

**IN THE DISTRICT COURT
AT HAMILTON**

**I TE KŌTI-Ā-ROHE
KI KIRIKIROA**

**CIV-2020-019-000925
[2021] NZDC 6951**

IN THE MATTER OF	THE BUILDING ACT 2004
BETWEEN	WAIKATO REGIONAL COUNCIL Appellant
AND	POSEIDON HOLDINGS LIMITED Respondent
AND	CHIEF EXECUTIVE OF MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Interested Party

Hearing: 19 February 2021

Appearances: N A Speir for the Appellant
No appearance by or for the Respondent
T Gray for the Interested Party

Judgment: 19 April 2021 at 10.00 am

RESERVED JUDGMENT OF JUDGE S R CLARK

Introduction

[1] Poseidon Holdings Limited (PHL) are the owners of a farm situated at 242 Rawhiti Road, Te Aroha. The farm contains two effluent storage ponds. They were not built by PHL but rather by a previous owner.

[2] It is common ground that the construction of the smaller effluent pond (the pond) did not require a building consent, nevertheless it still needed to comply with the provisions of the Building Code.

[3] The pond does not comply with the Building Code. The Waikato Regional Council (WRC) have issued the previous owner and PHL with a notice to fix (NTF) the non-complying work.¹ The issue is whether in those circumstances, an NTF can be issued to the current owner when the non-complying building work was undertaken by a previous owner.

Background facts

[4] In February 2015 NZ Pork Limited (NZ Pork) were the owners of the farm. At that time, they arranged for the construction of the two effluent ponds.

[5] For the purposes of the Building Act 2004 (the Act), effluent ponds are classified as dams. Section 7 of the Act defines what is meant by “dams” and “large dams”. Due to its dimensions and volume, the smaller effluent pond is not caught by the definition of a “large dam”.² As such it did not require a building consent, as the large dam would. Nevertheless, it must still comply with the Building Code.³

[6] WRC carried out a site inspection of the farm in March 2016. Concerns were noted about the risk of failure of the smaller pond due to concerns about the stability of an embankment.

[7] On 3 August 2016 WRC carried out a further inspection of the pond. WRC subsequently engaged a geotechnical engineer, who carried out another inspection on 29 August 2016. The engineer produced a report to WRC dated 1 September 2016. The engineer opined that the pond did not comply with the Building Code.

[8] On 9 September 2016 WRC issued an NTF to NZ Pork. They were required to comply with it by 1 November 2016. NZ Pork were advised that if they did not then they could commit an offence under s 168 of the Act and may be liable to a fine of up to \$200,000 and a further fine of up to \$200,000 for each day or part of a day they failed to comply.

¹ Building Act 2004, sections 163-168 inclusive.

² Building Act 2004, s 7.

³ Building Act 2004, s 17.

[9] On 15 September 2016 the farm was sold to PHL. On 11 October 2016 WRC served an NTF upon the new owners PHL. PHL were required to comply with the NTF by 1 November 2016. On 8 February 2017 WRC served PHL with an infringement notice pursuant to s 168(1) of the Act.

[10] Discussions and correspondence were exchanged between WRC and PHL until February 2018. PHL also engaged their own geotechnical engineer and forwarded a report to WRC for them to consider in February 2018.

[11] On 31 July 2018 PHL filed an application for determination by the Chief Executive of the Ministry of Business Innovation and Employment (MBIE), pursuant to s 177 of the Act.

[12] On 6 September 2019 a draft determination was issued to the parties. It concluded that an NTF had been correctly issued to PHL.

[13] A second draft determination was issued to the parties for comment on 3 December 2019. It reached a different conclusion, which was that the NTF had been incorrectly issued to PHL.

[14] As part of that process an independent engineer's report was commissioned by MBIE, to consider whether the effluent pond complied with the Act and review the expert reports provided by WRC and PHL. The expert concluded that WRC had reasonable grounds to consider that the effluent pond did not comply with the Building Code.

[15] A final determination was released by MBIE on 10 August 2020. In it the decision maker determined that PHL was not a specified person under ss 163 and 164 of the Act.

[16] WRC appealed that decision on 31 August 2020. I record that PHL have not taken an active role in this appeal and they abide the decision of the Court.

Legal principles

The legislation

[17] Sections 163, 164 and 168 of the Building Act are particularly relevant in this case. I set those out in full:

163 Definitions for this subpart (Notice to Fix)

In this subpart, unless the context otherwise requires,—

Responsible authority means, as the context requires,—

- (a) a building consent authority; or
- (b) a territorial authority; or
- (c) a regional authority

Specified person means—

- (a) the owner of a building;
- (b) if a notice to fix relates to building work being carried out,—
 - (i) the person carrying out the building work; or
 - (ii) if applicable, any other person supervising the building work;
- (c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
 - (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

- (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.
- (3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—
- (a) notify the other authority that it holds that view; and
 - (b) give the other authority the reasons for that view.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.

168 Offence not to comply with notice to fix

(1AA) A person commits an offence who fails to comply with a notice to fix a means of restricting access to a residential pool.

(1AB) A person who commits an offence against subsection (1AA) is liable on conviction to a fine not exceeding \$5,000.

- (1) A person commits an offence if the person fails to comply with [any other notice to fix under this Act.
- (2) A person who commits an offence under [subsection (1)] is liable [on conviction] to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.

[18] This appeal requires a close examination of the meaning of ss 163 and 164(1)(a) of the Act. Pursuant to s 163, a responsible authority is defined as including a regional authority. In this case the regional authority WRC were entitled to issue an NTF if it considered that the specified person was contravening or failing to comply with the Building Act or the regulations.

[19] There is no argument that PHL are caught by the definition of a specified person as the current owners of the pond. The issue to be determined is whether they are “contravening or failing to comply”, as envisaged by s 164 of the Act.

[20] I should note that s 164(2) of the Act requires a responsible authority to issue the NTF if it becomes aware that a specified person is contravening the Act. It appears

that other than the exception set out in s 164(3), there is limited discretion on the part of the responsible authority to determine whether it should issue an NTF.

The authorities

[21] There is a surprising paucity of authority on point. Counsel have provided me with three previous MBIE determinations involving similar facts and one High Court decision.

[22] *Determination 2011/033* (the Seymour determination) concerned a sleepout. Three NTFs had been issued concerning work involving the construction and alteration of the sleepout, prior to and post the commencement of the Act. One of the issues considered was whether an NTF could issue to the current owner of the sleepout, notwithstanding the fact that they were not the persons who originally converted the sleepout.

[23] The Chief Executive held that a “specified person” can include the current owner of the building even if the building work concerned was carried out by a previous owner.⁴

[24] *Determination 2014/035* (Sunbrae Grove determination) involved the construction of a two-storey timber dwelling. At issue was the decision to issue an NTF to the current owner of the building, notwithstanding that the building work concerned was carried out by a previous owner.

[25] At paragraph 5.3.2 of the determination it was held that a current owner is a “specified person” as defined in the Act. However, an NTF can only be issued to an owner in respect of a contravention or failure to comply with the Act or regulations. If a person who contravened the Act is no longer the owner of the building, an NTF cannot be issued to a subsequent owner who did not contravene or fail to comply with the Act or regulations.

⁴ MBIE Determination 2011/033 at 6.4.1. In practice the determination in this case, the two that follow in my discussion above and the instant case were all made by a person delegated to do so on behalf of the Chief Executive of MBIE.

[26] *Determination 2015/073*, (the Hobson Terrace determination) involved a construction of a sleepout, retaining wall and deck. It was held that an NTF can only be issued to an owner in respect of a contravention or failure to comply with the Act or regulations. An NTF could not issue to a former owner as they are no longer the owner of the building, furthermore that an NTF cannot be issued to a subsequent owner, as they had not contravened or failed to comply with the Act or regulations.

[27] It should be noted that the approach taken in the *Sunbrae and Hobson* determinations differ from that taken in *Seymour*, notwithstanding that it was the same person who made each of those determinations on behalf of MBIE.

[28] The *Seymours* were prosecuted, convicted and fined in the Auckland District Court on 14 May 2014.⁵ They appealed that decision to the High Court.

[29] They were successful before the High Court in overturning those convictions. In *Seymour v Auckland City Council*,⁶ Brewer J found that the prosecution was founded upon an NTF which required the Seymour's to carry out work which was not their responsibility to fix. In that case the Seymour's had carried out some work post the commencement of the Building Act, however that work was not specified in the NTF.

Approach on appeal

[30] A determination made by the Chief Executive of MBIE is binding on the parties⁷, although there is a right of appeal to the District Court pursuant to s 208 of the Act. On the hearing of an appeal, the District Court may confirm, reverse or modify the determination.⁸

[31] This is a general appeal. I must form my own view on the merits while giving due weight to the views of the decision maker. If I reach a different view to that of the decision maker I am entitled to intervene and allow the appeal.⁹

⁵ *Auckland Council v Seymour* DC Auckland CRI-2012-090-293, 3 November 2014.

⁶ *Seymour v Auckland Council* [2015] NZHC 743.

⁷ Building Act 2004, s 188(2).

⁸ Building Act 2004, s 211(1)(a).

⁹ *Austin Nichols & Co Inc v Sticking Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

Submissions

Appellant's submissions

[32] WRC identified the core issue as being whether the current owner must be the same person that completed non-compliant building work, in order to be a “specified person” to whom an NTF can be issued under s 164 of the Act. They submit that the position adopted in the MBIE determination that a specified person must be the same owner that undertook the building work places a gloss on ss 163 and 164 which the Act does not support.

[33] At the core of their argument is the proposition that the owner of a building fails to comply with the Act, where building work done does not comply with the building code, regardless of when the building work was done or whom it was undertaken by.

[34] They submit that there is no reference in the Act to the need for continuity of ownership. They refer to s 17 of the Act which states that building work must comply with the Building Code and s 3, which promotes the accountability of owners who have responsibilities for ensuring that building work complies with the Building Code.

[35] WRC draw a distinction between the definition of specified person at ss 163(a) and (b) of the Act. They point to temporal attributes in those definitions. They submit that the definition at s 163(a) can only mean the current owner of the building as opposed to a past or future owner. In contrast they submit that s 163(b)(1) and (2) provides for an NTF to be issued to a person actually carrying out the building work or a supervisor of that work, whilst the construction work is in progress.

[36] They submit that this case is an important one, given the paucity of authority on point and the inconsistent determinations by MBIE. They point to the need for responsible authorities to have a practical weapon in their armoury to ensure that buildings are brought up to the standard required by the Building Code.

[37] They also point to the fact that the life of a building often exceeds that of ownership. They highlight the practical difficulty that work which does not require a building consent is not routinely inspected and if defective in some respect can be difficult to detect. Thus they submit it makes practical commonsense for the ability of a responsible authority to issue an NTF to the current owner, to ensure that the building concerned is brought up to the Building Code standard.

MBIE submissions

[38] MBIE appear as an interested party. They provided a report pursuant to rule 18.16 of the District Court Rules 2014 which refers to the reasons for the conclusions set out in the determination. It also draws the Court's attention to a consideration of, other than the findings of fact, to matters which MBIE had regard to in making the determination. They also highlight matters relevant to the general administration of the Act which in their view ought to be drawn to the attention of the Court.

[39] In providing the report, MBIE adopt the position that they do not comment on the correctness or otherwise of the determination, rather it is provided for the assistance of the Court.

[40] In their submissions, counsel for MBIE referred to various parts of the Act, including s 3 (the purposes) and s 4 (the principles). They draw the attention of the Court to the definitions of "building work", "dam" and "large dam" in s 7 of the Act.

[41] MBIE highlight the point that an NTF is an enforcement tool. It is served on a "specified person", thus it is personal to that person. An NTF is most commonly issued for one of the following contraventions of the Act:

- (a) Carrying out work without a building consent when a building consent is required, contrary to s 40 of the Act;
- (b) Carrying out building work in contravention of the building consent, contrary to s 40 of the Act;

- (c) Carrying out building work in contravention of the Building Code (whether a building consent is required for that building work or not), the instant case being such an example.

[42] MBIE accept that PHL is an “owner” and “specified person” as defined in s 163 of the Act. The issue is whether PHL were “contravening” or “failing to comply” with the Building Act or regulations, for an NTF to issue.

[43] They refer to the fact that the determination decided that PHL had not undertaken the building work on the pond and was not the owner of it when the building work was carried out. Thus, they submit PHL was not “contravening” or “failing to comply” with the Act or the regulations.

[44] They go on to highlight several ways in which a building may contravene the requirement of the Act or fail to comply with the Building Code. They submit that there is no obligation in the Act for a person who becomes an owner of a building that does not comply, to undertake work to ensure that it complies with the Building Code.

[45] MBIE submit that there are provisions in the Act which impose obligations on the owner of a building that does not comply with either the Act or the Building Code, to improve the compliance of their building, or at least not do anything that would further reduce the compliance of the building. The obligations imposed are different and apply in different ways depending on the type of contravention or non-compliance.

[46] MBIE submit that if the Act is interpreted to apply to the current owner of the building, to require that they ensure that the building work complies with the Building Code, where work has been undertaken by a previous owner, would be a significant change to the way in which the Act has been interpreted to date. They submit that it would open a “Pandora’s Box” and unwittingly capture several otherwise innocent purchasers of buildings.

Discussion

[47] Sections 163 and 164 of the Act provide that a responsible authority must issue an NTF if they consider on reasonable grounds that the “specified person” is *contravening or failing to comply* with the Act or the regulations (emphasis added).

[48] Section 163 of the Act defines what is meant by “specified person”. There are three classes of “specified person”, they are:

- (a) The owner of a building;¹⁰ or
- (b) The person actually carrying out the building work;¹¹ or
- (c) If applicable, any other person supervising the carrying out of the building work.¹²

[49] With respect to the second and third classes, I accept there is a temporal aspect to the definitions which captures those involved in either the construction or supervision of the building work. That scenario does not apply in this case.

[50] Where the definition refers to the “owner of a building”, the ordinary meaning of that phrase must mean the current owner. However, that is not a complete answer as s 163 must be read in light of s164. That means an NTF could only be served on PHL if they as a specified person were “contravening or failing to comply” with the Act or regulations.

Statutory Interpretation

[51] What is meant by the phrase “contravening or failing to comply”? The answer requires an interpretation of the phrase. I start by referring to s 5(1) of the Interpretation Act 1999. It reads:

¹⁰ Building Act 2004, s 163 (a).

¹¹ Building Act 2004, s 163 (b)(i).

¹² Building Act 2004, s 163 (c)(ii).

5. Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

[52] “Contravening or failing to comply” is not defined in the Act. There are no authorities that have considered the phrases as it appears in the Building Act. Hansard is silent on the meaning of the phrase.

[53] Black’s Law Dictionary defines the verb contravene to mean:

- (a) To violate or infringe (the law, a rule, etc); to defy < the soldier contravened the officer’s order, and went AWOL >;
- (b) To come into conflict with, to be contrary to < the court held that the regulation contravenes public policy>¹³

[54] Black’s Law Dictionary does not contain a definition for the phrase “fails to comply”, however it does contain the definition of the word “failure”. It is defined as:

- (a) Deficiency: lacks: want.
- (b) An omission of an expected action, occurrence or performance.¹⁴

[55] The Concise Oxford English Dictionary defines the word “contravene” as meaning to offend against the requirements of (a law, treaty, etc); infringe – conflict with (a right, principle, etc), especially to its detriment.¹⁵

[56] In *Air New Zealand Ltd v Johnson*,¹⁶ the word “fails” was considered. It was stated:

As reference to the judicial dictionaries will show, there are many cases in the books on the meaning of “fail” or “failure” and it is clear that the meaning depends on the context and purpose of the provision. It does not necessarily

¹³ Black’s Law Dictionary (11th Ed) Thomson Reuters 2019 at 415.

¹⁴ At 739.

¹⁵ The Concise Oxford English Dictionary, 11th ed (revised) Oxford University Press) 2006 at 310.

¹⁶ *Air New Zealand Ltd v Johnson* [1989] 3 NZLR 641.

connote a culpable omission or breach of duty on the part of anyone. See for example *Ingram v Ingram* (citation omitted).

[57] In *Ingram v Ingram*, it was noted that “fail” may have at least three possible meanings:

- (a) Simply an omission to do a thing in question, irrespective of any reasons;
- (b) An omission by reason of carelessness or delinquency, but not as a result of a possibility; or
- (c) An omission to do the thing, including the impossibility arising from some clause (in a contract) being included and others being excluded.¹⁷

Purpose

[58] What assistance can be derived from attempting to glean the purpose of the enactments in question? I start by referring to s 3 which sets out the purposes of the Building Act. It reads:

3 Purposes

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

¹⁷ *Ingram v Ingram* (1938) 38 SRN SW 407 at 410 per Jordan CJ.

- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[59] The purposes are to provide for the regulation of building work, the licencing of building practitioners and the setting of performance standards for buildings so as to ensure that buildings will: protect against the injury or illness; contribute to health, wellbeing and physical independence; have a means of escape from fire; and promote sustainable development.¹⁸

[60] Section 4 sets out certain principles, of which s 4(q)(iv) is relevant. It provides inter alia owners are accountable for their role in ensuring that building work for which a building consent is not required complies with the Building Code.

[61] Subpart 4 of Part 2 outlines certain responsibilities. It includes s 14B(c) which provides that an owner is responsible for ensuring compliance with any notices to fix. On the face of it that captures current owners of a building, regardless of whether they were responsible for the non-compliant work or not. However, s 14A of the Act provides that the statement of responsibilities in s 14B are an outline and intended for guidance only.

[62] Sections 15(1)(a) and 17 are relevant. They provide that all building work must comply with the Building Code to the extent required by the Act, whether a building consent is required in respect of that building work or not.

[63] Returning to ss 163 and 164 of the Act, they are contained in subpart 8 of Part 2 of the Act. That subpart sets out a procedure for dealing with contraventions of the Act and regulations made under it, not otherwise identified as offences. Such contraventions include: failing to apply for a code of compliance certificate contrary to s 92(1); failing to apply for a certificate of acceptance contrary to s 91(4); failing to comply with the owner's obligations in respect of a compliance schedule under s 105; changing the use of a building after giving the Territorial Authority notice under s 114, but without having obtained a s 115 notice from the Territorial Authority; failing to display the international access symbol contrary to s 120; resisting admittance by an

¹⁸ Building Law in New Zealand (online ed. Westlaw NZ) at BL3 Synopsis.

authorised officer contrary to s 222(1); and failing to assist a Territorial Authority's inspection contrary to s 223.¹⁹

[64] The purpose of subpart 8 Part 2 of the Act is to provide responsible authorities with an enforcement tool where building work does not comply with either the building consent or the Building Code, or, building work has been carried out without a building consent when a one was required.

[65] The procedure is civil in nature up to the point where the NTF has issued. If thereafter the specified person fails to comply with an NTF they commit a criminal offence and are liable upon conviction to a fine of up to \$200,000 and in the case of a continuing offence, a fine of up to \$20,000 for every day the offence continues.²⁰

[66] The offence created by s 168(1) of the Act is a strict liability one. Section 388(2) of the Act allows for only a highly circumscribed defence when a "specified owner" is prosecuted. That section reads:

388 Strict liability and defences

- (2) It is a defence in any prosecution that is referred to in subsection (1) if the defendant proves—
- (a) that all of the following circumstances apply:
 - (i) the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property; and
 - (ii) the conduct of the defendant was reasonable in the circumstances; and
 - (iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or
 - (b) that the action or event to which the prosecution relates was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case—
 - (i) the action or event could not reasonably have been foreseen or been provided against by the defendant; and
 - (ii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

¹⁹ Building Law in New Zealand (online ed. Westlaw NZ) at BLP Pt2Sub8.02.

²⁰ Building Act s 168 (1) and (2)

[67] I find it difficult to accept that the legislature intended that criminal liability can be sheeted home to an innocent owner of a building who is not prepared to remedy defective building work, carried out by a previous owner. Put simply, there would seem to be a strong policy argument against criminal sanctions being visited on the current owner of a building who had no knowledge of and was not responsible for the non-compliant work.

The Resource Management Act 1991

[68] Although not directly comparable it is worth comparing s 168 of the Act with the enforcement notice provisions in s 314 of the Resource Management Act 1991 (the RMA). Subsections 314 (1) (a)-(da) inclusive read:

314 Scope of enforcement order

- (1) An enforcement order is an order made under section 319 by the [Environment Court] that may do any one or more of the following:
 - (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the [Environment Court],—
 - (i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, [a rule in a proposed plan,] a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section [20A] (certain existing lawful activities allowed); or
 - (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
 - (b) Require a person to do something that, in the opinion of the [Environment Court], is necessary in order to—
 - (i) Ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, [a rule in a proposed plan,] a requirement for a designation or for a heritage order, or a resource consent; or
 - (ii) Avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:
 - (c) Require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person:

- (d) Require a person to pay money to or reimburse any other person for any [actual and] reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect [on the environment, where the person against whom the order is sought] fails to comply with—
 - (i) An order under any other paragraph of this subsection; or
 - (ii) An abatement notice; or
 - (iii) A rule in a plan [or a proposed plan] or a resource consent; or
 - (iv) Any of that person's other obligations under this Act:
- (da) Require a person to do something that, in the opinion of the [[Environment Court]], is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier:

[69] An enforcement order is one of a range of enforcement tools available under Part 12 of the RMA. A person or local authority may apply to the Environment Court for an enforcement notice requiring another person to cease or remedy anything done or to be done by or on behalf of that person which contravenes or is likely to contravene the RMA, any regulations, a rule in a plan or a resource consent.²¹

[70] Like s 168 of the Building Act a failure to comply with an enforcement notice is a criminal offence. A natural person is liable on conviction to a term of imprisonment not exceeding two years or a fine not exceeding \$300,000, in the case of a person other than a natural person, to a fine not exceeding \$600,000.²²

[71] Section 314 of the RMA does not have retrospective effect and does not apply to actions prior to the commencement of the RMA.²³ Enforcement notices can issue against former owners pursuant to s 314 (1) (da).²⁴ However the Environment Court has refused to issue an enforcement notice pursuant to ss 314 (1) (b) and 314 (1) (c) when considering the environmental effect caused “by or on behalf of that person”.

²¹ Resource Management Act 1991, s 314(1)(a)(i).

²² Resource Management Act 1991, ss 338(1)(b) and 339(1)(a) and (b).

²³ *Voullaire v Jones* (1997) 4 ELRNZ 75 4 ELRNZ 75 (EnvC).

²⁴ *Western Bay of Plenty District Council v Te Whaiti NZEnvC* Christchurch A128/05, 5 August 2005

[72] In *Ryan v De France*,²⁵ the applicant sought an enforcement order against the respondent, claiming that glass and other hazardous materials had come from the respondent's property onto the applicant's property as a result of work to the boundary fence. The Court declined to grant the order as it held that the presence of glass was not due to any actions taken by or on behalf of the respondents. No liability could attach to the respondents for the effects of the glass as it was most likely put there by another party.

[73] In *Palmerston North City Council v Farm Holdings (4) Ltd*,²⁶ the previous owners of a property obtained a resource consent to fill in a gully to enable a subdivision. The consent envisaged piping work to be undertaken, it was not. A dam was also built across the gully. In combination that meant that stormwater could not follow its natural watercourse down the gully leading to significant flooding. At issue was whether owners who purchased the property after the work was undertaken should be issued an enforcement notice to remedy the adverse effect on the environment caused by or on behalf of that person. The Court held that the adverse effects were caused by the previous owner not the current owners who had inherited the situation.

Decision

[74] In my opinion the phrase "contravening or failing to comply" is meant to encompass the acts and omissions of a "specified person". The first part of the phrase "contravening", which is a verb, connotes a sense of action/s undertaken on the part of the "specified person". A relevant question to be asked is: "have they undertaken any action/s or are they currently undertaking any action/s, which violate, infringe, are contrary to, or in conflict with the Act and Building Code?"

[75] The second part of the phrase "or failing to comply" is to be read in contradistinction to "contravening". This part of the phrase captures the omissions of a "specified owner". A relevant question to ask is: "have they failed or omitted to undertake any steps to ensure they comply with the Act or regulations?"

²⁵ *Ryan v De France* [2015] NZEnvC 13 at paragraph [114].

²⁶ *Palmerston North City Council v Farm Holdings (4) Ltd* [2016] NZEnvC 192 at paragraph [37].

[76] PHL was not the owner of the land at the time the building work was carried out nor did it build an effluent pond which failed to comply with the Building Code. The responsibility for that rests solely with NZ Pork. It was they who undertook the action/s complained of, the building of a non-complying pond. PHL did not undertake any steps or actions which contravened the Building Code. To hold a subsequent owner responsible to fix the defective work of a previous owner in those circumstances would, it appears to me to strain the ordinary meaning of the words “contravening”.

[77] What then were the failings or omissions by PHL? First it pays to recall that it was NZ Pork who failed or omitted to ensure that the pond met the requirements of the Building Code. At its high water mark the alleged failing on the part of PHL is that they as the current owners have not complied with an NTF, which refers to the non-complying building work of a previous owner. I find that the proposition contended for, that PHL should carry out remedial work for building work they were not responsible for and inherited, requires an unacceptable straining of the ordinary meaning of phrase “failed to comply”.

Decision

[78] The appeal is dismissed. I confirm *Determination 2020/019* dated 10 August 2020.

[79] The parties have agreed in a joint memorandum dated 9 October 2020 that these proceedings are for cost purposes a category 2 proceeding. MBIE are entitled to costs and disbursements pursuant to that category.

Judge SR Clark
District Court Judge

Date of authentication: 19/04/2021