

**IN THE DISTRICT COURT
AT NEW PLYMOUTH**

CRI-2008-021-001238

BETWEEN TARANAKI REGIONAL COUNCIL
 Informant

AND VICTOR ALAN MOULAND
 Defendant

Hearing: 16 November 2010

Appearances: K de Silva for the Informant
 Defendant in person

Judgment: 16 November 2010

ORAL JUDGMENT OF JUDGE B P DWYER

[1] This is a re-convened hearing in respect of matters referred to me pursuant to s 88 of the Summary Proceedings Act 1957 (SPA).

[2] On 17 July 2009, Mr Moulard, I convicted you on two charges brought under the Resource Management Act 1991 (RMA). I fined you a total of \$50,000 plus solicitor and Court costs. The fines remain unpaid.

[3] The matter of non-payment has been referred to me for consideration by the Registrar pursuant to the provisions of ss 88(1)(c)(ii) and 88(2)(b) SPA.

[4] Before proceeding with my consideration of the relevant provisions of SPA I formally note for the record that there was no appeal filed against the fine which I imposed upon you. I am accordingly entitled to assume that the \$50,000 fine was an appropriate penalty for the offending in question.

[5] Although SPA does not contain detailed procedural provisions in respect of s88 matters and is silent on the matter, I instructed the Registrar to give notice of these proceedings to Taranaki Regional Council which appeared before me and

made submissions on these proceedings. Pursuant to s 342 RMA the Regional Council is to receive 90 percent of the fine which I imposed, and accordingly has a direct interest in these proceedings. Additionally, I was of the view that the Regional Council might hold relevant financial information through its rating records which could assist me in my considerations.

[6] I have had the benefit of a report from the Registrar, comprehensive submissions from your previous solicitors including detailed financial information, and a pre-sentence report from a Probation Officer. I record that although you were initially represented by counsel you now appear on your own behalf, Mr Mouland.

[7] The position that you have advanced to the Court is that you are unable to pay the fine imposed and you have sought that I exercise the powers available to me pursuant to s 88(3) SPA. I set out the provisions of s 88(3) for the record as they list the options available to me in considering this matter.

[8] Section 88(3) provides as follows:

Subject to subsection (3AA) of this section, the District Court Judge or Community Magistrate may, after considering the report of the Registrar, and the financial position of the defendant (whether determined from any financial statement prepared by the defendant or from other sources)—

- (a) refer the matter to the Registrar with a direction that one or more of the enforcement procedures referred to in section 87(1) of this Act, as specified in the direction, be invoked; or*
- (b) subject to section 106E of this Act, direct that a warrant of commitment in the prescribed form be issued; or*
- (ba) subject to sections 80A to 80ZM of the Sentencing Act 2002 and section 106E of this Act, sentence the defendant to a sentence of home detention; or*
- (bb) subject to sections 69B to 69M and sections 70 to 80 of the Sentencing Act 2002 and section 106E of this Act, sentence the defendant to a sentence of community detention; or*
- (c) subject to sections 55 to 80 of the Sentencing Act 2002 and section 106E of this Act, sentence the defendant to community work; or*

- (f) *direct that action be taken under paragraph (a) or paragraph (b) of this subsection in respect of a lesser amount than the fine due; or*
- (fa) *if the amount that the defendant owes in respect of 1 unpaid fine, or in total in respect of more than 1 unpaid fine, is \$5,000 or more, refer the matter to the Registrar with a direction that action be taken under section 96A of the District Courts Act 1947 in relation to 1 or all of the fines making up the total owing by the defendant as if the fine or fines were an order for the payment of money and as if the Registrar had obtained the order; or*
- (fb) *direct that a greater time for payment of the fine be allowed subject to such conditions as may be directed by the Judge or Community Magistrate; or*
- (g) *direct that no further enforcement proceedings be taken in respect of the fine for such period or subject to such conditions as may be directed by the Judge or Community Magistrate; or*
- (h) *remit the fine or a part of the fine.*

Those are the options available to me.

[9] The proposition which you have advanced is that I sentence you to community detention and community work in substitution for the fine of \$50,000. It is unclear as to whether or not I have that combination of sentences available to me when exercising the powers contained in s 88(3) which are in each case expressed as alternatives. Section 88(3) SPA is not subject to the provisions of ss 19 and 20 of the Sentencing Act 2002 which allow a combination of sentences to be imposed. However, that is not a decision that I have to make today for reasons which will become apparent.

[10] In determining what action I ought take on the Registrar's referral I am obliged to consider your *financial position*. I have had the benefit of extensive financial information.

[11] The relevant circumstances of your financial position are that in 2004 your wife and yourself established a family trust (the Trust) which took over properties which the two of you then owned. The Trust now owns two properties at Hawera

with a capital value as at 1 September 2009 of approximately \$750,000. There is a mortgage to the bank with about \$290,000 owing. One of the properties is a rental property and you reside at the other property which is where the offending for which you were sentenced, took place.

[12] You were the settlor of the Trust and you have the power to appoint trustees. Initially the trustees were you, your wife and an independent trustee appointed by you. You are a beneficiary of the Trust. You and your wife have separated and as part of your matrimonial arrangements your wife was to resign as trustee and will no longer be a beneficiary of the Trust.

[13] Consequent upon transfer of the properties to the Trust, your own personal assets are limited. Your most substantial asset is a debt owed to you by the Trust of approximately \$163,000 as at 9 December 2009. I am uncertain as to your current work situation but note that as at 13 May 2010 you were on a sickness benefit as the result of surgery, but it appears that was envisaged as a temporary situation during your recovery.

[14] Earlier this year the Trust carried out the subdivision and sale of part of the property which it owned and the monies received as a result were used to make a payment to your wife of \$78,000 under your matrimonial property arrangements, a reduction of \$40,000 to a housing loan and repayment of a personal overdraft. After the sale the Trust retains ownership of the two properties to which I have referred as having a value of \$750,000.

[15] That general description of affairs then brings me to what I consider is the central issue with regard to your financial position, namely the substantial asset which you have, being the debt of approximately \$163,000 owing by the Trust to you.

[16] Is it reasonable that the Court should expect that you look to have recourse to this debt or part of it to enable repayment of the fine which you owe to the community. The answer, in my view, is yes.

[17] In the submissions made on your behalf when you were represented by counsel, the position was put that the independent trustee of the Trust had genuine concerns as to the ability of the Trust to service any borrowing necessary to pay out monies owing to you. I accept that is an appropriate and genuine concern for a trustee to have. I do not accept, however, that borrowing is the only course open to the trustees. The Trust's property is contained in two titles, one of which is a rental property. It has been submitted that an outcome which led to sale of the rental property would be unduly harsh and would have financial repercussions for the Trust, including a diminution of the capital of the Trust.

[18] I do not accept that is the case. Nor do I consider that the impacts on the Trust of it having to pay the debt owing to you are appropriate considerations in determining the outcome of this process. I am not going to go down the path suggested by Ms de Silva for the Regional Council, of looking behind the Trust to investigate the reality of control. However, I note that the situation where you are settlor, appointor, trustee and beneficiary and have been able to access funds from the Trust to settle matrimonial and personal debts, raises real issues in that regard.

[19] Rather, I have accepted that the Trust's assets are separate to your own. However, the corollary of that proposition is that the Trust's liabilities and how it deals with them are similarly the Trust's affair. The impact on the Trust of having to put arrangements in place to meet a debt duly and properly owed by it, is not something that I propose to take into account in determining these proceedings.

[20] In this case there is no dispute that the Trust owes you a substantial sum of money which would enable you to meet payment of your fine. When you appeared before me in September you advised that no demand had been made of the Trust for repayment of the money owed to you, in whole or in part. Accordingly the trustees have not had to formally consider how the Trust's affairs might be ordered to enable that to happen. As responsible trustees exercising their obligations, they would be required to do that if they received demand for repayment and to make payment if it was in the Trust's financial capacity to do so. In view of the very substantial equity the Trust has and its ownership of two properties it clearly has that financial capacity. The reality is that the Trust is being used to shelter not only the assets

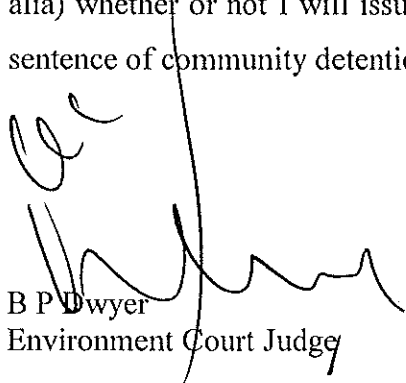
contained within the Trust itself (which is a legitimate function of a trust) but also your own personal asset, namely the debt which the Trust owes to you.

[21] Accordingly, I have determined to deal with this matter on the following basis. Pursuant to the provisions of s 88(3)(fb) SPA I hereby direct that you be allowed the further period of nine months from today's date in which to make payment of the fine.

[22] I have allowed that time in which to enable you to make formal demand for repayment of monies owed to you by the Trust and for the trustees to responsibly consider how that can be accommodated and to take steps to do so. I record that the requirement for you to make demand in writing for repayment of sufficient monies to meet payment of your fine is a condition of granting this extension of time. You are to lodge a copy of such demand with the Registrar within one month of today's date. Again, that is a condition of the extension, imposed pursuant to s 88(3)(fb) SPA.

[23] If the fine has not been paid at the conclusion of the nine month period, I direct the Registrar to refer the matter to me again for further consideration which I will undertake at a date to be notified to you. Pursuant to ss 88(2A) and 88(9) SPA I direct that you be returned to the Court at that time.

[24] I direct that not more than 14 days prior to that date (that is the date that the matter might be referred back to me, if it is referred back to me), you are to complete a statement of means for consideration by me so that I am able to determine (inter alia) whether or not I will issue a warrant for your committal to prison or impose a sentence of community detention or community work in substitution for the fine.



B P Dwyer
Environment Court Judge