IN THE DISTRICT COURT
AT ROTORUA

CRN: 08063501462
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BAY OF PLENTY REGIONAL COUNCIL
Informant

v

P F OLSEN LIMITED
Defendant

Hearing: at Rotorua on 18 September and at Tauranga on 4 November 2009

Appearances: P H Cooney and A A Hopkinson for Bay of Plentry Regional Council
D M McLellan and M D Atkinson for P F Olsen Limited

Judgment: 13 November 2009

RESERVED DECISION AS TO JURISDICTION OF JUDGE J A SMITH

Introduction

[1] Can proceeding for offences under s 338, in this case under ss 9 and 15 of the Act, still be commenced by laying an information pursuant to s 12 of the Summary Proceedings Act?

[2] This is the core question asked in relation to the prosecution of P F Olsen Limited **(P F Olsen)**. The matter was originally set down on intimation of guilty plea for sentencing in Rotorua on 18 September 2009. Written submissions were filed by each party prior to the date for hearing and at page 25 of the 28-page written submission for the defendant, the question of the entry of convictions was raised.

The issue raised

[3] Essentially the issue was whether the offence is an infringement offence under the Resource Management Act **(the RMA).** If this is so s 78A(1) of the Summary Proceedings Act **(SPA)** provides that a conviction cannot be entered for an infringement offence.

Process

[4] Given that this issue was raised as part of sentencing submissions the Court was reluctant to receive a guilty plea and proceed with sentencing until the position had been clarified as to whether s 78A applied.

[5] The Regional Council was not in a position to address this novel argument on 18 September which on its face appeared to relate to whether or not all proceedings (at least under ss 9 and 15 of the RMA) were infringement offences.

[6] Directions were made towards a jurisdictional hearing at the beginning of November and detailed submissions were received from each of the parties. In addition to the original submissions the Court received submissions from both parties on the infringement offence issue and supplementary sentencing submissions. The Court was also referred to a copy of a Minute of Wild J in respect of the *Wallace Corporation v Waikato Regional Council* appeals which indicates that similar arguments have been raised in that case. There is an additional ground raised in that case that an information for an infringement offence could not be laid without leave. A similar submission was made later by the defendant in this case.

[7] At the hearing on 4 November the defendant sought an adjournment until such time as the decision of the High Court was available. This was strenuously opposed by the informant. In a separate ruling I declined to adjourn the matter, particularly given

- that the Court had received detail submissions from both parties
- that counsel had already travelled for the hearing to Tauranga
- and the Court had no other matter set down for hearing at the same time.

[8] Both counsel spoke eloquently to their submissions and the Court was able to refine the point from one relating to s 78A and s 21 of the SPA to the general proposition stated at the commencement of this decision.

[9] The question might be stated in several alternative ways including:

a) are the relevant offences (under s 9 and s 15) ones where a prosecution can only be commenced in accordance with the infringement offence procedures of s 20A and s 21 of the Summary Proceedings Act; or

b) does s 343A to D in the Act and the accompanying Regulations deem all identified offences under s 338 (particularly ss 9 and 15) to be infringement offences?

[10] Given that these same issues are to be addressed in various fora in the near future it might be of assistance to those Courts to have some background information relating to the Court's dealings with summary offences.

Summary offences

[11] Summary offences are one of the tools available to Regional Councils to achieve the sustainable management purpose of the Act. In addition to plan provisions Councils have extensive educative roles which are frequently utilised particularly by Regional Councils to try and bring about compliance with the Act. Councils use warning systems and often have internal processes by which they select

the appropriate response to various perceived or accepted breaches of the Act or plan.

[12] Abatement notices are used frequently by Councils where a perceived breach of the Act is not remedied promptly by the person involved. Abatement notices are often issued as the next step in a hierarchy towards compliance but are also issued on occasion either in parallel with other Court action or after such action is taken. I note that the breach of an abatement notice is in itself an offence against the Act under s 338.

[13] Councils also have the power to seek enforcement orders whereas an abatement notice can be issued by the Council itself. An enforcement order requires an application to the Environment Court and orders made by that Court. Often these are taken in parallel with other action including prosecution. The Court has power to make enforcement orders upon conviction of a person for an offence under the Act see s 339(5). It has become increasingly common for the Court to look to enforcement orders as part of sentencing for offences under the Act.

S12 SPA procedure

[14] When it comes to the question of offences prior to 2000 all offences were commenced by information under s 12 of the Summary Proceedings Act relying upon s 338 of the Act. Section 338 creates the offences but there is no direct reference to the Summary Proceedings Act beyond subsection (4) which states:

> Notwithstanding anything in the Summary Proceedings Act 1957, any information in respect of any offence against subsection (1) of this Act may be laid by any person at any time within 6 months after the time when the contravention giving rise to the information first became known, or should have become known to the local authority or consent authority.

[15] It is clear that the offences under the Act are intended to be regarded seriously. Prior to the recent increase imprisonment for up to 2 years and a fine not exceeding $200,000 could be imposed together with a further fine of $10,000 per day for a continuing offence. Those fines have now been increased substantially by recent amendments to the Act.

[16] Section 339(4) makes it clear that sentences of community work and the provisions of the Sentencing Act apply. In addition to that the Court has powers to make enforcement orders as previously described.

[17] Since coming into force in 1991 the Act has been applied to a range of offences, most of which fit within the category of offences under ss 9 or 15 of the Act. More rare are prosecutions relating to breach of abatement notices with occasional proceedings relating to enforcement orders. Prosecutions under s 338(1A), (1B) and (2) are rare. In total well over a thousand informations have been laid since 2000 with over 600 sentences delivered by the District Court presided by a Judge who also is an Environment Judge. Although statistics are unreliable I would estimate a lower number of prosecutions for 1991 to 2000.

[18] On conviction (usually on guilty plea) fines and costs are usually imposed. Although these may vary the amounts are usually in the thousands. 90% of the fine and any orders for Council expenses for tests are paid to the local authority under s 342 of the RMA. Millions of dollars in fines, as well as enforcement orders and imprisonment have been imposed in reliance on the legislation.

Infringement offences

[19] Section 343A to D were added in 1996 but relevant Regulations did not come into force until 2000 being promulgated by Resource Management (Infringement Offences) Regulations 1999 **(the Regulations)**. Section 1 of the Regulations indicate that they came into force on 1 February 2000 and these are the Regulations contemplated by s 343A of the Act. They are made under s 360(1)(bb) and (ba) of the Resource Management Act. The relevant provisions read:

> **2. Infringement Offences**
>
> **Those offences under the Resource Management Act 1991 listed under Schedule 1 are infringement offences for the purposes of s 343A to 343D of that Act.**
>
> **3. Infringement Fees**
>
> **The fee specified in Schedule 1 for each offence is the infringement fee for that offence.**

4. Infringement Notices

Every infringement notice issued under s 343C(3) of the Resource Management Act 1991 must be in the form set out in Schedule 2.

5. Infringement Offence Reminder Notices. Every infringement offence reminder notice issued under s 343C(4) of the Resource Management Act 1991 must be in the form set out in Schedule 3.

[20] There follows a schedule with a series of headings. Annexed hereto and marked A is a copy of the Regulations 1999. It can be seen that it refers firstly, to the offence section, then to the general description of the offence, and then to the infringement fee. For example P F Olsen Limited have been charged with an offence of discharging contaminants onto land which may result in that contaminant entering water, a charge under s 15(1)(b) of the RMA, which is specified in the First Schedule, as being under s 338(1)(a) of the RMA, and leading to a fine of $750.

[21] Another charge relates to a breach of the operative plan under s 9(3)(a) of the Act, the contravention of which is an offence under s 338(1)(a) and would lead in this case to an infringement fee offence of $300. In the defendant's submission remedial costs of some $250,000 have been incurred by the defendant. The defendant submitted a starting point for fines of some $40,000 compared to the prosecutions of $135,000 to $150,000. In short the infringement offence fees bear no relationship to the range of penalties contemplated on conviction commenced by information.

Prosecution for infringement offences

[22] Section 343 notes that where any persons alleged to have committed an infringement offence, that person may either:

a) Proceed against for the alleged offence under the Summary Proceedings Act 1957; or

b) Be served with an infringement notice as provided for in s 343C.

[23] For the purposes of this hearing Mr Cooney for the informant was prepared to concede that any proceedings for an infringement offence under s 343B laid by way

of an information under the Summary Proceedings Act would need Court leave to proceed due to s 21 of the SPA.

[24] That laying of an information in respect of an infringement offence requires the leave of the District Court pursuant to s 21(1) which provides that proceedings in respect of an infringement notice may be commenced-

a) With the leave of the District Court Judge or Registrar by laying an information under this Act, or by filing a notice of prosecution under s 20A of this (SPA) Act; or

b) Where an infringement notice has been issued in respect of the offence, by providing particulars of the reminder notice in accordance with subsection (4A) or by filing a notice of hearing in the Court under this (SPA) Act.

[25] It is clear from this that the Council thereby has an election as to how to proceed against a defendant. If it proceeds by way of an infringement notice, it is bound by the First Schedule to the Regulations as to the offence fees that can be charged. Since 2000 the only infringement offences that I am aware that the Judges have seen are those where an infringement notice is disputed and a notice of hearing is therefore issued for a Court hearing.

Actual practice since 2000

[26] Although there has been a theoretical ability to lay charges under ss 21 or 20A I am not aware that any have to date been filed in the Court. This is not surprising in that all proceedings to date have been filed under s 12 of the SPA relying on s 338 of the RMA.

[27] To my knowledge, both prior to 2000 and subsequently, all actions informations laid for prosecutions by way of Summary Proceedings against a defendant in the District Court have been commenced by way of filing an information under s 12 of the SPA relying on s 338 of the RMA together with the relevant sections, say ss 9 or 15 of the Act.

[28] Section 12 of the Summary Proceedings Act provides:

> 1. Commencement of proceedings
>
> Except where the defendant has been arrested without warrant, all proceedings brought under this part of this Act shall [subject to ss 20A and 21 of this Act] be commenced by the laying of an information or the making of a complaint.
>
> 2. Where a defendant has been arrested on any charge and no information has been laid, particulars of the charge against him shall be set out in a charge sheet.
>
> 3. Provisions of this Act shall apply with respect to every entry in a charge sheet as if that entry were an information.

[29] Before the Environment Court all proceedings are commenced by way of an information in a standard District Court form. For the sake of completeness are annex and mark B, a copy of one of the informations in this case. The case is then assigned a CRN number in terms of the Department of Justice computer system and where appropriate can also be assigned a CRI number, particularly where there is a group of offences.

[30] Because of the requirement that the proceedings must be heard before a District Court Judge who is also an Environment Judge, matters are usually identified through all the District Court registries in New Zealand and arrangements are made for an Environment Judge to deal with the proceedings in due course. Given the limited involvement of District Court staff with the Resource Management Act matters it is most unlikely that a Registrar would be able to exercise any of the discretions as to commencement under s 21. The practical impact would be that if an information required prior leave it would need to be

a) identified by District Court staff

b) referred to an Environment Judge in one of the three main centres and

c) returned for swearing and issuing.

[31] From my enquiries this has never occurred to date and I can safely assume that all informations filed with the District Court since 2000 have continued to rely on s 12 of the Act and do not have leave.

Did the Regulations remove the s 12 SPA avenue for laying charges

[32] Section 343A to D was passed in 1996. We do not understand that between that date and the date upon which the Regulations took effect in 2000 it is suggested that the Summary Proceedings s 12 route for laying an information was not available. This would also follow from the definition section of s 343A which did not provide any definition of either an infringement fee or an infringement offence unless and until relevant Regulations were passed. Accordingly I am able to conclude that it was not the addition of s 343A to D to the RMA in 1996 which had any impact upon the available route for informations under the Summary Proceedings Act.

[33] Section 343A commences with the words ***in ss 343B to 343D***. From this I have concluded quite clearly that s 343A provides the definitions only for the purposes of s 343 B to D inclusive. Any doubt about this issue is removed by reference to the Regulations, Regulation 2, which importantly uses the words at the end of the sentence ***for the purposes of s 343A to 343D of that Act***.

[34] Mr McLellan urged the Court that the definition of infringement offence substituted by this Regulation defined all of the relevant offences under s 338 as infringement offences. Mr Cooney on the other hand pointed to these words I have just identified. He argued that if the purpose had been to define all relevant offences as infringement offences then these words would not have been included within the definition. I keep in mind that as subservient legislation the Regulations would not be intended to change any provisions of the parent statue the RMA. I conclude the Regulations were not intended to remove the power for any person to lay an information under s 12 of the SPA and s 338 of the RMA. Accordingly the offences under s 338 may be progressed under s 12 of the SPA.

Interpretation of s 343 A to D and Regulation 2

[35] It is clear that when we are looking at the interpretation of the words of an Act we are to adopt the purposive interpretation. Given that informations had been commenced under s 338 of the RMA and s 12 of the SPA for many years the question is whether or not the introduction of the Regulations intended to or did remove the ability to commence proceedings in that way.

[36] I can see nothing in either of the provisions of s 343A to D or the Regulations which demonstrate this intended or actual effect.

[37] That interpretation is reinforced by reference to the Report of the Planning and Development Select Committee on Resource Management Amendment Bill No. 4 which brought in the infringement offence regime into the RMA. The statement recorded

> **Infringement notices provide for a penalty to be issued after an offence has occurred. There is concern that the prosecution of minor offences under the Act has become cumbersome and costly. Proposed new ss 343A to 343D are intended to rectify the situation and provide Councils with another enforcement tool in the Act.**

[38] Even earlier with an original introduction of the infringement force regime in Resource Management Bill No. 3 the Honourable Simon Upton noted:

> **Clause 56 introduces new provisions that allow local authorities to impose an infringement fee or instant fine on a person who commits an offence. The schedule of offences and level of fine will be set by Regulation. It is proposed that the maximum fine that may be set by Regulations is $1000. I have to say that that figure has reached mindful of the level of instant fine proposed under the Hazardous Substances legislation since there was some commonality across the two Bills. As with speeding tickets the normal ability to appeal such a fee will apply.**
>
> **I just diverge from my notes and say that it does seem to me that this is the only sensible cost-effective way of enabling minor breaches to be dealt with swiftly. It is absurd that minor breaches have to go through the full machinations of the law at vast cost which means they will never happen or I should say that enforcement is never undertaken.**

[39] Accordingly on a plain interpretation of the provisions I have concluded that the proceedings under s 343A to D were never intended to substitute for an election

by the Council to take informations under s 12 of the Summary Proceedings Act relying directly on s 338. This view is supported by reference to *Wellington Regional Council v Bicknell.*[1] That case related to whether an infringement offence under the RMA could be proceeded with before Justice of the Peace. The Judge noted

> The present proceedings are quite clearly an infringement offence but only for the purposes of s 343A to 343D of the Resource Management Act.

[40] Mr McLellan's primary position was that the plain application of the wording of the Act meant that all offences under the Act with the exception of those exempted ie s 338(1)(b) are infringement offences. My primary conclusion is that the wording of the Act does not suggest that conclusion.

[41] If I am correct the scheme of the legislation would provide that there is an election by the local authority to commence prosecution by way of the infringement offence process in s 343A to D or by way of laying an information directly under s 12 of the SPA.

[42] As Mr McLellan pointed out this could result in a situation where an information might be laid by a Regional Council under s 21(1) of the SPA which required leave of the Judge when an information under s 12 of the Act did not. He suggested that this created an incongruous and unlikely result. For my part I do not see any such inconsistency. Before the Court would grant leave for an information under s 21 it would want to know why the local authority did not consider it appropriate that a conviction be entered for the charge and why they considered s 21 a more appropriate mechanism than proceeding under s 12 of SPA. In other words the expectation on laying an information is for the Court to have available the full range of remedies under the RMA. So while an information might be laid for an infringement offence it is not an intended outcome of the procedure and requires leave.

[43] As I have already indicated such an election to commence by way of s 21 has not yet arisen to my knowledge and is most unlikely. This appears to me entirely

[1] [2002] ELRNZ 28 DC Masterton, Judge Dalmer.

consistent with Parliament wishing to avoid unnecessary cost and delay in commencing proceedings while allowing minor matters to be dealt with as infringement offences.

The alternative approach

[44] If I am wrong in my primary interpretation as to the meaning of the statutory provisions I would still conclude that the resulting outcome of Mr McLellan's interpretation, that all relevant proceedings are infringement offences and would require leave for an information, would:

a) be an impractical and unrealistic interpretation of the provisions of the Act;

b) to result in an absurd or an unsustainable outcome; and

c) to conflict with the principle of proportionate response for the offending.

[45] My reasons for these conclusions relate to the type of RMA proceedings before the Court. Some of these RMA proceedings have been taken to superior Courts on appeal. They involve issues of significant financial impact, incarceration and ongoing obligations to perform work. It is not uncommon for enforcement orders following a conviction, for example, to amount to tens or even hundreds of thousands of dollars. Although still not common there are a number of cases where persons have been imprisoned for serious breaches of the Act. Directors can be held liable for offences committed by the company, see s 340(3). Moreover there are strict liability provisions and limited range of defences, some of which must be notified to the prosecution within 7 days after the service of the summons, see s 341(3).

[46] None of these issues are consistent with minor or inconsequential offences. This position is strengthened even further by the rights of election to jury trial which are sought and granted because the proceedings are commenced under s 12 of the Summary Proceedings Act. Section 66(5) notes that a person punishable by more than three months imprisonment can elect trial by jury. It is difficult to imagine that

s 21 SPA procedures which allow the laying of an information could then be subject to an election to trial by jury in circumstances where no conviction can be entered under s 78A.

[47] Furthermore, under s 13 of the Summary Proceedings Act any person may lay an information whereas under the infringement offence provisions of s 343 only a local authority can commence action. Could it be intended that this restriction on who may commence action was intended given the public and participating nature of the RMA?

Conviction

[48] Conviction is an important part of the provisions of the RMA. Conviction is widely regarded as an essential precursor to imprisonment. At page 46 of the Law Commission Study Paper, 2005 on the infringement system, it recommended at page 15 that an infringement offence should never result in imprisonment. They noted

> **Those infringement offences that are contrary to the Legislation Advisory Committee Guidelines Restriction on Imprisonable Offences should be redrafted.**

[49] Given that this Report is dated 2005 and that these Regulations became operative in 2000 we would have expected the Commission to have identified them as a significant example of a breach of the Guidelines and of the principles set out in Recommendation 2 if Regulation 2 had the effect now suggested. However we consider that the statement by the Commission accords with the general principle of law that no person should be imprisoned without due process and a conviction being entered.

Relevant cases

[50] Mr McLellan pointed to examples of imprisonment without conviction such as for contempt. However I consider that example well disconnected from the operation of a penalty regime under remedial legislation.

[51] Mr McLellan referred me to two particular decisions which supported his interpretation namely, the *Registrar of Companies v Everall* [2008] 8 HRNZ 697 and *Carr v The Police* HC Auckland A202/99, 6 April 2000 Randerson J.

[52] It is not appropriate for me to comment on other legislation given my limited mandate in terms of the Resource Management Act. As I understand it the Financial Reporting Amendment Act does not include provisions relating to imprisonment or the type of significant enforcement provisions included within the RMA. This Court and superior Courts on appeal have consistently held that a principal purpose of sentencing under the RMA is deterrence. Conviction has been considered to constitute a significant element of that penalty. In some cases the High Court has overturned RMA penalties of the District Court because of the impact the conviction would have ie on a person's ability to travel for example. In many fields (including I suspect that the forestry contracting undertaken by P F Olsen Limited) contracts require the applicant to disclose whether they have received any convictions under the RMA.

[53] The convictions also have a significant impact upon further penalties where second subsequent offences are proven. We note in this case that the informant has advised the Court that further offences are alleged for the 2009 year against P F Olsen which have yet to be processed through the Court. The impact of any conviction for these offences may have a significant impact in relation to any future offences proven.

[54] In the *Everall* decision it appeared to be accepted that the offence was an infringement offence as defined in s 42 of the Amendment Act. In this case the question is whether in fact the offence is an infringement offence or an offence under s 338 of the RMA able to be proceeded under s 12 of the SPA.

[55] The decision in *Carr v The Police* makes it clear that the principal thrust of s 78A is:

> to make it clear that a conviction is not to be entered when a person is found guilty or pleads guilty to an infringement offence whether proceeded against summarily or under the infringement offence procedures.

Accordingly this decision does not bear on whether these informations are under s 338 of the RMA and s 12 of the SPA or are deemed to be infringement offences.

Conclusion

[56] For the reasons I have given I have concluded that the RMA, the SPA and Regulations are clear. The definition of infringement offence is intended only for the purposes of s 343A to D and does not redefine all offences under s 338 of the RMA. Accordingly any person may lay an information under s 338 of the RMA and s 12 of the SPA by way of an information. In that regard the range of penalties provided for in the RMA are available and the defendant is entitled to an election to jury trial. Many other remedies can be adopted upon conviction.

[57] It is also possible for a local authority to take action for an infringement offence. In doing so, it may proceed by way of infringement offence notice or under s 20A or lay an information under s 21. If the local authority elects to commence an action by information under s 21 of the Act it must seek leave of the District Court Judge or Registrar. One anticipates such a course would be very rare.

[58] It is question of fact in any case whether the information has been laid under s 338 and s 12 or under Infringement Offence Procedures of s 343A to D inclusive and s 21 of the SPA. Where reliance is made upon s 343 and s 21 we would expect the information to be clear as to the relevance of these sections and an application for leave to be made prior to the filing of the information.

[59] In the circumstances of this case I am satisfied that the informations laid have been laid under s 12 of the SPA in reliance on s 338(1)(a) of the RMA. Accordingly the full range of outcomes provided for in the RMA is available to the Court including conviction.

Directions

[60] On this basis I consider that I am in a position to proceed to take the defendant's plea and consider sentencing if appropriate. Given that there are other appeals pending I acknowledge that the parties may wish an opportunity to consider their positions. I direct Tuesday 1 December 2009 at 9.30am for a teleconference to address the further progress of this matter.

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J A Smith
District Court Judge