**IN THE DISTRICT COURT**
**AT GISBORNE**

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

**CRI-2018-016-002420**
**JUDGE VIA AVL**
**[2020] NZDC 11112**

**GISBORNE DISTRICT COUNCIL**
Prosecutor

v

**DNS FOREST PRODUCTS 2009 LIMITED**
Defendant

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| Hearing: | 15 June 2020 |
| Appearances: | A Hopkinson for the Prosecutor<br>M Atkinson for the Defendant |
| Judgment: | 15 June 2020 |

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**SENTENCING NOTES OF JUDGE B P DWYER**

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[1] DNS Forest Products (2009) Limited (DNS) appears for sentence on one charge of breach of s 15(1)(b) Resource Management Act 1991 (RMA) by discharging a contaminant; namely, slash, logging debris, waste logging material and/or sediment (forestry waste) onto land in circumstances where it might have entered water as it did in fact do. The charge is set out in full in charging document CRN ending 1490 and is brought by Gisborne District Council (the Council).

[2] DNS has pleaded guilty to the charge. It seeks a discharge without conviction. I will return to that matter in due course.

[3] Section 24A Sentencing Act 2002 is not applicable in this case as the victim of the offending declined to participate in a restorative justice conference.

[4] The offending occurred between 1 June 2017 and 10 July 2018 at Makiri Forest, a 493-hectare plantation forest located about 38 kilometres from Gisborne in the headwaters of the Waihora Valley. DNS held a resource consent enabling (and was responsible for) harvesting of the forest and related works, although the forest was actually owned by another entity.

[5] On 9 November 2016 the Council granted DNS a land use resource consent allowing the formation of 11.1 kilometres of roads, the construction of 28 landings and pads, the harvesting of 398 hectares of trees and extraction of logs. The consent was granted on a number of conditions, including the following relevant conditions set out in paras 21(a) to (g) of the summary of facts:[1]

> (a) The proposal shall proceed in accordance with the information and plans submitted by the consent holder in support of the application except as amended by the conditions below (Condition 1);
>
> (b) On slopes greater than 25 degrees, fill used in compaction of road and landing formations or sidecast to waste shall be held in place by benching, compaction, armouring or a combination of these such that it does not directly or indirectly enter the watercourses shown in blue on the attached map (Condition 8);
>
> (c) Runoff onto landings is to be intercepted by cut-off drains and is to discharge clear of any fill (Condition 10);
>
> (d) Water table culverts shall be installed and shall not discharge directly onto fill or sidecast material (Condition 11);
>
> (e) Cut-off drains are to be installed at a maximum spacing of one every 50 metres along arterial tracks to disperse water and prevent ponding and scouring following harvesting (Condition 14);
>
> (f) Ephemeral channels draining runoff are to be kept open (Condition 18);
>
> (g) At the conclusion of logging at each landing, no unstable accumulation of slash, log ends, tree heads or waste logging material, including mixed in spoil are to be left on or beneath landing edges in situations where they may move downhill into the watercourses shown in plain blue on the consent map (Condition 23).

[1] Summary of facts at [21].

[6] The consent did not authorise discharges of forestry waste into water or onto land in circumstances where it might possibly enter water.

[7] In early 2017 DNS entered into contracts with A & R Logging Limited (A & R) and Logic Forest Solutions (Logic). A & R was to construct roads, harvest trees and remove the logs. Logic was to oversee and manage that process. Contract documents required these contractors to comply with all resource management requirements and the like.

[8] Work in the forest began in February 2017. Between 1 June 2017 and 17 January 2018 A & R carried out forest harvesting operations in the south-east part of Makiri Forest including construction of a number of skid sites, pads and roads in between them. Logic oversaw the process, carried out audits of A & R's work and reported regularly to DNS which marketed and sold the logs. In none of its reports did Logic advise DNS that resource consent conditions were being breached and many of the reports stated that all consent conditions had been met. DNS staff or directors visited the forest on about five or six occasions over this period.

[9] In late 2017 there was fall-out between DNS and the two contracting entities. A & R and Logic quit operations in the forest in January 2018. At that time they had not completed required post-harvest work such as pulling slash back from the edge of landings and reinstating water controls to divert water away from skid sites.

[10] The summary of facts records that DNS attempted to find another contractor to take on work, in particular stabilisation of slash sites and reinstatement of drains before June 2018 but was unable to do so by that date, although it had engaged a roading contractor to clear slips and drains on the main access road in the forest.

[11] On 3 - 4 June and 11 - 12 June 2018 there were substantial rain events on the east coast of the North Island which led to large volumes of trees and forestry waste being mobilised from plantation forests. The second of these two events had a greater impact on the Makiri Forest. There were massive depositions of trees and forestry waste onto neighbouring properties, numerous water bodies and into coastal areas across the region. These incidents were highly publicised. Subsequently the Council

commenced an investigation into what had happened and a number of prosecutions have followed.

[12] This prosecution arose as a result of an inspection of Makiri Forest undertaken by the Council on 10 July 2018. The summary of facts records what was discovered in these terms at para 43.[2]

> (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 though 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.

[13] I record that it is the consequences of landing site failures described in paras 43(e) and (f) which are the basis of the charge against DNS. The Council apparently regards the other failures as being the responsibility of the contractors.

[14] The environmental effects of the discharge of the forestry waste from the landing sites was described in paras 54 to 56 of the summary of facts:[3]

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[2] Summary of facts at [43].
[3] Summary of facts at [54] – [56].

[54] On 16 October 2018 a Council ecologist carried out an assessment of streams and watercourses in Makiri Forest to assess the effects of the discharge of slash, logging debris, waste logging material and sediment on stream ecosystems in Makiri Forest.

[55] The Council ecologist observed the following adverse effects on tributaries and streams in the forest:

(a) The collapse from landing 11 resulted in woody debris and large amounts of sediment moving down the gully and into the tributary of the Waihora River.

(b) The collapse from landing 9 was the largest failure and resulted in woody debris and sediment migrating down the gully, damaging the riparian areas and depositing woody debris and sediment into the tributaries of the Waihora River and into the Waihora River itself. The damage to the stream bed and surrounding riparian area was described as "extreme".

(c) Invertebrate species in the Waihora River did not appear to have been adversely affected by the landing failures. This is probably due to the large buffer that the mature unharvested trees have provided.

(d) Assessment of invertebrate species in the tributaries of the Waihora River indicates those tributaries suffered some degradation becoming more severe in streams closer to where the landing failures occurred.

(e) Remediation is needed to address the issues resulting from the landslides and potential ongoing sedimentation and erosion.

(f) Overall, the harvesting operation at Makiri Forest resulted in the release of large loads of sediment into tributaries of the Waihora River. Woody debris has damaged riparian margins, exposing large areas of stream bank and increasing the risk of stream bank erosion and further sediment migration into tributary streams and the Waihora River itself. The removal of riparian vegetation will influence stream temperatures. There was a noticeable decline in quality of tributary streams in and near Makiri Forest compared with other watercourses in the area which were surrounded by mature forests which had not been logged.

[56] The discharges of slash from Makiri Forest in June 2018 affected the neighbouring farm – Matuku Station. The Waihora Stream flows through that farm and after the second rain event in June 2018 large amounts of slash and sediment washed down the Waihora Stream onto the farm. The owners of the farm spent approximately $2000 on fencing materials and time cleaning up the sediment and slash that had washed downstream from Makiri Forest.

[15] There was no dispute between counsel as to the principles applicable to resource management sentencing which I am required to apply and undertake in this

sentencing. There is a difference between them as to the application which has been made for discharge without conviction.

[16] I note that the maximum penalty for this offender, being a corporate entity, is the sum of $600,000. Fixing the starting-point for penalty raises similar issues to those which I previously addressed in other forestry discharge sentencings in this region including the *Gisborne District Council v Juken New Zealand Limited* (*Juken*) case.[4]

[17] I commence my discussion in that regard by recording that 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.

[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.

[19] As I did in the *Juken* case, I note the serious aspect to the offending which arises in this case out of failure to comply with consent conditions that were imposed to avoid remedy or mitigate adverse effects of forestry-related works. This is a significant factor in assessing the seriousness of the offending even accepting that DNS was not on the job checking these matters itself.

[20] DNS was a commercial forest entity undertaking its core business which must be expected to comply with best practice and to pay an appropriate commercial penalty when it fails to do so.

[21] As I have also done in other sentencings in this region, I record that deterrence of bad practice in the forestry industry is a matter of real importance. There are extensive plantings on vulnerable land in Gisborne District and sentencings for

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[4] *Gisborne District Council v Juken New Zealand Ltd* [2019] NZDC 24075.

offending such as this must be set at a level which drives compliance and deters poor practice.

[22] Evidence of the environmental effects of this offending is largely generic in character. I have no information before me as to the values of the waterways impacted by the discharges nor any specific impact on those values. The discharges in this case can most generously be described as having made a real but indefinable contribution to the levels of sediment and other forestry contaminants in the waterways of this catchment. However, at a general level it is well recognised that sediment in waterways:

- Affects the clarity of water into which it is discharged;
- Impacts on the ability of fish to find food in streams;
- Smothers the benthos of water bodies affecting the ability of plants and marine animals to live there;
- Interferes with fish breathing systems;
- Adds to past depositions and is added to by future depositions, so it accumulates and is mobilised and merged downstream into other rivers, streams and water systems and ultimately into marine coastal waters.

[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.

[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.

[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.

[26] Accordingly, I attribute a significant degree of culpability to DNS entirely relating to that five-month period.

[27] I have considered the various cases referred to me by counsel for the purposes of s 8(e) Sentencing Act. Referring to the most relevant comparisons in this case, starting-points range from $100,000 in *Marlborough District Council v Laurie Forestry Services Limited* to $200,000 in *Juken* and *Gisborne District Council v Aratu Forests Limited*.[5] I concur with the proposition that *Laurie* (where there was one skid site failure - albeit with significant environmental consequences) was less serious than the offending in this case and that *Juken* (11 skid sites) and *Aratu* (eight skid sites) both with similar effects, were more serious.

[28] I have determined that the appropriate starting-point for penalty in this case is $150,000.

[29] I have chosen that figure not because it is half way between the other cases to which I have referred, but because:

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[5] *Marlborough District Council v Laurie Forestry Services Ltd* [2019] NZDC 2602; *Gisborne District Council v Juken NZ Ltd* [2019] NZDC 24075; and *Gisborne District Council v Aratu Forests Ltd* [2020] NZDC 2808.

- I consider it reflects that the offending was less serious than *Juken* and *Aratu* on the basis of a lesser number of skid site failures;

- It has regard to the features of insidious but indefinable adverse effect of this sort of offending on waterways in these vulnerable catchments;

- It marks the seriousness of offending of this sort in a vulnerable environment where a high degree of care is required;

- It sends a significant deterrent signal in a region where forestry operations continue on a large scale;

- It reflects the seriousness of offending which involves breach of resource consent conditions;

- It constitutes a significant economic penalty for offending undertaken as part of a commercial activity;

- It is 25 percent of the maximum penalty so recognises that this offending does not fall into the higher penalty range to which a corporate defendant may be subject;

- Finally, I repeat the factor I have referred to previously, that DNS was the consent holder and was the party ultimately responsible to ensure that the job was "done right".

[30] I will reduce the starting-point by five percent on account of the Defendant's past good character but make no allowance for the costs incurred in complying with an abatement notice issued to bring matters into the state they should have been.

[31] A guilty plea was entered 10 days before trial was due to commence. Mr Atkinson has suggested that a full discount of 25 percent should be allowed from starting-point as the parties were negotiating issues relating to the basis on which the Defendant might enter a guilty plea. However, it has had the benefit of that agreement which led to the withdrawal of another charge. The Council was required to prepare

for trial on this charge in which a guilty plea was entered very late in the piece, some 10 days before commencement of trial.

[32] The Prosecution has suggested a reduction of 10 percent from starting-point should be allowed. I have determined to allow a reduction of 12½ percent which I note is half the "standard" 25 percent reduction. In doing so I have had regard to the *Te Kinga* case where a 10 percent reduction was allowed by the High Court for a guilty plea entered on the day trial was intended to start.[6] I think the reduction by half of the 25 percent is appropriate.

[33] Those findings bring me to the matter of discharge without conviction which DNS seeks. The basis on which I might grant such a discharge is to be found in ss 106 and 107 Sentencing Act which provide, in summary, that a Court must not grant a discharge without conviction unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending. In deciding whether or not to grant a discharge, a Court is required to take a broad view of all relevant facts and circumstances.

[34] Working backwards, I find that this was an offence of some degree of gravity. It involved a commercial forester carelessly discharging contaminants into water and would attract a fine (on the basis of my earlier calculations and allowing for the credits I have determined) of $124,700. So, this is an offence of some moment.

[35] Use of the term "out of all proportion" suggests that the test creates a high bar. The test is not that there are no consequences of conviction but there would be a real and substantial disproportionality between the two. It is intended that sentencing should have consequences which include denunciation and deterrence of offending which damages the environment or has the potential to do so.

[36] The direct and indirect consequence of conviction to which Mr Atkinson points is found in paras 53 to 55 of his submissions where he contends as follows:[7]

> [53] Despite the fact that A & R and Logic were the principal offenders and the parties with the greatest culpability for the offending, the Council chose to withdraw the charges laid against A & R and Logic immediately after DNS

[6] *Te Kinga Farms Limited v West Coast Regional Council* [2015] NZHC 293.
[7] Defence submissions dated 10 June 2020 at [53]-[55].

entered its guilty plea. This surprising action by the Council creates the potential for gross disparity in treatment of the co-offenders. It is respectfully submitted that this issue must be addressed by the Court when considering the sentence to be imposed on DNS.

[54] Section 8(e) Sentencing Act 2002 provides:

> *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 offending in respect of similar offenders committing similar offences in similar circumstances.*

[55] It is submitted that the only appropriate sentence is a discharge without conviction. Any other outcome would result in the disproportionate treatment between DNS and its co-offenders which would offend against the principle of equal justice.

[37] Mr Atkinson put considerable emphasis in his submissions on the provisions of s 8(e) Sentencing Act. There is no question in my mind that the application of the provisions of s 8 generally can be relevant factors in determining whether or not to grant a discharge (and probably on the question of proportionality as well) Mr Atkinson cited McMullin J's statement in *Lawson* at para 57 of his submissions:[8]

> *... a marked difference in sentences imposed on co-offenders, and for which no justification can be shown, may be of importance in the administration of justice generally in that such a marked and unjustified difference will tend to bring the administration of justice into disrepute. The Courts must bear in mind that public confidence in the administration of justice is best preserved if justice appears to be administered even-handedly. It is for this reason that a disparity in sentence imposed on co-offenders may justify a reduction in a sentence imposed on one which would otherwise be appropriate. But the test of intervention by an appellate Court is not merely whether an offender feels a sense of grievance over the sentence imposed on him compared with that imposed on his fellow offender but whether the disparity is such not to be consonant with the appearance of justice.*

[38] Mr Atkinson referred to a number of cases where offenders were given discharges without conviction by appellate courts on the basis that there should be parity between co-offenders.[9]

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[8] At [57]; *R v Lawson* [1982] 2 NZLR 219 (CA).

[9] *Smith v Police* HC Dunedin AP17/91, 10/4/1991, [1991] BCL 943; *Rutter v Police* AP43/01 Napier High Court, 16/11/2001; *Alshamsi v Police* HC Auckland CRI-2007-404-62, 15/6/2007, [2007] BCL 720; *Kohere v Housing New Zealand* HC Auckland CRI-2007-404-2, 26/4/2007, [2007] BCL 557; *Police v Paki* [2014] NZHC 3112; and *Godoy v R* [2017] NZHC 2172.

[39] He contended that if DNS is convicted in this case when Logic and A & R have had the charges against them withdrawn, then it would be obvious to any independent observer that something will have gone wrong with the administration of justice.

[40] I think that the direct or indirect consequences of conviction to which Mr Atkinson points is that DNS will have suffered an injustice if it is convicted and other initial defendants have not been proceeded against. As I indicated to counsel in the course of discussion, I disagree with the various propositions advanced for a number of reasons.

[41] Firstly, s 8(e) applies to similar offenders committing similar offences in similar circumstances. I do not consider DNS to be a similar offender to Logic and A & R. DNS was the consent holder authorised by the Council to undertake the forest harvesting operation. It held ultimate responsibility to ensure that the operation was undertaken in accordance with the consent. In layman's terms, "the buck stopped with it" and not with its contractors for whose acts it might be strictly and vicariously liable. Another point of difference is that the offending occurred five months after the contractors had decamped from the property. DNS had ample opportunities to rectify any shortcomings of the contractors' poor work on the slip sites within that time and the site was directly under its control at the time of the offending.

[42] Secondly, I am simply not in a position to determine or consider the basis on which the Council decided to withdraw charges against Logic and A & R. I must sentence on the basis of the facts contained in the summary of facts, findings made in a disputed-fact hearing or at trial. In this case it is the first of those. Nothing in the summary of facts enables me to determine whether the Council properly chose not to proceed against the contractors. Further to that, I have substantial reservations as to whether or not it is my function to enquire into or determine that in any event.

[43] Thirdly, s 8(e) applies to a Court sentencing or otherwise dealing with an offender and requires it to take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders by sentencing Courts. A Court has neither sentenced, nor otherwise dealt with other alleged offenders in this case as part of its sentencing processes. This Court is not where the charges initially laid against those alleged offenders were dealt with. The

court was not required to sentence or otherwise deal with those alleged offenders who had not pleaded guilty to any charge, as DNS has done. I note that all of the cases cited by counsel involved instances where other defendants had been discharged without conviction by a Court. That is not the case here.

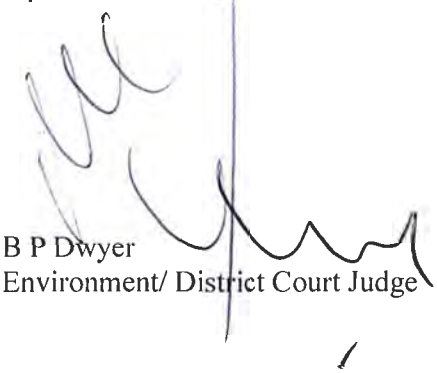
[44] The question which the Court must ask is whether or not conviction of this particular resource consent holder, which failed to meet its obligations when undertaking a substantial forest harvest operation, has direct or indirect consequences which are out of all proportion to the gravity of the offending. DNS has failed to convince me that is the case by a substantial margin. The outcome is that:

- Firstly, I hereby convict DNS;

- Secondly, I indicate that I would impose a fine of $124,700 on it should I have the capacity to do so.

[45] Counsel have raised issues arising out of DNS' liquidation which require investigation and further submissions from counsel to advise the Court whether or not it has capacity to impose such a fine in this case. I will adjourn final sentencing to be completed at Gisborne on 20 July 2020 as I have previously indicated, for that reason.

[46] Finally, I can indicate that I would similarly consider the matter of economic reparation to the contended victim of this offending at that hearing.



B P Dwyer
Environment/ District Court Judge