IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CRI-2020-416-13
[2020] NZHC 2437

BETWEEN	DNS FOREST PRODUCTS (2009) LIMITED Appellant
AND	GISBORNE DISTRICT COUNCIL Respondent

Hearing: 16 September 2020

Counsel: M Atkinson for appellant
V C Brewer for respondent

Judgment: 17 September 2020

JUDGMENT OF ELLIS J

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[1] In the first half of June 2018, the Gisborne region experienced a significant storm. Heavy rain over a number of days upheaved large amounts of logging debris and carried it onto roads and landings. Forestry waste flowed onto and into neighbouring properties, water bodies, and coastal areas across the region. The environmental impact was significant.

[2] DNS Forests Products (2009) Limited (DNS) later pleaded guilty to a charge under s 338(1)(a) of the Resource Management Act 1991 (the RMA) of contravening or permitting the contravention of s 15(1)(b) of that Act. The contravention here involved the discharge of contaminants—slash, logging debris, waste logging material, and forestry waste—onto land in circumstances where it then entered water.

Judge Dwyer declined DNS' application for a discharge without conviction;[1] he sentenced DNS to a fine of $124,700 and ordered reparation of $6,500.[2]

[3] DNS now appeals that decision.

Background

Makiri Forest and the resource consent

[4] Makiri Forest is a 493 ha plantation forest about 38 km from Gisborne in the headwaters of the Waihora Valley. As Judge Dwyer noted in the District Court, the area is particularly vulnerable:

> [17] … about 90 percent of Makiri Forest falls within Land Overlay 3 of the Gisborne Regional Rules, being land areas most susceptible to erosion, sediment generation and soil loss in the region, an area which is well known for its vulnerability to significant weather events. The need for absolute compliance with best forestry practice in terms of resource consents when harvesting such land is overwhelmingly obvious.
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> [18] Even when these requirements are followed there is a high degree of risk of slope failure and forestry waste mobilisation during (and for a period of some years after) harvesting. Forest owners or harvesters undertaking harvesting operations in these conditions are at real risk no matter how careful they are.

[5] Since early 2017, the Makiri forest has been owned by South Pacific Forestry Holdings Ltd (South Pacific). DNS was, effectively, the company responsible for the forestry operation on the land. Both South Pacific and DNS are wholly owned and controlled by Mr Daning Sun.

[6] On 9 November 2016, the Gisborne District Council (the Council) granted DNS a land use resource consent that allowed the formation of 11.1 km of roads, the construction of 28 landings and pads, the harvesting of 398 ha of trees, and the extraction of logs. The conditions of that resource consent included that:

> (a) On slopes greater than 25 degrees, fill used in compaction of road and landing formations or sidecast to waste was to be held in place by benching, compaction, armouring or a combination of those measures.

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1 *Gisborne District Council v DNS Forest Products 2009 Ltd* [2020] NZDC 11112.
2 *Gisborne District Council v DNS Forest Products 2009 Ltd* [2020] NZDC 14233.

(b) Runoff onto landings was to be intercepted by cut-off drains and was to be discharged clear of any fill.

(c) Water table culverts were to be installed and to discharge clear of fill.

(d) Cut-off drains were to be installed at a maximum spacing of one every 50 metres along arterial tracks.

(e) At the conclusion of logging at each landing, no unstable accumulations of logging debris could be left on or beneath landing edges.

[7] The consent did not authorise discharges of forestry waste into water or onto land in circumstances where the waste might then enter water.

The forestry operation and its failures

[8] In early 2017, DNS entered contracts with A&R Logging Limited (A&R) and Logic Forest Solutions (Logic). A&R was to build roads, harvest trees, and remove the logs; Logic was to oversee and manage this process. The contracts required A&R and Logic to comply with the resource management conditions. As it transpired, A&R and Logic did not comply with those conditions. But Logic did not report to DNS any breaches; in many of its reports, it advised DNS that all resource consent conditions had been met. DNS staff or directors visited the site around five or six times during the course of these operations.

[9] The forest work continued from 1 June 2017 to 17 January 2018, when, after a contractual dispute with DNS, both A&R and Logic abruptly quit the operations. Post-harvest work (such as pulling slash back from landing edges and reinstating drains to divert water from skid sites) had not been completed. DNS tried to find another contractor to finish the work but was unsuccessful.

[10] And so, the scene was set for the disastrous consequences of the heavy rainfalls in June 2018.

[11] An inspection of the forest by the Council following the June rains revealed:

(a) There was no evidence of benching, compaction or armouring of fill on the roads constructed on slopes greater than 25 degrees other than the clearing of material off old skid located below some roads and landings (breach of condition 8);

(b) Water on landings was being directed onto fill and logging debris including waratah waste mixed with soil on the edge of landings (breach of condition 10);

(c) Runoff from roads was being directed [through] cut-offs and culverts (where culverts were found) onto fill and side-cast material (breach of condition 11);

(d) A number of cut-offs were seen along the outside edge of the access road and runoff directed into fill or side-cast material causing rilling and scouring (breach of condition 14);

(e) Three landings where harvesting operations had been completed had unstable accumulations of logging debris, slash, and/or waste logging material mixed with soil left on the edges of landings, with many landings having perched slash/slovens overhanging the landings and below the landings (breach of condition 23);

(f) Three landings had collapsed causing debris slides of forestry harvesting waste material, sediment and sediment contaminated water to enter watercourses within the forest. These landing collapses were the direct result of various breaches of consent conditions as referred to above;

(g) There was a lot of woody debris in the beds of streams.

The subsequent criminal charges

[12] Charges were laid against DNS and South Pacific under ss 338, 9 and 15(1)(b) of the RMA. As the District Court Judge recorded, it was apparently the failures referred to at (e) and (f) that formed the basis for those charges.[3] Logic and A&R were seen as responsible for the other matters listed; charges were laid against them, too.

[13] By February 2020, DNS agreed to a plea deal whereby:

(a) DNS—rather than South Pacific—would be the Sun company held responsible for the offending;

(b) DNS would plead guilty to the s 15(1)(b) charge;

(c) the Council would seek leave under s 146 of the Criminal Procedure Act 2011 (the CPA) to withdraw all charges against South Pacific and the s 9 charge against DNS; and

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3 At [13].

(d) Mr Sun would give evidence at the hearing of the charges against Logic and A&R.

[14] DNS' culpability was also agreed and recorded in a joint memorandum of counsel in the following terms:

(a) After A&R left the site in January 2018, DNS ought to have reviewed the state of the forest. It would then have become aware of the need for logging debris and sediment to be pulled back from landing edges, and the need for water controls to be reinstated.

(b) DNS' offending was not deliberate or reckless.

(c) DNS was not responsible for deficiencies in the construction of roads (including water controls) and landings. DNS had no reason to doubt Logic's assurances that those features had been built correctly.

[15] DNS' guilty plea was entered on 11 February 2020. In accordance with the plea deal, the Council then sought and was granted leave to withdraw charges against South Pacific and the s 9 charge against DNS.

[16] But then, on 17 February, the Council sought leave under s 146 to withdraw all charges against Logic and A&R. Leave was granted.[4] It seems that no reasons were recorded for the grant of leave. Because of the limitation periods in the RMA, there is no possibility of charges being laid again.[5]

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4 Ms Brewer for the Council has suggested that the charges were sought to be withdrawn because of the Council's potential exposure to a large costs award in the event the prosecution was unsuccessful. The perceived risk of a failed prosecution here may have arisen due to the fact that Logic and A&R had left Makiri Forest five months before the damage occurred. Ms Brewer also noted that shortly before the application for leave, the defendants' expert briefs of evidence had been served on the Council.

5 This obliterates the usual distinction drawn between the withdrawal of a charge with leave under s 146 and the dismissal of a charge under s 147, which is deemed to be an acquittal.

Sentencing in the District Court

[17] Judge Dwyer's analysis began by noting that the maximum penalty for the offence was a fine of $600,000. The Judge noted the need for deterrence—particularly given the vulnerability of the Gisborne region to significant weather events.

[18] As to culpability, the Judge said:

> [23] Culpability is a matter of some debate in this case. DNS was a "hands-off" forester depending on its forest manager and contractor performing as they should have done. It was badly let down but, in any event, is caught by principles of strict and vicarious liability which are not disputed in the sense of being defended in this case. However, as it must accept, there was a period of five months after the contractors walked off site during which the skid sites and their water diversion systems were left in an unsatisfactory state. Over this period DNS should have been on guard for potential problems due to unsatisfactory work leading to slumping and road disruption which required repair. I concur with the Council's view that it should have been on notice to check the standard of the work which had been done.
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> [24] DNS contends it was unable to get a contractor to undertake the necessary work on skid sites. In my experience and observation, ascertaining skid site condition is not a difficult exercise. The need to pull slash back from the edge of landings from where it might easily be mobilised downhill and divert water flows is readily apparent. Simple common sense is all that is required.
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> [25] In this case that was also required by consent conditions. It is difficult to describe leaving the three skid sites which give rise to the offending discharges in an unsafe condition for five months as anything other than extremely careless. Their tidying should have been a matter of high priority and it was not. Even if the Defendant was unable to arrange a contractor to look at and tidy up any skid sites, it could have asked the Council to have checked to make sure everything was satisfactory once it was aware there had been failures in the standard of site works.
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> [26] Accordingly, I attribute a significant degree of culpability to DNS entirely relating to that five-month period.

[19] Given the environmental damage (and with reference to similar cases), the Judge set a fine of $150,000 as the sentencing starting-point. He reduced this by five per cent for DNS' previous good character. For the guilty plea, entered 10 days before trial, he gave a 12.5 per cent reduction.

[20] The Judge then turned to the question of a discharge without conviction, which had been sought by DNS. He noted that s 107 of the SA set a high threshold, and that

the court needed to be satisfied that the direct and indirect consequences of a conviction would be "out of all proportion" to the gravity of the offending.

[21] The Judge rejected the submission made for DNS that because the Council had withdrawn charges against A&R and Logic—despite those companies being (counsel said) the principal, and more culpable, offenders—the parity principle reflected in s 8(e) of the SA required a discharge. His reasons were:

(a) Section 8(e) applies only where the relevant offenders and offending are similar, which was not the case here. DNS was the consent holder who held ultimate responsibility to ensure that the operation satisfied the consent conditions. The offending also occurred five months after A&R and Logic had left the site—DNS had ample opportunities to rectify any shortcomings.

(b) The Court was unable to consider why the Council withdrew charges against A&R and Logic; DNS' sentence needed to be based on the summary of facts, which contained nothing that might permit the Court to question the propriety of the withdrawal of charges against the other two entities.

(c) Section 8(e) had no application because no court had sentenced, or indeed "otherwise dealt with", either A&R and Logic. The authorities relied on by counsel for DNS all concerned parity with other, related, defendants who had been discharged without conviction.

[22] The Judge concluded that the fine of $127,400 was not out of all proportion to the gravity of DNS' offending.[6]

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6 Later, at final sentence, he imposed an additional sentence requiring payment of $6,500 reparation (under s 32(1)(a) SA) to be paid to an adjoining property owner: [2020] NZDC 14233, above n 2, at [4].

The appeal

[23] An appeal against a refusal to discharge without conviction is properly characterised as an appeal against conviction and sentence.[7] It is brought under s 232(2) of the CPA: an appellant must show either that a miscarriage of justice has occurred by virtue of a material error by the sentencing judge in entering a conviction, or that "for any reason" the judge has erred in applying the relevant s 107 principles.[8]

[24] Here, DNS' appeal is based squarely on s 8(e) and the parity principle. DNS says that Judge Dwyer failed to properly consider consistency in the treatment of DNS, Logic, and A&R. Mr Atkinson says that the Judge's reasons for rejecting the application of the principle and refusing a discharge without conviction were wrong because:

(a) the parity principle applies here;

(b) there is nothing special (or relatively more culpable) about being the consent holder;

(c) the effluxion of time after A&R leaving the site does not reduce Logic and A&R's culpability (although it does increases DNS' culpability).

[25] If—despite these submissions—this Court does not consider a discharge without conviction is appropriate, then Mr Atkinson asks that the level of DNS' fine be adjusted to reflect parity.

Discussion

[26] It is useful to begin with s 8(e) itself. It provides that, in sentencing or otherwise dealing with an offender the court—

> must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; …

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7 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144.
8 *Jackson* at [12]; *Gaunt v Police* [2017] NZCA 590 at [9].

[27] And s 4(3)(a) of SA provides that "otherwise dealing with an offender or other means of dealing with an offender":

> means dealing with the offender in relation to an offence following a finding of guilt or a plea of guilty, instead of imposing a sentence; …

[28] Although there is authority from this Court that parity can be relevant to a decision to discharge without conviction,[9] it is quite clear that s 8(e) has no application in this case. Rightly or wrongly, neither A&R nor Logic have been convicted of any offence (and so are not "other offenders"); neither has been sentenced or "otherwise dealt with" following a finding or plea of guilt.

[29] Nor am I able to agree that parity is a principle of wider application that can be applied even though A&R and Logic have not been—and now cannot be—convicted and sentenced. As Judge Dwyer said, there is no way of knowing why the charges against A&R and Logic were withdrawn. But it must be assumed that (consistent with the Solicitor-General's Prosecution Guidelines) the prosecutor sought leave after reviewing the sufficiency of the evidence against those companies and after evaluating the public interest in the prosecution continuing. It is neither desirable nor possible to second-guess that decision and proceed on the basis not only that A&R and Logic were effectively guilty, but also that their level of culpability can be assessed.

[30] And even if that were not the case, I do not agree that it is in any way obvious that DNS is less culpable than those companies.

[31] First, I agree with the District Court Judge that DNS' status as the consent holder is relevant. The consent holder is, ultimately, responsible for compliance with the resource consent. The fact that Logic and A&R may have been contractually obliged to comply with the terms of the consent is just that: a contractual matter between those companies and DNS. And the fact that a consent may not be personal to the consent holder (as s 134 of the RMA provides that a consent runs with the land) is similarly immaterial.

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9 *Police v Paki* [2014] NZHC 3112 at [54].

[32] Secondly, I do not accept that DNS' liability here was vicarious or (for that reason) that Cooke J's decision in *Sowman v Marlborough District Council* is of any relevance or assistance.[10] I acknowledge that Judge Dwyer did refer (at [23]) to DNS being "caught by principles of strict and vicarious liability". I also acknowledge that, apparently, it is not necessary for a prosecutor to specify reliance on s 340 of the RMA in the charging document, if liability is alleged to be vicarious.[11] But a reading of both the summary of facts and the joint memorandum does not suggest that DNS was charged vicariously here. Rather, liability under s 338 was founded on DNS' own failure to take steps to prevent—and so "permitted"—a contravention of s 15(1)(b). As Ms Brewer submitted, DNS ought to have checked compliance at Makiri Forest after 17 January 2018 because:

(a) The harvesting manager and harvesting contractor had abruptly left the forest after a commercial dispute;

(b) Their abrupt departure meant that post-harvest work (such as pulling logging slash away from landing edges and reinstating water controls) was left incomplete;

(c) The longer that the forest was left alone during this time, the greater the risk of environmental issues;

(d) There were obvious risks of environmental damage at Makiri Forest given its steep terrain, susceptibility to severe erosion, and the difficulties that DNS had had in engaging contractors to work on such tricky terrain;

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[10] *Sowman v Marlborough District Council* [2020] NZHC 1014. At [57] of that decision, Cooke J said:

> The RMA contemplates a principal may be strictly liable for the act of an agent. But the position is different at sentencing. The whole focus of the Sentencing Act is to carefully consider an offender's individual circumstances and sentence accordingly. The parity principle presupposes that, all things being equal, co-offenders ought to receive the same sentence. But matters such as the relative involvement in the offence often justify different outcomes.

[11] Subject to specified defences, s 340 makes a principal liable for the acts and omissions of his agents, contractors and employees in relation to offences committed under the Act. In *Fulton Hogan Ltd v Canterbury Regional Council* [2019] NZHC 1767, [2019] NZRMA 642 this Court held that the Council was not required to refer to s 340 in a charging document where vicarious liability was alleged.

(e) After engaging a new contractor to clear major slumps in the forest in February 2018, DNS was on heightened notice of potential issues in the forest;[12]

(f) DNS' resource consent application identified the risks of slash heap and bird nest collapse at Makiri Forest; and

(g) DNS' resource consent application also said that it would follow the New Zealand Forest Owners Association's Environmental Code of Practice for Plantation Forestry, but DNS' offending involved breaches of those standards too.

[33] And I agree with the Judge that it is also relevant that this failure to act continued over a period of five months, over which time the risk increased.

[34] The fact that blame of some (non-criminal) kind may be laid at the feet of A&R and Logic for other defaults and breaches is neither here nor there. That submission falls at the first hurdle, namely that A&R and Logic have not been convicted of any such failings—they cannot be taken into account. While DNS may well have private remedies against them for those breaches, that can have no bearing on the appropriate sentence for DNS.

[35] So in short, the parity principle has no application here and, even if it did, it would not assist DNS.

[36] Once that point is reached, Mr Atkinson very properly accepted that no issue could realistically be taken with either the decision not to discharge without conviction or with the end sentence imposed here. More particularly:

(a) The offending here was serious, and DNS has not pointed to any direct or indirect consequences disproportionate to its offending.[13] It is

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12 Between February and June 2018, DNS engaged a new contractor both to clear slips that were blocking parts of the main access road and to clear major slumping in the forest. But DNS did not engage this new contractor to check the skid sites or water controls, or to carry out any work to address skid site issues.

13 Although DNS is now in liquidation, it has insurance to cover the fine in this case.

simply not possible to conclude that the s 107 "out of all proportion" threshold is met.

(b) The sentence imposed was not manifestly excessive. The starting point of $150,000 fell within the appropriate range and accorded with:

(i) DNS' culpability;

(ii) the environmental damage caused by the offending;

(iii) comparable cases; and

(iv) the need to denounce environmental breaches in the forestry industry, particularly in Gisborne.

[37] The appeal is dismissed, accordingly.

Rebecca Ellis J

Solicitors: