IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-3054

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	URS NEW ZEALAND LTD First Plaintiff
AND	BROWN BROS (NZ) LTD Second Plaintiff
AND	THE DISTRICT COURT AT AUCKLAND First Defendant
AND	AUCKLAND REGIONAL COUNCIL Second Defendant

Hearing: 9 June 2009

Appearances: Paul David and Allison Ferguson for First Plaintiff
Daniel McLellan for Second Plaintiff
No appearance for First Defendant (abiding decision)
Deborah Hollings QC, Lana Hamilton and Toby Futter for Second Defendant

Judgment: 10 June 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 5:00 pm on 10 June 2009

SOLICITORS
Wilson Harle (Auckland) for First Plaintiff
Tompkins Wake (Hamilton) for Second Plaintiff
Crown Law (Wellington) for First Defendant
Auckland Regional Council (Auckland) for Second Defendant

COUNSEL
Deborah Hollings QC; Paul David; Daniel McLellan

Introduction

[1] This application for judicial review of a decision in the District Court at Auckland, dismissing a submission of no case to answer made at the conclusion of the prosecution case in a summary trial, is being heard and determined under constraints of urgency.

[2] The Auckland Regional Council (ARC) has charged the plaintiffs, URS New Zealand Ltd and Brown Bros (NZ) Ltd, with offences under the Resource Management Act 1991 (RMA): by discharging a contaminant either onto or into land in circumstances which may have resulted in the contaminant entering water other than as allowed by a rule in the regional plan, a resource consent or regulations (s 15(1)(b) RMA) or from industrial trade premises into or onto land (s 15(1)(d)).

[3] The trial commenced before Judge McElrea in the District Court on 17 February 2009. The scheduled duration was five days. But the trial has actually lasted for 12 days, spread over a two month period. At the conclusion of the prosecution case on 15 April both defendants submitted that the proceeding should be dismissed. In a reserved decision delivered the next day, the Judge held there was a case to answer. However, a typed copy of his judgment was not available until 11 May, causing a delay in filing this application. The trial is due to resume tomorrow, 11 June. In the event that the plaintiffs call evidence, another 12 days of hearing will be required.

[4] The plaintiffs concede that this application is novel and that in most cases the High Court should not interfere in a District Court criminal trial before its conclusion. However, they say that this Court should exercise its statutory jurisdiction to cure legal errors made by Judge McElrea, sparing the state and the parties the cost, inconvenience and uncertainty of what they contend will be two further unnecessary weeks of trial. The ARC counters that this Court has no jurisdiction to review but, if it has, the Judge did not make a reviewable error.

[5] I have enjoyed the benefit of written and oral submissions of high quality, which have assisted me in reaching an immediate decision. I am conscious, though,

that the pressures of time do not allow me to do full justice to the depth of the competing arguments advanced skilfully by all counsel.

Background

[6] Except for two critical areas, the relevant facts upon which the prosecutions are based are not in material dispute.

[7] Chevron operated a Caltex service station at 211 Taniwha Street, Glen Innes, Auckland. In early 2007 the company decided to close down and decommission the site. Chevron engaged Fuel Installations Ltd to carry out decommissioning work. That work was largely completed when Caltex was prevented from removing fuel tanks and lines by an injunction obtained in this Court on 4 May 2007. Decommissioning work ceased then.

[8] Chevron engaged URS in early July 2007 to investigate the site for contamination and to prepare a benchmarking report. The site remained in the same partially decommissioned state as on 4 May 2007, although bowsers had been removed and power cables cut.

[9] URS subcontracted Brown Bros to drill seven bore holes to install three ground water monitoring wells at the site. The parties had access to a site plan showing the location of the fuel tanks and indicative locations of the bore holes. But the plan did not identify or refer to the existence of any fuel delivery lines, which are plastic in nature. Before drilling started URS engaged another subcontractor to locate underground services such as electricity and telephone lines, but its process could only identify metal products and it did not detect the fuel lines. Brown Bros used a geoprobe on 7 July 2007 to obtain core soil samples at the various locations. The geoprobe is not a drill and does not rotate, instead using hydraulic direct technology to push tubes into the soil to obtain samples.

[10] Later in 2007 another fuel company, Gasoline Alley Services Ltd (GAS) contracted with the owner to re-open the site. GAS engaged Fuelquip (NZ) Ltd to carry out the re-commissioning. The site remained in the same condition as at 4 May

2007. Fuelquip installed new bowsers and undertook a process designed to purge any existing air in the fuel lines. One of its employees carried out this task negligently. Without going into detail, it is sufficient to record that when carrying out the purging manoeuvre on or about 19 December the employee discovered 10,000 litres of 91 octane fuel was missing from the underground tank. The ARC was notified immediately. Fuel was found to have entered a stream at a nearby reserve. ARC undertook an extensive cleaning-up operation.

[11] On 21 December Fuelquip established the source of the leak at a specific point in the 91 octane delivery line. Its employees found that the line was pierced and broken between the underground storage tank and the fuel dispensers. Fuel was pooled around the break. The escape mechanism was triggered by disintegration of a rubber coupling at a point where the line from the separator (which is designed to collect any fuel from the surface of the forecourt) joined the stormwater line. The fuel flowed down around the separator and migrated into the pipe, and from there to the stream. ARC alleges that the damaged coupling accelerated this process.

[12] ARC's case is succinctly summarised in these passages from its memorandum of further particulars:

> (g) During the drilling of one of the bore holes in July 2007, the drill pierced the 91 octane delivery line, which was situated at a depth of between 0.7 and 0.8 metres.
>
> (h) The URS field work procedures state the bore holes are not to be hand-cleared to 1.2 metres before using a drill to avoid the risk of drilling through fuel lines and services. A geoprobe drill head was used for the drilling. URS, through Shona Macintosh, who was standing next to the driller, supervising, should have been aware of the damage to the fuel line. If the damage was not noticed, then URS's procedures were clearly at error or inadequate. The damage caused was a direct drill hole into the fuel line.
>
> (i) The consequences of URS's hole into the fuel line and its apparent failure to notice or report the damage to the line, caused the fuel to be discharged on or about 19 December 2007, in that URS allowed the fuel to escape by failing to take the precautions that a reasonably prudent person in the position of URS would take to prevent that escape. URS should have been aware of facts from which a reasonable person would recognise that escape could occur. The failure to investigate and take appropriate preventative steps in July 2007, amounts to allowing the discharge to occur and the escape of

> 91 octane fuel from the service station into a watercourse in or about 19 December 2007.

[13] The two critical areas of factual dispute identified by Mr Paul David for URS are (1) whether when Brown Bros was operating the geoprobe at a site known as 'Soil Bore 3' or 'SB3' on 7 July, the drill pierced the 91 octane delivery line at a depth of between 0.7 and 0.8 metres; and if so, (2) whether this act was the source of discharge of 10,000 litres of fuel from the line during re-commissioning of the petrol station on or about 19 December 2007.

[14] ARC has separately prosecuted Fuelquip. The company pleaded guilty to RMA offences and has been sentenced.

Statutory Provisions

[15] Section 15(1) RMA provides:

> No person may discharge any— …
>
> (b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or …
>
> (d) Contaminant from any industrial or trade premises onto or into land—
>
> unless the discharge is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan, a resource consent, or regulations.

[16] The phrase 'discharge' where used in s 15 is defined as including 'emit, deposit and allow to escape'.

[17] Section 338 RMA confirms that a person 'who contravenes or permits a contravention' of, inter alia, s 15 commits an offence against the Act. Section 341 provides:

> **Strict liability and defences**
>
> (1) In any prosecution for an offence of contravening or permitting a contravention of any of 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; or

(b) That the action or event to which the prosecution relates was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case …—

(i) The action or event could not reasonably have been foreseen or been provided against by the defendant; and

(ii) The effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

(3) Except with the leave of the Court, subsection (2) does not apply unless, within 7 days after the service of the summons or within such further time as the Court may allow, the defendant delivers to the prosecutor a written notice—

(a) Stating that he or she intends to rely on subsection (2); and

(b) Specifying the facts that support his or her reliance on subsection (2).

District Court

[18] In accordance with orthodox principles, Judge McElrea determined the applicants' submission of no prima facie or arguable case by the test of whether or not, as a matter of law, ARC had adduced sufficient evidence on which the Court might find guilt. The plaintiffs do not challenge the Judge's formulation of the test but his application of it.

[19] URS advanced these two alternative arguments in the District Court in support of its no case submission: (1) a party cannot cause a discharge or allow fuel to escape unless it is in control of the site or contaminant at the time of discharge; and (2) (described by the Judge as very much a second string to the bow) third parties committed intervening acts which severed the chain of causation, with the result that URS's actions no longer operated as the cause of the discharge. Brown Bros supported this argument. The ARC opposed on the ground that the law did not require proof that a defendant was in control of the site at the time of discharge, and such a requirement would be contrary to the statutory scheme.

[20] Judge McElrea summarised his conclusions on the legal principles with admirable clarity: at [16]:

> a) Causation must be approached on a common sense basis and in a way consistent with the objectives of the Act.
>
> b) There can be, and often is, more than one cause of a discharge. As a result more than one party can be liable.
>
> c) Different causes can occur at different times, all leading to or resulting in the eventual discharge.
>
> d) The law does not contain a requirement that a defendant be in control at the time of the discharge, ie at the end point of a sequence of events. It is sufficient to have control of the operation or contaminant at the time of an act leading to a discharge.
>
> e) The statutory defences available to the strict liability imposed by s 341 do not support the defendant's arguments; rather they tend to contradict it.
>
> f) The English authorities relied on by the defendants do not establish that a defendant charged under the Act whose actions have contributed to or led to a discharge, is no longer said to have caused the discharge because of the subsequent act of a third party which is 'extraordinary'. That approach is at odds with s 341 whereby events over which a defendant has no control are only a defence if they could not reasonably have been foreseen or provided for, which is a different test to the 'ordinary versus extraordinary' test in the English cases. Secondly, under the New Zealand statute the effects must have been adequately mitigated or remedied by the defendant, a requirement which does not appear in the English cases. (The proof of these elements under the statutory defence of course lies on the defendant on the balance of probabilities.)
>
> g) The extra points relied on by Mr McLellan do not assist. In particular, with reference to the absence of consent to a discharge (an element of the offence), it is not necessary to be the owner of a

property in order to seek a resource consent for an activity. Therefore the argument that the owner, being the person most likely to be in control, is the only person who can make such an application, does not succeed.

h) Any subsequent acts of other defendants may have completed the chain of events but do not diminish the causal *nexus* between these defendants, URS and Brown Bros, and the discharge.

i) Therefore, there is evidence upon which a reasonable tribunal of fact could (not necessarily 'would') find proved the allegations of a discharging of 91-octane fuel into land by these two defendants.

[21] The Judge supported his conclusions with a detailed analysis of the leading appellate authorities from New Zealand, England and Canada, with particular emphasis upon the actual terms of the statutory provisions.

Jurisdiction

[22] A critical threshold question arises. The principle is settled that this Court has the power to review a decision of the District Court in exercising its criminal jurisdiction: *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA) at 135. It is common ground that the power should be exercised sparingly. However, Ms Deborah Hollings QC for ARC submits that it would be wrong as a matter of policy for this Court to exercise the power in the course of a summary trial where the circumstances are not exceptional. She points to the factors of uncertainty and interference in the criminal process, inconsistency between the cases which could properly be subject to judicial review, the relevant statutory framework involving the interrelationship between the Summary Proceedings Act 1957 (SPA) and the Crimes Act 1961 (CA), and, in particular, the protection of a party's rights afforded by the appeal provisions in the SPA.

[23] In my judgment Ms Hollings is correct. While in principle this Court retains a supervisory power to review a decision of an inferior Court, I am satisfied that the statutory regime operates to oust its applicability to this type of case. The plaintiffs elected trial in the summary jurisdiction of the District Court. The hearing is subject to and governed by the SPA. The procedural aspects of the CA, regulating the conduct of indictable trials, do not apply: s 3(1) SPA.

[24] This statutory distinction has discrete consequences. In a summary trial the common law power to dismiss for no case to answer is normally invoked at the conclusion of the prosecution case, usually on the ground of an insufficiency of evidence to support the charge. But it is also an appropriate remedy where the prosecution evidence, if accepted, could not constitute an offence in law. By contrast, the statutory power to discharge under s 347 CA is limited to committal on indictment but is exercisable before or at any stage during trial. Ms Hollings accepts that s 347 incorporates the power to dismiss for no case to answer: see *R v Flyger* [2001] 2 NZLR 721 (CA) at [16]-[17].

[25] It is of particular relevance that both governing statutes provide distinct rights of appeal against no case to answer and s 347 decisions. In the summary jurisdiction both parties are entitled to request the District Court to state a case on appeal to the High Court on a question of law if the decision results on a no case submission in a determination of the charge on the ground of 'being erroneous in point of law': s 107 SPA. The decision will be determinative where either (1) the Judge dismisses the charges or (2) the Judge dismisses a no case submission, the defendant elects not to call evidence, and the Judge convicts on the legal reasoning on which the dismissal was based. But there is no right of appeal if the decision is not determinative – that is, where the Judge dismisses a no case submission and finds that the defendant has a case to answer. However, the defendant has the right of general appeal against a conviction which may follow dismissal of a no case submission: s 115 SPA.

[26] In the indictable jurisdiction the prosecution may apply to a Judge who discharges an accused under s 347 to refer a question of law for the opinion of the Court of Appeal: s 381A CA (enacted on 26 June 2008). As in the summary jurisdiction, the accused also has a right of appeal against a conviction entered on a finding of guilt by a jury which may follow a Judge's refusal to discharge under s 347: s 379 CA onwards.

[27] The legislative intent is clear. In the summary jurisdiction of the District Court either party is entitled to appeal against a no case to answer decision if it is determinative. There is no statutory right to challenge a non-determinative decision made during the hearing. That limitation conforms with the nature and purpose of a

summary trial. The delays and disruption inherent in exercising a right to review a non-determinative decision made during the proceeding, with unconditional rights of appeal from this Court to the Court of Appeal, would be contrary to the constitutional objectives of the proper administration of justice in providing the prompt, efficient and fair process of summary trial. The whole aim of the summary jurisdiction 'is the speedy resolution of relatively minor offences': *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 412. By comparison, judicial review proceedings can be both 'cumbrous and time consuming': *Commissioner of Police v Ombudsman* at 378. And allowing a right of review would not serve any underlying constitutional purpose, given that a disaffected defendant's grounds of challenge are preserved by the right of general appeal.

[28] In *C v Wellington District Court* [1996] 2 NZLR 395, cited by Ms Hollings, the Court of Appeal dismissed an application to review a decision of the District Court to commit an accused person for trial on the ground of insufficiency of evidence for the reason that: at p400:

> As a matter of general principle truly exceptional circumstances will be required for the Court to entertain an application for judicial review of a decision to commit for trial under s 168 of the Summary Proceedings Act 1957 where the sole ground is a challenge to the sufficiency of the evidence. That principle should apply even if an identifiable question of law (other than sufficiency of evidence) is said to arise. The Crimes Act 1961 provides a person committed for trial with an alternative, adequate, and convenient procedure to obtain the same remedy. There is a comprehensive statutory procedure included in Part XII of the Crimes Act 1961 governing indictable trials which is directed to their just and expeditious disposal, and in a situation such as the present there is no cause for the Court's wider review process to be brought into play and thereby to interfere with that process.

[29] It may not be unsurprising that against this background there is no authority to support the plaintiffs' contention. The only possibly analogous authorities are two decisions of the Court of Appeal, recognising the Crown's right to review a District Court Judge's decision to discharge under s 347 which was plainly wrong in law. In *Auckland District Court v Attorney-General* the Judge erred in discharging the accused before trial. In *Parris v Attorney-General* [2004] 1 NZLR 519 (CA) the error occurred in discharging an accused at the end of her evidence. The rationale for intervention was that the Judge's decision had deprived society of the proper constitutional outcome of a jury verdict: *Parris* at [21].

[30] In both cases there was no statutory mechanism for challenging a final but legally incorrect decision where, but for judicial review, the Crown was without a remedy. And each was decided before s 381A CA was introduced on 26 June 2008. The Crown's right of appeal against a s 347 discharge on a question of law supervenes the justification for the Court's intervention by way of judicial review.

[31] I am conscious of Mr David's forceful submission that this Court has an obligation inherent in its supervisory capacity to interfere if it is satisfied that an inferior Court has clearly erred in law. There is little, if any, scope in that situation, he says, to exercise the residual discretion which is inherent in the power to review. Some support might be found for this proposition in *Parris* at [20]-[21]. However, Tipping J's observations are made in the context, as noted, where there was no alternative statutory mechanism for remedying a plain and, importantly, decisive error. By contrast, if the District Court Judge errs in law in declining a no case submission, the appeal process preserves both parties rights of challenge. Neither party would be prejudiced by a refusal to review.

[32] While I am conscious also of Mr McLellan's submission that s 4 Judicature Amendment Act 1972 provides a right to apply to this Court for review 'notwithstanding any right of appeal possessed by the applicant in relation to the subject matter of the application'; the discretionary nature of the remedy of review is directly relevant in this context. In an analogous sphere, in *C v Wellington District Court* the Court of Appeal rejected the availability of judicial review where a party enjoys an alternative remedy within the criminal procedure, adopting with approval at p400 this passage from the speech of Lord Scarman in *Re Preston* [1985] AC 835 at p852:

> My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.

In *C* at p400 the Court also observed:

> That principle must apply in particular to a situation such as the present where the decision under challenge is no more than a preliminary inquiry which does not involve the determination of any substantive issues relating to the proceeding, namely the trial on indictment according to established procedures.

[33] Accordingly, for these reasons, I am satisfied that this Court in exercising its residual discretion should not recognise a right to review a decision made by a District Court Judge in the summary jurisdiction to dismiss a submission of no case to answer. However, to meet the contingency that this conclusion is wrong, I shall consider the substantive grounds of challenge.

Decision

[34] In support of their application for review, the plaintiffs essentially repeat and develop the arguments advanced in the District Court. They assert that Judge McElrea erred in two material respects: first, by determining what was necessary as a matter of law to establish a contamination of s 15 by a party which does not actively discharge a contaminate; and, second, in finding that no extraordinary intervening acts by third parties can result in a breach of the chain of causation. Both alleged errors are said to be central to the assessment of the ARC's case. I shall deal with each separately.

(1) Control

[35] The primary argument advanced by both Messrs David and McLellan is to the effect that the three leading authorities mandate proof of the presence of control by a party over the contaminant, the site or system at the point where the discharge occurs in order to prove a breach of s 15: see *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA); *Alphacell Ltd v Woodward* [1972] 2 All ER 475 (HL); and *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161. They submit that the requirement to establish this control factor means that a party which did not actively discharge the contaminant could not cause a discharge because the relevant operations or contaminants were not within its control.

[36] Counsel submit that this construction is consistent with two aspects of the available statutory defences: ss 340(2)(b) and 341(2)(b). A necessary component of each is that a party adequately mitigated or remedied the effects of the event after it occurred; and a party can only take those steps if it knew of the discharge and had the ability to remedy or mitigate. It follows that the alternative test of 'allowing to escape' involves the elements both of an awareness of facts from which a reasonable person would recognise that a contaminant could escape and of control. This latter element underpins both an active and a passive discharge – that is, causing a contaminant to be discharged or allowing it to escape.

[37] Mr David submits that the effect of the leading authorities is that a party causes a discharge where it is in control of the relevant site or contaminant at the point of discharge, even if there was some other direct cause; that applying this test to the prosecution facts, ARC cannot possibly establish a sufficient causal connection between the alleged breaches in July 2007 and the act of discharge in December 2007; and that by excluding the requirement to prove control, Judge McElrea applied a 'but for' test to a criminal statute. As a result, any party which committed an act that can be seen as part of the chain of causation, for example through the innocent act of delivering fuel to the site, will also be liable for breach of s 15.

[38] Mr David's arguments are founded substantially upon certain dicta from *Biogas*. It is thus important to examine the ratio of that decision, in order to give context to the passages upon which Mr David relies. In *Biogas* the Court of Appeal was asked to determine an appeal by way of case stated. The question of law formulated for determination was:

> What is the mental element (or mens rea) of the offence created by s 15(1)(b) and s 338 [RMA]?

[39] At first blush the premise underlying this question seems antithetical to the offence of strict liability created by s 15. The question in *Biogas* arose in this way. Biogas was responsible for installing and operating a wastewater plant for a factory where potatoes and other vegetables were processed. The treatment process involved the reduction of biological oxygen demand from the waste in a digester

formed by a large elastic bladder of rubber material, which was in turn contained in a three-metre deep excavation in the factory grounds. The waste was then to be passed to the sewer. Contemporaneously with the excavation work, Biogas dug a trench and installed a drain for water which might seep into the excavation outside the bladder. But the drain led through the wall of the excavation to the stream.

[40] The bladder burst and its contents discharged through the excavation wall where the drain was installed, carrying backfilled earth as well. The bladder waste and the earth discharged into the tributary of the stream, causing high organic pollution. The ARC charged Biogas with offences under ss 15 and 338 RMA, as here. (By reference to the District Court decision in *Biogas*, Judge McElrea confirmed that the company owned the site when the work was carried out. However, ownership passed to another party some 12 days before the failure of the trench, and some six months after the defective work was undertaken.)

[41] In *Biogas* the District Court Judge upheld a submission at the end of the prosecution evidence that ARC had failed to establish a prima facie case. He was not satisfied that Biogas had discharged the contaminant, even though he had found that:

> In short, the effective cause of the discharge was that the backfilling of the trench made to install the drain had not been compacted sufficiently to retain the lateral pressure from the bladder when filled.

[42] The District Court Judge's reasoning was as follows: *Biogas* at pp666-667:

> The only serious issue at this stage is whether the defendant discharged the contaminant. If it did, it could only be by allowing it to escape. There was no question of an active or deliberate discharge.
>
> The word 'allow' is not a word of precision. Its meaning can vary according to context. I have considered the entries about the word in *Words and Phrases Legally Defined* (3rd ed) and *Stroud's Judicial Dictionary* (5th ed). I consider that in s 15 'allow' must connote at least the elements of awareness of the circumstances in which a contaminant might escape, an ability to prevent that occurring, and a neglecting to take steps to prevent it. Because the context includes s 341, which creates offences of strict liability, the awareness might be indirect, otherwise the effect of the latter section could be undermined. However, before any question of the statutory defence arises, there must be a prima facie case that the defendant had awareness, and ability to intervene, and neglected to do so.

…

> However there is no evidence that the defendant was aware, directly or indirectly, of the weakness of the wall of the excavation where it had been backfilled. In my opinion that awareness is an essential element in 'allowing' the contaminant to escape, and it has not been established that the defendant was aware of it. So although the defendant had installed, commissioned and operated the plant for retaining a substantial quantity of contaminant that proved incapable of retaining it from escaping and contaminating fresh water, in the absence of awareness of the defect the defendant did not 'allow' the contaminant to escape.

[43] The High Court dismissed an appeal by way of case stated, upholding the District Court's interpretation of the phrase 'allow to escape' as an extended meaning of the word 'discharge'. However, the Court of Appeal reached a contrary view. Its decision appears to be based on two primary grounds. First, s 15(1) extends to and includes, by use of the words 'emit' and 'allows to escape', the consequences, direct or indirect, of activities carried out by a person. A person may discharge a contaminant in terms of s 15(1) unintentionally. A requirement of foresight or knowledge of the discharge would be inconsistent with the available defences. There is no room for a mental element in the act of discharge.

[44] However, a person could not be said to discharge the contaminant without a causal connection to the discharge. In the ordinary, natural meaning of the language used in s 15(1), a person discharges something when he causes it to be discharged. The statutory meaning of 'discharge' extends to engaging in an activity which results in the emission or discharge of a contaminant, consistently with the policy of preventing contamination of waterways. The extension of the meaning to 'allow to escape' encompasses a passive lack of interference: see pp669-670.

[45] The Court's conclusion on this point is stated as follows: *Biogas* at p672:

> Once it is accepted that to discharge in s 15(1) includes to cause to be discharged, the present case is indistinguishable from the *Alphacell Ltd* case. Just as in that case the failure of pumps to prevent overflow from settling tanks led to the discharge of polluted water into the river, so in this case the failure of the excavation to contain the bladder led to the contaminant flowing by way of the drain into the stream. Even more directly in this case, on the findings of the Judge, the manner in which the bladder was installed by or under the supervision of the respondent ultimately led to the discharge. The operations which the respondent was in a position to control caused the discharge.

[46] Second, the phrase 'allow to escape', which is the alternative of 'passive contamination', is satisfied where a person fails to take reasonable precautions necessary to prevent an escape. The ratio of this finding is as follows: *Biogas* at p672:

> We are of the view that the same result follows if, as in the Courts below, consideration is confined to the particular meaning of discharge of 'allow to escape'. Accepting that the normal meaning of allow imports elements of awareness and capability of control the issue remains: awareness of what? In the District Court the view was taken that the required awareness must be of the weakness of the wall of the excavation. It would follow from this view that no matter how negligent or reckless a person might be, so long as he is not shown to be aware of the impending escape he will be not liable and will not need to resort to the statutory defences. With respect that cannot be consistent with the broad and carefully drawn purpose and principles in Part II of the Resource Management Act.
>
> We find no straining of language in saying that a person allows a contaminant to escape who fails to take the precautions that a reasonably prudent person in the position would take to prevent that escape. The element of awareness in the concept of allowing is broader than that adverted to in the Courts below. It is sufficient if there is awareness of facts from which a reasonable person would recognise that escape could occur. In that case, failure to investigate and take appropriate preventive steps would amount to allowing an escape should it subsequently occur. On the findings of the Judge in this case as to the absence of engineering advice in the design, construction and testing of the digester the conclusion that the respondent discharged the contaminant by allowing its escape is inevitable.

[47] I do not read anything in *Biogas* to support Mr David's submission. In my judgment it does not justify imposing a gloss importing onto the clear words of s 15 a separate element of control of the site at the time of discharge. *Biogas* recognises the distinction between the alternatives of positive acts or passive omissions in breach of s 15. In the former or active category, the word 'discharge' embraces the concept of causing to discharge, thereby bringing into the net of liability a party whose acts or omissions are an operative or effective factor in the chain of causation leading to a physical discharge. In the latter or passive category, the phrase 'allows to escape' within the meaning of 'discharge' allows a limited relaxation of the statutory principle of strict liability, by measuring liability against reasonable standards of care.

[48] The concept of control was not relevant to these conclusions in *Biogas*, except to the important extent emphasised by the Court at p672 of the defendant's

ability to control the activity or operation which caused the discharge. With respect, that recognition is entirely consistent with the plain meaning of s 15, and is the essence of the ARC's case against the plaintiffs. *Biogas* is not authority for the very different and far reaching proposition that control of the site at the point or time of discharge is a necessary precondition of liability. To the contrary, as established by Judge McElrea's summary of the District Court decision, the defendant was not in control of the site (although it had been present) when the discharge occurred. URS's thesis conflates the distinct events of control at the time of (a) a causative act or omission and (b) the point of discharge. Both events can be separated by time and circumstances and only the former, on the authority of *Biogas*, is relevant to a prosecution under s 15.

[49] If Mr David's proposition was correct, it would lead to anomalies, even unfairness, and undermine the purpose of strict liability provisions designed to impose criminal liability on those responsible for discharging contaminants. On Mr David's argument, the plaintiffs would escape liability in circumstances where, for example, GAS had engaged either or both as part of the re-commissioning process and they had plainly ruptured or punctured a fuel line, leading directly to discharge of the contaminant when the tanks were filled, say, a week later. On this premise the party of primary responsibility, and culpability, would escape criminal sanction. Only GAS would be exposed to liability.

[50] That result is contrary to public policy and would bring the process of justice into disrepute, for the reasons expressed by Dickson J in *City of Sault Ste Marie* at p179:

> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by 'supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control': Lord Evershed in *Lim Chin Aik v The Queen* [1963] AC 160 at p174. The purpose, Dean Roscoe Pound has said (*Spirit of the Common Law* (1906)), is to 'put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale'. As Devlin J noted in *Reynolds v GH Austin & Sons Ltd* [1951] 2 KB 135 at p139: 'a man may be responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark'.

> Devlin J added, however: 'if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim'.

[51] Messrs David and McLennan submit that the result of Judge McElrea's approach is that a party with 'a purely factually historic connection to a later discharge', and unable after conducting its work to control the operations which caused contamination, will be criminally (by virtue of strictly) liable for the consequences; and that the obligation on the prosecution to prove causation is replaced by the burden assumed by the plaintiffs who wish to raise statutory defences. He submits that the whole purpose of the strict liability offences created by the RMA is to impose criminal liability on those who occupy or control. In this respect he seeks support from passages in *Sault Ste Marie*, decided under a differently worded statute, to the effect that the test for statutory liability is designed to control the activities of those who control the relevant activity at the point where pollution occurs.

[52] I do not accept this submission for three reasons. First, it proceeds on the disputed factual premise that the plaintiffs' causative relationship with the discharge was relegated to historical importance by subsequent events. This issue will doubtless be the subject of further contested evidence and argument.

[53] Second, Judge McElrea expressly recognised that the question of causation must be approached on a common sense basis; the inquiry, as the leading authorities emphasise, is of a purely factual nature: see *Alphacell* per Lord Salmon at 489-490. The Judge will have to evaluate whether the evidence establishes that the plaintiffs contributed sufficiently to the chain of causation of discharge to justify a finding of guilt. His decision correctly recognises that there can be more than one cause of discharge and more than one party of liability. This approach cannot be characterised as wrong or as the adoption of a 'but for' test.

[54] Third, I do not read the Judge's decision as transferring the causation inquiry to consideration of the statutory defences, if raised. Both plaintiffs are entitled to rely on s 341 provided they have given the requisite notice. Judge McElrea at [16](f)

(in a passage cited above) correctly, in my view, summarised the effect of s 341. Mr David sought to argue that, because the plaintiffs were not in control of the site at the time of discharge, they were somehow precluded from establishing the preconditions of the statutory defence.

[55] However, I agree with Ms Hollings to the contrary. The particular area of contention on the statutory defence relates to the plaintiffs' ability to adequately mitigate or remedy the effects of the discharge after it occurred: s 338(2)(b)(ii). Ms Hollings explained the purpose of the statutory defence as imposing an incentive on a party of potential criminal liability to take prompt and effective steps to remedy the consequences of its acts or omissions, thereby pre-empting a criminal charge. The Act is designed to promote self regulation and acceptance of responsibility. There is no suggestion that the plaintiffs were prevented from taking these steps at any stage between the contamination and the laying of charges: see *Canterbury Regional Council v Newman* [2002] 1 NZLR 289 (CA) at [108].

[56] Finally, I do not read *Sault Ste Marie* as assisting Mr David's argument. I agree with Judge McElrea that Dickson J for the Supreme Court was emphasising, as in *Biogas*, the importance of control of the activity which results in the discharge. ARC's case is that the activity causing the discharge was Brown's piercing of the fuel line. The fact that it occurred six months before the contaminant escaped does not alter the legal position, as *Biogas* confirms.

[57] For these reasons I am satisfied that Judge McElrea did not err in law in concluding that ARC was required to prove that the plaintiffs were in control of the site at the time of discharge.

(2) Causation

[58] Both Messrs David and McLellan alternatively submit that Judge McElrea erred in finding that extraordinary intervening acts of a third party cannot break the chain of causation. I do not accept that the Judge made that finding. He held specifically that, while subsequent acts by other parties such as Fuelquip may have

completed the chain of events, they do not of themselves diminish the causal nexus between the plaintiffs and the discharge.

[59] I do not accept that this finding constitutes an error of law. I repeat Judge McElrea's acknowledgement that the causation inquiry is of a purely factual nature, to be undertaken on all the evidence. The Judge did not commit an error of law in dismissing a submission at the end of ARC's case that the acts of third parties, intervening in time between the plaintiffs' conduct and the discharge, fell into an 'extraordinary' category which of themselves broke the chain of causation. This ground of challenge must also fail.

Result

[60] The plaintiffs' application for an order reviewing Judge McElrea's decision on 16 April 2009 dismissing a submission of no case to answer is itself dismissed.

[61] Costs must follow the event. ARC is entitled to costs for two counsel according to category 2B.

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Rhys Harrison J