IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI 2008-419-94
CRI 2008-419-97

	BETWEEN	CALFORD HOLDINGS LIMITED AND RONALD THOMAS PARK Appellants
	AND	WAIKATO REGIONAL COUNCIL Respondent

Hearing: 10 March 2009

Appearances: P M Lang for appellants
F Pilditch for respondent

Judgment: 26 May 2009

JUDGMENT OF ALLAN J

This judgment was delivered by Justice Allan on Tuesday 26 May 2009
at 4.30 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] Calford Holdings Ltd ("Calford") owns a substantial property on Old Taupö Road, near Tokoroa. During 2007 it was engaged in converting the property, former forestry land, to dairy farming pasture. The necessary earthworks were undertaken by Tirau Earthmovers Ltd (Tirau) and Mr Park. In the course of carrying out the necessary work each of these three parties committed certain offences under the Resource Management Act 1991 (the Act). The respondent brought a number of charges against them. Having pleaded guilty, each appeared for sentence before Judge Harland in the Hamilton District Court on 19 September 2008.

[2] In a reserved judgment delivered on 11 November 2008, the Judge imposed fines totalling $33,000 on Calford, $24,000 on Tirau and $10,000 on Mr Park, who was also sentenced to 300 hours community work. Court costs of $130 were also awarded to the respondent on each information. Each defendant was also ordered to pay a solicitor's fee of $226 in respect of each charge. Ninety per cent of all fines was directed to be paid to the respondent.

[3] The Judge also ordered Calford to pay the respondent's legal costs amounting to $23,453. Calford and Mr Park (but not Tirau) have appealed against the sentence imposed upon them. Mr Lang for the appellants argues that:

a) The fines were manifestly excessive.

b) The sentence of community work imposed upon Mr Park was too harsh.

c) The order for payment of solicitor's costs of $23,453 was made without jurisdiction and ought to be quashed.

[4] Mr Lang contends that in adopting an approach that reflected the principles discussed in *R v Taueki* [2005] 3 NZLR 372 the sentencing Judge was wrong in principle, and that earlier sentencing authorities which arguably took a different line ought to be preferred. Accordingly, it will be necessary to consider the application of *Taueki* to cases arising under the Act.

Factual background

[5] In a very detailed decision Judge Harland set out at some length the works undertaken by the appellants and Tirau, and carefully ascribed responsibility to each of the separate defendants. For the purposes of this appeal it is sufficient to summarise the relevant factual background rather more briefly.

[6] In 2007 Calford purchased 129 acres of cut-over plantation forest which it wished to convert into pasture for dairy farming purposes. For that purpose it obtained two resource consents from the respondent. The first consent authorised earthworks and tracking activities in a high risk erosion area and further authorised the associated discharge of contaminants to air and water in association with the land development. The second consent authorised the installation, use and maintenance of 900 millimetre diameter culverts in the bed of the stream for vehicle crossing purposes.

[7] Calford carried out no work itself. The physical works were carried out by Tirau and Mr Park. Mr Park ended up supervising the whole of the earthworks on the site by default. He also undertook the majority of the tracking, roading and culvert installation work. The earthworks were extensive.

[8] Two charges were brought against each of the defendants in respect of work carried out in the vicinity of the first culvert for which a resource consent had been granted. In one charge the respondent alleged unlawful disturbance of the riverbed and in the other unlawful use of the land with respect to roading and tracking work.

[9] The essence of these charges was that the defendants were in breach of the consent conditions in that they had failed to install any recognised erosion and sediment controls on areas of exposed soil, or to install efficient decanting earth bunds. The result was that a significant amount of soil, rock and debris was sidecast into the stream, resulting in a significant volume of uncompacted fill being placed right up to the edge of the stream. Sediment laden stormwater was discharged untreated into the stream, partly by reason of the defendants' failure to take proper

precautions and partly because a tracked machine such as an excavator had been driven in the stream, downstream of the culvert.

[10] Two further charges were brought against each defendant in respect of similar offences committed in the vicinity of a second culvert for which a resource consent had been obtained. Again, there was evidence that the stream bed in the vicinity of this culvert showed signs of significant sediment deposit. Again, there was evidence of inadequate protection for the stream from the effects of the extensive earthworks undertaken by the defendants in breach of the resource consent conditions. Moreover, there was further evidence of machine operations in the stream itself, some distance upstream from the second culvert.

[11] The fifth charge was faced by Mr Park alone. He had installed a 300 millimetre diameter PVC culvert pipe some 80 metres upstream from the first culvert. This third culvert provided access from the existing farmland over the stream and had been installed in order to further facilitate access to the site by machinery and other vehicles. There was no resource consent for this culvert. There was evidence of erosion in the vicinity of the culvert and of sedimentation of the stream bed. No spill-way had been constructed to ensure the safe passage of flood flows. The culvert pipe was significantly undersized for the stream flow and insufficient measures to minimise the effects of erosion had been taken.

[12] The respondent's inspector undertook an inspection of the three sites (in the vicinity of the three culverts). He considered that there had been a degree of ecological degradation ranging from severe at one point to mild at another. There were significant sediment deposits which were likely to persist for an extended period.

[13] It is appropriate to record that the defendants contended that some, at least, of the ecological damage of which the respondent complained, resulted from earlier forestry operations and not from the defendants' more recent activities. But it was not in dispute that the ecological impact of the defendants' unlawful activities was significant.

[14] When the extent of the damage was brought to Calford's attention the company immediately retained a consultant to assist with the remedial work required by abatement notices served by the respondent on 17 September 2007.

Appellants' explanations

[15] All of the defendants co-operated fully with the respondent during its investigations. Calford had earlier ensured that a representative would visit the site twice weekly to inspect progress, but conceded that it relied chiefly on Tirau and Mr Park to devise and carry into effect such steps as were necessary in terms of the consent conditions in order to protect the environment.

[16] Tirau's managing director had not read the resource consents fully. He relied upon his staff. The contract manager employed by Tirau to oversee the site attended a Council erosion and sediment control course on 28 August 2007, but the Judge found that he failed to ensure that Tirau implemented accepted industry standards in respect of erosion and sediment control on the site.

[17] Mr Park accepted that he had assumed *de facto* responsibility for carrying out the earthworks and culvert installations on the site under the direction of Calford's representative. Unlike Tirau staff, Mr Park had fully read both the resource consent conditions and the earthworks guidelines, and he had over 40 years experience in operating a bulldozer in the earthworks industry. He considered at the outset that the sediment traps installed by him were sufficient to comply with the requirements of the respondent.

The Judge's approach

[18] Judge Harland commenced her culpability assessment by discussing applicable sentencing principles. She said:

> [50] I think the correct approach in terms of principle is for a global starting point to be adopted, taking into account all relevant aspects relating to the offending (*R v Taueki* [2005] 3 NZLR 372; (2005) 21 CRNZ 769 (CA)). Whilst matters such as the effect on the environment will be the

> same for each defendant, there is still a need to consider each defendant's culpability in setting the starting point. In this case a separate starting point must therefore be identified for each defendant. In some cases where defendants are closely related that may not be the appropriate approach and a starting point which is then allocated to each defendant may be required. There are no aggravating factors as they relate to each defendant which require an uplift from the starting point, but each defendant has mitigating factors which require a deduction from the starting point.

[19] Having noted the need for consistency with other similar cases, the Judge then analysed in some detail six earlier authorities, concluding that the overall offending in this case fell somewhere between the two extremes reflected in those cases. It was common ground that as a matter of principle, fines were appropriate on most of the charges, but Judge Harland observed that the fines must be pitched at such a level as to constitute an appropriate deterrent, both to the defendants themselves and more generally. Further, she noted, the fines "must be sufficiently large to ensure they are not seen as a licence to offend".

[20] The Judge then turned to the individual positions of each of the defendants. She thought Calford to be the most culpable. It was in breach of its obligation to ensure that Tirau was aware of the consent conditions and of its obligation to ensure that Mr Park, who was actually supervising the project on a day to day basis, secured compliance with those conditions. Calford had done insufficient to ensure that the project was properly managed. In the Judge's opinion this was a complicated and significant development. It required the oversight of an experienced consultant who ought to have been retained at the outset, and not at a later point when the respondent had intervened. There was no doubt that the project was of sufficient size and value to justify that step from an economic point of view, in her opinion.

[21] The Judge fixed the appropriate starting point for Calford at $55,000.

[22] Tirau was regarded as "negligent in the extreme by not referring to the resource consents at all". Judge Harland was not impressed by Tirau's indication that it was ignorant of the requirements of the Act, but nevertheless she believed that Tirau was less culpable than Calford and so attracted a starting point of $40,000.

[23] Mr Park was solely responsible for the placement of the third culvert, but was a sole operator with limited financial means. The Judge noted that the fine imposed upon him would need to be reduced to take that into account.

[24] The Judge then turned to mitigating features. She noted that all defendants had pleaded guilty and fully co-operated with the respondent. They were all first offenders and were entitled to have their previous good character taken into account. Calford had taken immediate steps to engage a professional consultant to assist in remedial work at very considerable cost, but she thought that little weight could be accorded that factor because a consultant ought to have been retained in the first place. Tirau had arranged for its operations manager to be educated in respect of erosion and sediment control, but again the Judge considered training of that sort ought to have been undertaken in any event.

[25] The Judge allowed discounts of 40 per cent each for mitigating factors in respect of Calford and Tirau, so producing total fines of $33,000 and $24,000 respectively. She considered that mitigating factors applicable to Mr Park were the same as for Calford and Tirau, but, observing that he was not in a position to pay a substantial fine, imposed fines totalling $10,000 in respect of all of the charges save that relating to the unconsented culvert, which she characterised as "serious". For that, Mr Park was sentenced to community work of 300 hours.

[26] Mr Lang submits that the Judge's approach was wrong in principle and that, in consequence, the penalties imposed upon the appellants were manifestly excessive.

[27] I deal first with his challenge to the Judge's methodology.

Sentencing principles

[28] In *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 the Full Court of the High Court set out a number of principles that it considered as being relevant to sentencing under the Act. For some time, that case was regarded as the cornerstone of sentencing principles in this area. But following the enactment of

the Sentencing Act 2002, sentencing Judges have been obliged to take into account all of the factors set out in that Act as well as those identified in *Machinery Movers Ltd*: *Selwyn Mews Ltd & Others v Auckland City Council* (HC AK CRI 2003-404-159-161 30 April 2004) at [43]. Randerson J's observations to that effect in *Selwyn Mews* were adopted by the Court of Appeal in *R v Conway* [2005] NZRMA 274 where it was said:

> [60] The second point is to apply the Act and the Sentencing Act in harmony. That the two statutes were intended to be read in that way is clear enough from the specific terms of s 339(4) of the Act.
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> [61] It is also clear that the Sentencing Act was intended as an overarching piece of legislation designed to apply to all sentencing in this country. We refer to and adopt observations of Randerson J in *Selwyn Mews Ltd v Auckland City Council* (High Court, Auckland CRI 2003-404–159 – 161, 30 April 2004) to that effect.
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> [62] The third point relates to the approach to sentencing for offending against the Act. The Judge regarded protection of the public as the primary consideration in sentencing for offending under the Act. In so doing he relied on a decision of the Full Court of the High Court in *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492 and on a Canadian decision, *R v Bata Industries Ltd* (1992) 9 OR (3d) 329, 7 CELR (NS) 293.
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> [63] In our view the proper approach to sentencing for offending of this nature has been modified by the Sentencing Act. That point was made by Randerson J in *Selwyn Mews.* Randerson J said:
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> > [35] Reference was made to the sentencing principles established in *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492. That decision continues to have application but must now be read in the light of the provisions of the Sentencing Act 2002.
> >
> > [36] The Sentencing Act largely replaces the Criminal Justice Act 1985 and codifies sentencing principles developed by the courts over a lengthy period. It applies to all sentencing on criminal charges including charges laid under the Building Act and the Resource Management Act. It calls for a systematic approach to sentencing, commencing with a consideration of the purposes of sentencing under s 7. Not all those purposes will always be relevant to sentencing in environmental cases. For example, in some cases the harm done may be to the community generally rather than specific members of it. Reparation to particular victims may be relevant in some cases but not others. Rehabilitation will have no relevance to corporate offenders and may not be relevant to individuals who are otherwise of good character.
> >
> > [37] But many of the purposes of sentencing in s 7 will usually be relevant in environmental cases including holding the offender accountable for harm done; promoting a sense of responsibility for

> the harm; denunciation and deterrence (both personally and generally).
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> [38] The principles of sentencing in s 8 will also be relevant particularly (under s 8(a)) to the gravity of the offending and the degree of culpability involved. That will include the extent of any damage or adverse effects caused to the environment and the extent to which there was deliberate or reckless conduct. As well, the court will need to consider the issues of seriousness of the offence and penalties under s 8(b), (c), and (d); consistency in sentencing levels under s 8(e); the effects on victims under s 8(f) where applicable; and the particular circumstances of the offender under s 8(h) and (i). Where there are issues about mitigating any adverse effects on the environment such as repairing damage or clean up work, then ss 8(j) and 10 will become relevant.
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> [39] Aggravating and mitigating factors under s 9 are to be considered. Although a number of these do not have particular relevance in environmental cases, the matters to be considered are not exclusive: s 9(4).
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> [40] In environmental cases, fines will most often be the appropriate penalty. There are a number of provisions of the Sentencing Act relevant to fines. Section 13 provides that a fine must be imposed unless any of the specified exceptions in s 13(1)(a), (b), (c), or (d) applies. Other provisions relevant to fines are ss 14 and 39 to 43. Obviously, the capacity of the offender to pay a fine will be very relevant and the court has power to order an offender to make a declaration of financial capacity if necessary. That might have been a useful tool in the present case.
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> [41] Under the Resource Management Act, the court also has power to impose a sentence of imprisonment or community work: s 339(1) and (4). If a sentence of imprisonment is being considered, s 16 of the Sentencing Act is important. First, regard must be had to the desirability of keeping offenders in the community so far as practicable in terms of subs (1). Secondly, there is a presumption against imprisonment under s 16(2). Section 8(g) is also relevant (the least restrictive outcome in the circumstances).

[29] In *R v Taueki* [2005] 3 NZLR 372, decided after *Conway*, the Court of Appeal emphasised the need for transparency in sentencing. Sentencing Judges are required to select a starting point which reflects the gravity of the offence, to identify any aggravating or mitigating factors relevant to the offence, and then to consider aggravating and mitigating factors relating to the offender. In so doing, the Court confirmed the validity of a technique which until that time been adopted by most sentencing Judges in any event. Recently, the *Taueki* approach has been applied in two cases involving regulatory offences under the Health and Safety in Employment

Act 1992. In *Talleys Frozen Foods Ltd v Department of Labour* (HC BLE CRI 2008-406-6 19 November 2008) Mallon J said at [38]:

> To set a fine at the appropriate level apart from considerations of financial capacity, sentencing should be approached in the manner set out in *R v Taueki* [2005] 3 NZLR 372. That requires an assessment of the gravity of the offending. From that starting point aggravating and mitigating factors personal to the offender are applied. Once an appropriate fine has been assessed by this process, the Judge is to take into account financial capacity to pay. This is the approach discussed in *Department of Labour v Street Smart Ltd* HC HAM CRI 2008-419-000026 7 August 2008 at [50] and cited with approval in *Affco* at [42]. See also *Areva T & D New Zealand Limited* at [45] where *Taueki* is cited. It differs from the approach discussed in *Department of Labour v de Spa and Co Limited* [1994] 1 ERNZ 339, but that decision pre-dated *Taueki* and, as the Department acknowledges, there is no reason why regulatory offences cannot be approached in this way. The advantage of doing so is that it assists in making comparisons with other cases necessary to achieve consistency.

[30] A few weeks later, in *Department of Labour v Hanham and Philp Contractors Ltd* (HC CHCH CRI 2008-409-2 18 December 2008), the Full Court of the High Court (Randerson and Panckhurst JJ) said:

> [50] We accept that the circumstances of offending under s 50 HSE Act will vary greatly and therefore make the fixing of starting points more difficult than, for example, in cases of serious violence or rape. But we consider the *Taueki* approach should be adopted in the fixing of fines for offending under s 50. We view this as necessary to promote consistency and transparency in sentencing in this field and to ensure that the levels of fines imposed reflect the true culpability of the offender. The financial capacity of the offender may in some cases result in a significant variation from the starting point but this should not detract from the advantages of adopting the *Taueki* approach to sentencing in this area.

[31] In the light of these authorities, I am satisfied that it is appropriate to apply the *Taueki* approach to criminal proceedings arising under the Act. That was the view expressed without analysis by Priestley J in *Heenan v Manukau City Council* [2007] DCR 354. Mr Lang does not take issue with the general applicability of *Taueki* in a resource management setting, but he argues that, historically, starting points in cases of offending under the Act have been selected by considering the offending globally; that is, by assessing a starting point for the totality of the offending, and then allocating portions of the criminal responsibility so assessed among the defendants. In his written synopsis he says:

> 4. In comparable cases of offending under the Resource Management Act 1991 involving multiple parties, each of whom played a distinct role in contributing to the overall offending, the approach of the Disrict Court has often been to identify a 'global' starting point relating to the overall offending of all defendants, then allocate responsibility for that overall offending amongst the defendants, and to arrive at penalties which recognise the limited role played by each party.
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> ……
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> 7. The appellants challenge the method by which the 'starting point' was identified for each of the defendants. The first sentence of paragraph 50 of the sentencing decision indicates that the Court considered it appropriate in principle to identify a global starting point, taking into account all relevant aspects relating to the offending. However, the following sentences in that paragraph indicate that the Court intended to identify a separate starting point for each defendant, rather than identifying a global starting point which is then 'allocated' to each defendant.

[32] I accept that in some of the earlier cases to which Mr Lang referred there are references to global starting points, but greater transparency is now required as a necessary part of the sentencing process. Criminal culpability is assessed by reference to the role played by each individual offender; even where a number of persons acting together commit a criminal offence, the Court is required to assess the culpability of each offender separately and to impose on each a penalty that reflects the gravity of that offender's criminality.

[33] Of course, the Court is required to fix a starting point for the offending as the first step in the sentencing process. That will sometimes involve the placement of the case in one or other of the sentencing bands laid down in tariff cases. *Taueki* itself is an example of such a case. But having assessed the gravity of the offending itself, the Court is then required to turn to the role of each offender where there is more than one accused, and to assess both the nature of the role played by each offender, as well as aggravating and mitigating factors attaching to each. Individual sentences are thereby tailored by reference to factors unique to each individual.

[34] Mr Lang's argument is that where, as here, the defendants played well defined roles that only partially overlap, the District Court should have fixed a global starting point and then allocated culpability between the various offenders in the light of that starting point. As I understand his argument, he contends that the

sentencing judge ought to have determined the overall fine by reference to the totality of the offending and then simply divided it up between the defendants in proportion to the roles played by each of them. I reject that approach. It is contrary to principle and in particular, is contrary to the guidelines set out in *Taueki*, which both the sentencing Judge and this Court are bound to apply. A fine that is appropriate for an individual defendant is not to be reduced simply because other offenders were involved.

[35] Mr Lang's argument, if carried into the arena of offences under the Crimes Act would, for example, require sentences for multi-accused street attacks to be reduced simply by reason of the number of offenders involved. It would plainly be wrong to do that. There is no warrant for taking a different line in cases under the Act. To do so would lead to reduced fines and to a concern that penalties under the Act might be regarded as licensing fees for offending. Fines imposed under the Act must be meaningful: *Machinery Movers*, adopted in *Plateau Farms Ltd v Waikato Regional Council* (HC ROT CRI 2007-463-16 17 September 2007). In my opinion those who commit offences under the Act are to be treated in precisely the same way as those who commit other regulatory offences and indeed, in the same fashion as all offenders. The Judge identified a starting point for the offending and then made adjustments to reflect the separate culpability of the individual offenders. In so doing she adopted the approach mandated in *Taueki*. I reject the submission that she made an error in principle in so doing.

Manifestly excessive

[36] Mr Lang argues that, irrespective of the reasoning adopted by the Judge, she ended up by imposing fines that were too high. In the course of her analysis the Judge considered a number of prior authorities and selected several as being of some assistance. Significant care is needed when evaluating some of the older authorities because there has been a recent overall increase in the level of fines imposed in order to reflect the need for ongoing deterrence and denunciation where environmental offending is concerned: *Auckland City Council v North Power Ltd* [2004] NZRMA 354 and *Plateau Farms Ltd*. The cases to which the Judge devoted particular

attention were *Canterbury Regional Council v Wallace & Ors* (DC TIM CRN 07076500316, 1 April 2008), *Waikato Regional Council v Trower* (DC HAM CRI 2005-072-155, 29 September 2005), *Bay of Plenty Regional Council v Barry Andrew & Ors* (DC TAU, CRN 1070019372, 6 August 2002) and *Auckland Regional Council v Holmes Logging & Anor* (DC AK CRI 2006-089-752, 29 May 2008). The Judge regarded each of these cases as less serious than the present case. In *Wallace* there was a single event with fewer aggravating features than here. The Judge's reasoning in *Andrew* is difficult to discern because the discount allowed for mitigating factors, including a guilty plea, is not identified, but Judge Harland thought the case to be of assistance because, although the earthworks in *Andrew* were of a larger scale and took place over a longer period of time, that was counter-balanced by the lack of due diligence in the present case and the breach of the resource consent conditions. There was the added feature in Mr Park's case of the offending relating to the unconsented culvert. In *Andrew*, fines totalling $33,000 were imposed on three defendants, the highest penalty being $17,500.

[37] The Judge also thought that *Trower* ($25,000 fine imposed on a single offender) was a less serious case than this, because here the actual waterway channel was manipulated and large amounts of sediment entered it, and the failure to comply with the resource consent conditions was an aggravating factor in the present case. She also considered that *Holmes Logging* was less serious in that the effect on the stream was less severe and the offending was only a small part of an otherwise well run operation which had taken into account the ecology of the area.

[38] Mr Lang advised this Court that the starting point advocated by the appellants in the District Court was between $50,000 and $55,000. That submission was, in effect, accepted by the Sentencing Judge who took a starting point for Calford of $55,000. The thrust of Mr Lang's submissions on appeal is, in my view, significantly weakened by the fact that the Judge has in effect adopted his submission as to starting point, albeit calculated by Mr Lang in the context of his "allocation" approach to the sentencing process.

[39] For each of these offences the appellants were liable to a fine not exceeding $200,000: s 339. The fine imposed on Calford was little more than fifteen per cent

of that figure. The Court was required to take into account, in fixing appropriate penalties, the legislative policies that underpin the Act: *R v Conway* at [68]. Those policies are to be found in ss 5, 6 and 7 of the Act which read:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.
>
> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
>
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
>
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> (f) the protection of historic heritage from inappropriate subdivision, use, and development.
>
> (g) the protection of recognised customary activities.

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) Kaitiakitanga:

(aa) The ethic of stewardship:

(b) The efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) The maintenance and enhancement of amenity values:

(d) Intrinsic values of ecosystems:

(e) Repealed.

(f) Maintenance and enhancement of the quality of the environment:

(g) Any finite characteristics of natural and physical resources:

(h) The protection of the habitat of trout and salmon:

(i) The effects of climate change:

(j) The benefits to be derived from the use and development of renewable energy.

[40] In my opinion, the Judge was perfectly entitled to regard these offences as calling for significant penalties – there was a wholesale failure to take proper precautions to protect the environment. I am satisfied that the fine imposed upon Calford was within the available range; although the starting point might be thought to have been somewhat on the stern side, it is significantly counter-balanced by a generous discount for mitigating factors. This was a case in which the consent holder simply left to others the responsibility for implementing the consents in a lawful fashion, when a much more rigorous approach ought to have been adopted.

[41] Mr Park is in a somewhat different position. The Judge correctly took into account his limited means in reducing the fine which would otherwise be payable, but she made an order that Mr Park undertake 300 hours community work in respect of the culvert charge. While the Judge was perfectly entitled to reflect Mr Park's additional culpability on that charge by imposing a sentence of community work, the length of that sentence was, in my view, outside the available range. Mr Pilditch did

not argue otherwise. A sentence of 100 hours community work is sufficient to mark the criminality involved.

Costs order

[42] The Judge directed Calford to pay costs of $23,453 to the respondent. The Court had jurisdiction under ss 314(1)(b) and 339(5) of the Act to require Calford to pay actual and reasonable costs, but the respondent did not seek an order. The Court is advised that, where costs are sought, it is the practice of the respondent to submit a detailed analysis of costs by way of affidavit in order to establish what was "actual and reasonable". As it happens, the Court is now told that the figure upon which the District Court acted is not correct and that it should be significantly lower. The respondent formally abides the decision of this Court, but in all the circumstances I am satisfied that it is proper to quash the order for costs. The Judge's direction that 90% of the fines be paid to the respondent stands.

Result

[43] The appeals succeed in part. The sentence of 300 hours community work imposed upon Mr Park is quashed. I substitute a sentence of 100 hours community work.

[44] The order for payment by Calford of costs to the respondent of $23,453 is also quashed.

[45] The penalties in the District Court are otherwise upheld.

C J Allan J