IN THE SUPREME COURT OF NEW ZEALAND SC 48/2011

CAROL MARGARET DOWN

Appellant

v

THE QUEEN

Respondent

Hearing:	29 November 2011
Coram:	Elias CJ Blanchard J McGrath J William Young J Gault J
Appearances:	A D Banbrook for the Appellant M D Downs for the Respondent J G Miles QC and A Fergusson for URS New Zealand Limited – First Intervener D A T Hollings QC and S Robertson for Auckland Council – Second Intervener

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CRIMINAL APPEAL

MR BANBROOK:

May it please the court. Mr Banbrook, I appear for the appellant.

ELIAS CJ:

Thank you Mr Banbrook.

MR DOWNS:

May it please the court, Mr Downs for the Crown, the Respondent.

ELIAS CJ:

Thank you Mr Downs.

MR MILES QC:

May it please the court, I appear with Ms Fergusson for the first intervener.

ELIAS CJ:

Thank you Mr Miles, Ms Fergusson.

MS HOLLINGS QC:

May it please Your Honours, Ms Hollings, and I appear for the Auckland Council, the second intervener, with Ms Robertson.

ELIAS CJ:

Yes thank you, Ms Hollings, Ms Robertson. Yes, Mr Banbrook?

MR BANBROOK:

I have addressed the points on which leave was granted in a memorandum of some 20 pages. I don't propose reading that; I am simply going to go through that and highlight what I see are the salient features of the argument for the appellant. In the introduction I have noted that the appellant, Carol Margaret Down, was originally convicted in the Auckland District Court after a jury trial on a series of offences under the Resource Management Act and those included what I have described as discharge offences. There were other offences which we're not concerned with here but there were a series of what I have described as discharge offences under section 15 of the Resource Management Act and section 338(1)(a). Those are the offences we're concerned with here.

I have said in my memorandum the central issues in this appeal are: firstly – well, naturally, they are the points on which leave was granted. Firstly, whether the Auckland Regional Council, which of course was then the prosecuting authority, in relation to the eight discharge counts, which constituted infringement offences, was required to obtain the leave of a District Court Judge or the Registrar under section 21 of the Summary Proceedings Act before laying any informations and what the consequences are if no leave was obtained, and I think it's common ground that there was no leave. And secondly, if the prosecuting authority, namely the Auckland Regional Council, was required to obtain leave under section 21 before

laying the informations and did not obtain leave, then is the prosecution and the convictions entered nevertheless saved by the provisions of section 204 of the Summary Proceedings Act (section 204 of course being the savings provision)?

The background to the matter we don't need to go into; I've set it out in section 2 in my memorandum. This appellant was convicted along with a much better known co-accused, a Mr Conway, who had previously had been convicted under the Resource Management Act for matters relating to the operation of quite a large scale scrap metal business in Auckland. The upshot was that Ms Down was sentenced to 250 hours of community work on her convictions. In the Court of Appeal Ms Down did not pursue her appeal against the convictions for breach of enforcement orders but she did pursue her appeal against her conviction on the discharge offences. The argument being that the court lacked jurisdiction because the prosecuting authority had not obtained leave before filing the informations which initiated the prosecution and that as a consequence the convictions on each count were a nullity and should be quashed.

As I have stated it is common ground that there was no leave obtained before the informations were laid charging Ms Down with the discharge offences in the Auckland District Court. At section 3 of my memorandum I've outlined the, what I've described as the, legislative framework of the infringement offence regime under the Resource Management Act and the, what I see as the, relevant definitions. The relevant excerpts from the Summary Proceedings Act are to be found at tab 1 in the casebook of the appellant. The definition of an "infringement offence" is found at section 2 of the Summary Proceedings Act which says, "Infringement offence means an offence under any Act in respect of which a person maybe issued with an infringement notice." On the face of that, it would clearly include an infringement offence under the Resource Management Act.

"Infringement offence" is also defined in section 343A of the Resource Management Act. That material is at tab 2 in the volume. Section 343A defines an infringement offence in section 343B to D, "Infringement offence means an offence specified as such in regulations made under section 360(1)(ba)." Section 360 I have referred to there, that's at tab 2 in the volume, but it simply empowers the Governor-General to make the regulations and I make the point that an infringement offence is further defined in regulation 2 of the Resource Management (Infringement Offences) Regulations 1991. Those are to be found at tab 3 in the casebook, the regulations.

ELIAS CJ:

Aren't they really key because the definitions all run off the regulation, don't they?

MR BANBROOK:

Yes. Yes. And in the regulations it says infringement offence, those offences defines infringement offences as those offences under the Resource Management Act 1991 are listed in Schedule 1 are infringement offences for the purposes of section 343A to D of the Act. And then I've included at the top of page 4 in my memorandum an excerpt from Schedule 1 of the Resource Management – the regulations include, that includes, the two sections under which the appellant was charged, namely section 15(1)(a), discharge of contaminants or water into water or onto or into land where the contaminant is likely to enter water and the second category of charge which she faced is 15(1)(c) and (d), discharge of contaminants into environment from industrial or trade premises. And I say it follows that the six counts of permitting a discharge of a contaminant, both those categories clearly constitute infringement offences under the Summary Proceedings Act 1957, the Resource Management Act 1991 and the Resource Management (Infringement Offences) Regulations.

McGRATH J:

For the purposes of sections 343A to D?

MR BANBROOK:

Yes, indeed. I have gone then onto the prosecution process dealing with section 343B, "Commission of infringement offence", which provides: "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; or (b) be served with an infringement notice as provided for in section 343C," of the Resource Management Act. So clearly one of the prosecutorial options when dealing with an infringement offence, and that includes of course a discharge offence, would be to proceed under the Summary Proceedings Act if the authority thought that the offending warranted that sort of process as opposed to the issue of an infringement notice.

The issue of an infringement notice is governed by the provisions contained in section 343C of the Resource Management Act. I've set out the provision there. It's

notable perhaps for the fact that at the end of sub-clause (2) in section 343C, it links that process with the Summary Proceedings Act. It says for the purposes of the Summary Proceedings Act 1957, it –

ELIAS CJ:

Sorry, where are you?

MR BANBROOK:

Sorry this is in, I'm on, page 5 of my memorandum. It's the –

ELIAS CJ:

Yes. I'm sorry, 343C.

MR BANBROOK:

343C, infringement notices, and I'm making the point that at the end of sub-clause (2) it states, "For the purposes of the Summary Proceedings Act 1957 it," meaning the infringement notice, or the copy, "shall be deemed to have been served on that person when it was posted." That's dealing with the posting of the infringement notice. And then below there's a section setting out … (3) says, "Every infringement notice shall be in the prescribed form and shall contain the following particulars." A series of particulars. Notable is: "(e) a summary of the provisions of section 21(10) of the Summary Proceedings Act." So a summary of section 21(10) is required to be included in the infringement notice. And at the foot, at (b), this is sub-clause (4)(b), right at the foot of that extract, "Proceedings in respect of the offence to which the infringement notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act 1957, and the provisions of that section apply with all necessary modifications."

So it's clear from those references in section 343C that prosecution action under the Summary Proceedings Act is an option if the prosecuting authority elects to go down that track. And I say that, for the purposes of commencing proceedings under the Summary Proceedings Act pursuant to 343B(a) and 343C(4)(b) of the Resource Management Act, those procedures are governed by section 12 of the Summary Proceedings Act which of course is the provision which governs the commencement of all summary proceedings, which are set out at the top of page 6, where it's headed, "Commencement of proceedings," except where the defendant has been arrested without warrant or proceedings brought under this part shall,

subject to sections 20A and 21, be commenced by the laying of an information or the making of a complaint.

Section 20A of the Summary Proceedings Act deals with the summary procedure for minor offences and is not relevant to this argument. Section 21 provides for the prosecution process in relation to infringement offences. So on the face of it that's directly relevant to this argument. Section 21 has the heading, "Summary Procedure for Infringement Offences." So it appears to apply directly to what's under consideration. Subsection (1), "Proceedings in respect of an infringement offence may be commenced," and under (1)(a), "With the leave of a District Court Judge or a Registrar, by laying an information under this Act, or by filing a notice of prosecution under section 20A." And that is very much the nub of this argument because the appellant's case is that leave was a requirement – because the prosecution considered the offending was of such magnitude that it warranted prosecution action instead of just issuing an infringement notice or a series of infringement notices to the appellant. Because the prosecuting authority considered that it warranted the laying of informations, then the procedure in section 21 is the procedure that needed to be followed, and a precursor to laying valid informations alleging the discharge offences was the obtaining of leave from a District Court Judge or from a Registrar and as I've indicated –

ELIAS CJ:

Mr Banbrook, the issue really is whether this is an "infringement offence" and you say it's an infringement offence because the offence is specified in Schedule 1 of the Regulations?

MR BANBROOK:

Yes and I've set out the table which I think makes that clear at the top of page 4, Schedule 1, infringement offences and fees, and it specifically refers to the sections under which the appellant was originally charged.

ELIAS CJ:

But the question really is whether the identification of the sections is definitive or whether you have to look at the whole of the Schedule and that this is a carve out from the offences described in section 338. Isn't that the argument you have to meet?

MR BANBROOK:

That's the contrary argument, yes.

ELIAS CJ:

Yes.

MR BANBROOK:

Yes, and I must confess I have some difficulty in comprehending exactly how that argument fits together because I think to me it's clear from Schedule 1 that these are infringement offences. Now –

ELIAS CJ:

Except that schedule 1 has to be read in the context of the Resource Management Act and it's quite clear that, on the face of the Schedule, it's not purporting to deal with the entire offence. There's no provision for imprisonment.

MR BANBROOK:

Well there's only reference to the sections which create the offences in the schedule. It simply refers to section 15(1)(a) and (d) and section 15(1)(c) and (d). Now those are the sections under which this appellant was originally charged and the Schedule makes it clear, at least to me, that those are to be treated as infringement offences.

BLANCHARD J:

For infringement offences am I right in saying that imprisonment is no longer an option?

MR BANBROOK:

Imprisonment can, there can be a consequence of imprisonment in relation to certain infringement offences, yes.

BLANCHARD J:

Isn't that precluded by section 78A?

MR BANBROOK:

A conviction is precluded by section 78A but not imprisonment. It doesn't affect the penalty.

ELIAS CJ:

It's a startling result.

BLANCHARD J:

That wasn't the way I read section 78A but –

MR BANBROOK:

Perhaps we'll go to section 78A.

WILLIAM YOUNG J:

You say "such orders", "other such orders", includes imprisonment?

MR BANBROOK:

The section is headed, "Conviction not to be recorded for infringement offences."

BLANCHARD J:

And without a conviction you can send somebody to prison.

MR BANBROOK:

Well the section says, "The court shall not convict the defendant but may order the defendant to pay such fine and costs and may make such other orders as the court would be authorised to order or make on convicting the defendant of the offence." So if an infringement, I read that to mean, if an infringement offence carries the potential for a term of imprisonment, I can't recall any case where anyone's ever been imprisoned for an infringement offence, but if it carries the potential for a term of imprisonment, then the court would have the jurisdiction under section 78A to impose a term of imprisonment. Because it's –

BLANCHARD J:

What on earth would be the point of not entering a conviction in those circumstances?

MR BANBROOK:

Well that's what the provision says. It doesn't affect penalty and it doesn't affect the prospect that a person could potentially be sentenced to a term of imprisonment.

BLANCHARD J:

It's a very obscure way of allowing imprisonment to be imposed. If there's no conviction, but you can make an order to pay a fine and costs, and nothing is said about imprisonment.

MR BANBROOK:

Well it goes on to say –

BLANCHARD J:

Doesn't it follow that if you can't convict you can't imprison?

MR BANBROOK:

No, it goes on to say, "May make such other orders as the court would be authorised to order or make on convicting the defendant of the offence."

WILLIAM YOUNG J:

Yes, well, literally, "I order you to go to prison" could be another order but –

MR BANBROOK:

But I –

WILLIAM YOUNG J:

– it's not, it's more likely to encompass things like witness' fees or perhaps reinstatement costs, isn't it?

MR BANBROOK:

Yes, yes, but the, I emphasise the last part of that provision which says, "Such other orders as the Court would be authorised to order or make on convicting the defendant of the offence." In other words, if the infringement offence carries with it, whatever penalty it carries with it, then the Court can impose it, notwithstanding the fact that there is no conviction entered. Because the section says so.

ELIAS CJ:

Why on earth would the – what's the point of this section? It seems to be something that's solicited as sort of minor transgressions. If you're sending someone to prison why would people balk at convicting them?

MR BANBROOK:

Well –

ELIAS CJ:

It just seems a nonsense.

MR BANBROOK:

These are the provisions that are there and as I've indicated the closing words of that section make it clear that whatever the penalty is, the court can impose it, regardless of the fact there is no conviction in place.

ELIAS CJ:

All right, well –

MR BANBROOK:

What we're dealing with, of course, infringement offences by their definition and in reality they normally range from the completely paltry that would barely justify any prosecution action, which are normally, of course, dealt with by infringement notices, to offences that are somewhat more serious and are dealt with by way of information. I can't recall any case where a person has been sentenced to a term of imprisonment for a discharge offence for instance. But –

McGRATH J:

But is the purpose, though, of section 78A, and providing there's to be no conviction, really to protect the person involved from having a criminal record?

MR BANBROOK:

That's certainly a purpose that is consonant with the provisions in the section.

McGRATH J:

And if that's so isn't it rather contrary to that to actually see them in prison?

MR BANBROOK:

Yes I think one could justifiably raise that point.

McGRATH J:

So doesn't that mean that the section, the way you interpret it, which has some literal force, isn't particularly consistent with the purpose of section 78A?

MR BANBROOK:

Well I think section 78A, as your Honour has indicated, is there to protect, bearing in mind that the vast bulk of infringement offences are relatively minor or are minor. The last thing one would need, of course, is to have people with criminal convictions for what are, what I would describe, as paltry offences, because – we went through this in the Environment Court right at the outset with Carol Down. I put it to the Environment Court Judge and he agreed that a thimbleful of oil spilt on a roadway in a situation where it could enter water would be an offence for which a notice could be issued. But you'd hardly expect to get a criminal conviction for putting a thimble, spilling a thimbleful of oil on a roadway.

BLANCHARD J:

But section 338 and 339 are not just contemplating paltry offences. There is a term of imprisonment as a maximum penalty there.

MR BANBROOK:

There is a whole array of offences that they provide for and of course there are instances and one of them, of course, is this very case where people have been sentenced to imprisonment for offences under 338 and 339 but not for discharge offences.

ELIAS CJ:

May I just say that, or put it to you, that you are looking at single provisions and making a submission that's very literal to us. The alternative is that these provisions have to be construed as a whole and that key to it is your assertion that this is an infringement offence. The contrary view is that, reading the whole together, it's only an infringement offence if the prosecution has elected to proceed that way and if the penalties are the infringement fees prescribed in the regulations, that they are a carve out from the wider offending.

MR BANBROOK:

As I understand the position, these are infringement offences but the prosecution of them, the prosecuting authority has a choice to make, if you like. It can either go down the infringement notice –

ELIAS CJ:

Sorry. Can you just tell me why you say these are infringement offences?

MR BANBROOK:

Because as I say they come within the definitions and they're found, I mean the most powerful argument is, because they're there in the schedule of infringement offences and fees.

ELIAS CJ:

Well, the sections –

MR BANBROOK:

The two sections are the sections under which this appellant was charged.

ELIAS CJ:

The sections are referred to but it clearly can't embrace the whole offending contemplated by those sections because there are limits to the penalty in the infringement fee prescribed.

MR BANBROOK:

Yes that's if the, if the, authorities elect to go down the infringement notice track, if you like. They don't have to. If they consider the offending is more serious, and clearly they did here in the case of this appellant, they laid informations which they're entitled to do. Instead of going down the infringement notice track they, they didn't issue any infringement notices, they simply laid informations.

ELIAS CJ:

Well Schedule 1 purports to be a definition of infringement offences.

MR BANBROOK:

Yes. Well it's, that's not the whole of the Schedule but, yes, it's the part that I say is relevant to what we're considering here, because those are the two sections under which this appellant was charged: section 15(1)(a) and (d) and section 15(1)(c) and (d).

ELIAS CJ:

Well, on the basis of your argument section 338(1)(a), (c), (d), et cetera, have been amended significantly by regulations.

MR BANBROOK:

Yes, when the infringement notice – sorry the infringement offences regime was introduced, yes, they were amended, yes.

ELIAS CJ:

Thank you.

MR BANBROOK:

But as I say, the authority has a choice, the prosecuting authority has a clear choice. Either they issue an infringement notice, if they consider the offending to be minor. If they consider it to be more serious they issue informations, which of course they can do. The argument for the appellant is simply that if they choose to go down the latter route, in other words to file informations alleging offences, because they consider the offending to be more serious, they need to get leave under section 21 before the file the informations.

ELIAS CJ:

Well I understand your argument.

MR BANBROOK:

And if I just jump ahead there, the reason I say that you, the leave provision is there is a filtering process to winnow out, if you like, situations which really ought to be dealt with as infringement offences but for whatever reason the prosecuting authority has decided to take a big stick to the defendant from cases which genuinely warrant the full force of the criminal prosecution process. So that's why I say the leave provision, there's a logical reason why it's there, because it's intended that it provides an opportunity to see that if informations are being laid, as they were in this case, that the offending is of a sufficiently serious nature to warrant that. Now, in this case, if leave had been sought, I have little doubt that it would have been granted because the allegations were very serious against this appellant and against the co-accused.

ELIAS CJ:

The contrary view is that serious offending proceeds by way of information under section, is it section 12 –

MR BANBROOK:

12, yes.

ELIAS CJ:

... That if you are within the infringement offence regime, particularised in the schedule with its prescribed fees, you are within the infringement regime. You can proceed by notice but you might have to, or you might choose to proceed by seeking leave of the court to proceed by information in cases where you are inevitably going to be into a dispute as to the facts. So rather than go issue a notice, have the person to whom the notice is being given them disputed, you might, because it's a disputed facts situation, you might apply for leave to proceed by way of information so that you can establish the facts in an orderly way. I mean I'm just putting that to you, that the scheme of the Act can make sense, whereas on your argument section 338 seems to have been entirely filleted by the regulation and the infringement offence regime.

MR BANBROOK:

Well section 338, I'll just need to go to it, section 338 provides a whole array of offences. These are only a small part of the offences –

ELIAS CJ:

Yes, I understand that.

MR BANBROOK:

– under 338. I mean there are offences, you know, not obeying enforcement orders, not obeying abatement notices, they're the offences for which you get a sentence of imprisonment if it's a serious enough situation. So that the, the infringement offences are only a small part of the overall offences which are prescribed in section 338 and the others, as I say, are far more serious. A breach of an enforcement order or an abatement notice or other orders of the court, of course, are treated much more seriously and they are offences for which people do get sentenced to imprisonment and there a number of examples. But we're not dealing with that here, we're dealing with so-called discharge offences and in my submission, as I've said, the prosecution has a choice. Once they make their choice then they're got to follow through with the procedure which in the case for the appellant involves an application for leave before filing the informations.

Going back to – or picking up from where I was at ...

McGRATH J:

Which was at?

MR BANBROOK:

Yes, I was on page 6 of my memorandum.

McGRATH J:

Yes, thank you.

MR BANBROOK:

It dealt with commencement of proceedings and we'd also looked at section 21. I then dealt with an issue which my learned friend for the respondent raised matters. This question of whether, yes, what the significance was, of the fact that the appellant here elected trial by jury. She wasn't charged on the indictment but she elected trial by jury and at 4.6 I've got there the definition of an indictable offence and it makes it clear that the mere fact, of course, that a defendant elects trial by jury under section 66 of the Summary Proceedings Act because the offence carries a potential penalty of three months' imprisonment or more, does not transmute that offence into an indictable offence. It's not an indictable offence merely by virtue of the fact the person has elected trial by jury.

Going then to the, I've really sort of summarised, or been summarising, all of the salient points. At section 5 I deal with the first ground of the appeal on which leave was granted and I've quoted there from paragraph 27 of the judgment in the Court of Appeal where the court was dealing with the question of section 338 and the discharge offences, so-called discharge offences, and there the Court pointed out that there was an option to issue an infringement notice and what the consequence thereof were. The fact you had the limited penalty of course under the infringement offences schedule and what the consequences were of failure to pay your fine and the fact, of course, you could request a hearing. I make the point at 5.2 that the comments there are entirely consistent, I say, with the argument for the appellant on the following points. Firstly, that the offence under section 338(1)(a) includes the discharge offence 15(1)(d) of the Resource Management Act. Also includes the other category of discharge offence created by 15(1)(b) of the Resource Management Act. That second point, that it is an enforcement option for

infringement notices to be issued by the prosecuting authority – we've already covered that.

Sections 21(2) and 21(5AB) of the Summary Proceedings Act provide for a monetary penalty in respect of an infringement offence where an infringement notice has been issued. We looked at the provision relating to the form requirements for infringement offences – infringement notices – and there was a link there with section 21 of the Summary Proceedings Act. And section 21(6) to 21(9) of the Summary Proceedings Act apply to confer the right to a hearing in the event that there is a dispute as to liability under an infringement notice. So clearly the proceeding to be followed in the infringement notice process is governed by the provisions set out in section 21 of the Summary Proceedings Act.

I say then that the conclusions that are set out at paragraph 27 in the judgment of the Court of Appeal, which is under appeal, appear to be inconsistent with the conclusions stated at paragraphs 46 and 47 of the judgment. At paragraph 46 the Court of Appeal concludes that not only is the prescribed form of the infringement notice under section 343C to be found in the RMA Regulations, which is accepted, but further that the regulation of payment of fines for infringement notices, the process is to be followed where a defendant seeks to dispute liability or fails to pay the fine and the consequences of failure to pay the fine are all governed by schedules 1, 2 and 3 of the RMA Regulations, rather than section 21 of the Summary Proceedings Act. And I say these conclusions contradict, and are inconsistent, with the conclusions earlier stated.

At paragraph 47 of the Court of Appeal judgment, again it refers to the RMA Regulations and the fact that an infringement notice issued under section 343C must be in the form set out in Schedule 2 to the RMA Regulations and the reminder notice must be in the form set out in Schedule 3 to the RMA Regulations. In the second half of paragraph 47, the conclusion that prescribed forms of the RMA infringement and reminder notices contain their own procedure for dealing with all comparable steps set out in the balance of section 21 for disposition of the notice – if that is, up to commencement of proceedings in accordance with the procedure required by section 21(1)(b).

I take issue with that statement. Both the infringement notice and the infringement offence reminder notice simply summarise the procedures and provisions contained

in section 21. Both notices are endorsed with the following statement, and then I've set it out at the top of page 9. If one goes to the casebook of the appellant and to tab 3, there's a copy of the Resource Management (Infringement Offences) Regulations and from the divider, if one goes over to page 3, if one goes to page 3, the numbers are in the lower right-hand corner of the page, "Schedule 2", "Form of Infringement Notice", and then if you go over one more page, in the middle of the page there's a heading, "Payment," and below that a bold note: if under section 21(3)(a) or (3C)(a) of the Summary Proceedings Act 1957 you enter into, or have entered into, time to pay arrangements with the informant in respect of an infringement fee payable et cetera.

So it makes it clear that those proceedings in the Summary Proceedings Act are incorporated in the form of the infringement notice. Then if one goes over to the page, on this occasion for some reason the number is in the lower left-hand corner of page 8 at the foot of the page. This is an endorsement on the form of the infringement notice. "Full details of your rights and obligations are set out in sections 340 to 343D of the Resource Management Act 1991 and section 21 of the Summary Proceedings Act 1957." So a clear endorsement there on the infringement notice to say that section 21 of the Summary Proceedings Act summarises your rights and obligations along with those provisions in the Resource Management Act.

Then if one goes over two more pages, same divider, this is page 10 in the lower left-hand corner, and it's Schedule 3, near the, two-thirds of the way down the page, Schedule 3, "Infringement Offence Reminder Notice Form", and if one goes over then to – the numbers have gone back to the lower right, and two thirds of the way down the page, full details of your rights, this is an endorsement on the reminder notice, full details of your rights and obligations are set out in sections 340 to 343D of the Resource Management Act 1991 and section 21 of the Summary Proceedings Act 1957. So it, in my submission, that makes it clear that the, whilst the forms are prescribed in those regulations, the obligations are those under the Summary Proceedings Act.

ELIAS CJ:

Sorry, what page was that endorsement?

MR BANBROOK:

Are we talking about in the bundle or ... ?

ELIAS CJ:

No, it's all right, I've found it thank you. It's page 15.

MR BANBROOK:

Yes, the reminder notice is at – sorry, the numbers seem to have flicked backwards and forwards. They go back to the low right-hand corner of the page and it's got that endorsement about the section 21 of the Summary Proceedings Act 1957. And I've got, I make reference to, that situation at paragraph 5.5 in my memorandum of argument.

ELIAS CJ:

It's funny that it starts with section 340 on your argument.

MR BANBROOK:

Sorry, that's the reference in the notice –

ELIAS CJ:

Well, that's the liability of the principal for acts of agents. But it would be information that is relevant, whether or not it's an infringement offence or an offence under section 338. ... Assuming for the moment that there's a difference because you would need to know that you're liable for the acts of your agents.

MR BANBROOK:

Mmm.

ELIAS CJ:

But on your argument why wouldn't it say, "all the details are set out in 338 onwards"? Why would you start with section 340?

MR BANBROOK:

Well, I've just quoted what's there on the notice. The purpose of quoting it, of course, was to draw the attention of the Court to the fact that section 21 of the Summary Proceedings Act seems to be the section relied upon as governing the rights and obligations of the person served with the infringement notice or the infringement reminder notice. The point being, the Court of Appeal reached the conclusion that the infringement offences regime under the Resource Management

Act was a separate sort of standalone procedure that was distinct from other infringement offences that were dealt with under section 21 of the Summary Proceedings Act and the case for this appellant is that that's not, with respect, correct. ... That whilst the form may be cast in the regulations the procedures are those under section 21 of the Summary Proceedings Act.

WILLIAM YOUNG J:

Can I just sort of add – I thought you said earlier, go back, do you say that people are not sentenced to imprisonment for offences under the Resource Management Act?

MR BANBROOK:

No. I know of a number of cases, indeed I can advise the court that the co-accused of this appellant is –

WILLIAM YOUNG J:

Well, that's right, yes, Mr Conway was sent to jail.

MR BANBROOK:

Twice actually.

WILLIAM YOUNG J:

So –

MR BANBROOK:

Well he's – (a) he was sentenced to imprisonment for an offence some years ago; and (b) he is I believe currently, he might not be in jail, but he's been sentenced to a term of imprisonment.

WILLIAM YOUNG J:

So that could only be under the – well, sorry, was that for the section 15 offences?

MR BANBROOK:

No, no. Mr Conway was sentenced for a series of convictions for effectively contempt of court. Failure to obey enforcement orders.

WILLIAM YOUNG J:

But did they not encompass the section 15 offences?

MR BANBROOK:

He was also charged with section 15 offences but the sentencing Judge, I don't know whether we've got the notes of the sentencing Judge here –

WILLIAM YOUNG J:

Yes, we do have them.

MR BANBROOK:

Indeed I need to turn the case – yes it's at tab 1 of the case on appeal –

WILLIAM YOUNG J:

Well there are section 15 offences in there.

MR BANBROOK:

Yes, yes. He was charged with section 15 offences but he was also charged with offences that were distinctly more serious and that was failure to obey enforcement orders and offences of that nature. Well, yes, page 23, at the foot –

ELIAS CJ:

Well where are we? What volume?

MR BANBROOK:

Sorry we're in the, we're now in the case on appeal, the big volume.

ELIAS CJ:

And page?

MR BANBROOK:

And the page, well it starts at 23 with references to Mr Conway and his convictions. At the foot of the page, this offending occurred some 15 months after Mr Conway's conviction and imprisonment for similar offending.

WILLIAM YOUNG J:

This sentence he received did encompass the section 15 offences, the penalty?

MR BANBROOK:

I don't believe so, no. No, I think that –

WILLIAM YOUNG J:

What did he get for them?

MR BANBROOK:

At an earlier, in an earlier case, Mr Conway was sentenced to three months' imprisonment on nine charges, three of which related to discharge of contaminants into water, two related to contravening an abatement notice and four relating to breaching Judge Whiting's enforcement order. Now I don't know whether those were all lumped together or how that was dealt with because I wasn't involved.

WILLIAM YOUNG J:

Well looking at page 23, para 73 of the sentencing remarks Mr Conway received, this was an earlier offending: "Mr Conway received an end term of imprisonment of three months in respect of nine charges, three of which related to discharge of contaminants into water," which is a section 15 offence?

MR BANBROOK:

Yes.

WILLIAM YOUNG J:

So people are sentenced to imprisonment –

MR BANBROOK:

Well –

WILLIAM YOUNG J:

– for section 15 offences?

MR BANBROOK:

Mr Conway was convicted on the same counts in the indictment that Ms Down was convicted on. She got fined and 250 hours of community work. The Judge made it clear that she considered the serious offending to be the breach of enforcement orders on the part of Mr Conway. But it's correct, you can be sentenced for discharge offences.

WILLIAM YOUNG J:

Or it can be because the Act provides for that and sometimes may be as Mr Conway –

MR BANBROOK:

Yes, well Mr Conway is a good example –

WILLIAM YOUNG J:

– establishes ...

MR BANBROOK:

– of someone who was. Yes. But it's quite clear that the penalties provided do include imprisonment under the section 15 offences that we're considering here.

Going on with the points there at – sorry ... At 5.6, once the infringement notice is issued under the provisions contained in section 343C of the Resource Management Act, I say the procedures for disposition of the notice are governed by the provisions contained in section 21 of the Summary Proceedings Act.

I then set out paragraph 33 from the decision in the Court of Appeal, where the Court said, "It is common ground that the offences with which Wallace and the others," I think Ms Down is included in "the others", "were charged with infringement offences within the meaning of section 343A of the Resource Management Act." But the Court went on to say, "But the section 21(1)(a) SPA," Summary Proceedings Act, "leave provision will not apply unless the offences also fall within the definition of infringement offences under section 2(1) of the SPA. That definition is in turn dependent on whether section 343C of the RMA which provides for the use of the infringement notice procedure under that Act, can be construed 'as providing for the use of the [s 21 SPA] infringement notice procedure' within the meaning of section 2(1)(k). In deciding that issue our primary focus must be on the composition of section 2(1)."

And the submission I make is that, section 343C of the Resource Management Act simply provides the authority for the issue of an infringement notice in respect of infringement offences. It does not provide the procedure to be followed in disposition

of the notice because that procedure is to be found in section 21 of the Summary Proceedings Act.

I say this conclusion is strongly supported by the analysis provided at paragraph 5.5 above from which it is clear that, firstly, section 343C provides for the issue of an infringement notice. The RMA Regulations 1999 provide the form of both the infringement notice and the infringement offence reminder notice. And those are the notices we've just looked at. Both the notice and the reminder, however, are endorsed with a statement under the heading 'Summary of Rights' to the following effect: "Full details of your rights and obligations are set out in sections 340 to 343D of the Resource Management Act 191 and section 21 of the Summary Proceedings Act 1957."

And I say this is consistent with the content of section 343C of the Resource Management Act, which supplies the legislative machinery for the issue of infringement notices but then specifically provides for the use of the infringement notice procedure under section 21 by virtue of the provisions contained in section 343C(4)(b), which states that "Proceedings in respect of the offence to which the infringement notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act 1957 and the provisions of that section apply with all necessary modifications."

ELIAS CJ:

Well, what do you take from the words, "to which the infringement notice relates"?

MR BANBROOK:

Well, to the alleged offence in respect of which the infringement notice has been issued.

ELIAS CJ:

But there must always be an infringement notice to bring you within this procedure, surely?

MR BANBROOK:

Well if the prosecuting authority elect to go down that track, yes, there will be an infringement notice. But they don't have to issue an infringement notice. They can issue an information if they decide it's more serious than warrants an infringement

notice. They can issue an information. And the real issue is the one that we're addressing, namely if they elect to go down the, as they did here with Ms Down, if they elect to go down the information track, then is it necessary for them to obtain leave before they file the information?

ELIAS CJ:

The argument against you is that the prosecution has two elections: first, to decide whether to proceed by way of information in the normal way; secondly, whether to proceed by way of infringement notice. If they have proceeded by way of infringement notice, then they have the further election of seeking leave of a Judge to proceed by way of information, and I have suggested why that course might be appropriate, or they simply enforce the notice.

MR BANBROOK:

I didn't think it was necessary for the prosecuting authority to issue an infringement notice before they issued an information. They can just go straight ahead and issue an information if they –

ELIAS CJ:

Well what –

MR BANBROOK:

Even though it's an infringement offence they can go straight ahead and issue an information under section 12 of the Summary Proceedings Act, but if it is an infringement offence then they've got to get leave before they file their information, that's all.

ELIAS CJ:

Well, that's why I ask you what these words, "to which the infringement notice relates," what effect they have, because do not they seem to suggest that section 343C is concerned with proceedings after an infringement notice has been issued?

MR BANBROOK:

Yes. It is proceedings in respect of the offence to which the infringement notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act. If the prosecuting authority, well, I think regardless in relation to an infringement notice or not … If they elected to issue an information they could do so.

ELIAS CJ:

You say that they can commence proceedings under section 343C in accordance with section 21 whether or not an infringement notice has been issued, do you?

BLANCHARD J:

Not under 343C which deals only with –

ELIAS CJ:

Yes.

BLANCHARD J:

– infringement notices.

ELIAS CJ:

That's really what I'm asking him. Sorry, we may be at cross-purposes, Mr Banbrook.

MR BANBROOK:

343C is headed "Infringement Notices."

BLANCHARD J:

Don't we need to look at 343B –

ELIAS CJ:

Yes, that's right.

BLANCHARD J:

– which creates the alternatives?

MR BANBROOK:

It says, "Where any person is alleged to have committed an infringement offence, that person may either (a) be proceeded against for the alleged offence under Summary Proceedings Act 1957, or (b) be served with an infringement notice, as provided for under section 343C." So that's the choice the prosecution has and that relates to the commission, or alleged commission, of an infringement offence. So the prosecution has a choice to make. If they elect to go down the first option, be

proceeded against for the alleged offence under the Summary Proceedings Act 1957, that leads on to section 12 of the Summary Proceedings Act, commencing the proceedings, and that leads on to section 21, which says if it's an infringement offence they need to get leave from a Judge or a Registrar before you file your information. And the appellant says, this was a case where that ought to have, that procedure ought to have been followed and wasn't followed. So what needs to be addressed then is: what are the consequences of failing to obtain leave?

Was there any more on that point at this stage?

ELIAS CJ:

No.

MR BANBROOK:

I'm indebted to the Court for referring us to section 343B because that's, sort of, the crux of, yes, the crux of this part of the argument.

I then went on to refer to paragraphs 39 to 42 of the Court of Appeal judgment, which then survey the historic chronology of the progressive addition of various statutes to the Schedule to section 2(1) of the Summary Proceedings Act and the conclusion is stated, that the omission of section 343 of the Resource Management Act 1991 from the Schedule must have been intentional. What the Court of Appeal actually said was, it cannot be said that Parliament would have been unaware or have overlooked section 343(c) when enacting the Summary Proceedings Amendment Act 2006. To the contrary, the statute amended section 343C(4) while in the same part amending the five other relevant infringement notice provisions, being, and there's reference there to the Biosecurity Act, Civil Aviation Act, Fisheries Act, Gambling Act, Land Transport Act, by then all listed in the section 2(1) schedule but section 343C of the RMA was not added. And I say, at paragraph 42, support is sought for this argument from the nature of amendments enacted by the Summary Proceedings Amendment Act, specifically with reference to the form of the reminder notice prescribed by section 343C(4)(a) and the conclusion stated, "this amendment reinforced the existing provision and its emphasis on compliance with the discrete enforcement notice and reminder notice regimes under the Resource Management Act not the Summary Proceedings Act", and that is, of course, an important part of the, or perhaps the very foundation of the, Court of Appeal's decision, is that they formed the view that the enforcement notice and reminder notice regimes, under the RMA,

were quite distinct from the other categories of infringement notice regimes provided for under the Summary Proceedings Act.

The Court went on to say, in particular, it retained the existing reference to an infringement notice issued under this section, that's section 343C. The added provision made no reference to the use of section 21 infringement notice procedure, which is necessary to trigger section 2(1)(k) and I say, with respect, the conclusions reached in paragraphs 38 to 42 of the Court of Appeal, both as to the Schedule to section 2(1) of the Summary Proceedings Act and as to the amendment to section 343C by the Summary Proceedings Amendment Act 2006, do not bear scrutiny and I say this is so firstly, the conclusion as to the schedule to section 2(1) of the Summary Proceedings Act set out in paragraph 40 of the Court of Appeal judgment proceeds on the assumption that the Schedule to section 2(1) of the Summary Proceedings Act provides an exhaustive list of all enactments that are intended to adopt the infringement notice procedure prescribed by section 21. I say that this is not the case, as made clear by reference to section 2(1)(k) of the Summary Proceedings Act, which provides, in part, as follows: "This is the interpretation provision, infringement notice, means and notice issued under (k) any provision of any other Act providing for the use of the infringement notice procedure under section 21." So it's open-ended in the definition section.

Further, the statement to be found at paragraph 42 that this amendment reinforced the existing provision and its emphasis on compliance with the discrete enforcement notice and reminder notice regimes, under the Resource Management Act, not the Summary Proceedings Act is not, with respect, correct. That is so because while section 343C provides the authority for the issue of an infringement notice in the form of the infringement notice and the infringement offence reminder notice prescribed by the regulations, the notices themselves refer expressly to section 21 of the Summary Proceedings Act as providing full details of your rights and obligations when read in conjunction with sections 340 to 343D of the Resource Management Act.

I then go on to paragraph 54 of the judgment in the Court of Appeal. There the Court expressly accepts an argument advanced by counsel, or the counsel who appeared for the Waikato Regional Council, to the effect that it would be most unusual for Parliament to require a prosecuting authority to seek and obtain leave of the court before filing informations in respect of offences which have a maximum penalty on

conviction of two years' imprisonment. And that, of course, the right to elect jury trial, as did the appellant. This argument is relied upon to reinforce the contention that it could never have been the legislative intent that a prosecuting authority under the Resource Management Act would then, when prosecuting infringement offences, be governed by the leave procedure prescribed in section 21 of the Summary Proceedings Act.

The flaw in this argument is that it fails to acknowledge the huge range of offending that is captured by the discharge offences in section 15. So theoretically, these could range from incidents which are as trivial in the extreme, such as a drop of oil on a roadway in circumstances where that oil might enter water, and major discharges having potentially catastrophic consequences for the environment. And that is illustrated by this case in which there were allegations made, not directly against this appellant but against her co-accused that there were discharges of hundreds and hundreds of litres of oil into a waterway, which led straight into the Hauraki Gulf, so there's a huge range of potential offending.

WILLIAM YOUNG J:
What would happen if the prosecutor wanted to amend a count where's there's been an election of trial by jury, would the amended count require some sort of leave?

MR BANBROOK:
If leave has been granted, in fact there's an authority on this point in the casebook –

WILLIAM YOUNG J:
Is there?

MR BANBROOK:
– I'm just trying to recall which one it is, which deals with amending an indictment in a case where leave was sought and where the point was taken on appeal that although consent was had to initiate the prosecution action, that it didn't cover – they amended one of the counts to allege an attempted offence as opposed to a completed offence but the point was not sustained on appeal.

WILLIAM YOUNG J:
And you would say –

MR BANBROOK:

They said if consent was had then that would cover amending the charge in the indictment.

WILLIAM YOUNG J:

And it wouldn't be open to the prosecutor or to the court to add a count to an indictment?

MR BANBROOK:

Well that would be a more interesting argument perhaps because – and the case I'm thinking of, which as I say is in the casebook, –

WILLIAM YOUNG J:

Come back to it after the morning adjournment if you want to mention it. I'm sure it will be mentioned later anyway.

MR BANBROOK:

Yes, the case – I'm indebted to my learned friend, I've actually got it in my notes but my learned friend has brought it to my attention, it's at tab 7 in the casebook of the appellant and it's the case of *R v Ostler and Christie* [1941] NZLR 318 (CA).

BLANCHARD J:

Right, yes.

MR BANBROOK:

But it doesn't cover the point that your Honour has raised, which is perhaps the more interesting point, is if you wanted to add to the indictment by alleging a quite different offence perhaps but one which, nevertheless, required leave, presumably, in that situation, you would need to get leave before you could proceed with the amended indictment. In *R v Ostler and Christie* I think what was done was I think they amended the indictment to allege an attempt.

Just going back to – was there anything further on that point?

BLANCHARD J:

No, no.

MR BANBROOK:

Yes I make the point, on page 13 of my memorandum at Roman numeral two, the forms – well, we know the forms of the infringement reminder notice are found in the regulations and we've looked at that. Both forms, again, bare that endorsement on the summary of rights, referring to section 21 of the Summary Proceedings Act. And I make the point, I ask a rhetorical question really, at the foot of that Roman numeral two, I say, how could it then be said that the section 21 procedure – this is under the Summary Proceedings Act – must refer to and be limited to infringement notices issued in accordance with the form prescribed by regulations under the Summary Proceedings Act, not under the Resource Management Act? What's quite clear from the endorsement on the forms is that section 21 of the Summary Proceedings Act does apply to the notices issued under the Resource Management Act and at point 3, clearly the procedure for disposition of infringement notices is that set out in section 21 of the Summary Proceedings Act, and I say it follows that the infringement offences, or discharge offences, in section 15 of the Resource Management Act come within the catch-all provision found in section 2(1)(k) of the Summary Proceedings Act 1957.

I say, at Roman numeral four, it necessarily follows that in the event that a prosecuting authority elects to proceed, by way of information, in respect of an infringement offence under the Resource Management Act, that it is a necessary prerequisite to the legality of the prosecution process that leave is first obtained to the laying of the informations, in terms of section 21 of the Act, from a District Court Judge or a Registrar and if so, failure to obtain such leave will render the prosecution process a nullity.

Then I move on, at section 6 in my submissions, to the second ground of appeal and the heading there is, if leave is required, are the proceedings saved by section 204 of the Summary Proceedings Act 1957? And I say if it is contended by the appellant on a proper reading and construction of the provisions contained in section 12(1) and 21(1)(a) of the Summary Proceedings Act, leave is required before an information can be filed to prosecute an infringement offence under the Resource Management Act, then it's common ground that no leave was sought or obtained by the prosecuting authority before the informations against the appellant were filed in the Auckland District Court.

The second issue, addressed in the Court of Appeal decision at paragraph 62 and following, is whether the saving provision, in section 204, can operate to save the prosecution in respect of the absence of leave.

Set out at 6.3 is the text of section 204 and I say the issue central to this inquiry is as to whether the omission to seek and obtain leave before filing information for an infringement offence under the Resource Management Act vitiates the Court's jurisdiction and renders the prosecution process a nullity. The competing argument is as to whether the failure to obtain leave, prior to filing the information, constitutes only a procedural irregularity and is capable of being cured under section 204 in the Summary Proceedings Act. I say at 6.5: there is a consistent line of authority in New Zealand cases that establishes the general proposition that whereby statute leave is required to commence prosecution, then failure to obtain leave goes to the jurisdiction of the court and will render the prosecution proceeding a nullity.

The argument there is that if there is a legal requirement that leave be obtained before the prosecution can be commenced, if you simply barge ahead as a prosecution authority and initiate the prosecution by filing information without leave, then the prosecution has no legal foundation. That's the argument. Has no legal foundation and therefore it must be a nullity and any conviction arising must be a nullity.

At 6.6, I deal briefly with some of the New Zealand authorities which I say, on the casebook, we've referred to *R v Ostler and Christie*, "Provisionally with no prosecution for an offence against this regulation," this being the Public Safety Emergency Regulations 1940. "No prosecution for an offence against this regulation should be commenced except with the written consent of the Attorney-General. Judicial note should be taken of any signature under this clause –

BLANCHARD J:
We have had the opportunity of reading the submissions. You don't need to read it all out to us.

MR BANBROOK:
No, no I'll move more quickly.

McGRATH J:

I think the real issue here, Mr Banbrook, is that this is a different type of leave provision to those which the cases discussed. It's a – there's no question here whether or not the prosecution process will be brought to bear, the question is as to the mode of it and whether what the leave provision is protecting is of the same sort as in these cases and clearly, it's different, and that's the basis on which it's distinguished –

MR BANBROOK:

Well, I think that it differs –

McGRATH J:

– in your opponent's argument.

MR BANBROOK:

Yes, I think each case – sorry, each statute – has its own particular considerations. I've indicated here what my view is of the leave provision. I mean, either you have a leave provision or you don't. If you're going to have a leave provision then you've got to get leave, if you want to do – commence – the prosecution action, you've got to get leave, that's what the statute says. The purpose for that leave, in this situation, is what I've already indicated, that it's intended as a filtering mechanism because of the – I say – because of the huge range of culpability. Here, you're dealing with offences for which people would certainly go to prison and offences for which –

McGRATH J:

And I've understood –

MR BANBROOK:

– even a –

McGRATH J:

– I've understood –

MR BANBROOK:

– $10 fine would be excessive –

McGRATH J:

– that to be your argument but I don't think it actually has a lot to do with the cases which are really looking at a leave provision of a different kind, as to whether the prosecution should be commenced at all, not as to how it should be commenced.

MR BANBROOK:

Well, yes, and some of the cases – yes, as I say, that they vary according to what the nature of the – certainly in the likes of –

McGRATH J:

Which case is the nearest to your situation?

MR BANBROOK:

Probably something like *Price v Humphries* [1958] 2 QB 353, the English decision, where you had to get the consent of the Minister by an inspector or other officer authorised on their behalf. That's a prosecution under the National Insurance Act but my primary point is that if there is a leave provision, then it's intended –

McGRATH J:

Yes, you've made that point in the written submissions and you've made it orally this morning as well –

MR BANBROOK:

– it's intended that it be observed, yes.

McGRATH J:

– I understand that point.

ELIAS CJ:

Can I ask: do we have a copy of the information in this matter? It doesn't matter if we don't, I just would have liked to look at it. It's not in the case?

MR BANBROOK:

No, I don't think I do have a copy of it, the –

ELIAS CJ:

No, that's all right, that's fine.

MR BANBROOK:

– information. Well, the indictment of course. There would've been information originally laid, of course.

ELIAS CJ:

Yes.

MR BANBROOK:

Yes, well as I've said, I take the point that these authorities on the question of leave, most of them are derived from situations where the alleged offending is far more serious than what's alleged – or was alleged against the appellant here – and there are good reasons underlying the requirements for leave but irrespective of that, I say there are good reasons for the leave requirement here also. Different considerations but nevertheless material ones and ones that should be observed and enforced because otherwise you could have rafts of prosecutions for relatively – it tends to be an area in which the zeal of the authorities sometimes overcomes their judgement, put it that way, when it comes to how matters should be dealt with.

WILLIAM YOUNG J:

Just to go back to the question I asked earlier: section 21, on the face of it, is permissive isn't it? It explains how things *may* be done.

MR BANBROOK:

That's right.

WILLIAM YOUNG J:

It doesn't explicitly say that things may not be done without something.

MR BANBROOK:

It has an unusual – it's not cast in the same sort of mould as the normal leave provisions.

WILLIAM YOUNG J:

Well, let us just assume that the regional council had obtained leave to file an information, the proceedings would then have been, undoubtedly, correctly

commenced. The case goes to trial on indictment. Would there really be need for consent to add a count or amend a count?

MR BANBROOK:

Not on the authority of *Ostler and Christie*, not to amend it.

WILLIAM YOUNG J:

Well *Ostler and Christie* deals with an attempt, which they treat as included in the consent for the substantive offence –

MR BANBROOK:

Right.

WILLIAM YOUNG J:

– but those were – that was a restriction saying you can't be prosecuted for a particular offence without consent.

MR BANBROOK:

Leave consent, yes.

WILLIAM YOUNG J:

Here, this is a permissive provision that says, well, you can do this or you can do that. You can only get a prohibition, implied prohibition, by reading this along with section 12, can't you?

MR BANBROOK:

Yes, well section 21 simply says, the proceedings in respect of an infringement offence may be commenced, in the first option, with a leave of a District Court Judge or Registrar, by laying an information under this Act. So it makes it clear what – it's framed in a slightly – it's not, yes, it's not framed as a prohibitive injunction as it were but it, nevertheless, establishes a requirement for leave. If you are prosecuting an infringement offence and you want to lay an information, you've got to get leave.

WILLIAM YOUNG J:

What's your answer to the proposition that the Resource Management Act, section 343B(a), creates a third option?

MR BANBROOK:

343B(b)?

WILLIAM YOUNG J:

Yes, 343B(a).

ELIAS CJ:

Little (a).

WILLIAM YOUNG J:

Little (a), sorry. Capital B, little (a).

MR BANBROOK:

Yes, 343B(a) says, where any person is alleged to have committed an infringement offence that person may either, firstly, be proceeded against for the alleged offence under the Summary Proceedings Act 1957 ...

WILLIAM YOUNG J:

Yes, so why can't that simply be construed as permitting the informant to go directly to the information?

MR BANBROOK:

No, because the informant has to go from that provision to the provision which is headed, "Commencement of Proceedings", which is section 12 of the Summary Proceedings Act. He then reads that and it refers him to section 21, and he goes to section 21, and if he's prosecuting for an infringement offence, he realises he's got to get leave before he files his information. That's the way the procedure works as I understand it. That's just a global reference to the Summary Proceedings Act 1957 as a statute, but once you refer to the statute the path is clear. Section 12 is the commencement of proceedings and section 21 is the leave provision and, as I say, although it's, it's unusual, the wording in the leave provision is unusual, it's not prohibitory in the way that the other authorities, the leave provisions in most of these other authorities, are. It's nevertheless a leave provision and if you've got a leave provision – no point in having a leave provision if they're not going to be enforced. You either have a leave provision or you don't have a leave provision and here, I say, there is a leave provision and it needs to observed and it wasn't observed.

WILLIAM YOUNG J:

So 343B(a) means, be proceeded against the alleged offence under the Summary Proceedings Act 1957, but only if section 21(a) is complied with?

MR BANBROOK:

Yes, I say it's implicit in that you've got to comply with the requirements of the Summary Proceedings Act. If you elect to go down that track, you've got to comply with the requirements of the Summary Proceedings Act which means you proceed by way of information. If it's an infringement offence, you need to get leave before you file the information.

WILLIAM YOUNG J:

Thank you.

MR BANBROOK:

I'm moving forward fast, the section dealing with the authorities but I think just – at 6.11, there's reference there to the decision of the Court of Appeal in *Abraham v Auckland District Court* [2008] 2 NZLR 352 (CA), which is to be found at tab 10 in the volume of authorities. At the top of page 17 in my memorandum, I think this is very important in dealing with the question of section 204 ... This is an extract from the decision of the Court of Appeal in *Abraham* and I think the point is very important and well taken, where they said, the effect of section 204 cannot be to confer jurisdiction where it does not exist. Similarly, where some process, the effect of which is to confer jurisdiction, has not been followed – for example, a statutorily required consent to prosecute has not been obtained – it is easy enough to characterise what follows as a nullity. That's from the decision of the Court of Appeal in *Abraham* and I say that that has direct application here.

ELIAS CJ:

Well that depends if it is a jurisdictional impediment. That's the point that Justice McGrath was putting to you but there's no need to open that up again.

MR BANBROOK:

Well, the reference says, "If a statutorily required consent to prosecute has not been obtained ..." Well, isn't that what is required here? You need to get consent of the District Court Judge or the Registrar before you can file your information and it wasn't

done. According to the Court of Appeal, it's easy enough to characterise what follows as a nullity.

I go on to say – yes, well I make the submission, it's from 1 to 2, that it goes to jurisdiction and I refer there to paragraph 75 in the Court of Appeal decision, where they said, such leave is not required before the substantive decision could be made to prosecute. Well, we're not talking about the decision to prosecute, we're talking about laying an information. The crucial point is when they go to lay the information.

ELIAS CJ:

Look, it's a mile away from *Abraham*, Mr Banbrook. That was a case where there was a jurisdictional threshold because of the right to elect trial by jury which wasn't put to the –

MR BANBROOK:

Yes, I –

ELIAS CJ:

– here, there's no question that this is going to be resolved, one way or another, by the Court.

MR BANBROOK:

But I'm just quoting –

ELIAS CJ:

It's just a question of procedure.

MR BANBROOK:

This is obiter, I think, that I've quoted from the Court of Appeal decision but it makes the point which I say is the cornerstone of the appellant's argument here and, as I say, they said, "For example," they're just giving an example, it's not referring to what actually happened in *Abraham*. I know what happened in *Abraham*. It's giving an example: "If a statutorily required consent to prosecute has not been obtained, it is easy enough to characterise what follows as a nullity." Well, I say, there was a statutorily required consent here, it wasn't obtained, that's common ground and the result is that – and the case for appellant, what follows is a nullity and her conviction is a nullity.

At 6.13, just dealing there with the interrelationship between section 12 and section 21 ... I think we've been over that pretty thoroughly.

BLANCHARD J:

Wouldn't it be rather an oddity though, that the omission to get a consent from a Registrar would vitiate a trial conducted by a Judge?

MR BANBROOK:

Well, it seems strange but there must be – one is left to speculate as to why they put in the business about the Registrar when they've got a District Court Judge –

BLANCHARD J:

It just doesn't seem that, that the lack of a consent in those circumstances would be intended to have that kind of consequence.

MR BANBROOK:

Well I think this point was raised in argument at the Court of Appeal and the consensus seemed to be that the scheme might be that the Registrar looked at the – I mean some cases are clear-cut, obviously, because if you had a case, say, like the wreck of the Rena at Tauranga and there's all the gushing into the ocean and there's a charge that relates to that, even a Registrar could quickly work out that leave ought to be granted in that sort of situation, just dealing with it on a practical level but in a more finely balanced matter, the Registrar might then refer it to the District Court Judge for him to consider whether leave should be given or not. It does seem strange that you have consent from a District Court Judge sort of bracketed, as it were, with a Registrar, but that's what the provision says and it is a leave provision and it wasn't complied with.

As I said at 6.13, we don't need to go through that again, that's the interaction between section 12 and section 21 of the Summary Proceedings Act. Then I've referred to paragraph 84 of the Court of Appeal judgment, where it says section 21(1)(a) is also silent as to when leave is to be granted. Well, I suppose that depends on how one interprets section 21(1)(a), but it says – the Court of Appeal are making the point that we've just been discussing. By contrast, the wording of the statutory provisions at issue in the English cases, as well as *R v O'Connell* [1981] 2 NZLR 192 (CA) and *Burgess v Field (No 1)* [2007] 3 NZLR 832 (HC) explicitly

required consent before proceedings could be commenced. The relevant sections were phrased in prohibitory terms. As a matter of degree, Parliament made clear its intention in those cases that leave was an essential prerequisite and integral to the process of issuing proceedings and the leave requirements were stipulated in the provisions constituting the offences in question. In effect, the offence was incomplete in those cases and did not come into existence until consent was given. So without it the Court had no jurisdiction.

At paragraph 85, in respect, in this respect, counsel assumed that leave under section 21(1)(a) of the Summary Proceedings Act required contemporaneously or with or before filing the information. "We accept that its wording implies that timing but Mr Miles did not suggest ..." that – "... suggest why that time is essential, as opposed to any other time along the procedural path to determination. Providing leave is given or deemed to have been given at some stage, and unlike the statutory provisions we had discussed, Parliament did not consider the issue of such importance to stipulate emphatically that leave was a prerequisite defining the information. There is no reason why leave could not be deemed from, or implicit in, the court's substantive decision." And at 86, "In our judgment the omission," I think that should be ARC's, "omission to obtain leave from the District Court Judge or Registrar, if it was required, was not a failure to satisfy a jurisdictional requirement which requires proceedings to be treated as invalid."

And I say that those conclusions reached by the Court of Appeal are inconsistent, in my submission, with the plain meaning of the relevant statutory provisions in the Summary Proceedings Act, and I say: if the provisions of section 12 are read in conjunction with section 21, it's clear proceedings in a prosecution for an infringement offence under the Resource Management Act are commenced by laying an information in the District Court, or can be commenced by laying an information in the District Court. Where the information involves an alleged infringement offence, then the leave of a District Court Judge or Registrar is required before the proceedings are commenced by filing the information.

So it follows that provisions in section 12 and 21, when read together, impose a statutorily required consent to prosecute in the terms used in paragraph 49 in *Abraham*; I've just referred to that section out of that part of the judgment. So it follows: if leave not obtained this vitiates the legal basis for the commencement of proceedings and goes to jurisdiction.

I say at paragraph 85, Court of Appeal judgment, "The court considers the point in time at which it is necessary to obtain leave, if leave had indeed been required. As it is, the argument for the appellant was that leave was required prior to or contemporaneously with the filing of the information." The Court went on to observe – I think we've looked at that passage. I find the concluding comment there rather curious, "There's no reason why leave could not be deemed from, or implicit in the court's substantive decision." I would've thought if there was a leave requirement, you either comply with it or you don't.

WILLIAM YOUNG J:

Well there are cases that deal with leave being granted nunc pro tunc, now for then.

MR BANBROOK:

Yes.

WILLIAM YOUNG J:

That's presumably what the Court of Appeal had in mind.

MR BANBROOK:

But none of the authorities on the question of leave which is a prerequisite of initiating a prosecution action, that I've seen, support the theory that you could have a deemed leave later in the piece and indeed, they're quite the opposite. The English authorities are quite clear that –

WILLIAM YOUNG J:

But it's really, in truth it's really another way of looking at the question: whether failure to obtain leave invalidates the proceedings. It's just another facet of the same little jewel.

MR BANBROOK:

Yes.

ELIAS CJ:

So does that really bring you to your conclusions?

MR BANBROOK:

Yes, it does, yes. Is this a convenient point?

ELIAS CJ:

Well, I think it would be probably convenient to finish your submissions Mr Banbrook because then counsel can move onto the lectern.

MR BANBROOK:

Indeed. So, well, I'm just making the point which to me seems quite obvious, that – perhaps I see things too simplistically but I would've thought that given a leave provision of that nature, the point where you need to get leave is before you filed the informations, or contemporaneously with filing the informations.

I say that the comment in the Court of Appeal judgment, that leave might be deemed to have been given, or indeed be implicit to the decision of the District Court, is simply not consistent with the plain meaning of the statutory provisions. So you have to get leave before you start and then in conclusion – well, the conclusions, I don't need to repeat those. I say that (a) that leave was required; it wasn't obtained. Section 204 doesn't help because this is a case like the example given in *Abraham*, where there was a statutorily required consent, before prosecution commenced. That wasn't done, it wasn't complied with and therefore what followed should be characterised as a nullity, including the conviction of my client.

And that, unless the Court has any questions, any further questions, concludes my submissions.

ELIAS CJ:

Thank you Mr Banbrook. Mr Miles, we will hear briefly from you, particularly in the light of the discussion you've heard. Thank you.

MR MILES QC:

I'm obliged Your Honour.

ELIAS CJ:

After the adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.49 AM

ELIAS CJ:

Yes, Mr Miles.

MR MILES QC:

Yes, may it please your Honours, I'd like to concentrate on the conclusory paragraph in the Court of Appeal's judgment on the issue of the notice and its applicability to the Resource Management Act. You'll find it at section – well, rather, paragraph 59.

ELIAS CJ:

Sorry, I've got a separate copy. So what paragraph is that?

MR MILES QC:

Paragraph 59. It's page 131 of the case on appeal. The court concludes by saying, "In summary, we agree with Ms Downs. Section 2(1)(k) of the SPA Act doesn't include infringement notices issued under 343C of the RMA. In our judgment 343 doesn't provide for the use of the s 21 infringement notice procedure, it provides its own procedure for issuing infringement notices self-contained within the terms of 343 in the prescribed form. Analogous to the s 21 procedure but stands alone independently. The section 21 procedure must refer to and be limited to infringement notices issued in accordance with the form prescribed by the regulations made under SPA and not under the RMA." And that really, I think, accurately sums up the arguments advanced by the Court of Appeal. And, with the greatest of respect to the Court of Appeal, what it really shows is the same difficulty they had with the judgment of Justice Wild in the first instance, that both his Honour in the High Court and the Court of Appeal have struggled to make sense of the Act, have been faced with what I'm saying is a coherent regime, leading inexorably to the proposition that for infringement offences leave is required, so long as you go through 343BA – namely the information – and that, however, faced with the pragmatic information given to them at every level that several hundred of these prosecutions have been run up and down the country for the last, I don't know, five, seven years, and faced with the implied threat that some way and somehow a number of those defendants may apply for a re-hearing, the courts have struggled to avoid what seems to me to be the, not just the "literal meaning", as your Honour the Chief Justice refers to, but I prefer the less pejorative "plain meaning", and the way around it has been to adopt a process adopted by Justice Wild, which I think everyone has accepted was plainly wrong, and I will be suggesting that the arguments summarised at paragraph 59 are equally

wrong, and that this is one of the occasions which Lord Bingham, talking about in *R v Clarke* [2008] UKHL 8, [2008] 1 WLR 338, that however distasteful it might be, but that a technicality has not been complied with, if your Honours are satisfied that that technicality had to be complied with, then, however distasteful it might be, the rule of law requires the convictions to be set aside.

Let me just look at paragraph 59. For a start, there is a subtle mis-stating of the requirement of section 2(1)(k) of the SPA. That does provide for the use of – well, let me quote directly. It provides for, that "infringement notices" means the notice issued where any provision of any other Act provides "for the use of the infringement notice procedure." So, the relevant phrase is, "the use of the infringement notice procedure." That's been restated in that second, third sentence so it provides its own procedure for issuing infringement notices, which isn't quite the same thing. But it then, it leads his Honour to then say, well, that's self-contained, as it were, in 343 because, under the RMA, the notice is prescribed and hence he says it's self-contained. Now the problem with that is that's a complete irrelevance, with respect. When you go back to the defining sections, which is 2(k), describing what the relevant infringement notices must be, and that's significant because the infringement offence hangs on that, the definition of "infringement offence" –

ELIAS CJ:

Sorry, the definition of "infringement offence"?

MR MILES QC:

Means any offence under any Act in respect to which a person may be issued with an infringement notice.

ELIAS CJ:

Yes.

MR MILES QC:

So, clearly what they're talking about is infringement notices under some other Act. I mean, that's just implicit in the wording, "in any other Act." And when you actually go through all of those Acts that are specifically referred to in section 2, and we have, and you've got the Transport Act, the Litter Act, the Financial Report, et cetera, down to (k), or any other one that has a similar provision, you'll find that a number of those have been inserted in both the bundles of authorities provided by the Crown and by

my client, and you'll see that I think in almost every one of them – and the only reason I say "almost" is because in one or two of them only one page or so of the Act has been incorporated into the bundle of authorities – but you'll see in almost every one of them they use exactly the same formula as the RMA Act, notice prescribed by the relevant statute. Let me just take you to just a couple of examples just, you can see what I'm talking about.

If we go to the respondent's – well, it's – yes, go the respondent's bundle of authorities, where, say, the Building Act stops short, but I think you'll find that it does. But let's just take you to the Cadastral Survey Act, which is tab 3, and you'll see under section 60 you've got similar provision as the RMA: "If any person is alleged to have committed in infringement offence, the person may either be proceeded under the Summary Proceedings Act or be served with the infringement notice," exactly the same provision as the RM Act.

ELIAS CJ:

In all of these – well, the ones up to the Cadastral Survey Act, they also follow the subdivision of the statute in that they are headed, "Infringement Offences," or something similar. We don't have the other offences, but we know that in the Resource Management Act, infringement offences are distinct from offences.

MR MILES QC:

Well, yes and no.

ELIAS CJ:

They overlap.

MR MILES QC:

They, what they do is – well, they don't strictly speaking, your Honour, because –

ELIAS CJ:

No, your argument doesn't have them overlapping.

MR MILES QC:

No.

ELIAS CJ:

They have the infringement offences subtracting from the offences.

MR MILES QC:

Well, I wouldn't put it that way, with respect, Ma'am. If you go to 343A, you get an absolutely specific statement in the Act, saying what are infringement offences and what are not.

ELIAS CJ:

Well, they are the offences specified as such in regulations made –

MR MILES QC:

Absolutely.

ELIAS CJ:

– under section 360(1)(ba).

MR MILES QC:

And they –

ELIAS CJ:

And section 360(1)(b)(a), that may have something to…

MR MILES QC:

Well, the effect of the regulations, which we're told what, we're then directed to the regulations, and –

ELIAS CJ:

Well…

MR MILES QC:

– they're quite specific.

ELIAS CJ:

Well, section 360, the regulation-making power in (ba) permits offences, permits regulations prescribing those offences under this Act that constitute infringement offences against this Act.

MR MILES QC:

Yes, and then when you go to the regulation –

ELIAS CJ:

Yes.

MR MILES QC:

– regulation 2, it specifically says that those offences under the Resource Management Act listed in Schedule 1 are infringement offences, for the purposes of 34A to 34D, and that covers 343B, which is the provision where you issue the proceedings or issue a notice.

ELIAS CJ:

They specify that the section which is the derivation but why do you say that – I mean you are driven to saying that all offences under section 338(1)(a) and (d) and the other provisions in the regulations are infringement offences.

MR MILES QC:

Yes, yes, Ma'am. Some aren't but if you actually go to the list –

ELIAS CJ:

What is the purpose in specifying under the, under Schedule 1, the infringement fee?

MR MILES QC:

That's if you go down in the notices. If you go down in the notice provision then those are the fines. It's only if you go down the first alternative under 343B.

ELIAS CJ:

Yes, I understand that argument but on your argument why would it not have been sufficient to specify the provisions of the Act specifying the offences because that's what Schedule 1 purports to be.

MR MILES QC:

Yes, but what Parliament decided to do in 1996 was to bring in the infringement notice and infringement offence regime into the Resource Management Act. What it then did is it had a look at all the offences under 338, and it worked out which of those were subject to this regime and some of them are not. Some of the

enforcement provisions, for instance, are not. This is an odd one, there's a subdivision category if you like which is not part of it. So they made a very careful decision as to which of those offences would be, would come, under this new regime and wouldn't.

BLANCHARD J:

And is it your argument that once they're specified like that they're exclusively under the regime?

MR MILES QC:

Yes.

ELIAS CJ:

Yes, it has to be.

BLANCHARD J:

Well in that case I think you're going to have to confront section 73 – sorry, section 78A. Do you support Mr Banbrook's argument that under 78A, despite silence, imprisonment is possible?

MR MILES QC:

Absolutely, Sir.

BLANCHARD J:

So there's no conviction but off you go to jail?

MR MILES QC:

Yes.

BLANCHARD J:

That seems to me an impossible proposition.

MR MILES QC:

I'm –

BLANCHARD J:

Can you give us any other instances of a New Zealand statute doing that?

MR MILES QC:

What I'm going to give you, your Honour, it might have to be after lunch, but what I understand the position to be under the Sentencing Act is that that does not require a conviction before entering a jail sentence. Now the reason why I'm not being absolutely specific about it is that we did discuss this in the Court of Appeal and the reason why it didn't figure prominently, I think, in the Court of Appeal judgment, is that their Honours were satisfied that while you might have expected a greater specificity if you like, or a slightly altered section, nevertheless section 78 as structured gave you that power, that included the other orders right, and that the combination of that, plus the Sentencing Act, meant that a conviction was not a pre-requisite to jail.

BLANCHARD J:

You accept that, and that if you're right on that point, there's a horrible problem with the overall argument?

MR MILES QC:

No, I don't, your Honour.

BLANCHARD J:

Because it would mean that 78A has written out imprisonment yet it's still there in 339 and was confirmed as recently as two years ago by an amending Act?

MR MILES QC:

I don't think it affects the coherency of my argument as to how the new regime was supposed to operate and because I consider that it still gives the court power to carry out whatever sentence is necessary, then it remains compatible anyway, if somewhat odd. I mean I accept it's an odd proposition but it's not, it doesn't affect the coherency of the argument itself, and if your Honours considered contrary to what I'm saying, that it is a sort of fundamental block, that doesn't affect the coherency of the argument leading up to that. It merely suggest there's a lacuna in the Act which would have to be dealt with maybe by Parliament, but it doesn't mean that you then rewrite the crucial areas of the Act dealing with leave, which is something which I say they're simply not permitted to do.

ELIAS CJ:

Can I just ask you, while we're talking about coherence, and you mention the specific statutes that have been left out of the –

MR MILES QC:

Yes.

ELIAS CJ:

– the specific offences that have been left out of the regime. What do you think is the guiding – what has guided that choice?

MR MILES QC:

Oh, I can't –

ELIAS CJ:

Because one could imagine it would be, one would have thought that this is for more trivial offending, and yet the discharge of contaminants may be extremely serious.

MR MILES QC:

Let me, it might help your Honour, because I can't tell you, and I don't think any of us can –

ELIAS CJ:

No. Whereas a subdivision may be excluded because it's very difficult to prescribe a set fee for that, but if you're talking about discharge of contaminants that is not particularly serious, you may feel a lot more confident about prescribing a fee.

MR MILES QC:

Let me take you to the, to section 338, and I'll give you a rundown as to what is or isn't included.

ELIAS CJ:

Yes.

MR MILES QC:

You find it at the, I'm working off the Resource Management Act –

ELIAS CJ:

Yes.

MR MILES QC:

The one I'm looking at just happens to be the Down, the appellant –

ELIAS CJ:

I'm looking at the Act.

MR MILES QC:

Okay. Well if you go to 338 …

ELIAS CJ:

Sorry, where is it in the bundle?

MR MILES QC:

The only reason, it might be helpful if you look at the bundle, if you could mark it up as I speak.

ELIAS CJ:

Yes.

MR MILES QC:

But it's the appellant's bundle which is what I'm looking at and that's at tab 2 and I think I'm right. I have tried to get this right, Ma'am, but if you look at 338(1), sections 9, 12, 13, 14 and 15 are all infringement offences but 11 is not so that's been taken out. (B), the enforcement order, that's not subject to the infringement regime. There are a couple of odd ones under (1A). It's specifically 338(1B) and 338(1A) –

ELIAS CJ:

Sorry where does that appear?

MR MILES QC:

That comes in under (1)(A) so that's a contravention of parts of section 15, it's not the title section 15. I haven't actually analysed this to the last subsection, your Honour but part of that is not included. Under subsection (2)(b), section 42, which relates to protection of sensitive information, that's not covered by the infringement regime nor is, under (e), an order by the Environment Court. Nor is (3): the willful obstruction et

cetera, or the (b) contravening or refusing to cooperate with the Environment Court, and (c) contravening an esplanade strip or access to it. Now you could say that there is some sort of pattern there where enforcement orders of one sort or another are clearly outside the purview of the infringement –

ELIAS CJ:

Or ones where prescribing a fee for infringement are really forlorn because it's such a contextual assessment.

MR MILES QC:

I don't understand that, your Honour. I don't understand why the issue of a fee should be significant. It looks to me as if there's an issue that certain of these offences are simply too serious to be trivial and in those circumstances you just have the usual, "file the information" and away you go. You don't have the –

ELIAS CJ:

But that takes me back to the question I asked you. A number of discharges may be extremely serious.

MR MILES QC:

But there's no difficulty with that, Ma'am, because then you file the information under 343 –

ELIAS CJ:

And you get leave?

MR MILES QC:

Yes, and – in other words, if you're going to put it at its absolutely simplest, literally the only change in 1996 was the introduction of the notice for the trivial offences. The information requirement remains precisely the same except you need leave, and that's the payoff, if you like, because the new regime gives the prosecuting authority the discretion. Do they just issue a notice or do they issue an information? And Parliament said, well, there ought to be at least the fundamental requirement of granting leave because otherwise there might be examples where the regulator has been too heavy-handed and is issuing informations when it should be issuing notices. Apart from that, no change at all. And that's why I say the structure is entirely coherent and –

ELIAS CJ:

The reason why a fee may be important is in the definition in the Summary Proceedings Act of infringement offence: "Any offence in respect of which a person may be issued with an infringement notice."

MR MILES QC:

Yes.

ELIAS CJ:

So the prescribed fee is pretty central to this.

MR MILES QC:

Well, I don't read that into any of the definitions. The simplest way of introducing this is the way they've introduced it in every one of the Acts which is one-by-one gone back, gone into this regime, and the single defining factor is that they all require a prescribed notice.

ELIAS CJ:

And in the prescribed notice, do they, is it similar to the Resource Management Regulation that we have here, which prescribes the fee?

MR MILES QC:

I haven't checked that, Ma'am. I went so far as to look at a number of the statutes which are, by definition, part of this regime. They're the ones that are actually specifically referred to in section 2, and the reason why the issue of a prescribed notice becomes significant is that this was the rationale in the Court of Appeal for why the SPA doesn't apply. Their Honours said the notice regime is self-contained within the RMA, hence it's not covered by the definition. Which is, it cannot be right, Ma'am, because in all of those Acts that I've looked at, they have a similar regime. They're all prescribed –

ELIAS CJ:

I understand that argument and my question isn't really directed at that.

MR MILES QC:

I appreciate that.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Do they all, I mean they're not all exactly the same?

MR MILES QC:

Not precisely but when you look through them, your Honour, you'll see this pattern.

WILLIAM YOUNG J:

Yes. Do they normally prescribe the reminder notice?

MR MILES QC:

No, they don't.

WILLIAM YOUNG J:

And the Land Transport, the Transport Act does I think?

MR MILES QC:

Some of them do, your Honour, I think. Some don't – and that's, you see, and let me come to the next point. You'll remember if you go back to 59 you'll see their Honours conclude with the statement, "A section 1 procedure must refer to, be limited to infringement notices issued in accordance with the form prescribed by regulations made under the SPA", not under the RMA." So you can see what their Honours are saying. They're saying, if there's a prescribed form in any of these Acts, and that's standalone, you don't actually introduce the SPA into it. Quite wrong, with respect, because the definition specifically talks about the notice regime under other Acts. But where it becomes patently wrong is that claim that it would otherwise be issued in the form prescribed by regulations under the SPA. There are no such regulations under the SPA defining notices.

WILLIAM YOUNG J:

But they define the reminder notice, don't they?

MR MILES QC:

Yes.

WILLIAM YOUNG J:

Not the infringement notice?

MR MILES QC:

Yes, they do, Sir, but not the notice. And, in fact, your Honour is quite right, under the SPA, the reminder notice is quite specific. There's even a form, it's form 10 actually, but there is nothing in there about the notice and the reason there's nothing in there about the notices is because those are the requirements under the clients' acts if you want, just to –

WILLIAM YOUNG J:

Looking – I mean it's not an entirely easy mix of statutes but if you look at section 343B(b) and 343C(4) …

MR MILES QC:

Yes.

WILLIAM YOUNG J:

It's – there's a sort of a double up between 343C(4)(b) and 343B(a).

MR MILES QC:

It's just driving it home, I would put it, your Honour. That – I think the court, it's accepted by all that if you go under the notice regime, then you're bound to go under section 21 of the SPA.

WILLIAM YOUNG J:

So in section 343C(4)(b) this must be a reference to getting leave to the need to prosecute?

MR MILES QC:

Well I'm not sure it does. You –

WILLIAM YOUNG J:

Or that's the direct reference to the section.

MR MILES QC:

Yes.

WILLIAM YOUNG J:

That invokes section 21, which could conceivably suggest that section 343B(a) is just a general indication of some –

MR MILES QC:

Yes it is.

WILLIAM YOUNG J:

– Act and thus section 12 – is that sort of what the Court of Appeal was getting at in a perhaps a rather lengthy sort of way?

MR MILES QC:

I don't think so, Sir.

WILLIAM YOUNG J:

You don't think so. Well it's consistent with what they're saying, isn't it?

MR MILES QC:

It isn't consistent with 59, Sir.

WILLIAM YOUNG J:

With what?

MR MILES QC:

It's not consistent with the summary where the whole point of the summary is that they recognised that if there's a notice regime under any other Act then that's almost certainly covered by 2(k) and hence you're into section 21. What they're trying to say is they're trying to get out of the link between the definition in 2(k), any other Act that has a notice procedure, then the next subsection under that says, we define an infringement offence based on the notice regime and that leads them inexorably to 21 that says, where there is an infringement offences then you have to use the 21 procedure, confirmed by section 12 that says, start with the information as usual but subject always to 20 and 21. It is. It is absolutely coherent. And one could rely on, sort of, one or two, I suppose, other factors that tend to support that. The list of statutes that are part of the regime and which are listed at section 2 is not complete.

It's recognised, I think, at paragraph 53 or 55 I think of their judgment … that there are at least another 12 statutes beside the RMA which are not listed but which have the notice regime. So merely being included in that list is simply not a pointer either way, it just happens to be a number that are. There are an equal number that aren't. Similarly, and the third factor which does point very significantly to our assessment as to the proper construction of the statute, is that a number of these, including four or five of those statutes which are specifically named at section 2, have a deliberate opt out clause from section 21.

Let me take you to one of those. If we go to the respondent's bundle, you'll see at tab 8 the Land Transport Act. If you go to –

ELIAS CJ:

Is this enacted after the amendments to the Summary Proceedings Act?

MR MILES QC:

Yes, Ma'am.

ELIAS CJ:

Which the Resource Management Act wasn't?

MR MILES QC:

No, there's no – there's no significance, there are about five or six of these and I don't think there's any significance in that.

ELIAS CJ:

Well, I just – you might be entirely right but if a procedural change is engrafted onto an existing statute, it's not surprising that there's more specific linkages in a subsequent statute.

MR MILES QC:

Well, this is '98.

ELIAS CJ:

Yes.

MR MILES QC:

The amendments into the Resource Management was '97, I think, '96 or '97, '96. If you go to section 138 which is page 2 of the – where the infringement offence is, 138, identical section, the one we're used to but if you go over the page to 2, "Despite anything in section 21 of the Summary Proceedings Act, leave of a District Court Judge or Registrar to land information is not necessary where the enforcement authority proceeds with the infringement office summarily." So, a quite deliberate opt-out which is about as clear an indicator that it otherwise complies without that, as you could get.

ELIAS CJ:

Do we know how infringement offences are defined in the Land Transport Act?

MR MILES QC:

I haven't – I hadn't checked that but I – it will be linked with the issue, it will be; the notice is in a prescribed form that – there will be somewhere in here that will specifically refer to that. Otherwise, of course, because the notice regime is an integral part of the Act, it relates back to section 2 and the Land Transport Act is specifically named as one of those Acts which is subject to that regime.

The – I'm just – there are a number of other Acts that come into this category and we've actually listed some of those, your Honour, in our bundle of authorities and I can actually just jot them down for you if you thought it was helpful. We've got the Gambling Act, the Financial Reporting Act, the Fisheries Act, Railways Act and the Land Transport Act, are all Acts that have these opt-out clauses.

I'm just going to take you to one of those because it's a particularly interesting example and that's the Fisheries Act which is 1996 incidentally, so that's before the Resource Management. Gambling is 2003 – Financial Reporting is actually 1993, so there's no pattern here but if we go to the Fisheries Act which is tab 9 of our bundle, we have a more subtle opt-out clause.

You'll see that's, as I say tab 9, paragraph 260, the infringement offences. Again, 1A and B, same format. Then under 2: "Despite anything in section 21 of the Summary Proceedings Act, leave of a District Court Judge or Registrar to Land Information is not necessary if a fishery officer proceeds with an infringement offence summarily." So the distinction there, which is an interesting one, is that so long as it's the fishery officer that's laying the complaint, then you don't need leave.

WILLIAM YOUNG J:

But it's only fisheries officers, isn't it? Section 260A refers to a fishery officer.

MR MILES QC:

Yes but under the Act, your Honour, an –

WILLIAM YOUNG J:

Can anyone prosecute?

MR MILES QC:

Exactly, exactly, and it's the same under the RMA, Sir. So the filter would immediately be a factor there.

BLANCHARD J:

That section was actually put into the Fisheries Act by an amending Act in 1999.

MR MILES QC:

Well yes, thank you, Sir.

BLANCHARD J:

And similarly, the Financial Reporting Act, the section in question was put in in 2006.

MR MILES QC:

Right.

BLANCHARD J:

For what it's worth.

MR MILES QC:

For what it's worth, quite.

ELIAS CJ:

And similarly, we don't know how infringement offences are defined for the purposes of the Fisheries Act, do we?

MR MILES QC:

Well, I've actually – my junior – apparently we've already done some work on that, unbeknown to me and I actually have a schedule here. In the Civil Aviation Act for instance, we've got section – regulation 5, under the – might be –

ELIAS CJ:

Are they similar, are they prescribed by regulations?

MR MILES QC:

Yes and I –

ELIAS CJ:

Do we have a copy of one of the regulations?

MR MILES QC:

I can – let me –

ELIAS CJ:

It's fine if we don't, but it does seem to me that the definition of infringement offence and whether – is perhaps key to the case.

MR MILES QC:

Yes, but I don't think it's relevant though your Honour, when you look at the route by which you get there through the Summary Proceedings Act.

ELIAS CJ:

But surely one starts with the principal Act which creates the offences and in the Resource Management Act, just looking at it generally, you have a wider range of offences than is encompassed in the infringement offences and, on one view, the infringement offences are simply a carve out of the other offences created by the Act, presumably because they deal with the low end offences?

MR MILES QC:

I'm with you up to the last phrase, your Honour. I would put it as a sort of different form really.

ELIAS CJ:

But you would say it takes out of the definition of offences, anything in –

MR MILES QC:

Specified in the schedule, yes –

ELIAS CJ:

– anything that is named in the schedule. Even though the schedule is a much more composite identification because it's tied into the fees prescribed.

MR MILES QC:

Yes, but not that part, your Honour. The –

ELIAS CJ:

Well you have to divide it up then, you have to slice and dice it.

MR MILES QC:

Well no, no you don't, because it's completely irrelevant to the definition as to what fees might or mightn't be charged, if you moved under the notice provision.

ELIAS CJ:

Well that's what I'm not sure of, because it does seem to me that the whole system may well be coherent if it's the lower end, defined by the decision to seek only the prescribed fee that is in the infringement offences.

MR MILES QC:

But section 343(2) then becomes irrelevant because that gives you the two options. On your proposition Ma'am, it seems to me that there's no point then in issuing an information because if you're only to get the sorts of penalties as defined in the schedule, namely a list of fees or whatever, then why would you bother? You'd just go straight through the notice provision.

Also too Ma'am, if you go to 343A, that defines what an infringement offence is: "An infringement offence means an offence specified as such in the regulations." So, you know, that couldn't be clearer.

ELIAS CJ:

But it depends how you read the regulations. It depends whether you see them as making all offences under – I've forgotten what the provision is – if it makes them all infringement offences. It depends how you read the regulations.

MR MILES QC:

Well, if you go to the regulation which I'm looking at the moment, you've got regulation 2 which specifically talks about infringements offences and regulation 3, that talks about infringement fees and regulation 4, that talks about infringement notices. Now, each one of these issues are dealt quite separately and the purpose of course is to make it clear that when the Act talks about infringement offences as defined here, this is what you look at, you look at regulation 2 and those offences listed in schedule 1 are infringement offences. The fees are irrelevant to regulation 2.

So, one can conclude, your Honour, I think logically, just still finishing off I suppose with section 59, paragraph 59 of the judgment, that the section 21 procedure must refer to and be limited to infringement notices issued in accordance with the form prescribed by regulations made under the SPA Act which, as I've said, doesn't ... because there is no such form because the SPA always accepts that the notices are issued under other Acts and the SPA Act then enforces those through the notice, the reminder notice and the subsequent ways of enforcing it because there's no way of enforcing these under the RM Act.

You know, my friend for the appellant took your Honour through the other point which is the suggestion in the Court of Appeal that these are self-contained provisions under the RM Act. I'm not going to go through all those again but you'll remember that as you go from 340, is it, through to 343, they permeate, the SPA Act permeates through the notice regime, the reminder regime and the Act itself. There's nothing standalone about this at all. Section 21 permeates through those provisions which is exactly what you'd expect if there is this coherency in this regime that I'm talking about.

Because I know I won't be able to respond to my friends for the Crown and for the ARC, can I just make a couple of points? No, before I do that – yes, yes, no, I'll just make a couple of points on this issue before I get onto the leave, the section 204 issue.

My friend for the ARC relies, as does the Crown up to a point, on certain propositions that they say they find from the Law Commission. When you go to the Law Commission and the relevant section, there's just a throwaway sentence which is simply wrong. That sentence suggests that leave is not required in the case of two or three of these statutes that they refer to. They give no reason why they say that. We think it's just wrong and our proposition that –

ELIAS CJ:

Where do we find the Law Commission statement?

MR MILES QC:

It's at the end of our – tab 28.

ELIAS CJ:

Tab 28 of?

MR MILES QC:

Of the, yes, of the Crown's –

ELIAS CJ:

Of the Crown's.

MR MILES QC:

Yes and the particular throwaway lines we're talking about your Honour, is paragraph 218 at page 58 and there's –

WILLIAM YOUNG J:

Paragraph 218?

MR MILES QC:

Yes, Sir, paragraph 218, page 58, it's the last bullet point under 218. You'll see that bullet point starting where the breach is adhered to and if you go down about four lines you'll see, "Filing an information for an infringement offence generally requires the leave of the court or a Registrar, though for a number of regimes such leave is not required," and then you'll see it quotes from the Building Act, Cadastral, Civil Aviation. It's not at all clear to us why that throwaway line is inserted.

ELIAS CJ:

Sorry, which is the throwaway line? The –

MR MILES QC:

At paragraph 218.

ELIAS CJ:

Yes.

MR MILES QC:

See the last bullet point on page 58?

ELIAS CJ:

Yes, yes.

MR MILES QC:

Four lines down, "Filing an information for an infringement offence generally requires the leave of the court or a registrar to which –

ELIAS CJ:

Yes.

MR MILES QC:

– though for a number of regimes such leave is not required."

McGRATH J:

So you're saying that leave is required in those Acts referred to in footnote 177?

MR MILES QC:

We say it's required on all of them, your Honour. Unless –

WILLIAM YOUNG J:

Unless it's specifically –

MR MILES QC:

– there's an opt out –

WILLIAM YOUNG J:

So these are statutes that don't have the opt-out?

MR MILES QC:

Well one or two of them, I think, do. I think the Civil – no, none of them do, no. So, we don't know.

WILLIAM YOUNG J:

Do you know what the logic is of this little collection? Are they not mentioned in section 2(1)?

MR MILES QC:

Several of those are –

WILLIAM YOUNG J:

The Dog Control Act –

MR MILES QC:

– and I think the Building Act. Oh, no, the Building Act isn't, Sir, nor is the Cadastral, Civil Aviation is and Dog Control is and the Animal Welfare –

WILLIAM YOUNG J:

Dog Control isn't, is it? Oh yes, it is, sorry, yes.

MR MILES QC:

And I know Your Honours won't ask me what coherent factors are involved here.

WILLIAM YOUNG J:

All right.

MR MILES QC:

I have no idea and quite why some were and some weren't. I mean, you can see why in a broad sense, why they picked up on a whole number of Acts to say ought to be, or could logically opt –

WILLIAM YOUNG J:

Have they got opt-outs, the Dog Control and the Civil Aviation Acts?

MR MILES QC:

Neither of them, Sir. The only opt outs I listed are Fisheries, Land Transport, Gambling, Financial Reporting and Railway. For all I know, your Honour, the reason why they might have an opt-out is because the bureaucrats running that particular division of government may have just preferred to remove the requirement for leave. I mean, who knows. I don't myself see any logical connection between those with the opt-out and those that don't. The only significant point of course, to be drawn from it, is the fact they needed the opt-out at all.

BLANCHARD J:

What's happened to this Law Commission report? Has it been –

MR MILES QC:

Can't help your Honour on that but running through –

ELIAS CJ:

They talk about "fixed penalty offences". Your submission is that the schedule to the regulations doesn't identify fixed penalty offences?

MR MILES QC:

No, it doesn't, Ma'am, no because it recognises that the penalties are those at 338. Running through the submissions for the ARC is the, what I would respectfully describe as, the fallacy where it is suggested that this regime that came into play in 1996, was simply in a sense too level a regime. It kept the standard filing of information and then added the notice regime whereas what we say is the only logical way of – that excludes altogether 343B because the moment you have 343B you have the clear two options within the new regime and my friend never really deals with that.

ELIAS CJ:

Although if it is a fixed penalty regime that is the infringement offence then it's entirely understandable that if you want to proceed by way of information you would have to get approval. So it's not totally redundant, that provision, which is what I understood your submission to have been.

MR MILES QC:

Well I think it is Ma'am because you've still got the right to issue information in the usual way for the non-infringement offences. I think what your Honour is saying, the only other alternative is the notice regime and the fixed fees.

ELIAS CJ:

Yes. My question to you is that it is possible to look at this regime as preserving the entire offence but carving out a fixed penalty regime and within the fixed penalty you can either proceed by notice or you can get permission to proceed on information in circumstances where that's warranted, and I raised the suggestion that it might be, where you know there's a factual dispute and it would be better really to have that set up for determination rather than leaving it to the person receiving the notice to dispute it later ...

MR MILES QC:

Yes.

ELIAS CJ:

I mean it's not incoherent.

MR MILES QC:

It just isn't what the Act says.

ELIAS CJ:

All right. Okay.

MR MILES QC:

And if it says what I, and my friend Mr Banbrook, say it does, and actually what the Crown as a matter of fact, I just mention this as a by the way, the Crown in the Court of Appeal accepted that the notice regime, if you like, was as I am describing it today. They accepted that a notice under the Resource Management Act amounted to a notice pursuant to section 2(k), precisely what the Court of Appeal disagreed with, but they conceded in a formal concession that that was the only way literally to look at it. That that was the inevitable and literal approach. They then, of course, went on to say, well perhaps in a big picture, you know there might be something different, and of course they argued very strenuously that section 204 was the way out of this. But I am a little concerned that my friend for the Crown today is ignoring completely

that concession and as I understand his argument is not, is simply ignoring that concession and I'm not entirely sure what is proper in those circumstances.

ELIAS CJ:

Well you're an intervener and this is a public law matter that has to be resolved properly. I'm not sure that really a concession, if it doesn't affect you, is something that would be determinative.

MR MILES QC:

Well it really doesn't affect me because I agreed with it in the Court of Appeal.

ELIAS CJ:

Yes, of course.

MR MILES QC:

So I just look, I just mention that, your Honour.

ELIAS CJ:

Yes.

MR MILES QC:

And I suppose if you're being at one's most charitable, you would say that that just recognises the complexity of this, of the –

ELIAS CJ:

Or the strength of the argument that you're putting to us.

MR MILES QC:

Well that's a nice way of putting it, Ma'am. All right can I move on, I'm conscious that I'm, in a way this is a, some indulgence, on the part of your Honours. Could I just touch on the 204 issue? In the Court of Appeal they really distinguished what seems to me to be essentially indistinguishable, that's that line of authority, I suppose starting with *O'Connell* in New Zealand but that went back to *Bates* in England and during the first war. Then followed through with *Abraham* then with *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA), or rather *Hall* and then *Abraham* and then *Burgess v Field*. So you've got *Abraham* and *Burgess v Field* just in the last few years, *O'Connell* back in 1981 and *Hall* around about the same time. Now of course some

of the factual issues in those judgments have no relevance to what we're talking about today but what is relevant is the single theme running through all of those judgments, going back to *R v Bates* [1911] 1 KB 964 in 1915 or 16 whenever it was, where, if there is a leave requirement that goes to jurisdiction, and the Court of Appeal consistently in all of those cases has accepted that as a proposition. Now I noticed his Honour Justice Young was counsel in *O'Connell* I think.

WILLIAM YOUNG J:

I was, yes. I remember it well.

MR MILES QC:

Yes. Did you say you were?

WILLIAM YOUNG J:

I remember it well.

MR MILES QC:

Yes, and of course you failed there because the delegation had, in fact, taken place whereas the – or it hadn't been recorded in the information or there hadn't been evidence on it or something to that effect, but what the Court of Appeal, and I might say it's clear your Honour very nearly got there, but the, ultimately it failed because it didn't – the fact that the delegation had occurred turned – and the failure to prove it was an irregularity or omission that squarely came within 204. But what the Court said was if the delegation had not taken place then that would have been a different matter and note that the delegation there was quite a significant one. The leave required was the Attorney-General, but the Attorney-General had the right to delegate it to the Commissioner of Police who in turn could delegate it to a senior police officer, I think someone with the rank of Inspector. So we had there what was on the face of it a consent from a very senior public law officer but who then under the delegation process it could go down, sufficiently far down the track, if you like, so that a police officer was able to give the approval.

I think – so there's no question about that legal principle that has been, both in England and here, been dominant since 1917 I suppose. The issue which is troubling your Honours is the precise wording of the leave and perhaps I understand the sense there that your Honours see a distinction between the specific requirement, which tends to be the wording in those cases where the leave is

required before something can happen, before the prosecution can commence, and there seemed to be a distinction between that and the wording of this Act. I'm inclined to agree with Mr Banbrook that the distinction is not a fundamental distinction. In either case leave is required.

When you look at section 21 if – yes, "[P]roceedings may be commenced with the leave of a District Court Judge by laying an information." I don't see that as any other set of requirements other than if the decision is to lay the information, then leave is required, you can't lay the information without it, and hence you come squarely within that jurisdictional issue. And why should it not be? It's clearly there for a purpose and it would be quite wrong, I would respectfully suggest, for this Court to undermine the clear intention by Parliament to have that there, by saying that it is in fact not required. Because I don't think there's a halfway house, either it is or isn't, and if your Honours take the view of the Court of Appeal, which for instance suggested that those earlier decisions could be distinguished because they were public law officers, Attorney-General and such like, well, again, that seems wrong to me. We've got a Judge here, certainly delegate – or a Registrar – but both senior figures in their own right, and we have the opt-out clauses where, in certain circumstances it has been suggested it's not needed, which has the clear, I suppose, inference, that where it stays there it is needed, and it's a requirement. I wonder whether the closest analogy – because your Honours said to my friend, "What's your best case here?" – and I mean, I'm inclined to think, while not, while still happily relying on the others, but I'm inclined to look at *R v Clarke* as being probably the most helpful. We find that in the appellant's bundle at tab 11.

Now, it's significant for two or three reasons, your Honours, it seems to me. Firstly, it's a decision of Lord Bingham's in the House of Lords, and a relatively recently decision. Secondly, his Lordship recognised – have your Honours got the case? Yes. You'll see it's about as technical an issue as it could conceivably get. You pick it up, I think, at page 340 and 341 of the judgment, at paragraph 2 of the judgment on 340, his Lordship said, "The heart of the issues is the sections of the 1933 Act," and that sets out, at paragraph 2, "Where any, at commencement of this – any persons, obtained the direction or consent in writing of a judge of the High Court for the preferment of an indictment under the Vexatious Indictments Act," then that's what you do. Under 2(1), you'll see down in the last line, "Where a bill of indictment has been so preferred the proper officer of the court she, if he is satisfied the

requirements of the next following subsection have been complied with, sign the bill," and it then becomes an indictment.

And the next subsection is that next one that says that, "Provided the judge or chairman of the court is satisfied that the requirements have been complied with he may, on the application of the prosecutor, direct the proper officer to sign the bill and the bill shall be signed." What I think this, while a slightly roundabout way of describing it, is saying is that the Judge is satisfied the requirements for the indictment, he'll direct the proper officer to sign and then the proper officer, who I understand is really the, sort of an equivalent of the Registrar, then has to satisfy himself that that has been, that the Judge has done that, and then he will sign the bill. Now, in this case, the bill was never signed, you know, it was literally as, it was just one of those oversights that happened, and it went to the Judge, and you'll see at the beginning of the judgment what happened –

ELIAS CJ:
Twelve years' imprisonment.

MR MILES QC:
Imprisonment, and pretty serious –

WILLIAM YOUNG J:
Which they'd served by the time the case was heard.

MR MILES QC:
Well, he got 12 years, so it was pretty serious. Well, what his Lordship went on to say, you see, at paragraph 9, where he said it's very similar to *R v Morais* (1988) 87 Cr App R 9 where something very similar had happened and they held that without an indictment there couldn't be a valid trial. And then at the top of page 350, you know, three lines down, his Lordship said: "Technicality is always distasteful when it appears to contradict the merits of a case," duty of the court is to apply the law, sometimes technical, may be thought if the state exercise its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place; I doubt if that was, obviously irrelevant to that case, but it was the point before that, of course, that had some significance.

And you'll see at 20, where he discounted the so-called sea-change, which had been referred to in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 and *R v Ashton* [2007] 1 WLR 181 (CA), and he was pretty critical of *Ashton*. You'll see, a few lines down, "I can't accept the basis on which *Ashton* distinguished its earlier decisions." The reason that this had some significance is because the Court of Appeal was given *Ashton*, which talks about a sea-change, a so-called sea-change, being a different way of looking at technicalities, and Lord Bingham wasn't really having any of that. He thought that the fundamental issue remains exactly the same – if that's a requirement then that goes to jurisdiction and can't be saved.

So, your Honours, I'd say, distasteful as it might be, this is a requirement that the regulator was bound to follow, failed to do so, and it matters not, it matters nothing that there'd been a number of, several hundred of convictions before this, you would know what will happen then, and it's irrelevant to this. This point was taken by my client actually before the conviction was entered, and the learned District Court Judge, by that stage, by the time he gave his judgment, Justice Wild had delivered his judgment and he felt he was bound by that, so the rest was history, as it were. That's…

ELIAS CJ:

That's it? Thank you, Mr Miles. We'll take the adjournment and resume at 2.15.

COURT ADOURNS: 12.58 PM

COURT RESUMES: 2.16 PM

MR MILES QC:

Your Honour, Mr Downs has given me one and a half more minutes if you would permit that?

ELIAS CJ:

Yes, of course.

MR MILES QC:

It's just a reference to the report, the Law Commission report, that one that, that's tab 28 in the Crown's bundle. There is a reference at paragraph 46 to this issue of some infringement offences in New Zealand noted as being imprisonable offences, and

they specifically refer to the Resource Management Act, section 338 and 339. It's just significant because they note that that's –

ELIAS CJ:

Yes.

MR MILES QC:

– in other words the regime includes the imprisonable offences. They don't like it, as it happens, and recommend against it but that's by the by.

ELIAS CJ:

Thank you.

BLANCHARD J:

Well the next paragraph says if there's a range of culpability, or potential for harm is so wide as to justify imprisonment, in more grave instances offending, then drafters should break the offending into separate offences in the legislation. Well arguably maybe that's been done?

MR MILES QC:

They don't think so.

ELIAS CJ:

This is 2005?

BLANCHARD J:

Yes.

MR MILES QC:

And under the Dog Control Act, in case your Honours weren't totally au fait with those –

ELIAS CJ:

No.

MR MILES QC:

You can be imprisoned up to three months, section 54(2), and it is an infringement offence under Schedule 1 of that Act.

ELIAS CJ:

Is the Schedule in the same sort of –

MR MILES QC:

I believe so, Ma'am.

ELIAS CJ:

It has the infringement fines noted in it too, does it? Don't worry, we can look at it.

MR MILES QC:

I can't be certain of that, but I have said at least one other in that form.

ELIAS CJ:

Yes, thank you. Yes, Mr Downs?

MR DOWNS:

Yes, may it please the Court. This is a case in which this Court is confronted with dissonance or apparent dissonance as between the Summary Proceedings Act and the Resource Management Act and it's the respondent's submission in this Court that when Parliament amended the Resource Management Act in 1996 to incorporate an infringement offence capacity, it did not intend to import a leave requirement a la section 21 for offences that hitherto had not required leave and which, to that point, had been prosecuted in the full-blooded criminal way.

The submission can be expressed in different ways. I've used the phrase "a dual classification offence" in the respondent's written submissions. I acknowledge it's my phrase as opposed to anyone else's, but I hope it captures this capacity to prosecute what could be a serious offence as such in a summary fashion. But which also may have an infringement capacity for relatively trivial aspects. Your Honour the Chief Justice referred to a "carve-out" provision in the context of the Resource Management Act. In my respectful submission the point is the same as I'm trying to make.

Now we acknowledge, as we must as pointed out by my learned friend, that this argument is rather different to that proffered to the Court of Appeal but we also observe that the concession wasn't accepted by the Court of Appeal and in those circumstances we respectfully observe that there's no reason for it to be repeated here and in any event the Crown has had the benefit of, with respect, helpful submissions of the second intervener, that institution undoubtedly being familiar with the Resource Management Act, and hence the change of position which we acknowledge has occurred.

It may be worthwhile to commence what I hope will be a briefish oral presentation to say something about the history of the infringement offence regime because that may shed some light on this interpretive problem. Now that's captured by the Law Commission's report which finds its way, it's at tab 28 of our written bundle, but it can be stated reasonably succinctly. The infringement offence regime began life concerned with unsurprisingly trivial offences or reasonably trivial offences such as parking, overloading, minor transport offences that were clogging up the work of the District Court and it was recommended that those offences should be dealt with in an administrative way. That resulted in changes to the Land Transport Act to deal with those sorts of offences, with the first true generic regime for infringement offences being the amendments to the Summary Proceedings Act 1957 in 1987, and that Amendment Act introduced the two key requirements of the regime that prevails today and they are section 21, which imports the leave requirement and contains the machinery in relation to infringement offences, and also section 78A, which has been the subject of some discussion thus far in the hearing.

Now if I might pause at this point to address a question ventured in the course of argument earlier, what's happened with the Law Commission's report? What I can say is that the Criminal Procedure Act 2011 maintains the definition of an infringement offence in section 2 of the Summary Proceedings Act. So it maintains that key provision. What is currently section 78A will be section 375 of the Criminal Procedure Act and I regret it's not in front of me but from memory it's either similar or in identical terms to the existing provision. The net effect appears to be that the regime that exists today will be that which continues under the new Criminal Procedure Act with commencement from some time in 2013.

So to return to the history. The Law Commission observes that predictably regulatory bodies received authorisation from Parliament to add a variety of

infringement offences to their regimes to control essentially a variety of regulatory aspects and the Law Commission noted that this growth was unforeseen. The significance to this case is that that growth seems to have occurred in a particular way and that is the reason, in my respectful submission, why the Law Commission has identified five enactments that it says do not contain or are not bound by the leave criteria in section 21. This is the point my learned friend says was a throwaway line in the Law Commission's report. With great respect it's anything but. If we examine those enactments, or at least the relevant provisions of them, in the respondent's bundle they appear at tabs 1, 2, 3, 4 and 6. They contain, for example, to look at section 161 of the Animal Welfare Act, which is behind tab 1, it contains a provision similar if not identical to section 343B of the Resource Management Act. And if we continue on, for example, and look at the Building Act, section 371(1) is the relevant provision there, again similar if not identical to the provision in the Resource Management Act. And we can track those through but that is the one provision that the respondent has been able to identify in common with the Resource Management Act which appears to be the reason for the Law Commission's opinion, which I accept is just that, but nonetheless important, that the leave criterion in section 21 doesn't necessarily govern offences that can be charged as infringement offences.

WILLIAM YOUNG J:

But aren't the other – some of the other statutes that are mentioned in the infringement notice definition in similar terms? Don't they often, the Fisheries Act for instance, contain a provision that a prosecution could be either under the Summary Proceedings Act or by infringement notice?

MR DOWNS:

I think I'm right to recall that the Fisheries Act is one of the opt-out cases as described by the first intervener. It and a number of other Acts have what's –

WILLIAM YOUNG J:

Oh I see.

MR DOWNS:

– said to be the opt-out clause but – and this was a point touched upon in argument in the course of the first intervener's submissions … If we look at the timing of those opt-out provisions, all of them appear to have been subsequent to the amendments

to the Resource Management Act. The first on my hopefully careful reading is 1998 and they follow from that date. Now where does that take us –

WILLIAM YOUNG J:

So just remind me, when was the Resource Management Act, 1996?

MR DOWNS:

1996, your Honour, yes, enacted first in 1991 and then the amendments in 1996.

WILLIAM YOUNG J:

All right.

MR DOWNS:

And the point I would simply seek to make is that whilst those opt-out provisions contain unequivocal language that there's no leave requirement for those corresponding enactments, in my submission this is a case in which the legislature has subsequently responded to an apparent problem with more carefully, with respect, chosen language. It's not a case that the provision that appears as section 343B, and those identified by the Law Commission, were intended to have opposite or different effect.

Now in support I suggest for the Crown's argument, which largely repeats in advance I must confess, the second intervener's case, is that the amendments to the Resource Management Act were intended to offer an additional prosecutorial capacity as opposed to imposing a leave requirement. And we find some support for that in intrinsic materials. The relevant passage from Hansard appears at page 7 of the Crown's submissions under paragraphs 18 and 19 and it's the smaller text reproduced as a quotation in paragraphs 18 and 19. Rather than read it aloud I simply, with respect, invite the Court's attention to it, if it pleases the Court.

Now the argument for the appellant and the first intervener is an awkward fit with what appears, in my submission in this, or in these passages. It seems tolerably clear that the intention was to increase the capacity of prosecuting authorities under the Resource Management Act to have recourse to the infringement offence procedure where the offence was relatively minor, relatively trivial, but it wasn't to import the leave criterion, in my submission.

Now if we're wrong about that then there remains the problem of section 78A of the Summary Proceedings Act and this, with great respect, poses a substantial hurdle to the argument for the appellant and the first intervener because it makes clear beyond any doubt that there cannot be a conviction for an infringement offence and it would appear, it would appear that the purpose of the provision is to preclude a sentence of imprisonment. I accept it doesn't say as much but we respectfully endorse the comments from the bench, that section 78A which was, as we've observed, a feature of the original infringement offence regime, established by the amendments to the Proceedings Act in 1987, was to ensure that a person who had committed an relatively trivial offence didn't have the stigma of conviction and wasn't punished in a more severe way, other than by the imposition of the infringement fee and of course if they disputed the case, by costs, court costs in accordance with section 21 of the Summary Proceedings Act.

McGRATH J:

Section 78A was – has been in the legislation, albeit in a different form, for quite some time, hasn't it? I mean, going back to the early 1980s.

MR DOWNS:

There was a different, mmm, there was a different way in which the early infringement offences operated and, I confuse, I'm going by memory but, as I recollect it, the early regimes such as the Land Transport Act –

McGRATH J:

Then the Transport Act?

MR DOWNS:

Yes, in 1980 for example, that provided for the issue of an infringement notice. If the person didn't pay the applicable infringement fee, they were then liable for the original offence and a conviction.

McGRATH J:

I think you may find section 78A then was solely concerned with traffic offences which would be consistent with what you're saying.

MR DOWNS:

But then with the expansion of the infringement offence regime, clearly Parliament –

McGRATH J:
From 1987?

MR DOWNS:
Yes, from 1987, was clearly concerned to protect against those sorts of consequences and, in my respectful submission, is consistent with the Crown case.

Now other textual points are made by the second intervener and unless the court wishes otherwise, I simply propose to have the second intervener either address those, or the Court have reference to the written submissions in that regard, rather than repeat, with respect, of what are important but rather obvious points which brings us – I'm sorry ...

McGRATH J:
I just wanted perhaps Mr Downs, what you said about the point in relation to the regulations, regulation 2 –

MR DOWNS:
Yes.

McGRATH J:
– that the offences listed in Schedule 1 are infringement offences for the purposes of 343A to 343D, those sections –

MR DOWNS:
No, indeed.

McGRATH J:
– not 338. Is that – I just wondered really if you had any submissions as to how strong that point was?

MR DOWNS:
Well it's probably, in truth, it's probably an alternative argument to the one that the Crown is advancing because our argument really proceeds on the assumption that in a sense, that in a sense this new regime that's arisen has created infringement offences that can be dealt with either way.

McGRATH J:
Yes.

MR DOWNS:
Whereas I understand the submission on behalf of the second intervener is that the original full-blooded criminal offence remains just that and it's not to be considered as an infringement offence for any purpose whatsoever and so presumably, you know, it would place weight upon regulation 2, as underscoring its argument.

McGRATH J:
Right.

MR DOWNS:
As to leave, this is of course the point under section 204 of the Summary Proceedings Act and I should hope to be equally brief. I suggest that, despite a great effort, no case has been placed before the court on all fours with this one. All of the authorities that are identified and quite properly so, are concerned with the situation in which there was a prohibition on the commencement of a prosecution and the point we make, or seek to make, is that section 21 doesn't require leave for the filing of an infringement for the service of an infringement notice and so forth.

So it doesn't prevent the act of prosecution. However, leave is directed to modus; that is, if a person is to be brought before the Court pursuant to the normal criminal machinery and if we seek and if we contend that that's a distinguishing feature from the leave criterion that appears in so many other enactments with which the Court is familiar, requiring either the consent of the Attorney-General or, in some other instances, a High Court Judge.

The allied point is that that power is exercisable by a Registrar of the District Court, and it would appear to be the case that Parliament considers that the leave criterion is to protect against the misuse, the misuse of the informant process by laying an information in relation to an infringement offence, which is clearly an unwarranted exercise of prosecutorial power, something plainly trivial, dropping litter for example, in a public place, has resulted in the person – speaking, I confess, a little emotively –

being hauled before a court and answering a summons on an information. And, with respect, that's what it's directed to, to prevent against such abuse.

ELIAS CJ:

It also could be, I suppose, directed against clogging up court time.

MR DOWNS:

Perhaps, if we have regard to the purpose of course of the infringement offence regime, which was to prevent just that.

ELIAS CJ:

And the officer who can, the Registrar, giving approval.

MR DOWNS:

Yes. Now, with that submission, we make the connected point that no one has suggested that this is a case of overcharging, or that there's been any improper use of the procedure or an abuse. It was never suggested to the Court below so far as I'm aware, and certainly no such abuse was ever found.

McGRATH J:

But you really – while I accept that – you're really arguing here, I suppose, are you, that the nature of the circumstances in which leave is exercised is such that Parliament can't have contended that failure to comply would lead to invalidity?

MR DOWNS:

Yes, that is our argument, Your Honour, I apologise that I haven't begun with that banner. But the point here is that this couldn't be considered to be a jurisdictional error. So, to use a case by way of example, the court may recall a case called *R v Blows* CA103/95, 31 August 1995, in which a gentleman was tried in the District Court for a charge of rape or some sexual offence but which, because of the procedural quirks along the way, could only be tried in the High Court. And the Court of Appeal, understandably, said, "Well, that's an error of jurisdiction in its purest sense and therefore it couldn't be saved by any savings provision." That was a case directed to the proviso to section 385 of the Crimes Act, but a similar point arises, in my respectful submission. The sort of error here, if it is such, is not of a jurisdictional nature.

McGRATH J:

Does that leave the Court with a discretion?

MR DOWNS:

I wonder if I might pause before answering that to refresh my memory as to the exact nomenclature of section 21 – sorry, section 204. Yes, we'll find it in the Crown's bundle behind tab 11. Having done so – to answer your Honour's question directly – if the Court were to conclude that the error was jurisdictional, then obviously there'd be no discretion to do anything but to quash the convictions. But the inquiry, and relevant inquiry in my submission, then becomes whether there's been a miscarriage of justice.

McGRATH J:

So it's mandatory, that effect, that's what you're saying, I think, isn't it?

MR DOWNS:

Yes, it is, in my submission. And the point is made that assuming, assuming that this is the type of error that's not jurisdictional, there's no argument and, as I see it before this Court, that there has been a miscarriage of justice. Indeed, I note that the appellant, when confronted with the summary charge, elected trial by jury. So it would be difficult for her to assert that she wanted to be dealt with by the prompt administrative disposal of the case, pursuant to the infringement notice procedure.

May it please the Court, those are the submissions on behalf of the respondent, unless there are further questions from the Bench.

ELIAS CJ:

Thank you, Mr Downs.

MR DOWNS:

May it please the Court.

ELIAS CJ:

Ms Hollings.

MS HOLLINGS QC:

May it please your Honours. I wanted to start by referring to a paragraph in Justice Wild's decision in the High Court. It's paragraph 29 of his decision, and his decision is in the Crown's bundle of authorities under tab 12.

WILLIAM YOUNG J:

Sorry, what paragraph?

MS HOLLINGS QC:

29. And his Honour says that, "When inserting the 'infringement offence' regimes into Acts such as the RMA, Parliament needed to make it clear that they represented an alternative way of dealing with offences created by the Act, offences which were appropriate dealt with as infringement offences. Parliament needed to make it clear that it was not changing the law so that all offences which, following the amendment, came within section 2(1) of the Summary Proceedings Act definition of 'infringement offences' had to be dealt with as infringement offences. It needed to make it clear that these offences could be dealt with either as infringement offences or as summary offences." Now, his Honour says Parliament failed to make it clear. The submission of the Auckland Council is that in fact it is clear enough, and the submissions for the Council rely on text, context and purpose, for that submission.

I wanted to focus in fact on text in these submissions, and focus in particular on new issues in regard to text. The Council says that there are six reasons why it is clear that there are these two different regimes for these offences, and in my submissions I address the first three of those, which are the headings, i.e. sections 338 to 343 all deal with offences. Section 343 deals with infringement offences.

ELIAS CJ:

Sorry, say that again? Section –

MS HOLLINGS QC:

343A to D. The second is the word of section 338, the starting point, as Justice Wild held, and especially section 338(4). So, of course, that section which I deal with in my submissions at paragraph 10 onwards, specifically says that, for example, "It is an offence to breach section 15 of the Act," in regard to discharges. And subsection (4) says that any information in respect of any offence against subsections (1), (1)(a) and (1)(b) may be laid by any person at any time within six months of the

contravention. Now those provisions of course simply can't be ignored, they are clear. They relate to the creation of offences, not infringement offences.

WILLIAM YOUNG J:

But don't they overlap?

MS HOLLINGS QC:

They do overlap, because we know that – well, we submit that a discharge can be both – but that there is an offence, not just an infringement offence –

WILLIAM YOUNG J:

But isn't there always an offence, as well as an infringement offence? Aren't – sorry, putting it another way – aren't infringement offences a subset of offences?

MS HOLLINGS QC:

Yes, yes. But for the appellant's argument to be correct, they have to effectively ignore that there are also these offence provisions dealing with a regime which clearly contemplates anyone being able to lay an information within six months of the offence, and very serious penalties.

WILLIAM YOUNG J:

So you say that there's a disconnect because only an enforcement officer can resort to the infringement notice procedure?

MS HOLLINGS QC:

Yes, that's another part of the problem. Because only councils can proceed under the infringement offences provisions, whereas anybody can lay an information under section 338. But the key point I'm making is that 338 sets up an offences regime, as distinct to an infringement offence regime. Thus it uses the words "offences".

BLANCHARD J:

I'm sorry, I'm just grasping something for the first time here. You're saying that there's a restriction on who can lay, or who can prosecute infringement offences?

MS HOLLINGS QC:

Yes.

BLANCHARD J:

Where do we find that?

MS HOLLINGS QC:

That is a –

WILLIAM YOUNG J:

343C(1).

MS HOLLINGS QC:

Yes, 343C(1) and also section 2 and section 38 make that clear –

ELIAS CJ:

And what was the second one?

MS HOLLINGS QC:

– in terms of the definitions.

ELIAS CJ:

Oh, its definition.

MS HOLLINGS QC:

So section 343C refers to an enforcement officer –

BLANCHARD J:

That's in relation to an infringement notice. Is there a similar restriction where 343B(a) applies?

MS HOLLINGS QC:

No, you're right, your Honour, there isn't. But in terms of infringement notices in that process, there is. There's a definition of "enforcement officer" in sections 2 and section 38 of the Act.

WILLIAM YOUNG J:

So there's no general restriction in the RMA about prosecutions only being commenced by enforcement officers?

MS HOLLINGS QC:

No, and indeed, 338 makes it clear anyone may, because – and you'll find that under subsection (4), 338(4), "Information may be laid by any person."

WILLIAM YOUNG J:

Yes, I think, yes, okay, although it's really addressed to the limitation, I suspect.

MS HOLLINGS QC:

It is, it is addressed to the limitation, but nevertheless it is in conflict with the, it is a conflict in regard to the interpretation sought by the appellants.

BLANCHARD J:

And even though the limitation to the time it became known to the local authority or consent authority.

MS HOLLINGS QC:

The third textual provision that I draw your Honours' attention to is section 309 of the Resource Management Act, which again I address in the submissions at paragraph 11. It's the provision which deals with proceedings under section 338, which relates to offences, so again there's that same distinction that I submit is the relevant distinction between offences and infringement offences, shall be heard in the District Court and by a Environment Court Judge or a specially warranted District Court Judge and of course, in accordance with *Panela Corporation v District Court at Whangarei* HC Auckland M1885-SW99, 6 June 2000, if they are all summary offences, then they come under section 12 of the Summary Proceedings Act.

McGRATH J:

This is a pattern and I take it the pattern really reflects whether the provisions came in in 1996, or there earlier?

MS HOLLINGS QC:

It does, Sir, it does. This is definitely a click-on to the mother spaceship and the click-on is infringement offences, instant fines, to deal with some of this offending which doesn't warrant a full scale criminal prosecution and deals with the more minor offences which is working well in practice, very well in practice (the instant fine process).

McGRATH J:

Thank you.

ELIAS CJ:

Does that mean that the infringement offence is limited to the set fine?

MS HOLLINGS QC:

Yes, it does, and that's even if having elected to go down the infringement offence process, either by way of notice or directly into a prosecution for an infringement offence, you're limited to the fine, the level of the fine, in the regulations.

ELIAS CJ:

Would that mean that an infringement offence is defined by reference to the prescribed penalty?

MS HOLLINGS QC:

To a significant extent, yes, that's the difference but also the sections prosecuted under. For example, when one lays an information under 338, one refers to section 338 in the information and I have Ms Down's informations here because your Honour was asking whether they were available. I do have copies for the court if your Honours wish to see them.

ELIAS CJ:

Yes, I'd like to see them, thank you.

MS HOLLINGS QC:

You'll see the reference there to 338(1) as the relevant provision that the defendant, at that stage, had to answer and 340 as well because of the agency provisions.

BLANCHARD J:

Are you saying that the infringement fee limit applies where the 343B(a) route is being taken?

MS HOLLINGS QC:

Yes. Yes, I'll jump straight to that, your Honour. In terms of section 343, I'll address that now. The Council's position and submission, is that section 338 offences can be

infringement offences and there are three pathways that can be followed for taking proceedings, for example, for a discharge. The first is to prosecute under section 338 and lay an information, as happened in Ms Down's case. That is, not to treat the offence as an infringement offence and it proceeds summarily by way of laying an information under section 12 and the defendant, if they elect trial by jury, as Ms Down did, it becomes an indictable offence.

The second option is that under section 343B(a), that is, because it's under the infringement offences provisions, where a council elects to treat the offence as an infringement offence, but it elects also to proceed to directly lay an information with leave of the court, or to file a notice of prosecution for a minor offence under section 20A, and you might see that, as her Honour the Chief Justice was discussing with counsel this morning, where for example it was considered to be a minor offence, but the council was aware that there were factual disputes. They thought, "Well, it doesn't really justify a fine of more than a thousand dollars for this discharge, but this person is adamant that they're going to dispute it, that they don't think it's fair." We think it's fair to go down this process and, having done that, leave would be appropriate, because then you have a check, "Well, should this just be being dealt with by way of a simple notice?" And then, if you go under that process, your Honour Justice Blanchard, then my submission is you are limited to the imposition of the amounts in the regulations.

BLANCHARD J:

Well, it wouldn't just be limitation, because it's a fixed amount, isn't it?

MS HOLLINGS QC:

It's a fixed amount, yes.

BLANCHARD J:

So the only penalty would be the fee.

MS HOLLINGS QC:

Possibly some costs.

BLANCHARD J:

How does that square with section 78A?

MS HOLLINGS QC:

78A is limited to proceedings for an infringement offence, and that, if a council proceeded under 343B, in my submission, they would be proceedings for an infringement offence, and no conviction could be entered.

BLANCHARD J:

But it doesn't help – wouldn't you expect 78A then to talk about infringement fee? But it's talking about a fine, and the making of other orders.

MS HOLLINGS QC:

What other orders could the Court, would the Court be authorised to make on convicting the defendant of the infringement offence?

ELIAS CJ:

Desist orders.

BLANCHARD J:

Well, they're not provided for in this.

ELIAS CJ:

No, they're provided for in other provisions of the Resource Management Act.

MS HOLLINGS QC:

Witness costs, court costs.

BLANCHARD J:

Until now, I've been under the impression that the 343B(a) route would, because of section 78A, preclude imprisonment, but would allow the imposition of whatever fine was elsewhere prescribed.

MS HOLLINGS QC:

If you look at the context of section 343B, it's clearly under the heading of, "Infringement offences," and it is dealing with those offences. 343A says that the infringement offences are defined by the regulations but, importantly, it says, "Infringement offences in section 343B to 343D." So it's saying, these are the infringement offences that 343B is talking about. It's the same, exactly the same wording that, in sections 343B to 343D, which is the point his Honour Justice

McGrath was picking up in regard to the regulations, is in fact repeated in the Act. It's saying that, for these provisions, this is what an infringement offence is going to be, "It applies to these provisions." So, having defined it by that and put in to the regulations what the fixed fee will be, infringement fee for offence, when one deals with discharges by way of an infringement offence, including by way of prosecution, then you have to get leave and you will be confined, in my submission, to the infringement fee set out in the regulations.

McGRATH J:

This presumably doesn't happen very often?

MS HOLLINGS QC:

I have no examples from Auckland Regional Council where they have elected to use this process, but that doesn't mean to say it's not there.

McGRATH J:

I understand.

MS HOLLINGS QC:

The notice provisions are working well and successfully, so they are used in preference. They have very few re-offenders, most people get the point from the instant fine. We've had some people elect, as they're entitled to, defendants, to go before the court, after having been served with a notice, had three or four of those people who weren't happy that they were actually, should be liable, but we haven't had any where we have gone – and the ARC is probably the major prosecutor in this area in the country – where they have gone straight for a prosecution. But –

McGRATH J:

The levels of the – I'm sorry, you finish.

MS HOLLINGS QC:

But one can anticipate unusual circumstances where one may elect to do that.

McGRATH J:

I think the Law Commission suggests that the infringement fee, set fees, are fixed at a level that's going to make it uneconomic to continue with the process you're

allowed to have. So you have to be someone who's determined to the extent that you're prepared to lose money but make a point, before you go on with the process.

MS HOLLINGS QC:

That's true, that's true. And it works the other way, for a regional council or a local body, they, unless they really thought it was justified in terms of going straight for an information in regard to a minor offence, they too, it's far more efficient to go under the infringement notice process.

So that is the second pathway. And then the third pathway is section 343B(b), where a council again elects to treat the offence as an infringement offence and elects to issue an infringement notice followed by, if necessary, a reminder and, if necessary again, they can seek leave under section 343C(4)(b), to commence under section 21 of the Summary Proceedings Act in regard to an infringement offence. And, as the legislation says, "And the provisions of that section apply with all necessary modifications." So, that interpretation of section 343B, i.e., that it's another second alternative, is consistent with the scheme of this Act and the scheme of the Summary Proceedings Act, and it resolves all issues, in my submission, in regard to the problems with the appellant's argument in regard to imprisonment without conviction, despite section 339 of the Act, as his Honour Justice Blanchard pointing out, specifically requiring a conviction before these high fines and imprisonment can be imposed.

Turning briefly to the infringement offences regulations, which I deal with at paragraph 17 of my submissions ... I emphasise there the wording of those regulations, the point that Justice McGrath raised this morning that we've just discussed, that that, again, that phrase is used in the Act as well, "For the purposes of section 343A to 343D," and the language at the top of the schedules, offences specified as "infringement offence" and "infringement fee" for offence. The clause 2 clearly does not make the offences in Schedule 1 infringement offences for all purposes. It in fact simply limits the operation of schedule 1 to specify that these offences are only infringement offences for the purposes of 343A to D. So, neither the regulations or the Act specify that certain offences under section 338 of the RMA are infringement offences for all purposes.

BLANCHARD J:

If they were, section 339(1) would be a dead letter, wouldn't it?

MS HOLLINGS QC:

It would. 339(1), meaning penalties?

BLANCHARD J:

Yes.

MS HOLLINGS QC:

Well, I suppose –

BLANCHARD J:

Because you'd first of all have to have conviction, and then you've got this problem about imprisonment as well. But, as you're not allowed to have a conviction for an infringement offence, section 339(1) could not apply.

MS HOLLINGS QC:

I suppose it could apply to breach of an enforcement order.

WILLIAM YOUNG J:

Yes, but nothing to do with section 15, though.

MS HOLLINGS QC:

No, nothing to do with section 15.

BLANCHARD J:

Yes, and – yes.

MS HOLLINGS QC:

It just is completely illogical, it doesn't make sense, because 15 is the key provision which defendants are prosecuted under. Obviously you can have minor discharges, but a lot of these offences are very serious offences from industrial trade premises. Rena, for example, is clearly going to be a prosecution under section 15, which deals with discharges to sea, water and from ships. Discharges to air are under section 15. These are likely to be significant environmental offences, and that is what they have been. There aren't a huge number of people who've been imprisoned for discharges. Why? Most of the defendants are large corporations. Why? Because to do these discharges, these really serious discharges, you're generally operating from an

industrial trade premise. You have control over a pollutant. And that's when of course that type of penalty's going to come in. There are, however, four instances which the Auckland Council have located, of people being imprisoned for discharges, individuals obviously, and that is Mr Conway on two occasions, and there's another case called *R v Borrett* [2004] NZRMA 248 (CA) and another case called *R v Feeney* DC Hamilton CRI-2006-0196265, 7 April 2008, and I can give you those references if your Honours wish to have them.

ELIAS CJ:

No, I don't think that's necessary.

MS HOLLINGS QC:

So, that limit on the operation of the regulations would not be there, in my submission, if Parliament had intended that the offences set out in section 388 be treated only as infringement offences, and Parliament, we could reasonably expect, would have made that far clearer and said so explicitly. The 1996 amendment did not explicitly set that out. Rather, it provided for regulations to specify that some offences could be infringement offences, and did not repeal the existing provisions relating to summary offences. And it gave the councils, in particular, a discretion about where particular offences clicked in, which they already had in regard to whether they responded by way of an enforcement order, an abatement notice or a prosecution. But, in addition, the instant fine regime came in.

Now, I want to deal with section 2 of the Summary Proceedings Act, and this isn't in my written submissions. And it is my submission that section 2 is part of the same legislative model for two separate pathways: offences and infringement offences. Where a council elects to seek convictions and fines of up to $600,000 for pollution incidents, and prosecute under section 338, not section 343A to D, then those offences cannot be subject to an infringement notice under the RMA; they must be dealt with by way of information. It's only when the council officers seek a fine of the $1000 or seek a fixed –

WILLIAM YOUNG J:

You mean, when they serve an infringement notice?

MS HOLLINGS QC:

Yes, or where they go under section 339(1)(a) and seek – sorry, wrong section, opened at the wrong page – where they go under 343B and seek to lay an information in regard to an infringement offence.

WILLIAM YOUNG J:

But section 343B is serving an infringement notice?

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

So the cut-off is whether the enforcement officer issues an infringement notice or not?

MS HOLLINGS QC:

Well, no, because they could have elected to –

BLANCHARD J:

It's where they're electing to seek an infringement fee rather than a larger penalty.

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

But it's not the election, it's the service of the notice. The service of notice no doubt reflects the choice that's made, but it …

BLANCHARD J:

Yes, but they don't have to serve a notice. They can –

McGRATH J:

Yes.

BLANCHARD J:

– simply commence the proceeding –

WILLIAM YOUNG J:

How?

BLANCHARD J:

That probably makes sense of that …

WILLIAM YOUNG J:

But how can they – what give them, under what do they commence the, how do they commence a proceeding under the, as for an infringement offence, if they don't issue a notice?

MS HOLLINGS QC:

Under –

ELIAS CJ:

By information.

BLANCHARD J:

Well, they have to seek leave.

ELIAS CJ:

Yes, after obtaining leave. And that fits with the definition of "infringement offence" in the Summary Proceedings Act.

WILLIAM YOUNG J:

Oh, I see.

BLANCHARD J:

And if they seek leave, that's the signal that they're only after the infringement fee.

MS HOLLINGS QC:

Yes, and they should be quoting these sections as well, in the information, one anticipates as well. But, yes, that's the signal. So…

ELIAS CJ:

And that does fit, because the Summary Proceedings Act definition of "infringement notice" means: "An offence in respect of which you may be issued with an

infringement notice," if that's – so it's a definitional thing. An infringement offence is described by the regulations as including that fixed penalty.

MS HOLLINGS QC:

That's exactly my point. Whereas –

WILLIAM YOUNG J:

So you're say the choice is – I'd rather been proceeding on the basis that the argument was that the prosecutor had a choice under section 21, or the enforcement officer, whether to go down route A, which is – I suppose I'm – sorry, I'll start again. I was rather assuming that your argument was that the case wasn't really within section 21 because the choice was given by section 343B. That the choice the enforcement officer has is either prosecute or issue an infringement notice, and that's only where an infringement notice is issued that section 343C envisages the, 343C(4) envisages that there will be proceedings commenced.

MS HOLLINGS QC:

No, no, mine goes back to the point I was making before, that when one, for example, has a discharge, there are actually three initial pathways. One, is to proceed under 338 by laying an information, in which case my submission is that is not an infringement offence under section 2 because an infringement notice may not be issued for 338 offences because the penalties are too high and you're seeking those much higher penalties. The second –

WILLIAM YOUNG J:

But that just rests on a choice though.

MS HOLLINGS QC:

Yes. A choice by the –

WILLIAM YOUNG J:

Yes. I mean the same behave – but by the –

MS HOLLINGS QC:

– prosecuting authority.

WILLIAM YOUNG J:

Yes. It's just that, I suppose I may have had my mind rather stuck in a groove but it did seem to me that section 343C(4) envisaged an enforcement officer resorting to section 21 only where an infringement notice had been issued?

MS HOLLINGS QC:

Yes, except that there's still 343B(a) to deal with.

WILLIAM YOUNG J:

Yes, but if it is the case that section 343A is a stand-alone authorisation for issuing an information, then where section 343B(a) is invoked, there's no need to go to section 21.

ELIAS CJ:

There is in respect of infringement offences.

WILLIAM YOUNG J:

Well, yes.

ELIAS CJ:

As defined in the Regulations.

MS HOLLINGS QC:

So that requires you to get leave –

WILLIAM YOUNG J:

But that, that –

MS HOLLINGS QC:

– if you go down that path as well.

WILLIAM YOUNG J:

That requires you to conclude that these are infringement offences within the meaning of – of, because the statutory – that they're infringement offences within the meaning of section 2 of the Summary Proceedings Act, that they are, irrespective of whether a notice has been issued –

ELIAS CJ:

Yes.

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

But the alternative is to say that if you look at – construe – the 1996 amendments as being the primary statutory instruments but construe them in light of the statutory scheme to which they are clipped on, section 343C provides for what is to happen where the infringement notice process is to be adopted, issue a notice and then at the option of the, if not complied with, issue proceedings under section 343C(4) which would require leave under section 21 –

MS HOLLINGS QC:

It may.

WILLIAM YOUNG J:

– or alternatively simply bypass section 21 and on the basis that section 343B is an authorising provision. 343B(a) is the authorising provision.

MS HOLLINGS QC:

Yes, which does seem to contemplate a prosecution being issued without having to serve an infringement notice.

WILLIAM YOUNG J:

Yes, that's right, yes.

MS HOLLINGS QC:

So those are the other, the two alternatives.

WILLIAM YOUNG J:

It may be that they're not actually hugely different.

ELIAS CJ:

Well one is after you've served an infringement notice and you haven't received payment.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

The other one is an option to seek, to not issue a notice but to proceed by information with leave but for an infringement offence.

WILLIAM YOUNG J:

So what – if one issues an information with leave for an infringement offence, what is it in the statute that limits you to the infringement fee?

MS HOLLINGS QC:

Well it, my submission is that if you look at the context of 343A to 343B and the wordings of the Regulations because 343B is clearly dealing with infringement offences and the regulations say, these are the – for infringement fees, these are the fixed fees. So – and it's consistent, if it's only an infringement offence –

WILLIAM YOUNG J:

Why would you issue a summons?

MS HOLLINGS QC:

You would issue a summons possibly in circumstances where you knew there was going to be a dispute in regard to the notice, you thought that – the Council thought, well it's not a serious enough offence to justify going under 338, we're only after the infringement fee, but we know that the defendant wishes to be heard in court and has, and there's dispute. You might elect to go there.

WILLIAM YOUNG J:

I haven't really read carefully through the sort of, the long tail to section 21 but where the reminder notice has not been complied with, the prosecutor either files a reminder notice or files a notice of the hearing and then is, are the powers of the court confined to the fee?

MS HOLLINGS QC:

Yes. Having, the same thing operates. Having elected to go under the "Infringement offences" provisions, issue a notice, then you, the council, the prosecuting authority is limited to the fixed fee, it can't jump back in and –

WILLIAM YOUNG J:

And can the Court impose less than the fixed fee? It looks as though it's to define if any, it looks as though the Court has a choice then.

MS HOLLINGS QC:

Some discretion, yes.

WILLIAM YOUNG J:

Under subsection (9).

MS HOLLINGS QC:

Subsection (9), is it?

ELIAS CJ:

What of 20, 21?

WILLIAM YOUNG J:

Yes.

MS HOLLINGS QC:

Yes. Some discretion.

WILLIAM YOUNG J:

But there's no comparable set of provisions for what happens if there's a notice, if an information is filed by leave?

MS HOLLINGS QC:

Well there would be because in my submission –

WILLIAM YOUNG J:

There's section –

MS HOLLINGS QC:

– that would mean under section 2 that it is an infringement offence –

WILLIAM YOUNG J:

Yes.

MS HOLLINGS QC:

– because it could have been dealt with by way of an infringement notice and that means automatically section 21 applies.

WILLIAM YOUNG J:

Yes but where, where is there, I mean the problem is working the two statutes together.

MS HOLLINGS QC:

Mhm.

WILLIAM YOUNG J:

What one, I suppose, envisages with this, that there's – if the section 21(1)(b) process goes on, then the defendant will be exposed at the maximum to the prescribed fee plus costs?

MS HOLLINGS QC:

Yes.

BLANCHARD J:

Can I draw attention to subsection 11, section 21. Like Justice Young I'm reading the tale for the first time. That provides, "That where an infringement fee is paid but not within the time referred to in 10A, the amount paid may be held and applied towards any final costs the defendant may become liable to pay." That on one reading might suggest that the fine could be more than the infringement fee?

WILLIAM YOUNG J:

Which section 78A rather suggests too.

BLANCHARD J:

Yes.

McGRATH J:

With a varied use of the different terms as well?

WILLIAM YOUNG J:

Yes.

BLANCHARD J:

Which may suggest if you go the 343B(a) route there isn't a limitation to the fee.

MS HOLLINGS QC:

Yes, yes, it does rather suggest that. I accept that. The – I suppose the problem is that the way in which the infringement offences provisions are drafted in the Resource Management Act in terms of how they define when it is an infringement offence to cause a discharge and the fees that are payable overall indicates that it was intended that where a person faces a charge of breach of an infringement offence, those are the penalties that they are facing.

WILLIAM YOUNG J:

But that can't be right in terms of subsection (11).

MS HOLLINGS QC:

Well the alternative, if you say that, it's also not logical that an infringement offence can result in a fine of $600,000.

ELIAS CJ:

Section 21 applies with all necessary modifications. I'm just wondering whether the starting point is not really the scheme of the Resource Management Act.

MS HOLLINGS QC:

But to make section 21 work so that it is compliant with the provisions –

WILLIAM YOUNG J:

No. To construe section – the Resource Management Act in a way that obviously is congruent with section 21 but with the Resource Management Act is the dominant provision, what does it mean, and there are ways of dealing with that and I would have thought the way I suggested earlier is a reasonably obvious one but the prosecutor has got a choice if section – if the A option is open then an information is filed, end of story, minor offence process goes out the window, only if a notice is issue, infringement notice is issued, does the – is the minor offence process engaged and there is the specific reference to section 21 in section 343C(4).

MS HOLLINGS QC:

Which implies that it comes in at that level.

WILLIAM YOUNG J:

Yes.

MS HOLLINGS QC:

That would require then to interpret 343B(a) as relating to committing an infringement offence – the problem is that that just doesn't work in terms of reading the 343B(a) because that section is clearly dealing with an breach of an infringement offence proceeding under the Summary Proceedings Act rather than issuing an infringement notice.

WILLIAM YOUNG J:

"Be proceeded against for the alleged offence" meaning in this context that as an offence rather than a subset, the infringement offence.

MS HOLLINGS QC:

Well the first part of the sentence, "Where any person is alleged to have committed an infringement offence" …

WILLIAM YOUNG J:

Yes, that "person" but an infringement offence is always an offence because infringement offences are a subset of a broader category of offences. So you can either say, okay, we'll go for the infringement offence procedure, in which case we go under B, or we just treat it as an offence in which case we deal with it under A.

MS HOLLINGS QC:

Yes, yes, you could certainly treat it like that and certainly my learned friend Mr Downs in his submissions, that's how he treats –

WILLIAM YOUNG J:

Yes.

MS HOLLINGS QC:

– section 343B as simply emphasising the dual pathway choice, and I accept that that is a possible interpretation of that section.

WILLIAM YOUNG J:

Okay, thanks.

McGRATH J:

Section 21(7)(b) appears to contemplate some, that the Court has some discretion as to the penalty it might impose.

MS HOLLINGS QC:

Section 21?

McGRATH J:

(7)(b).

MS HOLLINGS QC:

Yes it does. So it's fairly obviously fixed fee if it's dealt with by way of notice but if it goes before a court it's not fixed fee.

McGRATH J:

I'm sorry?

MS HOLLINGS QC:

The court is not limited just to that fixed fee if it goes before a court.

McGRATH J:

Yes. It's not limited to that and there's no ceiling apparently specified. Or we haven't seen one yet?

MS HOLLINGS QC:

No.

McGRATH J:

I can see there's not much incentive to challenge these infringement notices.

MS HOLLINGS QC:

No, that's quite right, your Honour. The – my only reply to that is really just, is the wording of the regulations which set an infringement fee for infringement offences for the purposes of section 343A to D.

BLANCHARD J:

But it looks as though an infringement fee applies only where there's a notice and you pay on the notice otherwise it's a fine or other penalty allowed for by the underlying offence.

MS HOLLINGS QC:

The approach of the Council has always been that if they proceeded by way of a proceedings under the Summary Proceedings Act for infringement offence, they would be limited to the fee set out in the Regulations and that is because the Regulations appear to imply that and they elected to go down that path, recognising that it's a more minor offence and it would be unfair to suddenly having, for example, issued a notice requiring a payment of $1000 for a discharge to then seek a much higher penalty and –

BLANCHARD J:

That may be fair and a reasonable practice, but I don't think it's consistent with section 78A, because there when you're found guilty of, or plead guilty to an offence, so that's something that's gone to court, there's no conviction but the court can order the defendant to pay such fine and costs and make such other orders as the court would be authorised to order or make on convicting the defendant of the offence.

MS HOLLINGS QC:

Yes.

BLANCHARD J:

And that's clearly the underlying offence.

MS HOLLINGS QC:

Yes. Well, perhaps the practice has been more kind than was necessary.

ELIAS CJ:

But I thought you had said that the Council had never, in fact, had recourse to 343B(a).

BLANCHARD J:

If it had, it would've been kind.

MS HOLLINGS QC:

No, it has had, remember, defendants who have, people have been served with a notice who have requested a hearing and –

ELIAS CJ:

But that's different.

MS HOLLINGS QC:

That is different but in those circumstances the Council considered itself limited to the infringement fee.

BLANCHARD J:

Whereas, in fact, it doesn't appear that's correct.

MS HOLLINGS QC:

I accept your Honour's point. It's section 78 –

BLANCHARD J:

You'll have to change your advice.

ELIAS CJ:

That doesn't affect the main thrust of the submission that you're advancing to us, which is that within the scope of an infringement offence, which is an offence in respect of which you can be issued with an infringement notice, if you read these statutes together, within that scope the Council has the option of proceeding by giving a notice or seeking leave.

MS HOLLINGS QC:

That's right. It doesn't make any difference to that and it doesn't –

ELIAS CJ:

And it doesn't affect the submission you make that when you're not, as a matter of choice, prosecutorial choice, within the scope of what you could issue an infringement notice for, you're left to prosecute in terms of an information.

MS HOLLINGS QC:

That's correct, your Honour, in which case it's not an infringement offence under section 2.

ELIAS CJ:

Unless the appellants are right, that the reference to section 338(1)(a) is, takes the whole offences of that sort, within the infringement offence regime.

MS HOLLINGS QC:

And leaves nothing outside –

ELIAS CJ:

Yes.

MS HOLLINGS QC:

– and that just can't be right in my submission; it's not logic, not logically right. So although we've ended up with a rather convoluted system because we have some offences which can be both, once the election's made which pathway you go down, then it is clear under the way that the two pieces of legislation work together, that the infringement offences are under one regime and if you elect to go under a straight prosecution for an offence rather than an infringement offence, then you're under the normal regime.

BLANCHARD J:

Why would you ever go under the 33, the 343B(a) route?

MS HOLLINGS QC:

That, as I have indicated, the Auckland Regional Council has never opted to do that.

BLANCHARD J:

But why would it ever?

MS HOLLINGS QC:

Well, there is the possibility of a circumstance that was discussed this morning where the offending is minor –

WILLIAM YOUNG J:

I suppose there is the possibility that you've been doing it without knowing it – if I'm right?

MS HOLLINGS QC:

Well, there is –

WILLIAM YOUNG J:

If you've been doing it all the time.

ELIAS CJ:

– there is also the possibility that that's what the leave provision is there for which is the appellant's argument, that she must seek leave if you're going to, if you're seeking to have a higher penalty than the infringement notice penalty.

MS HOLLINGS QC:

Yes, except that that's just entirely inconsistent with other leave provisions in requiring leave for prosecutions at this, of this level of seriousness and with the fact that, for example, you don't have to seek leave for breach of an abatement notice or an enforcement order. Now those offences sometimes get a slightly higher penalty, they're under the same penalty regime as discharges and that's because someone has been given a warning and ignored it and the Environment Court therefore treats it more seriously. But of course there are discharge offences which are far more serious than breaches of abatement notices and to say, well you have to get leave for those but not for others, it just, it's just not terribly logical, unless the statute has provided for ... The better interpretation, in my submission, is that these sections 343A to D set out the provisions relating to infringement offences and because we have offences which can be both, the prosecuting authority makes an election over which pathway it does down. If it goes down the infringement offences pathways, these provisions apply.

WILLIAM YOUNG J:

What would the infringement, sorry, what would the information look like if an information was laid on your interpretation of section 21(1) for a discharged offence but treated as an infringement notice?

MS HOLLINGS QC:

It would refer to 343A and specify that it was an infringement offence. And it would also have a leave –

WILLIAM YOUNG J:

And what, so the consequence would be the –

MS HOLLINGS QC:

An application for leave.

WILLIAM YOUNG J:

– that the defendant would be exposed to the full fine and any other orders that could be made, it would not be convicted and would not be imprisoned?

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

Which isn't going to be much different from just issuing an ordinary summons?

MS HOLLINGS QC:

Not, not much difference, but that's –

BLANCHARD J:

I suppose it's less heavy-handed in the sense that it doesn't expose the defendant to a conviction?

MS HOLLINGS QC:

Or imprisonment.

BLANCHARD J:

Or imprisonment. It still doesn't make much sense but then this thing doesn't make sense whichever way you go.

McGRATH J:

Well your submission is it's clear enough, you're not sort of –

MS HOLLINGS QC:

It's at, where I started, clear enough.

McGRATH J:

You're not claiming total consistency of everything if we just understand it?

MS HOLLINGS QC:

That's one of the reasons I made the submission that 343B(a) is a separate pathway, even though I know that seems slightly odd, is that that is, provides for much more consistency across both pieces of legislation because it's talking, it's in the infringement offence provision and it, and it doesn't muddle the definition of infringement offences with, in the Summary Proceedings Act, because it's an offence that you can issue a notice for, whereas if one doesn't treat it as, treat the offending as an, as an infringement offence and go straight to 338, doesn't – and the prosecuting authority doesn't seek leave, doesn't refer to 343A to D in its information, then that is clearly not an offence you can issue a notice for.

WILLIAM YOUNG J:

Why would the legislature provide for three options – a really heavy-handed one, a moderately heavy-handed one and a very light-handed one – but make the leave requirement apply only to the middle one?

MS HOLLINGS QC:

The leave requirement also relates to the ... obviously after the notice is issued if you want to go to court at that level, so –

WILLIAM YOUNG J:

Yes, yes, yes.

MS HOLLINGS QC:

– as soon you're dealing with an infringement offence you need leave to go to court on both.

WILLIAM YOUNG J:

But you don't if you're happy to just file a reminder notice?

MS HOLLINGS QC:

Yes, if you're happy just to file a reminder notice.

WILLIAM YOUNG J:

So if you're seeking to treat the thing as seriously as it can be, you don't need leave. If you want to treat it in a regulatory way you don't need leave: it's only if you're sort of in the middle that you need leave?

ELIAS CJ:

Because the infringement notice is defined by the penalty, but if that's not accepted then there's no reason for it.

WILLIAM YOUNG J:

Well I don't think the infringement, I don't think there's any – do you accept that if, if, as it were, that if the middle slot is selected by the prosecutor there's no – the only limitation is no imprisonment, no conviction. So, fined $600,000, they can be fined $600,000?

MS HOLLINGS QC:

Well my first submission has been that it's in fact, the penalty is defined by the regulations because of the wording of the regulations but section 78A clearly indicates that a higher level of fine can be imposed, as pointed out by his Honour Justice Blanchard.

McGRATH J:

But a District, the District Court Judge involved is going to have to have regard to the legislative policy –

MS HOLLINGS QC:

Yes.

McGRATH J:

– in relation to the set fees. And I suppose what's really happened here is that Parliament's become more focused on the infringement offences regime and it's

forgotten all about the provisions that were already in the Act when it was setting about doing it so we shouldn't be too worried about trying to make the overall statutory scheme consistent. It might be hard enough just to make the 1996 provisions consistent?

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

But just the infringement, the fee is defined only by reference to situations where a notice is issued, isn't it?

BLANCHARD J:

Yes.

WILLIAM YOUNG J:

So the fee has got nothing to do with the penalty options on your interpretation of section –

BLANCHARD J:

Yes.

WILLIAM YOUNG J:

– 34. I'm just going to drive you bonkers on 343B(a) –

McGRATH J:

That's true.

MS HOLLINGS QC:

Schedule 1 is set out in paragraph 18 of my submissions which –

ELIAS CJ:

Well it's at tab 3 of the appellant's casebook.

BLANCHARD J:

But it only applies if you pay up promptly under the notice. If you don't pay promptly or you don't pay at all then it doesn't seem to have any application. Do you accept that just looking on a few more pages, the reminder notice form says –

MS HOLLINGS QC:

What page?

BLANCHARD J:

This is page 26.

ELIAS CJ:

Yes.

BLANCHARD J:

"You will become liable to pay costs, in addition to the infringement fee, if you do not pay the infringement fee and you do not ask for a hearing and the enforcement authority decides to bring court proceedings." So that suggests they're being told that the only additional imposition, if they don't pay out and court proceedings are brought, will be costs.

McGRATH J:

Yes.

BLANCHARD J:

... Which seems contrary to section 21. This is a complete mess.

MS HOLLINGS QC:

Well 21 only applies if "all necessary modifications" ... and this was why my starting point was that the Regulations say these are the penalties for infringement offences if you go down that path, whether or not, even if you proceed by way of an information.

BLANCHARD J:

What, what is the reminder – there's a reminder notice under the Summary Proceedings Act itself isn't there? What does that say?

WILLIAM YOUNG J:

I think that's in Mr Miles' bundle. Tab 18.

ELIAS CJ:

Sorry, what tab was that?

MS HOLLINGS QC:

It's 16. Oh no, it's not, it's 18.

WILLIAM YOUNG J:

That says, "Pay costs to a fine."

BLANCHARD J:

In addition to a fine.

WILLIAM YOUNG J:

Oh, sorry, "The fine will be equal to the amount of the infringement fee, the amount of the infringement fee remaining unpaid."

MS HOLLINGS QC:

Aha.

ELIAS CJ:

Where are we, what page?

MS HOLLINGS QC:

We're on page 54 and 55, it's regulation 5. Here we go, we're back to where we started.

ELIAS CJ:

But these regulations don't bite do they because of the specific regulations.

BLANCHARD J:

Yes I know but I'm –

WILLIAM YOUNG J:

Specific regulations are similar in substance.

MS HOLLINGS QC:

It has the same effect, which is, if you go under the infringement offences provisions you are stuck with the infringement fee. And all, all that's happening – where we're getting muddled I think, Sir, is that they've used the word, in section 72, "fine", but that has two, that is, in fact, the infringement fee or less so there's a ceiling on it.

BLANCHARD J:

But does that ceiling apply if you've gone the 343B(a) route or is it only a ceiling if there's been an infringement notice and a failure to pay the infringement notice?

MS HOLLINGS QC:

Well, my primary submission is that it does apply because it's being treated as an infringement offence and that's because of the wording in 343B.

WILLIAM YOUNG J:

But the reminder notice – if the limitation is to be found in the reminder notice, it's never going to apply on your approach to section 343B(a).

MS HOLLINGS QC:

It helps with my interpretation, obviously, but it's really the language of that, of the Schedule that I think, in my submission, points to a ceiling. "Infringement fee for offence"; it must be for the infringement offence and that's what it's saying.

WILLIAM YOUNG J:

Well, on any approach to it, on your – the Council's general position, the decision whether it's an infringement notice or not, it's an infringement offence or not, is primarily for the Council to prosecute.

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

You say there are three routes, two of which involve infringement offence limitations.

MS HOLLINGS QC:

Yes.

WILLIAM YOUNG J:

Right, okay.

MS HOLLINGS QC:

And for both you need leave if you want to prosecute them and that's because they are minor offences and it's another restriction, in terms of prosecuting people for very minor offences.

ELIAS CJ:

Ms Hollings, does that really complete what you wanted to say to us?

MS HOLLINGS QC:

Yes, I think it does.

ELIAS CJ:

I'm thinking of producing camels by looking at all of this in concert.

MS HOLLINGS QC:

Producing what Ma'am?

ELIAS CJ:

Camels, you know, committees writing and producing a camel.

MS HOLLINGS QC:

Well one could say for a resource management case it has produced a great deal of paper.

ELIAS CJ:

Yes.

MS HOLLINGS QC:

That does complete my submissions unless I can be of further assistance.

ELIAS CJ:

Thank you, Ms Hollings. Mr Banbrook, do you want to be heard in reply?

MR BANBROOK:

Just very briefly, may it please the Court. I may be mistaken as to my learned friend Ms Hollings' position that she ultimately reached, but as I understood it she came to the conclusion that there were three courses that could be followed, two of which would require leave, and that appears to be consonant with our situation. If one goes to section 343B, the first option obviously is to proceed and the wording, 343B says, "Commission of an infringement offence". It says, "Where any person is alleged to have committed an infringement offence that person may either – be proceeded against for the alleged offence" ... The alleged offence must be referenced back to the infringement offence that's referred to in the opening line of the provision.

So if, as I contend, it's clear that the discharge offences under section 15 are infringement offences for the purposes of the statute, then if the prosecuting authority elects to go under 343B(a), then it will be necessary to seek and obtain leave under section 21 before laying informations. If the prosecuting authority elects to go under 343B(b), that is serving an infringement notice and if necessary a reminder notice, then of course there's no leave required: the prosecuting authority can proceed down that track without any qualification. If, however, the prosecuting authority, for whatever reason, elects to adopt the third course, which is open under section 343C(4)(b), that is the issue of proceedings – it says, "Proceedings in respect of the offence to which the infringement notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act 1957 and the provisions of that section apply with all necessary modifications." Then under that third option leave would be necessary.

McGRATH J:

Sorry, what provision is that?

MR BANBROOK:

It's section 343C(4)(b).

McGRATH J:

Thank you.

ELIAS CJ:

But isn't that if the, that's if the infringement notice hasn't been complied with by having the payment made and a reminder notice has issued.

MR BANBROOK:

Well, what it says is: if an infringement notice has been issued under the section, (a) a reminder notice must be in the form prescribed under this Act; and (b) proceedings in respect of the offence to which the infringement notice relates may be commenced. So –

ELIAS CJ:

Well, that's enforcement proceedings, isn't it?

WILLIAM YOUNG J:

That's section 343B(b) proceedings.

MR BANBROOK:

Well, in that event leave is then with, in terms of the actual prosecution action, with just the plan A and plan B under section 343B. Either the authorities proceed by way of information, in which case they need leave, or they proceed by way of infringement notice in which the case is, of course, they don't require leave.

Now there was one other point that arose: Justice Blanchard was pointing to the penalty provision which I think he described as possibly becoming a "dead letter". This is section 339(1); it's at tab 2 in the appellant's bundle, extract from the Resource Management Act. It says there, "Every person who commits an offence against section," 338(1)(A), (1)(b) or (1) – sorry, "(1)(a) or (1)(b) is liable on conviction," and then it sets out the penalties. Now I understand that Justice Blanchard was making the point that if there can be no conviction then how can there be a penalty, but of course that is cured by going to section 78A because section 78A makes it clear that although there can be no conviction the same penalties can be imposed because that's what the section says: "... may order the defendant to pay such fine and costs and may make such other orders as the Court would be authorised to order or make on convicting the defendant of the offence."

BLANCHARD J:

But there'd be no ability to imprison which is what 339(1) actually envisages because it imposes a maximum term of imprisonment.

MR BANBROOK:

It certainly, yes, it exposes the offender to a term of imprisonment. The answer to that, of course, is that there's nothing in section 78A to mean that a person couldn't, potentially at least, be sent to prison because the Court can make any order –

BLANCHARD J:

Yes.

MR BANBROOK:

– that they would be authorised to make on convicting the defendant of the offence and one order is a sentence of imprisonment.

BLANCHARD J:

Well, I don't accept that argument. I just, I think it would be extraordinary if you could have people sent to prison without having been convicted of an offence.

MR BANBROOK:

Yes, well I accept that –

BLANCHARD J:

For one thing –

MR BANBROOK:

– would be highly unusual.

BLANCHARD J:

– you would lose the protection of section 30 of the Sentencing Act which requires that counsel be representing you at the stage which, at which, you're at risk of conviction.

MR BANBROOK:

Yes. Well, my final submission for the appellant is simply this. That the statutory interpretation ... a measure of confusion as has been commented on today. These are penal provisions, the appellant of course was in a situation of sustaining criminal convictions as a result of all of this. If, at the end of the day, the Court comes to the conclusion that the, there is so much uncertainty surrounding the way in which the Summary Proceedings Act and the Resource Management Act is to be construed, then in my submission the benefit of that, of any doubt or confusion, must go to the

appellant, given that these are criminal convictions and a criminal prosecution that the appellant has been subjected to. Unless there are any other questions?

ELIAS CJ:

No thank you, thank you, Mr Banbrook. Thank you counsel, we'll take time to consider our decision in this matter. It's an extremely difficult issue of statutoryinterpretation.

COURT ADJOURNS: 3.58 PM