IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2022-416-000002
[2024] NZDC 17521

GISBORNE DISTRICT COUNCIL
Prosecutor

v

DYLAN MICHAEL JAMES O'CONNELL
Defendant(s)

Hearing: 12 October 2023

Appearances: M Blaschke for prosecutor
L Maynard for defendant

Judgment: 26 July 2024

SENTENCING NOTES OF JUDGE D A KIRKPATRICK

Introduction

[1] Dylan Michael James O'Connell has pleaded guilty to two charges of contravening or permitting contravention of an enforcement order, being offences under s 338(1)(b) of the Resource Management Act 1991 (**RMA**).

[2] The defendant contravened enforcement orders made on 27 August 2018 requiring the defendant to:

(a) cease using the road reserve within 100 metres of 143 Seddon Street for the temporary or permanent storage of vehicles, vehicle parts and/or any items associated with a car repair business;

(b) cease storing vehicles, vehicle parts and/or any items associated with a car repair business outdoors where those vehicles, vehicle parts or associated items are visible from adjacent residential sites, visible from the road reserve at Seddon Street, Gisborne or visible from the road at Seddon Street, Gisborne; and

(c) comply with these orders on an ongoing basis.

[3] The maximum penalty for each offence is imprisonment for a term not exceeding two years or a fine not exceeding $300,000.

Background

[4] The defendant lives at 143 Seddon Street. He operates a mobile mechanical repair business. He also collects old cars and utes.

[5] The area where the property is located is a small rural settlement approximately 15 kilometres outside of Gisborne city. The other residential sections in the area are open, have generous grass verges and established trees.

[6] From June 2014 Gisborne District Council has received ongoing complaints that vehicles, derelict vehicles, vehicle parts and rubbish were being stored on the road reserve outside the property.

[7] The Council attempted to address the issue with the defendant, sending him warning letters, and issuing him infringement notices and abatement notices.

[8] Mr O'Connell's responses during this period included telling Council officers he would remove the vehicles then not following through, temporarily removing vehicles and car parts then resuming storage, and threatening Council officers and neighbours.

[9] On 23 May 2018 the Council applied to the Environment Court for enforcement orders as a further attempt to address the issue. On 27 August 2018 enforcement orders were made.[1] The orders were served on the defendant by a Police

[1] *Gisborne District Council v O'Connell and De Cent* [2018] NZEnvC 142 (reasons) and 153 (order).

constable on 3 September 2018. On 20 December 2018, the defendant was ordered to pay the Council costs of $23,505.00.[2]

Offending

[10] The deadline for compliance with the enforcement orders was 1 October 2018.

[11] The defendant initially complied with the requirement in the enforcement orders to cease using the road reserve beside the property for the temporary or permanent storage of vehicles and vehicle parts. The defendant did not pay the costs ordered.

[12] In late 2019 the Council began to receive complaints about vehicles, derelict vehicles and vehicle parts being stored on the road reserve outside the property. The Council carried out further drive-by compliance inspections from November 2019 onwards during which Council officers observed the number of derelict vehicles, functioning vehicles and associated items on the road reserve beside the property gradually build up. From 14 July 2020 onwards, the road reserve outside the property looked the same or worse than it did prior to the granting of the enforcement orders.

[13] The Council continued to receive complaints and conduct drive-by compliance inspections. On 16 July 2020, 24 July 2020, 23 December 2020, 3 March 2021 and 12 April 2021, Council officers observed a number of derelict vehicles, functioning vehicles and associated items on the road reserve adjacent to the property in contravention of the enforcement orders.

[14] On 12 April 2021, the officer observed that there were seven vehicles parked on the road reserve outside the property (four of which appeared to be derelict, i.e., severely damaged, rusty, missing number plates and/or missing essential parts). There were a number of old tyres. There was also at least one derelict vehicle on the other side of the road reserve from the property on this date and at least one derelict vehicle within the property that could be seen from the road.

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2 *Gisborne District Council v O'Connell and De Cent* [2018] NZEnvC 247.

[15] On 28 April 2021, the Council executed a search warrant with the assistance of Police officers. Council officers found:

(a) seven vehicles on the road reserve beside the property and within 10 metres of the property. Five of these were derelict, two had current registration and warrant of fitness;

(b) three vehicles on the road reserve across the road, between 30 and 36 metres from the property. Two of these were derelict and one had a current registration and warrant of fitness, there was a wrecked car sitting on its deck;

(c) on the road reserve immediately beside the property a Metalco scrap bin containing a small amount of rubbish, a rusty engine block sitting on a trolley, old car tyres, waster blaster, rusty welding machine, 1,000 litre bulk container with steel cage, large sheet of wood, steel gate, LPG bottle, blue kayak, old wheelbarrow, plastic containers, trailer axles with two wheels attached;

(d) 28 derelict vehicles in the area surrounding the house at the property. A number of these were visible from adjacent neighbouring properties or from the road reserve or from Seddon Street.

[16] While officers were at Seddon Street on 28 April 2021 a local resident approached Council officers saying the cars on the road reserve were an ongoing eyesore, residents were happy the Council was finally doing something about this, the defendant is aggressive to deal with, and the cars and material on the road reserve made it hard to see when people drive onto Seddon Street from the adjacent street and meant cars could not pull over if a large vehicle was coming the other way.

[17] When the search warrant was initially executed the defendant was not present, but he returned to the property while the search was underway. After being cautioned by a Council enforcement officer, the defendant made a number of statements including that he understood the enforcement orders, he has an arrangement with Metalco (a recycling company) to remove the material in bins, Metalco's crane cannot be used at the property to remove cars because of power lines so he has to bring each

car out one by one, he tries to cut the vehicles up and take them away, all the vehicles are vehicles he has acquired and worked on, he would buy a car, drive it and on sell it, he is allowed to sell up to seven cars a year, most of the cars were registered to his partner.

[18] After the search warrant was executed, the Council made inquiries with Metalco who said they do not charge the defendant to take away vehicles, they come to collect their bins whenever he contacts them, and they were happy to remove all the vehicles, estimating it would take one day.

[19] On 30 June 2021, a Council officer inspected the property and found there were more cars parked on the road reserve outside the property.

Environmental effects

[20] The main adverse effects of the offending relate to the reduction in amenity values and potential soil and stormwater contamination from discharges from or related to the old vehicles.

[21] The outdoor storage of the derelict vehicles at the property and the adjacent road reserve detracts from the residential character and amenity values of Seddon Street. The areas of grassed road reserve have important value in terms of the character and amenity of the residential environment in this area. Covering these areas with old vehicles has a significant impact. All other grassed areas in this area are free from storage of items. The residential character and appearance of the site is not being maintained. The use of the adjacent public road reserve for private storage is creating a nuisance for other residents in the street. Themes running throughout complaints are that the activities are an "eyesore" and detract from the neighbourhood. The Council has received complaints about the vehicles attracting vermin. During the inspection on 28 April 2021 Council officers found a dead rat on the ground between two of the derelict cars.

[22] On 28 April 2021 Council officers took soil samples beneath or near derelict vehicles at and adjacent to the property. Two of those soil samples had very high levels of Total Petroleum Hydrocarbons (**TPH**). These high levels of TPH are indicative of heavy fuel oils and lube oils. TPH in the soil presents potential environmental and

human health risks based on exposure pathways and receptors. The site where the soil samples were collected in the road reserve is close to a stormwater drain. Any contaminants located on the road reserve will potentially be transferred into the stormwater drain.

Prosecutor's submissions

[23] The prosecutor submits that the current offending is serious by virtue of the length of time the breach has gone on for, and that the visual/amenity impact of it has been effectively a permanent one for those living around the defendant. Further, the cars have leeched contaminants into the soil, impacting that soil and contributing to cumulative environmental degradation. The prosecutor submits the defendant's refusal to comply with the order is fundamentally against the community and can be seen as anti-social.

[24] The prosecutor submits the breach is deliberate, with the defendant simply choosing not to comply with the enforcement order. The prosecutor notes the order was sought after years of efforts to have him clean up the site failed, and he had every opportunity comply with the order.

[25] The prosecutor submits the breach is not a commercial one, and that this offending is more akin to hoarding.

[26] The prosecutor referred me to the following cases:

(a) *R v Gordon*[3] where Mr Gordon was convicted of five RMA offences relating to contraventions of enforcement orders and acting without resource consent. Mr Gordon was sentenced to three months home detention and 270 hours community work;

(b) *Bay of Plenty Regional Council v Waaka*[4] involved eight RMA offences, including breaching enforcement orders, in relation to an illegal landfill

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[3] *R v Gordon* [2009] NZCA 141.

[4] *Bay of Plenty Regional Council v Waaka* DC Tauranga CRI-2009-070-008232, 13 September 2011.

operation. The starting point would have been $120,000. Mr Waaka was sentenced to 400 hours community work;

(c) *Tasman District Council v Jager*[5] where two defendants were charged with breaches of an enforcement order and breaches of the Building Act by carrying out building work without consent. The court adopted a starting point of $35,000 but noted that had there been a direct adverse environmental effect a higher starting point would have been adopted. The prosecutor submits the offending is more serious than what occurred in *Jager*;

(d) *Southland Regional Council v Fernlea Farm Ltd*[6] where the court adopted a starting point of $25,000 for contravention of an abatement notice;

(e) *Canterbury Regional Council v Annexure Tyre Services*[7] where the court adopted a $50,000 starting point for an offence of contravening an enforcement order in the context of a large-scale tyre dumping facility; and

(f) *Bay of Plenty Regional Council v Merrie, Merrie & Spencer*[8] where three defendants were sentenced for contravening an enforcement order made two years earlier. The offending related to the large-scale unlawful storage of used tyres. A starting point of $35,000 was adopted for one defendant, a starting point of 220 hours of community work was adopted for each of the other two defendants.

[27] The prosecutor submits that the important aggravating factor not present in any of the decisions referred to, is that this offending occurred on a residential street and involved the Council road reserve, in addition to the property the defendant has been occupying. That different status means that despite the smaller scale of the defendants offending, its impact is disproportionate to that scale. The duration of the offending,

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5 *Tasman District Council v Jager* DC Nelson CRI-2014-042-1217, 15 August 2014.
6 *Southland Regional Council v Fernlea Farm Ltd* [2020] NZDC 10046.
7 *Canterbury Regional Council v Annexure Tyre Services* [2020] NZDC 26486.
8 *Bay of Plenty Regional Council v Merrie, Merrie & Spencer* [2020] NZDC 114444.

in the context of long standing (and persistent) non-compliance, is also seriously aggravating.

[28] It was anticipated the defendant would be unable to pay a fine. For the sake of consistency, the prosecutor suggests that a starting point be set in terms of a fine, then adjusted, and converted to a community-based sentence.

[29] The prosecutor submits a starting point in the vicinity of $35,000 to $45,000 would be appropriate. The offending is inherently serious because it involves the deliberate contravention of enforcement orders.

[30] The prosecutor submits a discount of 10 per cent should be applied for the guilty plea, and there should be no allowance for previous good character given the defendant's previous convictions.

[31] The prosecutor advises there has been ongoing non-compliance with the enforcement order since these proceedings were initiated. A small number of cars were removed initially, but it appears other cars have been added. At the time of the sentencing, the number was lower than what was present when the search warrant was undertaken in April 2021. The prosecutor submits the defendant's continued non-compliance with the order requires a punitive response.

[32] The prosecutor submits a substantial sentence of community work should be imposed. The defendant is fit and capable of manual work. His continued non-compliance imposes a substantial cost onto the community, first in terms of impact on the Patutahi community, and secondly in terms of the Council resource used and expended in responding to it. The prosecutor submits it is appropriate the defendant complete somewhere in the region of 200 to 300 hours of community work.

Defendant's submissions

[33] Counsel for the defendant acknowledges that the primary aggravating feature in this case is the duration of Mr O'Connell's non-compliance with the enforcement order.

[34] Counsel submits the offending referred to in the decisions cited by the prosecutor comprise larger scale and more serious or quite different conduct than the current offending.

[35] Counsel for the defendant submits an appropriate starting would be up to $35,000. It is accepted that the defendant's guilty plea came shortly before trial, nevertheless counsel submits that a reduction of 15 per cent would properly reflect his pleas considering his inability to understand the proceeding and his deep distrust of the local council. Counsel provided a letter from a family friend regarding the defendant's personal circumstances.

[36] Overall, counsel submits that the purposes and principles of sentencing can be met by the imposition of a community work or community detention sentence.

Legal framework

[37] There is no dispute as to the approach which the Court should take on sentencing under the Resource Management Act. In sentencing an offender, the Court must follow the two-stage approach as set out in *Moses v R*,[9] first identifying the starting point incorporating any aggravating and mitigating features of the offence, and then assessing and applying all aggravating and mitigating factors personal to the offender together with any discount for a guilty plea (calculated as a percentage of the starting point). The two stages involve separating the circumstances of the offence from those of the offender.

[38] All of the purposes and principles in ss 7 and 8 of the Sentencing Act 2002 must be borne in mind, as well as the purpose of the RMA to promote the sustainable management of natural and physical resources. Of particular relevance under the Sentencing Act 2002 are the purposes of accountability, promoting a sense of responsibility, denunciation and deterrence, and the principles relating to the gravity of the offending and the degree of culpability of the offender, the seriousness of the type of offence, the general desirability of consistency with appropriate sentencing levels and the effect of the offending in the community.

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[9] *Moses v R* [2020] NZCA 296 at [45] – [47].

[39] As to the overall sentencing approach for offending against the RMA, *Machinery Movers Ltd v Auckland Regional Council*[10] and *Thurston v Manawatū-Whanganui Regional Council*[11] are the leading decisions of the High Court which provide a comprehensive summary of the applicable principles. Briefly, the RMA seeks not only to punish offenders but also to achieve economic and educational goals by imposing penalties which deter potential offenders and encourage environmental responsibility through making offending more costly than compliance. Relevant considerations include the nature of the environment affected, the extent of the damage, the deliberateness of the offence, the attitude of the defendant, the nature, size and wealth of their operations, the extent of efforts to comply with their obligations, remorse, profits realised and any previous relevant offending or evidence of good character.

Evaluation

[40] I agree with counsel for the defendant that a primary aggravating factor in Mr O'Connell's case is the duration of his non-compliance with the enforcement order. I also agree with counsel for the prosecutor that an important aggravating factor is the offending occurring on the property of another person with whom he lives and in a quiet residential area. I consider that those two factors are linked in terms of the effects which the offending has had on the people around Mr O'Connell. I have been assisted in my assessment of this offending by the letter from a family friend who has intervened to try and assist Mr O'Connell to achieve compliance with the enforcement order. I hope that Mr O'Connell continues to receive and accept that kind of support.

[41] The defendant does not have any previous convictions for RMA offending but has a history of non-compliance leading up to the Council's application for enforcement orders and previous criminal convictions for other offences. It is clear that he does not have a high regard for the Council's authority. In the circumstances of this offending, it appears that this has prevented Mr O'Connell from having appropriate regard for the interests of the people around him and their rights to the maintenance of the amenity values and quality of the environment. I urge him to

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[10] *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 at 503 (HC).

[11] *Thurston v Manawatū-Whanganui Regional Council* HC Palmerston North CRI-2009-454-24, 27 August 2010 at [39] – [66] and [100].

consider his behaviour and his collection of vehicles and parts in terms of how other people are affected and to limit the effects which his activities have on them.

[42] There is a consensus between counsel that an appropriate starting point for a fine for offending of this kind and degree would be in the vicinity of $35,000. I accept that the ultimate plea of guilty merits a reduction of 15%, which l would leave a fine of $29,750.

[43] I also accept that the defendant is unable to pay a fine of that amount and in any event I consider, in light of my assessment of the effects of the offending on other people, that a sentence of community work would be more appropriate.

[44] There is no direct relationship between the amount of a fine, were one to be imposed, and the number of hours period of community work to produce any sort of rate between them. While, as noted above, there are some decisions imposing community work for offending under the RMA, there is no tariff and the range of circumstances arising in different cases makes the identification of truly comparable decisions difficult, if not impossible.

[45] Having regard to the particular circumstances of this offending, the ultimate compliance with the order, and the personal circumstances of Mr O'Connell, in my judgment a period of 160 hours of community work is an appropriate sentence.

Publication orders

[46] The defendant applied for orders prohibiting the publication of the summary of facts or photographs from the summary of facts.

[47] The prosecutor opposed any such orders on the basis that an agreed summary of facts was filed which would normally be available to the media at or following sentencing unless there is evidence establishing any of the grounds in s 205(2) of the Criminal Procedure Act 2011 (**CPA**) and the Court considers it appropriate to displace the presumption of open justice. The prosecutor submits the defendant's argument that he is upset by media coverage of his case does not meet any of the thresholds in s 205(2) of the CPA including in particular causing undue hardship to any victim or endangering the safety of any person.

[48] I accept the submission that there is no basis for making an order under s 205 for suppression of the summary of facts in this case. The legislation is clear that an order may only be made if the court is satisfied that one of the thresholds in s 205(2) exists. I am not satisfied of any of them.

[49] I note that the circumstances of this offending, including photographs, were the subject of a news report on 13 October 2023, the day after the sentencing hearing. I can understand that Mr O'Connell would be unhappy about any publicity, but there is no basis for suppression of this case in light of existing public knowledge.

Sentence

[50] I convict Dylan Michael James O'Connell on the charges in CRN 21016500648 and CRN 21016500649 and sentence him to undertake 160 hours of community work.

Judge D A Kirkpatrick
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 26/07/2024