IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2021-016-001211
[2023] NZDC 4734

GISBORNE DISTRICT COUNCIL
Prosecutor

v

YANNIS KOKKOSIS
GYPSY INVESTMENTS LIMITED
Defendants

Hearing:	13 - 14 March 2023
Appearances:	A Hopkinson and R Zame for the Prosecutor A Simperingham and K-C Leung for the Defendant Kokkosis Y Kokkosis appears in person for Gypsy Investments Ltd
Judgment:	15 March 2023

ORAL JUDGMENT OF JUDGE B P DWYER

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[1] This is my decision in these proceedings. As with any oral decision I reserve the right to amend the written record to correct any errors or misquotations which do not affect the rationale for or outcome of the decision.

[2] Yannis Kokkosis (Mr Kokkosis) and Gypsy Investments Limited (GIL – jointly the Defendants) each plead not guilty to two identical representative charges brought against them by Gisborne District Council (the Council). The charges are set out in full in charging documents ending 0644, 0645, 0646 and 0647:

- That Gypsy Investments Ltd, between 22 November 2020 and 6 February 2021, at or near 42 MacDonald Street, Gisborne, contravened or permitted a contravention of s 9(1) of the Resource Management Act 1991 in that it used land in a manner that contravened Regulation 10 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by disturbing soil when that activity was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act 1991 (charging document ending 0644);

- That Gypsy Investments Ltd, between 1 September 2020 and 6 February 2021, at or near 42 MacDonald Street, Te Hapara, Gisborne, contravened or permitted a contravention of s 9(1) of the Resource Management Act 1991 in that it used land in a manner that contravened Regulation 11 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by disturbing soil when that activity was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act 1991 (charging document ending 0645);

- That Yannis Kokkosis, between 22 November 2020 and 6 February 2021, at or near 42 MacDonald Street, Gisborne, contravened or permitted a contravention of s 9(1) of the Resource Management Act 1991 in that he used land in a manner that contravened Regulation 10 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by disturbing soil when that activity was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act 1991 (charging document ending 0646); and

- That Yannis Kokkosis, between 1 September 2020 and 6 February 2021, at or near 42 MacDonald Street, Gisborne, contravened or permitted a contravention of s 9(1) of the Resource Management Act 1991 in that he used land in a manner that contravened Regulation 11 of the Resource Management

(National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by disturbing soil when that activity was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act 1991 (charging document ending 0647).

[3] In considering these charges I will undertake a background recital of relevant facts. A number of these are uncontentious and/or conceded. To the extent that any factual findings might be decisive or determinative in outcome I find those findings to be determined beyond reasonable doubt unless I state to the contrary.

[4] It will be seen from the charging documents that the Council contends that in each case the Defendants breached the provisions of either reg 10 or reg 11 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (the NES/Regulations) by disturbing soil at or near 42 MacDonald Street, Gisborne (the site).

[5] The reg 10 offending is alleged to have occurred between 22 November 2020 and 6 February 2021 and the reg 11 offending between 1 September 2020 and 6 February 2021.

[6] There was no dispute between the Council and the Defendants that breach of the regulations constitutes breach of s 9(1) of the Resource Management Act (RMA). The emphasis in these proceedings was interpretation of the Regulations and that is the matter I will direct my attention to in this decision.

[7] The site is a Residential zoned parcel of land containing 2,605 square metres. At the time of the alleged offending the site was owned by GIL which had purchased it in August 2020 for the purpose of undertaking a four lot subdivision. There was an existing 1950s house at the road end of the site and three more houses were to be constructed on the remaining lots. Mr Kokkosis was then and, I understand, remains the sole director of GIL. For the purposes of this decision I will treat the actions of himself and GIL as one and the same.

[8] At the time of purchase by GIL the site had on it the 1950s dwelling, three sheds and a glass house. On about 28 August 2020 Mr Kokkosis contacted Land Development and Engineering Limited (LDE) (a company with expertise in land development) by telephone asking it to assist him in the subdivision of the site.

[9] On 2 September 2020 Ms J M Taplin (an engineer and geologist employed by LDE) replied to Mr Kokkosis' telephone enquiry by email setting out a proposal for LDE to undertake a geotechnical and soil contamination report to support a resource consent application for subdivision. The email described the scope of the work to be undertaken by LDE to that end and included the following statement:

> **Proposed work scope environmental**.
>
> A short desktop review indicates that historically land uses at the site include possible horticultural activity as well as buildings that have since been removed. These activities pose a possible lead/arsenic and asbestos contamination which is required to be assessed including soil sampling.

In short, on 2 September 2020 the Defendants were alerted that there was a potential contamination issue pertaining to the site.

[10] On 4 September 2020 Mr Kokkosis responded to LDE accepting its proposal to undertake a geotechnical and contamination assessment. LDE commenced that work accordingly. A number of its employees were involved including Ms Taplin and Mr J E Davenport (a senior scientist in LDE's environmental team). Mr Davenport was responsible for undertaking an environmental soil contamination assessment of the site. He had been involved in the desktop review referred to in Ms Taplin's email of 2 September.

[11] After receiving Mr Kokkosis' email instructions Mr Davenport undertook a preliminary site investigation (PSI) by reviewing historical aerial photographs. The purpose of the PSI was described in these terms in paragraphs [28] to [30] of Mr Davenport's brief of evidence:

> 28. The purpose of the PSI was to identify if there were any historical or current activities on the property that could have caused the soil at the property to become contaminated. In particular, my PSI involved checking whether HAIL activities had been carried out at the property in the past.

29. "**HAIL**" is the acronym used in the contaminated land context for the Hazardous Activities and Industries List. The HAIL is a compilation of activities and industries that are considered likely to cause land contamination resulting from hazardous substance use, storage or disposal. The HAIL is intended to identify most situations in New Zealand where hazardous substances could cause, and in many cases have caused, land contamination.

30. The HAIL is prepared by the Ministry for the Environment and the current version is dated October 2011. I have downloaded the current version of the HAIL from the Ministry for the Environment's website.

[12] His findings in that regard are described in paragraphs [41] to [49] of his brief:

41. My review of these historical aerial photographs indicated that the property had been used in the 1960s for growing produce and then had been used for small to medium scale horticultural land use in the 1980s.

42. My assessment of these historical photographs was later recorded in the LDE report.

43. [REFER TO LDE REPORT – PAGE 7]

44. I concluded from my PSI that activities or industries described in the Hazardous Activities and Industries List (**HAIL**) had occurred at the property.

45. [REFER TO LDE REPORT – PAGE 8, 10 & 11]

46. My conclusion was on page 11 of the LDE report in section 6 where I referred to the relevant HAIL activities I considered had occurred at the property.

47. The first was HAIL - clause A10, which refers to persistent pesticide bulk storage or use including market gardens, orchards, glass houses or spray sheds. I had identified from historical imagery that there had been glasshouses and a garden in an aerial image taken of the property in 1966.

48. The second was HAIL - clause I, which refers to any other land that has been subject to intentional or accidental release of a hazardous substance in sufficient quantity that it could be a risk to human health or the environment. I had identified from historical aerial imagery of the property that there was potential for lead paint flakes and asbestos material to be released into the soil from structures that had been located across the site. This may have happened over time or when those structures were removed.

49. Based on the findings of the PSI, it was my opinion that the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (**NES**) applied to the property and that a detailed site investigation was necessary.

[13] At the same time as Mr Davenport was undertaking his PSI, Ms Taplin undertook a geotechnical investigation. In the course of that investigation she observed white building cladding on the site which may have contained asbestos. These findings (that is the findings of Mr Davenport's work and Ms Taplin's observations) led to LDE undertaking a detailed site inspection involving the collection of soil samples from the site and analysis by Analytica Laboratories (an independent laboratory). Eight samples were taken on about 12 October 2020 on part of the site behind the existing house and tested for heavy metals and asbestos. I will refer to the general area from where the samples were taken as "the piece of land" for reasons which will be apparent in due course.

[14] The sampling results were received from Analytica by Mr Davenport on 23 October 2020. They showed that the soil on the piece of land was contaminated with asbestos and high levels of arsenic and lead. Mr Davenport summarised these findings in the following terms~~:~~

- Arsenic

> 78. The levels of arsenic in the contaminated parts of the property ranged from 44 mg/kg to 225 mg/kg which is eleven times higher than the residential guideline value under the NES and are considered very high for a residential property
>
> 79. When I refer to the "residential guideline value under the NES", I am referring to the values in the Ministry for the Environment 2011 publication called *Methodology for Deriving Standards for Contaminants in Soil to Protect Human Health.*
>
> …
>
> 84. Levels of arsenic in uncontaminated parts of the property ranged from 3.9 to 6.8 mg/kg which is within natural background levels.

- Lead

> 86. The levels of lead in the contaminated parts of the property ranged from 301 mg/kg to 1,310 mg/kg which is six times the residential guideline value under the NES.
>
> …

88. Levels of lead in uncontaminated parts of the property ranged from 17.6 to 69.5 mg/kg. The predicted natural background levels for Gisborne is 25mg/kg.

- Asbestos

90. The analysis results showed that the two suspected asbestos fragments from the fibre board samples taken at the property tested positive for white asbestos, which is known as chrysotile asbestos.

91. One of the soil samples also tested positive for brown asbestos (amosite) and white asbestos (chrysotile) indicating that during the demolition process, asbestos fibres had been released to the ground.

[15] In summary the sampling results established that the piece of land was contaminated with asbestos and very high levels of arsenic and lead. These findings were accepted by the Defendants' expert witness on contaminated sites, Mr A W Woodger. It was common ground that samples had been taken and analysed accurately in accordance with National Guideline values.

[16] Additionally LDE compared the contaminant levels on site with background levels of naturally occurring arsenic and lead in Hawke's Bay (there being no comparable information for Gisborne). The maximum levels of arsenic and lead in the soil samples from the piece of land were 25 and 48 times higher respectively than Hawke's Bay background levels.

[17] Mr Woodger provided two detailed written analyses of the LDE results. In his second report he noted an anomaly in the test results in that concentrations of arsenic and lead in two instances were significantly higher than surrounding samples. I understood him to say that these samples might be anomalies representing elevated spikes of contaminants not typical of the wider situation on the piece of land.

[18] Nevertheless in paragraph [26] of his February report Mr Woodger recorded as follows:

> I accept that based on the interpretation LDE has made and without any further investigations the site can likely be considered a "Piece of Land" with the threshold for a HAIL activity 1. As such the NESCS applies to the site.

[19] Accordingly it was common ground that part of the site was contaminated by arsenic and lead at levels which brought compliance with the Regulations into play. A consequence of that was that a resource consent was required to disturb and/or subdivide the piece of land. Additionally of course there was asbestos to deal with.

[20] Following receipt of the Analytica results LDE pressed on with completion of a detailed site inspection report including a remedial action plan to remove contaminated soil and replace it with clean soil. On 8 November and 12 November 2020 Mr Davenport emailed Mr Kokkosis regarding steps which would need to be taken regarding the contaminated soil. The email of 12 November included a site plan showing the extent of the piece of land identifying particular areas marked in blue where sampling had shown remediation was definitely required and a wider area marked yellow where it might potentially be required in a worse case scenario.

[21] I understood the blue areas to be shed sites (two of which had already been removed) and a burn pit. The wider yellow area was grassed lawn or the like. No one has undertaken any measurement of the piece of land involved. As I have noted, the area in question is situated at the rear of the property from the street and might encompass something like one fifth or one quarter of the total site, although I make no reliance on that guesstimate.

[22] On 13 November 2020 LDE completed its site investigation report and forwarded it by email to Mr Kokkosis. The recommendations of the report were summarised in paragraph [127] of Mr Davenport's brief of evidence:

> 127. The recommendations on page 16 of the report included the following:
>
> (a) That the concentrations of soil contaminants posed an unacceptable exposure risk associated with a residential subdivision and therefore remedial works would be required prior to the proposed residential subdivision development.
>
> (b) That a remedial action plan was required for the safe removal of the contaminated soil followed by a site validation report after the remedial work had been completed.
>
> (c) That the LDE report and a remedial action plan needed to be submitted to the Council for consideration prior to any earthworks taking place at the property.

(d) That if the proposed subdivision were to proceed, a restricted discretionary consent under the NES would be required.

(e) That as contaminants existed above natural background levels including extremely high arsenic concentrations and high lead levels, no soil should leave the site from within the remedial area and be disposed offsite without the oversight of a contaminated land professional.

(f) That, in the event the proposed development did not proceed, the owner of the site had a duty of care to advise site workers occupiers of the risks associated with contaminated soils at the site.

[23] On 15 November 2020 Mr Kokkosis replied by email to Mr Davenport advising as follows… "The contaminated soil has been disposed of via Jukes Carriers and Waste Management could you please let me know the costs and procedure to have the areas of concern checked again …".

[24] It transpired that two truckloads of material from the piece of land had been removed by the Defendants and deposited at the Tomlin Landfill operated by ME Jukes & Son (Jukes) on 31 October 2020. Jukes recorded that the two loads weighed 6.01 and 7.9 tonnes respectively and described the contents as being… "concrete, brick, asphalt etc". Mr Kokkosis' contended that this material was largely concrete and other foundation material from demolished sheds but acknowledged that soil would have been included albeit, as I understood it, in small quantities.

[25] Mr Kokkosis' advice drew a response from LDE which ultimately led to termination of its services for the Defendants on 19 November 2020. On 22 November 2020 LDE sent a copy of its report to the Council triggering the investigation process which gives rise to these prosecutions.

[26] Of some relevance in that regard is a letter dated 11 February 2021 from Jukes to Mr P Stuart (Senior Investigator at the Council at that time) who was investigating the contaminated soil issue at MacDonald Street. Mr Stuart had conducted an interview of Mr Kokkosis on 5 February 2021. Mr Kokkosis provided a written explanation to the Council about what had happened on site dated that same date but apparently not delivered to the Council until 12 February.

[27] The Jukes' letter was attached to Mr Kokkosis' letter and had in any event been sent to the Council directly. I imply that Mr Kokkosis' uncritical inclusion of the Jukes' letter must mean that he agreed with the contents of it. The letter identified that six truckloads of material from 42 MacDonald Street had been deposited at the landfill between 25 September 2020 and 5 February 2021. The loads were described in these terms in the Jukes' letter:

- 25 September 2020 - 0.55 tonne asbestos;
- 31 October 2020 - 6.01 tonnes concrete, brick asphalt, etc;
- 31 October 2020 - 7.9 tonnes concrete, brick, asphalt, etc;
- 14 November 2020 - 2.6 tonnes low-level contaminated soil;
- 14 November 2020 - 7.69 tonnes soil, spoil, etc;
- 5 February 2021 - 1.54 tonnes low-level contaminated soil –

giving a total of material allegedly deposited at Jukes' landfill between those dates of 26.29 tonnes.

[28] The Council has brought the two sets of charges against each of the Defendants which I have described previously. Before looking at the relevant regulatory provisions, I note that they commonly refer to a "piece of land". I am satisfied that the reference to a piece of land in the Regulations is a reference to an area of land which is allegedly, potentially or actually contaminated, not to a whole allotment as described in s 218 of the RMA. That was the evidence of Mr Davenport and Mr Woodger as well as the Council's planning witness (Ms J Noble). That interpretation is confirmed by an MFE guidance document and by my reading of the definition of subdivision in reg 5(5)(a)-(c) of the Regulations so I accept that interpretation.

[29] Regulation 10 of the Regulations is a restricted discretionary activity provision and relevantly provides:

10 Restricted discretionary activities

(1) This regulation applies to an activity described in any of regulation 5(2) to (6) on a piece of land described in regulation 5(7) or (8) that is not a permitted activity or a controlled activity.

(2) The activity is a restricted discretionary activity while the following requirements are met:

(a) a detailed site investigation of the piece of land must exist:

(b) the report on the detailed site investigation must state that the soil contamination exceeds the applicable standard in regulation 7:

(c) the consent authority must have the report:

(d) conditions arising from the application of subclause (3), if there are any, must be complied with.

(3) The matters over which discretion is restricted are as follows:

(a) the adequacy of the detailed site investigation, including—

(i) site sampling:

(ii) laboratory analysis:

(iii) risk assessment:

(b) the suitability of the piece of land for the proposed activity, given the amount and kind of soil contamination:

(c) the approach to the remediation or ongoing management of the piece of land, including—

(i) the remediation or management methods to address the risk posed by the contaminants to human health:

(ii) the timing of the remediation:

(iii) the standard of the remediation on completion:

(iv) the mitigation methods to address the risk posed by the contaminants to human health:

(v) the mitigation measures for the piece of land, including the frequency and location of monitoring of specified contaminants:

(d) the adequacy of the site management plan or the site validation report or both, as applicable:

(e) the transport, disposal, and tracking of soil and other materials taken away in the course of the activity:

(f) the requirement for and conditions of a financial bond:

(g) the timing and nature of the review of the conditions in the resource consent:

(h) the duration of the resource consent.

Consequence if requirement not met

(4) If a requirement described in this regulation is not met, the activity is a discretionary activity under regulation 11.

There is no dispute in these proceedings that the soil disturbance activity undertaken by the Defendants constituted disturbing the soil of the piece of land identified in the LDE report. Regulation 5(4)(a) provides that an activity is disturbing the soil of the piece of land which " … means disturbing the soil on the piece of land for a particular purpose". In this case that purpose was to remove contaminated soil to enable subdivision and development.

[30] The Council contends that the disturbance in breach of reg 10 occurred between 22 November 2020 and 6 February 2021. I assume that the date of 22 November was chosen by the Council as the commencement date of the alleged reg 10 offending because at that time it had received the LDE report which constituted a detailed site investigation in accordance with reg 10(2). There is no dispute that the Defendants did not have a resource consent allowing soil disturbance on the piece of land (Ms Noble testified in that regard). I assume again that the date of 6 February 2021 was chosen as the conclusion of the offending period because 5 February was the date on which the Jukes' letter described there having been a deposition of 1.54 tonnes of what was described as low-level contaminated soil at the landfill on that date.

[31] The evidence provided to the Court included a weighing docket of 5 February 2021 from Jukes with a handwritten note on it saying… "42 MacDonald Street contaminated soil" and signed by Trevor Jukes on 21 April 2021.

[32] Mr Kokkosis testified that the writing on the document was not his. He is the contracting business and is a regular customer of the Jukes' landfill. He cannot recall what, if any, material might have been deposited on 5 February 2021 and testified that

he had other drivers and contractors dump material for him on occasions. The only evidence as to the origin of the material was the address written on the docket by an apparently unknown third party (possibly Mr Jukes?) who was not called to give evidence.

[33] Other than the layman's description on the Jukes' letter and the docket there is no analysis at all of the contents of the 5 February load nor the nature of the alleged contaminants in it. I had no evidence of any other depositions by the Defendants at the landfill between 22 November 2020 and 6 February 2021 so the outcome of this charge rests on the alleged 5 February deposition.

[34] All of the evidence I heard points to removal of contaminated soil from the site having occurred some months before February 2021. Mr Kokkosis advised or testified (and it was confirmed by photographic evidence) that subdivision earthworks on the piece of land had been substantially completed by mid/late November. I cannot be satisfied beyond reasonable doubt (nor I might add to any lesser standard) that contaminated soil on the piece of land was disturbed between 22 November 2020 and 6 February 2021 and deposited at Jukes. I dismiss both charges of breach of reg 10 against both Defendants. That is charging documents ending 0644 and 0646.

[35] That finding brings me the remaining charges against each defendant, a breach of reg 11 between 1 September 2020 and 6 February 2021. Reg 11 relevantly provides as follows:

> **11 Discretionary activities**
>
> (1) This regulation applies to an activity described in any of regulation 5(2) to (6) on a piece of land described in regulation 5(7) or (8) that is not a permitted activity, controlled activity, or restricted discretionary activity.
>
> (2) The activity is a discretionary activity.

[36] As I have found previously, the Defendants did disturb soil on the piece of land previously described. They did not have a discretionary activity consent allowing them to do so at the time the proven soil disturbance took place. However, in determining the Defendants' guilt on the reg 11 charges three issues arise.

[37] First is that the charging documents contend that the period of offending was between 1 September 2020 and 6 February 2021. For the reasons previously given in respect of the reg 10 matter I have found the contention that a disturbance of soil took place on 5 February 2021 not to be established beyond reasonable doubt.

[38] The next relevant date which the Council might contend would be applicable was 14 November 2020 when the Jukes' letter and weighing dockets show deposition of two loads of material. Although the charges have been framed as representative charges I am going to amend the end date in them to 14 November 2020 to reflect reality. I will leave the 1 September commencing date for the charging period intact but note that that date pre-dates the proven disturbance date.

[39] The second issue relates to the offending which is alleged to have occurred on 14 November 2020.

[40] The third issue relates to the defence advanced by the Defendants who contend that such disturbance as they did undertake on the piece of land was a permitted activity in terms of reg 8(3) of the Regulations.

[41] The second issue relating to the 14 November date creates something of a difficulty for the Defendants. In his initial dealings with the Council and in dealings with his engineering and soil remediation advisors, Mr Kokkosis advised both orally and in writing on a number of occasions that the total weight of soil disturbed on the piece of land and removed to the Jukes' landfill was 26.29 tonnes. This weight included asbestos removed on 25 September 2020 and soil deposited on 5 March 2021 which I am not satisfied beyond reasonable doubt came from the piece of land for reasons I have attempted to spell out.

[42] Excluding those items, the total tonnage of contaminated soil allegedly disturbed amounts to 24.2 tonnes, deposited in two lots into Jukes' landfill on 31 October 2020 and 2 lots on 14 November 2020. Somewhat surprisingly, in his evidence to the Court Mr Kokkosis contradicted his previous advice to the Council and his advisors regarding the soil which went to Jukes on 14 November. He testified that the two depositions of soil on that date did not come from the Site but from a

collapsed bank on his father's property at Whittaker Street, Gisborne which required repair and the construction of a new retaining wall.

[43] Defendants' exhibit A was a photographic booklet with photographs 16 to 18 showing a collapsing bank and retaining wall. Mr Kokkosis' father gave evidence on this topic. He confirmed the slip incident which he said had happened a couple of weeks after his birthday in October. He said that his son came with a truck and digger to clean the bank up a couple of weeks or so later in mid-November. He did not know where his son took the soil to. Nothing in his cross-examination gave rise to any reason to doubt this evidence.

[44] The contention that the soil deposited at Jukes on 14 November was from his father's property, however, raises something of a credibility mountain for Mr Kokkosis to climb in light of his not having previously advanced that explanation and his previous acceptance of the 26.29 tonne deposition figure. He explained that at the time of the Council investigation process he was working 70 to 80 hours per week in his contracting business plus trying to advance the subdivision of the site. He was aware of the fact that Jukes had provided information and docket slips to the Council and what those figures added up to. Mr Kokkosis saw the figures from Jukes and assumed that they all related to the MacDonald Street site without any detailed checking on his part or appreciating that the 14 November date was "irrelevant" (in the sense that it did not apply to the site - as I understood it).

[45] I formed the impression that Mr Kokkosis was out of his depth in his dealings with the Council on a manner at which he was in considerable legal jeopardy. No fault lies with the Council in that regard - all necessary warnings were given to the Defendants. However when the evidence of Mr Kokkosis, Mr Kokkosis Snr and the advanced state of development of the site by mid-November are taken into account I find that it is highly likely that the soil deposited at Jukes on 14 November came from Whittaker Street (that is Mr Kokkosis Snr's address) notwithstanding Mr Kokkosis' failure to identify that earlier.

[46] It was not disputed that the Defendants had disturbed soil on the piece of land on 31 October 2020 and deposited that soil at Jukes' landfill. That finding brings me

to the defence advanced by the Defendants that the soil disturbance which they indisputably undertook on 31 October 2020 constituted a permitted activity. Regulation 11 does not apply to permitted activities. Regulation 8 identifies what constitutes permitted activities under the NES. In particular reg 8(3) requires:

> **8 Permitted activities**
>
> ...
>
> *Disturbing soil*
>
> (3) Disturbing the soil of the piece of land is a permitted activity while the following requirements are met:
>
> (a) controls to minimise the exposure of humans to mobilised contaminants must—
>
> (i) be in place when the activity begins:
>
> (ii) be effective while the activity is done:
>
> (iii) be effective until the soil is reinstated to an erosion-resistant state:
>
> (b) the soil must be reinstated to an erosion-resistant state within 1 month after the serving of the purpose for which the activity was done:
>
> (c) the volume of the disturbance of the soil of the piece of land must be no more than 25 m^3 per 500 m^2:
>
> (d) soil must not be taken away in the course of the activity, except that,—
>
> (i) for the purpose of laboratory analysis, any amount of soil may be taken away as samples:
>
> (ii) for all other purposes combined, a maximum of 5 m^3 per 500 m^2 of soil may be taken away per year:
>
> (e) soil taken away in the course of the activity must be disposed of at a facility authorised to receive soil of that kind:
>
> (f) the duration of the activity must be no longer than 2 months:
>
> (g) the integrity of a structure designed to contain contaminated soil or other contaminated materials must not be compromised.

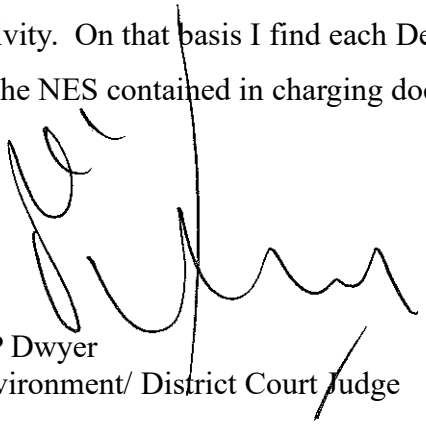
Sub regs (a) to (g) set out a series of requirements which must be met for disturbance to fit into the permitted activity category.

[47] I commence my considerations of reg 8(3) by observing that it provides a positive defence which the Prosecutor is not required to negate in advance. In any event the Council addressed a number of the qualifying requirements of the regulation through the evidence of its planning witness Ms Noble who dealt in some detail with the issue of deposition of the disturbed soil at the Jukes' landfill. That is a requirement of sub reg (3)(e) which must be met for the activity to be permitted.

[48] Ms Noble deposed that Jukes was not authorised to receive soil contaminated by arsenic and lead to the extent that this soil was. Her conclusion in that regard was confirmed by the Defendants' expert witness Mr Woodger who testified that all soil removed from the site should have required TCLP (Toxicity Characteristic Leaching Procedure) testing to be accepted at the landfill. That was not done. That finding in itself takes the disturbance activity outside the permitted activity requirements of reg 8(3)(e).

[49] I further record that none of the evidence I heard remotely plausibly satisfied me that the soil disturbance activity met the requirements of reg 8(3)(a), (b) or (d)(ii) in addition to requirement (3)(e).

[50] For that reason I reject the proposition that the soil disturbance of the site indisputably undertaken by the Defendants on 31 October 2020 was a permitted activity. On that basis I find each Defendant guilty on one charge of breach of reg 11 of the NES contained in charging documents ending 0645 and 0647 respectively.



B P Dwyer
Environment/ District Court Judge