IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2018-016-002405
[2020] NZDC 19089

GISBORNE DISTRICT COUNCIL
Prosecutor

v

PF OLSEN LIMITED
Defendant

Hearing: 14 September 2020

Appearances: A Hopkinson for the Prosecutor
G Hughes for the Defendant

Judgment: 14 September 2020

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] PF Olsen Limited (Olsen) appears for sentence on one charge of breach of s 15(1)(b) of the Resource Management Act 1991 by discharging a contaminant, namely slash, logging debris, waste logging material and sediment (forest waste) onto land in circumstances where it may enter water, as it did in fact do. The charge is contained in charging document ending 1459.

[2] Olsen has pleaded guilty to the charge. Section 24A of the Sentencing Act 2002 is not applicable. No suggestion has been made that Olsen should be discharged without conviction and it is convicted accordingly.

[3] The charge arises out of forest harvesting operations carried out at Paroa Forest, an 1800 hectare plantation forest located west of Tolaga Bay in the

Gisborne District. Olsen is a forest management consultant. It manages thousands of hectares of forest across New Zealand. Amongst the forests which it manages is Paroa Forest which is owned by Permanent Forests Limited (Permanent) The offending which is the subject of this prosecution was the ultimate result of a rainfall event on 3 – 4 June 2018. Olsen was Permanent's forest manager in June 2018 and had been for some time.

[4] In June 2018 Olsen was managing harvesting operations which were being undertaken on the forest pursuant to a series of four resource consents. These consents authorised the usual range of works associated with forest harvesting, including the formation of roads and skid sites, harvesting of trees, vegetation clearance and log extraction. The consents were subject to a number of conditions intended to ensure that operations were undertaken in accordance with good forest management practice and that adverse effects on the environment were avoided. Neither the consents nor any of their conditions authorised the discharge of forest waste to water, nor to land in circumstances where it might enter water.

[5] The circumstances surrounding the storms of June 2018 and this offending are set out in the summary of facts as follows:[1]

> 25. On 3 - 4 June 2018 a major storm event occurred on the East Coast of the North Island. This rain event resulted in severe flooding in the Tapuae catchment near Tolaga Bay and the mobilisation of a large volume of sediment and woody debris from plantation forests in the area.
>
> 26. A second significant rain event occurred on 11 - 12 June 2018 but the peak rainfall intensity from this event was lower than the 3 - 4 June 2018 rain event. The 11 - 12 June rain event did not significantly impact forests near Tolaga Bay. It had a greater impact on forests south of Tolaga Bay.
>
> 27. Damage caused by the 3 - 4 June 2018 rain event included an estimated 47,000 m^3 of woody debris that was deposited on the beach at Tolaga Bay, with likely significant but unknown quantities of woody debris deposited throughout the Uawa catchment.
>
> 28. The flow of debris from Paroa Forest damaged a farm immediately downstream – Paroa Station. It is possible that a small amount of forestry debris that flowed from Paroa Forest had washed down the Tapuae Stream into the Uawa River which flows to the sea at Tolaga Bay.

[1] Summary of Facts at [25] – [43].

29. Following the above two rain events Council began investigating the causes of the large scale discharge of forestry debris which ended up in and near Tolaga Bay. This involved inspections of forests near Tolaga Bay and south of that area.

30. At the time of the storm, seven landings where harvesting operations had been completed had inadequate water controls or drainage either at the landing site itself or on roads connecting to the landing site. This occurred at landing sites 2, 5, 16, 17, 19, 21 and 49.

…

32. Of those seven landings, five landings where harvesting operations had been completed had untidy accumulations of either a combination of logging debris, slash, and/or waste logging material mixed with soil left on the edges of landing. These were at landing sites 2, 5, 16, 19 and 21. However, only skid sites 21 and 5 had accumulations which were unstable. …

33. The inadequate water controls at landings 2, 5, 16, 17, 19, 21 and 49, and the location of stored slash in respect of landing sites 2, 5, 16, 19 and 21, gave rise to discharges of sediment and/or slash from those landing sites, either during or shortly after the storm event, to the slopes below.

…

34. The sediment and slash in each case was discharged onto land in circumstances where it entered an ephemeral watercourse.

35. At some of these sites:

(a) the absence of sufficient benching or compaction of the fill over which the water flowed was a contributing factor on some slopes greater than 25 degrees; and

(b) water overwhelmed any drainage infrastructure, and became re- directed onto fill, some spoil dumps and some side-cast material.

36. On a road near skid site 17, there was an un-flumed culvert that discharged onto the ground. A landslide occurred at that location and discharged sediment to an area where it entered water.

37. It is possible that some sediment, slash and logs from these sites were among those deposited further downstream, on Tolaga Bay Beach. However, it is not possible to establish quantities that may have reached Tolaga Bay as the sediment and slash and logs became part of the overall landscape response once they entered watercourses. However, the lack of connection between most slash deposits and waterways in Paroa Forest suggest it was minimal.

38. Additionally, it is possible that some slash and windthrow from skid site 16 contributed to a log jam in the upper Tapuae, however it is not possible to separate the degree to which this may have contributed to that log jam from the contribution from other sources of slash and windfall in the area.

> 39. Some slash originating from Paroa Forest in June 2018 affected the neighbouring farm – Paroa Station. The owners of Paroa Station have received total payments of $388,038 from Permanent Forests in relation to that damage and the associated clean-up work.
>
> 40. The owners of Paroa Station estimate that the further remedial work required to remove forestry debris from Paroa Station will cost $100,000 to $175,000.
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> 41. The majority of damage caused by sediment and forestry debris to Paroa Station and Paroa Forest itself in June 2018 was not associated with skid site and roading failures at Paroa Forest.
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> 42. Rather, the majority of damage was the consequence of a global landscape response of soft erodible soils comprising volcanic ash, known as "tephra" on steep slopes with an underlying base of hard mudstone, combined with a significant rain event in the early hours of 4 June 2018.
>
> 43. Many landslides were observed on surfaces unconnected to forestry infrastructure. In some cases, those surfaces contained forestry waste from consented harvesting operations that was deposited there in accordance with consents, or windfall, and in other cases only sediment was discharged. There were also discharges of slash and sediment associated with forestry infrastructure but where there was no evidence of consent breaches.

[6] Council inspections on 15, 16 and 21 June 2018 identified a number of shortcomings in forest management practice described in the summary of facts as follows:[2]

> 49. As a result of Council's investigation into the defendant's forestry harvesting practices at Paroa Forest following the June rain event, a number of shortcomings were identified that contributed to the issues observed by compliance officers on 15, 16 and 21 June 2018. These included the following examples of poor practice:
>
> (a) The construction of infrastructure in the forest involved poor drainage control and a failure to protect exposed and disturbed soil at the locations where the discharges occurred.
>
> (b) Drainage controls on forest roads and landings were poor or non-existent. This created concentrated water run-off which can cause downslope failure.
>
> (c) There were large quantities of harvest residues, especially large diameter woody debris, left on or below the edge of many tree processing landings, although they were not unstable except at skid sites 5 and 21. This included material being placed on steep fill slopes. At skid sites 5 and 21, this material should have been pulled back onto landings or to other safe places to mitigate the risk of the material being moved off-site.

[2] Summary of Facts at [49(a)-(e)].

(d) Above average levels of harvest residues had been left on harvested areas in the forest.

(e) There was inadequate or no benching / compaction for roads and landings constructed on steep terrain.

[7] In terms of environmental effects, there is a lack of certainty in the summary of facts as to the extent to which the discharges at Paroa Forest which are the subject of this charge contributed to the wider environment carnage visited on the region by the June 2018 storms. In particular, I note that para [37] of the agreed summary which I have previously cited records that while it is possible that some of the forestry waste from Paroa Forest may have been among the volumes of trees deposited on Tolaga Bay Beach, it is not possible to quantify the contribution from Paroa, which is suggested to be minimal. Similarly, it is not possible from the material before the Court to discern with any degree of accuracy the precise contribution which the offending discharges made to the receiving waters within the forest and the wider catchment.

[8] The agreed environmental effects of the offending, however, are described in these terms in the written summary:[3]

> 59. A Council ecologist carried out an assessment of several streams in the Paroa Forest and downstream of adjacent farm land on 12 December 2018. The Council ecologist observed the following adverse effects on watercourses in the forest:
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> (a) There are elevated levels of deposited sediment in the lower Tapuae and lower Waipurupuru streams;
>
> (b) Downstream of the forestry harvesting activities and farm land the sediment levels are thick and cover 100% of the stream beds;
>
> (c) There is continuing erosion, including stream bank erosion, within the catchment (that includes Paroa Forest and adjacent farmland) that is contributing to the sediment load in both streams.
>
> (d) There is a large and significant wetland in the Paroa Forest (wetland being a threatened ecosystem within the region) which has been adversely affected due to the mobilisation of sediment;

[3] Summary of Facts at [59].

(e) Streams have been degraded with MCI scores (Macroinverterbrate Community Index) being in a category described as poor and average %EPT taxa being <20. The dominant macroinverterbrate species found in the streams show degraded stream water quality and instream habitat.

[9] In fixing a starting point and end penalty for this offending I have had particular regard to the following factors:

- The maximum applicable penalty;
- Environmental effects;
- Culpability;
- The need for deterrence;
- Comparable cases;
- Loading for previous convictions;
- Guilty plea discount.

[10] The maximum penalty for this offence is $600,000. The Prosecutor contends that a starting point in the $170,000 – $180,000 range is appropriate. Mr Hughes for the Defendant suggests a figure of $150,000. I will return to that issue in due course.

[11] The issue of environmental damage has two relevant components in this case. The first is that I accept that water bodies in the forest have been subject to the effects of sedimentation. Paragraph [59] of the summary of facts identifies that. Two of the affected water bodies are protected streams under the Regional Freshwater Plan and they flow into the Uawa River which is subject to a statutory acknowledgment with Ngāti Porou. That river in turn, flows to Tolaga Bay.

[12] There is reference in the summary of facts to a large and significant wetland being a threatened ecosystem which had been adversely affected by the mobilisation of sediment and a number of streams were affected by sedimentation according to the summary. Although the consequences of sedimentation in these particular water bodies have not been set out in detail, at a general level it is well recognised that sediment affects the clarity of the waters into which it is discharged, impacts on the ability of fish to find food in water, smothers the benthos on the bed of water bodies, interferes with fish breeding, adds to past deposition and is added to by future depositions. So it accumulates, is mobilised, and merges downstream into other rivers, streams and water systems and ultimately into coastal waters.

[13] It is important to stress the significance of sediment discharges into our water bodies in looking at this offending. The NIWA document, *Suspended sediment dynamics in New Zealand Rivers* (4 July 2019) records that fine sediment is the most pervasive and significant contaminant in New Zealand's rivers, estuaries and coastal seas. Accordingly, the discharge of sediment from land disturbance activities is a serious matter even if its immediate effects are not apparent because of their insidious and cumulative nature. In this case sediment is only one component of the contaminant material which also includes slash, log remnants and other debris.

[14] The summary of facts states that the majority of damage caused by sediment and forestry debris at Paroa Forest was the consequence of the collapse of soft erodible soils rather than skid site collapse which gives rise to these charges against Olsen. I accept that as being the case, having regard to the summary of facts. However, it is apparent from the photographs included in the summary that considerable volumes (and I can be no more specific than that) of sediment and and forestry waste were mobilised from skid sites and discharged in circumstances where they would inevitably enter water bodies and where they would add to sediment and forestry debris generated by land collapse. The fact that the proportions of forestry waste from different sources cannot be separated out does not minimise the offending in any way.

[15] The second component is that the Paroa discharges happened at the same time as and would have had cumulative effects with, all the other forestry discharges which caused environmental havoc across the region in June 2018. Mr Hughes contends that

while the summary of facts states that it was possible that waste from the discharge locations formed part of the material deposited on the Tolaga Bay Beach, the Court cannot sentence on possibilities. Again, he contends that there is no way to separate out what might have been derived from the land which is the subject of the offending. I accept that any contribution of forestry waste from this offending to the 47,000 cubic metres of logs and other waste on Tolaga Bay Beach cannot be quantified. However, I disagree with Mr Hughes' contention at a basic level.

[16] The definition of effect in the Resource Management Act includes:[4]

> (d) any cumulative effect which arises over time, or in combination with other effects—
>
> regardless of the scale, intensity, duration or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[17] These offences occurred in a catchment whose waters flow to Tolaga Bay. It is apparent from consideration of the summary of facts that forestry waste from the discharge sites was a potential contributor to the accumulation of waste which has had a high adverse impact on Tolaga Bay. I accept that its potential contribution is likely to be minor compared to other more substantial contributors but again, this does not minimise this offending. The key point is that these discharges had the potential to contribute to the cumulative adverse effect which has occurred at Tolaga Bay even accepting that the extent to which they actually did cannot be proved.

[18] The Resource Management Act is directed (at least in part) to the avoidance of risk of environmental harm and I am obliged to have regard to the potential effects of the discharge. Had the extent of contribution from this offence to the accumulation of waste at Tolaga Bay been shown to be more than just potential and had that contribution been quantifiable, that would have considerably increased the seriousness of the offending and consequent penalty starting point.

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[4] Resource Management Act 1991, s 3.

[19] I accept the Council's contention that Olsen's culpability for the offending arising from identified management failures is high. Seven skid sites had inadequate drainage contrary to resource consent conditions. There were unstable accumulations of slash on two skid sites, unstable slash had been left on the edges of five skid sites, and a culvert had not been flumed properly. As the manager of harvesting operations, Olsen was responsible to ensure that consent conditions were adhered to and failed in that responsibility. Additionally, its failures were in breach of the Forest Owners Code of Practice and, frankly, simple common sense.

[20] In its submissions Olsen contends that it is its conduct relating to the offending which must be determinative of starting point and I agree, but make two observations in that regard:

- Firstly, substantial breaches of conditions are of themselves indicative of poor forest management and demonstrate a disregard for the obligation to responsibly undertake harvesting operations;

- Secondly, it is apparent from the summary of facts that breach of conditions was a contributing factor to the offending discharges. I refer again to the various examples given in paras [32] – [36] of the Summary of Facts.

[21] I refer to the comment previously made by the Court in the *Juken* sentencing as to the inherent seriousness of failure to comply with conditions of consent. Olsen's failure in that regard is a significant factor in my assessment as to the high degree of culpability attaching to it.

[22] Mr Hughes made the point in his submissions that Council compliance monitoring in the forest was non-existent between 2016 and 2018, while properly acknowledging that this did not absolve Olsen of liability, an acknowledgement with which I concur.

[23] I am obliged to observe that the Council's failure to monitor harvesting operations in a large commercial forest established on land known to be highly vulnerable to slope failure, particularly after forestry clearance, over a two-year period

can only be described as disgraceful. Section 35(2)(d) of the Resource Management Act imposes a duty on local authorities to monitor the exercise of resource consents that have effect in their region or district. The Council failed to meet that obligation. Mr Hopkinson advises that the Council has taken steps to improve its monitoring practices. Whether or not these improved practices lead to the avoidance of incidents such as these in future remains to be seen.

[24] I record that the factor of deterrence is a matter of considerable weight in my sentencing considerations. It is important to give the message to those undertaking commercial harvesting operations on vulnerable country that they must do so in compliance with the terms of resource consents and best practice. Penalties should be set at levels which deter breaches of these conditions.

[25] I have given consideration to penalties imposed in other cases in this area arising out of the June 2018 storms, as I am required to do by s 8(e) of the Sentencing Act. In my view, the offending has significant areas of consistency with the *Juken* and *Aratu* cases even acknowledging that there are differences. I propose adopting a similar starting point of $200,000 for penalty considerations.

[26] Olsen has two previous convictions from 2010 for Resource Management Act offending in the Bay of Plenty which occurred in 2008. Counsel agree that there should be an uplift from the starting point to reflect that and I concur with their calculation in that regard.

[27] I observe that there is no standard rule of thumb as to appropriate uplift, although the *Yates* case suggests that 33 per cent is getting close to an upper limit. Factors such as the lapse of time since the previous offending, similarity with previous offending, relative seriousness of offending incidents and the number of offending incidents will all come into play.

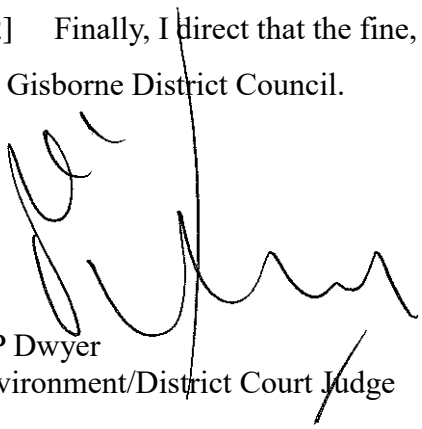
[28] In this case, I agree with counsel that 10 per cent is an appropriate uplift which will give a starting point figure before allowance for mitigating factors of $220,000.

[29] I concur with Mr Hopkinson's submission that there should be no discount for personal mitigating factors.

[30] I consider that a 10 per cent discount for a last minute guilty plea on the day before trial is consistent with the *Te Kinga* decision giving an end penalty of $198,000. Olsen is fined that amount accordingly.

[31] Olsen 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 of $130.

[32] Finally, I direct that the fine, less 10 per cent Crown deduction, is to be paid to the Gisborne District Council.



B P Dwyer
Environment/District Court Judge