

**IN THE DISTRICT COURT
AT GISBORNE**

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

**CRI-2020-016-001624
[2021] NZDC 15199**

GISBORNE DISTRICT COUNCIL
Prosecutor

v

TAIRĀWHITI PHARMACEUTICALS LTD
Defendant

Hearing: 22 July 2021

Appearances: A Hopkinson for the Prosecutor
M Atkinson for the Defendant (via AVL)

Judgment: 22 July 2021

SENTENCING NOTES OF JUDGE B P DWYER

[1] Tairāwhiti Pharmaceuticals Ltd (TPL) appears for sentence on two charges of breach of the Resource Management Act 1991 (RMA) brought by the Gisborne District Council (the Council). The first charge contained in charging document ending 0739 is that TPL contravened s 9(2) RMA by using land in contravention of a rule in the Council's Regional Plan (the Plan) by modifying a regionally significant wetland. The second charge contained in charging document ending 0740 is that it contravened s 14(2)(a) RMA by taking water from the wetland.

[2] TPL has pleaded guilty to both charges. Counsel advise that s 24A Sentencing Act 2002 is not applicable. There has been no suggestion that TPL should be discharged without conviction and it is hereby convicted accordingly.

[3] TPL has operated a factory extracting oil from the leaves of manuka trees at Te Araroa, north of Gisborne since 1993. In November 2019 it established a new 30-hectare manuka plantation near Te Araroa to supply product for the factory. The plantation occupies land in four separate but contiguous titles with four separate sets of multiple owners. TPL has entered into four separate forestry right agreements with the various owners allowing the plantation operation.

[4] Part of a regionally significant wetland known as the Te Whare Wetlands is located within parts of the four titles. These wetlands are identified as being of regional significance in the Plan. In order to establish the manuka plantation, in November 2019 the land to be planted was disced and harrowed. About 3.1 hectares of the work undertaken was within the identified wetlands and one and a half to 1.9 hectares of wetland vegetation was actually affected by these works.

[5] Additionally, 460 metres of channels were excavated in the wetlands to lower the water table and reduce the ponding and flooding of the plantation. Manuka trees were planted within that part of the wetlands which had been disced and harrowed.

[6] Following establishment of the plantation water was pumped from the wetlands to a portable sprayer which was used to irrigate the planted trees. I understand that this was over a period of about 51 days in January and February in 2020. TPL calculates that it used approximately five cubic metres of water on each day. The summary of facts records that the trees were not irrigated after February 2020.

[7] Neither the earthworks nor the water take were authorised by the Plan nor any other instruments or means provided under RMA such as a resource consent, hence these charges.

[8] The environment affected by the offending was the wetlands which are identified in the Plan as a Regionally Significant Wetland. The key values of the wetlands are described in these terms in schedule G17 of the Plan:

15. Schedule G17 of the TRMP records that the key values of the Te Whare Wetlands are as follows:

Freshwater and estuarine wetlands – Part of freshwater coastal complex. Supports Manuka, Flax, Raupo Reedlands, Kahikatea (*Cyperus Ustulatus*) Tree Sedgeland. High wildlife values supporting very large numbers of Wetland Birds including Bittern, Spotless Crake. Important habitat for Lamprey and Giant Kokopu.

[9] Schedule G17 also records that the wetlands are what is known as a “protection management area” and that again is described in the Summary of Facts in para 16:

16. Schedule G17 of the TRMP also records that the Te Whare Wetlands are a protection management area (*PMA PR6 Te Araroa*). A protection management area is defined in the TRMP as:

An area which provides a representative example of the District’s original natural ecosystems, including indigenous habitat and indigenous species. The mapped Protection Management Areas are derived from relevant survey reports undertaken by the Department of Conservation for the national Protected Natural Areas Programme. Information on the district’s Sites of Special Wildlife Interest has been included only where it coincides with PNAP survey information.

I note that these particular wetlands provide habitat for both threatened and common indigenous bird species. Threatened indigenous fish species such as lamprey and giant kōkopu are also found there.

[10] In addition to the Plan provisions the wetlands have been more widely recognised as an area of high ecological value for a number of years. They were identified as a Category 1 Priority Ecological Area by the Department of Conservation in 1988. Category 1 Areas are those which have 20 percent or less remaining indigenous vegetation.

[11] Wetlands play an important role in purification of water by retention of sediment and removal of nutrients. These functions are particularly important at the Te Whare Wetlands due to their proximity to the coast.

[12] Section 6(a) RMA provides that persons exercising functions under the Act are to recognise and provide for the preservation of the natural character of wetlands as a matter of national importance. When exercising a sentencing function such as this, I consider that s 6(a) requires the imposition of penalties which denounce and deter degradation of our wetlands at a level which reflects the national importance of their preservation. I am told that in the Gisborne region wetlands have been reduced to 1.75 per cent of their original extent.

[13] The Summary of Facts initially presented to the Court identified quite significant differences of opinion between the parties' ecologists as to the adverse effects occasioned by the works. The Council's ecologist (Ms A Salmon) was of the view that there was potential for significant adverse effects. The Defendant's ecologist (Dr H Dumbleton) said any adverse effects were at a considerably lower level.

[14] A disputed facts hearing clarified the extent of the works (i.e the physical extent or spread of the works) within the wetlands leading to amendments to the Summary of Facts clarifying the areas of disturbance I have previously cited. The matters remaining in dispute between the ecologists involved issues where expert witnesses might reasonably disagree. I am not sure that the Court's inexperienced judgment will necessarily add value to the mix. The important fact is that the ecologists agree that it is possible to mitigate and remedy any adverse effects by processes and works described in para 53(c) of the Summary of Facts and I understand that these matters have largely been undertaken to the satisfaction of the Council.

[15] The other matter which is of particular significance in my considerations is the fact that prior to its establishment as a manuka plantation much of the identified wetlands were grazed pasture. The adverse effects of grazing wetlands, particularly pertaining to sediment loss and nutrient discharge, are well recognised. My understanding is that the 1.5 to 1.9 hectares where wetland vegetation was disturbed will still have performed some wetland functions notwithstanding the grazing but the quality of the wetlands would have been degraded to some extent prior to the manuka being planted. There appears to be some disagreement between the ecologists as to whether or not planting manuka would have improved matters and again I do not intend to try and resolve that.

[16] The maximum penalty for this offending is \$600,000 for each offence. The Prosecutor suggests appropriate starting points of \$35,000 to \$40,000 on each charge. The Defendant suggests there should be a global starting point on both charges of \$30,000 all up.

[17] Dealing with the first issue as to whether I should identify separate penalties or proceed on a global basis and fix one starting point for both, I note that is a matter of judicial discretion. Factors such as proximity of time and place of the offending, whether the separate offences occurred as part of one ongoing offending incident, comparative seriousness of the different offences, the comparative effects of the different offences and the like will all come into play in that consideration.

[18] In this case both offences occurred over the same time period as part of the development of the manuka plantation. I will adopt a global starting point for penalty as Mr Atkinson and Ms Birch have suggested in their submissions for the Defendant. I observe the fact that the offending involved two separate and distinct charges is something that goes to starting point in my calculations as it relates to the seriousness of the offending where more than one offence was involved. There are a number of factors which have been of particular relevance for me in arriving at a starting point.

[19] The first is that the offending involved works in a vulnerable environment. Wetlands are a diminishing resource which are vulnerable to what might be regarded in isolation as minor nibbling away when any particular incident is looked at individually, but cumulatively the wetland resource across specific areas and New Zealand generally is diminished. As I noted previously, somewhere in the order of only 1.75 per cent of Gisborne region's original wetlands remain, so that even comparatively minor degradation of small areas has an impact on this important resource.

[20] Section 6(a) RMA seeks to protect wetlands from inappropriate development as a matter of national importance. That fact suggests that penalties for offending such as this, although apparently minor and largely inconsequential other than on a temporary basis (even that appears to have been minor) ought to be set at a level which marks the importance of wetlands and deters illegal works in them. That is particularly

the case where wetlands have been specifically identified in regional planning documents as these have been. Even acknowledging the diminished values attaching to some of the wetland area as a result of grazing, it still performed some wetland functions. However, I also recognise that the damage caused by the offending works and water take will be remedied. Had that not been the case, had the quality of the wetlands been higher than it was or damage to them more extensive, I would have adopted a much higher starting point than I will do in this case.

[21] The matters of carelessness and culpability are at issue between the Prosecutor and the Defendant. The Prosecutor submits that there was a high degree of carelessness on the part of TPL. Ms Birch and Mr Atkinson described the Defendant as being only moderately careless as to its obligations under RMA. They contended that the offending arose as a result of the Defendant being unaware that the wetlands were designated in the Plan and because the area developed did not have the appearance of a significant ecological area due to the effects of grazing there.

[22] Some support for that latter proposition can be found in the aerial and other photographs which I considered as part of the disputed facts hearing and because it is apparent that the Defendant sought to avoid areas which appeared to be of obvious ecological significance. I accept that the Defendant largely acted in ignorance in that regard, but I also consider that the possible need for a permit to irrigate crops and trees from agricultural and horticultural operations is common across the country. The fact that the Defendant was familiar with the water consent process through water takes for its factory is something to which it might reasonably be expected to have turned its mind. For this reason I concur with the moderately careless assessment advanced by the Defendant's counsel.

[23] I have considered the various starting points in the comparable cases to which I have been referred by counsel. They range from \$15,000 to \$70,000. The number of charges in the various cases ranges from one to three. None of the cases are on all fours with this case but I concur with the observation of Ms Birch for the Defendant that there is a certain commonality in terms of limited adverse effect with the *HB Properties*, *Dyer* and *Cambria* line of cases where starting points of \$30,000 were adopted.

[24] The distinguishing feature to which I propose to give some weight in this case is that the offending took place in wetlands which are formally noted as regionally significant in the Plan. I have accepted that the Defendant was unaware of that, however I consider that it is appropriate for the Court to mark the significance of the wetlands as a factor giving some additional weight to starting point above the comparable cases. I think that is consistent with the Court's obligation under s 6(a).

[25] For all of these reasons I determine that the appropriate starting point for penalty considerations for the two offences is the global figure of \$40,000.

[26] Mr Hopkinson made the point that penalties ought not be a licensing fee and that corporate bodies should not be in a position where they can simply regard fines as part of the cost of doing business. In this case I understand the Defendant to be a small, community-based business enabling local persons to receive a commercial return from communally owned lands which might otherwise be of limited productive value. In those circumstances I consider \$40,000 is not an insignificant amount.

[27] There will be a total reduction from that figure of 30 per cent being 5 per cent recognising past good character and 25 per cent for prompt early plea. I make no further allowance for the remedial works which have been done which were simply putting things in order. That gives an end all up fine of \$28,000 which I will divide equally between the two charges.

[28] Accordingly, on each charge Tairāwhiti Pharmaceuticals Ltd is fined the sum of \$14,000. In addition it will pay solicitors' costs of \$113 plus Court costs of \$130 on each charge.

[29] Finally, pursuant to s 342 RMA, I direct that the fines less 10 per cent Crown deduction are to be paid to Gisborne District Council.


B P Dwyer
Environment/ District Court Judge