IN THE DISTRICT COURT
AT HASTINGS

I TE KŌTI-Ā-ROHE
KI HERETAUNGA

CRI-2018-020-000900
[2018] NZDC 16898

HAWKE'S BAY REGIONAL COUNCIL
Prosecutor

v

THE TE MATA MUSHROOM COMPANY LIMITED
Defendant

Hearing: 13 August 2018

Appearances: J Krebs for the Prosecutor
L Blomfield for the Defendant

Judgment: 13 August 2018

NOTES OF JUDGE C J THOMPSON ON SENTENCING

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[1] The Te Mata Mushroom Company Limited has pleaded guilty to two charges, one occurring on 12 February 2018 and the other on 15 February 2018, of allowing a contaminate, that is an odorous compound, to escape from the boundaries of the property it uses for its mushroom production in Havelock North, when that discharge was not permitted by one of the applicable pieces of legislation or a resource consent. In fact the company does have a resource consent and it expressly requires that no offensive odour be allowed to escape beyond the property boundary.

[2] The maximum fine for a company in respect of those charges is $600,000 so they are, on the face of it, significant offences. There is no doubt about that. I will return to the figures later.

[3] I have had very helpful submissions both from Mr Krebs, for the Council, and from Ms Blomfield, for the company, discussing the background to the matter; drawing my attention to the relevant pieces of law, and suggesting appropriate outcomes in terms of a fine and in terms of a possible enforcement order aimed at requiring compliance in the future.

[4] Essentially, the Council emphasises that these two occasions were not *one-off* events. There was an earlier prosecution in 2015 where the company was convicted of a representative charge for similar offences. On that occasion an enforcement order was made requiring an application for a new resource consent to be applied for - and the company has done that. The consent application was made to the Regional Council. That is presently *on hold* because under the provisions of the Resource Management Act 1991 it was decided that a consent also needed to be sought from the Hastings District Council because of the change in process and the way in which the land was to be used.

[5] So, in terms of resource consent outcomes the situation has not concluded but the company has complied with the enforcement orders so far as it has been able and that needs to be recognised.

[6] There have also been infringement notices issued against the company in October 2017; and there are records of ongoing complaints. The council has taken the policy decision to respond in the way of these charges. But it is an ongoing situation that plainly requires to be addressed.

[7] In terms of the defendant company's position, one has to have some sympathy for it in general terms, in the sense that the company has been operating on the site for something of the order of 50 years and Havelock North - being a desirable place to live - has expanded with of course councils' involvement - to come within 200 or 300 metres, and even closer for some properties, of the company's operation. As the situation is referred to in resource management law we have a classic situation of *reverse sensitivity,* where a sensitive land use (ie residential) has come within range of something that produces an effect which the residents, understandably, find very unpleasant indeed.

[8] That situation, I think, does need to be recognised in terms of culpability. It does not alter the requirement that we have to do something to try and remedy things and make it better for the future. But I do particularly record the quotation from the report that was done at the time, referred to as the Jacob report, that is set out at para 29 of Ms Blomfield's submissions. The quotation concludes, "We, [that is the consultant] consider the reverse sensitivity effect would be significant given there is evidence that the current separation distance to sensitive development is already less than necessary." So, it was a situation that was no doubt contributed to by that situation.

[9] I also accept that the company has so far spent significant amounts of capital on changing its layout and processes for the making of compost. It has incurred additional annual expenditure. There was no formal proof of those figures but, as I said in the course of discussion with counsel, I see no reason not to accept them as being put forward in good faith.

[10] Significant expenditure has also been incurred in terms of advancing the resource consent that is presently before the council - of the order of $200,000. So I accept that the company is doing its best to get things into a much better situation where it is not causing these effects on the amenity of its neighbours.

[11] In terms of the purposes and principles of sentencing I think we can deal with things quite quickly. There is certainly an element of deterrence. There is an element of the protection of the community. One has to look at the relative seriousness of the offending compared others of a similar kind. And I have noted, and I find helpful, the cases of other situations that have been referred to by counsel.

[12] I have read the statements made by neighbours who have been affected by the odours, and one has to have absolute sympathy for the situation they find themselves in - where they are unable to fully enjoy the properties that they have acquired, built up, and have come to love. They find themselves unable to enjoy them to the extent of being able to enjoy going into the garden, of entertaining outdoors, all those sorts of things that would be what every homeowner would like to do. So I accept that there has been a severe impact on them.

[13] In terms of previous convictions I accept, of course, that the company does have that piece of history that I have already eluded to. It is an ongoing issue. It is not yet resolved and that everybody's thrust and direction must be, one would have thought, to the future.

[14] The offending was not done for profit in the strict sense of it being a one-off action that was intended to make money. It is part of a commercial operation, certainly, and the company has to deal with it on that basis. I do also take account of the fact that the company is a significant business and employer within the district. It employs of the order of 120 people, I am informed. That is significant. The situation has to be balanced between that, of course, and the effects that is has on its neighbours.

[15] It was not a situation where there is high culpability in the sense that the offending was deliberately or negligently done. The company is conscious of the problem and is taking steps, as best it can, to remedy the situation.

[16] I have discussed with counsel the terms of the proposed enforcement order suggested by the council. The company accepts that the first order suggested by the council could be made, that is, that the company will on 1 October 2018, cease producing compost unless the company has lodged with the Hastings District Council, an application for land use consent to be advanced in conjunction with the application for consent filed back on 1 December 2016 to the Regional Council. The company accepts that it should make that application. It is, I am informed, almost ready to go and from thereon in hopefully it can be progressed quickly and efficiently.

[17] The company does not accept the appropriateness of the second and third orders suggested by the council and, as I have discussed with Mr Krebs, I have significant reservations about them also. What they would require is that the company would cease producing compost in situations where *other* people may not have done things. That is unless the Hawke's Bay Regional Council and the Hastings District Council have issued the consents required, and so on. I have a difficulty in principle and in practicality with making enforcement orders against an individual where that individual will not have control of the situation.

[18] Giving the individual the opportunity to come back to the Court and to ask for relief where other people have not done things that they could have, or should have, really seems to me to reverse what should be the situation. That is that if the company fails to take steps that is required of it somewhere along the line then an enforcement order certainly can be sought - or some sort of addition to or alteration of the existing enforcement orders could be sought by parties other than the company. So my clear view is that I should make the order number 1, but that the other two orders and the *out clause* in term 4, should not be made.

[19] In terms of fine the prosecution suggests a start point of between $50,000 and $60,000 and seek an uplift to have regard to the previous infringements. It acknowledges that a reduction may be appropriate to reflect the making of an enforcement order. I have already discussed that. There was a submission that the guilty pleas to the charges were not entered at the first reasonable opportunity and that a reduced allowance should be made for that.

[20] Taking the higher figures that the council puts forward that would mean a fine of a net $41,000 or thereabouts. Unsurprisingly, Ms Blomfield for the company suggests a lower start point - of the order of $40,000 - and submits that the company should be allowed the maximum allowance for a guilty plea. I think that having regard to the fact that there was a significant dispute, apparently, about some of the facts on which sentencing would otherwise have been sought and that the company, responsibly, indicated a guilty plea but subject to a disputed fact hearing, which has now been resolved, I think that it would be unfair not to allow the company the full benefit of an allowance for the plea.

[21] I would have thought that a start point of around the order of $50,000 would be sufficient to make the point that this needs to be resolved with concentration and hard work. The company has a problem and that the neighbours do too, and it is within the company's power to do something about it. I accept that it has done a lot so far to try to improve the very difficult situation. I would make an allowance for that and the expenses that it has been put to and the expenses still to come.

[22] I would take a start point allowing for that of $40,000. I would allow a full 25 percent for the guilty plea and, although this was a "repeat" situation, I do not see it as appropriate to impose an uplift. In fact the company has been making attempts at compliance, there are costs that have been incurred and there are costs that are still to come. I would allow a further 10 percent for that.

[23] So the outcome, although the maths becomes a little artificial, is that:

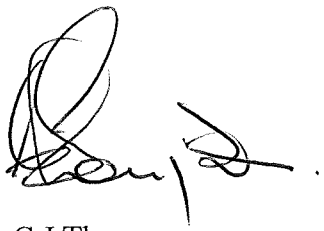
(a) I will impose a total fine of $26,000.

(b) I will divide that equally between the two charges.

(c) There will be the necessary order under s 342 Resource Management Act that 90 percent of those fines are to be paid to the Regional Council.

(d) There will be an order for Court costs

(e) I will make an enforcement order in terms of para 1 of the draft lodged by Mr Krebs.



C J Thompson
District Court Judge/Environment Judge