It is not necessary to determine what factors might in other factual situations need to be considered in order to decide who had priority at the council stage. In the present case it seems clear that Fleetwing lodged its completed application first; that its application was first to be formally received and then publicly notified by the council; that it was allocated the earlier hearing time; and that its application was heard first. As at present advised, we are inclined to the view that receipt and/or notification by the council is the critical time for determining priority in such a case but in the absence of extended argument and of any need to do so, we prefer not to express a concluded opinion.

The appeal is allowed and the matter is remitted to the Environment Court for reconsideration of the procedural aspects of the appeals and for determination in the light of the conclusions of law expressed in this judgment of the priority to be accorded the ultimate consideration and decision of the appeals.

Fleetwing is entitled to costs in all Courts. The orders for costs made in the High Court and any costs orders in the Environment Court are vacated. Costs in this Court and the High Court are fixed overall at $10,000 together with reasonable expenses as fixed, if necessary, by the Registrar. Costs in respect of this matter in the Environment Court are for consideration by that Court.

Fugle v Cowie

High Court Palmerston North AP48/96
4 July 1997
McGechan J

Rivers and streams — Excavation and dumping — Trout habitat — Whether actions necessary and reasonable — Timescale and proportionality — Serious adverse effects on property and adverse effects on environment — Mitigating and remedying effects — Resource consent — Resource Management Act 1991 ss 6, 7, 13, 338(1)(a), 339(1), 340, 341(2)(a)

Sentencing — Rivers and streams — Trout habitat — Matters of national importance — Resource consent — Whether actions necessary and reasonable — Plea — Level of fines for similar offending — Resource Management Act 1991, ss 6, 7, 339(1)

The appellant was the sole director of a company which owned land with a stream running through it. The stream's course abutted the bottom of a cliff. The appellant instructed an employee to place some tree stumps at the point where the stream contacted the cliff, and to cover the stumps with shingle from the stream bed in order to control erosion. All of the work took place in the bed of the stream. The work was not permitted by a plan or a resource consent. In the District Court it was held that the work was not necessary to prevent serious damage to property at that stage, and that the removal of shingle from a trout habitat was unnecessary.

Held (dismissing the appeal):

(1) Whether action is "necessary" for the purposes of s 341(2)(a) RMA was an objective test. Having satisfied this preliminary requirement, the next question was whether the action was carried out reasonably. This involved determination of whether the action was immediately or urgently necessary, and whether the action would produce results disproportionate to the perceived harm.

(2) It would be easier to consider that conduct was reasonable in cases where any immediate adverse effects could be, and had been, remedied.

(3) In the circumstances of this case the appellant's actions were not necessary to prevent serious damage to property. Nor was it necessary to avoid actual or likely adverse effects upon the environment. It was not

reasonable to carry out work of this sort without first obtaining a resource consent.

(4) The difficulty of mitigating and remedying the effects of the work made it more difficult for the appellant to claim that his actions were reasonable. Further, the appellant did not carry out such mitigation or remedial work as was possible.

(5) The primary policy behind penalties in this area was deterrence. Offending was viewed seriously by Parliament, and should be dealt with accordingly. The Courts should not shrink from imposing substantial, commercially meaningful fines.

(6) Trout habitats had been wrongly referred to as a matter of national importance by the sentencing Judge. Considerable importance was attached to the protection of those habitats. The Judge should not have penalised the appellant for pleading not guilty, as it was his right to defend the charges. However these matters did not demand reconsideration to be given to the fines imposed.

Cases referred to in judgment

Auckland Regional Council v AA Wholesale Ltd (1995) 1 NZED 40
Canterbury Regional Council v Crum Contracting Ltd (1996) 1 NZED 329
Canterbury Regional Council v Peter Kealey Contracting (1996) 1 NZED 646
Carlton & United Breweries Ltd v Minister of Customs [1986] 1 NZLR 423
Commissioner of Stamp Duties v International Packers Ltd [1954] NZLR 25
Environmental Defence Society Inc v Mangonui County Council [1989] 3 NZLR 257
Machinery Movers v Auckland Regional Council (1993) 2 NZRMA 661
South Wairarapa District Council v Riddiford (1996) 1 NZED 306
Tasman District Council v Concrete & Metals Ltd (1996) 1 NZED 616
Tasman District Council v Rowntree (1996) 1 NZED 615

Appeal

This is an appeal against conviction and sentence.

J M von Dadelszen for the appellants
P J Milne for the respondent

MCGECHAN J.

Appeals

These are appeals against conviction in the District Court at Palmerston North on 27 May 1996 and sentence in the District Court at Napier on 10 June 1996 on charges under s 338(1)(a) of the Resource Management Act 1991 alleging excavation and deposition of material within the bed of a stream in breach of s 13(1)(b) and (d). The appellant Mr Fugle, seen as the instigator, was fined $12,000 plus significant costs. The appellant Mr Hitchman, an employee who followed instructions, was fined $1,000. The appeals raise some significant questions as to the interpretation of s 341(2), and as to sentencing levels. I reserved decision accordingly.

Relevant legislation

Section 13 of the Resource Management Act 1991 provides (relevant parts):

> **13. Restriction on certain uses of beds of lakes and rivers** — (1) No person may, in relation to the bed of any lake or river, —
> (a) Use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or
> (b) Excavate, drill, tunnel, or otherwise disturb the bed; or
> (c) Introduce or plant any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or
> (d) Deposit any substance in, on, or under the bed; or
> (e) Reclaim or drain the bed —
> unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent.

Section 13 is backed up by s 338(1), under which every person who "contravenes, or permits a contravention" of inter alia s 13 commits an offence, punishable under s 339(1) by imprisonment for two years or a maximum fine of $200,000. Section 340 creates a vicarious liability for acts of "agent or employee". Both principal/employer and agent/employee are criminally liable.

Section 341 provides (relevant parts):

> **341. Strict liability and defence** — (1) In any prosecution for an offence of contravening or permitting a contravention of any sections 9, 11, 12, 13, 14 and 15, it is not necessary to prove that the defendant intended to commit the offence
> (2) Subject to subsection (3), it is a defence to prosecution of the kind referred to in subsection (1), if the defendant proves —
> (a) That —
> (i) The action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property or avoiding an actual or likely adverse effect on the environment; and
> (ii) The conduct of the defendant was reasonable in the circumstances; and
> (iii) The effects of the action or event were adequately mitigated or remedied by the defendant after it occurred. . .

Subsection (3) is a procedural provision of no present significance.

Background facts

Appellant has a family company, Bletchley Developments Limited ("BDL"). He is the sole director. The company owns land outside Palmerston North. A stream, the Turitea stream, runs through a section of that land. The stream is contained within a flat-bottomed valley. Over the years, it has tended to wander. As at offence date, the stream flowed up against a road (area C), then ran hard against a cliff (area B), and ultimately ran under a road bridge (area A). Mr Fugle has a substantial house some distance back from the cliff. There is a footpath between the top of the cliff and the house, leading to the rear of other properties.

Early in the morning of 30 August 1995, Mr Hitchman, employed by BDL, acting on instructions of Mr Fugle as its director, was carrying out

unrelated work on the land concerned. Mr Fugle noticed that the flow of the stream was running against the bottom of the cliff. He had not noticed that condition before. He diverted Mr Hitchman, instructing him to place half a dozen old stumps, which happened to be available, at the point of contact, and to cover those stumps with shingle. All of this occurred at position B. the toe of the cliff. It was intended as an erosion control measure. Mr Hitchman did so. The work involved creation of a small platform at the toe of the cliff, placement of the logs, then burial of the logs with shingle obtained from the bed of the stream. All work was within the "bed" as defined within the Resource Management Act, being land covered at fullest flow without over-topping the banks. A substantial part of the logs and shingle were above water level at the time. The logs were virtually unnoticeable. The Turitea stream is a trout spawning ground. The stream bed adjoining the work carried out was scraped clean in places in the process.

This work was not permitted by any express provision of a regional plan or proposed regional plan, and no resource consent was in existence. It was noticed and reported by locals. Council staff arrived soon after the work had been completed. There had been trouble before. There was something of a confrontation. No further work was carried out on the stream bed. This prosecution followed.

District Court decision

The defence mounted in the District Court was based on s 341(2)(a), asserting (i) the action concerned was "necessary" for "preventing serious damage to property or avoiding an actual or likely adverse effect on the environment"; was "reasonable in the circumstances"; and effects were "adequately mitigated or remedied" subsequently. Under this section, the onus of proof is on the defence, with the standard set at balance of probabilities.

The District Court Judge, highly experienced in environmental matters, gave an immediate oral decision.

As to s 341(2)(a)(i), the Court directed its mind to damage in the form of prospective cliff collapse of a severity such it might divert the stream so as to damage the bridge, and also to environmental effects in the form of prospective cliff collapse into a trout spawning habitat at the foot of the cliff. The Court accepted Mr Fugle noticed "erosion of the cliff-face where it was being undercut by the river." The Court noted the erosion concerned could not be observed on its own visit during course of hearing, but accepted evidence "there are signs of erosion at the base and by undercutting". Then, however, the Court found "these cliffs or the cliff have been around a long time and I was not convinced from any of the evidence I heard that there was an element of urgency or necessity which was peculiar to 30 August" adding forthrightly "I totally reject the proposition that there was a potential danger such that immediate action was needed". The Court found that Mr Fugle, if truly concerned about the cliff, would have taken engineering advice. Instead, he merely took steps which happened to be available to him at the time because machinery was present and stumps available. This "do it yourself way" was "symptomatic of his view of the potential danger". On this basis

s 341(2)(a)(i) did not apply, as the work was not "at that stage" necessary to prevent serious damage to property. Further, removal of gravel in place at the base of the cliff, "containing trout in the early stages of life living within that gravel" as material for that fill was "totally unnecessary", as gravel or material could have been brought from elsewhere. Referring to s 7 as requiring the Court to recognise protection of trout habitat as a "matter of national importance" (sic), the Court observed it would take "some convincing" that removal of trout habitat for "stop gap erosion control measures" was "necessary" action.

As to s 341(2)(a)(ii), with "no imminent danger" it was unreasonable to proceed without at least engineering advice or "without a resource consent if time permitted". The Court added that the work done, with "remedial and mitigation work" might be of some value for erosion control.

As to s 341(2)(a)(iii), adequate mitigation or remedy was dismissed as "[not] particularly relevant in the circumstances". No more was said.

The Court added a general observation that stream-side cliffs are not unusual, and nor are small slips or collapses; and that "to allow anybody to use that natural phenomena as an excuse for carrying out what they perceived to be remedial works" is "unacceptable".

Submissions for appellants: conviction

I had the benefit of detailed and careful argument.

Counsel submitted the Court should decide first whether actions were "necessary" for the purposes of s 341(2)(a)(i), and only then go on to consider whether conduct was "reasonable" s 341(2)(a)(ii), considering the two elements "independently of each other rather than together" as the District Court appeared to have done; although all, it was conceded, were "in one basket".

As to the law bearing on s 341(2)(a)(i), counsel submitted the District Court's reference to need for an element of "urgency" and for "potential danger such that immediate action was needed" overstated statutory requirements. Section 341(2)(a)(i) makes no reference to "potential danger" or "immediate action". The statutory requirement is merely that work be "necessary", put on the strength of *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 as "a fairly strong word" but "falling between expedient or desirable on the one hand and essential on the other". The District Court's approach savoured of an excessive requirement for essentiality. Counsel distinguished a decision of the Planning Tribunal in *South Wairarapa DC v Riddiford* (1996) 1 NZED 306 on its facts, the latter involving environmental damage which was self generated and of long standing.

As to the facts bearing on s 341(2)(a)(i), counsel noted appellants' motivation as being to protect the cliff, and thus prevent subsidence and resulting damage. Counsel analysed the evidence bearing on considerations of damage to property and adverse effects on environment in some detail. Suffice it to say it is clear there was a range of perceptions. Prosecution witnesses saw the likelihood of a major failure of the cliff as being very small, and as not justifying emergency works; indeed saw the adverse effects of the work done as greater than any possible benefits. In

contrast, Mr Fugle's evidence was of seeing (and for first time) "the bank was clearly eroding", and of "a real and immediate danger that this bank would erode considerably", and belief "it was necessary to respond quickly". Mr Fugle's evidence had been that if the action had not been taken, "major environmental damage would have occurred by further eroding the cliff, creating loss of land, flooding and other property damage". The appellants' engineer had given evidence of active erosion at the toe of the cliff, and an opinion that some works would be necessary, that a major slip could put the bridge at risk, that erosion is spasmodic, and that the effects of the work done were less than the effects of unimpeded natural processes. It was noted that the prosecution's engineer accepted that a large slip would affect trout spawning downstream.

On this evidence, particularly that of Mr Fugle, the work was put as "necessary". It was more than merely "expedient and desirable". It was of "sufficient urgency that it should be carried out then and there".

Counsel submitted the District Court's secondary reliance upon absence of engineering advice, and lack of necessity for destruction of trout spawning grounds, was misplaced. It was not the case Mr Fugle would have taken engineering advice in the situation he perceived. Moreover, that question was never put to him in evidence. Further, the Court had found in fact that neither appellant knew that the gravel at the foot of the cliff which was disturbed contained a trout spawning habitat.

As to s 341(2)(a)(ii), submissions started from a proposition that Mr Fugle subjectively believed, on 30 August 1995, that observed undercutting of the cliff required immediate action. Indeed, the prosecution witnesses accepted something needed to be done. It was "entirely reasonable for the appellants, on a subjective basis, to perceive a present danger and the need for steps to be taken there and then". As an engineering witness observed, the person on the spot was best placed to judge. The works done were of some value for erosion control, and were stopped before additional work (eg planting) could be undertaken. Mr Fugle, subjectively, held an honest belief in what was being done. In exchange between Bench and Bar, the position as to subjectivity complicated somewhat. It was accepted that the ultimate test of the reasonable is an objective one, in which subjective beliefs and behaviour are no more than some guide.

As to s 341(2)(a)(iii), mitigation or remedy was prevented by the council orders to cease work, and in any event have not been regarded by the District Court as of significance.

Finally, I note counsel rejected the District Court's concluding observation that given the frequency of slips into streams, there was not room for freedom to take remedial action on a basis such was perceived as necessary. This, it was said, was placing a gloss on the statute, inconsistent in particular with s 341(2)(a)(i).

Law: section 341(2)(a)(i) (ii) and (iii): "necessary" and "reasonable"

"Necessary" is a firm term. It does not suffice that action is merely "desirable", or "useful", or even "advisable". It must be as high as "necessary" — a matter "of necessity". The term often is construed as "reasonably necessary"; cp *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 260 per Cooke P citing *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 at 430 and *Commissioner of Stamp Duties v International Packers Limited and Delsintco, Limited* [1954] NZLR 25 at 54. The qualification "reasonably" explains the otherwise impossible distinction drawn by Cooke P between "necessary" and "essential". I consider the legislature intended this commonplace qualification in present context. There is no reason to believe it envisaged the unreasonable. As Cooke P ibid observed, "the test is no light one". The test is objective. Action either is necessary (in the sense of "reasonably necessary") or it is not. That does not depend upon defendant's beliefs.

Section 341(2)(a)(i) should not be considered in isolation. It is not possible, as appellants' submissions preferred, to view s 341(2)(a)(i), (ii), and (iii) in some entirely isolated fashion, even if as was suggested in oral argument they are placed "in the same basket". Considerations relevant to each do overlap.

Work may be "necessary" in the physical sense that without it serious danger, or adverse effects on the environment, sooner or later will or may occur. However, qualifying questions of timescale and proportion then arise.

First, timescale. It is true s 341(2)(a)(i) does not refer in express terms to immediacy or urgency. However, any argument dismissing time considerations on that basis is simplistic. Regard must be had to policy. The basic premise of the Act is that planning requirements are to be obeyed. Subject to complications over existing use rights, activities contrary to planning requirements are forbidden unless authorised by resource consent procedures. The legislature did not intend to facilitate arbitrary action (and certainly not in sensitive stream beds) contrary to planning requirements where time existed to apply for resource consents. Section 341(2)(a) creating a special defence to prosecutions was not intended to drive a horse and cart through the basic scheme of the Act. To the contrary, it is directed towards the occasional and exceptional situation where a person hardly can be blamed for pre-emptive action, and criminal liability would be unfair. It would not generally be "reasonably necessary" to carry out work without prior resource consent when sufficient time was available to obtain resource consent Nor would it be "reasonable" within s 341(2)(a)(ii) to engage in protective works, least of all in sensitive stream beds, in contravention of plans when time was available to follow planning requirements. Even if the work is physically "necessary" on some timescale, it is neither "necessary" nor "reasonable" to proceed with unnecessary haste. I am not unaware of views widely held in some quarters that resource consents are too slow and too expensive, particularly for minor work. That does not alter the requirements of the legislation.

Second, proportion. Work may be "necessary" in a physical sense for one purpose, but its execution may cause unacceptable damage in other respects. A farmer could not expect to divert a water course to save his paddocks at the expense of flooding a neighbouring town. Harm must not be disproportionate to cure. The requirement for "reasonable" conduct

applies once again. The work may be "necessary" in a physical sense for the owner's own limited purposes, but it must also be "reasonable" on a wider plane to carry it out Within this sense of proportion there can be particular needs to weigh risks against consequences in a quantitative way. High risks an event will occur may justify urgent action; but not necessarily so if damage likely to ensue from the event is minor. Low risks of high damage — eg a low risk of a damburst above habitation — may or may not present likewise. High risks of high damage speak for themselves. I need not labour the point further.

The s 341(2)(a)(ii) standard of "reasonable" conduct is objective, given facts as then known, and considerations of common-sense which should then prevail. One must avoid the dangers of hindsight.

There is a further overlap between s 341(2)(ii) and (iii). Conduct more readily can be regarded as "reasonable" when any immediate adverse effects can be, and have been, remedied. Where damage will be irreparable, one should pause long before acting. When resulting damage can be repaired, in whole or in part, it is harder to describe action taken as "reasonable" when that damage is left unrepaired.

In substance, I concur with the District Court's perception the law requires proven immediacy and urgency for remedial works before a s 342(2) defence will be available. That view was expressed without underlying analysis, but was correct. There was no error in principle.

This case: conviction

There is no doubt that some erosion was occurring at the toe of the cliff. It probably still is. The question is one of degree, risk, and resultant urgency. There was a clear conflict of evidence on those aspects before the District Court Mr Fugle's evidence was that he considered there was an immediate risk of cliff collapse. Other witnesses saw a risk of eventual collapse to some greater or lesser degree, but saw no significant immediate risk. Mr Fugle had the advantage of having seen the actual erosion on the day. He had the disadvantage, within a courtroom, of an intense self interest. The District Court did not accept his evidence. His Honour found, and in strong terms, there was no immediate risk of cliff collapse. It would be quite wrong for me, given the Judge's advantages in seeing and hearing the witnesses, to take some different view on appeal. However, in any event, there is independent common-sense support. It is an altogether unlikely coincidence that Mr Fugle just happened to have a suitable digger and driver down on the stream bed at a time it had become so "necessary" to protect the cliff that action could not wait for a resource consent. As witnesses and indeed the Judge observed, the cliff had been there for some time, without collapse. Given the realities of human nature, there is a high likelihood, as the Judge observed, that with some potential damage observed, and a digger and logs conveniently available, Mr Fugle simply took the opportunity to carry out some useful work. The burden of proof was on the appellants. It is quite understandable the District Court did not regard it as discharged.

Given there was no proved immediate risk of cliff collapse, and no urgency, the question arises whether the action taken can be categorised as "necessary" to prevent "serious damage" to property, or to avoid actual

or likely "adverse effect" on the environment. The further and related question then arises whether appellants' conduct was "reasonable" in the circumstances.

Clearly, the action was not "necessary" at that time to prevent serious damage to property. There was time within which to make application for resource consent. The worst case scenario of a major slip of the cliff itself could be described as "serious" damage both to the land form, and in its possibility of stream diversion endangering the bridge downstream. However, even the latter is not shown to be in a category so serious in degree that immediate action, despite insignificant risk of early occurrence, was "necessary". The case was not put as carrying the alternative statutory possibility of a danger to life or health. Matters could wait while the procedures laid down by statute were observed.

Was the action "necessary" at that time to avoid actual or likely adverse effect on the environment? The only postulated effect of cliff collapse would be on the trout spawning grounds immediately under the cliff through impact, and downstream through discolouration. No other environmental effect is suggested. Again, there was time within which to make application for resource consent. Interestingly, on the words of the statute, there is not the same express requirement for "serious" adverse effect on the environment. Damage to property must be "serious", but seemingly effects on the environment need not. Perhaps property is regarded as insurable and replaceable; and environmental matters are ranked higher on a planning scale (cp s 6(a)). Whatever the reason, not too much should be made of the distinction. The section would not have been intended to deal with environmental trivia. The appellants have a somewhat easier case in respect of required scale of likely adverse effects on the environment, even though ironically neither was acting with a view to environmental protection. However, the case carries a serious difficulty in terms of proportion. Action of this sort taken to protect trout as at late August would have an entirely opposite effect. It was a particularly bad time to disturb the stream bed, and would not so much prevent harm as occasion harm. With no risk of immediate major cliff collapse, it was not "necessary" to do undoubted damage to trout habitat at that time. Certainly, it was not necessary to scrape portions of the stream bed bare in the manner which occurred.

Was appellants' conduct "reasonable" in the circumstances? There is some overlap. It is clear from the District Court's finding as to absence of risk of immediate collapse, and the opportunistic nature of the appellants' actions, that Mr Fugle did not in fact see the situation on 30 August 1995 as one of immediate crisis. With that, submissions based upon acceptance of a subjective belief on his part of an immediate risk lose force. It was not "reasonable" to carry out self help erosion control work of this character without first obtaining resource consent. There was no need for the rush. It is true there is evidence that the work was not excessive or useless. There is evidence it had some residual value, although follow-up was needed. That, however, does not save matters. It was not "reasonable" to carry out work which was not necessary within the time frame required without obtaining that consent, even if the work done had some potential value.

This question of "reasonable" conduct rather merges into the final question of s 341(2)(a)(iii) mitigation and remedy after the event. Obviously, it would have been difficult to restore the bed of the stream to its pre-extraction natural condition, at least in its biological aspect, after the work was completed. Indeed even without reference to trout spawning habitat, exact restoration would not be possible. It increases appellants' difficulties in characterising conduct as "reasonable" when full mitigation and remedy obviously would be difficult. It increases such difficulties even more when, as certain photographs demonstrate, no full attempt was made. Portions of the stream bed were left scraped bare. I am unimpressed by the response that appellants were stopped from further work in the stream. Mr Hitchman had finished in area B by the time the order issued. He was not prevented from further intended restoration. That simply was not intended.

The District Court did not treat questions of mitigation and remedy as significant in themselves. Appellants may have been fortunate in that respect. The problems in achievement, and in effort afterwards, do count against the defence.

Standing back, and taking an overview, I am left in no doubt the District Court's decision was correct. The appellant Mr Fugle made an opportunistic decision to carry out certain protective work which was not immediately required. It was not "necessary" within the short term. He proceeded without the necessary resource consent. That was not reasonable in the circumstances. Further, he did not carry out such mitigation or remedial work as was possible. This situation is not within the exceptional class saved by s 341(2). The convictions were rightly entered.

Sentence

The District Court treated Mr Fugle as instigator of the work; a man who knew he should not "play around" with the stream, which had been the cause of concern and antipathy between himself and the Council. The Court observed he had acted without attempting to take advice. The potential for erosion damage was no greater than in many parts of New Zealand, and indeed was less than some. The efficacy of the works was doubted, on the basis gravel had washed away, with some concerns that the stumps may be redirecting water in a manner which will exacerbate the problem. The District Court referred to "the possibly most serious" aspect being interference with trout spawning habitat. It was noted as close to the worst time to disturb the habitat. The Court accepted Mr Fugle "may have been unaware that a spawning ground existed in this precise spot", but had no doubt "the value of the river for trout spawning purposes was generally known to him", as probably to all persons with properties on the bank. The Court considered a small fine would not accord with the purposes of the Act given the importance of Part II (ie protection of trout habitat). I note that earlier, in relation to Mr Hitchman, the Judge had referred to s 7 and to viewing trout spawning grounds as a matter of "national importance".

The Court noted modest income and assets, and properties tied up in family Trusts or placed within BDL, but did not see a need in that light to make allowances.

With concluding and specific reference to non criminality in the sense that Mr Fugle was trying to remedy something he perceived needed remedy, absence of knowledge of exact spawning grounds (although enquiry should have been made), and a plea of not guilty (tempered by steps taken not to waste time) the fine and costs as stated were imposed, 90% payable to the Council. There was an order Mr Fugle remove the stumps.

The District Court treated the driver Mr Hitchman as accustomed to working in streams, but unused to the Resource Management Act, and essentially a workman "who does what he is told". He was identified a an honest person not likely to break the law, and with no idea he was entering a trout spawning ground. The Court considered it was not an excuse simply to follow orders, and while allowances were to be made for fear of job losses, "contractors and machine operators must get the firm message that they have a responsibility under this Act" not escapable by pleading employer's instructions. The Court took personal position into account, and after reference to s 7 and trout spawning as "a matter of national importance", imposed the fine concerned, again with 90% payable to Council.

Counsel for appellants submitted the fines were manifestly excessive, and were out of line with sentencing trends. Matters of particular challenge in respect of appellant Mr Fugle included (a) omission to refer to appellants stopping work and being prevented from completion, evidence the work would have some benefit for erosion control, and that Council accepted something should be done. Submissions also challenged as speculative the asserted knowledge of appellants in general terms that the river had value for spawning purposes.

Counsel presented as comparisons a series of gravel extraction cases in particular *Tasman District Council v Concrete and Metals Limited* (1996) 1 NZED 616, fine $13,000 reduced on appeal to $9,000; *Tasman District Council v Rowntree* (1996) 1 NZED 615, fine $3,500; *Canterbury Regional Council v Crum Contracting Limited* (1996) 1 NZED 329, fine $5,000; *Canterbury Regional Council v Peter Kealey Contracting* (1996) 1 NZED 646 fine $4,000; and *Auckland Regional Council v AA Wholesale Limited* (1995) 1 NZED 40 fine $4,000 per offence.

On the Hitchman appeal, it was submitted appellant was unwittingly implicated by his employer; with no penalty necessary.

Counsel for respondent presented detailed submissions to the contrary. In particular, the leading case was put as *Machinery Movers v Auckland Regional Council* (1993) 2 NZRMA 661, recognising need for deterrents. Counsel rather complained the present High Court decisions had reduced "quite a number of penalties" thus reducing desirable deterrents to a point where fines could be economically preferable relative to benefits achieved. I was referred also to asserted previous offending by BDL in the matter of consents under the Building Act 1991, and even to a GST offence matter. Neither of the latter were before the District Court, and they are more pejorative than helpful. I put them aside.

Counsel for respondent referred me to a different range of decisions, this time on tree removals, the strongest examples of which imposed fines of $9,000 and $8,000.

There is no case as to attempted erosion control with implications for trout habitat and a background in any way comparable to the present I do not regard the examples cited relating to gravel extraction for commercial purposes, and to destruction of vegetation, as sufficiently analogous to furnish useful guidelines, and note these decisions as a source of principle only.

I agree that a primary policy behind penalties in this area must be deterrence. The Courts should endeavour to keep fines at levels which mean infringements are not worthwhile. While there are dangers in steering by the maximum, taken prone, it is a significant pointer that Parliament permits fines ranging up to $200,000, to say nothing of imprisonment for up to 2 years. Offending is viewed seriously, and should be dealt with accordingly. The Courts should not shrink from substantial fines, commercially meaningful.

Having said that, sentencing as always depends upon all the circumstances both of offence and offending.

Particular factual aspects raised in appellants' submissions do not much advance matters. There is little weight in the point appellants stopped work, and could not complete. The work in reality was finished. There is perhaps more potential weight in the point that the work could have some benefits. That possibility had been recognised at the earlier point of conviction. The District Court appears to have changed its mind by the time of sentence; dramatically so, given the order for removal of stumps. The earlier view was more beneficial to the appellants, but I do not say the latter view could not be taken. Council's acceptance something should be done is really no more than a variant of an accepted erosion situation which will need attention in due course, a point well recognised by the Court.

I consider it was open to the Court to infer a likelihood appellant Mr Fugle knew the river had value for trout spawning. As the Judge said, he lived beside it, and knew there were trout.

There are, however, some additional matters mentioned during argument which still cause me some concern. First, the Court referred, directly in the case of Mr Hitchman and indirectly in the case of Mr Fugle, to protection of trout habitat as a s 7 matter of national importance. It was correctly identified as within s 7, but the latter does not deal with matters of "national importance". The latter fall within s 6. Section 7 merely directs the Court to have "particular regard to" this factor. The Court attached considerable importance to the trout habitat aspect, and even a slight quantum error as to proper emphasis could have had repercussions. Second, the Court expressly took into account the fact appellants had pleaded "not guilty" (tempered by allowance for expedited hearing processes). That was wrong in principle. One cannot penalise for defending. It is every person's right. The most which can be done is to make favourable allowance for a plea of guilty, going down from an otherwise prevailing standard. While logicians may protest, that principle and emphasis is clear. Fortunately, any erroneous emphasis was mitigated to at least a significant extent by the express allowance made for expecting hearing.

With these points in mind, and particularly the reference to "national importance", I have weighed the sentences imposed with particular care. In outcome, I concur. Indeed, given the need for deterrence, and in the case of Mr Fugle the apparently deliberate defiance of resource consent requirements, I consider the fine imposed was towards the lower end of the range. Any further allowances which might perhaps be due on the basis of the points discussed are more than met by that leniency. At $12,000, the fine imposed is only 6% of the maximum. In the circumstances a fine of $20,000, or 10%, would not necessarily have caused concern. In Mr Hitchman's case, I consider the fine imposed, described as the "bare minimum", is exactly right. It is a suitable round figure warning to drivers that if they go into rivers on employer's instructions, and break the law, they do so at an unacceptable personal cost. There is no room for a Nuremberg defence. There must be fines on employees sufficient to encourage them to stand firm.

Order

The appeals are dismissed.