

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2023-004-002999
[2025] NZDC 2132**

MINISTRY FOR PRIMARY INDUSTRIES

v

NEW ZEALAND SUGAR COMPANY

Hearing: 11 September 2024

Appearances: L Dalton and S Symon for the Crown
Mr Keown and H Cassone for the Defendant

Judgment: 7 February 2025

**RESERVED DECISION JUDGE J M JELAŠ
[Sentencing]**

[1] The New Zealand Sugar Company (NZSC) has pleaded guilty to two representative charges laid under the Food Act 2014 being:

- (a) Breaching or failing to carry out a duty. As the operator of a food business that is subject to a national program, NZSC breached its duty to comply with all applicable requirements of the Food Act 2014 (Charge 1).¹ By pleading guilty, NZSC accepts that it:

¹ Food Act 2014, ss 240(4) and 80(c): maximum penalty for a body corporate of \$200,000. CRN: 23004501124.

- (i) failed to ensure that the cane raw sugar it imported aboard the *Rin Treasure* contained lead contamination which was at an acceptable level;
- (ii) failed to properly identify the risk of its sugar becoming contaminated whilst on board a shipping vessel as a result of the ship's previous cargo;
- (iii) failed to ensure that its testing procedures were appropriately timed to identify any contamination prior to the product being sold to consumers; and
- (iv) failed to ensure that lead contamination in the cane raw sugar was identified, controlled, and at an acceptable level which did not increase the likelihood of an existing risk to the health of those consuming the products.

Charge 1 is also described as the Systems Charge.

- (b) Negligently endangering, harming, creating risk, or increasing risk. As a person who trades in food, NZSC failed to comply with its primary duty under the Food Act to ensure that food is safe and suitable for human consumption (Charge 2).² By pleading guilty to this charge, NZSC accepts that:

- (i) it sold sugar products to retail food suppliers and food manufacturers across New Zealand and overseas which contained an unacceptable level of lead contamination;
- (ii) the level of lead contamination was elevated to such a degree that it rendered the sugar not safe or suitable for human consumption;

² Food Act 2014, ss 224(1)(c) and 14: maximum penalty for a body corporate of \$250,000. CRN: 23004501126.

- (iii) the level of contamination directly or indirectly increased the likelihood of an existing risk to the health of those consuming the sugar products, by increasing the dietary exposure to lead and therefore increasing the likelihood of consumers experiencing lead toxicity;
- (iv) its failure was negligent – it ought reasonably to have known that the failure may directly or indirectly increase the likelihood of the above consequences to those consuming the sugar; and
- (v) this charge further incorporates a failure by NZSC to notify the Chief Executive of the Ministry for Primary Industries of this contamination event at the first reasonable opportunity, which prolonged this increased risk.

Charge 2 is also referred to in the submissions as the Response Charge.

Outcome

[2] The fines imposed on the two charges are as follows:

- (a) Charge 1 a fine of \$65,780.00.
- (b) Charge 2 a fine of \$83,720.00.

Background facts

[3] NZSC is a long-established New Zealand business which manufactures, markets, and distributes a number of sugar products, including the well-known “Chelsea Sugar” brand. It operates out of the Chelsea Sugar Refinery in Birkenhead where it imports and then processes unrefined raw material (cane raw sugar) into a variety of consumable sugar products (sugar).

[4] As cane raw sugar is refined, it forms two general streams: white sugar, and brown sugar (and its derivatives which include raw sugar, soft brown sugar, treacle,

golden syrup, and molasses³) (**brown sugar**). For clarity, the lead contamination only affected brown sugar and these ‘brown sugar derivatives’ as the refining process removes impurities such as lead from white sugar, and concentrates them into the brown sugar stream.

[5] As a manufacturer of food for human consumption, NZSC is subject to a number of regulatory measures under the Food Act 2014 (Act), the Food Regulations 2015 (Regulations), and the Australia New Zealand Food Standards Code (Code) created by Food Standards Australia New Zealand (FSANZ).

[6] The cane raw sugar which NZSC imports to then manufacture into consumable sugar products usually contains very low levels of lead contamination. Despite NZSC’s internal standard of 0.5ppm, NZSC expects lead contamination in cane raw sugar to be *less than* 0.05ppm,⁹ and has historically been able to achieve much lower levels of contamination:

- (a) 79 per cent of the sugar NZSC previously imported was below the detectable limit for lead testing of 0.01ppm;
- (b) of the remaining 21 per cent of shipments which exceeded the detectable limit of 0.01ppm, the average lead contamination across those samples was 0.04ppm;
- (c) the highest reading ever recorded by NZSC was 0.098ppm arising from a shipment in June 2016 and February 2017;⁴ and
- (d) overall, the level of contamination NZSC has been able to achieve historically sits in the range of 0.008 and 0.016ppm.

³ Molasses is a dark brown viscous syrup produced as a by-product of the sugar refining process. Most molasses is sold by NZSC as animal feed. Less than 10% is further processed as food grade molasses. The intended use of food grade molasses is for immediate consumption and general food and beverage customer use. Molasses is derived from cane raw sugar, with the refining process concentrating impurities such as lead into molasses. Therefore, higher levels of lead in molasses are expected and to a certain degree tolerated owing to molasses being consumed in lesser qualities.

⁴ Between the period of 2011 and 2021.

How the sugar became contaminated

[7] In March 2021, NZSC entered into a contract with Wilmar Sugar Australia Trading Pty Limited (Wilmar Sugar) to supply 27,500 tonnes of cane raw sugar. The bulk carrier ship the *Rin Treasure* was selected to transport that shipment from Australia to New Zealand.

[8] On 14 September 2021, when the *Rin Treasure* arrived in Auckland, NZSC imported 25,688 tonnes of Australian cane raw sugar with elevated lead levels (contaminated raw sugar). The sugar became contaminated on the journey from Australia to New Zealand due to the *Rin Treasure* having been inadequately cleaned before the cane raw sugar was loaded and the accidental bursting of a pipe during the unloading process.

[9] The *Rin Treasure* had previously been used to transport metal sulphide concentrates (lead and zinc), including the shipment immediately prior to that of the sugar.

Inadequate cleaning of the Rin Treasure

[10] On 3 September 2021, NZSC was advised that the *Rin Treasure* failed a ship survey report which stated the holds were not fit to load bulk sugar in the current condition unless deficiencies were rectified. All holds failed the survey due to presence of rust, scale and cargo dust.

[11] On 7 September 2021, NZSC received a further hold cleanliness survey report which certified that the hold was in a fit state for the stowage and carriage of raw sugar (Cleanliness Report). This complemented a Pesticides Certificate dated 8 September 2021 prepared by Wilmar Sugar stating that it “hereby certify that the sugar is shipped free from chemical and pesticide products and heavy metals” (Pesticides Certificate).

[12] On 7 September 2021, the *Rin Treasure* carrying the cane raw sugar departed Queensland, Australia for New Zealand. Despite the above Cleanliness Report and Pesticides Certificate, the *Rin Treasure* had been inadequately cleaned and the cargo

became contaminated with high concentration levels of lead on the journey from Australia to New Zealand.

The burst pipe

[13] This contamination was potentially exacerbated when, during the unloading process, contractors of NZSC damaged an air vent pipe on the *Rin Treasure*, causing approximately 20-60 litres of water to spill into the cane raw sugar in Hold 5. NZSC was made aware of this event on 23 September 2021. At the time, NZSC was unaware of any contamination in the water from the pipe and only later identified the damaged pipe as a possible source of contamination after the cane raw sugar from Hold 5 recorded the highest level of contamination on 26 October 2021.

Use of the contaminated sugar in manufacturing

[14] From 15 to 24 September 2021, NZSC unloaded and used the contaminated cane raw sugar in its refinery. From 27 September 2021, it began producing consumable sugar products from that contaminated sugar and distributing the products to retailers and consumers for sale.

[15] NZSC's procedures at the time allowed for production, distribution and sale of food to occur *before* the results of heavy metal testing was completed and available.

The 7 October results

[16] On 29 September 2021, NZSC provided a composite sample of cane raw sugar from the *Rin Treasure* to Hill Laboratories for testing for heavy metals.

[17] On 7 October 2021, NZSC received the results of that testing, indicating that cane raw sugar transported aboard the *Rin Treasure* contained lead contamination of 0.53ppm (7 October result). An employee of NZSC identified this 7 October result as "really high", and that molasses being delivered to RJ's Licorice (RJ's) would be affected.

[18] This 7 October result exceeded NZSC's typical results of less than 0.01ppm in cane raw sugar by 53 times (5,300%), their previous highest reading from June 2016

of 0.098ppm by 5.4 times (540%) and exceeded the NZSC specification of 0.5ppm for Food Grade Molasses by 0.03ppm or 6%.⁵

[19] Despite the 7 October result, NZSC did not restore control over affected products going into the retail and consumer market for sale. Instead, NZSC sought further testing from AsureQuality.

The 18 October results

[20] The further testing was received from AsureQuality on 18 October 2021. This testing again confirmed lead in samples of molasses was 3.60 and 4.10 ppm for batches produced on 5 and 11 October 2021 (**18 October result**). Affected product had already been delivered to RJ's, albeit on the basis that it would not be used until NZSC had authorised its release.

The contamination was identified as being 'critical'

[21] On 18 October 2021, Sandra Fan (**Ms Fan**), Quality Assurance Manager at NZSC, first created a Non-Conformance Form (**Form**) recording that its food grade molasses did not conform to RJ's agreed specification and classifying the nonconformance risk as being 'critical'.

[22] NZSC decided to put all food grade molasses on hold and stop processing of raw cane sugar from the *Rin Treasure* pending an investigation. NZSC also decided to switch its cane raw sugar supply over to a shipment provided by another vessel, the Blue Balestier. However, residual lead contamination in the NZSC refinery continued to affect manufactured sugar products until the plant was cleaned on 15 November 2021.

[23] On 18 October 2021, NZSC also took the step of notifying its authorised verifier (AsureQuality) of the contamination and notifying RJ's liquorice who had received contaminated molasses.

⁵ Summary of facts at [43].

[24] At no point did NZSC take the step of informing Ministry of Primary Industries (MPI) of the contamination, its decisions above, or that affected raw sugar, brown sugar and treacle products had already entered the market and continued to be distributed domestically and abroad.

[25] Over the following days, the Form was updated as further test results were received from AsureQuality on 21 and 22 October 2021 indicating again significantly elevated levels of lead concentration in DC Raw (0.65ppm), Brown Sugar (0.11ppm), and Easy Pour Golden Syrup (0.021ppm).

[26] MPI was finally informed of the lead in sugar issue by NZSC on 3 November 2021, and was involved in the Consumer Level Recall decision on 4 November 2021.

[27] Charge 1 relates to the breach or failure by NZSC to carry out its duties to ensure food was processed or produced in a way that minimised contamination. In addition, there were appropriate procedures in place to identify controlled hazards. Charge 2 relates to NZSC's breach of its primary duty to ensure food it traded in is safe and suitable for human consumption. In addition, NZSC's failure to notify MPI of the contamination at the first reasonable opportunity.

Approach to sentencing

[28] The approach to sentencing is not in issue.

[29] Prosecutions under the Food Act require me to have regard not only to the provisions of the Sentencing Act, but also the mandatory considerations set out in s 274(4) and particular orders set out in s 269-273 of the Act.

[30] It is agreed that the lead offence is Charge 2 the response charge. Counsel submit I should identify a start point sentence for Charge 2 which I should then increase to reflect the additional offending encapsulated in Charge 1, the systems charge.

[31] I accept NZSC's submission that the relevant purposes and principles of sentencing under the Sentencing Act include the principle of accountability,

denunciation and deterrence and the need for there to be consistency at sentencing. The principle of consistency is particularly emphasised by NZSC in respect of the mitigating factors it advances. The sentencing exercise also needs to give effect to the purposes of the Act, which refer to the need to maintain confidence in New Zealand's food safety regime, and to require persons who trade in food to take responsibility for its safety and suitability.⁶

[32] The mandatory factors under s 274(4) of the Act are as follows:

- (a) how likely it was that a person would be harmed by the conduct constituting the offence:
- (b) how many people were likely to be harmed by the conduct constituting the offence:
- (c) how serious the harm was that was likely to be done by the conduct constituting the offence:
- (d) whether there were potential or actual implications for trade, including international trade.

[33] Sentencings bands under the Act were proposed by Judge Ryan in *Auckland City Council v Cook Brothers Bars Auckland Limited*, which also provides some guidance.⁷ The bands proposed were:⁸

- (a) Low culpability: from \$0 to \$40,000.
- (b) Medium culpability: being between \$40,000 and \$100,000.
- (c) High culpability: being between \$100,000 to \$160,000.
- (d) Very high culpability: being \$160,000 and above.

⁶ Food Act 2014, s 4(c) and (f).

⁷ *Auckland City Council v Cook Brothers Bars Auckland Limited* [2019] NZDC 14158.

⁸ At [53].

Relevant factors to setting the start point sentence

Likelihood of harm to a person

[34] The offending resulted in contaminated sugar reaching the retail market. It can be inferred that some of that contaminated sugar would have been consumed. At the time of the product recall on 4 November 2021 at least 971 tonnes of contaminated sugar products had been distributed throughout New Zealand and to six pacific nations.⁹ During the recall process all products exported were recovered. Approximately half of what was distributed within New Zealand was also returned under recall. Of the contaminated sugar recalled, 281 tonnes were ultimately deemed acceptable and safe. There are no known cases of a person suffering harm as a result of ingesting the contaminated sugar.

[35] Lead is a naturally occurring environmental contaminant. Harm from lead toxicity generally occurs as a result of toxic accumulation within a person over a period of time.

[36] NZSC submits the consumption of contaminated sugar would not have caused immediate harm to a consumer. The absence of an identifiable case of actual harm is highlighted. NZSC emphasises that the consumption of the contaminated sugar was over a short time frame which would have been unlikely to have had an immediate detrimental impact upon a person's health although it is acknowledged it would have contributed to the lead toxins stored within a person's body.

[37] I accept the likelihood of immediate harm to the healthy individual was low. Harm to a susceptible individual however cannot be discounted, but there were no instances of harm occurring.

[38] Society is well aware of the disadvantageous effects of lead consumption and as a result regulation and other industry standards have long been implemented to mitigate or eliminate exposure to the population. It cannot be said that *no* harm would

⁹ Approximately 66.65 tonnes were exported to the Cook Islands, American Samoa, Fiji, French Polynesia and New Caledonia.

have resulted from consumption of the contaminated sugar. NZSC acknowledges that increased exposure to lead is a serious matter.¹⁰ The agreed summary of facts admits as such. By pleading guilty to Charge 2 NZSC has accepted the following:

“The level of contamination directly or indirectly increased the likelihood of an existing risk to the health of those consuming the sugar products by increasing the dietary exposure to lead therefore increasing the likelihood of consumers experiencing lead toxicity”.

[39] Once lead contaminate is consumed it remains stored in the body. There is no way of knowing how the lead consumed from the contaminated sugar may contribute to a person’s health in the future. Consumers of the contaminated sugar have therefore suffered harm in that that they now have increased contaminants stored within their bodies albeit with no immediate negative health effects. However, the future risk to those persons is unknown but those individuals’ future risk of lead toxicity has been increased. While the risk of a future lead toxicity health event is unknown, and may be limited, no person enjoys learning that they have consumed an avoidable lead contaminant.

[40] I have therefore determined that harm has occurred by a person ingesting a contaminant that will remain with them for their lifetime and may contribute to a future health event. I accept there have been no immediate identifiable adverse health effects on any individuals and it is difficult to quantify the future health effects of those who have ingested the contaminated product. As there have been no identifiable cases of ill-health, but nonetheless a person’s risk of future health events have been increased, I consider this to be an aggravating feature falling in the moderate range.

The number of persons likely to be harmed

[41] Given the quantity of contaminated sugar distributed and not returned under recall, the number of persons affected when exposed to the harm of consumption of the lead contaminant is significant. The prosecution submits that the breadth of affected persons in this case is one of the largest ones to come before the Court.

¹⁰ Defendants’ sentencing submissions para 42.

[42] I assess the aggravation of this feature to straddle the moderate to high range as it is reasonable to infer a large number of persons would have ingested contaminated sugar products.

The seriousness of the harm

[43] As already stated, NZSC acknowledges an individual's increased exposure to lead is a serious matter. The level of seriousness however is difficult to quantify given the future effects on a person's health is unknown and subject to a multitude of other factors. It is therefore difficult to evaluate this factor. I accept the seriousness of harm is increased for those who are at risk persons being those with compromised health, young or pregnant. I assess this factor to fall at the low end of the moderate range.

Potential or actual implications for trade including international trade

[44] The consumer recall resulted in a widely publicised shortage of brown sugar products during the months of November and December 2021. This had an impact on New Zealand businesses.

[45] However, no information has been placed before me that there was a significant actual or potential impact on subsequent trade including international trade to our Pacific neighbours. The offending occurred in 2021. The sentencing hearing is taking place three years later. I consider that if there had been significant impact on trade or reputation, evidence of that would be available at sentencing. In the absence of identifiable evidence of an adverse trade effect, I consider this factor to be neutral.

Other aggravating features – breach of trust

[46] The prosecution submits that NZSC breached the trust of its loyal customer base by trading the contaminated sugar placing its business interests before those of its customers.

[47] I do not accept this submission. While NZSC is a well-known reputable food brand that has admitted to acting negligently and contrary to its duties under the Act, the circumstances of the offending do not enable me to infer that this was the result of

a decision to prioritise business over customer safety. The systems failures and the inadequate negligent responses to those systems failures can adequately explain the offending.

The extent of the offending

[48] I accept an evaluation of the extent of the offending is necessary for the sentencing process. The representative charges reflect the multiple system failures and negligent acts by NZSC as the operator of a food business. These failures and acts occurred over a significant period of seven weeks. NZSC also took some time before notifying MPI. I consider the nature of the system failures to be significant. NZSC was on notice that the Rin Treasures had previously been a contaminated vessel. While the subsequent cleansing report appeared to address those issues, the 7 October test results should have immediately put in issue the reliability of the cleanliness report. The past contamination issues and the 7 October test results should have been sufficient for NZSC to take immediate action to halt processing and distribution. These two factors combined provided a highly credible explanation for the test results. The continuation of business ignored this credible narrative for the source of contamination demonstrating a naivety and lack of systems by NZSC. The delay in reporting to MPI is also difficult to reasonably explain. I consider the scope and nature of the offending to be an aggravating factor.

Starting point sentence

[49] In determining the appropriate starting point sentence for Charge 2 NZSC accepts that its acts and omissions in respect of Charge 2 can be described as exhibiting characteristics of high culpability.¹¹ The prosecution also submit Charge 2 falls into the band of high culpability as set out in *Cook Brothers Bars*. I accept the prosecution submission there have been significant failures by NZSC both in scale and the severity. NZSC were aware that the contaminants in the sugar tested significantly exceeded the usual lead results but more importantly exceeded their own internal maximum thresholds. However, it chose to trade on. I consider this failure was highly negligent with consequences of potential harm to a large number of consumers. I consider the

¹¹ Defendant's sentencing submissions para 54.

acts and omissions by NZSC can properly be described as highly culpable and I adopt a starting point fine sentence for Charge 2 of \$130,000.

[50] That starting point will be increased for Charge 1 given the systems failings. I consider that the culpability for the systems charge to also fall within the high culpability threshold. I increase the start point sentence by \$100,000. The total starting point sentence is therefore a fine of \$230,000.

Mitigating factors

[51] There are multiple factors submitted for consideration.

Guilty plea credit

[52] The prosecution takes no issue that NZSC has responsibly pleaded guilty early to the charges before the Court and is entitled to seek full credit available for early guilty plea of 25 per cent. A 25 per cent reduction will be given for the early guilty plea.

No prior food safety breaches

[53] NZSC has an exemplary record and reputation. It has been operating for more than 100 years. There have been no prior breaches of food safety. It has a prior excellent record which warrants recognition in the sentencing process. Ten per cent credit will be given for that exemplary history of producing safe food.

Self-reporting

[54] NZSC seeks credit for identifying the contamination and for reporting it to MPI. I note when considering this submission that the agreed summary of facts records that NZSC accepts it failed to notify MPI of the contamination at the first reasonable opportunity. In addition, there was a statutory obligation upon NZSC to report the contamination.

[55] No credit will be given for this factor. No credit is warranted where there was a legal obligation to do so and there was a significant delay in complying with its legal obligations. It is reasonable to expect industries will comply with their legal obligations and no further encouragement or incentive in the sentencing process should be provided where the reporting was late.

Cooperation

[56] It is accepted that in some cases cooperation with the authorities can warrant credit in the sentencing process. This a discretionary factor.

[57] I consider that cooperation over and above any legal requirements provided by NZSC is adequately reflected in the full credit given for discount. While full credit for guilty pleas has been given, there was an inevitability to the prosecution outcome in the circumstances of this case.

Remediation and enhancement

[58] Credit is also sought for the remediation and enhancement steps that have been taken by NZSC subsequent to the offending. NZSC incurred significant costs of \$3,400,000 including lost sales and compensation to customers. I do not consider credit should be given for the remediation steps NZSC had to take as a direct result of their breaches of the Act. This is a consequence that naturally flows from offending which I do not consider in this case is a mitigating factor.

[59] Nor do I consider the enhancements that have been identified by NZSC in their written submissions warrant credit at sentencing. The enhancements are not substantial. The enhancements are limited to updating procedures and safety plans that I consider would be an ordinary part of NZSC's business and one would anticipate would be reviewed and updated from time to time. I do not consider the enhancements to be unique or outside the ordinary course of business to warrant particular recognition by way of mitigation.

[60] Therefore, having regard to all the mitigating factors advanced, I consider total credit of 35 per cent is available to NZSC (reduction of fine by \$80,500).

Fines imposed

[61] The fines imposed in respect of each charge having regard to the mitigating factors are as follows.

- (a) On Charge 1 a fine of \$65,780.00.
- (b) On Charge 2 a fine of \$83,720.00.

Judge J Jelaš
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 07/02/2025