IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2017-042-000416
[2018] NZDC 17605

TASMAN DISTRICT COUNCIL

v

HUNTER LAMINATES 2014 LTD (IN LIQUIDATION)

Hearing:	22 August 2018
Appearances:	A Besier for the Prosecutor D Mark for the Defendant
Judgment:	22 August 2018

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] Hunter Laminates 2014 Limited (In Liquidation) - (Hunters/the Defendant), appears for sentence on one charge brought by Tasman District Council (the Council) of breach of s 15(1)(c) Resource Management Act 1991 that:

> On various dates unknown between 3 June 2014 and 22 August 2016, at Beach Road, Richmond, Hunter Laminates 2014 Ltd discharged contaminants, namely combustion products from the burning of timber impregnated with metals, from industrial or trade premises, namely a factory manufacturing timber products, into air, when the discharge was not expressly allowed by a national environmental standard or other regulations, a rule in a regional plan, or a resource consent (charging document ending 165).

I record that this is laid as a representative charge for the period between 3 June 2014 and 22 August 2016.

[2] Hunters pleaded guilty to the charge on 28 June 2017. I am advised by Ms Besier, for the Council, that s 24A Sentencing Act 2002 is not applicable. I understand that to be the case as there was no ascertainable victim. I am satisfied that a discharge without conviction is not appropriate. The Defendant is hereby convicted accordingly.

[3] Before addressing the details of the charge itself, there are matters of process which must be noted in the record.

[4] Hunters was placed into liquidation by order of the High Court on 26 April 2018. I will return to its financial situation when considering the appropriate penalty to impose in this case.

[5] On 21 May 2018 the Council obtained an order from the High Court pursuant to s 248(1)(c) Companies Act 1993 allowing these proceedings to continue, notwithstanding the Defendant's liquidation.

[6] Prior to liquidation Hunters had been represented by counsel Mr D Neutze, I understand on instructions from the Defendant's insurer. On 20 June 2018, Mr Neutze advised the Court that he was no longer acting for Hunters and the Defendant has been without legal representation since then. It is represented at this sentencing today by Mr D Mark, a Nelson accountant appointed by the Liquidator (Mr G Falloon who is currently overseas) pursuant to the provisions of s 12 Criminal Procedure Act 2011.

[7] Prior to Mr Neutze's withdrawal from representation of the Defendant, counsel had been in drawn-out discussion as to the contents of a summary of agreed facts. A series of adjournments were granted by the Court to enable the parties to resolve or endeavour to resolve contentious matters of fact and technical issues.

[8] On 22 March 2018 I adjourned the proceedings to 28 May 2018 for a disputed facts hearing, to be followed by sentencing. This process was thwarted by the Defendant's liquidation and Mr Neutze's withdrawal from the proceedings.

[9] One of the consequences of liquidation is that proceedings may neither be commenced nor continued against a liquidated company, except with the agreement of a liquidator or the High Court. Understandably enough, the Liquidator did not agree to the prosecution continuing but as I have noted, the High Court made an order allowing these proceedings to continue on 21 May 2018.

[10] I understand that the Council sought consent for continuation for two reasons:

- Firstly, it considered that it was appropriate for a conviction to be entered to mark what it considered to be serious environmental offending;

- Secondly, the Council was aware that Hunters held an insurance policy which provided cover for statutory liability claims and hence Hunters had or should have had financial capacity to meet payment of any fine which might be imposed.

I consider the Council's determination to proceed with the prosecution for these reasons entirely appropriate and I will complete this sentencing accordingly.

[11] Now that Hunters is not to offer any evidence on the previously disputed facts, it is necessary for me to determine the basis on which I should proceed to complete this sentencing. I have previously noted that Hunters had pleaded guilty but a disputed facts hearing was set down to proceed. I had conducted a status hearing on 22 March 2018, where Mr Neutze had identified the matters relevant to sentence which were contested. I understood them to largely revolve around three issues

- The first was whether those responsible for management of the Defendant between 3 June 2014 and 22 August 2016 deliberately burnt timber containing contaminant products and/or the extent to which the practice was an

inadvertent continuation of previous practices at these premises prior to change of management personnel;

- The second issue was the number of occasions on which the offending had occurred;

- The third was whether there could be some other source which contributed to the contamination in the Richmond environment which was the subject of these proceedings.

[12] I expressed the view that these matters were clearly relevant to the determination of sentence in this matter and I indicated that to the parties accordingly. The disputed facts hearing was set down to resolve these issues.

[13] Section 24(1)(a) and (b) Sentencing Act relevantly provide:

> **24 Proof of facts**
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> (1) In determining a sentence or other disposition of the case, a court—
>
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender;
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

[14] Section 24(1)(a) and (b) allow or require the Court to accept facts that it has determined from hearing evidence at a trial, that the parties have agreed to and/or facts that are essential to the proof of guilt where a guilty plea has been entered.

[15] In this case no facts have been disclosed by evidence at trial as there has been no trial, neither has any agreement been reached by the prosecutor and offender on the topics I have indicated. I must accept as proven all facts expressed or implied that are essential to a plea of guilty.

[16] In this instance that requires me to accept that on an occasion or number of occasions between 3 June 2014 and 22 August 2016, the Defendant had discharged a contaminant from industrial or trade processes into air when the discharge was not

expressly allowed by any of the instruments specified in s 15(1)(c). Those essential elements were conceded by the guilty plea.

[17] In the absence of establishment of facts by trial or an agreed statement of facts, and in light of the known existence of disputed facts, I consider that it is necessary for the Court to establish those disputed facts in accordance with s 24(2)(c) Sentencing Act. The Council did so by way of an affidavit of David George Shaw (a compliance and investigation officer employed by the Council), that affidavit being dated 16 August 2018.

[18] Mr Mark indicated that he did not wish to cross-examine Mr Shaw on his affidavit and neither did I. The affidavit was accordingly taken in and formed part of the Court record. I will set out the matters which I consider Mr Shaw's evidence establishes as part of my disposition of these proceedings.

[19] Additionally, at today's hearing, the Court heard from Paul Morgan Sheldon (a scientist employed by the Council with 30 years' experience in air quality assessment) who also provided information relevant to the determination of the disputed matters and who provided Exhibit 1, which has been included in the Court record. I will refer to a number of aspects of Mr Sheldon's evidence during the course of this discussion. I now turn to the merits of the sentencing.

[20] Hunters is a limited liability company incorporated on 1 May 2014. Over the period specified in the charging document it operated a wood manufacturing business at its premises at 48 Beach Road, Richmond. It leased these premises. The property contained about 1.29 hectares and was occupied by several large warehouse-type sheds used for the storage and manufacturing of wood products. There are or were two drying kilns, a fuel hopper, bunker shed and boiler house containing a boiler for use with the kilns on the property.

[21] The property is contained in the Light Industrial zone of the Tasman Resource Management Plan (the District Plan). This document regulates (inter alia) the discharge of any contaminants to air from enclosed combustion processes. This activity was undertaken on the property by the Defendant. Hunters operated its

activities under Permitted Activity Rules 36.3.2.1 and 36.3.2.5 of the District Plan, which contain a permitted activity standard allowing burning in certain identified circumstances. However, the Rules do not permit the discharge of contaminants from burning treated timber. I was advised by Ms Besier that this is in fact a prohibited activity. Obviously, for that reason, Hunters did not and could not hold a resource consent authorising the burning of treated timber.

[22] During the period July 2013 to October 2015, the Council, as part of its normal monitoring activities, monitored the ambient air quality of the Richmond Air Shed where the business was situated. Filters which collect particulate matter were analysed over that period. The initial analysis of filters indicated elevated levels of copper chromium arsenate (CCA) from industrial premises[1] in the particulate matter and this led to further investigations by Council officers and consultant experts. CCA is a mixture of metal compounds widely used as a timber preservative to produce tantalised timber.

[23] As part of its investigations a warranted officer for the Council conducted an inspection of Hunters' property on 4 August 2016. The purpose of the inspection was to investigate the source of industrial CCA concentrations which had been identified through air quality monitoring. As part of the inspection a sample of ash was obtained from inside the door of a boiler on the premises, that boiler being used to heat water for further industrial processes on the property. The sample was sent to Hill Laboratories in Hamilton for analysis. The results showed arsenic at 28,000 milligrams per kilogram, chromium at 4,800 milligrams per kilogram and copper at 13,500 milligrams per kilogram in the ash. These readings established that CCA treated timber had been burnt there.

[24] On 18 August 2016 warranted enforcement officers for the Council spoke with the general manager of Hunters. The officers advised the general manager of the laboratory results from the 4 August sample and undertook an inspection. The general manager gave permission for additional samples to be obtained from within the boiler. Three ash samples were obtained from within the burn chamber together with a sample

[1] I was advised that it is possible to distinguish industrially generated CCA from domestically generated CCA due to (as I understand it) the greater heat of industrial boilers.

of sweepings off the boiler room floor. These samples were also sent to Hill Laboratories for analysis. The testing showed high levels of CCA within the samples taken from the boiler and the presence of CCA within the sweepings sample. These results indicated the presence of timber treated with metals within the woodchip sweepings from the floor of the boiler shed and within the ash found in the boiler.

[25] An abatement notice was served by the Council on Hunters on 22 August 2016 requiring that it cease all discharges to air from the use of the boiler on the property pending results from analysis of further ash samples. This was to be complied with by 18 August 2016. In other words, it was backdated to the date of the Council inspection when the general manager was advised verbally to stop burning this material. A further abatement notice was served on 2 September 2016 requiring Hunters to remove all ash from within the boiler, decontaminate the boiler and its environs and undertake a boiler assessment.

[26] I understand that the first of these abatement notices has been complied with. That is significant in these proceedings because after the 18 August 2016 abatement notice was served, the industrial CCA component of the tested air samples which the Council was checking, ceased.

[27] On 3 February 2017 a Council officer spoke to the general manager under caution. He stated that he was not aware of anyone burning treated timber on the property since his involvement at Hunters. He accepted that due to there being CCA in the boiler ash it had obviously been burnt on the property but he could not explain how or when that happened.

[28] As I have noted, issues have subsequently been raised as to the extent to which this practice was undertaken and whether there was any other source of these contaminants in the Richmond Air Shed which contributed to the readings found by the laboratory. These issues were addressed by Mr Shaw's evidence, which established the following:

- There was evidence from Hunters' employees that waste from timber processing operations at the factory was burnt as fuel for the boiler and also to dispose of waste;

- It was not contested by Hunters that prior to changes introduced in 2016, waste from the two processing sheds was directed by cyclone ducting to the fuel bunker storage shed and fuel hopper. Aerial photographs provided by the Council demonstrate that;

- At some stage after February 2016, when a Mr Douglas became the general manager, the ducting was re-routed to stop waste from the sheds going into the fuel bunker, where it had obviously been going previously, including in the period subject to these charges. However, CCA-treated wood waste remained at the factory in the fuel storage bunker and this waste continued to be burnt;

- On 22/23 August 2016 Hunters arranged for the waste in the fuel hopper and storage bunker to be removed and disposed of off-site. This supports the Council's view that there was a large amount of treated timber waste present at the factory at that date;

- After the abatement notice was served industrial CCA emissions disappeared from the air quality samples tested by the Council. The last recorded signature from an industrial emission discharge was on 18 August 2016, when Hunters was directed to stop the activity;

- Mr Shaw's affidavit satisfies me that the Council has thoroughly investigated other potential sources and that there are no other potential sources of industrial CCA in this area, something that was confirmed this morning in the additional evidence which I heard from Mr Sheldon;

- Finally, the samples taken of the wood dust and soot on 18 August 2016 demonstrated that it was contaminated with CCA at that time. This also supports the Council's view that the burning of CCA-treated timber was occurring.

[29] I am satisfied as to all of the above facts I have set out beyond reasonable doubt, on the basis of Mr Shaw's evidence and that of Mr Sheldon. In light of those findings, I consider the environment affected by the offending and the effects on that environment.

[30] CCA is a preservative used to treat timber products. As I have observed it contains copper, chromium and arsenic chemicals based from metal compounds. Timber products impregnated with CCA, when burnt, release smoke and ash which change, or are likely to change, the physical chemical and biological condition of the air into which they are discharged. The contaminants discharged in this case included particulate matter (fine particles which come through the burning process) and aerosols or gases which are released through the chimney at the factory.

[31] The main contaminant contained in the emissions to air was arsenic. Arsenic is contained in both the particulate matter and in the aerosol. Arsenic readily disperses into air from burnt timber which has been treated with CCA. Arsenic from the burning of CCA-treated timber in an industrial burner shows a different source emission signature, which is highly correlated with copper and chromium so that it can be identified as coming from an industrial source.

[32] The CCA in this instance was measured at an air quality monitoring site about 700 metres from the chimney of the factory. Arsenic from the industrial source was present as intermittent spikes throughout the year (winter and summer) with peak concentrations of over 100 nanograms per cubic metre measured at the ambient air quality monitoring site.

[33] Domestic burning of treated timber is also a significant contributor to airborne arsenic levels and was a contributor to measured levels at the monitoring station in Richmond. The arsenic from the burning of CCA in domestic fires is generally seasonal, that is, it mainly happens in winter. It has low correlation with copper and chromium. It could be identified that domestic burning of treated timber produced peak arsenic concentrations of up to about 30 nanograms per cubic metre measured over the winter period.

[34] I am advised that the split at the Richmond air quality monitoring site between industrial arsenic and domestic arsenic was approximately 50/50. That is half of each.

[35] Arsenic emissions have the potential to adversely impact the health of people and it is classified as a non-threshold high-potency carcinogen. Hunters' property is located in or near the township of Richmond, which has about 13,000 to 14,000 people, with the concentration of pollution being greatest in the area closest to the discharge. This area contains a mix of residential and industrial activities with schools and recreational areas being located near to the factory and had been identified by the Court in previous proceedings as being a vulnerable environment.

[36] Adverse effects of the discharge of arsenic to air on the health of people can be brought about by:

- People inhaling air contaminated with arsenic in either its gaseous or particulate form;

- The ingestion of vegetables and other produce from locations where the arsenic has deposited from the air;

- Contact through skin by people coming into contact with surfaces containing arsenic residue such as soils, playgrounds, park benches and the like.

[37] In fixing a starting point for penalty considerations, I note that this is a representative charge relating to discharges undertaken over a period of about 26 months from when Hunters took over operations at the existing premises until the discharge ceased consequent upon service of the abatement notice in August 2016. The maximum penalty for the offending is the sum of $600,000.

[38] Initially I had observed that there was some difficulty in fixing penalty in that it was not possible to ascertain with any degree of certainty just how often offending discharges took place over the period in question, primarily because the Defendant did not keep a log of its burning activities as required by the District Plan. However, I am

now satisfied from the evidence provided by Mr Sheldon (namely Exhibit 1) that I can attribute a degree of certainty to the number of occasions on which this happened.

[39] Exhibit 1 contains an analysis of some 458 sampling records at the air quality monitoring site over the period between 4 June 2014 and 18 August 2016. It is an analysis of the arsenic content of the samples which can be attributed to the industrial component of the air samples taken. I clarified that these samples do relate to the industrial component. I record that I am also satisfied that the sole contributor to that industrial component at this sampling point over the period in question was Hunters' factory. That was investigated and established by the Council.

[40] The analysis establishes is that of 458 samples taken where arsenic was present, 118 samples exceeded the 5.5 nanograms per cubic metre which is recommended as the "acceptable" standard contained in the Air Quality Guidelines. Of those 118 samples, 113 were in excess of the 5.5 nanograms per cubic metre and five were greater than 100 nanograms per cubic metre.

[41] I was advised that the important figure is not so much the spikes but the average over the period and what the analysis shows is that the average arsenic content over the period in question was 7.93 nanograms per cubic metre, which exceeds the Guideline recommendation.

[42] Accordingly, on that basis, I am able to accurately attribute particular effects which were an outcome of the burning process which took place by this offending.

[43] Ms Besier submitted that I should sentence Hunters on the basis that:

- The offending occurred over a period of two years;

- The contribution made by Hunters to pollution levels in Richmond is uncertain but significant and was aggravated by the toxic nature of the contaminants. (I think in fact we can be a little more certain of the extent to which it did so due to the figures contained in Exhibit 1);

- The effects of the offending are unknown given the difficulties in undertaking epidemiological research but it can be concluded that there is a significant risk that the unlawful burning will have impacted on peoples' health, particularly the nearby residential population;

- The offending degraded the quality of air in the environment generally and would have had an impact on the amenity value of the environment near to the boiler;

- The factory operated in an extremely sensitive environment in close proximity to a large number of residential properties, schools, reserve areas, the Waimea Estuary and the like.

[44] One of the matters in dispute between the Council and the Defendant was whether or not the offending was deliberate on the part of Hunters or its officers or employees or was an inadvertent continuation of practices undertaken by a previous operator of the factory.

[45] I am satisfied from Mr Shaw's affidavit that the practice was deliberate on at least the part of some of the directors and employees. I note in that regard that the basis on which Hunters' insurers withdrew cover under the statutory liability provisions of the Defendant's insurance cover was that there was direct evidence that the burning had taken place with the knowledge of an employee and some directors of the company and was deliberate.

[46] As I have noted, the other matter which was in dispute was that addressed by Mr Sheldon's affidavit. I am satisfied that the activities undertaken by Hunters led to not less than 458 discharges of arsenic into the atmosphere, 118 of which exceeded the Air Quality Guidelines. As I have also noted, the burning of treated timber is a prohibited activity under the District Plan so there should have been none.

[47] That brings me to the question of the appropriate penalty for the discharge of a dangerous contaminant generated by a deliberate burning process on 458 occasions over a 26-month period.

[48] As Ms Besier has observed, no direct harm to any person can be proven but I accept that the discharge on the occasions that took place was a very significant contributor to already elevated arsenic levels in the Richmond Air Shed.

[49] It is well known that these contaminants are carcinogens, they are dangerous and they should not have been discharged at all. Their effect is insidious. It is unlikely that any instant health consequences can be identified. It is something which happens over a period of years.

[50] Ms Besier submits that deterrence is a factor of particular significance in this case. I concur with that proposition. The Court has commented previously that significant discharges of pollutants from industrial activities will attract significant fines in order to drive home the message that industrial operators must adhere to their environmental obligations. That is especially so when we are dealing with contaminants of the type we are in this case.

[51] In my view, the elements of:

- The deliberateness of the offending;
- The duration of the offending (some 26 months);
- The number of occasions on which the offending took place (458);
- The nature of the contaminant;
- The already elevated levels of arsenic in the Richmond Air Shed;
- The vulnerable element of the Richmond environment –

combine to make this very serious offending indeed. When that is combined with the need for deterrence, I consider that this offending warrants the imposition of a very substantial fine.

[52] Ms Besier referred me to a number of decisions of the Court to assist in determining starting point. I do not think any of them combine all of the elements which we see in this case.

[53] I consider that there is certain comparative value in the *Taranaki Regional Council v Fonterra Ltd*[2] where I adopted a starting point of $240,000. In that case, Fonterra subjected the inhabitants of Eltham to a sustained period of six months or thereabouts exposure to highly noxious odours which had identifiable (but not life-threatening) health effects as well as significantly adverse amenity effects. The Fonterra offending involved incompetent management of waste milk product rather than deliberate offending as happened in this case.

[54] A further comparison maybe drawn with the case of *Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd*[3], where I adopted a starting point of $375,000 in respect of discharge of diesel into a stream which poisoned the drinking water of the town of Raetihi. The discharge in that case was accidental but the defendant took no steps to remedy the effects of the discharge until it was discovered by the Council. There were immediate health effects on residents who consumed diesel-contaminated water as well as economic effects on the inhabitants and businesses of Raetihi.

[55] I consider that this offending is more serious than *Fonterra*. The key element in that are the findings which I have made as to the deliberate nature of this offending, the number of occasions on which it took place and the potentially serious but insidious effects of CCA. I regard *Ruapehu* as somewhat more serious than this offending due to the direct and ascertainable effects of consumption in that case.

[56] Taking all of those matters into account, I have determined that the appropriate starting point for penalty consideration is the sum of $300,000. I note that is 50 percent of maximum penalty.

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[2] *Taranaki Regional Council v Fonterra Ltd* [2015] NZDC 14962

[3] *Manawatu-Wanganui Regional Council v Ruapehu Alpine Lifts Ltd* (2014) 18 ELRNZ 68, [2015] DCR 55

[57] The Defendant has no previous convictions but I note the offending commenced almost immediately after its incorporation and takeover of the business at Richmond so it receives no credit for past good character.

[58] In the normal course of events, Hunters would receive a 25 per cent reduction from starting point on account of its prompt guilty plea. I do not propose to do that in this case. Although a guilty plea was entered in June 2017, it was done in a context where matters which were absolutely fundamental to sentencing were disputed down to the finest detail.

[59] I was advised by counsel at the March status hearing that the disputed facts hearing, which I was to hold, might take up to one week. Negotiations on disputed issues took place over a lengthy period involving the instruction and conferencing of expert witnesses. Ultimately the Council was obliged to brief witnesses and prepare for the disputed facts hearing which was ultimately abandoned due to the Defendant's liquidation and withdrawal of counsel.

[60] There is some considerable merit in Ms Besier's submission that a not guilty plea, where the Court just got on with it, might have resulted in an earlier and less costly resolution of the matter. I concur with her submission that a 10 per cent reduction from starting point is appropriate to mark the early guilty plea in these circumstances.

[61] That would lead to an end penalty outcome of $270,000. In the normal course of events I would impose a fine of that amount together with solicitor and Court costs.

[62] However, that brings me to the issue of the Defendant's financial capacity. The only penalty which I can impose on this corporate defendant is a fine. Section 40(1) Sentencing Act requires that in determining the amount of a fine, the Court must take into account the financial capacity of the offender. The term financial capacity is not defined in the Sentencing Act but I understand it to enable a wide consideration of all financial circumstances pertaining to an offender to be undertaken. In this instance the Defendant is in liquidation.

[63] Ms Besier submits that it is important, for reasons of deterrence, that a fine is imposed. She contends that it is not relevant to have regard to the liquidation as there is no need to adjust the penalty to reflect financial circumstances and the fine can be added to the debt of the company and the final account of the Liquidator.

[64] I disagree. I consider that s 40 relates not only the issue of how much a fine should be but whether I impose a fine at all. It is incontrovertible in this case that Hunters has no financial capacity to pay a fine. Its insurer has abrogated liability in light of what it determined to be the deliberate nature of the offending, so that source of payment no longer exists.

[65] The Liquidator's statement reveals that the Defendant has no recoverable assets. Secured creditors are owed $508,800. Preferential creditors are owed $189,330 and unsecured creditors are owed $80,835, a total of $778,965.

[66] Under those circumstances, where there is no prospect whatever for payment of a fine or any portion of it, I consider that not only is it futile to impose a fine but in light of s 40 Sentencing Act, I should not do so.

[67] I record that had there been any suggestion in the Liquidator's statement that funds might be available to unsecured creditors, I would have imposed a fine of $270,000 as I have indicated. Even if potentially available funds were not sufficient to meet payment of such a fine in full, that is something which the Liquidator could have resolved on a pro rata basis as between the Council and other unsecured creditors. In the absence of any such funds being available that course of action is not open to me.

[68] Accordingly, the outcome of these proceedings is that the Defendant, Hunter Laminates 2014 Limited (In Liquidation) is convicted and discharged.

B P Dwyer
Environment Judge