

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CRI-2019-092-003683  
[2019] NZDC 26210**

**AUCKLAND COUNCIL – AKC ENVIRONMENT**  
Prosecutor

v

**U & S CHAND INVESTMENTS LIMITED**  
Defendant

Hearing: 20 December 2019

Appearances: A Castro for the Prosecutor  
M Kotigala for the Defendant

Judgment: 20 December 2019

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**NOTES OF JUDGE C S BLACKIE ON SENTENCING**

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[1] The defendant, U & S Chand Investments Limited, is charged that it operated a food business called Food 4 Less that prepared or manufactured food for direct retail sale to consumers and that it failed to comply with s 50(1)(a) Food Act 2014.

[2] The particulars are that the defendant failed to comply with s 50(1)(a), which required it to ensure that the operations of a food business to which a food control plan applied complied with the relevant requirements set out in the plan. The defendant ought reasonably to have known that the failure directly or indirectly created a risk to the lives or health of members of the public or directly or indirectly increased the likelihood of an existing risk to the lives or health of members of the public. To that charge, the defendant has pleaded guilty.

[3] The background circumstances are that the defendant operates this food business called Food 4 Less at 64 Atkinson Avenue, Ōtāhuhu, Auckland. The business sells prepared and manufactured food direct to consumers. Pursuant to s 48 Food Act 2014, the defendant applied to register a food control plan, which provides for the steps it is to take to manage food safety within its food business. The plan was approved and registered by Auckland Council pursuant to s 59 of the Act.

[4] Section 50 of the Act sets out the duties of an operator of a registered food plan. Those most relevant to the defendant in this case are that the operator of a registered food control plan must:

- (a) Ensure that the operations of a food business or food businesses to which the food plan applies comply with the relevant requirements set out in the plan.
- (b) Ensure that the operations of that food business or those food businesses comply with the applicable requirements of this Act.
- (c) Ensure that the plan is consistent with the applicable requirements of this Act.
- (d) Adequately implement and resource all operations under the plan, including instructing, training, and supervising staff to achieve the safety and suitability of food and ensuring that staff have the necessary competency to achieve that purpose.
- (e) Ensure that all operations under the plan are commensurate with the capability and the capacity of the place, facilities, equipment, and staff to achieve the safety and suitability of food.
- (f) Ensure that after commencement of operations to which the registered food plan relates, the plan is verified by an appropriate recognised agency or recognised person.

[5] It should be noted that s 245 of the Act imposes these requirements on a body corporate, a director or employee, an agent of a body corporate acting within the scope of his or her actual or apparent authority. The director or directors are deemed to have the requisite state of mind.

[6] On 9 March 2018, food safety officers attended the defendant's food business as a result of a complaint from a customer about unhygienic storage conditions for meat and temperature issues at the premises. The food control plan required the defendant to keep a cleaning schedule and to ensure that the premises, facilities and equipment were kept clean. A further requirement of the plan was to establish and carry out procedures to control pests, including carrying out regular checks for pests, removing sites where pests could breed and taking action to eradicate pests when found.

[7] However, upon inspection, the food safety officer observed:

- (a) The overall premises were unclean.
- (b) There was evidence of heavy cockroach infestation.
- (c) Boxes of rotten chicken and meat left on the ground on one side of the premises.
- (d) A strong foul smell emitting from the boxes with rotten food.
- (e) Unlabelled and uncovered food products.

[8] As a result of the unsatisfactory levels of cleanliness, pest control and overall compliance with the plan, the officer determined that the food produced, manufactured or to be sold at the premises would not be safe or suitable for consumption, and that there was an immediate risk to public health if the business were to continue to operate. Having seen the photographs taken by the officer, I consider that to have been an appropriate assessment. The build-up of dirt and filth shown in the photographs can properly be described as a breeding ground for pests and harmful bacteria. The officer accordingly directed that the business be closed until matters of concern were rectified.

[9] On 12 March 2018, the manager and director, Mr Pradhuman Lal, contacted Auckland Council and requested an inspection of the premises. An officer came and revoked the close notice following a reinspection and confirmation that the issues observed had been rectified. On the same day, however, the officer noted a shipping container filled with boxes of garlic with evidence of cockroach infestation. As there was no protective membrane around the garlic besides some mesh packaging, all of it was exposed to direct contamination. The officer gave notice to the defendant to condemn and dispose of this unsafe and unsuitable food.

[10] On 19 April 2018, the premises were inspected again by way of follow-up on the notice to condemn and dispose issued on 12 March. The officers found 64 boxes of garlic still in the storage area. Three boxes were inspected and all were found to be positive with cockroach infestation. A second notice of unsafe and unsuitable food was issued that day.

[11] Those facts that I have outlined give the background to the charge in respect of which I am to impose sentence.

[12] The submissions of both parties set out the appropriate approach for sentencing, that is, the methodology confirmed in *R v Taueki*: fixing a starting point on the basis of culpability of the defendant and the seriousness of the offence and then making adjustments for personal aggravating and mitigating factors, and finally applying any discount for a guilty plea.<sup>1</sup> It is agreed that s 274 of the Act requires the principles and purposes of the Sentencing Act 2002 to be applied.

[13] Ms Castro in her submissions discusses the purpose of the Act, Parliament's intention, and the notable increases in penalties available under the current regime to that under the 1981 Act. As acknowledged by Judge Harvey in the case of *Auckland Council v Po Yuan Meadowlands Limited*, through the enactment of the Food Act 2014 the government wanted to send a clear message that it was serious about food safety.<sup>2</sup> As public health and promotion of responsibility and

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<sup>1</sup> *R v Taueki* [2005] 3 NZLR 372 (CA).

<sup>2</sup> *Auckland Council v Po Yuan Meadowlands Limited* [2018] NZDC 15961

accountability are at the heart of the legislation, the purposes of denunciation and deterrence are most pertinent in this case.

[14] Consideration must be given to the orders available under ss 268 to 273 Food Act 2014, and to s 274(4), which sets out relevant factors as follows:

- (a) How likely is it that a person would be harmed by the conduct constituting the offence.
- (b) How many people were likely to be harmed by the conduct constituting the offence.
- (c) How serious the harm was that was likely to be done by the conduct constituting the offence.
- (d) Whether there were potential or actual implications for trade, including international trade.

I will deal with the first three of those factors in turn.

[15] The likelihood of harm: firstly, when considering the likelihood that a person would be harmed by the conduct underlying the offending, the officer undertaking the inspection noted heavy cockroach infestation, particularly behind the butchery at the storage area and underneath the chest freezers in the retail area and crawling on the floor. Weevils were also seen in the custard powder. Ms Castro again referred to *Auckland Council v Po Yuan Meadowlands Limited*, where Judge Harvey held that a lack of evidence of actual harm is not to be equated to low risk. To draw such a conclusion would constitute, in his words, “over-minimisation of risk”. Mr Kotigala for the defendant submitted that the likelihood of harm was low to moderate, as no pests were found in the food preparation area and the infested garlic and rotten meat were to be discarded and would not be sold to the public.

[16] I turn to the number of people likely to be harmed. In terms of how many people were likely to be harmed by the conduct constituting the offence, the prosecution submits that the number of live cockroaches suggests that the infestation

had not developed overnight and is likely to have posed a risk to the public for some time. Mr Kotigala, on the other hand, argues that the number of people likely to be harmed would be seen as low, given that measures had already been taken to control the cockroach infestation when it was discovered by the manager. Mr Lal, in his affidavit, stated that no cockroach activity was found on the premises until 13 February 2018, noting that the premises were actually treated for cockroaches on 12 February 2018. Mr Lal's evidence is that he called the pest controller on 13 February 2018 to inform him of the issue upon its discovery.

[17] The seriousness of likely harm: considering the seriousness of any likely harm, the council refers to information provided on the Ministry of Health website that describes the diseases that you can contract if you consume food that has had cockroaches on it. It is dysentery, salmonella and diarrhoea. On behalf of the defence, it was submitted in addressing this point that there was an admission that the defendant could have been more vigilant and that they are extremely remorseful.

[18] I now turn to consider case law. As acknowledged by both parties, the Act is relatively new and sentencing case law is, therefore, scarce. In submissions, both parties referred to *Auckland Council v Cook Brothers Bar Auckland Limited*, where an offender was charged under s 224(1)(b), the same charge as is faced by the defendant in this case.<sup>3</sup> In the *Auckland Council v Cook Brothers Bar Auckland Limited* case, the defendant was operating a restaurant wherein cockroaches were identified around the cooking area, underneath benches and fridges, and inside the bar cabinet during a verification check by a food safety officer. The restaurant was closed after inspection until all matters of concern had been rectified. The issues were rectified within 24 hours and the premises reopened following reinspection that day.

[19] A starting point of \$35,000 was considered appropriate by way of penalty. An end sentence of \$21,000 was reached following a 25 percent discount for the early guilty plea and a 15 percent discount for the following mitigating factors: that is, being co-operative and ready to open the following day, the fact that pest control was only three weeks prior, showing remorse, termination of the food control manager's

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<sup>3</sup> *Auckland Council v Cook Brothers Bar Auckland Limited* [2019] NZDC 14158

employment, termination of the head chef's employment, and terminating the contract with the current pest company and contracting with a new one. The new company was to ensure fortnightly pest control visits.

[20] Helpfully, Judge Ryan, during the course of her decision in the *Auckland Council v Cook Brothers Bar Auckland Limited* case, suggested a banding structure to give further guidance to the Courts. She suggested:

- (a) Low culpability: a fine up to \$40,000.
- (b) Medium culpability: a fine of between \$40,000 and \$100,000.
- (c) High culpability: a fine of between \$100,000 and \$160,000.
- (d) Worst-case scenario: a fine of \$160,000 and \$250,000.

It will be noted that the maximum fine pursuant to the Act is \$250,000.

[21] In a recent case of *Auckland Council v Dieb & Dieb Mao Limited*, the company and director each pleaded guilty to a charge under s 224(1)(b).<sup>4</sup> The defendants operated a restaurant which had a food control plan under the Act. A member of the public saw cockroaches in the waiting area and bathroom, and contacted the council. A food safety officer went to the premises to do an inspection. He discovered a number of features which were in breach of the safety plan, including heavy cockroach infestation, overall uncleanliness, build-up of debris, grease and food scraps, unlabelled and uncovered food in the chiller, perishable food not properly stored at the right temperature, and staff untrained in maintaining the plan. The restaurant was closed immediately. The defendant undertook remedial steps and made some improvements. However, upon reinspection the food officer was not able to allow it to reopen. It remained closed at sentencing date.

[22] Judge Thomas assessed the culpability as mid-range and took note that the increase in penalty is demonstrative of Parliament's intention that perpetrators of

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<sup>4</sup> *Auckland Council v Dieb v Dieb Mao Limited* [2019] 13456

offending of this nature are to be treated more seriously than in the past. A starting point of \$10,000 was suggested by counsel for Mr Dieb and \$50,000 for the defendant company. Judge Thomas stated that he could not see on a principled basis how the starting points could be less than that, and adopted each accordingly. Following discounts for an early guilty plea and in respect of the restaurant's limited means – it was no longer trading – end sentences of \$6000 and \$20,000 were imposed.

[23] I now turn to look at the starting point in respect of this particular charge and the defendant's culpability. As Ms Castro pointed out, in *Auckland Council v Cook Brothers Bar Auckland Limited* the only requirement that the offender failed to comply with was to implement a sufficient pest control schedule. She points out that the offending did not arise from a complaint but instead from an unsatisfactory verification check. She submitted that while *Auckland Council v Cook Brothers Bar Auckland Limited* is a good reference point for the case in hand, the current offending is more culpable. The council accordingly recommends a starting point of \$50,000.

[24] It accepts a 25 percent discount could be given in respect of the defendant's early guilty plea, resulting in a penalty of \$37,500, less any other appropriate discounts. Pursuant to s 275(2) of the Act, the council seeks that 90 percent of that fine be paid to it and that the Court can direct that the fine is paid off in increments over time.

[25] Mr Kotigala, on the other hand, submits that the offending by the defendant falls under the low culpability band for a number of reasons. Firstly, in *Auckland Council v Cook Brothers Bar Auckland Limited*, as noted by the Judge, while pest control was carried out only three weeks beforehand, the employees should have noted the cockroaches had they bothered to check as they were required. In this case, the defendant company had contacted the pest control provider the day after the pest control had been carried out because cockroaches were discovered behind the fridge. Therefore, the defence submits, the problem was already being addressed when the council officers arrived at the premises two weeks later. Mr Kotigala also highlights that no cockroaches were found in the food preparation areas.



[26] Whilst the argument is advanced the defendant was fulfilling its obligations under the Act, the defence nevertheless acknowledges that the problem should not have occurred in the first place.

[27] In relation to the boxes of pest-ridden garlic, the defence submits that it was also noticed before the officers arrived and that they were only in storage to be returned to the supplier to obtain a credit note. It was submitted that the garlic would never have reached the public or the display shelves, so it posed no danger or harm to the public. In response to the concerns raised about the rotten meat on the premises, by way of explanation the defendant states that the butchery was being upgraded at the time, so storage for meat items was quite limited, and they had temporary storage. Mr Kotigala notes that the meat was also to be thrown out and would not have made its way to the public. He has nevertheless acknowledged that the rotten meat should never have been kept near the freezer where the fresh meats were being stored. It was further conceded that the defendant company should have planned better to manage stocks during the time of ongoing construction.

[28] With regard to general uncleanliness, the defendant says that it is extremely remorseful and has retained staff and has gained, since then, an A food grading.

[29] Mr Kotigala further submits that when comparing *Auckland Council v Cook Brothers Bar Auckland Limited*, the offending falls at the low to medium level of low culpability and the starting point of \$20,000 is appropriate. He states that acting measures were taken in relation to the cockroaches but there were other shortcomings. Therefore, a starting point of \$25,000 is appropriate.

[30] He seeks a 10 percent discount in respect of mitigating factors, which largely appear to be the same factors relied on in arriving at the starting point. He seeks a further discount by making reference to construction companies doing work nearby, which, he argues, forces pests to come up from underground drainages and seek shelter in the nearby shops. Finally, he seeks a full 25 percent discount for a guilty plea, to arrive at an end sentence in the vicinity of \$16,250.

[31] I now move on to my findings. As noted, in addition to the factors set out above, deterrence, denunciation and the general public interest in ensuring proper hygiene in premises where food is for sale must be given due weight in cases of this nature. Considering the likelihood, the extent and seriousness of any harm which may have arisen from the conduct underlying the charge, I agree with the prosecution that the offending in this case is more culpable than in *Auckland Council v Cook Brothers Bar Auckland Limited*. As noted, there was one breach of a food control plan, whereas in this case there were several breaches, which seems telling to an overall complacent attitude to food safety.

[32] In considering each of the defence submissions, Mr Kotigala seeks to distinguish the current offending as being less culpable than *Auckland Council v Cook Brothers Bar Auckland Limited* on the basis that the defendant company was already purportedly dealing with the cockroach infestation before the initial inspection by the council officers. Whilst appropriately skilled pest controllers were employed by the company to manage the premises, the defendant's conduct in terms of disposing of contaminated food and overall cleanliness falls far short of what would be required by any safety plan, let alone this safety plan. As noted by Judge Ryan in *Auckland Council v Cook Brothers Bar Auckland Limited*, the implementation of the defendant's approved food control plan did not mean that the defendant could leave pest control to an outside controller. It had to be vigilant itself.

[33] Mr Lal's affidavit states that the cockroaches in the garlic were flagged by a pest controller on 5 March. By way of explanation for not disposing of the garlic immediately upon discovery of infestation, or when legally required to do so when served by the first notice to condemn and dispose, he states that they were kept on the premises for the purposes of returning to the supplier along with a credit note request. However, the credit note request, which is exhibit B in his affidavit, is dated 19 April 2018, which is in excess of six weeks after the infestation of the garlic was discovered. Disposal of a contaminated food should have taken place at the earliest opportunity in order to lessen the risk of cross-contamination or for infestation to worsen.

[34] That leads to a further argument advanced on the defendant's behalf, that the infested garlic and rotten meat posed no risk to the public as they were simply being stored until they were disposed of. I totally reject this assertion. There is a clear risk of contamination; indeed, it was acknowledged by the defendant that the rotten meat was placed near the chillers of fresh meat. To have stock in that state lying around was simply asking for bacterial growth and further infestation.

[35] Further, I do not accept the excuse that the rotten meat was stored in such a manner due to storage space limitations as a result of the butchery being upgraded at the time. An upgrade to part of the premises should have been well planned and relevant operational arrangements for suitable and safe stock management clearly should have been planned and implemented.

[36] Finally, the overall state of uncleanliness of the premises shows a concerning disregard for public health. Whilst measures may have been taken, the whole purpose of the food plan and the Act is that a company should not have to wait for the council to intervene to ensure compliance.

[37] I, therefore, consider this case to fall well within the medium culpability helpfully assessed by Judge Ryan, that is, deserving of a fine between \$40,000 and \$100,000. I consider in this case that the starting point by way of a fine is the sum of \$60,000.

[38] In terms of mitigating factors alluded to in the defence submissions, I view those simply as compliance with legal obligations under the plan, and therefore, as a neutral factor. But, they do constitute perhaps the absence of any further aggravating factors. I accept, though, that the defendant is entitled to a 25 percent discount for the early guilty plea, which would result in an end sentence of a fine of \$45,000.

[39] The defendant company will be fined accordingly.

[40] I have recorded that the defendant is convicted and fined \$45,000 and \$130 in Court costs, and an order is made pursuant to s 275 of the Act that 90 percent of the

fine when paid is to be directed to Auckland Council. I also direct that the fine be paid by way of instalments commencing 15 January 2020 in the sum of \$500 per week.

C S Blackie  
District Court Judge