IN THE SUPREME COURT OF NEW ZEALAND

SC 48/2011
[2012] NZSC 21

CAROL MARGARET DOWN

v

THE QUEEN

Hearing: 29 November 2011

Court: Elias CJ, Blanchard, McGrath, William Young and Gault JJ

Counsel: A D Banbrook for Appellant
M D Downs for Crown
J G Miles QC and A E Ferguson for URS New Zealand Limited
D A T Hollings QC and S Robertson for Auckland Council

Judgment: 3 April 2012

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

Para No

ELIAS CJ AND McGRATH J

(Given by McGrath J)

Background

[1] The appellant, Ms Down, managed a company which operated a scrap metal recycling business at two yards in Auckland. Following a trial by jury, she was convicted of 14 offences against the Resource Management Act 1991 and sentenced to 250 hours' community work. A co-offender was sentenced to six and a half months' imprisonment.

[2] The charges on which the appellant was convicted comprise six counts of permitting the discharge of a contaminant onto land in circumstances which may have resulted in the contaminant entering water (ss 15(1)(b) and 338(1)(a) of the Resource Management Act); two counts of permitting the discharge of a contaminant from industrial trade premises onto land (ss 15(1)(d) and 338(1)(a) of the Act); and six counts of contravening an enforcement order (s 338(1)(b) of the Act).

[3] This appeal concerns the wrongful discharge convictions. At her sentencing hearing, counsel for the appellant argued that, although these offences could be tried by a jury, they were infringement offences to which s 21 of the Summary Proceedings Act 1957 applied. Under s 21(1)(a) the leave of a District Court Judge or Registrar should have been obtained before the charges were laid in the District Court under that Act. In a reserved decision, the sentencing Judge rejected this submission and imposed the sentences indicated.[1] The appellant's appeal to the Court of Appeal was dismissed[2] and she now appeals with leave to this Court.[3]

Issues

[4] Two procedures are available for prosecution of discharge offences under s 15 of the Resource Management Act. An infringement notice may be served under

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1 *R v Conway* DC Auckland CRI-2008-004-19495, 18 December 2009.
2 *Wallace Corp v Waikato Regional Council* [2011] NZCA 119, [2011] 2 NZLR 573.
3 *Down v R* [2011] NZSC 81.

s 343C of the Resource Management Act and the matter then dealt with as an infringement offence under the Resource Management (Infringement Offences) Regulations 1999.[4] Those Regulations are made under powers to prescribe those offences under the Resource Management Act which constitute infringement offences under that Act.[5] In this case, however, the alternative offence procedure under s 338(1)(a) was followed. An officer of the prosecuting authority laid informations under s 12 of the Summary Proceedings Act 1957. The penalties for offending under s 338(1)(a) are governed by s 339(1) of the Resource Management Act under which the discharge offences are each the subject of a maximum penalty of two years' imprisonment.[6] The appellant was accordingly able to elect trial by jury and did so.

[5] The principal issue in the appeal is whether the informant was required to comply with s 21(1)(a) of the Summary Proceedings Act under which proceedings in respect of an infringement offence may be commenced by laying an information under that Act with the leave of a District Court Judge or a Registrar. The informant did not seek such leave and in this appeal the Crown contends there was no requirement to do so.

[6] This Court has granted the appellant leave to appeal on grounds raising two questions. The first is whether the laying of informations on the discharge counts required leave under s 21. The second is whether, if so, despite the absence of such leave, the proceedings were validated by s 204 of the Summary Proceedings Act. Section 204 provides that proceedings are not to be quashed, set aside or held invalid by reason only of any defect, irregularity, omission or want of form unless the Court is satisfied there has been a miscarriage of justice.

[7] In this judgment we first consider whether s 21(1)(a) of the Summary Proceedings Act applies on an analysis of the provisions in the two Acts and then consider whether the relevant context and purpose supports the result reached.

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4 Resource Management (Infringement Offences) Regulations 1999, reg 2.
5 Resource Management Act 1991, s 360(1)(ba).
6 Or a fine of up to $200,000 under s 339(1).

The statutory provisions

[8] Part 2 of the Summary Proceedings Act sets out the procedure where the defendant is proceeded against summarily.[7] Section 12 provides:

> **12 Commencement of proceedings**
>
> (1) Except where the defendant has been arrested without warrant, all 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.

[9] Under s 21(1) there is a restriction on commencing summary proceedings to prosecute "infringement offences":[8]

> **21 Summary procedure for infringement offences**
>
> (1) Proceedings in respect of an infringement offence may be commenced—
>
> (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; or
>
> (b) Where an infringement notice has been issued in respect of the offence, by providing particulars of a reminder notice in accordance with subsections (4) and (4A), or by filing a notice of hearing in a Court, under this section.

[10] Section 21(1)(a) was enacted in its present form in 1987. At the same time, s 78A was substituted for an earlier provision. Section 78A(1) provides that convictions may not be recorded for infringement offences:

> **78A Conviction not to be recorded for infringement offences**
>
> (1) Notwithstanding any other provision of this or any other Act, where in proceedings for an infringement offence (whether being an offence for which an infringement notice has been issued or not) the defendant is found guilty of, or pleads guilty to, the offence and the Court would, but for this subsection, convict the defendant, 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.

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7 Summary Proceedings Act 1957, s 11.

8 Section 21 goes on to provide for the procedure under the Summary Proceedings Act that follows the issue of an infringement notice.

[11] An "Infringement offence", to which s 21(1) applies, is defined in s 2 of the Summary Proceedings Act to mean "any offence under any Act in respect of which a person may be issued with an infringement notice".

[12] The next inquiry is accordingly whether an infringement notice *under the Summary Proceedings Act* may be issued for the offences with which the appellant was charged. "Infringement notice" is defined in the Summary Proceedings Act in both specific and general terms:

> **Infringement notice** means a notice issued under—
>
> (a) Section 42A of the Transport Act 1962; [9] or
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> (b) Section 14 of the Litter Act 1979; or
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> (ba) section 41B of the Financial Reporting Act 1993; or
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> (c) Section 32A of the Weights and Measures Act 1987; or
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> (ca) section 57C of the Gas Act 1992; or
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> (d) Section 58 of the Civil Aviation Act 1990; or
>
> (da) section 129 of the Plumbers, Gasfitters, and Drainlayers Act 2006
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> (e) Section 159 or section 159A of the Biosecurity Act 1993; or
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> (f) section 66 of the Dog Control Act 1996; or
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> (fa) section 165B of the Electricity Act 1992; or
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> (g) section 139 of the Land Transport Act 1998; or
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> (h) section 260A of the Fisheries Act 1996; or
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> (i) section 162 of the Animal Welfare Act 1999; or
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> (j) section 357 of the Gambling Act 2003; or
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> (k) any provision of any other Act providing for the use of the infringement notice procedure under section 21.

[13] As the specific paragraphs of the definition do not include a notice issued under the Resource Management Act, it is necessary to consider whether para (k) of this definition applies to infringement notices under that Act. This turns on whether the Resource Management Act provides "for the use of the infringement notice

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[9] Repealed in 2011.

procedure under s 21" of the Summary Proceedings Act, or whether the former Act provides otherwise in respect of its infringement notices.

[14] Part 12 of the Resource Management Act includes ss 338 to 343, which set out "Offences". It also provides for a subset of "Offences" to be "Infringement offences" in ss 343A to 343D. Section 343A defines "Infringement offences", for the purposes of ss 343B to 343D, as meaning "an offence specified as such in regulations made under section 360(1)(ba)". The Resource Management (Infringement Offences) Regulations are made pursuant to s 360(1)(ba) for the purpose of prescribing the offences under that Act which constitute infringement offences.[10] The offences listed in Sch 1 to the Regulations are infringement offences for the purposes of ss 343A to 343D.[11] They include offences under s 338(1)(a), one of which is contravention of s 15(1)(b), which prohibits discharge of any contaminant onto or into land in circumstances that may result in that contaminant entering water. Another is contravention of s 15(1)(d), which prohibits discharge of contaminants from industrial premises onto land. Such discharge of contaminants is accordingly an infringement offence under the Regulations and ss 343B to 343D of the Resource Management Act.[12] But, as indicated, penalties for s 338(1)(a) offences are also provided for under s 339(1)(a) of the Act, which may be significantly more serious than those under the infringement notice regime.

[15] Section 343B is critical to the issue before the Court. It makes clear that there are alternative ways of proceeding against those alleged to have committed infringement offences:

> **343B Commission of infringement offence**
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> Where any person is alleged to have committed an infringement offence, that person may either—
>
> (a) be proceeded against for the alleged offence under the Summary Proceedings Act 1957; or

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10 These Regulations are also made for the purpose of s 360(1)(bb) to prescribe the forms of infringement notices, particulars contained in them and the infringement fees for each infringement offence.

11 Regulation 2.

12 See s 343A.

(b) be served with an infringement notice as provided for in section 343C.

[16] Section 343C sets out how the Resource Management Act's infringement notice regime operates. Enforcement officers[13] are given powers to serve infringement notices on persons they observe committing, or have reasonable cause to believe have committed, an infringement offence.[14] There is provision for how service of the infringement notice may be effected.[15]

[17] As to the content of an infringement notice, and subsequent proceedings after it has been issued, s 343C(3) and (4) provide:

> (3) Every infringement notice shall be in the prescribed form and shall contain the following particulars:
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> (a) Such details of the alleged infringement offences as are sufficient fairly to inform a person of the time, place, and nature of the alleged offence; and
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> (b) The amount of the infringement fee specified for that offence; and
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> (c) The address of the place at which the infringement fee may be paid; and
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> (d) The time within which the infringement fee must be paid; and
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> (e) A summary of the provisions of section 21(10) of the Summary Proceedings Act 1957; and
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> (f) A statement that the person served with the notice has a right to request a hearing; and
>
> (g) A statement of what will happen if the person served with the notice neither pays the infringement fee nor requests a hearing; and
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> (h) Such other particulars as are prescribed.
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> (4) If an infringement notice has been issued under this section,—
>
> (a) a reminder notice must be in the form prescribed under this Act; and

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13 An "Enforcement officer", as identified in s 2, is a person authorised under s 38 of the Act to carry out enforcement functions.

14 Section 343C(1).

15 Section 343C(2).

> (b) 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.

Section 343D provides that local authorities may retain all infringement fees they receive in respect of infringement offences.

Court of Appeal judgment

[18] Following a detailed discussion of these statutory provisions, along with others relating to different infringement offence regimes, the Court of Appeal held that the infringement offence regime under the Resource Management Act was a self-contained code, analogous to the s 21 procedure under the Summary Proceedings Act, but also independent of it.[16] The Court concluded that the legislative history of the s 2 definition of "infringement notice" was not consistent with the analysis of the appellant.[17] The reference to s 21 of the Summary Proceedings Act in s 343C(4)(b) of the Resource Management Act did not in its view refer to the Summary Proceedings Act infringement notice procedure but to a new step of commencing proceedings that could be taken either by providing particulars of a reminder notice or by filing a notice of hearing in the District Court.[18] The various schedules in the Resource Management (Infringement Offences) Regulations were the source of the prescribed infringement notice.[19]

The meaning of s 343C(4)

[19] In this Court, Mr Banbrook for the appellant and Mr Miles QC for URS New Zealand Ltd, an interested party and intervener, took issue with the Court of Appeal's analysis of the interaction of the provisions of the two statutes. Mr Miles emphasised that the application of s 21 is necessary in s 343C to provide a mechanism for enforcement within its infringement notice procedure. Without s 21, there was no capacity for court proceedings to be commenced if infringement fees

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16 At [59].
17 At [34]–[45].
18 Under s 21(1)(b).
19 At [45]–[47].

were not paid. In this context counsel argued that s 343C(4) is "providing for the use" of the Summary Proceedings Act infringement notice procedure set out in s 21, so that para (k) of the definition covers a notice issued under s 343C.

[20] We accept that this is an available meaning of the legislative text, but whether it is the true meaning requires consideration of the context and legislative purpose behind s 343C(4). A major contextual difficulty is that if an infringement offence under the Resource Management Act is also an infringement offence under the Summary Proceedings Act, s 78A of the Summary Proceedings Act would apply to them. It provides that convictions are not to be recorded for infringement offences. Infringement offences under the Resource Management Act have varying culpability and at the serious end of the range provide for imprisonment. We do not accept Mr Banbrook's submission that Parliament must have contemplated that a sentence of imprisonment could be imposed other than following a conviction for the offence. That would be extraordinary. As well, had Parliament intended to confine penalties for infringement offences to fines set out by the Regulations, it would not have retained s 339 in its current form. The contradiction between the statutory provisions in this respect on the appellant's preferred meaning is one that could never reflect Parliament's purpose.

[21] Parliament enacted ss 21 and 78A in what is substantially their present form in 1987 at a time when infringement offences involved only minor culpability.[20] Issuing infringement notices allowed offending that was not deemed complex or serious enough to require full judicial attention to be dealt with administratively, so that limited resources could be applied to the cases that needed them. By opting into the infringement scheme, defendants could avoid conviction or a criminal record.[21] The purpose of s 21(1) in this context was to encourage use of the infringement notice procedure in law enforcement rather than resort to the summary process of the courts.[22] An interpretation of the Summary Proceedings Act which maintains that

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[20] Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, 2005) at [19].

[21] At [33]–[34].

[22] As the simultaneous introduction of ss 21 and 78A to the Summary Proceedings Act in 1987 demonstrates this purpose, we have not found it necessary to traverse the legislative history of ss 20A and 21.

meaning and scope of ss 21 and 78A is necessary if it is to reflect that continuing purpose.

[22] There is arguably another meaning of s 343C(4) available. On this meaning, the Resource Management Act has its own separate infringement notice regime. Section 343C(4) governs the issue, service and content of infringement notices for Resource Management Act infringement offences. Section 343C(4) then provides for an enforcement procedure, which is expressed in part by referring to and adopting language in the Summary Proceedings Act. On this meaning, which is similar to that adopted by the Court of Appeal, when para (k) of the definition refers to "providing for the use of the infringement notice procedure under s 21", it means the type of provision made in the earlier paragraphs of the definition, each of which explicitly makes an infringement notice under another statute's provisions an infringement notice under the Summary Proceedings Act. Under s 343C(4), proceedings may be commenced in respect of the offence to which the infringement notice relates. This is not achieved by making a notice issued under s 343C effectively a notice issued under the Summary Proceedings Act. Instead, provisions in that Act are incorporated in s 343C(4) where they "apply with all necessary modifications".

[23] The drafting device of incorporating in a Bill provisions that appear in existing legislation is common in New Zealand legislative drafting. It is the subject of insightful comment by Francis Bennion, who points out that the technique exemplifies the maxim: "words to which reference is made in an instrument have the same operation as if they were inserted in the instrument referring to them".[23] However, importantly, the incorporation of provisions from one statute in another does not affect their separate identities.[24] This characteristic of the drafting of s 343C(4) gives support to the second possible meaning.

[24] As is common with this drafting method, s 343C(4) requires that the incorporated provisions are subject to "necessary modifications" without specifying what they are. Where such modifications are in issue in litigation, the court must

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23 Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 758.
24 At 758–759.

decide what they are, in the course of interpreting the provision containing the incorporated language.[25] In the case of s 343C(4), the purpose of the section is to incorporate that part of the text of s 21(1) of the other Act which provides for proceedings to be commenced if the infringement fee is not paid. They are the proceedings referred to in s 21(1)(b), which are commenced by providing particulars of a reminder notice, or filing a notice of hearing in a court, in the manner prescribed in the following subsections. Section 21(1)(a), however, is not part of the text that is incorporated in s 343C(4). Nor is it included under s 343C(3)(e), which applies only to s 21(10). That provision states that a defendant who proves that the infringement fee has been paid within time has a defence. It does not detract from the separate and self-contained nature of the infringement notice regime. Finally, the second meaning presents no problem with s 78A, which is not part of the Summary Proceedings Act that applies to s 343C(4) either. The second meaning has none of the contextual issues raised by the first meaning.

[25] There is also some contextual support for that meaning derived from the omission of any reference to the Resource Management Act provisions in paragraphs referring to specific statutes in the Summary Proceedings Act definition of "Infringement notice". The drafting practice appears to have been to refer to all Acts which are intended to apply the generic infringement notice procedure under the Summary Proceedings Act in the specific paragraphs of the s 21 infringement notice regime.

[26] Other Acts provide in different ways for their own infringement offence regimes to operate outside the Summary Proceedings Act infringement notice process.[26] The structure of their provisions often reflects s 343C. While some have, helpfully, expressly excluded the application of s 21 of the Summary Proceedings Act, a comparison of their provisions and statutory schemes with those in the Resource Management Act does not, to our minds, provide meaningful contextual

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[25] Like William Young J, we have not found Hansard of assistance. The Minister's observations when introducing the 1996 amendments are expressed too generally to illuminate the meaning of the relevant statutory provisions.

[26] For example Animal Welfare Act 1999, s 161; Dog Control Act 1996, ss 65 and 66; and Cadastral Survey Act 2002, ss 61 and 62.

assistance in the interpretation of the provisions of s 343C of the Resource Management Act.

[27] For these reasons, we have concluded that the second meaning is the true meaning of s 343C.

[28] It follows that on the ordinary meaning of the text of the two Acts, an infringement notice issued under s 343C of the Resource Management Act does not qualify as an infringement notice under para (k) of the definition of that term in the Summary Proceedings Act. Nor, of course, does it qualify under any of the preceding paragraphs referring to specific statutes. On this analysis, infringement offences under the Resource Management Act are not infringement offences under the Summary Proceedings Act. The Resource Management Act has its own infringement notice procedure, which does not provide for the use of that under s 21 of the Summary Proceedings Act. Therefore, the requirement to obtain leave before laying an information under s 21(1)(a) does not apply.

[29] It is accordingly not necessary to consider whether s 204 of the Summary Proceedings Act has validating effect.

[30] It follows that s 343B is the pivotal authorising provision in respect of the procedure for dealing with infringement offences under the Resource Management Act. Those responsible for enforcement may commence summary proceedings under s 343B(a), using s 12 of the Summary Proceedings Act, or proceed by infringement notice under s 343B(b). The course they choose is entirely a matter of prosecutorial judgment in every case.

[31] In this judgment we have preferred to focus on the text of the Resource Management Act and incorporated provisions in ascertaining their meaning. While there are differences in the routes by which we have reached them, we regard our conclusions as to how the statute is to be read as being the same as those of William Young J.

[32] The appeal against conviction is accordingly dismissed.

BLANCHARD AND GAULT JJ

[33] We agree with the reasons given by McGrath J. We could equally have approached the conclusions upon which all the members of the Court are agreed in the same manner as William Young J.

WILLIAM YOUNG J

A preliminary comment

[34] As I will explain, infringement notices were first provided for in 1968 and the current generic infringement notice regime in the Summary Proceedings Act 1957 was established in 1987. Since then, there has been a huge increase in the use of infringement notices; so much so that by 2003–2004 (which is the last year for which I have figures), some 2.7 million infringement notices were issued, and there were nearly four times as many filings in the District Courts in relation to such notices as there were for ordinary proceedings.[27] Thirteen statutes which provide for infringement notices are now listed in the current Summary Proceedings Act definition of "infringement notice" and there are many others – 13 by my count – which provide for infringement notice procedures but are not specifically identified in that definition.[28]

[35] The importance of infringement notice procedures in the criminal justice system warrants a careful, systematic and consistent legislative approach to their establishment. For this reason, I started my consideration of the present case in the hope that if I made a sufficiently careful analysis of all the statutes which provide for infringement notice procedures, I would be able to discern an underlying legislative pattern, which, once understood, would enable not only the present case, but also any similar cases under other statutes, to be resolved in a consistent and principled way.

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27 Law Commission *The Infringement System: A Framework for Reform* (NZLC SP16, 2005) at [22].

28 These include the Resource Management Act 1991 along with the Building Act 2004, the Cadastral Survey Act 2002, the Hazardous Substances and New Organisms Act 1996, the Health and Safety in Employment Act 1992, the Local Government Acts 1974 and 2002, the Maritime Transport Act 1994, the Motor Vehicle Sales Act 2003, the Radiocommunications Act 1989, the Railways Act 2005, the Sale of Liquor Act 1989 and the Summary Offences Act 1981.

[36] Having examined the statutes which are listed in the "infringement notice" definition in the Summary Proceedings Act, I came to the dispiriting conclusion that there are no relevant patterns which provide assistance in relation to the interpretation issues we have to address. Indeed, I am left with the view that those responsible for the drafting of these statutes have sometimes lost sight of the Summary Proceedings Act provisions. For instance some of the statutes[29] listed in the definition of "infringement notice" contain provisions akin to s 343B of the Resource Management Act 1991, which, on their face, give the prosecutor a discretion whether to proceed under the Summary Proceedings Act or issue an infringement notice but do not expressly dispense with the requirement for leave under s 21(1)(a). These provisions might be thought to reflect a parliamentary intention to dispense with the leave requirement because otherwise they would simply duplicate, in a confusing way, the effect of s 21(1) of the Summary Proceedings Act.[30] Awkwardly, however, other listed statutes[31] expressly dispense with the requirement for leave under s 21(1)(a). As well, although none of these statutes expressly exclude the operation of s 78A, some[32] make overlapping but unnecessary provision to the effect that no criminal record be created where an infringement notice has been issued. My review of the other statutes (that is, those which provide for infringement notice procedures but are not identified in the Summary Proceedings Act definition of "infringement notice") has left me with the equally dispiriting conclusion that there is no clearly discernible rationale why some statutes have been listed and others not. I note as well that in the case of the Railways Act 2005 (which is one of these other statutes) there is an express exclusion of the s 21(1)(a) leave requirement.[33] The possible significance of this was debated before us but given the absence of a consistent legislative pattern, I do not see that debate as material to the outcome of the present case.

[37] The views I have just expressed were anticipated by a 2005 Law Commission study paper on the infringement fee system, which noted that the infringement fee

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29 See Litter Act 1979, s 14; Weights and Measures Act 1987, s 32A; Civil Aviation Act 1990, s 57; Biosecurity Act 1993, s 159; Dog Control Act 1996, s 65; Animal Welfare Act 1999, s 161.

30 This seems to have been the view of the Law Commission: see [218].

31 See Gambling Act 2003, s 357; Financial Reporting Act 1993, s 41A; Plumbers, Gasfitters and Drainlayers Act 2006, s 128; Electricity Act 1992, s 165A; Land Transport Act 1998, s 138 and Fisheries Act 1996, s 260A.

32 See Gas Act 1992, s 57F; and Plumbers, Gasfitters and Drainlayers Act 2006, s 132.

33 Section 98.

system had developed "in the absence of a principled framework, resulting in a variety of approaches"[34] dealing with infringement offences. All of this suggests to me that comprehensive legislative review of the system is warranted.

[38] Given my failure to discern a useful overall pattern to the statutes which provide for infringement notice procedures, I have been driven to a resolution of the case which depends primarily on the language and purpose of the relevant provisions of the Summary Proceedings Act and the Resource Management Act 1991. In approaching the case in this way, I have, however, derived some assistance from the legislative history of those provisions which I will, accordingly, discuss before coming to my reasons for concluding that s 21(1) of the former Act was not engaged by the prosecution of the appellant.

The origin and development of the infringement notice provisions in the Summary Proceedings Act

[39] Deploying the usual criminal law procedures in cases involving minor offences tends to involve a level of time, effort and expense which is disproportionate to the occasion. Recognising this, Parliament has provided a number of alternative procedures involving:

(a) standard fines;

(b) special minor offence prosecution procedures; and

(c) infringement fees.

[40] The standard fines procedure was introduced in 1955.[35] It was later provided for in s 21 of the Summary Proceedings Act as first enacted. This procedure applied to traffic offences punishable by fines not exceeding £50 (and not punishable by imprisonment), which had been appropriately designated by Order-in-Council. Standard fines for such offences were set locally by magistrates. A defendant

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34 At [23].

35 Justices of the Peace Act 1927, s 60A, as inserted by the Justices of the Peace Amendment Act (No 2) 1955, s 2.

prosecuted for such an offence was usually offered the option of paying the standard fine. This procedure was later abandoned[36] and there is no point in discussing it in any further detail.

[41] Special minor offence procedures were provided for by the Summary Proceedings Amendment Act 1973 which introduced s 20A into the principal Act. It applies to official prosecutions[37] for minor offences (now defined under s 20A(12) as offences which are not punishable by imprisonment or by fines exceeding $2,000 in relation to offences against the Land Transport Act 1998 or $500 for all other offences). Where a prosecution is subject to s 20A, a summons is not to be issued unless the informant satisfies the Registrar that "for special reasons" a summons should be issued or a District Court Judge (or now a Community Magistrate) so directs.[38] In all other cases, the prosecution is commenced by the filing of a notice of prosecution which is served on the defendant. An oral hearing is required only if the defendant requests it. In the absence of such a request, a District Court Judge (or now a Community Magistrate) may deal with the case on the papers, and in particular on the basis of the summary of facts which is set out in the notice.

[42] The Transport Amendment Act 1980 introduced a new s 21[39] into the Summary Proceedings Act under which prosecution for minor traffic offences could be either by way of the usual summary process or by the filing of a notice of traffic prosecution. The latter process was closely modelled on the notice of prosecution procedure under s 20A. There was, however, no requirement for leave to proceed by way of information and summons. This Act also introduced s 78A into the Summary Proceedings Act. As originally enacted, this section precluded the entry of conviction in all proceedings for minor traffic offences but authorised the imposition of fines, towage fees for parking offences and costs.

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36 Section 21 was repealed by s 4(1) of the Summary Proceedings Amendment Act 1976.

37 That is, by informants who are of a kind specified in s 20A(10).

38 The associated drafting is not free from difficulty and has been construed in divergent ways in two High Court decisions: see *Charteris v R* (1988) 3 CRNZ 355 (HC) per Anderson J and *Cairns v District Court* HC Dunedin CP9/93, 22 November 1993 per Tipping J.

39 Section 21, as first enacted, had been repealed when the standard fine procedure was abolished in 1976.

[43] The notice of prosecution procedure for minor traffic offences was abandoned, and absorbed into the s 20A procedure in 1987 when s 21 of the Summary Proceedings Act took on its present configuration.

[44] Infringement notice procedures were first introduced by ss 23 and 27 of the Transport Amendment Act 1968 in relation to overloading of vehicles and parking offences. The scheme became more developed as a result of the Transport Amendment Act 1974 which introduced a new s 42A providing for the declaration by the Minister of specified offences as infringement offences. An infringement offence could result in either summary prosecution (in which case an infringement notice was not to be issued) or service of an infringement notice. If an infringement notice was served and within a specified time the alleged offender had neither paid the fee nor elected to be proceeded against summarily, the prosecutor could proceed with summary prosecution in the ordinary way, "as if an infringement notice had not been issued".[40]

[45] The Litter Act 1979 independently provided for an infringement notice procedure. This was in relation to infringement offences specified as such under s 15(1) of the Act and was subject to the relevant local authority having adopted the relevant provisions of the Act under s 13. Subject to such adoption, where a control officer observed a person committing an infringement offence or had reasonable cause to believe that such an offence was being, or had just been committed, by that person, the officer could issue an infringement notice under s 14.

[46] A more complex regime was introduced by the Transport Amendment Act 1980 which recast s 42A of the principal Act and integrated the associated processes into the Summary Proceedings Act through the amendments to that Act which I have already discussed. The new s 42A provided for traffic officers to have the option of proceeding "under the Summary Proceedings Act 1957" or issuing an infringement notice.

[47] The Transport Amendment Act 1987 introduced yet another iteration of s 42A. Under this new s 42A (subs (6)), once an infringement notice had been

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[40] At Transport Amendment Act 1974, s 10.

issued, summary prosecution was expressly precluded unless the infringement fee was not paid within a specified time.

[48] The amendments to the Summary Proceedings Act by the Summary Proceedings Amendment Act 1987 repealed s 21 as inserted in 1980 (which provided for the notice of prosecution procedure for minor traffic offences) and replaced it with s 21 in substantially its current form. As well, it replaced s 78A as introduced in 1980, with the current provision which is set out and discussed in the reasons given by McGrath J. The scope of this procedure was confined to offences for which infringement notices could be issued under s 42A of the Transport Act 1962 or s 14 of the Litter Act 1979.

[49] When s 21(1)(a) was enacted, the practical position was that infringement offences (as defined in 1987) which could be the subject of prosecution[41] were also minor offences for the purposes of s 20A.[42] Accordingly, under s 20A, a summons could not be issued for such an offence without the sanction of the Registrar or a District Court Judge. To achieve congruence with subss 20A(1) and (2) and the clear intention that minor offences be dealt with in the ordinary way (i.e. by way of information and summons) only at the direction of the Registrar or a Judge, it was necessary to make the right to proceed by way of information in relation to infringement offences to also be subject to the leave of a Registrar or Judge being obtained.

[50] As will already be apparent, s 21 was drafted with particular offences in mind, being offences of a kind which were susceptible – as the Law Commission pointed out in its 2005 study paper[43] – to quick disposition on a one-size-fits-all basis. Because such offences characteristically result in minimal harm to the community, more formal court intervention and conviction are inappropriate. The

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41 Section 42A of the Transport Amendment Act 1987 provided that infringement offences included "overloading offences". Such "offences" carried penalties in excess of $500, but penalties could only be imposed by the infringement notice procedure. For this reason (as was recognised by s 42A(3)(a)), summary prosecution was not an option in respect of them.

42 This proposition requires one qualification. Under the Litter Act 1979, the infringement notice procedure was applicable to offences created by s 15(1) of that Act which, in the case of an individual, were punishable by a fine not exceeding $500 and, in the case of a body corporate, by a fine not exceeding $2,000. A s 15(1) offence was thus a minor offence for the purposes of s 20A if committed by an individual but not a minor offence if committed by a body corporate.

43 At [23].

Commission saw the associated trade-offs as justifying the s 78A prohibition on entering convictions.[44] I think it perfectly clear that s 78A (which in its first iteration applied to minor traffic offences) was predicated on an assumption that the offences punishable by imprisonment would not be infringement offences for the purposes of the Summary Proceedings Act.[45]

[51] On the basis of the considerations referred to in [49] and [50], I conclude that the s 21(1) leave requirement rests on a presumption that the offences to which it applies are of a kind for which prosecution in the ordinary way will usually be inappropriate.

The relevant provisions of the Resource Management Act

[52] The Resource Management Act came into effect on 1 October 1991. It provides for a comprehensive range of duties and prohibitions, including prohibitions imposed by s 15 on the discharge of contaminants.

[53] The general offence-creating provision is s 338 which criminalises contravention of specified sections (including s 15 pursuant to which the appellant was relevantly charged). Penalties are stipulated for primarily by s 339 in three bands involving:

(a) for the most serious offences (including the discharge offences in issue in this appeal), penalties of imprisonment for up to two years, fines of up to $600,000 (for corporations) and $300,000 (for natural persons) and additional fines in the case of continuing offences of up to $10,000 a day;

(b) for less serious offences, fines of up to $10,000 and $1,000 a day in the case of continuing offences; and

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44 At [72].

45 I agree with McGrath J (at [20]–[21]) that a sentence of imprisonment could not be imposed under s 78A, but the point I am making is slightly different, namely that the drafting of the infringement notice provisions was by reference to an assumption that the sort of offences which would become subject to them would be those for which s 78A would be appropriate, an assumption which would not be applicable in relation to offences punishable by imprisonment.

(c) for the least serious offences, fines not exceeding $1,500.

Section 339 also provides that any offence under the Act can result in a sentence of community work and empowers the Court to make enforcement orders under s 314 or to initiate statutory processes which can result in the cancellation of resource consents. As well, under s 339B, where the defendant has derived commercial gain, the Court may impose an additional penalty equivalent to three times the amount of the gain.

[54] The Resource Management Act infringement notice procedure was introduced into the Act by the Resource Management Amendment Act 1996. Section 343A, as introduced in 1996, defines an "infringement offence" as meaning an offence specified as such in regulations made under s 360(1)(ba). This latter subsection, which was also introduced in 1996, permitted any of the offences under the Act to be designated as infringement offences, a power which was exercised with the promulgation of the Resource Management (Infringement Offences) Regulations 1999, which came into effect on 1 February 2000. The offences which were designated as infringement offences include the discharge offences for which the appellant was prosecuted. The critical provisions of the Resource Management Act are ss 343B and 343C(3) and (4), which are set out in the reasons prepared by McGrath J.

[55] When introducing the 1996 amendments to the House of Representatives, the Conservation Minister, the Hon Simon Upton, said:[46]

> Clause 56 introduces new provisions that allow local authorities to impose an infringement fee – or instant fine – on a person who commits an offence. The schedule of offences and level of fine will be set by regulation. It is proposed that the maximum fine that may be set by regulation is $1,000. I have to say that that figure has been reached mindful of the level of instant fine proposed under the hazardous substances legislation since there is some commonality across the two Bills. As with speeding tickets, the normal ability to appeal such a fee will apply.
>
> I just diverge from my notes and say that it does seem to me that this is the only sensible cost-effective way of enabling minor breaches to be dealt with swiftly. It is absurd that minor breaches have to go through the full

[46] (14 December 1995) 552 NZPD 10715.

> machinations of the law at vast cost, which means they never happen – or, I should say, that enforcement is never undertaken.

This does not throw much light on the interpretative issue we have to deal with but it does rather suggest that the infringement notice procedures were intended to supplement, rather than restrict, the enforcement options of local authorities.

[56] The extent, diversity and comparative complexity of the penalties and other orders which can be imposed under the Resource Management Act reflect wide variations in both the culpability of those who offend and the harm they may cause. They also point to a need to tailor sanctions carefully to the particular circumstances of both offence and offender. While some offending will be minor, and thus properly susceptible to infringement notice procedures, the offences created by the Act are not similar in kind to those for which the procedure under s 21 of the Summary Proceedings Act was designed. In particular, they are not offences which could be presumptively classified as not appropriately the subject of ordinary criminal proceedings.

The reasons why s 21(1) of the Summary Proceedings Act did not apply in this case

[57] One way of looking at the case is through the prism of the Summary Proceedings Act. On this basis, the critical question is whether s 343C of the Resource Management Act provides "for the use of the infringement notice procedure under section 21" of the Summary Proceedings Act. As this formulation of the question suggests, and as I will, in any event, explain, this approach necessarily requires analysis of the relevant provisions of the Resource Management Act.

[58] Obviously s 343C(4) does, in a sense, provide for the use of the s 21 procedure. This is because the provisions of that section apply from the point where an infringement notice has been served. On the other hand, s 343C(4) (especially when read in conjunction with s 343B) arguably does not provide for the use of the entire s 21 procedure in that it applies only from the point where a notice has been served and it does not incorporate, at least expressly, s 21(1)(a). These

considerations leave me with the view that the case turns on whether ss 343B and 343C, on their true construction, are subject to s 21(1). If they are, it follows that the Resource Management Act provisions are within para (k) of the Summary Proceedings Act definition of infringement notice and the appellant's argument is correct. If not, s 343B provides adequate justification for the course taken by the prosecutor of laying informations without first having obtained leave.

[59] The most natural reading of s 343B and s 343C is that s 21 of the Summary Proceedings Act is only engaged if an infringement notice has been served. This is the effect of s 343C(4). As well, if s 21(1) applies, it renders s 343B redundant. On the other hand, if the purpose of s 343C is that it (and then s 21 of the Summary Proceedings Act) only become engaged when an infringement notice has been served, s 343B has a logical role to play.

[60] If the legislature intended s 21(1) to apply to Resource Management Act prosecutions, it could have: (a) added the Resource Management Act to the list of statutes in the definition of infringement notice in the Summary Proceedings Act, and (b) refrained from making independent provision for prosecution under s 343B, thus leaving a prosecutor with no choice but to rely on s 21(1). As is apparent, these obvious mechanisms were not adopted.

[61] As the Court of Appeal noted, the list of statutes in the Summary Proceedings Act definition of "infringement notice" was added to by various amendments between 1 March 1999 and 1 July 2004, which were collected into a single amendment by the Summary Proceedings Amendment Act 2006.[47] The same statute also made extensive amendments to the infringement notice provisions of the Summary Proceedings Act. Interestingly, it also amended the infringement offence provisions of a number of other statutes, including the Resource Management Act. If the legislature had wished to make it clear that s 21(1) applied to Resource Management Act prosecutions, this statute provided an obvious vehicle for doing so.

[62] There are broader reasons why Resource Management Act offences ought not to be regarded as infringement offences for the purposes of the Summary

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[47] *Wallace Corp v Waikato Regional Council* [2011] NZCA 119, [2011] 2 NZLR 573 at [40].

Proceedings Act. It must be remembered that the infringement notice procedure provided by Summary Proceedings Act was set up offences which (a) were minor and (b) of a kind for which the provisions of ss 21(1) and 78A and the associated one-size-fits-all treatment were perfectly apt. In contradistinction, offences under the Resource Management Act vary so considerably in culpability that this process and the associated limitations are not appropriate. For instance, convictions might often be warranted in relation to discharge offences as being relevant to sentencing in relation to later offending. And as well, given s 78A, treating discharge offences as being "infringement offences" for the purposes of the Summary Proceedings Act would, as McGrath J has pointed out, preclude the imposition of sentences of imprisonment as provided for by the Resource Management Act.

[63] All in all, construing the text of the Resource Management Act (including amendments) in light of what might be thought to be the purposes associated with the penalties regime under that Act, I think it is clear that:

(a) Section 343B is not subject to s 21(1) of the Summary Proceedings Act;

(b) Section 343C therefore adopts only part of, and not the entire, s 21 procedure; and

(c) Accordingly, the relevant provisions of the Resource Management Act do not engage para (k) of the Summary Proceedings Act definition of "infringement notice".

[64] Although I have reached this conclusion by a route which is not precisely the same as that followed by McGrath J and there are some differences between us of emphasis and nuance, my reasons are substantially the same as his.

Disposition

[65] For those reasons I would dismiss the appeal.

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