IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2020-016-001639
CRI-2020-016-001646
CRI-2020-016-001645
CRI-2020-016-001644
JUDGE VIA AVL
[2021] NZDC 5533

GISBORNE DISTRICT COUNCIL
Prosecutor

v

A F THOMPSON CONTRACTING LIMITED
SCARLY HEIGHTS LIMITED
JONATHAN NORMAN BAIN
PATRICK JOHN KERSHAW
Defendants

Hearing:	24 March 2021
Appearances:	A Hopkinson for the Prosecutor L Burkhardt for the Defendant A F Thompson O Manning for the Defendants Scarly Heights Ltd, Bain and Kershaw
Judgment:	24 March 2021

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] This is a sentencing of four defendants, Scarly Heights Limited (SHL), Jonathan Bain, Patrick Kershaw and A F Thompson Contracting Limited (Thompsons) on a series of charges brought by Gisborne District Council (the Council) for various breaches of the Resource Management Act.

[2] The charges are set out in a table in the summary of facts which I will incorporate into these sentencing notes

CRN 20016500-	Date	Charge	Provision	Maximum penalty
757 (Scarly Heights Ltd) 753 (Jonathan Bain) 749 (Patrick Kershaw) 741 (AF Thompson Contracting Ltd)	Between 16 January 2020 and 13 March 2020	Carrying out earthworks without a resource consent - contravention of rule C7.1.6(20) of the Tairāwhiti Resource Management Plan (**TRMP**)	Sections 338(1)(a) and 9(2) of the Resource Management Act 1991 (**RMA**)	Fine not exceeding $600,000 (for company) Fine not exceeding $300,000 or 2 years imprisonment (for individual)
759 (Scarly Heights Limited) 755 (Jonathan Bain) 751 (Patrick Kershaw) 743 (AF Thompson Contracting Ltd)	Between 16 January 2020 and 11 April 2020	Discharging sediment onto land where it may enter water	Sections 338(1)(a) and 15(1)(b) of the RMA	Fine not exceeding $600,000 (for company) Fine not exceeding $300,000 or 2 years imprisonment (for individual)
760 (Scarly Heights Limited) 756 (Jonathan Bain) 752 (Patrick Kershaw)	Between 14 March 2020 and 11 April 2020	Contravening an abatement notice	Section 338(1)(c) of the RMA	Fine not exceeding $600,000 (for company) Fine not exceeding $300,000 or 2 years imprisonment (for individual)

[3] In summary, all four Defendants face one charge each of breaching s 9(2) RMA by carrying out earthworks in contravention of the Tairāwhiti Resource Management Plan without a resource consent (charging documents ending 757, 753, 749 and 741). The four Defendants are also each charged with breaching s 15(1)(b) by discharging sediment onto land where it may enter water as it did (charging documents ending 759, 755, 751 and 743). Then SHL and Messrs Bain and Kershaw are also charged with breaching s 338(1)(c) by contravening an abatement notice (charging documents ending 760, 756 and752).

[4] The Defendants have all pleaded guilty to the charges against each of them. Counsel advise that s 24A Sentencing Act is not applicable. None of the Defendants seeks a discharge without conviction so each is hereby convicted of the charges against them.

[5] The offending occurred at various dates between January and April 2020 on a 10 hectare, steep, hilly, rural lifestyle block owned by SHL located at Scarlys Way, Okitu, about five kilometres east of Gisborne (the site/property). Mr Bain is a director and shareholder of SHL and Mr Kershaw is a shareholder. Thompsons is a local contracting company which undertook earthworks on the property under instructions from Messrs Bain and Kershaw. The earthworks were for the purposes of forming an access road to building platforms for houses and other related works. The property is situated on Land Overlay 2 of the District Plan where resource consents are required for any earthworks involving more than 50 cubic metres of soil disturbance in any three-month period.

[6] In November 2019 Mr Bain (together with his wife who is not now a defendant in the proceedings) made application to the Council for a resource consent to carry out earthworks involving a 220 metre long access way, a borrow to fill site and one building platform. The application identified that the proposal involved earthworks with a total volume of 6900 cubic metres, including 3700 cubic metres in the access road and 2560 cubic metres in the building platform. The application was originally filed by a planning consultant on Mr Bain's behalf. There appears to have been conflict between the consultant and the Bains leading to Mr Bain taking over management of the application.

[7] On 14 January 2020 Mr Bain wrote to the Council advising that he wanted to remove the earthworks for the building platform from the application. Resource consent was subsequently granted by the Council on 3 February 2020. The consent allowed 3700 cubic metres of earthworks to be carried out. The site plan appended to the consent stated that earthworks for a building platform shown on the original plans were excluded from the consent. The consent was subject to a number of conditions and did not allow discharges of sediment off site.

[8] Mr Bain commenced discussions with Thompsons about doing the earthworks on the property in January 2020. On 16 January he sent Thompsons a copy of the initial resource consent plan showing the house platform. Thompsons started earthworks in mid-February 2020. Mr Bain failed to give notice to the Council that earthworks had commenced notwithstanding that condition 3 of the resource consent required such notice be given.

[9] On 17 February 2020 Mr Kershaw sent emails to Thompsons containing plans and instructions for the earthworks to be undertaken which included five building sites. Between 17 February and 11 March 2020 Thompsons carried out large scale earthworks involving:

- Formation of the access road allowed by the consent;
- Formation of additional unconsented access tracks including forming or reinstating a track across a stream;
- Construction of two building platforms;
- Levelling an area for stables;
- 10,750 cubic metres of earthworks as opposed to the 3700 cubic metres allowed by the resource consent.

Obviously, these works were well beyond those which were allowed and form the basis of the land use charges against the Defendants. There is a combination of two factors involved in those charges - breach of conditions so that consented works were not carried out as expressly allowed by the resource consent and doing additional works which were not consented at all.

[10] On 11 March 2020 the Council had received queries from neighbours about the extent of earthworks being undertaken on the property. Enforcement officers went out to inspect and found the extent of works which I have just described.

[11] On 12 March 2020 the Council sent Mr Kershaw an email about the steps necessary to stabilise earthworks on the site from a rain event which was apparently anticipated on 14 March. On 13 March the Council inspected the site with a consultant engineer and also on that date issued abatement notices against SHL and Messrs Bain and Kershaw requiring immediate cessation of sediment discharge to land which might enter water and cessation of the breach of various conditions of the resource consent relating to silt and erosion control processes. An inspection of the property by a compliance officer on 23 March found that works were underway to comply with the abatement notices.

[12] On 30 March 2020 large amounts of sediment laden water flowed through the property onto three different locations beyond the property boundary including a pond on a neighbouring property, a tributary of the Hamanatua Stream and a roadside drain. The tributary was highly discoloured.

[13] On 10 April 2020 there was a further incident of discharge of sediment laden water from the property into the neighbouring pond. These incidents are the basis of the charges relating to discharge of sediment and breach of the abatement notice (the abatement notice charges do not include Thompsons).

[14] In terms of environmental effects the Prosecutor's submission contends that as a result of the earthworks the site was vulnerable to collapse in eight areas. That contention is supported by the engineering report obtained by the Council. More significantly the works led to discharges of sediment I have briefly described and in each case sediment entered water bodies beyond the property.

[15] The neighbouring pond is described as a large natural water body and condition 12 of the resource consent directly sought to protect it from sediment generated by the approved earthworks. I do not know what the consequences of the sediment discharges on the pond were. I have no information before me regarding that.

[16] The contaminated tributary was found to be significantly discoloured on 30 March. Other than that I have no information before me as to the values of either the tributary nor the Hamanatua Stream into it which flows nor as to the effect of

sedimentation on those values. That is typical of many of the contaminant discharge incidents that come before the Court. The context in which that must be viewed may be found in the NIWA website page, Sediment Dynamics in New Zealand Rivers (4 July 2019) which records that fine sediment is the most pervasive and significant contaminant in New Zealand rivers, estuaries and coastal waters.

[17] The effects of sediment deposition are well recognised. Sediment affects the clarity of the waters in which it is discharged, smothers the bed of water bodies and interferes with the ability of fish to feed, breathe and breed. Sediment accumulates with other depositions of sediment from other works and natural causes, is mobilised and travels downstream into our coastal waters. It is frequently not possible to identify the contribution to this process made by any one discharge event. The matter of concern to the Court is the cumulative effects of the myriad of small, individually insignificant discharges on our waterways. Individual sediment discharges which may be of little account in themselves are part of the wider picture which the Court must take into account.

[18] The maximum penalty for this offending is $600,000 for SHL and Thompsons and $300,000 for Messrs Bain and Kershaw. The parties have approached sentencing on the basis that SHL and Messrs Bain and Kershaw should be sentenced on a global basis because of their connectivity which means that a penalty against one effectively comes out of the pocket of the other. I concur with that. Obviously Thompsons will be sentenced separately from the other Defendants.

[19] The Prosecutor submits that appropriate penalty starting points are $80,000 to $90,000 for SHL and Messrs Bain and Kershaw, globally on the ss 9 and 15 charges and $20,000 to $30,000 on the abatement notice charges. For Thompsons the Prosecutor suggests a starting point of $50,000 to $60,000 globally on the ss 9 and 15 charges.

[20] Ms Manning for SHL and Messrs Bain and Kershaw submits corresponding figures of $50,000 to $60,000 and $15,000 are appropriate. Ms Burkhardt for Thompsons submits that $25,000 to $30,000 is the appropriate starting figure.

[21] In dealing with all of the Defendants I have accepted that the environmental effects of the offending are the generic, unidentified or unidentifiable cumulative effects I have described previously. Had any direct, provable adverse effects been established I would have almost certainly adopted higher starting points than I will do.

[22] Also, in dealing with both sets of Defendants I note that in each case (other than the abatement notice offence) we are dealing with two separately identifiable offences. Firstly, earthworks offences involving breaches of conditions of a resource consent as well as unconsented works and secondly, consequential unlawful discharges of sediment.

[23] The fact that the earthworks offending involved breaches of the terms of a resource consent is a serious aggravating factor in the case of SHL and Messrs Bain and Kershaw. A resource consent had been obtained in Mr Bain's name containing conditions intended to avoid, remedy or mitigate adverse effects of the identified and approved earthworks.

[24] Had Mr Bain as applicant advised the Council that he would not familiarise himself with the conditions of the consent and/or would not comply with them he would not have been granted the consent he obtained. If the Defendants had complied with condition 3 of the consent and notified the Council that earthworks were about to commence that would have given the Council the opportunity to monitor exercise of consent which could have prevented the extensive illegal earthworks which did occur and the subsequent discharge of sediment. Compliance with the other conditions of consent (particularly those requiring establishment and maintenance of identified sediment and erosion control measures under supervision of a qualified engineer) might have avoided the discharges altogether. Compliance with conditions of resource consents lies at the heart of the resource consent system and failure to comply with conditions is an inherently serious and aggravating factor in my sentencing considerations.

[25] Further, in relation to that is that, many of the earthworks were undertaken without resource consent in any event. Ms Manning has endeavoured to explain to the Court how it came to be that two building platforms were established on the

property, notwithstanding the fact that the one building platform which had been applied for was removed from the resource consent application by Mr Bain. Counsel tenders the explanation that Mr Bain had confused the term "building platform" with the term "building consent" meaning, as I understand it, that it was the actual construction of a building that he intended to withdraw from the application. That explanation does not credibly begin to explain or justify what happened in this case for a number of reasons.

[26] Firstly, the application for resource consent was for (among other things) a 40 x 37 metre building platform, not for a building on it. The building platform was shown on the site plan. Mr Bain's email to the Council on 14 January 2020 confirmed that he wanted to… "remove the earthworks for the building platform on the consent application" (my emphasis). His own terminology makes the explanation as to seeking to remove the building consent which had not been applied for totally implausible. Mr Bain directly sought to remove earthworks for a building platform from the application. Further to that, I note that the plan appended to the consent from the Council stated that the building platform had been removed and the volume of earthworks approved had been amended accordingly.

[27] Secondly even if that explanation was accepted (and it is not), that does not begin to explain how two platforms were established on the property when only one was applied for in the first place. Nor does it explain how additional access tracks beyond those shown on the consent application came to be created. Nor does it explain how 10,750 cubic metres of earthworks were undertaken when only 3700 cubic metres were allowed by the resource consent.

[28] Mr Bain was well aware of what had been applied for as an email he sent on 16 January 2020 included plans for the access road, building platform and site plan which had been included in the original application. It appears that he was frustrated that a delay in supply of information to the Council about the building platform by his (then) resource consent advisor was holding up the application and it was in that context that he withdrew the earthworks from the application.

[29] Mr Hopkinson characterises the offending as deliberate on the part of SHL and Mr Bain. The information before the Court strongly supports that proposition. On the most generous conceivable interpretation of events, Mr Bain acted in frustration at delay in obtaining resource consent and did not turn his mind to the consequences of undertaking works beyond the consent all together. That was so reckless as to border on deliberateness in any event. Culpability for the offending is accordingly at the very highest level in Mr Bain's case and through him on SHL.

[30] I accept there is a lesser degree of culpability attaching to Mr Kershaw who came into the picture attempting to help when the relationship between Mr Bain and his planning consultant had gone sour. However, it is apparent that Mr Kershaw did not read the resource consent although he was well aware the works required such a consent and that one had been obtained. There was a high degree of carelessness on his part for that reason. I will recognise that there was a lesser degree of responsibility attaching to him in my apportionment of the fines which I will impose on the three related Defendants.

[31] I have considered comparative cases for the purposes of s 8(e) of the Sentencing Act. I concur with Ms Manning's observation that none of the cases cited by counsel in these proceedings are on all fours with the facts of this case. I note the wide range of starting points identified in the various cases.

[32] I have had regard to all of these matters. Additionally, I record that I regard deterrence as a significant factor in considering appropriate penalty in this case which is a case of a developer failing to meet conditions of a resource consent and failing to obtain resource consent for works which must have obviously required consent. That developer and others must be discouraged from acting in that manner. As I had observed previously the breach of conditions of resource consent and undertaking works substantially beyond consented work are themselves significant factors in my considerations. When that is combined with the deliberate or reckless aspect, I consider that the appropriate starting point for penalty considerations is the global sum of $100,000 for the s 9(2) and s 15(1)(b) offending. I will apportion that at $40,000 each to SHL and Mr Bain and $20,000 to Mr Kershaw. I will adopt a starting point of $20,000 on the breach of the abatement notice. I consider that figure acknowledges

compliance issues which arose due to Covid 19 making completion of work difficult and I would apportion that $8000 each to SHL and Mr Bain and $4000 to Mr Kershaw.

[33] All three Defendants receive a discount of 25 per cent on account of their prompt guilty pleas with SHL and Mr Kershaw receiving an additional 5 per cent on account of past good character. I make no further allowance for remorse or the like. I acknowledge that the Defendants willingly undertook remedial works as of course they should have done. In any event they were largely obliged to do so by abatement notice so I make no allowance for that. Accordingly, I determine as follows

[34] On the charge contained in charging document ending 757, Scarly Heights Limited is fined the sum of $14,000. On the charge contained in charging document ending 759 Scarly Heights Limited is fined the sum of $14,000. On the charge contained in charging document ending 760 Scarly Heights Limited is fined the sum of $5,600, a total of $33,600.

[35] On the charge contained in charging document ending 753 Jonathan Bain is fined the sum of $15,000. On the charge contained in charging document ending 755 Jonathan Bain is fined the sum of $15,000. On the charge contained in charging document ending 756 Jonathan Bain is fined the sum of $6000, a total of $36,000.

[36] On the charge contained in charging document ending 749 Patrick Kershaw is fined the sum of $7000. On the charge contained in charging document ending 751 Patrick Kershaw is fined the sum of $7000. On the charge contained in charging document ending 752 Patrick Kershaw is fined the sum of $2,800. A total of $16,800.

[37] Turning now to Thompsons, I note that its situation differs from that of the earlier Defendants in that it was not involved in the resource consent process but came in to the picture when contracted to carry out earthworks on the property. Some of my earlier observations are accordingly not pertinent to it, however the observations as to effects and significance of discharge of sediment into waterways are obviously applicable as are my comments regarding the need to comply with the terms of resource consents when undertaking works pursuant to such consents.

[38] Thompsons was aware the works to be undertaken required resource consent but nevertheless took no steps to acquaint itself with the terms of that resource consent, to obtain copies of the resource consent or the plans forming part of the consent. This Court comments regularly as to the obligation on persons such as contractors undertaking earthworks to be aware of the rules under which they must operate. Thompsons is a forestry and general contractor. Undertaking work in these occupations in most parts of New Zealand routinely requires obtaining resource consents and complying with their conditions. I find it astounding that Thompsons undertook work involving 10,000 cubic metres of earthworks without checking what the applicable rules or standards or conditions under which it had to operate the work were. Ms Burkhardt submitted that Thompsons believed it had done the works in a competent manner but the question must be asked how could that be so when it had never checked the resource consent to see precisely what it was required to do by the consent and to what standard. In particular, earthworks and forestry contractors generally must be aware of the need to avoid discharges of sediment to waterways.

[39] It is apparent Thompsons was misled by the previous Defendants who did not advise it of the terms of the resource consent Mr Bain had obtained and provided plans to Thompsons showing additional works beyond what had been consented. Messrs Bain and Kershaw gave instructions to Thompsons as to what they wanted to be done, but then left it up to Thompsons as to how to do it.

[40] It seems that Thompsons acted in good faith on the basis of the information and instructions given to it by the other Defendants. Its fault in the offending lies in its failure make any query or investigation at all into the extent of the work it was legally entitled to undertake and the conditions under which it had to undertake that work. It was reckless in not doing so. There is accordingly a high degree of culpability attaching to it, but less than the other Defendants.

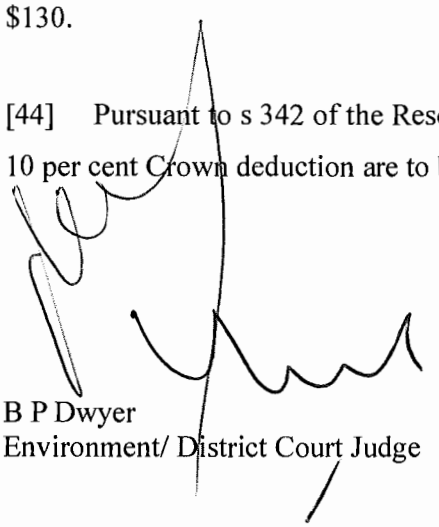
[41] Taking all of those matters into account I determine that the appropriate starting point for penalty consideration for Thompsons is the global sum of $50,000 to be divided equally between the two charges. I will reduce the starting point by a total of 25 per cent for the prompt guilty plea. Ms Burkhardt has suggested that a further discount might be given notwithstanding information as to unsatisfactory previous

compliance by this defendant with RMA requirements. I make the point that the discount which is given is a positive credit for past good character and that the failure to apply such a credit is not an additional penalty. In this case the Defendant cannot claim credit for past good character because of its previous unsatisfactory compliance record.

[42] Accordingly, on the charge contained in the charging document ending 741 A F Thompson Contracting Limited is fined the sum of $18,750. On the charge contained in charging document ending 743 A F Thompson Contracting Limited is fined the sum of $18,750.

[43] In all cases the Defendants will pay solicitor costs in accordance with the Costs in Criminal Cases Regulations (fixed by the Registrar if need be) and Court costs of $130.

[44] Pursuant to s 342 of the Resource Management Act 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