others from further offending. That is relevant in two respects in this case.

[30] The first relates directly to the Defendant itself. Juken's counsel submits that deterrence has limited value in its case because it did not intend to offend, has worked collaboratively with the Council and is at low-risk of re-offending. I disagree with that proposition and refer to my earlier comments regarding the obligations of commercial entities undertaking activities, particularly in vulnerable environments such as this. Juken is a large scale forestry operator with over 40,000 hectares of forest under management in New Zealand. Its failures in this case were multiple and significant. Penalty must be pitched at a level which deters any repetition across its substantial operations.

[31] Secondly, there is a need to deter the wider forest industry from similar failures. Forestry is a major activity in the Gisborne region, often undertaken on difficult country vulnerable to weather events. There is a history of slash and sediment discharges in the region going back a number of years which demonstrate the need for best management practice and compliance with consent conditions. Penalties should be set at a level which drives compliance and deters poor practice.

[32] Next, there is the matter of the Defendant's culpability for the offending. Mr Corlett characterises Juken's culpability as being in the moderate category. Mr Hopkinson contends it is at the higher end of the scale. I concur with Mr Hopkinson's view in that regard.

[33] In this case, where there were multiple failures in best management practice together with multiple breaches of consent conditions, it is impossible to describe Juken's management of the Waituna Forest as anything other than "careless in the extreme." A correspondingly high degree of culpability for the offending must attach to it. Juken did not deliberately offend but its poor management practices contributed directly to the offending.

[34] I have had regard to all of the various cases referred to by counsel for the purpose of s 8(e) Sentencing Act. Comparisons are difficult in this case as there is a wide range of starting points adopted in the cases referred to. It is correct, as Mr Corlett noted, that some of the cases referred to involve multiple charges rather than one as in this case. However, it is apparent when reading the multiple charge cases that they were usually sentenced on a global or an overall basis where one sentence was imposed on all of the charges. because they were treated as continuing aspects of a single offending event or incident.

[35] That is certainly what happened in the *Laurie Forestry* case where the Court adopted an all up starting point of $100,000 rather than two separate starting points of $50,000 as suggested by counsel (although the final fine was divided equally between the two charges). I observe that Laurie's management failures involved one slip and were considerably less extensive than was the case here. This offending is much more serious than that by many degrees of magnitude.

[36] I note that in the *Olsen* case where both the District Court and High Court assessed starting points separately, a starting point of $80,000 for a s 15(1)(b) offense was adopted by the High Court for offending which predated the 2009 penalty uplifts, where penalty levels were doubled.[2] I find that offending to be less serious than this, again by a significant margin.

[37] I have had regard to all of these matters in reaching a penalty starting point. I consider that the number of skid site failures in this case which greatly exceeds the number of failures in any of the other cases referred to and the consequent extent of damage to waterways at Waituna over a substantial area (shown in figure 2 of the ecologist's report) are significant factors in this case. Those factors must be combined with a high degree of culpability on the part of Juken for poor management of its forestry operation on what it knew, or must have known, to be a vulnerable site and a particular need for deterrence of poor forestry management practices in this region in light of past history.

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[2] *P F Olsen Ltd v Bay of Plenty Regional Council* [2012] NZHC 2392, *Bay of Plenty Regional Council v P F Olsen Ltd* DC Tauranga CRN08063501466, 16 March 2010.

[38] I am aware that Juken is a significant corporate entity. It has massive forest interests in New Zealand. I am advised that it has the capacity to pay a fine of the amount being debated by counsel (between $75,000 and $150,000). I consider that for the deterrent aspect of this sentencing to be meaningful the penalty must be commensurate in some way with Juken's financial capacity, which I have assumed to be substantial.

[39] Having regard to all of those matters I determine that a starting point for penalty in this case should be the sum of $200,000. I note that is one-third of maximum penalty.

[40] I record that the adverse effects of these discharges have fallen into what I have called the generic effects of contaminant discharge. I was given no information as to direct effects on any populations of fish or other aquatic species, although there would have been such effects on those species that were present in the waterways. I have no knowledge of those. I note that the river itself is apparently a trout breeding river, but again I had no evidence of effect on trout breeding. I can say that had there been evidence of effects on specific fish populations that would have elevated the seriousness of the offending and I would have adopted a higher penalty than I have.

[41] I do not propose making any reduction from the starting point on account of Juken's past good character. It has two past convictions for RMA offending in 1997. I do not propose any uplift in penalty relating to those due to the lapse of time.

[42] I have disregarded amounts spent by Juken on remediating its neighbour's property in my considerations. As I have noted, I have been given no details of effects of those incidents on the neighbour nor if the remediation work related to contamination of water bodies on the adjoining property or related to other land type improvements or remediation. The charge with which I am dealing relates to the discharge of a contaminant to water and it must be work to remediate that for which any credit should be given and I have no evidence in that regard.

[43] I accept that Juken has undertaken an extensive clean-up on its own land in accordance with abatement notices issued by the Council. It says this was underway

before Council intervention. It is apparently putting in place processes to manage slash on the forest better than those in place previously. Those processes are described in paragraphs 53 to 58 of the Council's submissions. The question might be reasonably asked as to why these processes were not in place previously in light of the Code of Practice and known vulnerability of parts of the forest.

[44] The Council agrees that there has been a high degree of willing co-operation between Juken and itself and says that Juken has gone beyond what was required to simply achieve remediation and compliance and that there has been an improvement in its management and supervisory processes which should be given some recognition. I will allow a deduction from the starting point of five percent to reflect that factor.

[45] The Defendant entered a not guilty plea on this matter on 12 March 2018. On 13 August 2019 it filed a memorandum seeking to vacate the plea and a guilty plea was formally entered on 22 August 2019, at which stage the Prosecutor advises, preparation for trial was underway. On that basis I concur with the Prosecutor's submission that a 20 percent discount from the reduced starting point be given for guilty plea.

[46] Accordingly, I determine as follows:

- Juken New Zealand Limited is fined the sum of $152,000.

- It will pay solicitor costs in accordance with the Costs in Criminal Cases Regulations (to be fixed by the Registrar if need be) and Court costs $130.

- Pursuant to s 342 Resource Management Act 1991 I direct that the fine less 10 percent Crown deduction is to be paid to the Gisborne District Council.

B P Dwyer
Environment/District Court Judge