

IN THE DISTRICT COURT
AT INVERCARGILL

CRI-2009-025-002700

BETWEEN

SOUTHLAND REGIONAL COUNCIL
Informant

AND

NIAGARA SAWMILLING COMPANY
LIMITED
Defendant

Hearing: 19-20 July 2010

Appearances: B Slowley for Informant
D Anderson for Defendant

Judgment: 21 July 2010

ORAL JUDGMENT OF JUDGE J E BORTHWICK

Introduction

[1] The defendant faces 15 charges laid under the Resource Management Act 1991 arising out of activities connected with its milling and timber processing plant located at Kennington Road, Invercargill.

[2] The charges are laid under section 338 and allege that the defendant committed an offence when it contravened section 15(1)(c) of the Resource Management Act 1991. In each case the informant says that the defendant discharged a contaminant; namely dust from the sawing and processing of timber from its premises.

[3] The offending took place over a period of 12 months from 14 January 2009 to 14 January 2010.

The defence

[4] The defendant admits the following:

- a) that its premises at Kennington Rd, Invercargill are industrial or trade premises;
- b) that the defendant is a person as defined by section 2 of the Act (a person includes the Crown, a corporation sole, a body of persons, whether corporate or unincorporated);
- c) that the dust is a contaminant;
- d) the contaminants that are the subject of the 15 charges came from the defendant's property in Kennington Road.

[5] The defendant does not rely upon the statutory defences.

[6] The defendant says that it did not 'cause' or 'allow' the discharges. The defendant says this case concerns the passive emissions of dust, the liability for which should be measured against standards of reasonable care. On each occasion the contaminants were mobilised by strong winds. The presence of the wind was a matter beyond its control.

[7] Defence counsel drew a distinction between positive acts and passive emissions giving rise to offending under section 15 of the Act. Referring to the Court of Appeal decision of *McKnight v NZ Biogas Industries Limited*¹ counsel submitted that a person 'allows' a contaminant to escape when they fail to take the precautions that a reasonably prudent person in their position would take to prevent that escape.

[8] Even though the discharge occurred before, during and after various remedial steps taken by the defendant in order to prevent the discharge of contaminants, the defendant denies liability saying its actions were reasonable in the circumstances

¹ [1994] 2 NZLR 664.

[9] Defence counsel submits that the charges of 4 November 2009 (CRN 132) and 7 November 2009 (CRN 133) should be dismissed because the discharges were caused by very strong winds and not by the defendant. These charges include the discharge of bark dust that occurred after the defendant had taken steps to prevent the discharge from this particular source. Likewise, for the charge of 14 January 2010 (CRN 134) (which concerns the discharge of fine wood particulate) the defendant says it should be found not guilty as its preventative measures were in place at the time of the alleged offending.

[10] The remaining charges all concern the discharge of either fine wood particulate, bark dust or both. The defence says these charges should be dismissed because the discharge occurred during a period when the defendant was *undertaking work to prevent the escapes*².

The informant

[11] The informant refused to be drawn upon the issue as to whether the defendant was a cause of the discharges or allowed the discharges to occur. Mr Slowley submitted that it was sufficient for the informant to prove that there was a discharge of contaminants emanating from the defendant's property as a consequence of activities being carried on its site. Indeed those facts are admitted by the defendant.

[12] With the possible exception (14 January 2010), there were numerous potential sources of discharge including from the operation of the cyclone (a particulate separator), the storage of bark, the gravel in its yard and its truck loading operations. The discharge could have arisen from one or more of these sources.

[13] Mr Slowley submitted that what was being mounted by the company was a new or hybrid defence that is unsupported by the Act.

² Defence counsel opening submissions.

The Law

[14] All charges are laid under section 338 and section 15(1)(c) of the Act. Section 338 provides:

Every person commits an offence against this Act who contravenes, or permits a contravention of, any of the following:

- (1) (a) Sections 9, 11, 12, 13, 14 and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants):

And section 15(1)(c) provides that no person may discharge any contaminant from any industrial or trade premises into air.

'Contaminant' is defined by the Act as follows:

Contaminant includes any substance (including gases, [odorous compounds,] liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat—

...

- (b) When discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged:

The meaning of 'discharge' is also given in the Act and includes to emit, deposit, and allow to escape.

[15] These are strict liability offences under section 341(1) of the Act; that is to say it is not necessary to prove that the defendant intended to commit the offence. The informant has the burden of proof to establish the elements of the offence and must prove each element beyond reasonable doubt. It then falls to the defendant to prove, on the balance of probabilities, that its conduct was expressly allowed by a rule in the Regional Plan.

Statutory exception

[16] While the defendant did not call evidence as to whether the activities were authorised by a rule in the Regional Plan, defence counsel made a submission to this

effect in relation to the discharge that occurred on 14 January 2010. Closing submissions are not an opportunity to express an opinion as to matters, here the compliance with the conditions of a rule, the assessment of which requires technical expertise. There was no evidence capable of establishing that any one of the discharges were authorised by a rule in the Plan.

No case to answer

[17] At the closure of the informant's case, defence counsel also made the submission in relation to one of the charges that there was no case to answer. I understood that if he were successful in that submission, he would make the same submission in respect of some of the other charges. I found, in the event, that there was a case to answer given that all of the elements of the offence were conceded by the defendant with the exception of whether or not there was a discharge. That was not conceded although it was admitted that the activities being undertaken on its premises were the source of the contaminants which had escaped to the properties located on Kennington Road.

Factual findings

[18] The defence did not challenge in any substantive way the evidence of the informant's witnesses as to the occurrence of the discharges. I briefly set out my factual findings in relation to the same.

14 January 2009 - CRN 685

[19] Following a complaint by Mr M Grantham, a local resident, Regional Council enforcement officers Messrs Nesbit and Connor went to the defendant company's premises at Kennington Road. Upon arrival Mr Connor noted the wind was from the west and at a measured wind speed of 10.3 kilometres per hour. Mr Nesbit gave very similar evidence describing "the wind as a breeze which while not very strong, was gusty at times".

[20] Both officers described seeing a slight dust haze in the air and their experience of grit entering their eyes which caused them discomfort. Mr Connor stated that from outside of the defendant's premises he could not see the actual source of the dust because of volume of material in the air. Later, when he entered

the premises he could see loose wood dust and fibre in the area of the cyclone where trucks had been loading and unloading. Dust and grit had accumulated on the roof of an adjacent building and also at the point where a sealed conveyor belt (a turbulator) emptied the waste sawdust and dust fines captured by the cyclone. Mr Nesbit described seeing the dust fines being *whipped* over the roof of the building towards Kennington Road.

[21] The officers interviewed company employee, Mr T Duffy. Mr Duffy is employed as the supervisor of the remanufacturing plant. Mr Duffy explained that the defendant had yet to construct a cover for the entry point of the conveyor belt. Mr Duffy explained that the company was intending to remove the building's gutters and also install a wind break at the loading area. He explained that the company had installed the cyclone on the western side of the building (it had previously been located on the eastern side) in an effort to reduce noise and dust emissions being experienced by residents along Kennington Road. He agreed to clean up the wood fires in the area in front of the storage facility.

[22] The officers remained in the area for approximately one hour. At the end of that time Mr Connor was still experiencing discomfort in his eyes.

[23] Mr Connor gave evidence (which was unchallenged) that he telephoned managing director, Mr R Richardson, on 16 January 2009 outlining the complaint and his investigation. He was assured by Mr Richardson that progress was being made on the dust problem and that he would get to the bottom of it and fix it.

16 January 2009 – CRN 686

[24] Mr Connor attended at the defendant's premises on 16 January 2009, this time in response to a complaint by Mrs Evans, a Kennington Road resident. When he got out of his car on Kennington Road at a location opposite the defendant company's site, the dust and grit was sufficiently bad to cause him to retreat back into his vehicle. Mr Connor describes wood dust getting into his eyes as he looked towards the defendant's premises; and the dust that had accumulated on his vehicle and on his clothes. At the time the wind was blowing in a westerly direction and at a moderate speed.

[25] He spoke to Mr Richardson, who responded, and again this was not challenged, "*Give us a chance to fix it. I was just talking to you this morning*".

27 January 2009 – CRN 687

[26] Following a complaint by Mr de Garnham, a Regional Council enforcement officer, Ms Thompson, went to Kennington Road to investigate. When she arrived she observed sawdust blowing in the westerly breeze. It could be seen on the newly mown grass and vegetation at Mr de Garnham's property and it appeared to be coming from the defendant's premises directly opposite.

28 January 2009 - CRN 689

[27] Following a second complaint Ms Thompson attended Mr de Garnham's address on 28 January 2009. Upon her arrival she noted a strong wind coming from the north-west quarter. She described a *heavy and visible haze in the air*. She said that she immediately got dust and grit in her eyes. Dust was settling on parked motor vehicles.

3 February 2009 – CRN688

[28] Mr de Garnham made a third complaint on 3 February 2009. This time enforcement officer Ms Meintjes investigated. In common with the previous complaints, on her arrival there was sufficient dust in the air to cause eye irritation. She described a dust haze around and swirling above the defendant's yard in the area of the wood chips, which she photographed. The wind was blowing from the west.

4 February 2009 – CRN 690

[29] On this date Mr de Garnham made another complaint which was attended upon again by Ms Meintjes. She described smelling a sawdust odour and of her eyes again becoming irritated. She observed dust on parked cars and accumulated on the road verge. The wind on this occasion was from the west.

10 February 2009 – CRN 691

[30] Mr McMillan, a Council enforcement officer, attended Kennington Road site having received a complaint from Mr de Garnham on 10 February 2009. On his

arrival dust was still falling from the sky. He could smell an odour he associated with sawdust. The dust caused discomfort in his eyes. He observed wood dust accumulated on a trailer parked at that address.

12 February 2009 – CRN 692

[31] Mr McMillan responded to Mr de Garnham's complaint on 12 February 2009. He observed dust floating in the wind. He described the dust as being like snow and settling on his face and on the ground. It appeared to be coming from the direction of the defendant's property and was identical to the dust he observed on his first visit. He noted more dust had accumulated on the trailer, dust had fallen in the lee of a hedge and was visible along the road verge. He ascertained that there were no upwind sources of the discharge.

16 February 2009 – CRN 693

[32] Mr McMillan attended Mr de Garnham's property on 16 February 2009 and described, in almost identical terms to the previous occasions, a further discharge of fine dust. The average wind speed was 6.5 kilometres per hour blowing from a westerly direction. Again he ascertained that there were no upwind sources of the discharge.

17 February 2009 – CRN 694

[33] Following a complaint made on 17 February 2009 Mr Brennan, an enforcement officer employed by the Regional Council, went to Mr Garnham's property at Kennington Road. Upon getting out of his car he too became aware of dust in the air, causing irritation to his eyes. A trailer located at the property was covered in a layer of dust. Mr Brennan then went to the defendant's premises and there he observed dust being blown off an uncovered conveyor belt. The wind at the time was from the south/south-west and was around 15-23 kilometres per hour.

[34] He was later contacted by a company representative and told that action would be taken to suppress the dust.

11 March 2009 – CRN 695

[35] Mr Brennan also attended Kennington Road following a complaint made by Mrs Evans on 11 March 2009. On that occasion he observed light coloured wood dust covering Mrs Evans' deck and on the same occasion he observed dust on vehicles owned by a neighbour, Mr Turnhout.

[36] He then went to the site and spoke to the manager of the joinery section. He was shown around the premises. He observed dust on the ground outside of the loading bays which he understood came from loading dust by-products into trucks.

30 March 2009 – CRN 696

[37] Mr Brennan attended Kennington Road on 30 March 2009 as a result of a complaint by Mr de Garnham. Upon his arrival he noticed dust in the air. There was a layer of light coloured dust, some two to three millimetres thick on a car parked at the property. Measured wind on that occasion was between 6.4 and 10.8 kilometres per hour coming from the south-west quarter.

4 November 2009 – CRN 132

[38] On 4 November 2009 Mr Connor went to the residence of Mr Grantham at Kennington Road following a complaint by him. On that occasion he noted there was a strong southerly wind. Looking southwest towards the defendant's property he struggled to keep his eyes open because he was affected by particles of windblown dust. He described the situation as being *severe*. He was standing downwind of a stockpile of wood chips located on the defendant's premises. The piles were several metres high, exceeding the height of a wooden perimeter fence.

[39] Mr Connor described his inspection of Mr Grantham's property and seeing fine dust particles throughout his house. There was light coloured dust inside a shed and in the dog's water bowl. The tap water inside the house, which is tank fed water sourced from the dwelling's roof, was discoloured and there looked to be sawdust material in it.

[40] Mr Connor went into the defendant's premises. There he observed a large pile of wood chips to the north of the building. Dust seemed to be coming from a

number of sources including the bark chip piles, gravel dust from the yard and particulate from the cyclone area and the building. After one hour, the dust conditions had not abated.

7 November 2009 – CRN 132

[41] Mr Connor, responding to a further complaint from Mr Grantham's property, attended the site to discover considerable dust particles in the air. As on previous occasions he had difficulties keeping his eyes open due to the same. Immediately upwind there was the large pile of bark chips. He noted dust on the complainant's car, on a sheet hanging in a shed and in the dog's bowl. He observed the airborne dust which, after some period of time, did not reduce in intensity. He then left the area checking for an alternative upwind source of dust but found none.

[42] On 9 November 2009 he telephoned Mr R Richardson and asked whether the company would remove the bark piles but received no commitment to do the same.

14 January 2010 – CRN 134

[43] As a result of a complaint from Mr Grantham, an enforcement officer, Mr McKenzie attended his address in Kennington Road. While Mr McKenzie could not detect any dust in the air or opposite the entrance to the defendant's property, he found a noticeable build-up of fibrous materials on two vehicles parked in the entrance of the Grantham property and on outdoor furniture located at that address.

Local residents

[44] Local residents Mr S de Garnham, Mr M Grantham and Mrs L Evans gave evidence about the discharges from the defendant's property. That evidence dealt in a general way with problems that they have experienced over the last five years (approximately). The evidence did not deal with the alleged offences directly. However, each of the residents is a complainant.

[45] Each of the witnesses described how dust entered their homes through gaps in the windows and doors, dust accumulated in the gutters of their roofs, and it blocked devices that filter water (such as washing machines). The dust has caused the residents expense. Mrs Evans has refitted her windows to seal out the dust.

Mr de Garnham has had to install filters to protect taps and fittings within his home. Mr Grantham talked about his young son coming in from the outside on several occasions crying because the dust had irritated his eyes.

[46] They observed that the dust appeared to increase at the time of the expansion of the defendant's operations on its site. All three appeared to attribute dust to the functioning of the cyclone. They talked about the relocation of the cyclone to the western part of the remanufacturing building and the problems that they experienced with dust becoming worse from that point. Mrs Evans and Mr de Garnham also spoke about black dust from the bark chip piles.

[47] From what I have heard and observed in the photographic evidence, the conditions that existed at the time of the discharges would have been extremely unpleasant and uncomfortable for these residents.

The defence case

[48] The statutory meaning of 'discharge' extends to engage in an activity which results in the emission or discharge of a contaminant³. The fact of the discharge is not in issue. The causal connection between the activities and the discharges appears to be admitted and given this there should be no need to determine whether the defendant was 'a cause of the discharge' or whether 'it allowed the escape of contaminants'. To do so would be inconsistent with the defendant's activities being a cause of the discharge, unless one of the statutory defences applies or the causal connection between the company's activities and the discharge had been broken⁴.

[49] This was vigorously argued and I now set out my findings in relation to the defence case. In doing so I have endeavoured to address defence submissions in the context of the two primary sources of the contaminants; being the cyclone and, secondly, the stock pile of processed bark chips. (While the submissions were not presented this way I have done so to better respond to the submissions made.) I

³ *McKnight v Biogas* cited in *URS New Zealand Ltd and Others v Auckland Regional Council*, Judge McElrea, 25 May 2010, para 171, CIV-2008-004-013603.

⁴ *URS New Zealand Ltd and Others v Auckland Regional Council* at paragraph 171.

note that there were other sources of contaminants admitted by the defendant, including dust sources from its yard and also the loading bay.

▪ *The Cyclone*

[50] The evidence was that the defendant decided to remove a cyclone installed on the eastern wall of the remanufacturing building following complaints about noise and sawdust emissions from the neighbouring residents. It installed a new cyclone on the western side of the same building in late 2008. However, when the cyclone was first started up in January 2009 it was soon discovered that it did not contain the sawdust produced in the remanufacturing plant and that sawdust was being discharged into air. There were a number of causes for the discharge. These were detailed by Mr R Richardson on behalf of the defendant including:

- (i) that the wind flow into the cyclone was too great, resulting in the discharge of sawdust to air through the top of its stack;
- (ii) the guard between the cyclone and turbulator had not been properly fitted, causing a disturbed airflow at the top of the turbulator. Sawdust was discharged to air at the guard and, in greater volumes, at the top of the turbulator; and
- (iii) sawdust was also discharged into air during the subsequent loading operations.

[51] Much was made about the presence of strong gusty winds transporting the sawdust off-site and onto the neighbouring properties. However, the failure to contain the discharge on a particular site is not an element of the offence.

[52] In response to these problems the defendant:

- adjusted the wind speed into the cyclone (and he did so in the third or fourth week in January 2009);
- adjusted the guard (again in the second half of January 2009);
- constructed a plywood box to house the discharge from the turbulator's outlet (February 2009);

- installed doors in the loading bay holding the sawdust by-product (March 2009); and
- constructed a fully enclosed truck loading bay (November-December 2009).

[53] In response to my query that the discharges occurred before any, some or all of the remedial steps had been taken, Mr Anderson responded that "*It is a question of awareness*". By that I understood him to say that the company was not aware that the new cyclone would not contain the sawdust. I accept that the company may not have been aware of that before the cyclone was first started up around 12 January 2009. However, this is a strict liability offence and an intention to commit an offence is not necessary to be proven. A person may commit an offence without intending to do so. Any requirement that a person foresee, or be aware of, the discharge would be inconsistent with the available defences: *McKnight v New Zealand Biogas Industries Limited* page 268.

[54] Following *McKnight v Biogas* a person discharges something when he causes it to be discharged. In this case the cyclone system failed to operate as it was intended, by separating sawdust from air pumped out of the remanufacturing plant and depositing the same into a collection bin. Instead it partially discharged the sawdust into the air at two points outside of the building. I find that the defendant was in control of the cyclone system which caused the discharge.

[55] Having done so there is no need to make any finding as to whether the defendant allowed the escape of the contaminant (which is also denied).

▪ ***Dust emissions from stored bark***

[56] As to the dust emissions associated with the piles of processed bark I understood the defence to be that while the contaminants arose from the company's activities again it neither allowed nor was a cause of the discharge.

[57] Mr Richardson's evidence was that the company became aware that there was a discharge of dust from its bark storage facilities in late 2007/early 2008. Fine dust particles were being discharged from piles of processed bark that were then

located on the eastern side of the property near Kennington Road. Discharges from this source are different in appearance to sawdust emitted from the cyclone in that the dust is finer and darker in colour. In response the company took the following remedial steps (I understand in 2008) to prevent the discharge of contaminants:

- relocated the finer processed bark to the rear of its property;
- unprocessed wood bark was stockpiled in its yard between the bark processing plant and Kennington Road;
- the unprocessed bark was stored behind a solid two metre high wall which was designed to retain the bark chip and provide additional wind buffering from the west;
- removed at least three piles of processed material from the eastern part of the stock pile;
- installed a groundwater bore and mobile irrigation system to be used to damp down the processed bark on dry windy days;
- it says it otherwise complied with the conditions set out in the 2004 abatement notice.

[58] Mr Richardson asserted that these measures were effective to prevent the discharge of contaminants to air, and yet the company also accepts that dust from this source was discharged. Mr Richardson did not give evidence as to whether all of these measures were actually being employed by the company on the days of the alleged offending. (For example, I do not know whether the piles were dampened down on the days of the alleged offences.) Mr Richardson did not comment on any of the charges directly; only to say his recollection was that wind conditions were gusty on the relevant days. Finally, I was advised that the company did not investigate the complaints that are the subject of charges in November 2009 which do concern dust from the processed bark.

[59] In respect of the dust discharges from the processed bark I found the defence argument to be particularly troublesome and I have taken what I hope is a common sense approach to the facts. The defendant says that it was not a cause; it was not *actively involved at the point where the pollution occurred*. It stored the bark chip in the relevant area but says the wind was the cause of the discharge.

[60] I take as a starting point that in any pollution case there may be more than one cause of the discharge, and equally there may be more than one party that is liable for the same. For liability to be established a person must be causally connected to the discharge. While the defendant may not control the wind, it does control the activities that are undertaken on its site including the storage of processed bark in an area that experienced wind gusts. I find that a cause of the discharge was the failure to store processed bark in a manner that did not result in the discharge of dust. It follows from this that I find that the defendant was a cause of the discharge. I do not regard the matter of the storage of bark chip as merely part of the background and otherwise unconnected to the offending.

[61] The relevant facts are that dust from the processed bark would escape from the storage area during times of gusty winds. The company was aware that this could occur which is why it had undertaken a series of steps to prevent future occurrences of the discharge. The company accepts that there was a discharge from this source but says that it is not liable. I infer from the evidence that the steps that it undertook were either ineffective and/or insufficient to prevent this occurrence; or alternatively they were not implemented on the days that the offending occurred. (On this latter matter I have no evidence either way.)

[62] As to whether the defendant 'allowed' the contaminants to escape – by 'allowing a discharge' the Act contemplates that there must be some element of control and hence an opportunity to change (although control was denied by the defendant averring to the wind conditions); also an awareness of facts from which a reasonable person would realise that the discharge could occur; and finally, a failure to take the steps a reasonably prudent person in that position would take to prevent that result.

[63] The defendant says it did not 'allow' the discharge because it had taken certain preventative steps. My findings as to the adequacy of the steps are relevant here too.

[64] There is some force in Mr Slowley's submission that the defence appears to be a new or hybrid defence incorporating elements of section 341. I do not agree

with defence counsel that Justice Harrison's comments at paragraph 22 of the *URS* decision recognises a new defence or is authority for the proposition that in cases where the discharge concerns one of *allowing a contaminant to escape*, then the offence is not one of strict liability. Justice Harrison is simply restates what the Court of Appeal had to say about this type of offending in *Biogas*.

[65] Nor can I see the relevance of the submission that the company was not aware that its measures would not be effective. That is beside the point. The Court of Appeal in *McKnight v Biogas* rejected an argument that the meaning of 'allowing' imports an awareness of the circumstances giving rise to the discharge. That is because no matter how negligent or reckless a person might be, so long as they are not shown to be aware of the impending escape, they will not be liable and will not need to resort to the statutory defences. The court held that could not be consistent with the broad and carefully drawn purpose and principles of Part II of the Act⁵.

Outcome

[66] It follows from what I have found that I am satisfied that the informations are proven.



J E Borthwick
District Court Judge

JEB/DD/SRC v Niagara.doc.