IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2018-016-002401
[2022] NZDC 24588

THE CROWN
Prosecutor

v

ERNSLAW ONE LIMITED
Defendant

Hearing:	9 December 2022
Appearances:	A Hopkinson and M Blaschke for the Prosecutor T Conder for the Defendant
Judgment:	9 December 2022

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] Ernslaw One Limited (Ernslaw) appears for sentence on one representative charge brought by Gisborne District Council (the Council) of discharging a contaminant (slash, logging debris, waste logging material and/or sediment) onto land in circumstances where it may enter water in contravention of s 15(1)(b) of the Resource Management Act 1991 (RMA). The charge is contained in charging document ending 449.

[2] Having initially elected trial by jury Ernslaw eventually entered a guilty plea to the charge. Restorative justice processes have occurred (somewhat belatedly it must be said) and a number of victim impact statements have been received by the

Court. I note that Ernslaw had a conviction entered against it on this charge when entering its guilty plea so I do not need to formally convict again.

[3] I am going to summarise the facts in this matter comparatively briefly for what constitutes a serious case of environmental offending.

[4] A number of disputed facts relevant to this sentencing were determined by the Court after a four-day disputed fact hearing in a decision dated 2 August 2022[1] which can usefully be read in conjunction with this decision, together with an updated copy of the summary of facts which reflects the findings in the disputed fact hearing. To the extent necessary, I direct the Registrar to make those documents available to media groups or other persons who might seek to inspect them as well as these sentencing notes.

[5] Turning to the basic facts, Ernslaw is a major participant in the forest industry. I am told that it owns nearly 100,000 hectares of forestry land spread across New Zealand. One of the forests which it owns is Ūawa Forest in the Gisborne District. That forest contains some 1143 hectares.

[6] Ūawa Forest was one of a number of forests in the district which were impacted by the Queen's Birthday weekend storm of 3 and 4 June 2018. The forest was being harvested pursuant to a resource consent at the time. I understand that harvesting activities had commenced in about 2014. Although the precise severity of the Queen's Birthday storm was a matter of dispute between Ernslaw and the Council there can be no dispute that the rain event on those dates was particularly intensive on any measure and had a devastating effect on the vulnerable steep slopes which make up much of Ūawa Forest as well as many others in the district.

[7] The Queen's Birthday storm precipitated discharges of earth, sediment, slash, logging debris and other material from four sources at Ūawa Forest:

[1] *Gisborne District Council v Ernslaw One Ltd* [2022] NZDC 14657.

- Firstly, there were something in the order of 2,000 slope failures on harvested hill slopes across the forest discharging earth and sediment which fell down the slopes;

- Secondly, the slope failures picked up forestry waste lying on the slopes and in gullies and conveyed that waste downhill;

- Thirdly, forestry waste accumulated in piles called "bird's nests" on haul and skid sites which were unstable and which collapsed entering gullies which they scoured out, picking up further soil and debris on their downhill journey. The representative charge being considered by the Court relates to discharge from 10 of those sites;

- Finally, there were discharges of fill and soil from side-casting of material over road edges, allied with poor stormwater management which discharged sediment-laden stormwater downhill from forestry roads in numerous places.

The destination of these various discharge materials was streams and ephemeral water courses in the forest which drain into the Mangaheia and Ūawa Rivers and ultimately to Tolaga Bay. The contaminants discharged essentially fall into two categories: sediment and forestry debris.

[8] Sediment has been described as the most pervasive and significant contaminant in New Zealand rivers, estuaries and coastal waters. It affects the clarity of the waters into which it is discharged, smothers the beds of water bodies and interferes with the ability of fish and other marine life to feed, breathe and breed. Sediment from Ūawa Forest would have accumulated with sediment from other forests in the region and catchment and would have been mobilised and ultimately travelled down downstream to Tolaga Bay.

[9] Wood debris in streams can form dams which move downstream, blocking rivers and water bodies and degrading the beds and banks of those streams. Slash build-up can obstruct fish passage and destroy fish habitat. Decomposition of woody material in water removes oxygen and degrades the life-supporting capacity of the water.

[10] The precise volumes of sediment and debris discharged into the water bodies of Ūawa Forest cannot practically be established. However, the material we are talking about emanated from 2,000-odd landslips, hundreds of hectares of cleared slopes, 10 bird's nests/skid sites and an extensive roading network.

[11] The effects of the sediment and debris discharges were described in these terms, in paras [59]-[63] of the summary of facts ultimately filed in these proceedings:[2]

> 59. The defendant declined to consent to a Council ecologist assessing the effects of the offending in Uawa Forest.
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> 60. The Council obtained a search warrant for this purpose and on 12 December 2018 a Council ecologist carried out an assessment of streams in the Uawa Forest on 12 December 2018 to assess the effects of the discharge of slash, logging debris, waste logging material and sediment on stream ecosystems in Uawa Forest.
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> 61. The Council ecologist observed the following adverse effects on tributaries and streams in the forest:
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> (a) There were elevated levels of deposited sediment in the Mangateao and Mangatoitoi streams.
>
> (b) There was continuing erosion, including stream bank erosion, within the catchment that was contributing to the sediment load in both streams. The erosion is the result of mobilisation of sediment from landings (skid sites) and roads.
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> (c) When compared to the tributary of another river in the area that was unaffected by the June storms, there were five times less fish/ invertebrate species in the Mangatoitoi stream despite the species found there being more tolerant to pollution.
>
> (d) There had been degradation of instream and surrounding habitat at Mangatoitoi stream.
>
> *Effects on downstream properties*
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> 62. Forestry debris and logs from Uawa Forest, washed up over approximately 15 hectares of Mangaheia Station which is a farm downstream of Uawa Forest. 180 trailer loads of pine logs were removed from the worst affected paddocks at Mangaheia Station and the remedial work cost $20,000 to $30,000.
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> 63. Logs and silt from Uawa Forest also affected other properties downstream from Uawa Forest including a lifestyle block at

[2] Summary of Facts at [59]–[63].

> Tauwhareparae Road and two farms on Paroa Road. These properties were also impacted by the large scale flooding the storm event caused.
>
> (footnote omitted)

[12] Having regard to all of those matters (my descriptions of where contaminants from the forest came from and the effects I have described), I consider that it is accurate to categorise the volumes of material discharged by this offending incident as substantial and the environmental effects of the discharges as seriously adverse. The combined effect of this offending and the other discharge offences which occurred at other forests in the Gisborne District on Queen's Birthday 2018 can best be described as devastating. However the basis on which I must sentence Ernslaw today relates to the effects of its individual discharges of contaminants which entered water in breach of s 15(1)(b) RMA.

[13] In fixing a starting point for penalty for this offending I have had particular regard to the following matters:

- Firstly, the effects of the offending which I have just described;
- Secondly, Ernslaw's culpability for the offending;
- Thirdly, consideration of comparable cases.

Having identified an appropriate starting point for the offending I will then further identify any aggravating and mitigating factors which warrant uplifts or deductions from starting point.

[14] In terms of culpability, the primary factors for consideration are:

- Firstly, the causative impact of the Queen's Birthday storm and the extent to which that might be considered as mitigating Ernslaw's offending in some way;
- Secondly, consideration of Ernslaw's breaches of conditions of its resource consent allowing harvesting and forestry best practice.

All of these matters were canvassed in detail in my earlier decision on disputed facts and again I will deal with them quite briefly in this decision.

[15] A matter which lay at the heart of Ernslaw's position in this case was that the Queen's Birthday storm was a major rain event which was not characteristic of the Gisborne Region and could not have been reasonably foreseen and provided against. The essence of my findings on disputed facts was that the Gisborne region has a history of storm-induced slash events, that it is entirely foreseeable that forests being harvested in the region might be subject to highly intensive rain events from time to time and that those events are likely to trigger landslides and other debris. It is not necessary to be able to predict the precise severity of any particular storm to foresee the likelihood of such events occurring.

[16] Those facts are compounded by the further factors that large areas of forest land at Gisborne, (including the majority of Ūawa Forest) are classified as "Land Overlay 3", being the worst eroding land at Gisborne and that recently harvested areas have a higher degree of vulnerability to and risk of landsliding for a period of five to eight years after harvesting until replacement tree crops take adequate root.

[17] All of these facts are well known. Foresters undertaking harvesting operations under these circumstances are vulnerable to a high degree of foreseeable risk. That risk came to fruition for Ernslaw and various other foresters as a result of the Queen's Birthday 2018 storms.

[18] It must be recognised that this situation cannot be repeated. The forest industry is a major player in the New Zealand economy in general and Gisborne in particular. It is unsatisfactory that the industry is vulnerable to the real risk of criminal prosecution when undertaking the planned harvesting of commercial forests which were ironically (in many cases) planted for land stabilisation purposes.

[19] Even more unsatisfactory, however, is the cost to infrastructure, neighbouring properties, neighbouring people, communities and the natural environment which has been occasioned by these incidents. Any sympathy which might be felt for Ernslaw as a result of what may be called "the storm factor" must be tempered by the fact that a real and substantial contributor to the discharges from Ūawa Forest

was Ernslaw's failure to comply with the conditions of its resource consent and forestry best practice when undertaking its harvesting operation.

[20] Paragraph [49] of the Council's submissions identifies the various breaches of conditions of resource consent which were found on investigation by the Council:[3]

> 49. The offending has occurred in the context of Ernslaw's forestry harvesting operation, from which it derives significant commercial benefits. Ernslaw could not carry out harvesting at Uawa Forest without the resource consent it obtained from Gisborne District Council. However, the rights under the resource consent for the forest were subject to important conditions that were intended to minimise the adverse effects of Ernslaw's activities. The offending involved direct contraventions by Ernslaw of the following conditions of the resource consent at Uawa Forest.
>
> (a) Conditions 7, 8 and 12 which relate to drainage and water controls (in particular that runoff must be diverted away from landings) were contravened at the 10 skid sites. They were also breached widely across the roading network in a way that primed slopes around them to fail. The lack of effective water controls across the forest infrastructure as a whole is a serious aggravating factor. The evidence of the experts might be summed up as a failure to control the water on the forest infrastructure is a failure to protect and control the forest itself.
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> (b) Condition 16, which required that all large logging slash, log ends and tree heads were to be removed to where they could not enter watercourses. The Crown evidence identified that large amounts of harvesting waste and wind throw logs had entered the streams in the forest. The pre-storm photographs produced by Ernslaw showed these issues were occurring prior to June 2018.
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> (c) Condition 21, which required that no unstable accumulation of slash, log ends or waste logging material was to be left on landing edges at the conclusion of logging, was contravened at the 10 skid sites. These were the breaches that were most obviously bound to lead to failure. They were large failures and were widespread across the forest. All of the 10 skids had multiple slash piles or poorly constructed edges. It was simply a matter of luck and water travel as to which edges collapsed.
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> (d) Condition 5, which required skid sites on slopes greater than 25 degrees to be benched, was contravened at least at three of the skid sites, namely, 0003_1, 004_10 and 004_11.

[3] Council's submissions dated 4 October 2022 at [49].

[21] The failures that I have just identified were further compounded by departures from forestry best practice identified in para [53] of the Council's submissions:[4]

> 53. Ernslaw's offending at Uawa Forest was the result of major and repeated departures from the standards contained in the [New Zealand Forest Owners Association] Environmental Code of Practice for Plantation Forestry, including:
>
> (a) The Code of Practice requirement to monitor slash piles to ensure that they are always stable.
>
> (b) The Code of Practice requirement to maintain water and sediment control structures in effective operating condition to prevent water building up in slash piles and adjoining landings to avoid possible landing collapse.
>
> (c) The Code of Practice requirement to remove slash offsite where onsite slash storage sites are insufficient.
>
> (d) The Code of Practice requirement to make every reasonable effort to avoid damage to restricted areas.

[22] The Council submits that the combination of these failures means that Ernslaw's culpability for the offending was at a very high scale. The Council acknowledges that the offending was not deliberate but contends it was, at the very least, very careless and arguably reckless. Mr Conder for Ernslaw disputes the contention of recklessness but concedes there was carelessness.

[23] There seems to me to be a certain degree of futility in the arguments in that regard. My understanding of the concept of carelessness is that it involves obviously a lack of care, whereas recklessness involves a lack of concern as to the consequences of one's actions. Just where in the interface between the two Ernslaw's failures sit is a matter of opinion, however its failure to comply with six conditions of resource consent relating to management of the forest and at least four standards of the forest industry's Code of Practice reveals a very high degree of failure indeed.

[24] Of particular interest to the Court in that regard were the observations of Mr Norm Ngapo referred to in my disputed facts findings that the skid site failures which were a substantial contributor to the discharges in this case, were bound to

[4] Council's submissions at [53].

happen anyway as a result of breaches of conditions and poor management. Mr Ngapo said that the weather events just sped things up.

[25] In my view Ernslaw's failures as to management of skid sites and roads were such as to render any distinction between high carelessness and recklessness, meaningless. I concur with the Council's assessment that Ernslaw's culpability for the offending is very high.

[26] That finding brings me to the matter of comparable cases. Section 8(e) Sentencing Act 2002 requires me to take into account the general desirability of consistency with appropriate sentencing levels for similar offences committed by similar offenders in similar circumstances. In my understanding s 8(e) is not an immutable rule and there may be occasions when there might be reasoned departures from the principle. The requirement for similarity is not a requirement for identicality. There will commonly be factual differences between any offending incidents. The extent to which those differences warrant different sentences is a matter to be determined by a sentencing judge but in my view a broad approach ought to be taken.

[27] In this instance the obvious comparative cases to be taken into account are the sentencings of the defendants *Juken, PF Olsen and Aratu* where starting penalty points of $200,000 were adopted in each case.[5] The forests in question in those cases ranged in size from 1,096 hectares to 1,300 hectares with between seven and 11 skid site failures on the forests together with roading failures. Deterrence against poor forestry practice and breaches of conditions of consent were factors in each case as were high levels of carelessness and culpability.

[28] There is a suggestion in the Council's submissions that the fact that Ernslaw entered a late guilty plea and contested the summary of facts might be a distinguishing feature. I do not consider that to be a feature for consideration under s 8(e) which relates to the circumstances of offenders and offending.

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[5] *Gisborne District Council v Juken New Zealand Ltd* [2019] NZDC 24075; *Gisborne District Council v PF Olsen Ltd* [2020] NZDC 19089; *Gisborne District Council v Aratu Forests Ltd* [2020] NZDC 2808.

[29] The Council submits that the starting point for penalty in this case ought to be in the range of $250,000 to $280,000. Counsel for Ernslaw suggests a figure of $180,000.

[30] There are a number of factors identified in the other three cases which are similar to the circumstances in this case:

- The maximum penalty in each case is $600,000;

- Adverse environmental effects on the water bodies which sediment from the other forests entered were seriously and substantially adverse, as here;

- The offending in the other cases involved breaches of conditions of resource consent and failures to comply with forest industry best practice.

I have taken all those things into account in fixing a starting point in this case.

[31] There are, however, in my view, some distinguishing factors applicable to this offending. I make the observation that the previous cases referred to were all sentenced on the basis of agreed summaries of facts. In this instance I have had the benefit of a disputed facts hearing where a number of facts came to light which might not necessarily have appeared in the earlier summaries of facts and which I consider are relevant to sentencing in this case.

[32] The first of these factors is the significance of the force of the skid site failures which happened in this instance and in the other cases. What emerged from the evidence of Mr Ngapo in particular, was the force and severity in the violence of these particular landslips down gullies and the extent of damage occasioned by them.

[33] Further to that, there is another factor which has to be added – it was Mr Ngapo's evidence that breaches of the conditions of consent had a direct result in the failures of the skid and haul sites which happened. There was a direct connection. It was not just a case of these failures to meet conditions being discovered on examination. The evidence, which I accepted, was that they directly resulted in landslips. Further to that again Mr Ngapo testified that these sites would have failed

anyway even if there had not been the Queen's Birthday storm which just sped things up. That is a feature which came to light during the course of the disputed facts hearing.

[34] The other matter which is of some significance arises out of the financial material provided in this particular instance as to the extent of income from the forest over a period of about five years. A fact which has emerged from the materials provided and in particular a letter, which was sent to the Council on behalf of Ernslaw, where the costs of undertaking anticipatory works to guard against this sort of occurrence were specified. Clearly there were measures which could have been taken by Ernslaw, such as clearance of some of the debris which was lying across hill slopes. There was a price put on clearing that as part of Ernslaw's considerations. There was a possibility of some sort of catching devices. Again, a price was put to that.

[35] Ernslaw obviously reached the view that the economics of these measures were such that it was not practical to take them. That was its decision to make however, it must also be recognised that in that situation it opened itself to the risk which came to fruition in this case. I have had regard to all of those factors, they are all in the mix.

[36] Ultimately I have decided that the appropriate starting-point which I should take for penalty considerations is the sum of $250,000 which I note is 40 per cent of maximum penalty.

[37] There have been no other aggravating factors personal to Ernslaw brought to my attention that warrant any uplift from starting-point. I will address mitigating factors following the template of Ernslaw's submissions.

[38] Ernslaw raises the issue of remedial steps and amends. It refers to s 10(d)(iii) Sentencing Act which, as it notes, obligates the Court to take into account any measures taken by a defendant to make good the harm done by the offending. It submits that a discount of 10 per cent from starting point is necessary to reflect the active steps taken by Ernslaw to make amends to the community. The basis on

which it seeks such discount is found in paras [35] and [36] of its sentencing submissions:[6]

> 35. Counsel submits that a discount from this starting-point [$180,000 which was suggested by Ernslaw] is necessary to reflect the active steps taken by Ernslaw to make amends within the community that was immediately affected by the offending. This is a mandatory consideration under s 10(d)(iii) of the Act, which requires the Court to take into account any measures undertaken (or proposed) by the defendant to make good the harm that has occurred.
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> 36. Ernslaw has made substantial contributions to cleaning up the consequences of the offending and the storm that created it. In the months immediately following the offending, Ernslaw paid a total of almost $400,000 towards these clean-up efforts including around $150,000 to properties around Uawa Forest.

[39] I do not propose to make any reduction from starting-point on account of those matters. The charge pleaded to by Ernslaw relates to breach of s 15(1)(b) RMA relating to the discharge of contaminants to water. It is not clear to me how much of the funds which Ernslaw has spent relate to that issue. I refer to the observation made by the Court in the disputed facts hearing, that the effects of contamination of waterways cannot be remediated as once contaminants were in water systems they could not be taken out. I make the point that the first victim in this proceeding was the environment.

[40] Secondly, the information provided by Ernslaw as to its expenditure relates to clean-up, slash removal, fence repair at various properties affected by flooding and debris deposition as well as Tolaga Bay. The adequacy of the payments or reparation made or proposed to be made to people affected by the discharges from Ūawa is not satisfactorily established as far as I am concerned. In my view the onus is initially on a defendant to do that.

[41] A reading of the restorative justice reports involving the Mitchell and Parker families and the victim impact statement made by the Parker family today, points to the belated and limited nature of Ernslaw's response, the effects of their losses which remain uncompensated and the insult of the size of the ex gratia payment offered in comparison to those losses.

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[6] Defendant's submissions at [35]–[36].

[42] The adequacy of compensation/reparation must be something that I should take into account when assessing whether or not a credit should be given for that. I am far from satisfied from the information before the Court that such moneys as Ernslaw has expended on remedial work on property other than its own, begins to adequately compensate persons whose properties were damaged as a consequence of the discharges from Ūawa Forest or otherwise make good the harm that those people suffered. I give no reduction from starting point on account of remedial steps or amends.

[43] Ernslaw next seeks a reduction from starting point of 10 per cent on account of its guilty plea. Its 10 per cent assessment reflects an implicit acknowledgement of the belated aspect of the guilty plea. It must be recognised that matters outside the control of both the Prosecutor and Ernslaw contributed to some of the delay in this case. Ernslaw points to contended failures on the part of the Prosecutor as a contributor to the delay, a proposition vigorously contested by the Prosecutor.

[44] It is apparent to me from information gleaned at the disputed facts hearing and material on file, that from the outset Ernslaw took the rock-hard position that the discharges from Ūawa which occurred could not reasonably have been foreseen and that there were only minor breaches of conditions. Those contentions drove Ernslaw's position up to and including the four-day disputed facts hearing. In my view, Ernslaw's position in that regard substantially influenced preparation for trial, including the number of witnesses the Council might have to call, discussions seeking to conclude a common position in an agreed summary of facts and admissibility of evidence. That position led to a s 147 hearing and the disputed facts hearing to which I have referred.

[45] It should be noted that benefits accrued to Ernslaw from that process in that the charges against Ernslaw were reduced to one representative charge of breach of s 15(1)(b) and the information and evidence provided to the Court was limited to the 10 skid sites which were one of the subjects of the disputed facts hearing. Charges against an associated defendant have been withdrawn. Ernslaw has had the benefits of that process which had a direct impact on delay in these proceedings particularly when, as Ernslaw's counsel acknowledged in his submissions, the Court largely

upheld the Prosecutor's summary of facts. I consider that these factors substantially diminished the value of the belated guilty plea which was eventually made. The disputed facts hearing took four days with part of a fifth day for delivery of the Court's decision. I understand that an estimate of 10 days' hearing time had been made if the case went to trial.

[46] Taking all these matters into account I determine that the appropriate reduction for guilty plea ought to be five per cent of starting point.

[47] Many of the observations which I make in that regard are equally applicable to the contention of Prosecutor delay and change of position which are disputed by the Prosecutor. In my view, the obdurate position adopted by Ernslaw was the substantial contributor to delay in this case and I make no reduction to starting point on that basis.

[48] It was common ground, I think, that Ernslaw is entitled to a credit of five per cent for previous good character, giving total credits of 10 per cent and an end fine of $225,000. Ernslaw is fined that amount accordingly.

[49] It will pay solicitor costs in accordance with the Costs in Criminal Cases Regulations (to be fixed by the Registrar in the event of any dispute) and court costs of $130.

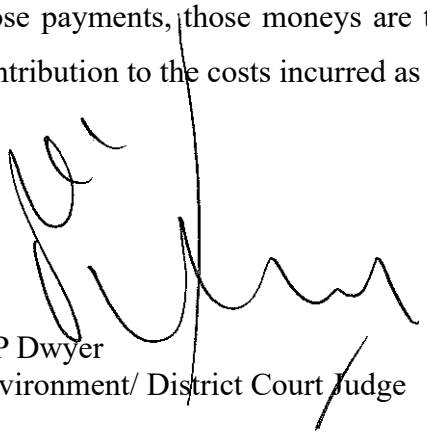
[50] Pursuant to s 342 RMA, I direct that the fine less 10 per cent Crown deduction is to be paid to the Gisborne District Council.

[51] In addition, I turn to the issue of payments recognising emotional harm. As I said to Mr and Mrs Parker, the Court cannot possibly adequately compensate for the emotional harm which was eloquently displayed by them today. Nor does the Court have the ability in these proceedings to adequately determine the extent of liability for actual physical harm and losses which have ensued. What the Court can do is order a payment for emotional harm simply to mark its recognition that such harm has been suffered by the victims in this case.

[52] I direct Ernslaw One Limited to make a payment on that account to Mr and Mrs Parker jointly in the sum of $50,000.

[53] I direct a similar joint payment to the Mitchell family named in the restorative justice report, of $50,000.

[54] Additional payments of $10,000 each are to be made to the three other parties who filed victim impact statements in this case. In the event that they do not accept those payments, those moneys are to be paid to the Gisborne District Council as a contribution to the costs incurred as a result of this offence.



B P Dwyer
Environment/ District Court Judge