IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI-2010-463-023
[2012] NZHC 2392

BETWEEN	PF OLSEN LTD Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

Hearing: 10 August 2012
(Heard at Tauranga)

Counsel: M Atkinson for Appellant
AA Hopkinson for Respondent

Judgment: 14 September 2012

JUDGMENT OF BREWER J

This judgment was delivered by me on 14 September 2012 at 4:45 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

SOLICITORS
Jones Fee (Auckland) for Appellant
Cooney Lees Morgan (Tauranga) for Respondent

Introduction

[1] PF Olsen Ltd appeals against the level of fines imposed by Judge JA Smith in the District Court at Tauranga on 16 March 2010 on two admitted charges of breaching the Resource Management Act 1991 ("the Act").

[2] The first charge was brought under s 9(3)(a) of the Act for using land in a manner which contravened a rule in a regional plan and which was not expressly allowed by a resource consent.[1] The fine imposed was $32,000.

[3] The second charge was brought under s 15(1)(b) of the Act and was for discharging a contaminant onto land in circumstances where it may enter water with such discharge not being expressly allowed by a rule in a regional plan or by a resource consent.[2] The fine was $48,000.

[4] As I will set out, the offences are closely related and I will have to consider the total of the fines ($80,000) when deciding this appeal.

[5] I have to consider the appeal de novo. That is to say, it is my task to look at the facts and the law and to reach my own decision on the levels of fines appropriate in this case. I will, of course, be assisted by the decision of the District Court Judge, but if I find that his sentence was manifestly excessive then I must substitute the sentence I find appropriate.

Facts

[6] The appellant is a major forestry contractor and was involved in clearance work in the Waiotahi Forest from July 2004 until September 2008.

[7] The clearance work was undertaken in very steep terrain. In order to conduct the harvesting of trees, the appellant would create sites, known as "skids". This involved the use of bulldozers. It was usual practice to push the slash and debris to

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[1] This is made an offence by s 338(1)(a) of the Act.
[2] This is also made an offence by s 338(1)(a) of the Act.

the sides to allow a worksite to continue operating until such time as the area was cleared. Over time the slash and debris would build up around the skid site and form what is known as a "bird's nest".

[8] Generally, the appellant would place the slash and debris in locations on or near the skid sites which were considered stable. However, where no location offered reasonable stability, the appellant would arrange for the slash to be loaded onto trucks and transported to a more stable location.

[9] The area of the forest that is the subject of the prosecution is an area known as "Barney's Ridge". This is a steep ridgeline which runs east-west across the forest. It is slip prone, and deforestation makes the soils and subsoils fragile and susceptible to collapse. A number of skid sites were constructed on the ridgeline.

[10] The appellant held a resource consent for working in the forest. This was subject to a number of conditions. These can be summarised as follows:

(a) Condition 6.2: Runoff controls to be installed wherever necessary along tracks, roads and log processing areas to avoid soil erosion.

(b) Condition 6.5: The appellant to ensure that the slash and woody debris on and around skid sites does not accumulate to levels that could result in soil erosion or instability.

(c) Condition 7.6: The removal of any trees or logging slash to be undertaken by the appellant progressively with the harvesting operation and to be undertaken so as to minimise any damage or disturbance to the stream banks.

(d) Condition 7.7: The appellant to manage all other logging slash to avoid accumulation to levels which could cause erosion or instability arising from the activity carried on by, or on behalf of, the consent holder.

[11] The harvesting of the area was undertaken in three stages. The first, occurring in July and August 2007, focused on the bulk of the north side of the ridge. The majority of the southern side was harvested between January and March 2008. The final part was harvested in April 2008.

[12] During the harvesting, the appellant instructed earthmoving contractors to move slash and debris to a number of more stable locations. However, it was the appellant's intention that the bulk of the slash and debris would be removed following the completion of harvesting in April 2008. The appellant says that had it considered there was a sufficient risk of instability, there was sufficient funding within the budget to remove the slash and debris by truck.

[13] The sensitivity of the area was such that regular inspections were undertaken by Council officers to ensure the conditions of the resource consent were being met. Following each inspection, the Council officers would issue a Compliance Field Sheet that identified any areas of concern and made recommendations for steps to be taken by the appellant in response. The summary of facts lists four separate Field Sheets issued prior to the April 2008 events which identified concerns over the risk of erosion and instability caused by the works. I will refer to the Field Sheets later.

[14] The harvesting finished on 4 April 2008. A few days prior to that, arrangements had been made with earthworkers for a full clean-up following completion. This was scheduled to start on 7 April 2008 but was rescheduled to 13 April 2008. On 15 April 2008, approximately 230 mm of rain fell. At that time the clean-up operation had still not commenced.

[15] The rain caused the soil beneath the skid sites to become heavily saturated, resulting in numerous slips. Five large piles of slash and debris, including those within the problem sites mentioned above, collapsed. Approximately 8,000 m^3-10,000 m^3 of debris was carried down with the logs in the slip.

[16] The effects have been significant. In certain areas, despite significant remediation work, there are still debris dams consisting of slash and sediment which

remain in place and may take some decades to dislodge. The collapses also caused significant erosion.

[17] The charge under s 9(3)(a) relates to the accumulation of the piles of slash and debris amounting to a failure to comply with conditions 6.5 and 7.7 of the resource consent. The charge under s 15(1)(b) relates to the discharge of the debris into the streams as a result of the slips.

The District Court sentencing

[18] In the District Court, the parties were at odds as to the state of mind of the appellant. The appellant contended that the discharge was simply bad luck due to the extreme weather event. The District Court Judge held, to the contrary, that there was a wilful failure by the appellant to heed the warnings from the Council as to the works being undertaken. This assessment was based on the appellant's knowledge of the fragility of the area, the risk in creating skids there, and its knowledge and experience of the area generally.

[19] The Judge then addressed the question of how to treat the charges in the sentencing exercise. He stated:[3]

> ... The first conclusion I have reached is that I should deal with the two charges separately. Although they essentially relate to the same series of events the failure to comply with the conditions of consent is a separate matter to the consequences of that failure. Provided the Court does not double count matters and adequately takes into consideration the various aggravating and mitigating factors in respect of each. It seems to me that this is a more appropriate course given particularly questions which arise in due course about earlier offences.

[20] The Judge then turned to the starting point for each offence. For the charge of using land in a manner not permitted by a resource consent, he set a fine of $40,000 as the starting point. This was justified on the basis that the breached conditions of the resource consent were at the heart of the resource consent process itself, the company had knowledge of the risk of erosion and instability around the

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[3] *Bay of Plenty Regional Council v PF Olsen Ltd* DC Tauranga CRN 08063501466, 16 March 2010 at [18].

area, and the company had failed to address the issues identified by the Council's inspections.

[21] For the discharge offence, the Judge said that the decision to load up the skid sites and wait to clear them when the company had finished harvesting the particular area rather than progressively removing the debris meant that the resulting discharge was an "almost inevitable consequence".[4] After having regard to a number of cases dealing with discharges,[5] the Judge set a starting point of $100,000.

[22] The Judge then turned to the personal circumstances of the appellant. While the appellant had significantly improved its identification and treatment of hazardous sites since the offence, the Judge also recognised that the appellant is a major corporation. This is a factor which could be taken into account in increasing the penalty. In the end, the Judge considered that these factors cancelled each other out and no change to the starting points was made in response to them.

[23] The Judge then considered the appellant's record. Two earlier offences were identified. The first related to the burn-off of vegetation on land as part of a forestry development, and the second related to the removal of vegetation within riparian reserve areas.

[24] The Judge did not impose an uplift for these offences in respect of the resource consent breach, but did for the discharge offence. He considered that igniting a fire outside times allowed by a resource consent did bear to some extent upon the company's current position. However, its impact was limited as it occurred some 15-16 years ago and did not relate specifically to an erosion or instability issue. Nevertheless, he applied an uplift of 20%, which increased the fine to $120,000.

[25] The District Court Judge then turned his mind to the fact that guilty pleas had been entered. Normally, a defendant who pleads guilty can expect some discount on sentence. At the time these guilty pleas were entered, a maximum discount of one-

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4 Ibid, at [21].

5 *Canterbury Regional Council v Doug Hood Limited* DC Christchurch CRN7076006426, CRN7076006424, 18 August 1998; *Waikato Regional Council v Trower* DC Hamilton CRI-2005-072-155, 29 September 2005; *Northland Regional Council v Lands & Survey Ltd* DC Whangarei CRN5084500347, 12 September 2006.

third might be anticipated for pleas entered at the earliest reasonable moment. In this case, the task of assessing a discount was not straightforward. An initial guilty plea was vacated by the appellant when, at the sentencing hearing, it was argued by the appellant that – for technical reasons – one of the charges could not be laid. This required a separate hearing and determination of the Court. The particular issue was before the High Court and subsequently the Court of Appeal in other cases so this case was put on hold. Eventually, the jurisdictional issue was determined against the position being advanced by the appellant and the pleas of guilty were re-entered. Despite all this, the District Court Judge allowed a discount of 20% on each of the charges for the guilty pleas.

[26] Finally, the Judge addressed the extensive remediation works undertaken by the appellant. The appellant spent approximately $250,000 in remediation. The Judge gave a discount of $60,000 from the $120,000 reached on the discharge offence, but noted that had these works not been undertaken it was likely the Court would have required enforcement orders to achieve the same result. The discount was applied only in respect of the discharge offence, as the breach of the resource consent did not directly require remediation.

[27] After accounting for the uplifts and discounts, this left the end sentences of $32,000 for the breach of resource consent offence and $48,000 for the discharge offence. The appellant was also ordered to pay solicitors' fees of $678 and Court costs of $130 in respect of each offence.

Appellant's submissions

[28] The appellant submits that the District Court Judge erred in:

(a) Imposing separate sentences for each offence arising out of the same conduct, giving no apparent recognition for totality;

(b) Giving insufficient recognition to the remedial work undertaken by the appellant;

(c) Finding that there was a wilful failure on the part of the appellant;

(d) Incorrectly applying the decision of *Canterbury Regional Council v Doug Hood Limited*;[6] and

(e) The uplift for aggravating factors was excessive taking into account that the previous convictions were imposed on a different entity.

[29] Under the first ground, the appellant has submitted that the breach of s 9(3)(a) was in failing to ensure that logging slash did not accumulate to levels which could cause erosion or instability. It was that failure that led to the resulting discharge and the charge under s 15(1)(b). Accordingly, the appellant submits that it was inappropriate to consider separate starting points for each charge. Instead, the Judge should have made an assessment of the combined starting point sentences, having regard to the totality of the conduct.

[30] In relation to the remediation work undertaken, the appellant submits that it should not matter whether an enforcement order to undertake such work would have been imposed if the work had not been undertaken voluntarily. When the remediation work is taken into account, the total financial impact on the appellant is $331,616, which substantially exceeds the maximum penalty for a single offence of $200,000. The appellant says that a greater discount should be given to reflect this.

[31] As to the third ground, the appellant submits that the Judge was wrong to accept that there was a wilful failure on the part of the appellant based solely on the summary of facts. The Judge did not hear evidence and the burden was on the prosecutor to prove beyond reasonable doubt the existence of that aggravating feature.[7] On that basis, the appellant submits that the sentence was unfairly aggravated.

[32] The appellant then turns to the Judge's application of the *Doug Hood* decision. The Judge seemingly used that case to support a conclusion that a starting point for the s 15(1)(b) charge was consistent with previous cases. The appellant

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6 *Canterbury Regional Council v Doug Hood Limited*, above n 5.
7 Sentencing Act 2002, s 24(2)(c).

says that the Judge was wrong to do this as it misinterprets *Doug Hood*. The total penalty in *Doug Hood* did indeed exceed $100,000. However, that included $54,200 for costs, and it also combined the fines imposed on the two defendants. The Judge seemingly assumed that the sentencing Judge in *Doug Hood* apportioned the fine between the two defendants. The appellant submits that this is an inappropriate approach and only the $30,000 fine imposed on the defendant company in that case is relevant.

[33] As to the final ground, the appellant recognises that the potential uplift for the size of the appellant as a company is unclear because it was neutralised with a mitigating factor. While it is permissible to take account of an offender's means in setting a sentence, the appellant submits that this is only relevant when there is a need for an effective deterrent and the fine that would ordinarily be imposed on a less affluent company would have little impact on a wealthy company. In this case, the appellant submits that the extensive remediation work undertaken has negated the need for an effective deterrent.

[34] Also under this ground, the appellant submits that the Judge proceeded on the basis that the appellant had relevant previous convictions in 1996 when in fact it does not. The appellant was not incorporated until three years after those convictions. The convictions were entered against an entity with a similar name, PF Olsen & Co Ltd. There was no commonality in management between that company in 1996 and the appellant in 2008. The appellant had a different CEO, different shareholders, and an independent board of directors. In any event, the appellant submits, the previous convictions relate to completely different conduct, with a total fine of $14,500 imposed. It occurred 13 years prior to this offending. On that basis, it is submitted that even if the convictions are taken into account, the uplift of 20% was excessive.

Respondent's submissions

[35] In response to the totality ground of appeal, the respondent argues that the two offences have separate objects. The focus of the s 9(3)(c) charge is on soil erosion and instability. The s 15(1)(b) charge is focused on the discharge of debris

into streams. The respondent submits that there is nothing wrong in approaching the offences separately. Even if the offences should have been treated together, the respondent submits that the ultimate assessment must be whether the total fine imposed is out of all proportion with the offending. As the total fines were not out of all proportion with the offending, the District Court Judge did not err.

[36] The respondent submits that the appellant should get little credit for its remediation work. The focus of the Act is on compliance with environmental obligations and the remediation work is simply a belated attempt to address lack of compliance. To give too great a discount would encourage environmental risk-taking.

[37] The respondent submits that on the material before the Judge it was open for him to find that there was a wilful failure on the part of the appellant to comply with its obligations. The agreed summary of facts detailed the respondent's notices to the appellant which set out its concerns over the issues with the skids. By failing to address those concerns, five large piles of logging debris collapsed causing serious and large scale damage to the hillside and valleys below. Further, the summary of facts details admissions of concerns held by the appellant's forestry manager regarding the offending conduct.

[38] The District Court Judge's application of the decision in *Doug Hood* is not, the respondent submits, in error. The sentences imposed were on an employer and its employee for the same offending. Had there been a sole offender, that would have justified a higher penalty. The respondent also points out that the case was decided in 1997 when sentencing levels under the Act were generally lower.

[39] As for the appellant's argument that its size does not justify a greater financial penalty, the respondent submits that a financial penalty that was any lower would risk being shrugged off by the appellant. In effect, it would be viewed as a modest tax for environmental pollution.

[40] Finally, the respondent submits that the previous convictions which led to an uplift are relevant given the close association of the two companies. The response of the District Court Judge was appropriate.

Discussion

[41] I have to decide whether or not the fines imposed by the District Court Judge were manifestly excessive. It does not really matter how he arrived at the quantum of the fines. What matters is whether they are within the range available to him.

[42] I find the approach to sentencing under the Act set out by Miller J in *Thurston v Manawatu-Wanganui Regional Council*[8] to be useful. I will adopt his focus on the principles of the Act in the context of the general Sentencing Act regime.

[43] I consider the following Sentencing Act purposes to be applicable:

(a) Accountability for the harm done to the environment;

(b) Promoting a sense of responsibility for the harm done; and

(c) Denunciation and deterrence.

[44] I consider the following Sentencing Act principles to be applicable:

(a) Gravity of the offending, including the degree of culpability;

(b) Seriousness of the offence; and

(c) Desirability of consistency with other sentences in respect of similar offending.

[45] I do not think it matters whether a Judge assessing fines for closely related offences does so regarding them as a whole or as separate exercises. If the former

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[8] *Thurston v Manawatu-Wanganui Regional Council* HC Palmerston North CRI-2009-454-25, 27 August 2010 at [40]-[45].

approach is taken, there will still need to be an apportionment at the end of the exercise because fines do not run concurrently with each other. What matters is that the sum of the fines does not offend the totality principle when considering the offending as a whole. In my view, the approach taken by the District Court Judge was open to him.

[46] For myself, I will consider an appropriate starting point for the whole of the offending, apportion it between the charges and then consider aggravating and mitigating factors personal to the appellant in respect of each charge. At the end I will step back and appraise the overall outcome against the totality principle. My decision on the appeal will be determined by whether there is such a difference between my outcome and that of the District Court Judge that an adjustment of the latter must be made.

Starting points

Wilful failure

[47] I consider first whether a sentencing Judge in this case is entitled to conclude that the appellant's conduct amounted to a wilful failure to act or whether the appellant was simply the victim of bad luck. The offences are strict liability offences, but the background circumstances including the knowledge of the offender is relevant to sentencing.

[48] A Judge is entitled to assess the summary of facts and draw reasonable inferences from those facts. If the facts are disputed, the Judge either accepts the offender's version or resolves the matter through a disputed facts hearing.[9] If the facts are not disputed and the argument is about what inferences should be drawn, that is different. That is a matter for the Judge.

[49] The appellant submits that the conclusion reached by the Judge that there "was a wilful failure by the company to heed the numerous warnings from the

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[9] Sentencing Act 2002, s 24.

council as to the works being undertaken" was not open to him.[10] The submissions of the appellant on this point are:

> 47. The appellant did not accept those facts. The appellant submitted at sentencing that the offence was not deliberate and that it resulted from an underestimation of the likelihood of a weather event which would cause the slash piles to become unstable. With regard to recommendations given by the council officer prior to the slips, it was submitted that the appellant did not ignore the advice but responded to each recommendation in a manner that it considered appropriate and that the appellant was not knowingly in breach of the consent conditions.
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> 48. The appellant accepted the statement in the summary of facts that the steps taken were inadequate, that fact being evident from the occurrence of slips. But it rejected the suggestion that it knowingly or recklessly disregarded the warnings provided by the council. It was submitted that the appellant's employees who were responsible for the harvesting operation honestly believed that the steps which they had taken were adequate to address the risk posed by the slash piles.

[50] I must accept the appellant's submission. If at sentencing an offender disputes clearly material matters, it is not open for a Judge to sentence on another basis without first resolving the dispute. I will look to see what inferences can be drawn from the summary of facts bearing in mind that it must be accepted that the offences were not deliberate, the Council officers' recommendations were not knowingly or recklessly disregarded and that the appellant was not knowingly in breach of the consent conditions.

[51] The following material from the summary of facts supports the conclusion that the appellant was more culpable than a victim of bad luck:

(a) In the appellant's resource consent application it identified that the potential effects of the proposed activities included "increased surface erosion and sedimentation, slope instability (mass erosion), woody debris build-up and movement in waterways" and "increased rainfall runoff and peak flows" particularly as a result of "major rainfall events";[11]

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10 *Bay of Plenty Regional Council v PF Olsen Ltd*, above n 3, at [16].
11 Summary of Facts, para 10.

(b) Council inspections were undertaken on 13 August 2007, 5 November 2007, 19 February 2008 and 3 April 2008. All inspections led to Compliance Field Sheets which required work to be undertaken. Generally, this work related to overhanging skid material which had the potential to cause erosion or instability, or the installation of the necessary water controls;

(c) The appellant failed to adequately address the issues raised in the Council's Compliance Field Sheets issued on these dates;[12]

(d) The appellant's forestry manager had been concerned by the comments raised in the 19 February 2008 Compliance Field Sheet and felt that those comments were justified and should have raised alarm bells;[13]

(e) There was a large accumulation of slash on Barney's Ridge skids due to the lack of room. The appellant's intention was always to pull it back so it was stable;[14] and

(f) The appellant had the budget to truck the slash off Barney's Ridge, but did not believe that was necessary until harvesting had finished.

[52] In my view, the summary of facts permits the inference that the admitted breach of the resource consent and consequent discharge took place in circumstances where the appellant had knowledge of the risks that were being run and at least ran the risk as to whether an extreme weather event would see discharge into the land, valleys and streams below the sites. I consider that this conduct can properly be seen as an aggravating feature of both offences, although not to the extent it might have been if a conclusion of wilful failure were available.

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12 Ibid, at para 20.
13 Ibid, at para 27.
14 Ibid, at para 28.5.

Infrastructure or other precautions taken to prevent discharges

[53] The appellant's resource consent application identified a number of systems it had in place to mitigate the potential effects of the proposed activities, including the installation of runoff and erosion controls where necessary to direct runoff onto stable and vegetated areas, regular monitoring of those controls, and whole extraction of trees to a skid site to be de-limbed where the slopes were too steep or there was a risk of slash entering the waterway.

[54] I do not consider that these precautions or controls carry much weight in light of the above findings as to the appellant's conduct. The precautions and controls were put in place to adhere to the conditions of the resource consent. When it was clear that the controls were not sufficient, not enough was done to ensure that compliance with the resource consent was maintained.

[55] I consider the presence of these controls are a lack of an aggravating feature rather than a mitigating factor.

Vulnerability of the environment

[56] The vulnerability of the environment has been identified above: the area is steep, access is difficult and there is a strong risk of erosion and instability making the area prone to slips. This was known to the appellant. It is an aggravating feature of the offending.

Extent of damage

[57] The primary environmental impacts from the collapsed ridgeline were the large scale erosion and the discharge of large amounts of slash, debris and sediment onto neighbouring property and into waterways. Three of the affected streams were estimated to have had 8000 m^3-10,000 m^3 of debris discharged into them as a result of the collapse.

[58] Further impacts include the blockages of streams and a shift in the stream channels and stream beds. The freshwater inhabitants were also affected, with the impacted streams being the habitats for banded kokopu and red fin bully. A freshwater ecologist concluded that it was difficult to see how fish populations would continue to exist in the degraded streams. However, the expert did say that the extent and duration of the impact from the debris flow, as opposed to the impact resulting from normal harvesting operations, was not possible to determine.

[59] An expert engaged by the neighbouring property owner identified that the primary impacts on the property from the collapse of the skid sites was damage to fences, culverts, stream crossings, streams, native bush and the farm's water supply.

[60] I conclude from this that there was a large discharge of debris which has had a lasting impact on the environment. I will turn later to the remediation undertaken by the appellant, but it seems that it is impossible to fix all the damage. Some of the blocked streams will take a long time to self-correct through storms and other natural events. The impact on the fish population is uncertain, however.

[61] This factor will affect the assessment of the starting point in respect of both offences as the damage caused is as a result of the breach of the resource consent and the consequent discharge.

Deterrence

[62] Penalties should be set to ensure that it is unattractive to take the risk of offending on economic grounds. Consequently, if there is any profit to be derived from the risk-taking activity, then a penalty needs to be imposed to make that an unattractive course of conduct.

[63] The conduct here had no direct profit motive. There is no need to elevate the need for deterrence by reference to this factor.

Disregard for Council notices

[64] This is an operative factor. On the appellant's submission, notices were not disregarded. But it is beyond argument that they were not responded to adequately.

Comparable cases in finding a starting point

[65] I have not received much assistance from looking at other cases. That is because they are either too old to be relevant or too different in the circumstances that they address. I include in this category *Canterbury Regional Council v Doug Hood Ltd*.[15] This was the main case relied upon by the District Court Judge and related to a major debris discharge from the Opuha River Dam site. Doug Hood Ltd was the construction contractor and Mr Hollingum was the project manager. They attempted a controlled release of water which had built up behind the dam. The result was that part of the dam under construction washed away. The offending amounted to a "knowledgeable failure",[16] which could be said to be similar to the situation in this case. Mr Hollingum was ordered to pay a fine of $20,000 and Court costs of $130. Doug Hood Ltd was ordered to pay a $30,000 fine and the costs of the prosecution in the sum of $54,200. The two defendants had an employer/employee relationship. It appears the Judge decided that the overall fine was the sum of the fines imposed upon both defendants. He refers to the decision in *Kiwi Drilling Ltd and Smith v R*[17] and stated that the case was in same level of seriousness where an overall fine in the range of 25% of the maximum should be applied (i.e. $50,000). Therefore, I agree that the respective fines imposed of $20,000 and $30,000 can be seen as an apportionment between the offenders.

[66] Accordingly, I consider the combined fine of $50,000 relevant for the purposes of comparison. In that regard, I do not accept the appellant's argument that only Doug Hood Ltd's fine should be considered. However, a fine of $50,000 is difficult to apply to this case as it takes into account all relevant factors, and is not

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15 *Canterbury Regional Council v Doug Hood Ltd*, above n 5.
16 Ibid, at 23.
17 *Kiwi Drilling Ltd and Smith v R* (1997) 4 ELRNZ 23.

simply a starting point. Further, in light of the trend of increasing penalties, I regard it as being at the lowest end of what might be decided today.

[67] The case I find most helpful is *Calford Holdings v Waikato Regional Council*.[18] Having been decided in 2009, it gives the most accurate assessment of sentencing levels prior to the lift in the maximum penalty on 1 October 2009 to $300,000. In that case, the defendants had discharged sediment into a stream while undertaking earthworks as part of a conversion of former forestry land to dairy farming pasture. Calford was not involved in the earthmoving but engaged contractors. Calford obtained resource consents for the earthworks in a high risk erosion area. The charges brought related to the failure to put in place any recognised erosion and sediment controls. The result of the failure was that a significant amount of debris entered a stream. Sediment-laden stormwater was discharged untreated into the stream as a result of a significant volume of uncompacted fill being placed at its edge. A starting point of $55,000 was applied for *Calford Holdings* as the consent holder. It had left the contractors to implement the consents without oversight. Allan J did note that the starting point was "stern", but that was offset by generous discounts for mitigating factors.

[68] In my view, the current case is more serious because of the wide impact on several waterways in the area compared to a single waterway in the *Calford* case. Secondly, in the *Calford* case the discharge occurred in the process of earthmoving while in this case there was a failure to move the slash and debris against knowledge of the risk.

[69] The maximum penalty for each of these offences at the time was $200,000. A total of $400,000. Of course, a maximum penalty represents the possible response to the worst case of offending of its kind. In my view, the conduct in this case falls at about one-third of the continuum. It occurred because of conduct which was negligent despite warnings from the Council officers having been received. The environment was a vulnerable one and that was known to the appellant. The extent of the damage was significant and, despite remediation, lasting. If the conduct could have been characterised as wilful, I would have put it towards the middle of the

[18] *Calford Holdings v Waikato Regional Council* (2009) 15 ELRNZ 212.

continuum. I would set a global starting point of $130,000, apportioned as to $50,000 for the s 9(3)(a) charge and $80,000 for the s 15(1)(b) charge.

Circumstances personal to the offender

[70] The relevant personal circumstances here are the previous convictions, financial capacity, remediation work and the guilty plea.

Previous convictions

[71] The issue is whether culpability for the previous convictions of PF Olsen & Co Ltd back in 1995 can be applied to the appellant. The appellant submits that there was no commonality between the two entities in 2008.

[72] There is comment suggesting that a defendant should not be impacted by convictions of its parent company.[19] There are also decisions which have treated prior convictions of a company within the same group as an aggravating factor.[20]

[73] In my view, the principle is that where an offender has previously committed offences of a similar kind to the one under consideration for sentence, that can be treated as an aggravating factor. One reason is that the offender has not been deterred by the responses to the previous offending. Another is that the factor of naivety no longer applies. Culpability is greater where previous offences have been committed and punished but nevertheless behaviour of similar kind recurs.

[74] For corporate offenders, this principle cannot in logic apply if the people responsible for the governance and management of the corporate entity have no effective commonality with those responsible at the time of the previous offending. This applies equally within groups of companies.

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19 *Auckland Regional Council v United Environmental Ltd* DC Auckland CRN2092060715, 21 March 2003 at [35].

20 *Waikato Regional Council v Hillside Farms Ltd* DC Hamilton CRI-2008-019-2997, 28 August 2009 at [29]; *Hawkes Bay Regional Council v Te Pohue Ltd* DC Napier CRI-2007-41-1243, 7 November 2007 at [27].

[75] Here, I have to accept the submission of the appellant that there was no such commonality.

[76] However, irrespective of that situation, I do not find that the degree of uplift that the District Court Judge gave was justified. He uplifted the discharge offence by 20% in relation to the earlier offences.

[77] A 20% uplift for previous convictions is significant. I would expect an uplift of that magnitude to reflect a degree of persistent offending for breaching resource consents. The time between the 1995 offences and the present ones is over a decade. It would not normally warrant an increase of more than about 5%, and that would depend on the similarities in the breaches.

[78] Whether for lack of relevant connection between the companies, or for lack of temporal proximity, I would not myself impose an uplift for previous convictions.

Remediation work and financial capacity of the appellant

[79] Section 40(1) of the Sentencing Act provides that the Court must take into account the financial capacity of an offender in reaching its sentence. At issue here is whether the appellant's apparent wealth would require an uplift in the sentence. The policy for this is clear: to ensure that the appropriate punishment is not diluted in its effect because of the offender's financial means.

[80] The appellant has submitted that the rationale for an increase is to ensure that the fines imposed act as an effective deterrent and that wealthy defendants do not treat the fine as a license fee. The appellant submits that it has incurred approximately $250,000 in remedial costs for which it received no benefit and so there is no justification for increasing the fine to achieve deterrence.

[81] I agree with the appellant's submission that the focus should be on the appropriate penalty to achieve deterrence. This is consistent with the comments

made by this Court in *Department of Labour v Hanham & Philip Contractors Ltd & Ors*.[21]

[82] In considering the global outlay of the appellant, I believe that deterrence has been achieved and there is no need to uplift the sentence to account for the fact that the appellant, by inference, has a financial capacity greater than that of an average company.

[83] In consideration of the remediation work itself, s 10(1)(a) of the Sentencing Act is relevant. That provides that the Court must take into account steps taken to make amends when sentencing an offender. The remediation work undertaken by the appellant here was voluntary. It can be seen similarly to reparation. Lang J in *Burns v Bay of Plenty Regional Council*[22] approved the following passage from the District Court decision in *Auckland Regional Council v Haines House Removals Ltd*:[23]

> [69] It is well settled that the Court must take into account any orders it may make relating to reparation and/or costs in setting the level of any fine...
>
> [70] The reason for taking account of any reparation paid or costs imposed in setting the fine, is to ensure that both fines and costs imposed add up to what globally is an appropriate penalty in total. The Court is therefore required to assess what is an appropriate penalty in total and then have regard to any award made by way of costs before imposing a fine. It is a not a strict mathematical exercise.

[84] The appellant has submitted that a greater discount should be given for the remediation work than the $60,000 afforded by the Judge. To support this, the appellant contends that the total financial impact on it has been $331,616, which exceeds the maximum penalty for a single offence.

[85] The respondent submits that where remedial work is a mitigating factor, it is inappropriate to reduce the penalty on a dollar by dollar basis. That, of course, must be correct. The remediation work was required of the appellant to comply with its environmental obligations. Some credit must be given but an offender cannot be seen to extinguish or greatly reduce obligations by spending money.

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21 *Department of Labour v Hanham & Philip Contractors Ltd & Ors* (2008) 6 NZELR 79 at [76].
22 *Burns v Bay of Plenty Regional Council* [2010] NZRMA 45 at [11].
23 *Auckland Regional Council v Haines House Removals Ltd* (2000) 6 ELRNZ 355 at [69]-[70].

[86] In the appellant's favour is the amount of the expenditure, but nevertheless there are long-lasting impacts on the environment.

[87] I feel I can also take into account that the remediation costs were well within the means of the appellant and offset at least to some extent by the budget allowance made by the appellant for the removal of the slash and debris by truck if that had been felt necessary.

[88] The discount of $60,000 was applied by the District Court Judge solely to the discharge offence. To be consistent, the discount should be applied to both offences. I consider the extent of the damage caused does go to both offences. It would be wrong in principle to now not apply a discount in respect of both offences for the remediation undertaken.

[89] I agree with the respondent's submission that the $60,000 discount, equating to 60% of the initial starting point for the discharge offence, is too generous. I would allow a 30% discount to both offences, bringing the respective fines to $35,000 and $56,000.

Guilty plea

[90] In a post Supreme Court *Hessell* decision,[24] I would find a 20% discount for the guilty plea overly generous. However, at the time the maximum discount was one-third. I will not disturb this aspect.

Conclusion

[91] On my assessment, the following sentences would have been properly available to the District Court Judge:

(a) For breach of s 9(3)(a), a fine of $28,000 ($50,000 starting point, $15,000 discount for remediation, $7,000 discount for guilty plea);

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24 *Hessell v R* [2011] 1 NZLR 607.

(b) For breach of s 15(1)(b), a fine of $44,800 ($80,000 starting point, $24,000 discount for remediation, $11,200 discount for guilty plea).

[92] This provides a global penalty of $72,800. In my view, this properly reflects the totality of the offending. This is 9% less than the global fine of $80,000 imposed by the District Court Judge. It is arguable whether, on an exercise which calls for judgment rather than mathematical precision, a 9% difference constitutes manifest excessiveness. In the exercise of my discretion I will find that it does.

[93] I allow the appeal. I quash the fines imposed for both offences and substitute a fine of $28,000 for the breach of s 9(3)(a) and $44,800 for the breach of s 15(1)(b).

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Brewer J