IN THE DISTRICT COURT
AT INVERCARGILL

CRI-2017-025-001925
[2018] NZDC 3355

DEPARTMENT OF CONSERVATION
Prosecutor

v

WAIRAKI STATION LIMITED
Defendant

Hearing: 20 February 2018

Appearances: P Williams for the Prosecutor
F Guy Kidd for the Defendant

Judgment: 20 February 2018

NOTES OF JUDGE M J CALLAGHAN ON SENTENCING

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[1] Wairaki Station has pleaded guilty to one charge that between 24 April 2017 and 8 May 2017 knowingly and without authority failed to comply with s 170(2) Conservation Act 1987 by carrying out an activity without a concession in the Takitimu Conservation Area, namely farming operations for the purpose of commercial gain. They have pleaded guilty to that charge.

[2] The impact of a plea of guilty to that charge is that the Court now has to assess whether or not the company is liable to a fine not exceeding $300,000 and a further penalty of $20,000 for every day on which the offence continued; or whether or not the sentencing should take place under s 39(1)(a)(b)(a) where the fine is a fine not exceeding $200,000 or continuing at $10,000 per day.

[3] The Takitimu Conservation Area comprises an area of approximately 45,500 hectares. It is one of Southland's most iconic mountain range areas and is readily accessible from Invercargill and Te Anau.

[4] I am told today in submissions that the area which has been the subject of this charge is not the area which is normally accessed by members of the public, but nonetheless forms part of that conservation area. The area contains a range of eco-system habitats and species, including some threatened in New Zealand, and offers a wide range of recreational activities and opportunities for the public, including tramping and hunting. The vegetation of the conservation area was historically modified by repeated fires, and more recently by pastoral farming. Much of the original beech forest has been replaced by red tussock and shrublands and regenerating forests. The Department of Conservation's management concentrates on controlling weed species and allowing the conservation area to regenerate naturally. There has been no approved grazing or pastoral farming operations within the area for approximately 25 years. Old waratahs remain and wire remains on the area from the previous farming activities.

[5] On 1 May 2017, Department of Conservation staff observed cattle grazing in the area. They also located a radio repeater which had been installed near the top of Mt Nicholas. On 2 May 2017 the area was visited and the cattle were located grazing. Damage by the grazing cattle was noted. On 4 May 2017 a survey by helicopter was undertaken. The cattle grazing were located in two distinct blocks in an area estimated to be about 190 hectares, and there were estimated to be about 380 head of cattle grazing in various mob sizes and roaming over that combined area.

[6] On investigation, the tags were looked at, and the defendant company was identified. The investigation showed that the cattle had entered the conservation area through a private forestry road, through a gate repaired by the defendant company. The cattle were contained in the conservation area by the existing fencing but a newly installed electric fence of approximately 600 metres in length was also installed. The radio repeater had also been positioned on Mt Nicholas by the defendant company without permission, and I note as an aside that the radio repeater is not part of the charge and has been explained and accepted by the Department as being there for the

purposes of radio communications on the defendant's farm property and not for anything to do with or associated with the cattle that were located grazing.

[7] The impact caused by the cattle while on the conservation area includes grazing damage to native vegetation, trampling and plugging, exotic plant transfer, damage to stream banks and watercourses, and impacts on water quality. Some areas were heavily grazed and impacted. Stock tracking damage included tracking on steep and/or unstable areas and there was disturbance of stream banks and river beds. In areas of high stock concentration there was heavy tracking of the stream where the river margin and stream beds were affected, as well as other wet areas. The cattle were removed on or about 8 May 2017. The electric fence remained in position until 31 October 2017.

[8] Richard John Slee is a director of the company and he has filed an affidavit. He was spoken to by the Department of Conservation. He admitted the cattle belonged to the company and he had instructed his staff to graze the cattle in that area. He was also responsible for having the staff install the electric fence. He acknowledged that the cattle had been in the area since 24 April 2017. He did acknowledge that there had been a previous incident in about September 2006 but that he had not recalled it at the time that the cattle were placed in the area.

[9] Both the defendant and the prosecution have filed submissions.

[10] The prosecution rely on s 43D of the Conservation Act on which penalties should be imposed. They say that the Court can be satisfied beyond reasonable doubt that the offence was committed for the purposes of commercial gain or reward, and it does not matter that there was actually no gain or reward realised as long as that was the purpose. If the Court is not satisfied that the offence was committed for that purpose of commercial gain or reward, then the maximum penalties and ongoing penalties are less.

[11] The prosecution say that in respect of the commercial gain or reward test, there is no discretion for the Court to impose penalty under ss 39 or s 44 as opposed to s 43D if the Court finds that it was for the purpose of commercial gain and reward.

The prosecution say that it is clear that the defendant company was intent on getting a commercial gain.

[12] As to cost, the defendant company has made a voluntary payment of $14,823 to the Department for the expenses incurred in this investigation and I take that fact into account.

[13] They have also entered into a reparation agreement whereby the company has agreed to pay for directly attributable costs of gorse and broom control in the affected area for the next five years, to a maximum cost of $35,000. That includes gorse or broom that is in the conservation area but cannot necessarily be attributed solely to the defendant company. They also have reinstated the boundary fence which had been removed. If those costs had not been agreed and paid, the Court would have had the power to order compensation for loss or damages and for costs, but because the voluntary payments had been made, the Court does not have to be concerned with imposing those orders, but of course must take them into account.

[14] The prosecution also accepts that the defendant company is remorseful and willing to work with the Department to ensure that the conservation area is now reinstated. In their submissions, the Department point out that the Conservation Minister may appoint suitable persons to manage strips, known as marginal strips, adjacent to or in the conservation area. Once appointed, the manager may manage the marginal strip in a way that best suits the purposes of the marginal strips and enables members of the public to have access along the strip. That is what has happened here, but there is no ability for the adjoining landowner to obtain a concession to use a marginal strip for farming purposes. They can, however, graze on a marginal strip of land as a management tool and that may be a condition of the agreement which is entered into.

[15] In this case the defendant company had three discrete areas of marginal strip totally 21.5 hectares adjacent to the Waitaki River. This was a 15-year term which expires on 31 August 2019.

[16] A special condition of that marginal strip agreement is that the defendant is allowed to graze the marginal strips in a specified maximum stocking rate, where the conditions of stock must be adequately contained within that site.

[17] There is also a condition that there must be a 10 metre vegetation strip maintained along all watercourses. The reason the Department point that out, they say, is that the defendant must have known its limitations in respect of the grazing or any other activity on the public conservation land, and that in order to allow any grazing or other activity on a conservation land a concession must be obtained. In this case no such concession existed other than the marginal strips, and in fact the land on which the cattle had been grazing had been retired from farming for approximately 25 years.

[18] Mr Slee's affidavit points out that he has lived almost his entire life in this region, apart from a short time away when he farmed in the Canterbury region.

[19] He acknowledges that the conservation land was right against the boundary and that he considered it as "rough feed," going to waste. His intention of letting cows go onto the area was to stall them for a couple of weeks over winter. The cattle that were in there were beef cattle and at the time that he put the cattle in there, there were a total of 600 cows on the farm property, and he deliberately chose to put those animals on the property that he did, as opposed to other stock on the farm at the time.

[20] He says there was sufficient feed on the farm to feed all of the stock and the only reason the stock was put onto the conservation land was for the convenience factor in that the feed was right next to the boundary. He says he did not register as to any financial gain.

[21] The reason that the fence was erected was to keep the cattle in the limited area so that they could adjust to the quality of the feed they were eating. The cows placed on the land were mixed age cows used for breeding stock and the progeny of the breeding stock are sold. All of the cattle in there at the time were pregnant. "The cows on the land was not done knowingly to save money," he says.

[22] As to the previous incident in 2006 he says that he had forgotten about the brief encounter he had regarding that. He points out in his affidavit that at the time that the cattle were put onto the conservation land, there was sufficient feed on the farm proper to service those stock animals.

[23] The Department says that "stalling" the cows on the property meant that the feed that the company had on their own farm would last longer. Also, they point out that the cattle were breeding stock and the progeny are sold, which is a financial reward being realised in due course. They also state that the decision to graze the cattle was a commercial decision from a commercial operation.

[24] Mr Slee, in his affidavit, does say that the company will now need to adjust its practices to have spare grazing, to quote "up our sleeve," for two to three weeks if needed.

[25] By inference, the Department says that the decision to graze the stock on the conservation land has a direct commercial benefit because the stock is not using the defendant's own feed, hence extending the quantity of reserve feed which the company would then not have to buy in. They also point to the fact that the electric fence and the gate were installed to better facilitate the farm operations of the stock on the conservation land which shows a commercial reality. If the cattle had not been detected they would have remained on the area for approximately one month. On that basis, the Department submits that the placing of the stock on the property was deliberate offending. The fact that they were only there for the 15 days is because they were detected.

[26] As to penalty itself, the Department says this was not one-off opportunist offending, but a concerted effort which shows that there was a purpose of commercial gain or reward to the defendant company, and as such the penalties at s 43D must follow. They do refer me to the decision of the *Tawha v Fish and Game*[1] case where the High Court commented on an uplift in penalties in 2013. They also referred me to the Parliamentary debate on the purpose behind the legislation, which they say shows,

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[1] *Tawha v Fish and Game New Zealand* [2015] NZHC 1119

"A very, very strong message that we take the protection of New Zealand wildlife and natural areas very, very seriously."

[27] The Department acknowledge that there are aggravating features in this case which they say was the deliberate offending, the harm, and the damage caused. In mitigation they say there are no previous convictions for the company; there was co-operation; there was remorse; and of course of the agreed payment of the gorse spraying operation and the cost.

[28] As to a starting point the Department says that this case is of moderate seriousness. A range of 10 to 15 percent of the maximum penalty would be appropriate and also that should apply to the ongoing operation.

[29] As to commercial gain, the defence also refers me to the Parliamentary debate which was put in their submissions at the time that the legislation came in. They say that in terms of the Court being satisfied beyond reasonable doubt that the intent for the degree of commercial purpose must be established, they say in this case it is impossible for the Court to reach that decision.

[30] In the submissions filed on behalf of the defendant, they say that when the Bill was being spoken about by Mr Phil Heatley, he said, "So we had divided it into two types of penalties. One targeted to those people or entities who are substantially not motivated by commercial gain or reward. So they are doing damage, they are causing deaths, or they are stealing wildlife or fauna, but not for commercial gain or reward. So for the lesser offences we are recommending that an individual's term of imprisonment... for Bodies Corporate that are not motivated by commercial gain or reward the fine is not exceeding $200,000."

[31] The defendant submits that the phrase, "…committed for the purpose of commercial or reward," should be read as meaning, "…offences that are committed for the predominant purpose of commercial gain or reward, or for which commercial gain was the substantial purpose." The defence argues that it is impossible for the Court to reach that decision and the penalties that should be imposed should be the maximum of $200,000 and $10,000 as opposed to those that the Department seeks.

[32] In mitigation the defence points out the defendant company has, first of all, met with all local farmers in the area and has advised them of the situation; it has participated in the reparation and is committed to the gorse spraying costs; and that the previous incident should not be taken into account - and I do not take it into account - and that the incident in 2006 was purely as a result of Mr Slee's lapse of memory regarding the previous usage of the conservation land, and the fact that the company removed the animals from the conservation area as soon as possible after it was alerted to them being located.

[33] As to a starting point the Department of Conservation says that the starting point of between 10 and 15 percent; the defence says that starting point should be about 7 percent of the maximum fine. From that, there should be discounts for remorse, for reparation, for costs paid, and for good character, as well as the guilty plea.

[34] The issue has to be whether or not this offending falls under s 43D of the Act in that it was committed for the purpose of commercial gain or reward.

[35] The defendant company has farmed the land on which it is farming for a significant number of years. It operates a beef and cattle operation and was aware of the conservation land containing rough feed. The intention of putting the cows on the property was to "stall" them for a couple of weeks over the winter period. While the company had feed on their own property, the reason for putting the stock on the conservation land was that there was feed right next to the boundary on their farm, on the conservation land. Electric fencing was put in place so the stock could be kept in the area and they could adjust to the quality of the feed. The stock were breeding age stock and their progeny is sold. All of the stock on the conservation land at the time were pregnant. While the cattle may not have been put on the land to actually save money, the impact of feeding the cows on land other than that which the company owned, means the company saved money by not having to provide or purchase, or utilise additional feed for its stock. It also meant that the defendant would have feed available for its stock at a later time in the season. The defendant company would therefore would not have to repurchase or purchase additional stock or feed, and the

only purpose for placing stock on the property - despite what is submitted by the defence and what Mr Slee says in his affidavit - has to be for a commercial gain.

[36] In my view it does not matter that the commercial gain may not be direct, it may also be indirect, and that savings to the operation of its feed for later usage in the winter must mean it is a commercial purpose.

[37] The fact that the cattle were pregnant also impacts upon that because the cattle would be required to feed to ensure that the progeny was safely delivered and then fit to be onsold in due course. It was also the intention to leave the cattle there for approximately one month. That, in my view, would have extended the period of time the stock feed on its own property that the defendant had would have been available later in the winter months.

[38] I am satisfied beyond reasonable doubt that the purpose of placing the cattle on the conservation land was for a commercial purpose for gain, namely that they would save on their own feed and have progeny available for sale at a later date.

[39] In placing cattle on land which has been set aside to regenerate for a period of approximately 25 years, and is successfully regenerating, and with the knowledge that there are restrictions on the use of marginal strips within the conservation area which the company had access to, I assess the starting point for this offending on the basis that it was a deliberate incident. It was not a one-off incident and the damage caused to the area of approximately 190 hectares, in my view, merits a starting point of a fine of $45,000.

[40] In mitigation there are no previous convictions for the defendant company. There has been co-operation with the investigation, co-operation with the removal of the stock, and commitment to make good the affected grazing areas. The costs for the Department have been paid, and there is genuine remorse and willingness to reinstate the land.

[41] A discount of 15 percent is appropriate for those factors, on the basis that an assessment needs to be carried out on the totality if the Court were imposing the amounts which have been paid or agreed.

[42] As there is no order for costs or reparation being made, I still need to take that into account. I am told that if the agreement for the gorse spraying is not followed through, then the Department would have to take some steps; but having made that offer and paid the costs and reparation, a further discount of five percent is appropriate. That then leaves me with a figure of $36,337.50.

[43] The company has pleaded guilty at the first available opportunity and is entitled to a full discount before that. Applying that discount to that matter, the total amount of the fine is $27,250, it being rounded down to that amount.

[44] The company will be fined $27,250. There are no orders for costs on that sum.

[45] In respect of the continuing offending for 14 days, where the fine is assessed at $3000 on the same percentage basis, that is rounded down to $1800 which means that the fine for the continuing offence amounts to $25,200.

[46] Total fines are therefore $52,450. No costs are imposed.

M J Callaghan
District Court Judge