IN THE DISTRICT COURT
AT HASTINGS

CRI-2015-020-1551

HAWKES BAY REGIONAL COUNCIL
Prosecutor

v

THE TE MATA MUSHROOM COMPANY LTD
Defendant

Counsel:
L Blomfield for Defendant
J Krebs for Council
Hearing by AVL 30 March 2016

SENTENCING INDICATION

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[1] I have heard submissions and read written material from Mr Krebs for the Prosecuting Council and from Ms Blomfield for the Defendant Company and I am dealing with a sentence indication on the basis that if the indication is accepted the existing charges will be replaced by one single representative charge covering the period March 2015 to October 2015, and that a guilty plea would be entered to that charge.

[2] I think, insofar as the facts of the operation are concerned, they are broadly agreed and can be relatively briefly stated. This business has been in operation since 1967 - that is, nearly 50 years. It has never previously been prosecuted under the Resource Management Act, or nor has any other action such as an abatement notice or an infringement notice been issued against it, and there have been no formal warnings or anything of that kind. So it has, in that sense, a good record and should be given credit for that.

[3] The business is one of growing mushrooms. It is not, as I understand it, the biggest in the country, but it is still a significant player in its field. The new owner took the business over in November 2013. It made, or its representatives made, due inquiries and was told by the Council that there had been no formal action taken about odour and no recent complaints but that, as it was put in the submissions, that the odd odour from time to time had been noticed. That is of significance, because the compost material in which the mushrooms are grown has a significant potential to produce an unpleasant odour and issues arising from that have come before the Court in respect of other operations.

[4] The current resource consent under which the business operates has been operative since April 2011 and that was taken over by the new ownership. Of significance is, as has been mentioned this morning, Condition 6 - the provision about odours - which is in more or less a very common form. It requires that there be ... *no objectionable or offensive odour to the extent that it causes an adverse effect at or beyond the boundary of the site.* Further, and one might assume to guard against odour complaints from residential activities that were coming closer to the property boundaries (which is the topic I will return to), two conditions, Conditions 12 and 13 require significant changes to the composting and turning process. They are required to be moved into fully enclosed buildings equipped with

ventilation to a bio filter. The first stage of that was required to be done by 1 March 2015 and the second by 1 March 2017.

[5] the first of those stages was not, it is agreed, achieved, which at first sight might seem to be something of a black mark against the Defendant Company. More information goes some way, if not wholly, towards it being not quite so black. It is accepted that the new owners approached the Council in advance of 1 March 2015, explaining why achievement had not been possible and suggesting a revised way forward. It is the Defendant's position that progress was, if somewhat slowly, being made before being effectively halted in its tracks by the Council's advice that it intended to prosecute the Company. Whether the Council's announcement of its intention justified or caused stalling of progress might be open for some debate, but for present purposes I think largely it can be put aside, not least because it is plain that investigations into a long- term solution have been in hand and a possible way forward has been identified, and has been a possibility for a little time now. In the meantime also, the Defendant Company has taken steps, at some expense, to improve the present process. I am informed that the capital cost for that was of the order of $195,000 and operating costs have increased for the new processes by something of the order of $90,000 per annum.

[6] Fundamental to a long-term fix of the issue is that the Defendant believes that the capital costs of wholly enclosing the process in buildings with filters cannot be justified on the present production and turnover of the business. In short, the business would have to significantly expand production at the same time as the enclosure buildings are built and equipped, and that will require a new resource consent regime.

[7] I touched on an issue a moment ago: - that is the issue of why the complaints seem to begin to arise circa early 2015 when the Company had such good previous record and the methods and processes employed had not changed, or at least not significantly so. It may not be the whole explanation, but the conclusion that the phenomenon of *reverse sensitivity* played a significant part is almost inescapable. Until relatively recently this operation was *in the countryside* surrounded by horticulture and agriculture and there were no complaints about odour, even if technically there may have been breaches of Condition 6 or its predecessors because there was nobody there to complain about it if it did occur.

But as the town of Havelock North is expanded to the east, its residential areas have moved closer to the mushroom operation and I am told that they are now closer than 200 metres on its south-western boundary. That is the making of a classic *reverse sensitivity* situation. The sensitive activities, that is the residents, have moved close to a potential source of adverse effects, odour, noise, whatever it might be and where previously there were none, there are now complaints which a local authority must respond to and which can restrict or in extreme cases even stop the previously non-problematic activity. So I think that is a factor to be taken into account.

[8] I will look at the principles and purposes of sentencing in s7 and 8 of the Sentencing Act and of the factors in the well-traversed case of *Machinery Movers*. The maximum penalty, it is agreed, for a Corporate Defendant for this offence is a fine of $600,000, so there is a substantial maximum penalty available. Looking at the nature of the environment affected, what has been affected is residential amenity, *amenity* being as defined in the Act - the things that make places pleasant and attractive and so on. The effect has been transitory in the sense that it comes and goes, but it is not to be dismissed on that account of course. It is no doubt unpleasant for those who are subjected to it and severely affects their amenity from time to time, but it is not permanent damage to the physical environment.

[9] In terms of the extent of the damage, we are dealing with ten recorded incidents over a period of eight months with, I accept, significant amenity effects. In terms of deliberateness of the offence, no one is suggesting of course that the Defendant or its management set out to cause this problem; it was a known risk and steps had been taken in the 2011 resource consent to address it. That arrangement, for whatever reason, has proved optimistic and the Defendant was not able to get there, but has taken steps to address the problem, even if not within that time frame.

[10] The issues of the attitude of the Defendant, attempts to comply, and remorse I think can be addressed as one. The suggestion by the Council that the Defendant had not progressed a long-term solution over the course of 2015, despite invitations to do so, is a factor. The Company says that the Council decision to prosecute threw a spanner in the works, and the process already under discussion, one way or another ground to a halt. Without enormous inquiry into detailed facts I cannot say that one view of that is entirely wrong and the other is entirely right, there may be an

element of both, but the point is that now there is a timed approach being put forward to address the problem and some significant steps have been taken at not inconsiderable cost in the interim. There were no profits made directly by the offence. The Company of course kept trading, that is a given, but it has spent not insignificant sums on interim steps and is proposing a staged way forward at some considerable cost. The previous record of the Company I have already dealt with, it has been until this event impeccable in terms of any formal issues.

[11] What I have struggled with is that it seems to me that intimately wrapped up with the possible financial penalty is the question of addressing a realistic time frame for long-term measures to be taken to prevent complaints into the future, and for that to be backed up by an enforcement order and/or a replacement resource consent dealing with the longer term issues.

[12] The parties agree that there should be such an enforcement order but had not been able to agree on its terms or its time frame. The Council does not specify, specifically, a timeline in its submissions. The Company has proposed that by 1 October 2016, a draft resource consent for the whole operation is to be lodged incorporating the new procedures and buildings and processes and so on and a completed application, after discussion with the Council, is to be lodged not later than 20 December 2016.

[13] The Council has reservations about the time frame being that long and, given the history, I can understand that reservation, although no specific alternative has been put forward. The cost of the ultimate solution, or what has hoped to be the ultimate solution is, I am told, going to be something between 2 and 3 million dollars. Given that the existing resource consent requires the final steps to address odour issues to be taken by March 2017, (that is the Part Two of the composting and turning process) I think that I have to take a view that I should not be concerned about the time frame proposed by the Defendant, given the steps that have already been taken which to my mind at least demonstrates a strong element of good faith and intent to deal with the issues substantively and finally.

[14] So, if an enforcement order along those lines could be settled with the time frames suggested by the Defendant Company, then having regard to the cases that have been cited for comparative purposes, such as the two *Waikato Regional*

Council cases, *New Zealand Mushrooms* and *Open Country Dairy Limited* and the others mentioned, and having regard also to the fact that the operation is a long-term inhabitant of the region and a significant employer in the region providing, I am told, something of the order of 120 jobs and three and a half million's annually in wages and salaries, it is a regional asset which is to be regarded as of some value.

[15] I think that a reasonable start point overall would be something in the vicinity of $40,000. I would allow a significant deduction for plea, if not the full 25 percent (that I do not think could be justified) but something of the order of 15 percent. I would allow significant deduction for the Company's or the operation's previous good record over a long period and to reflect the fact that the sensitive environment came to it, rather than the other way around. I would allow something of the order of 15 percent for that, and I think, in fairness, that I should make a further allowance for work and the costs of the work already done and for the costs to come to comply with the terms of the enforcement order and the new resource consent. I would allow something of the order of 30 percent. So, in net terms, that would come to a figure in the range of $16,000, but for rounding purposes I would say in my view an appropriate penalty would be a fine of the order of $15,000, and the enforcement order to be made along the terms that I have mentioned already. So that would be my indication for the Company to consider.

Dated at Wellington the 30th day of March 2016

C J Thompson
District Court Judge/Environment Judge