TWO SIDES OF THE COIN: COUNCILS' PROSECUTION ROLE AND STRATEGIES FOR THE DEFENCE

Karenza de Silva, Environmental Lawyer
Stuart Ryan, Barrister

This session is a co-presentation from two different perspectives – the prosecution and the defence. This is an interactive session – please ask questions.

The following topics are covered:

- Ensuring the process is right both prior to and after the decision to prosecute - Crown Law Prosecution Guidelines 2010
- Criminal Disclosure Act 2008
- Prior Conduct – is it relevant?
- Disputes at sentencing
- Officially induced error
- Collateral challenge
- Defence strategies: what works and what doesn't

Ensuring the process is right both prior to and after the decision to prosecute - Crown Law Prosecution Guidelines 2010

The Crown Law Prosecution Guidelines 2010 apply from 1 January 2010 (copy attached). These Guidelines replace the 1992 version. The 2010 version is similar to the earlier version.

The purpose and principles of the Guidelines are set out in section 2. The Guidelines *"reinforce the expectation …that a prosecutor will act in a manner that is fundamentally fair, detached and objective."*

This obligation coincides with the duties of a prosecution lawyer at 13.12 of the Rules of Conduct and Client Care for Lawyers[1] namely:

> *"A prosecuting lawyer must act fairly and impartially at all times and in doing this must—*
>
> *(a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and*
> *(b) present the prosecution case fully and fairly and with professional detachment; and*
> *(c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and*
> *(d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown."*

The Crown Law Prosecution Guidelines are intended to be applicable to local government.

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

The Guidelines at section 4 state:

<u>The independence of the decision-maker</u>

4.1 The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process.

4.2 In practice in New Zealand the independence of the prosecutor refers to freedom from political or public pressure. All government agencies should ensure wherever it is reasonably practicable to do so, that the initial prosecution decision is made by legal officers independently from other branches of the agency and acting in accordance with these Guidelines.

Karenza's comment:

<u>Who should make the decision to prosecute?</u>

Some local authorities delegate the decision to prosecute to an officer and for others the decision is made by the council.

There are advantages if the decision is delegated to an officer. Gerald Nation lists some of the advantages in a paper on RMA prosecutions[2]:

- *"…most likely to ensure that political considerations are not a factor in deciding whether or not to prosecute.*
- *"…easier for Council to show that political considerations have not been a factor."*
- *"If it becomes well known that the decision to prosecute or not is made independently of the Council, then over time, it is less likely that Councillors will have to face lobbying by constituents or particular pressure groups over the decisions."*

Stuart's comment:

The Guidelines appear primarily directed at decisions by enforcement agencies where there is a criminal enforcement regime but no civil enforcement regime. Most significant enforcement regimes applicable to local government generally provide for both criminal and civil enforcement remedies. Getting this criminal/non-criminal enforcement distinction "right" is important to maintaining the credibility (and fairness) of a local authority's enforcement regime.

The Guidelines set out a two stage test in determining the decision to prosecute. The first is the "evidential test", the second the "public interest test". While the Guidelines acknowledge all suspected offences must not automatically be the subject to prosecution they start from a presumption of prosecution where there is a contravention of the law. For instance (at para 6.7) it is stated:

*6.7 **Broadly, the presumption is that the public interest requires prosecution***

[2] *Advice from Gerald Nation, Wyn-Williams Regarding Prosecutions under the RMA* (written for the Canterbury Regional Council).

> ***where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case****. In some instances the serious nature of the case will make the presumption a very strong one. However, there will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).*

Section 84(1) RMA requires that where a plan is operative a regional council or territorial authority "*shall observe and, to the extent of its authority, enforce the observance of the policy statement or plan*". Local authorities are provided discretion as to how to enforce a plan. There is no rule applicable to local government that as a starting point every contravention of the plan is to be the subject of prosecution.

The Guidelines do articulate "*public interest considerations against prosecution*" including "*where any proper alternatives to prosecution are available*" (at 6.9.13) however this is given a subsidiary treatment amongst a list of other factors. In my view, if the Guidelines are to be applied by local government they should be applied with the qualification that alternative methods of enforcement including non-criminal sanctions (e.g. a warning, a general compliance program, an abatement notice, enforcement order or infringement notice, etc) be considered as an alternative to prosecution.

Criminal Disclosure Act 2008

The Criminal Disclosure Act came into force on 29 June 2009 (copy sections 12, 13 and 14 attached).

- The onus is on the prosecutor to disclose material identified as relevant and disclosable.
- There is an ongoing obligation on the prosecutor to disclose any further relevant information that becomes available:
- Initial disclosure - Section 12(1) requires disclosure of specified information, as soon as reasonably practicable, but no later than 21 days from the commencement of criminal proceedings.
- Section 12(2) provides that the defendant may specifically request further information. This information must be provided by the prosecutor as soon as reasonably practicable.
- Section 13 provides for the full disclosure of all available relevant information, including (but not limited to) certain types of standard information, as soon as reasonably practicable after a not guilty plea has been entered for a purely summary offence, or trial by jury has been elected, or the defendant has first appeared on indictably laid charges.
- Section 14 - the defendant can request additional information, which will need to be identified with sufficient particularity. The prosecutor may decline such a request if the information is not relevant to the case, can be withheld under sections 15, 16, 17, or 18, or the request is deemed to be frivolous or vexatious.

Stuart's comment:

Traditionally the report recommending prosecution would be the subject of disclosure. On a complex prosecution the report from the officer in charge is usually very helpful to defence counsel in trying to understand the nature of charges.

It would not represent current practice if prosecutors were to withhold any report recommending prosecution through the discretionary power to withhold information for the reasons in section 16 of the Criminal Disclosure Act 2008, which has relatively wide discretionary grounds for withholding information including:

> ***16 Reasons for withholding information***
> *(1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—*
> *(c) **the information is**—*
> *(iii) **analytical or evaluative material prepared, in connection with an investigation that led to the defendant being charged, by a person employed by a person or agency for another person employed by that person or agency or for the prosecutor; or***
> …

A defendant can apply to the court for an order for disclosure of the information under section 30 of the Criminal Disclosure Act 2008. The discretion held by the Court includes the ability to direct the disclosure where in the public interest, and this outweighs the interests of protecting the information.

Prior Conduct – is it relevant?

The High Court in *Wallace Corporation Ltd v Waikato Regional Council*[3] held that prior conduct is relevant to sentencing under the RMA if the prior conduct is reliable. The prosecution was for discharge of odour from an abattoir and rendering plant. The offence was a continuing offence on an intermittent basis for a total of 12 days. The defendant pleaded guilty and was convicted and fined $80,000. The defendant appealed against sentence.

The Court found that the history of complaints about smells was unreliable. The Council had a record of complaints but the record was not accurate and some of the complaints were unverified. The High Court reduced the fine to $47,000. One reason for the reduction in fine was the weight placed on the history of complaints. The Court found that the process followed by the Council when recording the complaints was not robust enough to make the complaints a legitimate source of "aggravation" on a sentencing. Justice France made it clear that he was not saying that prior conduct cannot be used in sentencing. At paragraph 19:

> *These observations should not be taken out of context. It is not a statement that prior conduct cannot be used on sentencing. It would be plainly undesirable to force Councils to charge every breach when a warning, or a negotiated solution, may be the preferable approach. If later offending occurs, the Council should be able to refer to earlier non-charged incidents. However, if this is to happen, the process followed must be sufficiently clear to establish that an uncharged breach has indeed occurred, or has been accepted by the consent holder as having occurred. I am not satisfied that is the case here.*

[3] HC Auckland CRI 2006-404-26, 8 June 2006, 8/06/06, France J.

In *Waikato Regional Council v Plateau Farms Ltd*[4]*, a prosecution for* discharge of dairy effluent in breach of s 15(1)(b), the District Court convicted and fined the defendant $35,000. The defendant appealed against sentence. The High Court dismissed the appeal[5]. An aggravating factor was the history of non-compliance. The history of non-compliance was the subject of a disputed facts hearing. The history consisted of a series of site inspections and warning letters. Judge Thompson said at paragraphs 14 and 16:

> *My view is, as expressed after the disputed facts hearing, that this company, given the history of problems with effluent disposal on the property, should have been hypersensitive to the need for close supervision and management. …"*
>
> *…*
>
> *The charge covers the period from 22 December 2004 to 19 January 2005. The relevance, in my view, of the disputed fact history is that the company cannot suggest that the systems and its management suddenly collapsed on or about the 22nd of December without warning. The company's failure, over the period from August on, to ensure compliance led inevitably to the offence. To that extent its culpability is, in my view, the greater.*

Karenza's comment:

Local authorities should make more use of abatement notices and infringement notices. These two low level enforcement mechanisms are a good deterrent.

In the *Plateau Farms* case, the disputed facts hearing could have been avoided if the Council had issued a series of abatement and infringement notices.

Abatement notices and infringement notices are a much clearer record of prior conduct than a series of verbal warnings and letters if the:

- Abatement notice has not been appealed or is upheld on appeal.
- Infringement notice has been paid by the recipient or proved after a defended hearing[6].

In *Northland Regional Council v McBreen Jenkins Construction Ltd*[7]*,* Judges Newhook and Dwyer found that the seven infringement notices issued to the defendant were part of the defendant's overall track record and were an aggravating factor.

[4]DC Rotorua CRI – 2005-069-2345, 25 January 2007, Judge Thompson.
[5] HC Rotorua CRI2007-463-000016, 17 September 2007, Stevens J.

[6] Only a small percentage of abatement notices and infringement notices are challenged.

[7] DC Whangarei CRN 5084500347, 349, 366, 368, 355, 357, 387 & 389, 12 September 2006, Judges Newhook & Dwyer.

Stuart's comment:

The relevance of any prior conduct (say an infringement notice) may be in contention. If the infringement notice forms part of the factual matrix to the offence then this is probably relevant evidence, and can be included in any summary of facts or witness statement.

However if the prior conduct is not relevant to the offence for which the defendant is charged then the prior conduct should be excluded. In addition its prejudicial effect may outweigh any probative value

An infringement offence does not constitute a prior conviction: 78A Summary Proceedings Act 1957.

Disputes at sentencing

Section 24 of the Sentencing Act 2002 sets out the process for determining facts that are in dispute:

24 Proof of facts

(1) In determining a sentence or other disposition of the case, a court—

(a) may accept as proved any fact that was disclosed by evidence at the hearing or trial and any facts agreed on by the prosecutor and the offender; and

(b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

(2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—

(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:

(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the hearing or trial:

*(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate **[**beyond a reasonable doubt**]** any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:*

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

The prosecution is required to prove beyond reasonable doubt any disputed aggravating fact and negative any disputed mitigating fact. The defendant is required to prove on the balance of probabilities any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence.

Karenza's comment:

In most of the disputed facts hearings under RMA, the Court has found in favour of the Council.

Stuart's comment:

A key to section 24 is to evaluate and be prepared to adapt to any indication given to the parties by the Court pursuant to section 24(2)(a) Sentencing Act 2002.

Officially Induced Error

In two decisions involving prosecutions under the building legislation the High Court has been prepared to recognise the possibility that officially induced error might be a defence in New Zealand to a strict liability offence but without having to conclusively determine the point. At the very least it has been recognised that officially induced error could support a discharge without conviction under section 106 of the Sentencing Act, but there must be a cogent factual basis for the doctrine to apply: *MacRae v Buller District Council*[8]; *Wilson v Auckland City Council*[9].

Wellington Regional Council v Capital Egg Company Ltd[10] involved a prosecution for the dumping of chicken waste in breach of section 15 RMA. The defendant alleged he had been led to believe that the dumping was acceptable following a telephone call to the Council's helpdesk. It was alleged that this was an officially induced error. Judge Thompson was not prepared to find that officially induced error amounted to a defence, saying:

> *[19] In terms of offences under the Resource Management Act I am certainly not, as at present advised on the state of the law, prepared to say that there is a defence of "officially induced error". It needs to be borne in mind that the offences created by s 338 of the Resource Management Act are strict liability offences. That is made perfectly clear by s 341(1) which reads, relevantly for our purposes:*
>
> > *"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."*

[8] HC Greymouth CRI 2005 4181, 12 December 2005, Chisholm J.
[9] [2007] NZAR 705 (HC).
[10] DC Wellington CRI-2007-085-3202 & 3203, 28 November 2007, Judge Thompson

In other words, if the physical actions constituting the offence are concluded, then the offence is proved unless the defendant can establish any of the limited statutory defences in the balance of s 341, on the balance of probabilities.

Waikato Regional Council v Hillside Farms Limited & Crafar[11] is one of a series of (recently publicised) dairy effluent prosecutions against the Crafar family. The defendants were convicted after a defended hearing. There were a number of charges. Three of the charges were for overflow of effluent from a sump into an unsealed holding pond. The defendants argued that the Council made a mistake in relation to advice given about the holding pond and the defendants should be discharged without conviction for these offences. The Regional Council had written a letter to the defendants in August 2007 indicating that those operating the farm might use the unsealed holding pond in an emergency, with the proviso that notice be given to the Council. The defence argued that it had used the holding pond in emergency situations. The Court held that there were no grounds for a discharge without conviction because the pond had been used on a number of occasions when there was no emergency and notice was not given to the Council. The Court gave a small discount when sentencing for "*the loose approach taken by the council in its letter*".

Collateral challenge

Collateral challenge involves an attempt to challenge the administrative law validity of an administrative action, statutory notice, or rule or bylaw in the course of defending a summary criminal proceeding, rather than bringing separate judicial review or declaration proceedings. The issue of collateral challenge may be relevant to:

- challenges to the validity of a rule or bylaw,
- challenges to a statutory notice, such as a notice to fix under the Building Act, or an abatement notice under the RMA.

Whether or not collateral challenge is open as a defence is likely to turn on the terms of the statute in question, and whether any collateral challenge is implicitly or expressly excluded.

Harwood v Thames-Coromandel District Council[12] involved an attempt to challenge dog registration fees imposed by the Thames-Coromandel District Council. The Council had prosecuted Mr Harwood for failing to register his dog contrary to section 42(1) of the Dog Control Act 1996. He was convicted in the District Court and appealed. He challenged the validity of the Council's fees. The question arose as to whether the challenge to the validity of the fees was open in the course of a summary prosecution. Randerson J described the challenge in these terms:

[20] There has long been difficulty in deciding in what circumstances an accused person may be permitted to challenge the validity of subordinate legislation or an administrative act either in the context of a criminal charge or by way of defence to a demand for payment. A challenge of this kind in criminal or civil proceedings is described as "collateral" to distinguish the challenge from one made directly, for example, in separate judicial review proceedings or in a claim for a declaration that the legislation or act in question is unlawful. ….:

[11] DC Hamilton CRI-2008-019-2997, 28 August 2009, Judge Newhook.
[12] [2003] NZAR 518.

Randerson J referred to two decisions of the House of Lords which recognised collateral challenge in the context of prosecution, saying:

> *[21] Two recent decisions of the House of Lords have thrown considerable light on the subject and have re-affirmed the citizen's right, under the rule of law, to defend proceedings by challenging subordinate legislation or administrative acts upon which the prosecution depend. These decisions are R v Wicks [1998] AC 92 and Boddington v British Transport Police [1999] 2 AC 143. In [Wicks], a land owner was prosecuted for failure to comply with an enforcement notice served by the local planning authority. It was pleaded that the notice was invalid because it was motivated by bad faith and immaterial considerations. The House of Lords held that, as a matter of general principle, where the criminal offence alleged lay in failure to comply with an order made under statutory powers, it was open to the defendant to challenge the lawfulness of the order on certain grounds by way of defence in criminal proceedings. However, the general principle had to take effect subject always to any contrary indication in the relevant legislation..*
>
> *[22] In Wicks, the relevant legislation contained an elaborate code with detailed provisions for appeals. The legislation was found to indicate that the appropriate forum in which to challenge the procedural invalidity of an enforcement notice was the Divisional Court and not in criminal proceedings arising out of failure to comply with the notice. ….*
>
> *[23] A different conclusion was reached in the Boddington case. There, the defendant was fined for smoking in a railway carriage contrary to railway by-laws. He pleaded that the by-laws were unreasonable. While the House of Lords upheld his right to make that plea, they dismissed it on the merits.*

Wilson v Auckland City Council[13] involved an appeal against conviction for doing work under the Building Act 1991 other than in accordance with a building consent. The defendant/appellant represented himself. While recognising the House of Lords decisions, the High Court held that:

> *[27] The present case is not one concerning an administrative decision to issue a notice nor is it to challenge a by-law. The only administrative decision of relevance to the prosecution was a decision to prosecute. The proper way to challenge that decision as to [judicially] review it, rather than to raise it as a defence in a criminal prosecution.*

TL & NL Bryant Holdings Ltd v Marlborough District Council[14] involved in appeal against conviction and sentence concerning conviction for land use contrary to the district plan and to unauthorised diversion of water. The appellant challenged the vires or validity of the rule in question. The High Court considered the issue whether *Smith v Auckland City Council*[15] was binding authority that the RMA demonstrates a Parliamentary intention to exclude challenges to rules in district plans in the context of a prosecution. On the facts the Court found the challenge to the rule's validity not made out but said:

> *[62] I recognise, however, that the issue is not clear-cut. In many of the cases I have referred to there are repeated references to the significance under the rule of law of the availability of collateral challenges in criminal prosecutions under delegated legislation. I am therefore more than a little hesitant to conclude that Smith is, … authority for the*

[13] [2007] NZAR 711.
[14] [2008] NZRMA 485.
[15] [1996] NZRMA 27. Confirmed on appeal by the Court of Appeal: [1996] NZRMA 276.

proposition that there will be no circumstances in which a collateral challenge will be available to a prosecution under the RMA.

In summary, at this time there continues to be some legal uncertainty around the extent to which a collateral challenge might be open in the context of a prosecution.

Defence strategies - what works - what doesn't?

"Can you get me off?"

On meeting a prospective client the question 'Can you get me off?' will often be the first one for a defence lawyer. The question falls squarely within the duties of a defence lawyer who: [16]

> *"..must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must:*
>
> *(a) put the prosecution to proof in obtaining a conviction regardless of any personal belief…, and*
> *(b) put before the court any proper defence in accordance with his or her client's instructions-*
>
> *but not mislead the court in any way."*

Despite this duty some 91% of charges in the RMA context plead guilty, no doubt reflecting the difficulty of defending offences of strict liability.[17] It follows that the defendant's dilemma is that to pursue a defence with grounds which are weak or unlikely to succeed will increase any financial penalty in the event of conviction. The defendant who elects to plead not guilty but does not succeed will have lost any opportunity for a substantial discount in any financial penalty through not pleading guilty at the first opportunity see *R v Hessell*[18].

The other issue for the defence is that defending prosecutions under regulatory enforcement legislation can be expensive, commonly running into thousands or tens of thousands of dollars. Such costs are not generally recoverable even if the charges against the defendant are dismissed.

Targeted defences

While a defendant is entitled to put the prosecution to proof in respect of all matters, and scattergun type defences sometimes do 'get lucky' more often than not it will be in a defendant's interest to narrow the issues and apply a targeted approach to the prosecution case. In the absence of the Summary Proceedings Act 1957 prescribing a procedure the practice of Judge McElrea is to encourage a method of pleading to a detailed summary of facts.[19]

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[16] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, para 13.13.
[17] http://www.mfe.govt.nz/publications/rma/rma-prosecutions-2008html/page1.html. The 91% is for prosecutions dealt with by the Court during the period 1 May 2005 to 30 June 2008.
[18] [2009] NZCA 450 (CA).
[19] Judge FWM McElrea "Some Thoughts on RMA Prosecutions", Resource Management Bulletin, September 2007, 67.

Challenge to Technical Instruments

Where technical instruments are relied upon by the informant to establish key facts there is a need (if challenged) to establish the reliability and accuracy of a technical instrument to the criminal standard (refer section 137 Evidence Act 2006).[20]

Discovery

It is essential for a defendant to make full and effective use of the prosecution obligations to provide discovery.

Plea at the first opportunity

Following the passage of the Sentencing Act 2002 the Courts have developed a more structured approach to sentencing with clear identification of aggravating and mitigating factors.[21]

R v Hessell[22] is a recent guideline decision of the Court of Appeal on the extent to which a discount is to be applied for a guilty plea as a discrete mitigating factor (consistent with section 9(2)(b) of the Sentencing Act). The Court identified that the extent of reduction for a guilty plea should depend on the stage in the proceedings at which a guilty plea is entered. The Court said:

> *15. The amount of the reduction is determined according to a sliding scale, with three benchmarks on that scale as follows:*
>
> *The First reasonable opportunity*
>
> *A 33% reduction (1/3) if the guilty plea is entered, or the willingness to plead guilty is communicated, at the first reasonable opportunity;*
>
> *At status hearing or first callover*
>
> *A 20% reduction (1/5) if the guilty plea is entered, or the willingness to enter a guilty plea is communicated, at a status hearing or equivalent stage of proceedings in summary cases, or at first callover after committal in cases proceeding by way of indictment;*
>
> *Three weeks before trial or hearing*
>
> *A 10% reduction (1/10) if the guilty plea is entered, or the willingness to enter a guilty plea is communicated, three weeks before the commencement of the trial or hearing.*
>
> *16. These percentages are not intended to be precise. The judge may use some "rounding" (for example, of months) to achieve a sentence that is workable.*

The Court of Appeal decision in *Hessell* has been granted leave to appeal to the Supreme Court.

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[20] For a recent case where the defence succeeded in challenging the accuracy of the surveying instruments used by the informant see: *Scott and Others v Otago Regional Council* HC Dunedin CRI 2008-412-17, 3 November 2008, Heath J.
[21] See the guideline Court of Appeal decision of *R v Taueki* [2005] 3 NZLR 372.
[22] Supra note 18.

Contrition, remorse and offers to make amends

There is a clear theme in the Sentencing Act 2002 towards a defendant's acceptance of responsibility and remorse. Any remorse shown by an offender is an express mitigating factor in section 9 Sentencing Act. In addition, a court must take into account any offer, agreement, response or measure to make amends, as set out in section 10 Sentencing Act. In this context others have written about the value of restorative justice type arrangements as a prelude to sentencing.[23]

A point worth making here is that if there is to be an apology, make it a fulsome one.[24]

There is a need to be careful of undoing any apology through contesting issues which might otherwise detract from any acceptance of responsibility. For example in *Northland Regional Council v Hamilton*[25] the defendant pleaded guilty and made an inappropriate apology for the offending, involving the felling of mangroves at an inlet in the Bay of Islands. However the defendant unsuccessfully contested a disputed facts hearing. In reflecting on the offender's attitude at sentencing the Court noted:

> *[25] That brings us to the attitude of the defendant. This is an area in which [Counsel for the informant] has submitted some credit may be due to the defendant in sentencing, and I agree with that. The defendant pleaded guilty at an early opportunity and is certainly entitled to credit for that. The informant submits that as against that he unsuccessfully contested two areas of fact, and put the Court, the informant and its witnesses to the cost and inconvenience of a Court hearing.*
>
> *[26] That much is true, and while I accept the submission of [Counsel for the defendant] that the defendant was entitled to contest matters that he felt had not been accurately put by the informant, nevertheless the consequence of that is, particularly if findings are made against him, that that can reduce the benefit that could otherwise have flowed from an early guilty plea. I do not say it removes it completely, but it reduces it.*

Blaming others

Given the focus on the Sentencing Act towards an offender's acceptance of responsibility it is prudent for the defence to ensure there is a sound foundation in fact and law before 'pointing the finger' at others. If allocating blame to others is not made out, there is a risk this will detract from any mitigating circumstances due the defendant.

Karenza's comment:

Taranaki Regional Council v Andrews & van Kerssen,[26] a prosecution for discharge of dairy effluent and silage leachate. The farm was owned by Andrews family trust. Van Kerssen was farm worker/manager. Disputed facts hearing on role of van Kerssen. Judge Dwyer found that he was unable to resolve the dispute. However, regardless of capacity in which van Kerssen had been employed, Judge said it was absolutely clear that there was no proper system in place for managing effluent and that there was a long history of poor management and Andrews, as farm

[23] See Deborah Clapshaw "Restorative Justice in Resource Management Prosecutions-a Facilitator's Perspective".
[24] For example: *Auckland City Council v 12 Carlton Gore Road Ltd* DC Auckland CRN04004502283, 11 April 2005 Judge McElrea, a decision involving felling of trees.
[25] DC Whangarei CRN7004503763, 15 October 2008, Judge Newhook.
[26] DC New Plymouth CRN 09043502602, 2610 & 2841, 16 July 2009, Judge Dwyer.

owner and consent holder, failed to put in place and supervise adequate management of the effluent system. At paragraph 22

> *Mr Andrews sought to divert responsibility for the effluent pond discharge to Mr van Kerssen, who, he says, allowed the pond to get to a stage of overflowing. In the disputed facts hearing I identified the disorganisation and lack of appropriate management systems to deal with the effluent which apparently prevailed on the property. Even if I had accepted Mr Andrews' claims that Mr van Kerssen was responsible, that would not be an excuse or mitigating factor in any way.*

Andrews was fined $30,000 on each charge (total of $60,000). Van Kerssen was discharged without conviction.

Dealing with infringement and abatement notices

Many prosecutions have a prior history of the informant having issued earlier infringement or abatement notices. The relatively low fine level on infringement notices may inadvertently "lull" recipients into a false security as it will usually be cost-effective simply to "pay up" than to question a notice, or to obtain legal advice on it. Infringement notices in particular need to be treated with greater care by defendants. Unfortunately the failure to effectively address these lower-level notices is a common theme.

Statutory Liability Insurance

Not so much a strategy to avoid prosecution, and best viewed as a backstop measure to limit the financial consequences of prosecution or other enforcement action, statutory liability insurance can be a useful protection in the event of errors or events which lead to prosecution.

In *Auckland Regional Council v Gubbs Motors Ltd*[27] the Court rejected submissions that availability of statutory liability cover was an aggravating feature at sentencing. Judge Moore suggested that it was to the credit of both defendants that the availability of insurance enabled full reparation for the discharge of diesel, and that absent insurance it was unlikely that anything approaching full reparation could have been made. The Court did not view the availability of insurance as an aggravating feature saying:

> *[38] …. The simple reality is that, probably because of it, the offenders have the ability to pay an appropriate fine. So there is no case for either not imposing a fine because the offender does not have the means to pay it, or reducing an otherwise appropriate fine because of the offender's limited means. …*

In effect the Court endorsed a more visible role for statutory liability insurers, who have been a player in RMA prosecutions now for some years.

[27] DC Auckland CRN 08088500246 & 08084500006, 20 March 2009, Judge Moore.

Multiple Charges arising out of one incident

Stuart's comment:

It is common practice for informants laying charges under regulatory legislation (especially the RMA) to charge the defendant or defendants with a series of offences arising out of the same incident. Frequently where there is a company involved charges will also be laid against the directors in their personal capacity. Although the Courts in New Zealand have been reluctant to take the step of interfering with the prosecutorial discretion[28], this practice has sometimes been criticised.[29] Yet despite occasional judicial rebuke, and a tightening up of the process for withdrawal of informations, the approach to date has generally been to leave such decisions in the hands of the prosecutors and enforcement authority. This practice risks the potential for unfairness where the defendant director is a first offender, but who does not fit into the narrow statutory defences and where little harm is done. In such a case, the defendant may feel victimised and reluctant to establish a better relationship with the enforcement agency in the future.

Due diligence defences

By due diligence defence it is meant a defence which establishes on the balance of probability that the defendant exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. Whether or not a due diligence defence can be made out is a question of fact in every case.

This type of defence will be relevant:

a) Where charges are brought by virtue of the vicarious liability provision in section 340(1), and it is necessary for a defendant to show under section 340(2) that:

    i. He or she lacked actual or constructive knowledge that the offence was to be committed, or

    ii. he or she can all reasonable steps to prevent the commission of the offence.

b) Charges are brought against a director or a person involved in the management of the entity, under section 340(3) and the informant is able to establish that he or she had actual or constructive knowledge and failed to take all reasonable steps to prevent the offence.

[28] See *Fox v Attorney-General* [2002] 3 NZLR 62 (CA).

[29] In *Auckland City Council v North Power Ltd*, Judge McElrea was critical of a prosecution which commenced by the informant laying 72 informations, 12 informations against the defendant company, and 12 each against its five directors. Later, the informant sought to withdraw charges in return for the defendant company pleading guilty to more appropriate charges, and for an enforcement order, beyond which the informant was to seek no financial penalty. The Court expressed concern that criminal proceedings were being used as a means of achieving civil remedies. The Court suggested the risk of an abuse of process.

c) The defendant seeks to establish as a defence to the strict liability offence under section 341(2)(b) that:

That the action or event to which the prosecution relates was due to an event beyond the control of the defendant, ..—

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.

There is a relationship here to defences which seek to establish a total absence of fault. In *Auckland City Council v Selwyn Mews Ltd*[30] (the Court accepted the availability of a defence of "total absence of fault" but on the facts the defendants had failed to make out the defence. The Court said:

> *[111] My conclusion therefore is that the defendants have failed to show that they acted with all due diligence, or to put the matter differently, with a total absence of fault, throughout the period of the continuing breach of the Enforcement Order. Their delay has been partly but not fully explained. If there had been fault of a de minimus nature the Court may have been prepared to overlook it, but this is not such a case. The delay in completion of the work was substantial…*

In *Canterbury RC v Newman*[31] the Court of Appeal said:

> *[83] Absolute criminal liability, especially on a vicarious basis, is a harsh regime. Parliament justifies such a regime in the public interest, but has provided some amelioration in s 340(2). Absolute criminal liability is not to be imposed where the defendant principal establishes reasonable lack of knowledge, or reasonable precautions, plus the taking of "all reasonable steps to remedy any effects of the act or omission giving rise to the offence.*

Even if not possible to show an outright defence through due diligence then establishing an environmental management system will be relevant as a mitigating factor at sentencing. This was recognised early on. In *Machinery Movers Ltd v Auckland Regional Council*[32] the High Court endorsed *Queen v Bata Industries Ltd*[33] where the Canadian courts had approved recognition of corporate due diligence programs is a factor on sentencing. Barker and Williams JJ in approving the *Bata Industries* approach to sentencing factors noted:

> *We also note that in relation to the extent to which a corporation has sought to comply, the adoption of appropriate in-house corporate environmental principles and the existence of an internal environmental compliance programme may be pertinent factors: see Fisse Corporate Compliance Programmes: The Trade Practices Act and Beyond [1989] Aust. Bus. Law Review 357 (especially at 369) and Chester and Rowley Environmental Committees and Corporate Governance [1992] International Business Lawyer 342. ….*

[30] DC Auckland CRN2004067301-19, 18 June 2003, Judge McElrea.
[31] [2002] 1 NZLR 289 (CA).
[32] [1994] 1 NZLR 492.
[33] (1992) 7 CELR (N.S.) 293 (Ontario Provincial Court), affirmed (1993) 11 CELR (N.S.) 208 (Ontario General Division).

> *These factors will be especially important in relation to larger companies the operations of which necessarily extend into environmentally sensitive areas. The Courts have taken these factors into account in trade practices cases..*

Again however there is relatively little judicial comment in New Zealand where defendants have sought to rely on an environmental management system as a mitigating factor. This is despite the growth of standards on compliance programs in recent years.[34]

There have been a few examples where defendants on conviction have sought to advance the existence of an environmental management system as a mitigating factor, although with little success. For instance in *Northland Regional Council Lands & Survey Limited and others*[35] defendant McBreen Jenkins Construction Ltd sought to advance its preparation of an environmental systems manual as a mitigating factor. However the Court gave this little or no credit because the same factor had been advanced for the company on a previous occasion on which it was convicted.

In *Canterbury Regional Council v March Construction Ltd*[36] the Court, on conviction noted:

> [20] *… when I asked Mr March what steps had been taken to put in place an environmental management plan which the website says is done on all contracts, he advised that this was not in place on this site.*

The *McBreen Jenkins* and *March Construction cases* illustrate that if an environmental management system is to be established it has to be maintained, and implemented, otherwise the Court may be likely to say that it is not worth the paper it is written on, or worse, the defendant company will in a sense be '"hoist by its own petard'. Thus, an employer or corporation wishing to obtain the benefit of a due diligence defence must do more than simply prove that the employer or corporation had an environmental programe which resulted in the production of a guide or manual for environmental management. They must also prove that the recommendations in that guide are actually being implemented and promoted by the management of the organisation.

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[34] See Australian and New Zealand Standards *AS/NZS 4360: Risk Management,* and *Compliance Programs NZ/AS 3806: 2006),* and Australian and New Zealand Standards *AS/NZS 4360: Risk Management,* and *Compliance Programs NZ/AS 3806: 2006, and ISO 1400 -Environmental Management System Standard.*

[35] DC Whangarei CRN 5084500347, 34, 355, 357, 366, 368, 387 & 389, 12 September 2006, Judges Newhook & Dwyer.

[36] DC Christchurch CRI-2008-009-8597, 5 November 2008, Judge Smith.