2013

Enforcement Manual

Imposing Penalties

Imposing penalties: Infringement notices and prosecutions

This guidance note is the fourth of seven guidance notes that form the RMA Enforcement Manual. Topics covered in this guidance note relate to infringement notices and prosecutions and include:

Guidance note

To access the guidance note scroll down or click the link above.

Context

Penalties are imposed for offences in law. Penalties can be imposed either by way of prosecution under the Summary Proceedings Act 1957 (SPA) or by issuing an infringement notice under s343C of the RMA. To proceed under the SPA is to proceed 'summarily'. This means that the decision is made by a judge alone, unless the defendant elects to be tried by jury under s66 of the SPA.

The choice between prosecution and infringement is defined in s343B of the RMA:

Where any person is alleged to have committed an infringement offence, that person may either—

a) Be proceeded against for the alleged offence under the Summary Proceedings Act 1957; or
b) Be served with an infringement notice as provided for in s343C.

The primary purpose of a penalty is to punish the offender and to deter future offending, not only by the offender, but in the community at large. Further information on the purpose of a penalty and sentencing is set out under s7 of the Sentencing Act 2002. Prosecutions are better suited to deterrence due to the public nature of the proceedings and options available to the sentencing judge.

It is most important to remember that prosecution is not principally a tool to obtain compliance. In this sense, prosecution is not a 'last resort'. Even if the offender complied soon after detection, it might be entirely appropriate to prosecute. The key consideration in a decision to prosecute, is that the offence should have been avoided in the first place, and to leave it unpunished would be contrary to the public confidence in the laws and to their effectiveness. Examples of when it is appropriate to prosecute include where the offence was grossly negligent or caused serious avoidable harm, was for commercial gain, or was a repeat offence.

Offences

Standard of proof

When deciding to impose penalties, the enforcement officer (in relation to infringement notices) or local authority (in relation to prosecution) must be assured that all elements of the offence can be proven beyond reasonable doubt. This is a standard of proof that stipulates that a charge is not proven if the Court is not satisfied 'beyond reasonable doubt' that the accused committed the offence based on the evidence provided to them.

By contrast, defences need only be proven on the balance of probabilities (i.e. that the circumstances or situation on which the defence relies 'more likely than not' existed).

Strict liability

Under s341 of the RMA, the breach of s9 and s11-15 of the RMA are strict liability offences. This means that it is not necessary to prove that the defendant 'intended' to commit the offence.

Breach of an enforcement order or abatement notice, and the obstruction of an officer, are common offences that are not listed under s341 of the RMA. Arguably, this means they require proof of intention to commit the offence. However, in the absence of statutory direction, a Court may still find that an offence does not require such proof. This is referred to as 'strict liability of the Mackenzie type' (after a case of that name, being effectively a third category of liability). Refer to other enforcement guidance notes for further information.

One of the grounds on which a Court may make this classification is that the difficulties of proving intention tend to point towards strict liability.

Proving intention in terms of an enforcement order or abatement notice, would involve showing:

- knowledge of the existence of the order or notice
- intentional or deliberate conduct that is non-compliant with the order or notice.

While knowledge may be easy to prove, non-compliance with a notice or order is an omission. Actions are usually a conscious choice, but an omission may be due, for example, to factors beyond a person's control or to the inaction of a person instructed to comply in the defendant's absence.

This issue was highlighted in the case Waikato Regional Council v Huntley Quarries Ltd [2004] NZRMA 32, where the Court found that the breach of an abatement notice was strict liability of the Mackenzie type. In this case, the Court commented that:

> If it was sufficient in an abatement notice case for a defendant merely to raise some evidence of lack of intention, and for the informant then to have to prove intention affirmatively beyond reasonable doubt, this would in my view be asking the prosecution to prove matters that are often peculiarly within the province of the defendant, and would be unrealistic. It would also serve to defeat the purpose of the legislation by making abatement notices for offences of omission very difficult to enforce.

The issue was also dealt with by the Courts in Auckland Regional Council v Biogas [1993] CRN 2048024848/49; [1993], AP 199/93; [1994] CA 526/93; [1994] CRN 2048024848/49, where a question arose as to whether the intention to commit the offence of discharging waste to a stream could be imputed because of wording in the offence, despite s341(1) of the RMA. District and High Court conclusions that it had not been proven the person was aware of the contaminants being discharged (a test supposedly required by the wording "allowed to escape" in the s2 RMA definition of discharge) were subsequently overturned in the Court of Appeal. It is not necessary that the party have 'control' over the contaminated site or system at point of discharge to prove a breach of section 15 of the Resource Management Act 1991 (URS New Zealand Limited v District Court at Auckland [2009] NZRMA 529).

Multiple charges for the same conduct

One act or omission may, on its facts, constitute a number of offences specified under one or more Acts of Parliament. For example, the removal, trimming or damaging of a tree or group of trees might be a breach of one or more of the following:

- consent conditions or plan rules
- an operative or proposed plan
- the Conservation Act 1987, the Reserves Act 1977, or the QEII National Trust Act 1977.

In another example, the failure to maintain or remedy a visually objectionable building might be a breach of either:

- a notice to fix under the Building Act 2004
- an abatement notice under the RMA.

Each of these contraventions could result in separate charges.

A local authority is entitled to lay each charge, though dealing with the same act or omission, and a Court is entitled to hear each. However, conviction should occur only once in relation to the same act or omission that gave rise to charges being laid.

In relation to infringement offences, the High Court has suggested that although an infringement notice does not result in conviction, to issue more than one infringement notice would be to penalize the same act or omission multiple times. That may be unreasonable but it will depend on the circumstances of the case.

If prosecuting, the situation is different because the Court and counsel can agree during proceedings which charges to proceed with. However, care should be taken not to waste the Court's time or put the defendant to unnecessary cost by laying charges 'just in case'. To avoid claims that the proceedings are oppressive or vexatious, there should be some good reason why the local authority has not pursued only its preferred charges from the outset. Examples include the following situations:

- where it could be reasonably argued that each charge represented significant differences in the acts or omissions subject to prosecution
- where the state of law was unclear or contentious in relation to liability or defences under the different provisions that were the subject of different charges
- where the sentencing outcomes on the different charges could be significantly different.

Some s338 offences do not match an infringement offence

Prosecution offences are set out in s338 of the RMA, and maximum penalties are stipulated in s339. Infringement offences and fines ('infringement fees') are set by regulation. Infringement offences are narrower, excluding for example the contravention of enforcement order, a breach of s15C of the RMA relating to dumping of radioactive material or storage of hazardous waste in a coastal marine area, and obstruction of an enforcement officer. The fines are also relatively small in comparison to the penalties

which may be imposed in the context of prosecutions. This reflects the purpose of the infringement mechanism which is designed as a quick and efficient way of dealing with minor matters.

The Crown can be served with infringement notices and can be prosecuted by a local authority, but as set out in sections 4(7) and 4(8) of the RMA, the Court may not sentence a Crown organisation to pay a fine in respect of an offence.

Where an offence has been committed that involves a breach of a resource consent, the Court may make an order that requires a consent authority to review a resource consent under s128(2) of the RMA. This review can be required instead of, or in addition to, the imposition of a fine and/or sentence. If as a result of a review, the authority finds that there are significant adverse effects on the environment resulting from the exercise of the consent the authority may cancel the consent under s132(4) of the RMA. The consent authority can also recover any costs associated with this review from the consent holder.

Offences, for which both the infringement offence procedure and prosecution are available, are identified below in italics. Offences not in italics are only available for prosecution.

338. Offences against this Act— (1) Every person commits an offence against this Act who contravenes, or permits a contravention of, any of the following: • Sections 9, 11, 12, 13, 14, and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, discharges of contaminants): • Any enforcement order • Any abatement notice other than a notice under section 322(1)(c) • Any water shortage direction under section 329 (1A) Every person commits an offence against this Act who permits a contravention of s15A or 15C (restrictions in relation to waste or other matter) (1B) Where a harmful substance or contaminant of water is discharged in the coastal marine area in breach of s15B, the following persons each commit an offence: a. if the discharge is from a ship, the master and owner of the ship b. if the discharge is from an offshore installation, the owner of the installation	In the case of a natural person, the maximum penalty for prosecution is two years imprisonment, $300,000 and $10,000 per day for a continuing offence. In the case of a person other than a natural person the maximum penalty for prosecution is $600,000 and $10,000 per day for a continuing offence.

(2) Every person commits an offence against this Act who contravenes, or permits a contravention of, any of the following: a. s22, which relates to failure to provide certain information to an enforcement officer; b. s42, which relates to the protection of sensitive information; c. any excessive noise direction under s327; d. any abatement notice for unreasonable noise under section 322(1)(c); e. any order (other than an enforcement order) made by the Environment Court.	A fine not exceeding $10,000, and if the offence is a continuing one, a further fine not exceeding $1,000 every day (or part day) during which the offence continues
(3) Every person commits against this Act who - a. wilfully obstructs, hinders, resists, or deceives any person in the execution of any powers conferred on that person by or under this Act: b. contravenes, or permits contravention of, any of the following: i. s283, which relates to non-attendance or refusal to cooperate with the Environment Court; ii. any summons or order to give evidence issued or made pursuant to s41 c. contravenes, or permits a contravention of, any provision (as provided in Schedule 10) specified in an instrument for the creation of an esplanade strip or in an easement for an access strip, or enters a strip which is closed under s237C.	Maximum penalty for prosecution is a fine not exceeding $1,500

Deciding whether to prosecute or issue an infringement notice

Local authorities should consider the scale and nature of the offending when deciding whether to prosecute or to issue an infringement notice. Evidence of adverse effects and/or likely adverse effects should be collected and considered carefully. To help achieve consistency of decision-making, local authorities should put in place a policy or protocol on when infringement notices will be issued and when a prosecution is a more appropriate penalty for an offence.

The policy should consider the purposes and principles of sentencing: sentencing is the justice system's way of determining the appropriate consequences of offending.

The purposes of sentencing generally, are broad. The Sentencing Act 2002 allows for a range of orders to rehabilitate offenders and provide restoration to victims. It also allows for consideration of any offers of amends, resulting for example from a restorative justice process.

Specifically in relation to penalties, sentencing is about punishment for an offence. As well as expressing the community's denunciation of conduct causing harm, the primary purpose of penalties is deterrence. The costs imposed through penalties are intended to make offenders specifically and the community generally internalise those costs against any perceived benefit of offending (the likelihood of detection is also a key factor in this equation).

An infringement notice imposes a relatively minor penalty and does not result in a conviction. Hence, it provides less deterrence, and should be used for less serious offending. Another reason to limit the use of infringement notices is that it reverses the usual onus on the local authority to prove the offence before a penalty is imposed. For infringement notices, the local authority's evidence comes under scrutiny only after issuing the notice, and if the recipient requests a defended hearing. Repeat offending that results in mounting infringement fees should go before a judge instead.

The advantages of the infringement notice procedure are that it is swift, efficient and inexpensive unless challenged. However, the penalty able to be imposed is relatively small ($300-$1,000).

Prosecution can achieve a lot more than the imposition of a higher penalty. The Court in sentencing may endeavour, through its statements that accompany conviction, to caution the community or particular groups about their present and future behaviour. Also, under the Sentencing Act 2002 the Court can:

- incorporate restorative elements that redress the harm done
- give victims and the community a chance to speak
- require efforts of the offender that go towards their rehabilitation.

Infringement notices

Relevant legislation

The relevant legislation is as follows.

- RMA: sections 343A-343D
- Resource Management (Infringement Offences) Regulations 1999 ('the Regulations') The infringement fees range from $300 to $1,000
- Summary Proceedings Act: sections 21, 78A and 78B
- Summary Proceedings Regulations 1958: regulations 15B-15E, First Schedule
- RMA: Form 10 reminder notice and Form 10A Notice of hearing in respect of an infringement notice.

A more detailed discussion of these provisions occurs in the body of this section, below.

Infringement offences and fines

Section 343A of the RMA defines 'infringement fee ' as the amount fixed by the Regulations, and 'infringement offence ' as an offence specified as such in the Regulations.

The words 'defendant', 'informant', 'infringement fee ', 'infringement notice ' and 'infringement offence ' are defined in s2 of the Summary Proceedings Act.

Schedule 1 of the Resource Management (Infringement Offences) Regulations 1999 sets out the sections of the RMA that, when contravened, give rise to an infringement offence, and the infringement fee for the offence (summarised below). Section 343D of the RMA provides that a local authority shall be entitled to retain all infringement fees received for notices issued by its enforcement officers.

Offence specified as infringement offence	General description of offence	Infringement fee for offence
Section 338(1)(a)	Contravention of section 9 (restrictions on use of land).	$300
	Contravention of section 12 (restrictions on use of coastal marine area).	$500
	Contravention of section 13 (restriction on certain uses of beds of lakes and rivers).	$500
	Contravention of section 14 (restrictions relating to water).	$500
	Contravention of section 15(1)(a) and (b) (discharge of contaminants or water into water or onto or into land where contaminant is likely to enter water).	$750
	Contravention of section 15(1)(c) and (d) (discharge of contaminants into	$1,000

	environment from industrial or trade premises).	
	Contravention of section 15(2) (discharge of contaminant into air or onto or into land).	$300
Section 338(1)(c)	Contravention of an abatement notice (other than a notice under section 322(1)(c)).	$750
Section 338(1)(d)	Contravention of a water shortage direction under section 329.	$500
Section 338(1A)	Contravention of section 15A(1)(a) (dumping of waste or other matter from any ship, aircraft, or offshore installation).	$500
Section 338(1B)	Contravention of section 15B(1) and (2) (discharge in the coastal marine area of harmful substances contaminants, or water from a ship or offshore installation).	$500
Section 338(2)(a)	Contravention of section 22 (failure to provide certain information to an enforcement officer).	$300
Section 338(2)(c)	Contravention of an excessive noise direction under section 327.	$500
Section 338(2)(d)	Contravention of an abatement notice for unreasonable noise under section 322(1)(c).	$750

Steps in the infringement notice process

Steps in the lead-up to issuing an infringement notice

1: Receipt of information or observation of activity by officer

Enforcement action normally begins with an enforcement officer directly observing an act or omission that constitutes an offence. Alternatively, an enforcement officer may issue an infringement notice after receiving information that gives him or her reasonable cause to suspect an offence may be, or is about to be, committed. The information received may be in the form of a complaint, the results of environment monitoring, or the observations of other local authority officers.

2: Investigate and collect information

After receiving information that suggests an offence may have been committed, the officer will then need to collect information (evidence) to confirm whether or not this is the case. If not already on-site, the enforcement officer will normally need to visit the site. In obtaining the information the enforcement officer should consider:

- What evidence is there to prove each element of the offence under consideration? (see the section on infringement offences above and the investigation of incidents guidance note).

- What does the evidence or information collected suggest regarding the seriousness of the offence? (for example: What is the scale of the effects? Who or what is affected? Is the offence accidental or deliberate?).
- Does the information or evidence collected connect a person or a party to the offence? Is there any information missing that would enable such a connection to be made?

3: Forming an opinion on the evidence and information collected

In order to issue an infringement notice, an enforcement officer is required to have either observed the person committing the offence, or have information or evidence that gives reason to believe an offence has been committed (refer s343C of the RMA).

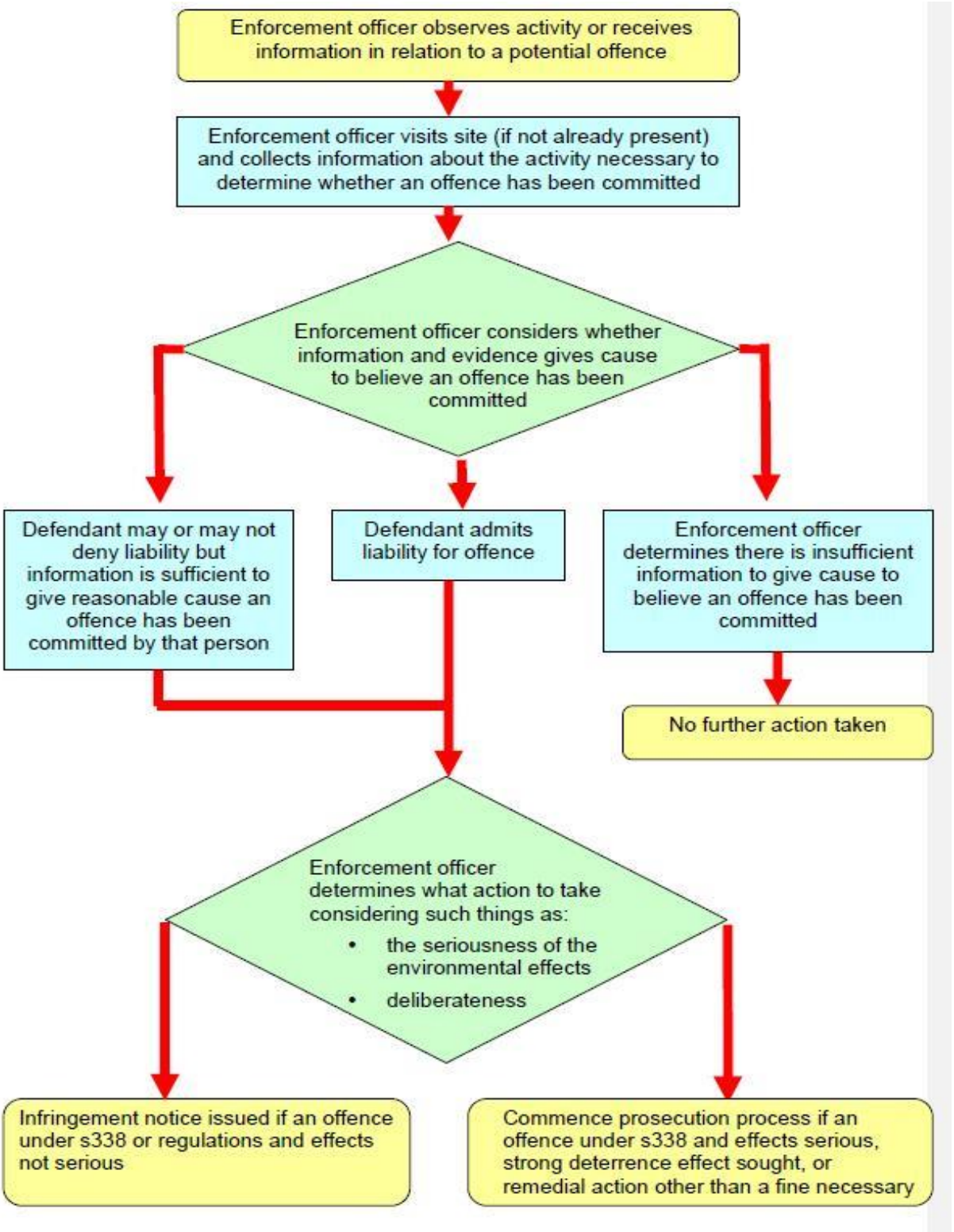
Where an enforcement officer has not observed the offence being committed, and the defendant has not admitted liability, the enforcement officer will need to consider carefully whether the information received or collected:

- is sufficiently to satisfy him or her, within the bounds of reason, that an offence has been committed
- links the person who will be served with the notice, with the offence.

Where the information is insufficient, consideration could be given to non-regulatory action, such as educating the suspected party about the effects of the activity and options to avoid, remedy or mitigate any adverse effects.

The enforcement officer should also consider whether an infringement notice is the most appropriate course of action based on the information available at the time. In cases where the effects of the offence are serious and a strong deterrent message is required, prosecution will likely to be more appropriate and effective. In considering prosecution, the enforcement officer will need to consider whether the type and robustness of the evidence collected would be sufficient to prove a case before a judge or jury (i.e. would it prove all the elements of the offence beyond reasonable doubt?).

The steps in the lead-up to issuing an infringement notice are set out in the diagram below.



Steps in issuing an infringement notice

1: Choice of proceedings: s343B of the RMA

Section 343B of the RMA provides that an infringement offence can be proceeded against by way of an infringement or by laying a charge under the Summary Proceedings Act 1957 (i.e. the usual route of prosecution, relying on the s338 offences which encompass all infringement offences and more).

2: Service of notice

Section 343C(2) of the RMA provides for service of infringement notices. Any enforcement officer (but not necessarily the officer who issued the notice) may deliver the infringement notice or a copy of it to the person alleged to have committed an infringement offence. Delivery may be in person or by post addressed to that person's last known place of residence or business. In the case of postal delivery the notice or copy shall be deemed to have been served on that person when it was posted.

3: Process after service of notice

Section 343C(4) of the RMA provides that where a notice has been issued, proceedings may be commenced in the District Court in accordance with s21 of the SPA (with all necessary modifications).

Section 21(1)(b) of the SPA specifies the various options for initiating infringement offence proceedings. It also sets out the steps that may be taken after an infringement notice has been issued, by an informant or by the person served with a notice.

The recipient may raise 'circumstances'

A person receiving an infringement notice may raise "any matter relating to circumstances" of the offence, by writing to the local authority within 28 days of the date on which the infringement notice was served or delivered to the person (refer Resource Management (Infringement Offences) Regulations 1999, Schedule 2, summary of rights, clause 2).

If the local authority accepts the circumstances that are raised as grounds not to pursue the infringement fee, it can choose to take no further action. This scenario is the most common that local authorities deal with. If the local authority does not accept the circumstances, it will continue with the infringement process by issuing a reminder notice.

When a local authority chooses to take no further action in the infringements process, it has no statutory obligation to notify the defendant of its decision. However, most local authorities do send a letter as a matter of courtesy and this is considered to be good practice.

Issue of a reminder notice

If the recipient does not pay the infringement fee and does not request a hearing within 28 days of the date of service of the infringement notice, the local authority can issue a reminder notice.

The form prescribed for the reminder notice is Form 10 in the First Schedule of the Summary Proceedings Regulations 1958. Section 21(2) of the Summary Proceedings Act 1957 requires that the reminder notice contain the same or substantially the same particulars as the infringement notice. If the reminder notice is materially different to the infringement notice, the local authority runs the risk of the infringement proceedings failing.

Once a reminder notice has been issued, the person receiving the notice has 28 days after the date of issue of the reminder notice to pay the infringement fee.

Payment of infringement fee by instalments

Section 21(3A) of the SPA provides that an arrangement can be made to pay by instalments if:

- the reminder notice has not been filed in Court
- the local authority has put in place the necessary management and accounting systems to allow the defendant to pay by instalments.

The local authority may, but is not required to, enter into an arrangement allowing the defendant to pay by instalments. The arrangement must be entered into within six months after the date of the offence and be completed within 12 months after the date of the offence.

If the defendant defaults in payment of any instalments, the local authority can enter into another arrangement for payment by instalments or serve a reminder notice on the defendant. Note that the reminder notice should include a record of the amount of infringement fee unpaid. If a reminder notice is issued, the defendant does not have the option of requesting a hearing.

Lodgement with the District Court

The defendant has 28 days from the date of service of the reminder notice to pay the infringement fee or request a hearing. If the defendant fails to either pay the fee or request a hearing, the local authority has two options:

- take no further action, or
- within six months of the date of the offence, file a copy of the reminder notice with the District Court, with a record of the date and method of service of the infringement notice (or a copy of the infringement notice with a record of the date and method of service of the reminder notice) and the Court fee of $30.

Where the local authority has allowed the defendant to pay the infringement fee by instalments and the defendant has defaulted in payment, the copy reminder notice/infringement notice can be filed within 12 months of the date of the offence.

The reminder notice can be filed at the Court that is closest to the prosecuting authority, although not required by the SPA. The advantage is that local authorities mostly deal with one Court. A defendant can apply for a transfer of the proceedings to the Court that is closest to the defendant; therefore it may be useful to discuss the venue with the defendant if the defendant denies liability and requests a hearing.

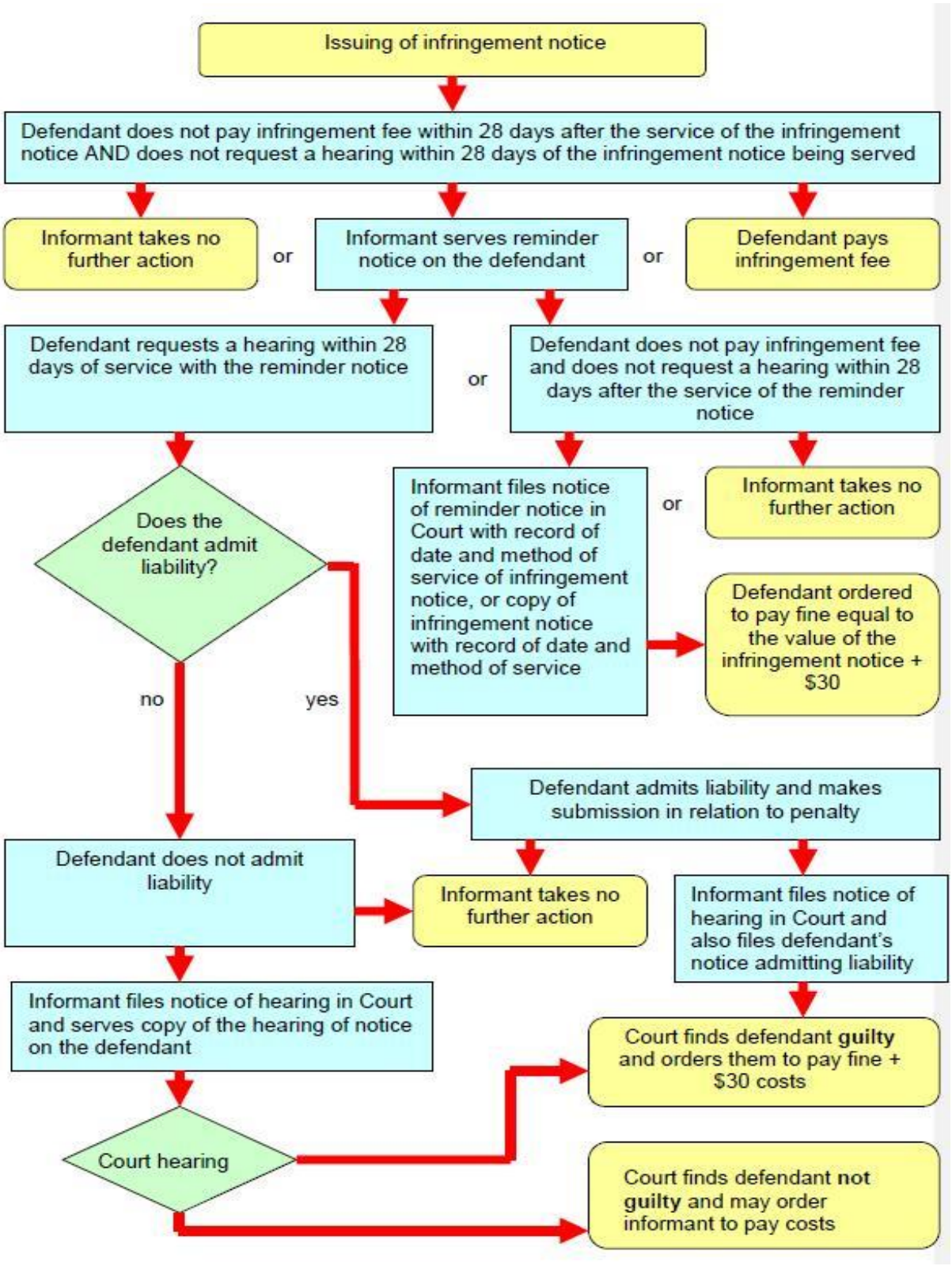
If the local authority files a copy of the reminder notice/infringement notice in Court, under s21(5) of the SPA an order is then deemed to have been made that the defendant pay a fine equal to the infringement fee for the offence and costs of the prescribed amount (currently $30).

The *defendant cannot file an appeal or apply for a rehearing* because there is no actual judicial decision.

The status of infringement notices generally, when comparing prosecutions and other determinations, was clarified in *Davies v Ministry of Transport* [1989] 3 NZLR 300. In this case, the Court of Appeal, in considering the process for issuing an infringement notice for minor traffic offences, noted "*nothing in that process can be characterised as a determination of an information by the District Court*".

Where the receiver of an infringement notice does not request a hearing within 28 days then further options to challenge the notice through the High Court cease to exist. As noted, in *Van Kan v Auckland City Council* [1992] AP98/92 there "*has to be a determination of a District Court before the right of an appeal arises; infringement notices not the subject of requests for hearings cannot give rise to an appeal*".

The steps in issuing an infringement notice are set out in the diagram below.



Form and content of an infringement notice

Section 343C(3) of the RMA provides that the notice shall be in the prescribed form (refer Schedule 2 of the Resource Management (Infringement Offences)Regulations 1999) and shall include:

a. such details of the alleged infringement offence as are sufficient fairly to inform a person of the time, place, and nature of the alleged offence. An example follows:

   Section of Resource Management Act 1991 contravened:
   Section 15(1)(b), being an offence against section 338(1A) of the Resource Management Act 1991.

   Nature of infringement:
   You discharged a contaminant, namely cowshed effluent, onto land, in circumstances which may have resulted in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water, namely a tributary of the Waitekauri Stream, when the discharge was not expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations.

   Location:
   The infringement occurred on land in Lot 34 DP568910, approximately 100 metres at its nearest point to the Waitekauri stream.

   Date and time:
   Between the hours of 5 am and 10 am (approx) on Saturday 5 November 2002.

a. the amount of the infringement fee specified for that offence
b. the address of the place at which the infringement fee may be paid
c. the time within which the infringement fee must be paid
d. a summary of the provisions of s21(10) of the SPA (providing a defence on proof of payment within time at the address stated on the notice)
e. a statement that the person served with the notice has a right to request a hearing
f. a statement of what will happen if the person served with the notice neither pays the infringement fee nor requests a hearing
g. such other particulars as are prescribed. The form in Schedule 2 of the Regulations requires:
   - full name and address of the person contravening the RMA
   - name of the enforcement authority
   - identification number of the enforcement officer or failing that, his or her name

     Note: It is not necessary for local authority enforcement officers to have identification numbers. The infringement notice form is based on the form used for infringement notices under other legislation, including the Transport Act, under which territorial authorities issue parking tickets. For obvious reasons parking wardens will wish to remain anonymous.
   - signature of the enforcement officer who completes the notice.

Correction of errors

Correction of irregularities in procedure - section 78B of the Summary Proceedings Act

Section 78B of the SPA provides that if the defendant did not receive the reminder notice or a copy of the notice of hearing, or if some other irregularity occurred in the procedures leading up to the order for the fine or costs, the Court can, on the application of the defendant:

- set aside or modify the order
- grant a rehearing
- require another copy of the reminder notice or notice of hearing to be served on the defendant, or
- make an order as to costs.

The ability to correct irregularities in the process of issuing an abatement notice through s78B of the SPA was confirmed in *Van Kan v Auckland City Council* [1992] AP98/92. The Court noted that such a correction "*does not require a rehearing unless the defendant did not receive a copy of the reminder notice or a copy of the notice of hearing*".

Correction of errors in notices - ss204 and 43 of the Summary Proceedings Act

The notice of hearing filed in Court is to be treated as an 'information' (charge), and a copy of the notice served on the defendant is to be treated as a summons to the defendant (refer s21(8) of the SPA).

If there is an error in the infringement notice, the reminder notice and/or the notice of hearing, the notices are invalid only if there has been a miscarriage of justice (refer s204 of the SPA). This position was stated in *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) where an error in an infringement notice excluded a mention that Hall had the right to dispose of the matter until 28 days after being served with a reminder notice. Further confirmation is provided in a resource management context in *Wallace Corporation v Waikato Regional Council* [2011] NZCA 119.

If there is an error in the notice of hearing, the local authority at the hearing can seek an amendment under s43 of the SPA, and the Court has power to make an amendment, including by substituting one offence for another. If the latter occurs, the defendant is given an opportunity to re-plead, and also to elect trial by jury (if s66 of the SPA applies). The Court may also adjourn the case, if it is of the opinion the defendant would be "embarrassed in this defence by reason of an amendment".

Defending an infringement notice

Request for a court hearing

Section 21(6) of the Summary Proceedings Act 1957 provides that the defendant can request a Court hearing before or within 28 days after service of a reminder notice. The request must be in writing, signed by the defendant and delivered to the local authority at the address specified in the infringement notice.

The local authority may allow the defendant extra time to request a hearing.

The defendant can either admit liability or not admit liability (refer s 21(7) of the SPA).

Local authority response to request for hearing

If it receives a request for a defended hearing, the local authority may:

- take no further action, or
- begin proceedings by filing a notice of hearing in the District Court (in accordance with Form 10A in the First Schedule of the Summary Proceedings Regulations 1958). An Environment Court Judge will hear a substantive hearing if required. If the defendant has admitted liability, the notice should be filed together with the request from the defendant admitting liability (refer s21(8) of the SPA).

When a request for a hearing is not clear

The defendant may not make it clear that he or she requests a hearing. In these cases, a local authority should ask the defendant to clarify whether a hearing is being requested.

Admission of liability

The defendant has the option of requesting a hearing despite admitting liability. However, in these circumstances the procedure is more limited than if there were no admission of liability. If the local authority responds by filing a notice of hearing, the defendant is entitled to make only written submissions, considered by a judge or justices of the peace in chambers, on the appropriate penalty or other matters they wish the Court to consider.

The local authority should not serve a copy of the notice of hearing on the defendant, as this would usually invoke a hearing in open court, contrary to the stated procedure. This situation occurred in Adam vs Wellington City Council (1998) AP18/98 where the Court noted that serving Adam with a hearing notice had created an alternative procedure in an open court hearing that was "*confusing and unlawful, and it should not have been done*".

Defences

If the defendant does not admit liability, in most cases the defendant will raise a defence. Defences are set out in s341 and s340(2) of the RMA.

The local authority should carefully consider any defence raised before commencing proceedings by filing a notice of hearing in court (and a copy on the defendant).

Standard of proof

The local authority is required to prove the infringement offence to the standard 'beyond reasonable doubt'.

If the defendant does not appear in Court on the allocated hearing date, the local authority should call evidence to prove the offence.

Presumptions

A local authority is not obliged to prove the validity of the infringement notice, service of the infringement notice, reminder notice or notice of hearing, or that the infringement fee has not been paid.

Section 21(12) of the Summary Proceedings Act provides:
In any proceedings for an infringement offence for which an infringement notice has been issued it shall be presumed, unless the contrary is proved, that—

a. *The infringement notice in respect of the offence has been duly issued, and the notice, or a copy of the notice, has been served on the defendant*
b. Any reminder notice or copy of a notice of hearing required to have been served on the defendant has been duly served:
c. The infringement fee for the offence has not been paid as required under this section.

It is open to the defendant to prove, on the balance of probabilities, that one or more of the steps in s21(12) of the SPA were not properly taken. The discretion of the Court to correct errors under sections 78B, 204, and 43 will apply in some situations (see correction of errors above).

Costs - defendant/local authority

Section 21(9) of the Summary Proceedings Act and regulation 15C of the Summary Proceedings Regulations 1958 stipulate that the Court must order the defendant to pay a prescribed fee, which is currently set at $30, if the defendant either:

a. admits liability and the local authority requests a hearing
b. does not admit liability and requests a hearing, and the Court finds the defendant guilty.

If the Court finds the defendant not guilty, the Court can order the local authority to pay costs. Section 21(8) of the SPA provides that if the notice of hearing is filed within six months of the date of the offence, the Costs in Criminal Cases Act applies. Costs can also be awarded to the defendant when the authority that issued the infringement notice withdraws charges.

Infringement notices: decision as to penalty

Section 78A of the SPA provides that a conviction is not imposed for an infringement offence. In *Wood v Police* [1998] AP1/98, the High Court quashed the record of conviction and held that s78A of the SPA applies and requires that a conviction not be recorded. The Court also quashed the order that the appellant attend a defensive driving course because the only penalty that can be imposed for an infringement offence is a fine and costs.

If a Court is required to make a determination (i.e. on request of a hearing), and finds the defendant guilty, the Court may impose a fine and will impose costs of the prescribed amount (currently $30). The Court can also order the defendant to pay further costs.

Based on case law on other legislation it appears the Court has a discretion to impose a fine of a lesser amount than the prescribed fee. Section 21 of the SPA allows submissions to be made on the penalty. The leading decision on whether infringement fees are mandatory fines (*Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA) can be distinguished from RMA cases because the reminder notice in the Summary Proceedings Amendment Regulations 1999, Form 10, does not include a note relating to RMA offences which is similar to the note on overloading offences.

In *Interfreight v Police*, the Court held that the specific provision in s69B(2)(b) of the SPA overrides the general provision in s21 of the SPA. As such, the option in the summary of rights in the infringement notice to make submissions as to the offence is to either allow the defendant an opportunity to challenge the calculation of the infringement fee or to contend that the significance of the offence was not to the degree alleged. In *Moses v Auckland City Council* [2010] CRI-2010-404-306 the High Court held that infringement fees were not mandatory and, once the prosecution had moved to the summary procedure, the Court could not look back at the infringement offence regime for the purpose of finding a penalty, let alone a mandatory one.

Recovery of fine and costs

The Court registrar will send notice of the fine to the defendant. The defendant has 28 days after the date the fine is imposed to pay it (refer s80 of the SPA). The Court can allow further time for payment and payment by instalments.

If the defendant has not paid the fine 21 days after the date the fine is imposed, and the Court has not made an order extending the time within which the defendant has to pay the fine or allowing payment by instalments, the Court registrar will send the defendant a further notice of the fine. This will inform the defendant that, if the fine is not paid within 28 days after the date on which it was imposed, and no arrangement has been entered into for an extension of time or for payment by instalments, enforcement action may be taken.

If the defendant does not pay the fine, the registrar may issue a warrant to seize property, or make an attachment order attaching any salary or wages payable or to become payable to the defendant, or issue a deduction notice requiring a bank to deduct the amount due from a sum payable or to become payable to the defendant (refer s87 of the SPA).

Prosecutions

Principle purposes of prosecution

The two principal purposes of prosecution are to punish the offender and to deter potential offenders. The purpose of deterrence is articulated in *Hall's Sentencing* (Lexis Nexis loose-leaf edition), I.3.3 page 210 as:

Deterrence is the attempt to restrain persons from offending by the threat, or actual imposition, of punishment. The principle has a twofold aspect: it may both specifically deter the offender before the Court from re-offending (specific [special] deterrence); and generally deter other persons who may be minded to offend in a similar way (general deterrence) … The essential distinction between the two is that the former relies on memory, the latter on imagination!

The Sentencing Act 2002 includes the two purposes of prosecution of deterrence and punishment as two of its principles (refer s8 of the Sentencing Act).

Standard of proof

Before prosecution can be considered as an option, the chances of success must be carefully considered based on the evidence. The prosecution must establish guilt to the criminal standard, which is 'beyond reasonable doubt'.

Whether a defence is available under s340 and/or s341 of the RMA should also be considered. The defendant must establish a statutory defence applies 'on the balance of probabilities '.

Continuing offence

Section 339(6) of the RMA provides that the continued existence of anything, or the intermittent repetition of any actions, contrary to the RMA shall be deemed to be a continuing offence.

The continuing nature of offending can also be a relevant factor in determining the appropriate sentence, including whether a term of imprisonment is an appropriate sentence (R v Conway CRI-2008-004-19495 (No. 2)).

Laying an 'information' (charge)

Filing in court

Laying the 'information' by filing it with the Court commences criminal proceedings. The Supreme Court has confirmed that it is not necessary for leave of the District Court to be sought under section 21(1)(a) of the SPA just because an offence also happens to be an infringement offence (*Down v The Queen* [2012] NZSC 21).

The 'information' must be filed in the District Court nearest to the place where the offence was alleged to have been committed, or where the informant believes the defendant may be found (refer s18 of the SPA).

Subsection (4) of s338 of the RMA provides that an 'information' (charge) may be laid up to six months from the time when the contravention first became known, or should have become known, to the local authority. Where the offence charged is a continuing offence, time runs from each and every day the offence continues (See *Waikato Regional Council v Ross (Des) Britten Limited* [2009] CRI-2009-024-527).

Particulars of an 'information' (charge)

Except where otherwise provided in the RMA, a separate 'information' (charge) must be laid for each offence. The information must contain sufficient detail so as to fairly inform the defendant of the substance of the offence the defendant is charged with (refer s17 of the SPA).

Where the exact date of the offence is not known, the date should be stated as being 'on or about' a particular date, or on a day unknown between two stated dates. It is important to identify the date of the offence alleged as accurately as possible.

If there is doubt about the particulars of the charge, the local authority should consider whether they might be stated in the alternative, or left out if not an element of the offence. For example, a local authority's primary theory might be that the defendant company was acting through a particular agent in the committing of an offence. If the local authority states these particulars, it will have to prove the link beyond reasonable doubt.

If a person other than a natural person is convicted of an offence against the RMA, it may not be necessary to rely on the agency to show liability (through s340 of the RMA). Instead, the fact that a director of the defendant or a person involved in the management of the defendant authorised and knew of the offending and failed to take all reasonable steps to prevent or stop the contravention can be relied on (refer s338 of the RMA).

The importance of clearly linking the offence and the offender was highlighted in *Auckland Regional Council v Horticultural Processors Ltd* [1993] CRN 2090016530. In this case, a charge was dismissed on the basis that the wording had not established a key link between a cartage contractor and the company responsible for the offence. The Court noted that the difficulty in the wording was apparent and could have been amended.

In addition to the above, enforcement officers should consider two more points in laying information for an offence:

- Local authorities need to be certain that the sections under which they are prosecuting relate to their functions and powers
- be conscious of the elapse of time between the date the offence is committed and the laying of the information when considering prosecuting (as the time limit

under s338(4) of the RMA is six months from time when the offence first became known, or should have become known, to the local authority).

Right to select trial by jury

Section 66 of the SPA provides that, for offences which are punishable by imprisonment for a term exceeding three months, the defendant has the right to elect trial by jury. Because the maximum term of imprisonment under the RMA is two years, a defendant being prosecuted under the RMA has this right.

Prosecution: defences

Overview

In prosecution cases the role of the defendant's legal counsel will generally be to:

- try to refute the evidence
- try to weaken the credibility of witnesses presented by the prosecution
- plead the original rule, abatement notice, enforcement order, infringement notice or resource consent condition as defective and materially affecting the defendant's rights.

The importance of clear and accurate notices for enforcement purposes was highlighted in *Waikato Regional Council v Huntly Quarries Ltd* [2004] NZRMA 32 (and confirmed in *R v Fugle* CRI-2007-054-4228 (dc)). In this case, the council had omitted to include the reasons in an abatement notice. The Court held on prosecution that the defect was a basic one, affecting the defendant's ability to decide whether to appeal, and no prosecution could properly be based upon such a notice.

Defences for principals of offenders - s340(2) of the RMA

The RMA provides defences for particular situations, including defences to the strict liability offences provided by s341(1) of the RMA, defences for 'principals' (those who appointed others who carried out or permitted the contravening act), and defences for the managers and directors of companies convicted of an offence. This includes directors and managers of Crown organisations and unincorporated groups. It is open to the defendant to prove a defence on the balance of probabilities, and if successful escape the relevant charges.

A further defence is found under common law in strict liability cases, being the defence of total absence of fault. For example, In *Auckland City Council v Selwyn Mews Ltd* [2003], CRN 2004 067301-19 the Court considered the test from *Millar v Ministry of Transport* [1986] 1 NZLR 660 as quoted in *Tell v Maritime Safety Authority* [2002] CA 230/02 and stated at paragraph 100:

…there must be a presumption in favour of 'total absence of fault' defence, rather than absolute liability. To impose absolute liability would need clear statutory language, and that is just not present here.

In terms of s340 of the RMA, a principal is a person (a natural person or a person other than a natural person) who appoints another who commits an offence while acting in the capacity as their agent or employee.

Section 340 of the RMA provides that a principal is liable for the acts of its employees and agents, including any contractor. If charges are laid against the principal, a defence is available under s340(2) of the RMA if it is proved that the principal:

- did not know nor could reasonably be expected to have known about the offence, and in the case of a person other than a natural person, the directors or any person involved in the management of the defendant did not know nor could reasonably be expected to have known about the offence or
- took all reasonable steps to prevent the commission of the offence, and
- took all reasonable steps to remedy any effects of the offence.

The Courts have been careful to prevent principals 'passing the buck' to employees and agents. Culpable knowledge has been found to include situations where the principal was aware that the offending act was likely to arise if something they had control of through their employees and agents did not occur, and had not taken adequate precautions to ensure the employees and agents performed accordingly.

For example, in *Northland Regional Council v Tranz Rail Ltd* [1996], Tranz Rail had relied on defence that a contractor was transporting the material that was discharged; and that it could not be proved beyond reasonable doubt that reasonable steps had not been taken to prevent a spillage. However, the Court found Tranz Rail guilty on the grounds that, given the Council had informed Tranz Rail over concerns in regard to their operations, Tranz Rail was aware of the need to guard against spillage, but had not taken adequate steps (within its control) to prevent it happening.

In *Canterbury Regional Council v Newman* [2002], the defence of taking all reasonable steps (s340(2) of the RMA) was relied on. The Court held that:

- the effects mentioned in s340 of the RMA are those on natural and physical resources, they are not social, economic, or effects by way of loss of profits
- remedying effects does not therefore extend to arranging alternative grazing, compensating for loss of profits, re-sowing, replanting or re-fencing
- a defendant can reply on remedial work carried out by an affected party, provided that work has been carried out before 'informations' (charges) have been laid
- fear of prejudicing liability insurance cover does not justify an action
- section 314(1)(d) of the RMA is available as a defence in instances of purely vicarious liability.

Defences for managers and directors of convicted companies

To obtain a conviction against a director of the defendant or a person involved in the management of the defendant of a person other than a natural person convicted of an offence, s340(3) of the RMA provides that the local authority must prove two points. These are:

- the act or omission that constituted the offence took place with his or her authority, permission or consent; and
- that he or she knew or could reasonably be expected to have known that the offence was to be or was being committed, yet failed to take all reasonable steps to prevent or stop it.

There is one common situation that in practice means a director of the defendant or a person involved in the management of the defendant might be convicted without proof of the requirements under section 340(3) of the RMA. Particularly in smaller companies, a director of the defendant or a person involved in the management of the defendant might be in direct (and/or sole) control of activities giving rise to the offence on site. If this is the case, that person can be charged with permitting a contravention in terms of s338 of the RMA, and the local authority therefore does not need to charge that person as a principal under s340 of the RMA.

For example, in *R. v Lorenzen* [2003] T031951, the sole director of a company was convicted of clearing vegetation without a resource consent despite not being the contractor who actually carried out the work (who could not be found). The Court held:

- the Crown does not need to rely on ownership of the land
- the prosecuting authority does not need to charge the company to be able to proceed against the defendant
- liability can arise directly through s338(1) as the person contravening the relevant provision or permitting its contravention.

Strict liability defences - s341 of the RMA

Section 341(1) of the RMA provides that various offences are strict liability offences (such that no motive needs to be proven).

The defence of due diligence (reasonable care) is available for a strict liability offence in common law. The defences in s341(2) are a codification of that common law defence.

Section 341(2)(a)

In summary, s341(2)(a) of the RMA provides a defence to the strict liability offences in s341(1) in certain emergency situations, provided the conduct was:

- necessary for the purposes of saving life, health, or preventing serious damage; and
- reasonable in the circumstances; and
- adequately mitigated or remedied by the defendant after they occurred.

Similar provisions exist in ss341A and 341B of the RMA in relation to discharges contrary to ss15A and 15B.

The Court has said that the three requirements of s341(2)(a) should not be considered in isolation, as they overlap.

In s341(2)(a), 'necessary' has been interpreted as having to be more than desirable: urgency has to be proved. In *Smith v Riddiford* [1996], necessary was taken to be a "fairly strong word falling between expedient or desirable on one hand and essential on the other".

In terms of 'reasonableness' the Court found in *Fugle v Cowie* [1998] 1 NZLR that 'reasonableness' must be determined objectively, given the facts known then and using common sense. Hindsight must be avoided. Conduct can more readily be regarded as reasonable when immediate adverse effects can be, and have been, remedied. Where damage is irreparable, one should pause long before acting. Where resulting damage can be repaired in whole or in part, it is harder to describe action as reasonable when that damage is left unrepaired.

In *Smith v Riddiford* [1996] CRN5035005704-6, Riddiford unsuccessfully relied on a s341(2)(a) defence in respect to large-scale earthworks. One of the arguments for the defence was based around the relationship between s341(2)(a)(i) and s341(2)(b). The Court stated that the two should not be read as though they were of a similar nature. Whereas s341(2)(b) indicated matters that were beyond the control of the defendant, the instances in s342(2)(a) "have nothing to do with a lack of control".

Section 341(2)(b)

Section 341(2)(b) of the RMA provides a defence where the action or event was beyond the control of the defendant (such as through natural disaster, or sabotage), could not have been reasonably foreseen, and were adequate mitigated or remedied by the defendant after the offence occurred.

If the remedial work required under s341(2)(b)(ii) to adequately mitigate or remedy the effects of an event is not work that is within the control defendant of the defendant to carry out, the defendant can reserve its position by formally offering to carry out the work or paying the reasonable costs of doing the works (*Auckland Regional Council v URS New Zealand Limited (No. 2)* CRI-2008-000413603).

Section 341(2)(b) was unsuccessfully relied on in *Auckland Regional Council v Bitumix Ltd* [1993] CRN 3048098, and in *Manawatu-Wanganui Regional Council v Wakapua Farms Ltd* [2012] CRI-2011-031-643 and *Canterbury Regional Council v Steelbro New Zealand Ltd* [2006] CRN05009503624.

In *Bitumix* the Court did not consider a discharge could not have been reasonably foreseen. This was because the valve in question "was plain for all to see" and the discharge had continued for some time, to the knowledge of at least the defendant's employees.

In *Wakapuna* the Court emphasised that an event beyond a defendant's control does not need to be as extreme as a disaster, or a mechanical failure, or sabotage or something of that kind. However, the Court considered that, in this case, nothing could have been more reasonably foreseeable than if the relatively unsophisticated system involved was not well monitored and not well managed, then it would fail and overflows would occur.

In *Steelbro* the defendant company could not show that a diesel spill was unforeseeable because, despite the spill being caused by a third party's act of sabotage, the defendant had failed to take the precautions that a reasonably prudent person would take to prevent the escape of the diesel.

Section 341(2)(b) was successfully relied on in *Bay of Plenty Regional Council v D 'Ath* [1995] CRN 4087005973 sabotage was successfully used as a defence. The Court held that the defendant had taken reasonable steps to avoid a discharge.

Defendant must give notice of defences - s341

If a defendant intends to rely on one of the defences in s341(2) of the RMA, the defendant must give written notice to the prosecutor, specifying the facts that support the defence, within seven days of service of summons. If the defendant fails to give notice within a seven-day period, leave of the Court must be sought for extension of time. In such cases the Court may grant an adjournment.

In *R v Conway* [2008] CRI-2006-092-1891 the Court was willing to grant an application for adjournment and leave to raise a defence under s341 because of changes in counsel for the defendants; the fact that current counsel were not acting during crucial periods of trial preparation; and the strict liability nature of offences which could result in imprisonment.

Sentencing

Overview of sentencing

Sentencing is the process whereby a Court arrives at an appropriate punishment for offending. It is a balancing exercise in which a range of factors are weighed.

Local authorities through their legal counsel can take an active part in sentencing. This can be done through both:

- making submissions on penalty
- suggesting a range of other sentencing options, including restorative (reparation) orders.

The relevant matters for sentencing under the RMA were considered in *Auckland Regional Council v Machinery Movers* [1994] 1 NZLR 492 at 501, where the High Court noted that:

Like many other statutes, the RMA is silent on the matters which may be taken into account on sentencing. To a large extent, the relevant criteria must be inferred from a consideration of the broad legislative objectives.

In *Machinery Movers* the High Court quoted and approved of the sentencing factors in *R. v Bata Industries Ltd* [1992] 9 OR (3d) 329 (liability); 7 CELR (NS) 293 (sentencing). *Bata* was a Canadian Court of Appeal case about discharge of waste by a shoe company into the ground in Ontario. In this case the Court stated:

Within the subtopic of public welfare offences, environmental offences have their own set of special considerations … The severity of the sentence should vary in accordance with several factors, including:

A. The nature of the environment affected;
B. The extent of the damage afflicted;
C. The deliberateness of the offence;
D. The attitude of the accused.

In sentencing corporations convicted of environmental offences, the Court should consider:

A. The size, wealth, nature of operations and power of the corporation;
B. The extent of attempts to comply;
C. Remorse;
D. Profits realised by the offence;
E. Criminal record or other evidence of good character.

Some or all of the sentencing factors for environmental offences, as stated in the Bata decision and approved by the High Court in *Machinery Movers*, have been referred to in the sentencing notes of almost every prosecution under the RMA since the *Machinery Movers* case and are now the well-established factors to consider when sentencing under the RMA.

The Court has emphasised that a penalty must not be a mere licence fee to offend but an effective deterrent to non-compliance (*Otago RC v Plakmaj Holdings Ltd District Council Invercargill* CRI-2010-017-247, 26 July 2010).

Some uplift from previous starting levels is appropriate given the increase in statutory penalty since 2009 (which increased the penalty for companies threefold) but this does not require an increase by a factor of three for companies (*Nelson City Council v Dalpeko Holdings Ltd* CRI-2012-042-537, 23 May 2012).

In *Waikato Regional Council v Chick* (2007) 14 ELRNZ 291 (DC) the Court in considering the starting points for penalties for dairy effluent discharge offences, classified offending into three categories in order to provide guidance on appropriate starting points for penalties. The categories take into account the seriousness, deliberateness and whether the offending is of a reoccurring nature.

Sentencing options

The RMA expressly provides, on prosecution, for fines, enforcement orders, and imprisonment in some cases. The Sentencing Act 2002 also applies, and should be read together with the RMA.

The Court has three options, if a defendant pleads guilty:

- convict and discharge without sentence
- discharge without conviction

- convict but require the defendant to come up for sentence if called on (s11 of the Sentencing Act 2002, but also see s106 and 108).

Section 20 of the Sentencing Act 2002 provides guidance on the use of combination of sentences. This allows the following alternatives:

- fine or community work
- supervision and community work
- fine and supervision
- imprisonment
- and any combination of these.

The major implication of use of combination of sentences in s20 of the Sentencing Act 2002 is, that the local authority cannot ask for both a fine and community work. Yet both might be desirable in environmental cases to achieve a financial penalty, as well as actively demonstrate compensation and perhaps remorse to the community at large.

Sections 11 and 12 of the Sentencing Act 2002 place a presumption in favour of reparation and fines if they can be lawfully imposed. Imprisonment is reserved for situations where the offenders are proven to have acted knowingly and with a demonstrated contempt for their legal obligations, and where the Court is convinced that no other sentence will achieve the relevant purposes of the RMA or is likely to be complied with by the offender if imposed. Section 16 of the Sentencing Act 2002 acknowledges that, in general, it is desirable to keep offenders in the community as far as that is practicable and consonant with the safety of the community.

Reparation is allowed for loss of, or damage to, private property. RMA offences rarely cause such personal loss. However, an order under s314 of the RMA can include restoration of a natural or physical resource (refer s314(4) of the RMA). Examples include tree planting on public reserves, after offenders have illegally cleared vegetation.

A sentence of community work is available under s55 of the Sentencing Act 2002 for those offences punishable by imprisonment. Section 50 of the SA allows special conditions to be imposed for a programme of supervision, where standard conditions would not adequately address the significant risk of further offending. This might include participation in an educational programme. There have been instances where offenders that are not natural persons have made offers of amends and these have been taken into account at sentencing. In RMA-related cases, this has included presentations to schools and industry groups about good environmental practice.

The making of orders other than, or in addition to, the imposition of a fine, aligns well with s7 of the Sentencing Act 2002 relating to the purposes of sentencing. Those purposes include, "to promote in the offender a sense of responsibility for and an acknowledgment of that harm", and "to provide reparation for harm done by the offending". Some people do not have the ability to pay a fine and few fines get close to maximum penalties (although fines are increasing generally, and for recurrent offenders in particular. This trend will continue following the 2009 amendments to the RMA, which raised the maximum penalties for RMA offences). Other sentences can get better results, especially for big companies or wealthy individuals.

The case noted above in relation to sentencing, *R. v Bata Industries*, became widely known in Canada and was also applied elsewhere due to the creative approach it took to sentencing. The Court applied its probation order powers to require publication of the details of the offence in Bata's international journal. The first such order in relation to RMA offences was made in New Zealand in a follow-up case to *Auckland Regional Council v Nuplex Industries* (DC Auckland, CRN 2004066321, 18/03/2003, Judge McElrea). In this case, the Court required that Nuplex Industries include both:

- details of the two relevant prosecutions in its next annual report
- environmental issues on the agenda of all board meetings for the next 24 months.

(Further information is available on the relationship between the Sentencing Act and RMA).

Fines to be paid to the local authority

Where a local authority lays a charge (information) and there is a conviction with the Court imposing a fine, then the fine is paid to the local authority under s342(1) and s342(2) of the RMA. This excludes a deduction of 10% which is credited to the Crown Bank account. However, under s342(1) of the RMA the Court can order that the whole fine be paid to the local authority.

Nothing prevents a local authority from redirecting (part of) those funds to a specific environmental purpose, as compensation to the community at large. Some possibilities are highlighted by examples of the creative uses of fines in Canada, including requiring a convicted company to pay $100,000 to promote the conservation of fish habitat; ordering a company to pay $30,000 to develop a local toxic waste programme; and directing a corporation to pay their fine to a local school board for the purpose of environmental education.

Restorative justice

Restorative justice in New Zealand started in the Youth Courts and was then trialled in the District Court. It is now incorporated into RMA offence proceedings by agreement of the parties, and involves engaging in meetings that can result in an offer of amends. Any restorative justice measures agreed to by the parties may be considered in sentencing (pursuant to s10 of the Sentencing Act 2002).

Restorative justice arises from a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour. Some of the programmes and outcomes typically associated with restorative justice include victim offender mediation, conferencing, victim assistance, ex-offender assistance, restitution and community service. Typically the programmes use cooperative processes involving all stakeholders to identify and take steps to repair harm. The acknowledgement of guilt by the defendant, and of the fact that he or she may have caused harm, is a crucial pre-requisite for restorative justice.

What makes restorative justice an alternative approach, is that it brings the victims and the community into the circle of justice. It rejects the common choice between either

assisting offenders or punishing them as too narrow, being focused only on the offender and the act of law breaking. Its central aims include:

- providing a process in which the victims and community and offender can learn about each other in relation to the crime. In particular, it helps to ensure that crime is met with an appropriate message from those affected by it; and to provide an opportunity for the offender to understand and display remorse for the wrong-doing
- producing practical outcomes that restore harm done, educate the offender and achieve a change in his or her attitude, and provide a basis for the community may begin to trust the offender again. This is to help the community to feel safe and secure so the offender may be reintegrated.

Three principles form the foundation for restorative justice:

- justice requires that we work to restore those who have been injured
- those most directly involved and affected by crime should have the opportunity to participate fully in the response if they so wish
- Government's role is to preserve a just public order, and the community's is to build and maintain a just peace.

The fact that restorative justice agreements are tied to sentencing is both a carrot and a stick to the defendant, especially if their track record and previous attitude is an aggravating factor for penalty.

Few local authorities have been involved in restorative justice on RMA offences, and opinions are mixed about its effectiveness. Some of its primary advantages are: raising community awareness of compliance under the RMA; gathering feedback about existing environmental values held by the community; and providing opportunities for on-going informal monitoring and reporting on environmental matters of interest to citizens, including compliance. A case law example of restorative justice is illustrated in *Auckland City Council v B & C Shaw Ltd and George Bernard Shaw [2006] CRN: 2004502435, 5003402436*.

Matters to bear in mind in using restorative justice include the danger of focusing too much on compensation and mitigating the effects of the offence, and less on appreciating the harm done and ensuring that the offender demonstrates remorse. The defendant may be more than willing and able to pay for mitigation to avoid a serious penalty or conviction, without being tested as to genuine remorse or a change in attitude about environmental behaviour. There is also the difficulty of providing an on-going framework for attitude change, because environmental values do not change overnight. Local authorities should also be wary of the costs that agreements can impose on them down the track. For example, if the defendant pays for the planting of trees on public reserves, the will be on-going maintenance costs which he or she may not meet.

Costs

In common law, costs are the remuneration and disbursements incurred in relation to legal work. The Court can award costs against (to) the unsuccessful party, in favour of the successful party in a prosecution.

Costs awarded to the prosecuting authority

Section 4 of the Costs in Criminal Cases Act 1967 (CCCA) authorises the Court, when a defendant is convicted subject to any regulations made under the Act, to order the defendant to pay such sum as it thinks just and reasonable towards the costs of the prosecution.

There is a maximum scale of costs in the schedule to the Costs in Criminal Cases Regulations 1987. The scale in the schedule for conducting a prosecution is:

- a maximum of $226 if the defendant pleads guilty
- for each half-day or part half-day the maximum is $113.

There is power under s13(3) of the CCCA for the Court to make an order for the payment of costs in excess of the scale if the Court is "satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable". This provision was considered in *Auckland Regional Council v Haines House Removals Ltd* [2000], where the Court considered that there was no jurisdiction to award costs in excess of the scale. The case, while important, was not of 'special importance'.

Costs incurred by a local authority in the taking of a prosecution (eg, solicitor fees and witness expenses) are to be considered separately from costs borne in the investigation of an offence. They are also separate from any direct action taken to remedy effects where there is non-compliance, including the indirect costs of investigating and monitoring those effects. Costs in the latter category can be recovered by way of an enforcement order under s314(1)(d) of the RMA. Section 318 requires that before deciding an enforcement order the Environment Court shall hear the applicant and hear the person against whom the order is brought (if that party wishes to be heard).

For example, in *Interclean Industrial Service Ltd v Auckland Regional Council* [2000] A198/99, the Environment Court awarded costs against Interclean from contravention of an abatement notice. Interclean subsequently appealed to the High Court and sought that scale costs be imposed in place of the $7,500. In making a decision, the High Court decided that the legal costs of taking a prosecution could not come within s314(1)(d) of the RMA (relating to reimbursement or payment of costs of avoiding, remedying or mitigating adverse effects on the environment), because:

s314(1)(d) is focussed on costs incurred in avoiding, remedying or mitigating adverse effects where there has been a failure to comply with an abatement notice (amongst other matters)

the clarification provided in s314(2) does not mention legal costs of taking a prosecution

orders made under s314(1)(d) are intended to be compensatory, and the deterrent effect of the sentence flows principally from the penalties imposed under s339

the CCCA applies to RMA prosecutions.

The Court will take account of any reparation paid or costs imposed in setting the fine, to ensure that both fines and costs imposed add up to a globally appropriate penalty. The

Court is therefore required to assess what is an appropriate penalty in total and then have regard to any award made by way of costs before imposing a fine (*Auckland Regional Council v Haines House Removals Ltd* [2000] and approved by the High Court ***in Burns v Bay of Plenty Regional Council*** [2010] NZRMA 45).

Costs awarded to the defendant

Section 5 of the Costs in Criminal Cases Act authorises the Court, subject to any regulations made under the Act, to order that the defendant be paid such a sum as it thinks just and reasonable towards the costs of the defence. This applies only when any defendant is acquitted of an offence, or where the information charging the defendant with an offence is dismissed or withdrawn - whether upon the merits or otherwise.

The schedule to the Costs in Criminal Cases Regulations referred to above applies, as does s13 of the CCCA, which allows the scale to be exceeded if the Court is "satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable".

Section 5 of the CCCA provides that the Court, in deciding whether to grant costs and the amount of any costs, shall have regard to all relevant circumstances. Particular considerations are whether:

- the prosecution acted in good faith in bringing and continuing the proceedings
- at the start of the proceedings, the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence
- the prosecution took proper steps to investigate any matter coming into its hands which suggested the defendant might not be guilty
- the investigation into the offence was generally conducted in a reasonable and proper manner
- the evidence as a whole would support a finding of guilt but the information (charge) was dismissed on a technical point
- the information (charge) was dismissed because the defendant established, either by the evidence of witnesses called by the defendant or by the cross-examination of witnesses for the prosecution or otherwise, that he or she was not guilty
- the behaviour of the defendant (in relation to the acts or omissions on which the charge was based, and to the investigation and proceedings) was such that a sum should be paid towards the costs of his or her defence.

Good practice examples and relevant case law

Scenarios

Infringement notice

Scenario 1: Error in notice for an infringement hearing

Enforcement officer Harry issues an infringement notice to Helen Melon for breach of s15(2) of the RMA. Ms Melon fails to pay the infringement fee within the 28-day period and Harry issues a reminder notice.

Ms Melon denies liability and requests a Court hearing 15 days after service of the reminder notice. Harry commences proceedings by filing a notice of hearing in Court, and he arranges service of the notice on Ms Melon. The Court allocates a hearing date.

A week before the hearing, Harry checks the infringement notice, the reminder notice and the notice of hearing. Harry is horrified to find that in the notice of hearing, the date of issue of the infringement notice is incorrect, as is the location at which the incident occurred. All the details in the infringement notice and the reminder notice are correct.

Q1: What should Harry do?

A1: *The notice of hearing is only invalid if there has been a miscarriage of justice. In this case the infringement notice and the reminder notice have the correct details, therefore the notice is not invalid. In Greenfield v Police there was a similar situation and the Court held there was no miscarriage of justice, and that the notice of hearing was not invalid because the information in the infringement notice and the reminder notice was correct; Mr Greenfield could not have been in any doubt as to what was alleged against him. The Council's lawyer should seek leave at the hearing to amend the notice of hearing.*

Scenario 2: Discharge of cowshed effluent

Enforcement officer Harry issues an infringement notice to Simon Sully for illegal discharge of cowshed effluent, in breach of s15(1)(b) of the RMA. The infringement fee is $750.

Mr Sully phones Harry and is very apologetic; he assures Harry it was a one-off incident and there will be no further illegal discharges. Mr Sully asks if Harry will reduce the fee to $500. Harry considers that Mr Sully is being truthful and accepts his assurance.

Q2: Can Harry reduce the fee?

A2: *The Council's policy on infringement notices should cover this issue. If the council policy allows Harry to reduce the fee, he can do so (the council policy may provide that requests for reduction of fees are referred to a senior enforcement officer or to the Council's enforcement decision group).*

Prosecution

Scenario 1: Pollution in river

Council receives a complaint of dead eels in a river. Harry and other enforcement officers investigate immediately and find thousands of dead eels in the river. They establish that the eels have died as a result of a caustic soda solution which has been discharged into the stream from a dairy factory.

The dairy factory owner, Mr Keel, admits that the caustic soda solution was discharged in breach of the resource consent and as a result the eels were killed. Mr Keel tells Harry that steps have been taken to ensure the incident does not occur again. Samples are collected and analysed and confirm that caustic soda was discharged and the eels died as a result.

Q1: What is the most appropriate enforcement mechanism?

A1: *The adverse effect is serious - thousands of eels have been killed. The council can prosecute. It appears there is sufficient evidence to prove the charge beyond reasonable doubt. The company has admitted the discharge and that the eels died as a result of the discharge.*

Before the council prosecutes, advice should be sought from the Council's lawyer to confirm there is sufficient evidence to prosecute and there is no defence available.

If prosecution is successful, the Court may, instead of or in addition to the maximum penalties of s339(1) and (1A) order the council to review the resource consent by directing it to serve notice under s128(2) to review the consent conditions. If the council finds that there are significant adverse effects on the environment resulting from the exercise of the consent, the council can, as set out in s132, cancel the resource consent.

Relevant case law

For a list of relevant case law refer to the Enforcement Manual case law summaries when appropriate.

The Sentencing Act 2002

The High Court in *Selwyn Mews v Auckland City Council* [2003] CRI2003-404-159 to 161 stated at paragraph 354 that *Machinery* Movers:

(...) continues to have application but must now be read in the light of the provisions of the Sentencing Act 2002 (...) [which] applies to all sentencing on criminal charges including charges laid under the Building Act 1991 and the Resource Management Act.

Paragraphs 36-42 of the decision provide a useful summary of the principal provisions that may be relevant:

(...) [the Sentencing Act 2002] calls for a systematic approach to sentencing, commencing with a consideration of the purposes of sentencing under s7. Not all those purposes will always be relevant to sentencing in environmental cases. For example, in some cases the harm done may be to the community generally rather than specific members of it. Reparation to particular victims may be relevant in some cases but not others. Rehabilitation will have no relevance to corporate offenders and may not be relevant to individuals who are otherwise of good character.

But many of the purposes of sentencing in s7 will usually be relevant in environmental cases including holding the offender accountable for harm done; promoting a sense of responsibility for the harm; denunciation and deterrence (both personally and generally).

The principles of sentencing in s8 will also be relevant particularly (under s8(a)) the gravity of the offending and the degree of culpability involved. That will include the extent of any damage or adverse effects caused to the environment and the extent to which there was deliberate or reckless conduct. As well, the court will need to consider the issues of seriousness of the offence and penalties under s8(b), (c), and (d); consistency in sentencing levels under s8(e); the effects on victims under s8(f) where applicable; and the particular circumstances of the offender under s8(h) and (i). Where there are issues about mitigating any adverse effects on the environment such as repairing damage or clean-up work, then s8(j) and s10 will become relevant.

Aggravating and mitigating factors under s9 are to be considered. Although a number of these do not have particular relevance in environmental cases, the matters to be considered are not exclusive: s9(4).

In environmental cases, fines will most often be the appropriate penalty. There are a number of provisions of the Sentencing Act relevant to fines. Section 13 provides that a fine must be imposed unless any of the specified exceptions in s13(1)(a), (b), (c), or (d) applies. Other provisions relevant to fines are sections 14 and 39 to 43. Obviously, the capacity of the offender to pay a fine will be very relevant and the court has power to order an offender to make a declaration of financial capacity if necessary. That might have been a useful tool in the present case.

Under the Resource Management Act, the court also has power to impose a sentence of imprisonment or community work: s339(1) and (4). If a sentence of imprisonment is

being considered, s16 of the Sentencing Act is important. First, regard must be had to the desirability of keeping offenders in the community so far as practicable in terms of s(1). Secondly, there is a presumption against imprisonment under s16(2). Section 8(g) is also relevant (the least restrictive outcome in the circumstances).

Under the Resource Management Act, enforcement orders under s314 may also be made either instead of or in addition to other penalties: s339(5). As monetary orders may be made under s314(d), reparation under the Sentencing Act may have less relevance in environmental cases but the power exists under sections 12, 14 and 32 to 38. Where a monetary order is not made under s314(d), attention must be given to s12 [of the] Sentencing Act which requires a reparation order to be made where a victim has suffered loss or damage to property unless it would create undue hardship or there are other special circumstances rendering such an order inappropriate.

Paragraphs 40-43 of *Waitakere City Council v John Gionis* and Daphne Gionis [2002] CRN 1090034293, 1090034295 2090007563 are also relevant.

Sections 7, 8 and 9 of the Sentencing Act 2002 set out the purposes and principles of sentencing as follows:

7. Purposes of sentencing or otherwise dealing with offenders-

1. The purposes for which a court may sentence or otherwise deal with an offender are-
    a. to hold the offender accountable for harm done to the victim and the community by the offending; or
    b. to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
    c. to provide for the interests of the victim of the offence; or
    d. to provide reparation for harm done by the offending; or
    e. to denounce the conduct in which the offender was involved; or
    f. to deter the offender or other persons from committing the same or a similar offence; or
    g. to protect the community from the offender; or
    h. to assist in the offender 's rehabilitation and reintegration; or
    i. a combination of 2 or more of the purposes in paragraphs (a) to (h).
2. To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

8. Principles of sentencing or otherwise dealing with offenders-

In sentencing or otherwise dealing with an offender the court-

a. must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
b. must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
c. must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

d. must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
e. must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
f. must take into account any information provided to the court concerning the effect of the offending on the victim; and
g. must impose the least restrictive outcome that is appropriate in the circumstances; and
h. must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
i. must take into account the offender 's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
j. must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

9. Aggravating and mitigating factors-

1. In sentencing or otherwise dealing with an offender the court must take into account the following aggravating [emphasis added] factors to the extent that they are applicable in the case:
    a. that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
    b. that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
    c. that the offence was committed while the offender was on bail or still subject to a sentence:
    d. the extent of any loss, damage, or harm resulting from the offence:
    e. particular cruelty in the commission of the offence:
    f. that the offender was abusing a position of trust or authority in relation to the victim:
    g. that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
    h. that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
        i. the hostility is because of the common characteristic; and
        ii. the offender believed that the victim has that characteristic:

        [(ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):]
    i. premeditation on the part of the offender and, if so, the level of premeditation involved:

   j. the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

2. In sentencing or otherwise dealing with an offender the court must take into account the following mitigating [emphasis added] factors to the extent that they are applicable in the case:

   a. the age of the offender:
   b. whether and when the offender pleaded guilty:
   c. the conduct of the victim:
   d. that there was a limited involvement in the offence on the offender 's part:
   e. that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
   f. any remorse shown by the offender, or anything as described in section 10:
   g. any evidence of the offender's previous good character.

3. Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).
4. Nothing in subsection (1) or subsection (2)-

   a. prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
   b. implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.