

**IN THE DISTRICT COURT
AT HASTINGS**

**I TE KŌTI-Ā-ROHE
KI HERETAUNGA**

**CRI-2019-020-1916, 1917
[2020] NZDC 4414**

HAWKE'S BAY REGIONAL COUNCIL
Prosecutor

v

SANTO DRAINAGE & CONTRACTING LIMITED
Defendant

Hearing: 23 January 2020
Appearances: LJ Blomfield for the prosecutor
NM Graham for the defendant
Judgment: 30 June 2020

SENTENCING DECISION OF JUDGE MJL DICKEY

Introduction

[1] The defendant, Santo Drainage & Contracting Limited (**Santo Drainage**) has pleaded guilty to one charge under ss 15(2A) and 338 of the Resource Management Act 1991 (**the Act**). The charge is that on 1 May 2019 at 574 Lyndhurst Road, Frimley, Hastings (**the site**) it discharged a contaminant, namely smoke and its constituents from a rubbish fire containing prohibited materials to air in a manner that contravened Rules 19c and 20 of the Hawke's Bay Regional Resource Management Plan.

[2] The maximum penalty for the charge is a fine not exceeding \$600,000. It was agreed between counsel that a fine is the appropriate sentencing response, and I agree.

[3] The differences between counsel were in respect of the starting point that I should adopt, with the prosecutor submitting that an appropriate starting point is in the range of \$15,000-\$20,000. For the defendant, Ms Graham submitted that a starting point in the vicinity of \$12,000 is appropriate. There has been no suggestion that the defendant should be discharged without conviction.

Regulatory framework¹

[4] Outdoor fires are regulated by the Hawke's Bay Regional Resource Management Plan (**the Plan**). In order to control air quality over the winter period when smoke from household heating appliances can cause air pollution, outdoor fires of any sort are prohibited. Rule 19c applies and provides that the following is a non-complying activity:

Except as provided for in Rules 19, 19d, 19e, 20 and 20a the discharge of contaminants into air in the Hastings and Napier Airsheds from outdoor burning during the months of May, June, July or August.

[5] Outdoor fires are further regulated to prohibit the burning of certain items at any time of the year. Rule 20 applies and provides:

Except as provided for in Rules 19 and 20a the discharge of contaminants into air arising from the burning in the open, and/or in a small scale fuel burner of:

- any combination of metals and combustible materials, including coated or covered cables; or
- animal waste (excluding animal waste generated on production land), tyres and other rubber, waste oil, wood treated with chemicals (except wood pellets which comply with the definition of "wood pellets" in this Plan), oiled, painted or stained wood, chip board, asbestos, medical waste, pacemakers, biomechanical devices, or chemical waste, or
- synthetic material, including but not limited to, motor vehicle parts, foams, fibreglass, batteries, surface coating materials, tar or any type of plastic, or
- peat.

[6] Section 15(2A) of the Act provides that no person may discharge a contaminant into the air, or into or onto land, from a place or any other source in a manner that contravenes a regional rule, unless the discharge is expressly allowed by a National

¹ Summary of Facts, paragraphs 4 and 5.

Environmental Standard or other regulations; or is expressly allowed by a resource consent; or is an activity allowed by s 20A. None of the exceptions under s 15(2A) apply here.

Background²

[7] The defendant is a duly incorporated company based in Hawke's Bay. It carries out drainage and land contracting services. Mr Santo is a director of the company.

[8] Since mid-2017 Santo Drainage has provided land contracting services for the site owner and developer, Greenstone Developments Limited. The site is within the Hastings Airshed.

Offending on 1 May 2019 – discharge of smoke and its constituents to air³

[9] On 1 May 2019 an employee of Santo Drainage, with its knowledge and at its direction, started a fire on the site to dispose of waste material from the site. The waste material burnt on 1 May 2019 included treated timber, plastic pipe, general plastic products, plastic hose, cement culverts, wire and coated metals including a galvanised flue. Over a period of approximately 30 minutes the fire discharged a large plume of smoke visible from at least the Links Road/Expressway roundabout, six kilometres from the site.

[10] The discharge of smoke from the fire is an offence against s 15(2A) of the Act and is expressly prohibited by Rules 19c and 20 of the Plan.

Explanation⁴

[11] When spoken to by Regional Council officers Mr Santo admitted that Santo Drainage was responsible for the fire.

² Summary of Facts, paragraphs 1-3.

³ Summary of Facts, paragraphs 3, 6-11.

⁴ Summary of Facts, paragraph 10.

[12] I was informed by the prosecutor that Mr Santo confirmed that company employees lit the fire as part of a “clean-up”. When asked about the presence of certain materials that enforcement officers had seen in the fire (concrete culverts, plastics etc), Mr Santo acknowledged that material of that sort should not be burned (but rather should have gone to the tip). Although not included in the Summary of Facts, Ms Graham confirmed Santo Drainage’s acceptance of that description of the explanation.

[13] The prosecutor confirmed that Santo Drainage’s employees began putting the fire out immediately following a request from the Council officer.

Sentencing principles

[14] Against that background I adopt a starting point for the fine. The purpose and principles of sentencing under the Sentencing Act 2002 are relevant insofar as they are engaged by a particular case. Counsel referred me to *Machinery Movers Ltd v Auckland Regional Council*,⁵ *Selwyn Mews Ltd v Auckland City Council*,⁶ and *R v Conway*⁷ as to the matters to be taken into account in sentencing. The Court in *Thurston v Manawatu-Wanganui Regional Council*⁸ has set out considerations that frequently assume relevance in pollution sentencing, which include an assessment of the offender’s culpability for the offending, any infrastructural or other precautions taken to prevent the discharges, the vulnerability or ecological importance of the affected environment, the extent of the environmental damage, deterrence, the offender’s capacity to pay a fine, disregard for abatement notices or Council requirements, remedial steps taken to mitigate the offending or prevent future offending, and cooperation with enforcement authorities.

Environmental effects of the offending⁹

[15] Ms Blomfield described the local environment:

⁵ *Machinery Movers Ltd v Auckland Regional Council*, [1994] 1 NZLR 492.

⁶ *Selwyn Mews Ltd v Auckland City Council*, HC Auckland, CRI-2003-404-159, 160, 161, 30 April 2004.

⁷ *R v Conway*, [2005] NZRMA 274.

⁸ *Thurston v Manawatu-Wanganui Regional Council*, HC, Palmerston North, CRI-2009-454-24, 25 & 27, 27 August 2010, Miller J.

⁹ Summary of Facts, paragraphs 8-9.

- (a) the site is immediately adjacent to the Expressway;
- (b) the north/north-western side of the Expressway is sparsely populated orchard land;
- (c) there is a nursery business immediately adjacent to the site;
- (d) there are densely populated residential areas to the south, south-east and south-west of the site, with the nearest homes being 300-400 metres from the site;
- (e) there is also a new subdivision being built immediately adjacent to the site, which has a constant flow of tradespeople travelling to and from it.

Ms Graham accepted that description.

[16] Ms Blomfield also advised that the fire was noticed by an enforcement officer driving down the Expressway to attend another job. When the officer arrived at the site he saw a large fire which was fully ablaze. The fire was approximately 5m² in area and contained burnt material that was unrecognisable and newly added material including the prohibited items described above. Ms Graham accepted that description of the size and composition of the fire.

[17] The Summary of Facts outlined the adverse effects of open fires, including the burning of prohibited materials. Low temperatures associated with open burning promotes particulate formation as well as many toxic and potentially harmful chemicals. These are emitted at ground level, which hinders dispersion. The chemicals can be inhaled, or deposited into the environment where they can subsequently enter the human food chain.

[18] Prohibited items were identified in materials being burnt at the site. The burning of these items is not only associated with nuisance dense smoke, but also emissions of hazardous air pollutants known to cause cancer or serious health effects and that persist in the environment and accumulate in body tissue when ingested. These include polycyclic aromatic hydrocarbons and dioxin.

[19] Ms Blomfield submitted a memorandum from Dr Kathleen Kozyniak (Principal Scientist – Climate and Air at Hawke’s Bay Regional Council). That memorandum summarised the environmental effects of open burning of prohibited items. The summary contained in that memorandum was largely replicated in the Summary of Facts. Ms Blomfield submitted that it is the generic and latent effects described that comprise the environmental harm in this case. With reference to Dr Kozyniak’s memorandum Ms Graham accepted that it is the accumulation of effects that is of concern but submitted that there was no evidence of any lasting or measurable adverse effects on air quality in this case.

[20] The items that were burned on 1 May 2019 comprised material that is expressly prohibited from being burned under Rule 20 of the Plan. There are adverse effects associated with the burning of prohibited items: nuisance dense smoke and emissions of hazardous air pollutants that persist in the environment. In this case the fire discharged a large plume of smoke, visible from some 6km away. I accept that there is no evidence of any lasting or measurable adverse effects on air quality, but determine that the effects on the environment from this offending were moderately serious and confined to the potential for cumulative effects. I especially note that there are densely populated residential areas in the vicinity of the site.

Culpability of the defendant¹⁰

[21] Ms Blomfield submitted that the lighting of the fire was deliberate and that, while not a motivation for the fire, disposing of prohibited items would have resulted in cost savings to Santo Drainage. Ms Graham submitted that Mr Santo was unaware that he was committing an offence; that two weeks prior to the offence and before lighting a different fire he had checked the fire ban rules by telephone with the Council. He was not told that the winter Airshed ban came into place on 1 May and was not, therefore, aware of the rule.¹¹ Ms Graham submitted that Santo Drainage’s conduct was “ignorant of the law and reckless rather than premeditated”.¹²

¹⁰ Defendant’s submissions, paragraphs 11-15.

¹¹ Defendant’s submissions, paragraph 12.

¹² Defendant’s submissions, paragraph 11.

[22] Ms Graham further advised that Mr Santo said that he was not aware of the plastics in the burn pile, but admitted that he should have checked on what his staff was doing. The fire was extinguished by the placement of soil on top of it. I was informed that Santo Drainage sifted through the remains and took all the plastics and other waste material to the dump, and the soil and tree stumps were taken to a private landfill in north central Hawke's Bay. The costs were borne by Santo Drainage.¹³

[23] Ms Graham submitted that while Mr Santo was not aware of the winter Airshed rules and did not know that prohibited items were among the other general materials to be burnt, he candidly and immediately accepted responsibility for his staff's actions. He was cooperative with the Council, made himself available for interview, and a guilty plea was indicated at the first opportunity.¹⁴

[24] Santo Drainage was prepared to participate in restorative justice. The offer of restorative justice was not taken up by the Council because there were no complainants indicated to the Council who found themselves affected by the fire. If people had said they were affected the Council may have considered it. Ms Blomfield accepted that Santo Drainage's willingness to go through restorative justice should earn it some credit.

[25] I find Santo Drainage's culpability in this case to be high. Its conduct was highly careless and the discharge resulted from an unawareness of the relevant rules of the Plan. Further, its failure to take sufficient precautions as to what was being burned is unacceptable. The rules in the Plan are clear. The activity of open burning is prohibited at certain times of the year, and the burning of certain materials is prohibited at all times. The defendant breached both those rules. As a drainage and land contractor it should have been aware of the Plan rules relevant to its business.

Starting point

[26] The Court is required to take into account the general desirability of consistency with appropriate sentence levels in respect of similar offending. Counsel

¹³ Defendant's submissions, paragraph 13.

¹⁴ Defendant's submissions, paragraph 14.

referred me to a number of cases they said were relevant to my setting of the starting point. I have read through them and highlight only those I consider provide some assistance in understanding counsels' submissions on the starting point. For completeness I note the cases I was referred to: *Hawke's Bay Regional Council v Cavell*¹⁵ (**Cavell**), *Hawke's Bay Regional Council v Steevens* (**Steevens**),¹⁶ *Waikato District Council v Matijasevich*,¹⁷ *Otago Regional Council v Paterson*,¹⁸ *Bay of Plenty Regional Council v Cool Haven Limited* (**Cool Haven**),¹⁹ *Canterbury Regional Council v Yeatman* (**Yeatman**),²⁰ *Tasman District Council v Mytton* (**Mytton**),²¹ *Hawke's Bay Regional Council v Colville* (**Colville**),²² *Otago Regional Council v Bendall* (**Bendall**),²³ *Otago Regional Council v Silver Fern Farms Ltd* (**Silver Fern**)²⁴ and *Canterbury Regional Council v Hogg* (**Hogg**).²⁵

[27] Three of the cases to which I was referred are local. In *Cavell* the defendant faced charges in respect of fires on two separate dates. The fire material included vegetation, metal, painted timber and the like, and the remains of a house. A starting point of \$12,000 was adopted. In respect of another defendant who had been charged in relation to the house fire only (the *Steevens* case), a starting point of \$12,000 was adopted. In *Colville*, which involved the burning of demolition material from three beach houses, including asbestos, treated timber, plastic, metal, chip board and painted timber, a starting point of \$16,500 was adopted. Ms Blomfield submitted that a key difference between those cases and this is that in this case the charges involve a company. She submitted that another differentiator for this case may be that the fire was lit close to residential development and a subdivision under development, whereas some of the other cases involved more remote locations.

¹⁵ *Hawke's Bay Regional Council v Cavell* [2017] NZDC 12180.

¹⁶ *Hawke's Bay Regional Council v Steevens* DC Hastings, CRI-2016-020-003295, 24 May 2017.

¹⁷ *Waikato District Council v Matijasevich* [2018] NZDC 26911: one charge of burning 30-40 tyres – starting point \$12,000.

¹⁸ *Otago Regional Council v Paterson* [2015] NZDC 7128: one charge of burning material including rubber, plastic and tyres – starting point \$12,000.

¹⁹ *Bay of Plenty Regional Council v Cool Haven Limited* DC Tauranga, CRI-2013-063-001402, 12 September 2013.

²⁰ *Canterbury Regional Council v Yeatman* DC Christchurch, CRI-2011-003-000497, 30 November 2011.

²¹ *Tasman District Council v Mytton*, [2017] NZDC 9820.

²² *Hawke's Bay Regional Council v Colville* [2019] NZDC 2477.

²³ *Otago Regional Council v Bendall* DC Dunedin, CRI-2014-002-000012, 26 May 2014.

²⁴ *Otago Regional Council v Silver Fern Farms Ltd* DC Dunedin, CRI-2009-012-001320, 30 July 2009.

²⁵ *Canterbury Regional Council v Hogg* DC Christchurch, CRI-2010-009-017937, 27 July 2011.

[28] Ms Blomfield noted that higher starting points had been adopted by the Court in *Yeatman* for a large fire that burned 75 tyres (\$22,000), *Mytton* where the material being burned included an entire fibreglass boat, foam padding, plastics, electrical equipment and wiring (\$25,000) and *Colville*, which I outlined above (\$16,500).

[29] Two cases have some similarities with the present case: *Mytton* and *Colville*. In *Mytton*, the environment affected by the offending included farmland, residential, and industrial areas. The Court found it particularly significant that the fire was lit very close to a well-populated urban area, and also that it was a prime horticultural and viticultural area where pollution considerations are of high importance to those who are farming and selling their produce. Additionally, the fire was lit in an Airshed area, which was noted as being vulnerable to pollution; it was a particularly sensitive environment.

[30] In *Colville*, a matter to which the Court had particular regard was that the offence was committed by a developer in the course of his development business. The Court found that three consequences flow from that.²⁶

...

- Firstly, as the Court frequently observes, persons in business are expected to know the rules under which they must operate and comply with them. The nature of the materials being burnt here was such that you should have been on enquiry as to whether or not it was okay to burn them;
- Secondly, fines should be set at the level that they do not constitute just a licence fee as part of the costs of doing business; and
- The third consequence is that one of the purposes of sentencing is to send a signal to deter not only yourself but other persons in similar positions;

The combination of these factors requires that the penalty which I impose has some bite, even acknowledging the absence of proven adverse effects...

[31] Ms Graham for the defendant addressed the *Cavell* decision but differentiated it on the basis that there were fires on two separate occasions and at a larger scale, as they included the remains of a house. She submitted that the offending there was more serious than in the present case. She referred to *Cool Haven*, noting that the fire included plastic items and tyres. A starting point of \$15,000 was adopted. Finally, Ms Graham referred to three other cases where she submitted lower starting points

²⁶ *Hawke's Bay Regional Council v Colville*, above n 22, paragraph 12.

were adopted for comparable offences: *Bendall* (\$8,000),²⁷ *Silver Fern* (\$8,000),²⁸ and in *Hogg*²⁹ a starting point of \$13,000 was adopted for a fire that burned for 12 hours, with smoke that continued to be discharged for the following five days. Her concluding submission on the matter of starting point was to the effect that Ms Blomfield had referred to decisions where high starting points were adopted and that all those cases were arguably more serious than the present case.

[32] Ms Blomfield submitted that a starting point for the offending should be in the range of \$15,000-\$20,000, reflecting that the defendant is a company (for which the maximum fine is twice the level that can be imposed for individuals), and emphasising the proximity of the fire to a densely-populated residential area.³⁰ Ms Graham submitted that a starting point in the vicinity of \$12,000 is appropriate.³¹

[33] I have determined that the defendant was highly careless in permitting the fire to be lit. Certain factors exacerbated that action being the site's location within the Hastings' Airshed, the proximity of the site to a built-up residential area, the fact that the fire contained items that are prohibited from being burned under the Plan, and the fact that the defendant is a land contractor who should know better. I also take into account my assessment that the effects on the environment were moderate and confined to the potential for cumulative effects only.

[34] Having considered all those matters, I consider that a starting point of \$18,000 is appropriate.

Aggravating and mitigating factors

[35] No aggravating factors are apparent. The prosecutor pointed to the fact that Santo Drainage has come to the Council's attention in the past as a result of a complaint about dust emissions from the site, which resulted in warnings given but no

²⁷ *Otago Regional Council v Bendall*, see above n 23: two charges relating to fires in a rural area – starting point \$8,000.

²⁸ *Otago Regional Council v Silver Fern Farms Ltd*, see above n 24: one charge of open burning at trade premises in an industrial area – starting point \$8,000 (before RMA 2009 amendment to fine levels).

²⁹ *Canterbury Regional Council v Hogg*, see above n 25.

³⁰ Prosecutor's opening submissions, paragraph 28.

³¹ Defendant's submissions, paragraph 17.

other enforcement action being taken. Ms Blomfield accepted that a discount of five percent for previous good character could be allowed.

[36] Ms Graham submitted that Santo Drainage has been operating for 32 years, and that with the exception of a dust complaint there have been no issues at all. She submitted that discounts of between 10 to 15 percent are routinely applied to recognise good behaviour and there is no reason why this should not be afforded in this case.

[37] I note Ms Graham's advice that the company was prepared to enter into restorative justice but that the Council did not think that was appropriate. Ms Blomfield accepted, however, that its willingness to undertake restorative justice should earn it some credit. Ms Graham also said that Mr Santo is extremely remorseful and that this incident was very much an isolated one. I allow a discount of seven percent for Santo Drainage's previous good character and willingness to enter into restorative justice.

Guilty plea

[38] The prosecutor accepted that a discount to recognise the prompt plea of guilty is appropriate. The amount suggested was 25 percent. I accept that the full discount should be applied.³²

[39] I convict the defendant and impose a fine of \$12,555. I direct that 90 percent of that fine should be paid the Council pursuant to s 342 of the Resource Management Act.

Judge MJL Dickey
District Court Judge and Environment Judge

Date of authentication: 30/06/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

³² In accordance with the principles set out in *Hessell v R* [2011] 1 NZLR 607.