

RARE SUCCESSFUL DEFENCE TO RMA PROSECUTION – ELIOT SINCLAIR AND PARTNERS LTD

A recent Environment Court decision¹ sets the bar for successful defence of a prosecution under the Resource Management Act 1991 ("RMA"). While often attempted, it is very rare for a defence to succeed against an RMA prosecution. This case is therefore of interest, particularly for professionals involved in development projects as it was an engineering consultancy facing the charges.

The key message is that consultancies must exercise the degree of skill, care and diligence normally expected of a competent professional. In this case the Court held that the requisite standard had been met and the consultancy did not "permit" the offending.

The charges

Canterbury Regional Council ("the Council") brought two charges against a surveying, engineering and planning consultancy ("the consultancy") for permitting the discharge of sediment laden water to water and permitting the deposit of sediment laden runoff in the foreshore and/or seabed ("the discharges") from a residential subdivision at Banks Peninsula to the waters of Duvauchelle Bay. The consultancy had designed an erosion and sediment control management plan ("ESCMP") for a subdivision and was later contracted by the subdivider to provide engineering consultancy services during construction of the subdivision infrastructure. The consultancy defended the charges on the basis that it had not permitted the discharges.

The subdivider and the contractor for site earthworks were also prosecuted by the Council and pleaded guilty. The subdivider was fined \$22,500 and the contractor \$30,000².

Events leading up to the discharges

On 27 February 2013 the consultancy notified the Council of a change to the ESCMP. Originally the ESCMP had required a sediment pond to be constructed and connected to the stormwater drainage system. However by 27 February the contractor had not installed the stormwater drains. The consultancy temporarily changed the ESCMP until the drains could be installed, requiring a bund to be constructed near the edge of the pond to intercept sediment laden water and direct it to a secondary flow path containing silt traps and hay bales and lined with mesh.

The secondary flow path worked satisfactorily until 20 April when the contractor cut a trench through the bund wall, which meant the pond could not retain water. The Council issued a formal warning because sediment was entering Duvauchelle Bay. The consultancy wrote to the contractor detailing work required to bring the system up to compliance. It prohibited the contractor from doing any further work until all the requirements had been met.

Over the following 9 days the contractor made some of the required improvements, then on 2 May the Council, and the consultancy, required the contractor to immediately fill the cut in the bund wall with lime stabilised soil. The contractor gave assurances that the work would immediately be undertaken, however it took three days to fill the cut and then it used the wrong material. The consultancy identified this mistake the day after it occurred and arranged to meet the contractor on site the following day. However in the meantime there was a heavy rainfall event which led to the discharges.

¹ *Canterbury Regional Council v Eliot Sinclair and Partners Ltd*, CRI-2013-009-010492, 11 July 2014, Judge BP Dwyer

² *Canterbury Regional Council v Sicon Ferguson Ltd & Tresta Holdings Ltd*, CRI-2013-009-010493 & 495, 27 June 2014, Judge JJM Hassan

Permitting

The Environment Court adopted the description of the notion of "permitting" from the *Crafar Farms* decision.³ The Council had to prove that the consultancy had provided an opportunity for, allowed, acquiesced in, abstained from preventing, or tolerated the acts or omissions that led to the discharges.

After hearing expert engineering evidence for the Council and the consultancy His Honour Judge Dwyer found that the consultancy had not permitted the discharges either:

a) by changing the ESCMP, because

- The decision to establish the sediment pond before the stormwater system was completed was a proper decision;
- The contractor was responsible for the delay in getting the system running;
- The consultancy could not have anticipated a lack of performance by the contractor or delays in getting the system running;
- The temporary sediment control system was adequate;
- The consultancy had operated a rigorous supervisory system – it inspected the site weekly and sometimes more often;
- There were benefits in getting on with construction in the summer.

b) or by the way the consultancy responded to inadequacies in the sediment control works brought about by the contractor's failures between 20 April and the incident, because

- The consultancy had clearly identified works required to be done by the contractor on a number of occasions, verbally and in writing, and had put a stop to site works;
- The contractor had not followed design specifications or direct instructions. This blatant breach could not have been anticipated;
- The consultancy had carefully designed the sediment pond to have the appropriate capacity and a secondary flow path. Had the bund wall been properly sealed as instructed the discharged would not have occurred;
- The most crucial item of work, sealing the bund wall, was raised by the consultancy from the outset and had been specifically pursued on a daily basis once the Council required it to be immediately sealed;
- The consultancy conducted numerous site visits (e.g. 11 visits in the 16 days between 20 April and the incident) and received direct assurances that the required work was being done;
- The consultancy had no practical alternative but to work with the contractor it had on this remote site.

The Court concluded that the consultancy had taken every reasonable step available to it to remedy the acts and omissions of the contractor. It had exercised the degree of skill, care and diligence normally expected of a competent professional engineer, as was its duty, and through acting to that standard had not permitted the discharge. The consultancy was found not guilty.

Conclusion

Where expert advisors act independently, fairly, impartially and carry out their role with the skill, care and diligence of a competent professional there should be a defence available to a charge of 'permitting' offending under the RMA.

Jackie St John

³ *Waikato Regional Council v Hillside Ltd*, CRI-2008-019-500880, 20 July 2009, Judge L Newhook