

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CRN-17004504609, 4611, 4624, 4628, 4630 & 4633  
[2019] NZDC 2337**

**AUCKLAND COUNCIL**  
Prosecutor

v

**DONGHUA LIU  
KELLY PARSONS**

**AND**

**DI GUAN**  
Defendants

Hearing: 11 February 2019  
Appearances: N A Speir for the prosecutor  
F Pilditch for the defendants  
Judgment: 1 March 2019

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**PRE-TRIAL RULING OF JUDGE D A KIRKPATRICK  
ON THE VALIDITY OF CHARGES UNDER BUILDING ACT 2004**

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**Introduction**

[1] The defendants seek a ruling on the validity of the charge that each of them faces under the Building Act 2004 (BA).

[2] The validity of the charge depends on whether s 21 of the Summary Proceedings Act 1957 (SPA) applies to a charge under s 40 BA so that the leave of a

District Court Judge or a Registrar is required before a charging document may be filed under the Criminal Procedure Act 2011 (CPA).

[3] An associated issue is whether s 375 of the CPA applies to an offence under s 40 BA, so that if any defendant is found guilty of or pleads guilty to the charge under s 40 BA, the Court must not convict that defendant but may order the defendant to pay any fine and costs and make any other order that the Court would be authorised to order or make on convicting the defendant of that offence.

[4] Both of these issues arise in terms of the regime for infringement offences under the BA. In broad terms, they turn on whether, or the degree to which, that regime is self-contained and independent of the provisions relating to infringement offences under the SPA and the CPA.

[5] The charge that each defendant faces is that between 19 September 2016 and 10 August 2017, at 110 St Andrews Road, Epsom, Auckland legally described as Lot 2 DP 499835, each defendant contravened s 40 BA “by carrying out building work except in accord with a building consent, by undertaking external alterations to the roof of a dwelling contrary to Building Consent B/2014/1822/B”, particularly that “the approved building consent plans specified the use of “corrugate profile long-run roofing at 20deg pitch (to match existing roof)” whereas asphalt shingle roofing tiles have been applied.”

[6] Under s 40(3) BA the maximum penalty in respect of this charge is a fine not exceeding \$200,000 and, in the case of a continuing offence, a further fine not exceeding \$10,000 for every day or part of a day during which the offence is continued.

[7] Each defendant also faces a charge under the Resource Management Act 1991 relating to the use of the land, but those charges are not the subject of this challenge and so are not relevant to this ruling.

### **Relevant statutory provisions**

[8] Offences against the BA are dealt with in two different ways. Proceedings for infringement offences under the BA are dealt with in ss 370-374. Proceedings for offences generally are dealt with in ss 375-389.

[9] In s 370 BA, *infringement offence* is defined to mean:

- (a) an offence that is declared, by regulations made under s 402, to be an infringement offence for the purposes of this Act; or
- (b) an offence that is stated by a provision of this Act to be an infringement offence.

[10] Section 371 BA provides:

#### **371 Proceedings for infringement offences**

- (1) A person who is alleged to have committed an infringement offence may either—
  - (a) be proceeded against by filing a charging document under section 14 of the Criminal Procedure Act 2011; or
  - (b) be served with an infringement notice under section 372.
- (2) If an infringement notice has been issued under section 372, proceedings for the offence to which the notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act 1957, and in that case the provisions of that section apply with all necessary modifications.

[11] In the Building (Infringement Offences, Fees and Forms) Regulations 2007, regulation 3 in schedule 1 provides that the offence under s 40 BA is an infringement offence for which the infringement fee is \$1,000.

[12] As well as these provisions of the BA, there are also provisions in the SPA dealing with infringement offences, in particular in s 2 – Interpretation and s 21 – Procedure for infringement offences.

[13] Under s 2(1) SPA, *infringement offence* is defined to mean:

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

And *infringement notice* is defined to mean:

A notice issued under [34 specifically listed statutory provisions] or

- (k) any provision of any other Act providing for the use of the infringement notice procedure under s 21.

[14] Under s 21 SPA:

- (1) Proceedings in respect of an infringement offence may be commenced –
  - (a) with the leave of a District Court Judge or a Registrar, by filing a charging document under the Criminal Procedure Act 2011; or
  - (b) where an infringement notice has been issued in respect of the offence, by providing particulars of a reminder notice in accordance with sub-sections (4) and (4A), or by filing a notice of hearing in a Court, under this section.

[15] Section 21 continues for a further twelve subsections which set out the procedure for dealing with infringement notices in detail. These provisions are not directly relevant to the questions presently before the Court and so are not set out here.

Also relevant to the issues before the Court is s 375 CPA, which provides:

**375 Conviction not to be recorded for infringement offences**

- (1) If a defendant is found guilty of, or pleads guilty to, an infringement offence (whether or not an infringement notice has been issued), the court—
  - (a) must not convict the defendant; but
  - (b) may order the defendant to pay any fine and costs and may make any other order that the court would be authorised to order or make on convicting the defendant of that offence.
- (2) Every reference in this or any other Act, or in any regulation or bylaw, to a conviction for an offence is, in relation to an infringement offence, deemed to be a reference to—
  - (a) an order that the defendant pay a fine and costs under subsection (1)(b); or
  - (b) a deemed order that the defendant pay a fine and costs under section 21(5) or (5A) of the Summary Proceedings Act 1957.
- (3) However, sections 229, 244, and 246 do not apply to any deemed order that the defendant pay a fine and costs under section 21(5) or (5A) of the Summary Proceedings Act 1957.
- (4) Subsection (1) overrides any other provision of this Act or any other Act.

[16] This provision is the successor to s 78A SPA (repealed) which previously provided:

**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.
- (2) Every reference in this or any other Act or in any regulation or bylaw to a conviction for an offence shall, in relation to an infringement offence where—
  - (a) an order has been made as referred to in subsection (1) that the defendant pay a fine and costs; or
  - (b) an order is deemed by virtue of section 21(5) to have been made that the defendant pay a fine and costs,—

be deemed to be a reference to the making of that order.

[17] For offences generally, s 375 BA provides:

- (1) Except as otherwise provided in this Act, all offences against this Act may be prosecuted, and all fines or sums of money imposed or declared to be due or owing by or under this Act may be sued for and recovered before a court of competent jurisdiction.
- (2) In this section, court of competent jurisdiction means a court having jurisdiction for punishment of offences of the same nature or for the recovery of fines or sums of money of the relevant amount.

[18] The following provisions in ss 377-380 BA then set out the requirements for filing charging documents, the time for filing, the basis for liability and so on, in a manner reminiscent of other statutes which regulate activities.

[19] Counsel for the defendant submits that paragraph (k) in the definition of *infringement notice* in s 2 SPA is a catch-all which means that a notice issued under the BA is an infringement notice in respect of an infringement offence under the SPA, so that s 21 SPA and s 375 CPA apply in respect of infringement offences under the BA.

[20] Counsel for the prosecutor submits that the provisions of the BA are sufficient to authorise proceedings to be issued under the BA in the ordinary way without leave first being obtained under s 21 SPA and for convictions to be entered without the limit under s 375 CPA.

### **The position under the Resource Management Act 1991**

[21] These issues have previously been considered in detail at appellate levels in the context of the Resource Management Act 1991 (**RMA**). Counsel for the defendant submits that the decision of the Supreme Court in that context can be distinguished, while counsel for the prosecutor says that it should be followed in the present case.

[22] In *Wallace Corporation Ltd v Waikato Regional Council*,<sup>1</sup> Wild J reviewed the development of the minor offences/infringement offence legislation as detailed in the Law Commission's study paper *The Infringement System – a Framework for Reform*.<sup>2</sup> He noted that s 21 SPA was inserted in 1987 when it applied only to lesser traffic offences and to offences under the Litter Act 1979. While an increasingly wide range of other Acts were amended by introducing provisions to deal with offences created by those Acts as infringement offences, he concluded that the intention was to remove from the summary offence procedures offences which did not justify or require those procedures, and that it was never the intention to do away with those procedures for the offences which did justify them. On a purposive interpretation, Wild J held that s 21 SPA applies where an offence may be and has been dealt with by serving an infringement notice under s 343C RMA.

[23] On appeal, the Court of Appeal disagreed with Wild J's reasons but upheld the outcome on different grounds.<sup>3</sup> The Court of Appeal heard several appeals on these issues together, including that of Ms Down who had managed a scrap metal recycling business and was convicted of 14 offences against the RMA, including permitting discharges of contaminants and contravening an enforcement order. At sentencing, her

<sup>1</sup> *Wallace Corporation Ltd v Waikato Regional Council* [2009] NZHC 2621, [2010] 2 NZLR 556.

<sup>2</sup> New Zealand Law Commission Study Paper 16, August 2005, at paras 13-20.

<sup>3</sup> *Wallace Corp v Waikato Regional Council* [2011] NZCA 119, [2011] 2 NZLR 573.

counsel submitted that leave was required before the charges were laid. That was rejected by the sentencing Judge.<sup>4</sup>

[24] The Court of Appeal held that the structure of the definitions in s 2(1) SPA and the pattern of amendments to it showed that Parliament had deliberately omitted s 343C RMA from the list in the definition of *infringement notice* and that such exclusion was inconsistent with bringing that provision within the ambit of s 2(1)(k) SPA. On that basis the RMA did not provide for the use of the procedure in s 21 SPA and instead provided its own procedure, analogous to but independent of that provision.

[25] On appeal in *Down v R*,<sup>5</sup> the Supreme Court held that the relevant provisions of that Act dealing with infringement offences stood on their own so that they were not subject to ss 21 and 78A SPA. In the Supreme Court decision there are two substantive judgments: one by Elias CJ and McGrath J, and one by William Young J. Both judgments reach the same conclusion, albeit by slightly different routes, and the other members of the Court, Blanchard and Gault JJ, said that they agreed with the reasons of both.

[26] Elias CJ and McGrath J considered that s 343B RMA (which corresponds to s 371 BA) was critical to the issue. This provision makes it clear that there are alternative ways of proceeding against those alleged to have committed infringement offences. They reviewed the procedural provisions of the RMA, including subs 343C(3) and (4) (which correspond to ss 373 and 371(2) BA, respectively), noting the references there to s 21 SPA.<sup>6</sup>

[27] Addressing the argument for the appellant and an intervenor that the application of s 21 SPA is necessary in s 343C RMA to provide a mechanism for enforcement, without which there was no capacity for proceedings to be commenced if infringement fees were not paid in response to an infringement notice, their Honours said that this was an available meaning of the legislative text but did not accord with

<sup>4</sup> *R v Conway* DC Auckland CRI-2008-004-19495, 18 December 2009.

<sup>5</sup> *Down v R* [2012] NZSC 21; [2012] 2 NZLR 585; (2012) 17 ELRNZ 283.

<sup>6</sup> *Down v R* fn 5 at [15]-[16].

the context and legislative purpose of the RMA. They characterised the prohibition on recording a conviction for an infringement offence under the RMA as a major contextual difficulty. They noted that infringement offences under the RMA have varying culpability and at the serious end of the range there may be a sentence of imprisonment for a term not exceeding two years. They did not accept the submission that Parliament must have contemplated that a sentence of imprisonment could be imposed other than following a conviction for an offence. They considered that had Parliament intended to confine penalties for infringement offences under the RMA to fines set out by regulations, it would not have retained s 339 RMA in a form which provided for substantially greater levels of fines and for imprisonment.<sup>7</sup>

[28] Elias CJ and McGrath J described the purpose of creating infringement offences was to address offending involving only minor culpability and not requiring full judicial attention by enabling it to be dealt with administratively. In that light, defendants could avoid conviction and a criminal record under s 78A SPA (now, s 375 CPA). The purpose of s 21 SPA was to encourage the use of the infringement notice procedure rather than the summary process of the courts, and the SPA should be interpreted to reflect that continuing purpose.

[29] On that basis their Honours considered that a preferable meaning of the RMA provisions is that they set out a separate infringement notice regime, in which the references to s 21 SPA import the method of infringement notices “with all necessary modifications” rather than making such notices issued under the RMA effectively a notice issued under the SPA.<sup>8</sup>

[30] Elias CJ and McGrath J also considered that the list of provisions to which the definition of *infringement notice* applies under s 2 SPA appears to refer to all Acts which are intended to apply the generic procedure under the SPA rather than particular procedure under the RMA, and hence the latter Act was omitted from the list. Having said that, they also observed that a comparison of the various provisions and statutory

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<sup>7</sup> *Down v R* fn 5 at [20].

<sup>8</sup> *Down v R* fn 5 at [22].

schemes did not provide meaningful contextual assistance in the interpretation of the RMA provisions.<sup>9</sup>

[31] On that basis Elias CJ and McGrath J held that infringement offences under the RMA are not infringement offences under the SPA, so that an enforcement authority could, in its prosecutorial judgment, choose under s 343B RMA, whether to proceed by filing a charging document or by issuing an infringement notice without needing to comply with s 21 SPA.<sup>10</sup>

[32] William Young J adopted a different course, seeking whether he could discern an underlying legislative pattern that would enable any similar case to be resolved in a consistent and principled way and coming to “the dispiriting conclusion that there are no relevant patterns which provide assistance”.<sup>11</sup> His judgment reviews the history of infringement offences and infringement notice procedures. He observes that s 21 SPA was drafted with particular offences in mind, being those susceptible to quick disposition on a one-size-fits-all basis, which characteristically are offences resulting in minimal harm to the community where formal court intervention, conviction and imprisonment are inappropriate.<sup>12</sup> On that approach, he considered that the extent, diversity and comparative complexity of the penalties and other orders which can be imposed under the RMA reflect wide variations in both the culpability of the offender and the harm they may cause, so that such offences are not similar to those for which the procedure under s 21 SPA was designed.<sup>13</sup>

[33] Against that background, William Young J analysed the relevant provisions of the RMA, coming to essentially the same conclusion as Elias CJ and McGrath J.<sup>14</sup>

### **Other Case Law**

[34] A number of other decisions were cited to me. Few directly addressed the issue raised here, with most being prayed in aid as examples of cases where convictions had

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<sup>9</sup> *Down v R* fn 5 at [25]-[26].

<sup>10</sup> *Down v R* fn 5 at [28] and [30].

<sup>11</sup> *Down v R* fn 5 at [35]-[36].

<sup>12</sup> *Down v R* fn 5 at [50].

<sup>13</sup> *Down v R* fn 5 at [56].

<sup>14</sup> *Down v R* fn 5 at [63].

been entered for offences which might come within the ambit of infringement offences. I do not consider that I should draw inferences from, or otherwise treat as authoritative, cases where there was an absence of explicit argument on the relevant point.

[35] Two High Court decisions where the issue was expressly addressed are the decisions in *Builders Corner Ltd v Department of Labour*<sup>15</sup> and *Plumbers, Gasfitters and Drainlayers Board v Maaka*.<sup>16</sup>

[36] In the *Builders Corner* case (which was decided prior to the decision of the Supreme Court in *Down v R*,<sup>17</sup> but after the decision of the Court of Appeal<sup>18</sup>), Brewer J considered the issue in the context of an offence against reg 66(1)(b) Health and Safety Regulations 1995 and s 50 Health and Safety in Employment Act 1992 (HSEA). He started by noting that the SPA is not intended to create an exclusive regime regulating infringement offences. Considering the scheme, scope and nature of the HSEA regime, he noted there were three levels of enforcement action and two categories of offence. The power to issue infringement notices was conferred on inspectors, indicating its role in improving safety in the workplace. For serious offences, the penalties included imprisonment for up to two years while for other, lesser, offences the only available penalty was a fine to a maximum of \$250,000. Infringement offences were limited to the other offences.

[37] Brewer J concluded that the HSEA was enacted as a standalone statute with a self-contained regime. While it has two categories of offence, and only a fine can be imposed in respect of other offences, the learned judge found it significant that Parliament did not provide unambiguously for the use of the procedure under s 21 SPA when it enacted the HSEA. He also considered that the maximum fine of \$250,000 was a large amount to be imposed in the absence of a conviction. He determined that the HSEA did not provide for the use of the infringement notice procedure under s 21 SPA.

<sup>15</sup> *Builders Corner Ltd v Department of Labour* (2011) 9 NZELR 57 (HC).

<sup>16</sup> *Plumbers, Gasfitters and Drainlayers Board v Maaka* [2015] NZHC 1948; [2015] 3 NZLR 854.

<sup>17</sup> *Down v R* fn 5.

<sup>18</sup> *Wallace Corporation Ltd v Waikato Regional Council* fn 3.

[38] It may be noted that after the HSEA was replaced by the Health and Safety at Work Act 2015 (**HSWA**), the definition of *infringement notice* in s 2(1) SPA was amended to include notices under s 138 HSWA. It is also to be noted that the definition of *infringement offence* in s 136 HSWA expressly excludes offences against ss 47, 48 and 49 HSWA, which are the serious offences, and that only s 47 HSWA provides for a penalty of imprisonment.

[39] In the *Maaka* case, Brewer J considered the corresponding provisions of the Plumbers, Gasfitters and Drainlayers Act 2006 (**PGDA**). Brewer J held that s 4 PGDA specifically defined the relevant offence provision under s 123 PGDA as an infringement offence. Distinguishing *Down v R*, Brewer J noted that, unlike the RMA, the relevant provision for issuing infringement notices under the PGDA is listed in the definition of *infringement notice* in s 2 SPA, and further that the penalties available under the LGDA do not extend to imprisonment.

### Discussion

[40] This Court is bound by any relevant decision of the senior courts of New Zealand and the decision of the Supreme Court in *Down v R*<sup>19</sup> is binding on me unless it can be distinguished. Ironically, that decision is authority for the proposition that there is no general rule applicable to identifying when s 21 SPA and s 375 CPA apply to infringement offences created under other Acts.

[41] I also note that while Elias CJ and McGrath described the appellant's and intervenor's submissions on the legislation as "an available meaning of the legislative text",<sup>20</sup> they did not conclude that it was the true meaning. Even if there is no general rule which resolves the issues, I am bound to follow the approach of the Supreme Court in addressing those issues.

[42] In my evaluation of the issues I have respectfully sought to follow the reasoning set out in the judgment of Elias CJ and McGrath J, and have considered whether that reasoning in respect of the RMA can apply to the corresponding

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<sup>19</sup> *Down v R* fn 5.

<sup>20</sup> *Down v R* fn 5 at [20].

provisions of the BA. Counsel for the defendant warned me that this would be a superficial temptation that would lead to obscure and contradictory outcomes. With great respect, the judgment of William Young J provides the same warning yet demonstrates that there is no appropriate alternative.

[43] The BA creates offences in respect of numerous provisions throughout the Act rather than in one general provision as in the RMA. The relevant provision in this case is s 40 BA, which provides:

**40 Buildings not to be constructed, altered, demolished, or removed without consent**

- (1) A person must not carry out any building work except in accordance with a building consent.
- (2) A person commits an offence if the person fails to comply with this section.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

[44] The words “on conviction” in s 40(3) BA are not determinative of the position under s 375 CPA given the deeming provision in s 375(2).

[45] As noted above at [11], the offence under s 40 BA is stated to be an infringement offence for which the infringement fee is \$1,000 under reg 3 of and sch 1 to the Building (Infringement Offences, Fees and Forms) Regulations 2007. That schedule sets out a list of some 37 provisions as creating infringement offences, with a range of fees from \$250 to \$2,000.

[46] It may also be noted that the various offence provisions in the BA provide for a wide range of fines as penalties, with some being limited to \$5,000. See for example:

- (a) s 58 – Liability to pay levy: building consent authority;
- (b) s 114 – Owner must give notice of change of use, extension of life, or subdivision of buildings;
- (c) s 138 – Regional authority must require audit of dam classification that it refuses to approve; and

- (d) s 168(1AA) – Offence not to comply with notice to fix a means of restricting access to a residential pool.

[47] Of these, it should be noted that ss 58, 114 and 138 are not listed as infringement offences in sch 1 to the Regulations. The offence under s 168(1AA) is subject to a maximum fine of \$5,000 and is listed as an infringement offence for which the fee is \$500. The general offence under s 168(1) of failing to comply with any other notice to fix is subject to a maximum fine of \$200,000 and is listed as an infringement offence for which the fee is \$1,000, which the same levels of fine and fee as for s 40 BA.

[48] I note that Brewer J, in his decision in *Builders Corner Ltd v Department of Labour*,<sup>21</sup> regarded a maximum fine of \$250,000 under the HSEA as a large amount to be imposed in the absence of a conviction. I respectfully consider that a maximum of \$200,000 under s 40 BA, to which may be added \$10,000 per day for a continuing offence, is similarly large. Certainly, I consider it to be well beyond the scope of a one-size-fits-all penalty. Conversely, the offence of carrying out building work without a building consent can involve quite serious offending with obvious potential significant risks to owners and users of the building and to the public for which an infringement fee of \$1,000 could be little more than a licensing fee to the offender.

[49] Proceedings for infringement offences under the BA are provided for in ss 370 – 374 BA. Counsel for the defendant helpfully provided a side-by-side comparison of those provisions with the provisions in ss 343A – 343C RMA which were the focus of the analysis by the Supreme Court in *Down v R*. I have followed that analysis by substituting the pertinent BA provision for the corresponding RMA provision to see whether the reasoning remains applicable.

[50] In essentially the same terms as s 343B RMA, s 371(1) BA makes clear that there are alternative ways of proceeding against those alleged to have committed infringement offences.

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<sup>21</sup> *Builders Corner Ltd v Department of Labour* fn 15.

[51] While the operation of the infringement notice regime under the RMA is set out in s 343C RMA, the corresponding provisions are set out, in a somewhat different order, in ss 371(2) – 373 BA. As I compare those provisions, I conclude that they are also essentially the same or to the same effect.

[52] Counsel for the defendant also provided a table comparing the relevant provisions of the BA and the RMA with the corresponding provisions in the PGDA. Counsel noted that the latter Act shares the same statutory mechanisms as the other two. However, its offence provisions unequivocally create infringement offences given the express inclusion of them in the list at s 2(1)(da) SPA and so demonstrate that there is no overall pattern in the legislation.

[53] None of the infringement notice provisions under the BA are listed in the definition of *infringement notice* in s 2(1) SPA. I do not consider that paragraph (k) in the definition of *infringement notice* in s 2 SPA is a catch-all: I respectfully follow the approach of the Supreme Court and must consider whether the BA provides “for the use of the infringement notice procedure under s 21” SPA, or whether it provides otherwise.

[54] Counsel for the defendant identified the absence in the BA provisions of the reminder notice provided for in s 343B(4)(a) RMA as a distinguishing feature. An infringement reminder notice is provided for in the form of infringement notice at sch 2 to the Building (Infringement Offences, Fees and Forms) Regulations 2007 and its form is set out in sch 3 to those regulations. Counsel submitted that these regulations simply set out the forms and that there was no requirement to use them. On that basis he submitted that the requirement derived from s 21(2AA) SPA and therefore was part of the s 21 SPA procedure.

[55] I do not accept that submission. Section 373 BA requires the use of the prescribed form for an infringement notice, including a statement of what will happen if the person neither pays the fee nor requests a hearing. The prescribed form specifically refers to the reminder process and to the use of the reminder notice. In any event, s 371(2) BA imports the provisions of s 21 SPA, with all necessary modifications, into the procedure under the BA. As Elias CJ and McGrath J noted, this

is a common method of legislative drafting and such incorporation does not affect the separate identities of the respective Acts.<sup>22</sup>

[56] A clear difference between the RMA and the BA is that offences under the former are subject to penalties including imprisonment while offences under the latter are not. The Supreme Court did not accept that a sentence of imprisonment could be imposed on an offender other than following a conviction, so that the consequential issue of the application of s 375 CPA provided a major contextual difficulty to the application of the SPA regime to offences under the RMA. That difficulty does not arise in the context of the BA.

[57] Counsel for the defendant submitted that the difference between the offending under the two Acts is stark, noting that offending under the BA is in category 1 in terms of s 10A Sentencing Act 2002, while offending under the RMA is category 3. This is a direct result of the availability of imprisonment for 2 years as a penalty under s 339(1)(a) RMA. In my view, the apparent step-change between sentencing categories must be seen in the context of the range of possible offending. In particular, while an available sentence, imprisonment is not a typical sentence for offending against the RMA. In general terms, the degree of difference between using land without a necessary resource consent and undertaking building work without a building consent are not so different that comparison of the legislative schemes and the processes for dealing with offending is inappropriate.

[58] In my judgment the difference in relation to the penalty of imprisonment, while a significant one, is not dispositive of the issues relating to the application of s 21 SPA to infringement offences created under other Acts. More important is the character and potential seriousness of the type of offending and the degree to which its gravity and the culpability of the offender in any particular case may vary. If the range is not great and is at the lower end of the scale, then that would tend to indicate that an appropriate procedure can be based on notices, standard fines and no entry of convictions. If the range is greater and of more significance, as is the case under both the RMA and the

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<sup>22</sup> *Down v R* fn 5 at [22] – 24].

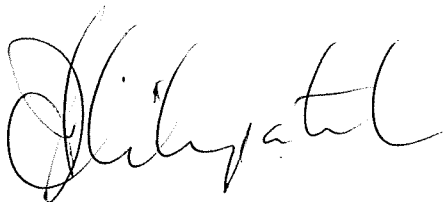
BA, then the appropriateness of using a judicial process with its checks and balances and a full range of possible sentencing outcomes is more appropriate.

### **Decision**

[59] I am satisfied that the approach taken in *Down v R* to analysing the infringement notice provisions under the RMA can properly, and should accordingly, be taken in respect of the corresponding provisions under the BA. The absence of an overall legislative pattern does not stand in the way of analysis of the relevant BA provisions using the same approach as used for the RMA. The two statutory schemes in relation to infringement offences are sufficiently similar to support that approach, notwithstanding the difference between them that an offender against the RMA may be sentenced to imprisonment but an offender against the BA may not.

[60] Considering an offence against s 40 BA, even if imprisonment is not an available sentence, a maximum fine of \$200,000 for a natural person is a substantial one and indicates that Parliament regards this offence as encompassing a broad range of possible cases. In my judgment it is an offence for which the prosecutor may choose whether to proceed by filing a charging document or by serving an infringement notice. It is not necessarily a minor offence for which leave should be required before a charging document may be filed.

[61] I therefore determine that the prosecutor was able to commence proceedings against the defendants under s 40 BA by filing a charging document under s 14 CPA without the prior leave of a District Court Judge or a Registrar under s 21(1)(a) SPA. It follows that I determine that s 375 CPA does not apply to these proceedings.



D A Kirkpatrick  
District Court Judge and Environment Judge