IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CRI-2023-419-000064
[2023] NZHC 3437

BETWEEN	JOHN LEONARD WALLING Appellant
AND	WAIKATO REGIONAL COUNCIL Respondent

Hearing: 21 November 2023

Counsel: MJ Hammond and EC Stewart for Appellant
JM O'Sullivan for Respondent

Judgment: 30 November 2023

JUDGMENT OF DOWNS J

This judgment was delivered by me on Thursday, 30 November 2023 at 11 am.

Registrar/Deputy Registrar

Solicitors/Counsel:
Tompkins Wake, Hamilton.
Gordon Pilditch, Rotorua.
J O'Sullivan, Wellington.

The appeal

[1] This appeal concerns a significant fine for offending contrary to the Resource Management Act 1991. The defendant, John Walling, argues the fine is too severe.

[2] The appeal must be allowed if the sentencing Court erred, and a different sentence should be imposed.[1]

Background

[3] Mr Walling, Cazjal Farms Ltd,[2] and three other defendants pleaded guilty to charges concerning the discharge of effluent to water, and breaches of an abatement notice in relation to effluent. The offending occurred at a dairy farm near Wharepūhunga. The farm was, and is, owned by Cazjal. Mr Walling was, and is, Cazjal's director.[3]

[4] The offending involved three distinct episodes; one on 30 June 2021; one on 21 September 2021; and one on 3 November 2021. The sentencing Judge, Chief Environment Court Judge Kirkpatrick, summarised matters this way:[4]

> On 30 June 2021, a resident in the area called the Council complaining that the Matapara Stream was a dark green colour and smelled of effluent. Council officers attended the farm shortly afterwards. They found an irrigator on the farm had been spraying on a limited arc on the right hand side of the tanker track on a slope above a tributary to the stream. There was a clear flow path of effluent from the irrigator across the paddock to a boggy area in the bottom of the gully and then into the tributary, which was still running green, was frothy in places and had an odour of effluent. Samples were taken in a number of locations and subsequent analysis confirmed the presence of high levels of contaminants.
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> On 21 September 2021 the same complainant called and there was a further inspection by Council officers. Analysis of samples confirmed elevated levels of contaminants consistent with dairy effluent. Council officers inspected the effluent pond which they found was full with very little freeboard left. A travelling irrigator was in Paddock 14 and had been set up to run in a heavily pugged and rutted area causing it to travel more slowly with the consequence that effluent was applied at higher rates and the further consequent risk of

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1 Criminal Procedure Act 2011, s 250.

2 Cazjal.

3 Mr Walling's wife was also a director until 31 March 2022.

4 *Waikato Regional Council v Cazjal Farm Ltd* [2023] NZDC 10973 at [9]–[13].

ponding due to the pugged soil. The farm's hydrant system was broken and prevented irrigation in a more suitable area. Effluent had ponded in an area up to a depth of 100 mm with two flow paths. One path was in Paddock 13 and ran downhill into a gully, through a spring-fed wetland and a duck pond and then following the path from that pond into the Matapara Stream. The other path ran downhill into a shallow gully and into a drain alongside a tanker track and then across a paddock and into the main stem of the Matapara Stream. The drag hose connected to a hydrant was leaking resulting in a muddied area through a further flow path.

On 3 November 2021 a stationary irrigator had been set up in Paddock 50 above the steep side of the gully. Council officers observed the remains of a heavy application of effluent in a partial arc pattern where the irrigator had not been spinning in a full circle. The flow path ran from the irrigator down into the gully, ponding against an earth dam up to at least 420 mm deep and flowing beneath the dam into a tributary stream. Analysis of samples confirmed high levels of contaminants down to the dam, with lesser concentrations from samples taken below the dam.

The environmental effects were conspicuous, particularly in the Matapara Stream adjacent to the farm. The results of the analysis of water samples indicates very high levels of contamination attributable to dairy effluent and which are well-known to adversely affect stream fauna. While the stream may recover, that is at least delayed by repeat offending. The river is classified as a significant habitat for both indigenous fish and trout.

Social and cultural effects follow from the environmental effects. Neighbours of the farm have complained of the effects of the farm's discharges on the Matapara Stream and on them. That stream flows into the Pūniu River. There are four marae along the Pūniu River: Mangatoatoa, Rāwhitiroa, Aotearoa and Whakamārama. The Pūniu River then joins the Waipā River just south of the town of Pirongia, which then flows into the Waikato River. The Waipā River is the subject of the Nga Wai o Maniapoto (Waipa River) Act 2012. The Waikato River, including all its catchment, is the subject of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Among the purposes of that legislation is to recognise the significance of the rivers to tāngata whenua and to recognise the vision and strategy for the Waikato River and its catchment, Te Ture Whaimana, which is part of the Waikato Regional Policy Statement and has as its vision a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the River, and all it embraces, for generations to come.

[5] Each discharge also contravened an abatement notice in relation to effluent at the farm.

[6] Mr Walling pleaded guilty to two representative charges: one of unlawfully discharging effluent where it may enter water,[5] and a second of breaching an abatement notice in relation to effluent.[6] Cazjal pleaded guilty to identical charges.

[7] The farm has a troubled history. In 2016, an abatement notice was issued in relation to its operation. In 2017, Cazjal and a farm manager were convicted of effluent-related offending (committed in 2016). In 2019, a formal warning was issued in relation to the farm's operation, and a manager convicted of effluent-related offending. In 2020, another formal warning was issued.

[8] The Judge imposed a $96,000 fine on Cazjal, and the same fine on Mr Walling. The Judge's methodology was the same for each defendant. He:

(a) Adopted a starting point of $100,000 for the discharge offending.

(b) Added $20,000 for the breaches of the abatement notice.

(c) Uplifted the global starting point by 10 percent because of the history at [7].

(d) Deducted 30 percent: 25 percent for early guilty pleas, and five percent for each defendant's consent to the imposition of an enforcement order.

[9] Cazjal has not appealed.

The argument

[10] Mr Walling contends his fine is manifestly excessive and should not have exceeded $56,000. He advances five contentions:

(a) The Resource Management Act contemplates a distinction in fine levels between companies and individuals.

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5 Resource Management Act 1991, ss 338(1)(a) and 15(1)(b).
6 Resource Management Act, s 338(1)(c).

(b) Both parties sought such a distinction.

(c) A lesser fine is warranted on the facts.

(d) The Judge erred in treating Mr Walling's enforcement history as aggravating (in the absence of a conviction).

(e) The overall penalty is too severe given the fine imposed on Cazjal.

Analysis

Does the Resource Management Act contemplate a distinction in fine levels between companies and individuals?

[11] Section 339 of the Resource Management Act is the relevant provision, and reads:

> **339 Penalties**
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> (1) Every person who commits an offence against section 338(1), (1A), or (1B) is liable on conviction,—
>
> (a) in the case of a natural person, to imprisonment for a term not exceeding 2 years or a fine not exceeding $300,000:
>
> (b) in the case of a person other than a natural person, to a fine not exceeding $600,000.
>
> (1A) Every person who commits an offence against section 338(1), (1A), or (1B) is also liable on conviction, if the offence is a continuing one, to a fine not exceeding $10,000 for every day or part of a day during which the offence continues.
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> (2) Every person who commits an offence against section 338(2) is liable on conviction to a fine not exceeding $10,000, and, if the offence is a continuing one, to a further fine not exceeding $1,000 for every day or part of a day during which the offence continues.
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> (3) Every person who commits an offence against section 338(3) is liable on conviction to a fine not exceeding $1,500.
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> (4) A court may sentence any person who commits an offence against this Act to a sentence of community work, and the provisions of Part 2 of the Sentencing Act 2002, with all necessary modifications, apply accordingly.
>
> …

[12] As will be apparent from s 339(1), the maximum fine for a natural person is $300,000, whereas the maximum fine for "a person other than a natural person" is twice that amount, $600,000. On behalf of Mr Walling, Mr Hammond contends the statute therefore anticipates an individual receiving a lesser fine than a company.

[13] The statute can be read this way, but this would be to misread it. The maximum penalty for "a natural person" is not a $300,000 fine, but a two-year term of imprisonment. Obviously, a company cannot be sentenced to a term of imprisonment. To compare maximum fine penalties is, therefore, not comparing like with like. The statute recognises other possibilities too. A company may have deeper pockets than an individual, and an individual may not be able to pay a fine. So, the statute does not signal, still less mandate, that an individual should receive a smaller fine than a company.

[14] This view accords the Court of Appeal's in *Trent v Canterbury Regional Council*:[7]

> The third reason we consider the argument is misconceived is that it overlooks that the maximum penalty for individual offenders for the offence in question is not in any event a fine of $300,000 but rather a term of imprisonment of two years. The company for obvious reasons is not liable to any custodial sentence. A comparison of fine levels is not a comparison of maximum penalties.
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> A fourth difficulty with the argument is that it assumes the reason for the higher monetary penalty for companies is that Parliament regarded companies as being generally twice as culpable as individual offenders or that offending by companies was inherently generally twice as serious.
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> However, in our view, the correct position is as stated by Mander J in the decision of *Waslander v Southland Regional Council:*
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>> [53] Similarly, comparison with the greater maximum penalty available for corporate defendants does not assist Mr Waslander's argument. Corporate defendants will usually be associated with larger commercial enterprises, although often it will simply be a matter of circumstance as to how the individual dairy farmer has organised or structured his dairy operation. The higher penalty for corporate defendants reflects both the need for the Court to be able to impose meaningful penalties that will carry the necessary punitive and deterrent effect on large commercial organisations and the absence of any alternative non-monetary sentences such as imprisonment which are available when natural persons appear before the Court for this type of offending. I do not consider the level of

7 *Trent v Canterbury Regional Council* [2021] NZCA 123, [2021] 22 ELRNZ at [33]–[35] (footnotes omitted).

fine imposed in the present case breached any policy which sits behind the higher penalty levels for corporate defendants in terms of a percentage of the maximum penalty, as was contended for by Mr van der Wal.

The prosecution's distinction in fine levels

[15] The prosecution sought a starting point of $240,000 for Cazjal, and a starting point of $150,000 for Mr Walling. Mr Hammond contends the prosecution's view that Mr Walling should be treated more leniently than the company supports the contention the Judge erred by treating both alike.

[16] The law on this issue is clear: a Judge sentences in the public interest and is not bound by the parties' submissions on penalty.[8] It follows a Judge may impose a more severe sentence than one sought by the prosecution.[9]

Was a lesser fine warranted on the facts?

[17] An additional piece of background is required to understand this part of the case. Two (of the three) other defendants were G & V Farms Ltd[10] and Gary Smith. G & V Farms was the contract milker, and Mr Smith the director of that company.

[18] Mr Hammond contends:

(a) Extensive and costly changes to the effluent management system had been made;

(b) A contract milking agreement was in place between Cazjal Farms and G & V Farms Ltd which required the contractor to "operate the effluent disposal system in an efficient and workmanlike manner and indemnify the owner against any charges or actions arising out of failure of the contractor to operate the system in a proper and skilful manner;

(c) Following the June incident Mr Walling spoke with the other defendants and instructed them not to let effluent run into waterways;

(d) After the September incident it was agreed G & V Farms would employ a new staff member to manage dairy effluent and irrigation so by the time of the November incident, he considered the management of this issue lay with Mr Smith;

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8 *R v Mako* [2000] 2 NZLR 170 (CA) at [15]-[17]; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 (CA) at 606 and *Haarhaus v R* [2010] NZCA 41 at [25].

9 As above.

10 G & V Farms.

(e) Mr Walling did not have day-to-day operational responsibility for the effluent disposal system; and

(f) The contract milkers operating the system were highly experienced dairy farmers conversant with the effluent system operating on the farm.

Mr Hammond argues all these warranted a lesser fine for Mr Walling.

[19] The Judge addressed these points at sentencing. He noted Cazjal and Mr Walling provided infrastructure; had oversight of the farm; and the ability to influence farming operations. Both failed these. The Judge held Cazjal and Mr Walling did not:[11]

(a) notify the existence of the existence of the abatement notice and its requirements;

(b) explain the effluent management system;

(c) notify the existence of and explain the Effluent Operation Manual;

(d) explain the identified risks relation to effluent irrigation;

(e) arrange for on-farm induction of the effluent management system; and

(f) supply with or sign a Contract Milking Agreement;

to any of the new staff on the farm for the 2021/2022 dairy season

The Judge also held there was a lack of induction, training, or both, by Cazjal and Mr Walling.[12]

[20] The Judge specifically addressed changes to the effluent management system following the offending in 2016. He considered there were problems with that system, and these contributed to the offending for sentence, including:[13]

(a) faults within the effluent loop lines that eliminated the more favourable areas of the irrigation block, this is similar to the circumstances of the 2016 non-compliance;

(b) leaking effluent hydrants were adversely influencing the operative loop line pressure, causing the effluent pump to trip out repeatedly, making irrigation more complicated and difficult to manage;

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11 *Waikato Regional Council v Cazjal Farm Ltd*, above n 4, at [53].
12 At [56].
13 At [57].

(c) that management failed to ensure that the required repairs, which had been notified to them, were undertaken in a timely manner;

(d) that Cazjal Farm chose to employ an absentee contract milker for the 2021/2022 dairy season, meaning there was a lessor level of operational management available on the Farm; and

(e) that this factor was also identified as a contributing factor in the 2019 prosecution where the contract milker was not living on the Farm and was managing two dairy farms for Mr and Mrs Walling. In this case, G & V Farms Limited are managing three dairy farms for Mr and Mrs Walling for the 2021/2022 dairy season.

[21] Two other more significant points must be made in answer to the contention. First, sentencing was based on an agreed summary of facts. Materially, the summary did not draw a distinction between Cazjal and Mr Walling. Second, a company can act only through people, and like many companies in New Zealand, Cazjal is small. Mr Walling directed and managed Cazjal. It is, therefore, not clear how a meaningful distinction could be drawn between him and the company on the facts.

Did the Judge err in treating Mr Walling's enforcement history as aggravating (in the absence of a conviction)?

[22] Mr Hammond contends the answer to this question is yes. He notes unlike Cazjal, Mr Walling had no previous conviction for offending contrary to the Resource Management Act. Mr Hammond contends it was thus wrong for the Judge to treat Mr Walling as if he had committed the earlier offending.

[23] I accept such an approach would be contrary to principle, and perhaps contrary to s 25(c) of the New Zealand Bill of Rights Act 1990, which affirms the presumption of innocence. However, a close reading of the sentencing remarks reveals the Judge did not approach matters this way. Rather, the Judge considered Mr Walling's *knowledge* of the circumstances in relation to the earlier offending aggravated culpability, as Mr Walling was aware of the risks posed by the farm, and its operation, to the discharge of effluent to waterways:[14]

> Cazjal Farm and Mr Walling *would have been aware* of the challenging nature of the Farm both in terms of the topography and the farm management systems. They were on notice that there were issues with management of farm effluent. There had been a number of inspections on the farm, since 2016, and

[14] *Waikato Regional Council v Cazjal Farm Ltd*, above n 4, at [49] (emphasis added).

> the visits by Council officers on each of the dates of this offending should have highlighted the need to address concerns. An abatement notice had been issued in June 2016 and copies provided to Cazjal Farm and Mr and Mrs Walling. Three separate contract milkers have been prosecuted for dairy effluent offences over three seasons (2017/17, 2019/20, and 2021/22). *The past prosecutions should have put Cazjal Farm and Mr Walling on notice to take greater care*. Further, Cazjal Farm and Mr Walling were sent letters in December 2019 and November 2020 reminding them that the abatement notice was still in place and that they had a responsibility to ensure anyone contracted to run the farm was aware of and complied with the abatement notice. They were also reminded that, as owners of the farm, they had responsibility to ensure compliance with farm animal effluent storage and irrigation rules.

[24] Furthermore, while Mr Hammond is correct a previous conviction is an aggravating factor under s 9(1)(j) of the Sentencing Act 2002, s 9(4)(a) of the same Act makes clear a Court may take into account "any other aggravating ... factor that the Court thinks fit". That Mr Walling knew of the risks—and still failed to address them—means his offending was more serious than it otherwise would have been.

[25] This leaves one issue. The prosecution also submitted Mr Walling's culpability was aggravated because of his operation of two other companies in 2012, or earlier, for earthworks in contravention of the Resource Management Act. Mr Walling was not convicted of that offending, but the sentencing Court concluded he was nonetheless careless and had a cavalier attitude.

[26] The Judge said this about the submission, and the 10 percent uplift more generally:[15]

> Counsel for the defendants submits that Cazjal Farm has taken significant remediation steps since the first offending, to its considerable credit, and that Mr Walling has no previous convictions. I accept that the relationship of these defendants bears upon the present situation. Mr Walling is or was a director and/or shareholder of companies which have previously been sentenced. I accept the submission that I am dealing with a situation where previous non-compliance can be considered an aggravating factor of the current offending for both Cazjal Farm and Mr Walling. I will apply an uplift of 10 percent for both Cazjal Farm and Mr Walling. This could have been higher, but I wish to acknowledge the work undertaken at this farm to upgrade the system since the 2017 sentencing, and to acknowledge that the Tui Glen Farm Limited and Walling Family Farms Limited offending was now some years ago.

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15 *Waikato Regional Council v Cazjal Farm Ltd*, above n 4, at [67].

[27] It is not clear how Mr Walling's involvement in those other companies could aggravate his sentence because he was not convicted of that offending and it would not appear to say anything about his knowledge of risk in relation to the farm. It could connote bad character, and therefore be germane to an assessment of a discount for good character, but the Judge was not being asked to offset or reduce a good character discount; he was being asked to treat this feature as an aggravating factor, without a conviction, absent direct relevance to the offending for sentence.

[28] It is not necessary to resolve the point, however. It is clear it had little effect, if any, on the uplift. I say this because: (a) the sentencing remarks demonstrate the Judge was focused on Mr Walling's connection to Cazjal and his associated knowledge of risk in relation to the farm; (b) the uplift was 10 percent, Cazjal received an identical uplift, and it obviously had no role in the unrelated offending; and (c) the Judge recognised the unrelated offending was "years ago".[16] So, no issue of material error arises.

Is the overall penalty too severe given the fine imposed on Cazjal?

[29] Mr Hammond contends Cazjal and Mr Walling "are essentially one and the same", so an overall fine of $192,000 is manifestly excessive. I make four points.

[30] First, the offending was serious. The primary offence concerned the discharge of effluent that may enter water; in this case, the discharges *entered* water. The affected waterways are significant for recreation, to neighbours, and iwi. The environmental effects were notable. I repeat what the Judge said:[17]

> The environmental effects were conspicuous, particularly in the Matapara Stream adjacent to the farm. The results of the analysis of water samples indicates very high levels of contamination attributable to dairy effluent and which are well-known to adversely affect stream fauna. While the stream may recover, that is at least delayed by repeat offending. The river is classified as a significant habitat for both indigenous fish and trout.
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> Social and cultural effects follow from the environmental effects. Neighbours of the farm have complained of the effects of the farm's discharges on the Matapara Stream and on them. That stream flows into the Pūniu River. There are four marae along the Pūniu River: Mangatoatoa, Rāwhitiroa, Aotearoa and

[16] *Waikato Regional Council v Cazjal Farm Ltd*, above n 4, at [67].
[17] At [12]–[13].

> Whakamārama. The Pūniu River then joins the Waipā River just south of the town of Pirongia, which then flows into the Waikato River. The Waipā River is the subject of the Nga Wai o Maniapoto (Waipa River) Act 2012. The Waikato River, including all its catchment, is the subject of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Among the purposes of that legislation is to recognise the significance of the rivers to tāngata whenua and to recognise the vision and strategy for the Waikato River and its catchment, Te Ture Whaimana, which is part of the Waikato Regional Policy Statement and has as its vision a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the River, and all it embraces, for generations to come.

[31] Second, and as observed earlier, Mr Walling knew the risks but did not address them.

[32] Third, it is important that fines in this context are sufficiently large to avoid pollution becoming a cost of business. To borrow the language of economists, fines must internalise externalities—and then some. Expressed in terms of the Sentencing Act, deterrence and denunciation are important sentencing principles for offences of this nature.

[33] On occasions, Mr Hammond's submissions appeared to suggest the Judge should have settled upon a global fine, then apportioned it between Cazjal and Mr Walling. While in theory this ought not produce different outcomes from the approach adopted by the Judge, dangers abound. Allan J's observations in *Calford Holdings Ltd v Waikato Regional Council* cannot be improved:[18]

> [32] ... greater transparency is now required as a necessary part of the sentencing process. Criminal culpability is assessed by reference to the role played by each individual offender; even where a number of persons acting together commit a criminal offence, the Court is required to assess the culpability of each offender separately and to impose on each a penalty that reflects the gravity of that offender's criminality
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> ...
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> [34] ... contends that the sentencing Judge ought to have determined the overall fine by reference to the totality of the offending and then simply divided it up between the defendants in proportion to the roles played by each of them. I reject that approach. It is contrary to principle and in particular, is contrary to the guidelines set out in *Taueki*, which both the sentencing Judge

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[18] *Calford Holdings Ltd v Waikato Regional Council* HC Hamilton CRI-2008-419-94, 26 May 2009, (2009) 15 ELRNZ 212, (2009) NZRMA 563.

> and this Court are bound to apply. A fine that is appropriate for an individual defendant is not to be reduced simply because other offenders were involved.
>
> [35] Mr Lang's argument, if carried into the arena of offences under the Crimes Act would, for example, require sentences for multi-accused street attacks to be reduced simply by reason of the number of offenders involved. It would plainly be wrong to do that. There is no warrant for taking a different line in cases under the Act. To do so would lead to reduced fines and to a concern that penalties under the Act might be regarded as licensing fees for offending. Fines imposed under the Act must be meaningful (*Machinery Movers*, adopted in *Plateau Farms Ltd v Waikato Regional Council* (High Court, Rotorua, CRI 2007-463-16, 17 September 2007, Stevens J)). In my opinion those who commit offences under the Act are to be treated in precisely the same way as those who commit other regulatory offences and indeed, in the same fashion as all offenders. The Judge identified a starting point for the offending and then made adjustments to reflect the separate culpability of the individual offenders. In so doing she adopted the approach mandated in *Taueki*. I reject the submission that she made an error in principle in so doing.

[34] The criminal law does not ordinarily disaggregate harm. If three defendants beat a victim to death while another offers (intentional) encouragement, all four are guilty of culpable homicide. Again, fines must not become a cost of business.

[35] Fourth, the Judge said he would have imposed a higher fine "but for the inter-relationship of the defendants".[19]

[36] Mr Hammond also referred to several cases to support a submission the fine was too severe.[20] None of these cases, however, involved offending as serious as Mr Walling's. This leaves me to record what is otherwise implicit: the $96,000 fine is not manifestly excessive given the circumstances of the case.

Result

[37] The appeal is dismissed.

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[19] *Waikato Regional Council v Cazjal Farm Ltd*, above n 4, at [64].

[20] *Huka View Dairies v Manawatu-Whanganui Regional Council* [2021] NZHC 1462, *Bay of Plenty Regional Council v Nettleingham* [2023] NZDC 3031 and *Manawatu-Wanganui Regional Council v Donview Farms Ltd* [2022] NZDC 20425.

Postscript

[38] The parties alerted me to a problem with the conviction records in relation to Mr Walling and Cazjal. The record for each contains more convictions than there should be, perhaps because convictions have been wrongly duplicated. As there is no conviction appeal before me, I do not have the power to direct anything. However, I invite those responsible for the conviction records to reconsider their entries, and to ensure they accord with the correct position.

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Downs J